

The Trouble with Experts

Eliot G. Disner

Some experts are excellent technicians, some are expert theorizers, and others are first-rate communicators. Whatever the expert's special skill, he or she needs your guidance to present the most effective testimony possible.

BACK WHEN life seemed simpler, some of us evaluated others in a rather primitive way. There were the attractive ones, the smart ones, those who were both attractive and smart, and those who were neither attractive nor smart. This sociological matrix probably served us pretty well in selecting friends and lovers. It serves about as well in sizing up that micro-cosm known as the expert witness community. Thus experts, the kind that testify at trial, fall into these four categories, the first two of which are the subject of this article.

Why won't this article concern the latter two categories of experts? Regarding experts who are neither attractive nor knowledgeable, the assumption here is that sooner or later the expert witness marketplace will rid itself of them. They have nothing at all to offer and some of them, at least, go back to teaching high school, one imagines. As for those experts who are both attractive and knowledgeable, these are the extraordinarily rare ones who both know their stuff and how to present it at trial. These are experts who, in short, are not their own

Eliot G. Disner is a partner with Ervin Cohen & Jessup, LLP. in Beverly Hills, California. His e-mail address is edisner@ecjlaw.com.

worst enemies. If in your practice, this is the kind of expert you are accustomed to retaining, you will need little, if any, of the information that follows. But if instead, you are like the rest of us, you have probably found the matter of handling experts to be quite troublesome at times. If so, perhaps some of what follows will prove helpful, or at least, entertaining.

THE GOOD, THE BAD, AND THE STRUGGLY • All of us who sweat in the noonday sun that illumines the trial vineyard readily know that many experts make poor witnesses. However, this may not be easy to discern from the expert's resumé. Indeed, "academic" experts usually have the best credentials, backed by brilliant careers in research and teaching, but with little ability to articulate their thoughts simply or to withstand the rigors of cross-examination. Those are the "good" ones. When they testify, they are often uncomfortable and ill equipped for cross-examination. Thus, they struggle in the trial environment.

Other experts are sometimes referred to as "professional" experts. However, they are often professionally weaker, with less "scholarship" under their belts, since many seem to be in it more for the money than the pride. What they do write seldom pushes the intellectual envelope. In terms of raw expertise, theoretically the most important expert requisite, these are the (relatively) "bad" ones. However, on the face of it they are often brilliant presenters of their theories. They may even withstand cross-examination...after a fashion, at least. The problem with these experts is that someone else frequently does their thinking, or, at least, their work for them, which sooner or later becomes evident.

Such professional experts are typically captains of teams of mini-experts who collectively have the expertise to provide the testimony sought. The only difficulty is that such experts cannot bring their teams to trial. If cross-exam-

ined competently, they too will struggle, then crumble. In other contexts this would seem quite odd. For example, in warfare, would the troops meet with their captain to develop a strategy for an upcoming battle, then send their captain to fight it out alone while providing support from far behind the front line? Perhaps a more apt modern analogy is presidential politics, where the superficially attractive candidate often fronts in public appearance for his collectively more competent, but less politically attractive, staff.

Can you do anything to make your experience with both "good" and "bad" experts less of a struggle, or even more of a pleasure? Consider the following advice borne from real-life experiences with a passel of troubling experts.

BEWARE OF THE "DISCOVERY CHANNEL" • Be very careful about the materials you provide to experts and they provide to you, plus the materials they otherwise generate. Inconsistencies between an expert's trial testimony and documents in his possession, or that of his staff can cause major problems.

If It's Written Down, Your Opponent Will Probably See It

Unfortunately, an attorney's effort to clean up the expert's fuzziness about the facts, or the expert's natural propensity to wander naively into the theoretical turf of the other side are both likely to be hamstrung by the imperatives of discovery. Whatever information is provided to, collected by, or created by the expert is discoverable. Thus, a handy canned outline of all the pertinent facts in the case, a "cheatsheet" as it were, neat as that seems, will be swooped up by the opposition in discovery. Experts are also discouraged from writing anything down, lest their meandering notes be held against them—since those notes are also discoverable. So, unnatural as it may seem, objective written rumi-

nations about the weaknesses and strengths of the opponent's position can prove problematic.

