Memorandum

To: Officers and Council

From: Jonathan B. Baker
       M. Howard Morse
       Co-Chairs, Economic Evidence Task Force

Re: Final Report of Economic Evidence Task Force

We are pleased to provide this report of the Economic Evidence Task Force. This Task Force was formed by Section Chair Donald C. Klawiter in August 2005 and charged with examining the role and effectiveness of economic evidence in antitrust proceedings.

I. Introduction and Summary

A number of questions were posed to the Task Force: Are judges, juries and enforcers persuaded by economic evidence? Do they understand it? Do they need additional resources to help them decipher it? Do economic experts present their findings in a way that juries and generalist judges can understand and evaluate evidence? Are there ways to do it better? How would the courts like to deal with economic testimony?

Over the past year, the Task Force, which has been made up of practicing lawyers, economists, academics and a federal judge, have undertaken a number of projects to attempt to address these issues. We focused specifically on the role of economic evidence in the federal courts. We have surveyed antitrust economists, spoken with a jury consultant about jurors’ attitudes toward economic evidence, interviewed a number of federal judges, and met with the authors of a Sedona Conference Commentary on the Role of Economics in Antitrust Law. We also reviewed the legal and economic literature regarding the use of economists in antitrust cases and the use of court-appointed experts in other litigation, interviewed economists that have served as court-appointed experts and interviewed lawyers in cases where there were court-appointed experts, and reviewed published opinions addressing Daubert motions in antitrust cases. The Task

---


2 We did not undertake a representative, scientific survey because we did not have access to a comprehensive list of antitrust economists. Instead, we used contacts with economic consulting firms, agency economists, and academic economists to circulate an invitation to participate in the anonymous survey which was accessible through an ABA-hosted website. A description of the survey and its results is appended to this memorandum.
Force also examined rules governing discovery of draft expert reports and communications between an expert and counsel, and provided advice to the Section leadership regarding a Litigation Section proposal to modify current discovery rules. An appendix to this report provides more details about these activities.

Throughout our deliberations, we distinguished between poorly articulated or complex economic testimony and evidence, which for expositional simplicity we will term “confusing,” and baseless or intentionally misleading economic testimony and evidence, which we will term “unprofessional.” The “confusing” category includes economic testimony that is unclear, confusing, or otherwise uninformative because of communications problems. The “unprofessional” category includes baseless economic arguments, defined as arguments so far out of the mainstream that they do not count as serious economics, as opposed to good faith arguments with which others would disagree or differences in opinion simply reflecting an ongoing debate in the economics literature. The “unprofessional” category also includes unsupported economic arguments, presented in a context such that they bear little or no relationship to the facts of the case. We view intentionally misleading economic testimony as “unprofessional,” but we recognize that it may be hard to distinguish this testimony from testimony that is “confusing” because it is difficult for an outside observer to assess the intent of the witness.

The Task Force members reached consensus regarding the importance of economics in modern antitrust law and the recognition, therefore, that it is critical that judges and juries understand economic issues and economic testimony in order to reach sound decisions. But we have somewhat differing views as to the extent and nature of current problems and the wisdom of the possible corrective steps we considered. Based on the available evidence, most Task Force members believe that economic evidence is at times confusing or unprofessional, but that the problems are not routine and when they arise, they are often addressed successfully by the existing litigation process. There was also general agreement that these problems can seriously affect the adversarial process by skewing judicial outcomes, by leading decision makers to ignore conflicting economic testimony or come to “wrong” conclusions, and can increase litigation costs. But there was not a consensus on how frequently judicial outcomes are affected or the significance of added costs.

While the Task Force members generally saw room for improvement, there were a range of views as to whether the benefits of various potential remedies are likely to exceed the costs. Among the changes that were supported by at least some members of the Task Force are: (1) Section-sponsored training for lawyers and economists on best practices in presenting economic evidence to judges and juries; (2) the Section preparing and making available materials for judges confronting antitrust cases; (3) Modifying discovery rules so that counsel can work more efficiently and effectively with experts; (4) Encouraging greater use of Daubert motions; (5) Encouraging greater use of non-adversarial tutorials to educate judges about economic principles and analytical techniques that are likely to be used in the case; (5) Encouraging use of consulting or testifying court-appointed experts; and (6) Encouraging use of various methods of pushing experts to clarify their differences. In general, the Task Force supports experimentation with these
options, many of which have rarely been tried, to learn more about their benefits and costs, and supports further discussion of them, in Section programming and publications.

This memorandum describes the arguments surrounding these issues and the views of the Task Force members on them. We also identify specific areas where we recommend additional Section efforts, particularly in developing programs and publications.

Our specific recommendations for the Antitrust Section include the following:

1. Systematically evaluate the availability of Section materials about antitrust law and economics to judges, in order to ensure that judges can quickly identify and obtain relevant publications when confronted with a major antitrust case, potentially working with the Federal Judicial Center.

2. Develop Section publications and programs on best practices in presenting expert testimony in court, and consider developing programs for economists to teach practical skills for deposition and trial testimony, with an emphasis on the clear articulation of economic analysis.

