Failure to Communicate? A Panel Discussion on Improving Expert Testimony

By Stephanie Cheng

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The ABA Antitrust Section's 2024 Spring Meeting panel "Failure to Communicate? Improving Expert Testimony" provided a lively discussion about the evolving role of the expert witness, what makes an effective expert witness, and changing trends in trial procedure that may help streamline expert testimony.

Swathi Bojedla of Hausfeld LLP summarized how the evolution of antitrust litigation has set the stage for how expert witnesses are used today. To certify an antitrust case, Plaintiffs must demonstrate that common evidence can be used to prove liability (including antitrust impact) and damages. Historically, this standard was not as stringent as today: discovery was often bifurcated between class certification and liability, and Plaintiffs could assert that common evidence would be shown later without providing extensive analysis at the class certification stage. This approach began to evolve as several decisions, including by the Supreme Court in Walmart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), required more rigorous analysis and greater scrutiny of expert opinions. This ultimately paved the way for the current landscape of substantially more detailed expert reports at the class certification stage.

As Aditi Mehta of the U.S. Department of Justice noted, expert witnesses play several different roles in antitrust litigation today. In addition to presenting quantitative evidence, they can provide an analytical framework to think through the factual record, give additional context about the industry, and help the fact finder understand how competition works in the industry and the effects of competition. The panelists also noted that the Courts are moving towards using more and different kinds of experts in their cases. For example, in cases involving Big Tech, economic experts have been joined by industry experts, technologists, and other methodologists—such as survey experts.

However, as moderator Kristof Zetenyi of Analysis Group discussed, concerns have been raised about the effectiveness of expert testimony in litigation. With both Plaintiff- and Defense-side experts providing long and oftentimes dense reports, some have

questioned the usefulness of experts that are "ships passing in the night"—providing free flow of arguments that do not address each other head-on—or "neutralizing each other," pushing the Courts to instead rely on qualitative evidence. While having multiple experts allows each expert to focus on their specific expertise, it also risks the possibility of experts providing overlapping or contradictory opinions. Furthermore, because experts are more likely to face Daubert challenges at class certification, experts are incentivized even more to "kick the tires" on their analysis and add more detail to their reports.

The panelists explained that as the number of experts—and therefore, the number of pages of expert reports—grows, each expert witness must establish their credibility with the fact finder early and distill their arguments in a manner that is clear without being condescending. Cynthia E. Richman of Gibson Dunn & Crutcher LLP laid out the four "Cs" of establishing an expert witness's credibility:

- Credentials: Does the expert have the academic background and experience necessary to offer opinions on a specific topic?
- Consistency: Is the expert's testimony internally consistent and consistent with their past opinions?
- Concession: Is the expert willing to concede points and acknowledge facts—even if unhelpful to their case?
- Common Sense: Particularly in front of a jury, are the expert's opinions consistent with people's real-world experiences and seem tethered to the actual evidence?

The panelists also noted that experts need to take ownership of their report and demonstrate that they understand—and can quickly find—all key points in their testimony. While no one expects an expert to do everything themselves, they must be personally involved in deciding the approach their team takes. The panelists gave the example of reviewing materials: because it can be impossible to review the entire record—or some parts of the record may not be relevant—experts should take an active role in deciding what portion of the record they need to review. If an expert has only reviewed documents selected by counsel or that are in support of their case, this can draw questions from the fact finder on whether they have full enough context to provide a reliable opinion.

Acknowledging the considerable volume of information when multiple expert reports are entered in the record, the panelists considered possible avenues for streamlining expert testimony. They discussed the feasibility of implementing page limits or submitting summary reports to better distill testimony. These suggestions received mixed reviews, with concerns that cutting down on the context surrounding economic analyses could potentially leave experts more vulnerable to Daubert motions.

When it comes to courtroom testimony, the panelists noted that there are many opportunities to "test out" an expert's demeanor without requiring a mock trial, such as reviewing deposition transcripts or observing interactions throughout the drafting of an expert report. Experts should convey confidence but not arrogance, with the best

experts coming across as professorial and teaching the facts. Particularly for a jury trial, it is also important to make sure the expert's demeanor works across a wide variety of people. As jury pools grow more diverse, counsel should keep in mind that jury members of different age groups or socio-economic backgrounds may have different impressions of a given expert witness.

Leah Brannon of Cleary Gottlieb Steen & Hamilton LLP noted that how an expert presents themselves to the fact finder can affect case outcomes. Recent district court judgments have discussed what expert opinions have been considered credible. For example, the New York v. Deutsche Telekom AG (S.D.N.Y. 2020) case referred to the economic experts as "two crystal balls" and was hesitant to put much stock in either testimony. In contrast, U.S. v. American Airlines Group highlighted the Plaintiffs' primary expert witness as "articulate and methodical," "consistently measured and precise," as well as "candid in acknowledging the limitations of his opinions."

In their concluding discussion, the panelists also acknowledged examples of innovative practices by some courts with respect to expert testimony. In some cases, hearing sessions offer opportunities for judges to interact with expert witnesses more effectively. For example, some judges may find it helpful to have an "economics session" prior to the start of trial to ask questions and lay the groundwork to better understand the economic issues. Concurrent testimony, sometimes referred to as "hot tubbing," is also becoming more common. These sessions—in which experts interact live in front of the judge and even ask each other questions—can bring opposing testimony closer together in time and push experts to respond to the same issues. If judges find these types of proceedings useful at highlighting key issues and clarifying each experts' arguments, they will likely become more commonplace in future litigation.