Better Have a Good Memory!

Therefore, the expert has the nearly impossible task of reviewing documents, including deposition transcripts, then remembering everything without writing anything down. While this description may be a bit exaggerated, still there are tremendous limitations on how lawyers can safely educate experts or what experts can safely do to educate themselves, all because of a concern for the disclosure of what is used to do so. Plainly, a very good memory is a prerequisite then to being a good expert. However, getting to be an expert often requires many years of training, research, and teaching, in addition to some marketing. The development of subject matter expertise tends to be inversely related to the development of memory capacity, limited by physical age as it is. No wonder some of the "best" experts fail to deliver.

What Bills Can Reveal

One example of the difficulty that can arise from an expert creating discoverable writings arose in a recent case involving a "professional" expert from a national consulting firm in a price fixing class action. Said expert (hired by a co-defendant's attorney) sent his client a bill in substantial detail—presumably to justify his hefty charges. One of the things he noted there was his review of certain statistical data pertinent to the applicable industry. When the various defense counsel met with him, I asked about this referenced data. He showed me several spreadsheets which, he said, revealed that prices for the product in question were lower in Southern California than in the rest of the country; hence, there could not have been any price fixing. This is how he justified "disclosing" this data on his discoverable bill.

On close inspection, however, it became apparent that while Southern California had a relative price advantage in 1991 in the pertinent industry, *vis-à-vis* the rest of the United States, by 1997 that advantage was lost, as prices here averaged 10 percent higher than in the rest of the country. There was approximately a 15 percent upward swing over the years of the claimed conspiracy. Jeez! The underlying documents proved to be disastrous since the increasing profitability of the alleged price fixers over the seven years it depicted was actually consistent with (illegal) price fixing.

Since there was no need to reveal or retain this information at all, having that reference in the expert's too-detailed bill created fertile cross-examination opportunities after the almost certain disclosure of these troubling documents in discovery. The mistake here was that no one was regulating what documents the expert was given or otherwise collected. No one was first discussing with him over the phone what was expected before he plunged into his research. Who should be doing all this regulating? The attorney who retains the expert. Who else?

THE OSTRICH • Perhaps the most important substantive advice here to minimize the trouble an expert might cause is to make certain he adopts a reasonable theory. Concededly, this can be difficult when the expert must maintain a lean file. Perhaps compensating for this limitation is that "reasonable" does not necessarily mean "correct" since there are seldom right answers here. What "reasonable" does mean, however, is persuasive, plausible, sellable, and above all, conservative.

"Zero" Is Unreasonable

Damage experts for defendants are frequently petrified (as are the lawyers who hire them) at the prospect of conceding there are any damages at all from their clients' allegedly wrongful

conduct. Their most *conservative* testimony then is to claim that damages are zero, even if liability is found. This “head in the sand” strategy is a risky one however. This is particularly so when plaintiff’s expert resists the urge to overdo it in the other direction and actually weighs in with a conservative damage estimate of his own, but a more sellable conservative estimate.

Keeping the Expert Down to Earth

Determining what damages are truly conservative should not be for the expert to decide in the first place. Whose job is it? The attorney who retains the expert. Again, who else? The attorney should consider what a case is “worth,” then hire an expert who is willing to work with the suggested concept, though never to blindly adopt it. Still, a particular set of facts may be susceptible to many views. Therefore, to tell an expert: “I can sell this case to a jury for \$1 million; try to find a damage theory that supports this number” is not an unfair place to begin. At times, the helpful expert will explore your case and find reasons for claiming greater or lesser damages. Certainly, developing expert testimony should be a dialectic process, in which spirited, but undocumented, dialogue between the attorney and his expert occurs. The best results occur when the attorney and the expert work together to establish a logical and defensible position.

A Hobo in Yuncckville

A recent case in which I was involved reveals the pitfalls of sticking with an unreasonable theoretical position through trial. In that case my client sued a large competitor for preventing it from building its business in a location near that competitor’s business. Our expert, sort of a borderline academic/professional with a clipped English accent, estimated the losses to be some \$5 million (given the millions of dollars spent on the project to that point and the large profits projected, not an unreasonable estimate). In re-

sponse, the defense expert, a professional from a national accounting firm, accepted some of our expert’s damage assumptions, then purportedly made “slight” modifications based on his own different assumptions.

