When I was a very junior lawyer (a long time ago), I was lucky enough to have a friend who sent me an important case for me to try. I was to defend a local doctor accused of malpractice.

I reached out for help to another friend, who was a more senior lawyer, and we talked the case through, and I worked up a strategy. My first acts were to enter my appearance and to answer the complaint. I won’t go through the lengthy thought process that enabled me to determine that the client should answer the complaint and not move to dismiss except to say that the case was in Philadelphia County (Pennsylvania), and the judges there had a notorious contempt for any case-dispositive motions.

So, I was moving along through the pretrial, taking depositions, defending depositions, and I suddenly realized: if I’m going to help my doctor client show that he did not commit malpractice, I’ll need a doctor expert to help the jury understand the medical issues. (This was long before statutes required so-called “certificates of merit” for plaintiffs in medical malpractice cases, about which more later.) I circulated a memo (this was before the days of email) asking the other lawyers in the firm to recommend a doctor
who would be willing to testify, preferably a cardiologist, since the issues were heart-related.

I found the perfect doctor, the head of cardiology at one of Philadelphia’s major teaching hospitals. I interviewed him, showed him the medical records, and asked if he’d be willing to testify. He immediately said yes, said he knew the doctor I was defending, thought highly of him, and didn’t believe he had committed malpractice.

I was so thrilled that I neglected to ask him to sign an engagement letter or even to tell me what he was going to charge. I realized much later that my client might not be happy to receive an extravagant bill, but as you’ll see, the issue never came up.

Fast forward to the trial. I put my doctor expert on the stand, and he was magnificent. He was clear, he was cogent, he was appealing. Members of the jury were nodding their heads as he spoke. This was a winner.

Then came the time for cross-examination. The plaintiff’s lawyer had not taken the doctor’s deposition and was content to have the doctor’s letter saying there was no malpractice. He opened with what he expected to be his ace in the hole.

“Doctor, how much are you charging to be here today?” he said.

Suddenly my gut tightened. I had no idea what my witness was going to say.

“Nothing,” my witness said.
Opposing counsel was nonplussed. I felt my own jaw drop.

“You are not being paid to come here today?”

“No, sir. I’m testifying because a fine young doctor is having his career besmirched, and I don’t want that to happen.”

It was as though some highly beloved television doctor had vouched for my client. My opponent didn’t continue the cross-examination. The jury found for my client—no malpractice.

After the trial, when I’d had time to calm down, I called my expert to thank him and tell him the outcome.

“I was as shocked as everyone when you said you weren’t charging for your time,” I said. “And I don’t want to do anything unethical, but don’t you think you should be paid?”

“No,” he said, “I meant what I said.”

In that case, I was flying by the seat of my pants—I really had no idea that I should even think about retaining an expert. Now, of course, it seems obvious that in a medical malpractice case, where the plaintiff has an expert doctor testify on his behalf, the defense will also need a doctor to dispute what the plaintiff believes happened. And in many jurisdictions, the rules and the law require a plaintiff to produce an expert in order to make a threshold showing of merit.

But there is plenty of evidence that juries don’t really believe experts at all, because they assume that they are just hired hands. In a battle of experts in an environmental
case, later in my career, it seemed obvious to my team that the opposing expert was a doofus and that ours was the only credible one. The case settled, and the lawyers talked to the jurors afterward (with the court’s permission). We were shocked to discover that the jury paid no attention to either expert and thought they were equally credible but that they were irrelevant.

In a case where experts are essential to understanding the facts, should your case be heard by a judge instead of a jury? In your jurisdiction, can an expert testify about the ultimate fact—liability? If so, does the jurisdiction require some magic language from the expert in order to satisfy a burden of proof? Do you need specific jury instructions to ensure the jury pays attention to the experts?

In some jurisdictions, the plaintiff in certain kinds of cases must have an expert to certify that the plaintiff has a legitimate cause of action. Failure to provide a statement by such an expert will result in the case being dismissed. The presence of this expert doesn’t give the plaintiff a pass, however, on proving her case. The “certificate of merit” merely gets the plaintiff past the threshold of failure to state a claim.

My intention in this book is to give you an overview of the issues that crop up when you are preparing for trial with respect to experts and expert witnesses. As I say in all of my books for lawyers, don’t rely on anything in this book as a hard and fast rule; remember that litigation is an art, not a science. Remember that case law can change on a dime. And as for rules—read them!