This tinkering reduced \$5 million to minus \$5,000, he gleefully reported in both deposition and in direct examination at trial. However, his position was not that plaintiff’s damages were minus \$5,000, rather that its expert’s damages theory was contaminated because reasonable adjustments thereto led to this catastrophic result. Said expert then attempted to limit his opinion by calling it a “critique,” not a separate damage analysis. He did not purport to calculate damages at all, preferring to stick his head in the sand—presumably assuming plaintiff would never get that far at trial.

However, events at trial severely tested this strategy. First, somewhat surprisingly, we were able to make our case of liability and our expert’s damage analysis seemed to work. When defendant put on its case, its expert provided his critique of plaintiff’s damages, as promised. On cross-examination, I asked the expert to agree that he had provided no alternative damage analysis at all for the jury to consider, that is the only damage estimate the jury could consider was plaintiff’s. In the course of this somewhat rugged session, the defense expert testified that his critique *could* stand as his own estimate of damages: i.e., \$5,000! That concession was all I needed. Defendant’s damages analysis could hide no longer.

In the closing argument that followed, I asked the jury to imagine the following when it considered defendant’s damages estimate. You are present at the opening day of plaintiff’s new business, the one that would have been built but for defendant’s interference. The 100,000 square foot facility is ready to open. Flags are flying and clowns are performing acrobatic tricks for the neighborhood kids in the parking

lot. At another area of the lot, free hotdogs and coupons for discounts to the new business are being distributed. The local press is there taking photographs and extolling the new jobs that plaintiff has brought to the community. It's a happy day in Yunckville.

Now, picture a hobo approaching from a distance. Soon enough he comes into view. He is holding a stick over his shoulder with a bag hanging off the end of it. The proprietor approaches the hobo and says, "I am the owner of this business." The hobo says, "I know, I'd like to buy it." At that point, the theretofore-beaming owner suddenly turns somber, a single tear rolling down his cheek. He hands a portfolio of pertinent papers to the hobo, the keys to the front door, plus a check for \$5,000, then says, "It's yours. You're in charge now. Take good care of it."

"That is the unlikely scene that applies," I told the jury, "if you accept defendant's damage estimate." After deliberating for several hours, the jury returned with exactly the damage figure our expert supported. While the jury never said so, the ridiculousness of the damages critique/estimate of defendant's expert undoubtedly helped fuel the suspicion that defendant must have been sufficiently deceitful to have injured plaintiff in the first place.

Risk Validation To Gain Credibility

The risk of a defense expert implicitly validating a plaintiff's case by coming in with a reasonable damage estimate is offset by the increased integrity that will be perceived for the defendant overall from such a strategy. Integrity is the most important asset a lawyer can use to defeat his adversary at trial. Here, extremism in the pursuit of (claimed) virtue is itself a vice, to twist a phrase.

THE GLOVE MUST FIT • The tension between theory and facts often arises when the ex-

pert comes into the case at a late stage, then and there to be greeted with dozens of boxes of exhibits and depositions (and the skimpiest lawyer's summary, for the reasons noted above) which he is asked to analyze, and upon which he is asked to build a theoretical construct supporting his client's position. Problems set in, however, when the expert lacks the will, energy, or budget to plow through the record to lay a good foundation for his thinking.

A Little Knowledge Is a Dangerous Thing

Nevertheless, the expert is paid to "theorize" and he does, by developing an approach he believes is applicable to the challenge at hand—based on what he does know. The problem is the approach doesn't always fit the evidence. When confronted with the real evidence in cross-examination at trial, the expert may have to jettison his theory, duck and cover.

Bowled Over by the Facts

To illustrate this, many years ago I was involved in an antitrust case about stainless steel mixing bowls. For a variety of reasons, stainless steel is an ideal substance from which to fabricate mixing bowls. Plaintiff's contention was that a predatory competitor outside the United States tried to monopolize the "stainless steel mixing bowl market" by preventing it from making any profit on its own sale of mixing bowls here. Central to this case, as it is to many antitrust cases, was plaintiff's legal obligation to prove that defendant's conduct occurred in a so-called relevant market in which it, the defendant, possessed so-called market power.

To dilute the market at trial, defendant's expert came up with the theory that there were countless substitutes for stainless steel mixing bowls. The staff of defendant's expert even went to the trouble and expense of buying such bowls, made of glass, copper, wood, pottery and other substances. A table in the courtroom

was filled for days with dozens of those damn bowls! This display was permitted to remain because I knew eventually they would be reduced to rubble, figuratively anyway.

Defendant's expert knew that just piling up a bunch of mixing bowls on a table would not be enough to make his case. Therefore, he topped it off in direct examination with a bit of micro-analysis that he believed would put his client over the top. Relying on available data measuring price sensitivity between stainless steel and aluminum, the expert proved there was positive price elasticity between these substances in cookware sales.

Assuming mixing bowls were akin to cookware, the expert concluded that defendants could not have monopolized the stainless steel mixing bowl market because aluminum was such a close substitute. Therefore, products made of aluminum would serve to curb the competitive excesses of anyone who tried to corner the stainless steel mixing bowl market, including the defendant that happened to be paying his bills.

After the expert presented his stainless steel/aluminum elasticity theory, I commenced my cross. First, I asked the expert to personally confirm that his staff searched high and low for mixing bowls and that the dozens on the table were about all they could find. Proud of his collection and their dogged efforts, he agreed. Next, I asked the witness to confirm his perspective that there was a positive connection between his aluminum/stainless steel price elasticity theory and mixing bowls; i.e., that there was a supply of aluminum mixing bowls in the market that, like aluminum cookware, would serve to discipline anyone attempting to raise prices for comparable stainless steel products. He confirmed this too.

Then, I invited the expert to descend from his lofty perch, so he could better view his collec-

tion of mixing bowls. "Where on that table is even one aluminum mixing bowl?" I queried. Of course, there were none. The fact is that mixing bowls are made of stainless steel, not comparable gauge aluminum, presumably because aluminum is too weak to be pounded incessantly during the mixing process and its heat conductivity feature has no utility in making chicken salad. The expert returned to the stand with head hung down, the jury intently watching his weakening gait. This expert's theory, indeed the expert himself, was deflated because that theory did not fit the facts.

Explain the Facts—or Else!

It is fundamental then that whatever theory the expert believes will assist his client's cause, it must fit the facts of the case. It is incumbent on the attorney to educate the expert, as best he can, since it simply may be too much to ask an expert to absorb hundreds, if not thousands, of pages of evidence, starting from scratch 90 days before trial.

CONSISTENCY REALLY DOES MATTER •

Another trouble with experts is that in their zeal to make the big bucks that may be unavailable to them as mere professors, they sometimes take different positions in different cases—or different positions between one case and their professional writings. This is a risk particularly borne by the most popular professional experts who may testify hundreds of times over a career, but may do so without any fidelity to a particular theory or approach.

The Search for Conflicting Testimony

It is important then to obtain detailed information from opposing experts during discovery as to their prior deposition and trial testimony in other cases. Some of this information may be disclosed on the expert's resumé; but a savvy expert is likely to remember little else.

Still, a case name, the name of the attorney who took the deposition or obtained the trial testimony, the name of that expert's client, or the venue of the prior proceeding, can all be good starting points to tracking down the possibly conflicting testimony.

Theory-by-Association (or Marketing Materials)

Also, while the expert witness may list his professional writings (which are usually obtainable), he also may have engaged in other marketing over the years, during which he circulated additional materials. Or, others in his expert organization may have circulated such materials. Those materials may present alternative theoretical approaches to those utilized by the expert or his colleagues. Sometimes, a theoretical approach previously embraced by an expert is the very one condemned by him in your case.

Therefore, any time I attend an expert demonstration at a Bar meeting and obtain substantive expert marketing materials, or obtain similar materials in the mail, I throw them in a holding file for possible later use. After nearly 30 years of practicing law, that file is now pretty thick. But, it paid big dividends in a trial I had not long ago when, sure enough, the opposing expert was condemning my expert's theoretical approach to damages, the very approach our opponent had espoused in a speech made in a local bar association meeting I had attended some years earlier. Stick a fork in him; that expert was done for when confronted with my yellowing copy of his own contradictory materials.

In another case, we were attempting to disqualify the opposing counsel for a conflict of interest. One of the issues was whether the large, multi-city law firm representing our opponent was aware of the conflict and should be held accountable as a consequence. To the extent the law firm had adequate procedures for monitoring conflicts, it might be off the hook. The ques-

tion then was, "Did the law firm have adequate procedures?"

During the evidence-taking hearing that followed, in strode the leading law firm ethics expert in the country, who was also a professor at a major law school. On direct examination, he answered the above question in the affirmative and concluded there was no disqualifiable conflict of interest. However, that professor had preceded himself, having written about the ways in which law firms might practice ethically. Perhaps not surprisingly, the advice given in those articles was substantially more rigorous than the slapdash approach the law firm there had actually used, which the expert, of course, blessed during his paid direct examination for a fee.

However, when confronted with this conflict on the stand, it was difficult, indeed impossible, for the witness to disavow his multitude of thoughtful articles in favor of the opportunistic, laissez-faire approach he had just espoused. After the expert departed with his tail between his legs, a disqualification order was entered. Whether hiring or opposing an expert, it is critical then to learn about all that expert's prior testimony, writings and marketing materials.

HE'S A SHY GUY • Another problem encountered with experts, particularly academic experts, is their frequent reluctance to personally contact strangers, i.e., third parties, to corroborate or enhance their intended testimony. More commonly, the expert gathers what data he needs from the attorney who retains him and perhaps pertinent executives who work for the client, in addition, of course, to what he finds in the library or on the Internet. While this may technically suffice for the expert to support a competent theory, it looks bad. And *looking* bad is more important than *being* bad.

Insularity

The result of the natural shyness or lack of industry of many academics and other experts is that their trial testimony takes on a somewhat insular tone. The following sample cross-examination can flush out this limitation to good effect.

Q: "When I took your deposition, you told me that in developing your opinion, you consulted with C1, C2, and C3 [his client's personnel]. Correct?"

A: "Yes."

Q: "Having listened to your direct examination, it's true that you have not modified your opinion since that time, have you?"

A: "That's true. I have not modified my opinion."

Q: "Is it correct then that you have also spoken to no additional people since that time?"

A: "That's true." (This is the one question to which you will not know the answer because there is not likely to be a follow-up deposition the moment before the witness testifies. Still, more often than not, the witness will not have spoken to any other persons. If that proves not to be the case, this whole line of questioning can be safely jettisoned right here.)

Q: "Isn't it true C1, C2, and C3 are all employees of the company that hired you?"

A: "Yes."

Q: "And you're aware, are you not, that there are other companies out there competing against your client?"

A: "Yes, I recognize that."

Q: "And you recognize, too, that there are also vendors and suppliers out there that might have a different view of the market than C, as to what this case concerns?"

A: "I suppose so." (By now, you don't care what the witness answers. At this point, the examina-

tion has sufficient momentum for the jurors themselves to fill in the right answers.)

Q: "But in preparing your "complete" report, you didn't contact even one individual who did not work for your client, did you?"

A: "Well, I guess that's right."

Q: "Not one vendor, not one competitor, not one customer, correct?"

A: "I guess so."

Q: "And you didn't even make an effort to contact my client, did you, to find out the view of its personnel with respect to the subject matter of your opinion?"

A: "Well, I thought that would be a waste of time—that you wouldn't let me speak to them."

Q: "Well, that's just what you assumed, wasn't it—you didn't even make an effort to contact me, did you?" (It is unthinkable that an opposing expert would be free to roam around your clients' personnel, right? Only to the attorneys. The jury will not know of any such rule of etiquette.)

A: "I guess that's true, too."

Q: "So, what you've relied on here is just what the plaintiff/defendant [pick one] told you, right?"

A: "Right."

Q: "So if the plaintiff/defendant happened to provide you any misinformation, that could affect your opinion here, couldn't it?"

A: "My opinion is the product of the facts I learn. So if the facts are changed, it's possible my opinion might change. Sure."

When this examination has been completed, the expert is likely to come across as one who is afraid to hear anything that might contaminate his perhaps too-fragile opinion. Of course, what will end up carrying the day is not a "fragile" opinion, rather a persuasive and sturdy one. What prevents some experts from providing

such opinions? The fact is experts, particularly “academic” experts, tend to be shy guys.

The Expert Reflects on the Party

Necessarily of greater significance here is that such a performance by an expert tends to reflect poorly on the party that hired him. Remember, it is the opposing party you are trying to beat, not the expert. After this cross-examination is completed, you are free to argue that the expert was the captive of, and misled by, your adversary, and was prohibited or not encouraged to contact others, or undertake independent research with respect to the testimony provided. Whether the party that retained the expert actually will have intended to curb his inquisitiveness is essentially unprovable. But that does not diminish the opportunity so argue. In no event, is the game here to separate the opposing party from the expert, only to destroy the expert. That is why the last two questions are such important ones for morphing the expert’s evident limitations into the evident deviousness of his client.

“IT’S NONE OF YOUR BUSINESS AND WE REALLY MEAN THAT!” • While many experts are shy about speaking to others, far fewer are shy about collecting all the written information they can (from their clients, the Internet, other public sources and elsewhere). This “need to know” is to avoid “embarrassment” at trial, so they say. While this objective seems laudable enough, it can effectively turn your expert against you. In another price fixing case that I was defending, our expert clamored for documents that would reveal the market structure of competition in the pertinent region. Technically, such documents are irrelevant in a price fixing case, where the only issue is whether or not the claimed price fixing occurred. As it happened, this information was unlikely to do us any good since the market had become more concentrated in the hands of fewer competitors in the

years subsequent to the claimed price fix. Did the expert have a “need to know” here?

Limit the Expert to Relevant Information and Inquiries

Experts are often hired to perform specific tasks. They are sometimes limited to answering hypothetical questions. We would never want to pay an expert thousands of extra dollars to consider matters not relevant to their work. So, if our expert were to be cross-examined on the question of “market structure” here, and he had previously seen no market structure information at all, he could honestly say, “That is not part of my assignment.”

If then asked why, he could say, “This case concerns whether or not there was price fixing. My job was to evaluate any evidence, direct or circumstantial, to support or refute that claim. It does not matter whether there are five, three, or 10 competitors to make my analysis. Therefore, market structure doesn’t matter. Plus, it was also my goal to keep my costs down and it would have added thousands of dollars of my time to consider this extraneous issue.”

That kind of answer would have properly reflected the expert’s limited role in the case and reinforced the testimony he did provide. Indeed, it would make an important point for us too—that this was a simple case in which plaintiffs had to prove whether or not certain unlikely acts actually occurred. That is their burden and any reliance by them on complicated market structure evidence would have been just a smokescreen for their lack of proof.

Marginally Relevant Inquiries and Documents give Your Opponent a Green Light

The worst thing would be to have market structure documents and analysis sitting in the defendant’s expert’s files which would be the subject of examination in deposition, which he

then would admit were somehow relevant. This would give a green light to plaintiffs to make market structure an issue in this case. Even if market structure issues could somehow have been made relevant by plaintiff's counsel or its expert, it would not have been too late for our expert then to undertake a review of market structure evidence, or to respond to a hypothetical question incorporating this data, such as, "Assume the market shares of the Defendants increased during the years of the claimed conspiracy, would that change your opinion that there is no conspiracy here?" Answer: "No." Question: "Why not?" Answer: (Then fill in what you and your expert have worked out over lunch.)

The Value of an Undisclosed Consultant

On the off chance such information might have helped us, or that we might need to think about how to defend against plaintiffs' use of it, that could have been remedied in the first instance by retaining an undisclosed "consultant." In short, this kind of information should not have been in the testifying expert's files, certainly not until counsel otherwise collected the pertinent materials (perhaps even with that expert's guidance over the phone), and separately studied the matter.

THE DEVIL IS IN THE DETAILS • Surprise is a major feature of lawsuits, despite the pretrial rules intended to eliminate it. Still, one unwanted surprise is an expert that got everything right, except for one big miscalculation. Of course, this typically happens because the high powered testifying expert does not actually grind out the calculations himself. Graduate students or clerks in the back room perform this ministerial duty, sometimes ineptly.

Where Do the Numbers Come From?

What typically occurs is that after experts develop a theory, and perhaps consider the actual

state of the record, their staffs repair to their computers and generate numbers, tables, charts, and graphs. This stuff typically passes as a blur before the eyes of the counsel that hires the expert. It is all we can do to make sure the expert understands the facts and applies a reasonable theory to them. Is it our job also to fly-speck every number?

Do the Math (Some of It, Anyway)

While there may be no legal responsibility for any lawyer to so micromanage his expert, it is not a bad idea to dive into the numbers and attempt to understand them, whether you have a mathematical background or not. Trusting this to the expert can be risky. In one federal trial I was told about, it was disclosed that the plaintiff's expert was confronted with a computational error on the stand and then and there was forced to cut his damage estimate in half. The expert then came off looking not just biased (all experts run that risk, of course), but also incompetent. Shades of Hal 5000, the computer that erred just once, then melted down in *2001: A Space Odyssey*.

SOMETHING FROM NOTHING IS SOMETHING • If experts are so much trouble, what are we all to do? How do we get around the trouble with experts and still put on our cases? Here is one answer: Do nothing. Do not hire an expert at all if you can possibly get away with it. This can be accomplished two ways.

Make Your Opponent's Expert Your Own

First, it is sometimes possible to make the other side's expert your expert. In one case I tried many years ago, I had no choice but to do this. It turned out that in the obscure industry which that case concerned, there was just one bona fide expert witness and my side got to him one day late.

I despaired this loss at first, then decided to make the best of it. Over two ostensibly relaxed days of deposition, I actually cross-examined the witness quite carefully, asking him to accept a number of “truisms,” framed in a way that disembodied them from the facts of the case (although they happened to fit our theory). I also pored over the documents the expert produced and found material therein that assisted our side. While there were also documents in his file that assisted our opponent, that did not concern me, of course, since he was their witness.

At trial, when the expert was called to the stand, in a fairly brief cross-examination, I was able to hit the various points that mattered to us, about which he had testified previously in deposition, and also to highlight those parts of his records that supported our position. I did not “break” the expert, as such, because I wanted him also to be a credible expert for us, too.

Consider Using a Lay Witness

There is one other way of doing “nothing,” or at least, almost “nothing.” Call a “lay” expert witness. Finding such an expert is much more like casting a movie role. The goal here is to find the right person for the part, as opposed to hiring a professional expert who slithers in like a chameleon. The lay expert believes just the way you want him to because he is likely to have held those beliefs all his life. Such an expert is also typically not paid or not paid much. (The disclosure in trial that experts are highly paid also sometimes interferes with their acceptance by the jury.)

Of course, the lay expert must be qualified to provide an opinion before the jury, just like a paid expert. Not surprisingly, lay experts are not likely to be as smooth on the stand as professional experts because they are not likely to have testified before. They also are not likely to be qualified to testify about “the big picture” or provide grand pronouncements about the evidence. But what they generally are is sincere and, most important, devoid of prior inconsistent statements—at least if they have been cast correctly. Whatever they do say often stands up.

In one case I tried 20 years ago, the issue was whether the defendant was a monopolist. The usual paid experts were on board causing problems, but the most persuasive witness, according to the judge, was an uninvolved competitor on the edge of the market who had been quietly observing competition there for 30 years. His thoughtful testimony, carefully supported by his own research, helped carry the day for us. The only issue remaining is to remember to designate such lay witnesses as opinion experts in whatever pretrial filings may be required.

CONCLUSION • All things considered, a careful “expert” strategy is of utmost importance in complex civil litigation. Leaving the process, or more specifically experts, to chance can be risky. Still, experts, professional, academic, and amateur, when carefully selected and carefully guided, can contribute significantly and positively to your case. Similarly, experts for your adversary, when carefully challenged, can sink its ship altogether. In sum, there can be tremendous burdens and benefits from dealing with experts. Just be careful out there!

PRACTICE CHECKLIST FOR The Trouble with Experts

The trouble with experts is that you often need them to win your case, but they present the biggest risk of losing it, too. What should you look for? And what should you do?

- Limit the materials you provide to experts and they provide to you, as well as the materials they otherwise generate. Inconsistencies between an expert's trial testimony and documents in his possession, or that of his staff, can cause major problems:

- If it's written down, your opponent will probably see it. Objective written ruminations about the weaknesses and strengths of the opponent's position are a bad idea;

- The expert should review documents, including deposition transcripts, and learn the facts without writing anything down—or as little as possible. Even the expert's bill is discoverable, and if it is too detailed, it can give your opponent fuel for cross-examination. Be sure to tell the expert about this.

- The best way to minimize the trouble an expert might cause is to make certain he adopts a reasonable theory. "Reasonable" means persuasive, plausible, sellable, and above all, conservative:

- "Zero damages" is an unreasonable position for a defense expert. Determining what damages are truly conservative should not be for the expert to decide in the first place—it is a job for the attorney. Always have your own idea of appropriate damages. At times, the helpful expert will explore your case and find reasons for claiming greater or lesser damages. Developing expert testimony should be a dialectic process, where spirited, but undocumented, dialogue between the attorney and his expert occurs. The best results occur when the attorney and the expert work together to establish a logical and defensible position;

- A reasonable damage estimate might implicitly validate the plaintiff's liability position, but this risk is offset by the integrity that the jurors will perceive. The greater the perception of your expert's integrity, the more effective he or she will be.

- The theory has to fit the facts, not the other way around:

- Since the documentation has to be kept to a minimum, the best way to make sure that the theory fits the facts is to bring the expert into the case as early as possible. The risk of an inappropriate theory increases with the progress of the case. When the expert has to plow through stacks of depositions and boxes of material in a short time, there is a great danger that he or she will overlook something;

- Explain the facts—or else! Educate the expert, as best you can, since it simply may be too much to ask an expert to absorb hundreds, if not thousands, of pages of evidence, starting from scratch 90 or even 180 days before trial.

- Experts sometimes take different positions in different cases—or different positions between one case and their professional writings. This can help you if it is the opponent's expert, but hurt if it is

your own. Do some hunting to find prior deposition and trial testimony in other cases. Good starting points include:

- The expert's resumé;
 - A case name;
 - The name of the attorney who took the deposition or obtained the trial testimony;
 - The name of that expert's client;
 - The venue of the prior proceeding;
 - The expert's marketing materials.
- Experts, particularly academic experts, are frequently reluctant to personally contact third parties to corroborate or enhance their intended testimony. Although this may technically suffice, it looks bad. This is often a fertile area for cross-examination.
 - Most experts collect all the written information they can (from their clients, the Internet, other public sources and elsewhere). This "need to know" is to avoid "embarrassment" at trial, so they say. While this objective seems laudable enough, it can effectively turn your expert against you:
 - Limit the expert to relevant information and inquiries. If your expert is hired to perform a specific task, make sure that he or she sticks to it, and does not begin collecting irrelevant or even conflicting information and documents. There is no point in paying an expert thousands of extra dollars to consider matters not relevant to his or her work; and
 - Marginally relevant inquiries and documents give your opponent a green light. The worst thing would be to have irrelevant or contradictory documents sitting in the defendant's expert's files during a deposition, which your expert would have to admit were somehow relevant because he or she chose to obtain them.
 - Know where the numbers come from. While there may be no legal responsibility for any lawyer to micromanage his expert, it is not a bad idea to dive into the numbers and attempt to understand them, whether you have a mathematical background or not.
 - Do not hire an expert at all if you can possibly get away with it. This can be accomplished two ways:
 - First, it is sometimes possible to make the other side's expert your expert. Cross-examine to get the expert to accept a number of "truisms," framed in a way that fits your theory. Do not try to "break" this expert, because you need him or her to be a credible expert for you, too; and
 - Consider using a lay witness. The goal here is to find the right person for the part. Such an expert is also typically not paid or not paid much. (The disclosure in trial that experts are highly paid also sometimes interferes with their acceptance by the jury.)