3. Develop Section publications and programs on the use of *Daubert* (Rule 702) in antitrust litigation, and ask an appropriate Section committee to address what factors should be considered in deciding whether to exclude economic testimony in antitrust cases, with the goal of identifying antitrust-specific criteria courts might use in ruling on *Daubert* motions.

4. Develop a Spring meeting program and articles in the Antitrust Law Journal, Source or Magazine, or a monograph, on the pros and cons and use of court-appointed experts in antitrust litigation, and ask a Section litigation committee to consider drafting a guide for judges considering the use of court-appointed experts that reviews their past use, identifies their advantages and disadvantages, describes alternative models, and suggests the parameters for judicial scheduling orders.

5. Consider developing Section publications and programs addressing methods of encouraging or requiring testifying experts to clarify their differences, such as requiring experts to write a joint report indicating where they agree and disagree, encouraging judges to hold economic pre-trial conferences, and use of economic rebuttal testimony.

II. **Confusing and Unprofessional Economic Testimony**

A majority of Task Force members believe that there is a problem with confusing economic testimony in the federal courts, although some characterize the problem as significant and others characterize it as only modest. It is widely recognized that economic testimony is often technical, that most judges and juries have little background in
economics or antitrust, and that judges rarely see antitrust cases. Notably, the jury consultant we spoke with thinks that parties often present expert economic testimony that juries can not understand. Several of the judges we interviewed believe that confusing expert testimony is a problem, at least sometimes. But a majority of the surveyed economists said this was “rarely” or “never” a problem, although a substantial minority said this problem “sometimes” occurred. A majority, but not all, of the Task Force thought that this problem is sufficiently serious, that something should be done about it.

Opinions vary as to whether there a serious problem with unprofessional economic arguments in the federal courts. Some think this problem is significant, even if not frequent, considering the effect on litigation costs (including the inducement of costly settlements by defendants who did not violate the antitrust laws) and unwarranted judicial outcomes when it does occur. Most of the economists that were surveyed thought this problem “sometimes” occurred, and half the economists surveyed thought it was so serious as to call for a remedy. The economists responding to the survey also provided a number of specific narrative examples of unprofessional economic testimony to illustrate the problem. In addition, the reported Rule 702 (Daubert) cases suggest that these kinds of problems do occur, although those decisions also suggest that the current system can expose and deal with them, at least unless one believes those cases reflect only the tip of an iceberg. Most on the Task Force believe that Rule 702, along with other procedural protections, such as motions in limine and the threat of cross-examination, and attorney and expert concerns about reputation substantially deter such problems or limits their adverse effects.

Some examples of the type of potential problems that concerned our Task Force will provide context for the rest of this memorandum. Many of these were suggested by the evidence we collected, including the narrative responses to the economists’ survey. During our deliberations, we considered whether hypothetical examples like these potentially raised problems for the litigation process and, if they do, whether those problems would be addressed adequately in litigation or whether they suggest the need for some reform of the litigation process.

1. Opinion based on little economic analysis: The expert’s testimony was limited to recounting that the expert had interviewed the CEO of the plaintiff company, that the CEO had said X was the market and the alleged practice Y was anticompetitive, and assuming the CEO was right, X was indeed the market and Y was indeed anticompetitive (with no discussion of other evidence and or of the economic reasoning employed).

2. Opinion based on economic theory without factual analysis: The expert based his testimony on a model in which firms had identical costs and engaged in a specific form of oligopoly interaction, without defending those assumptions. Different assumptions would lead to different inferences about possible harm to competition.
3. "Cooked" statistical estimates: An expert presents econometric results (with respect to damages or demand elasticities or something else). The opposing expert claims those results are not robust to including data that the expert had removed from the sample, and not robust to reasonable variation in the model or the variables. On cross-examination, the original expert defends the results as based on the most sensible model and sample. If an objective outside economist were asked, he or she would agree with the opposing expert, not the original one.

4. Potentially misleading omissions: The plaintiff’s economist testified that the defendant had a downward sloping demand curve or discriminated in price, and, consequently, possessed market power. Thereafter, the plaintiff’s lawyer would frequently refer to the economist’s testimony as demonstrating “monopoly power.” If an objective outside economist were asked, he or she would agree that demand was downward sloping and price discrimination occurred, but also add that entry was easy and firms did not earn economic profits. (That is, this was an industry characterized by monopolistic competition or competitive price discrimination.)

5. Conclusions that are internally inconsistent, or inconsistent with economic theory: The expert presented a damages analysis where predicted prices during the period of the alleged violation were less than shut down costs (and thus arguably inconsistent with profit-maximization). Or the expert presented an analysis that was tantamount to asserting an upward sloping demand curve (and thus arguably inconsistent with economic theory). The expert did not make an effort in either case to rationalize these results with economic theory.

6. Improper analytical comparisons: The expert presented a damage estimate derived using a methodology that simply compared during and after prices without controlling for variation in costs and demand (and that variation, if controlled for, would have altered the conclusions). An objective outside economist would view this methodology as improper.

7. Analysis that did not reflect understanding of antitrust principles: The expert defines the market based on segmentation principles employed in marketing, without considering whether that approach is appropriate for market definition in antitrust applications.

III. Remedial Options

The Task Force evaluated a number of options for remedying problems with confusing or unprofessional economic evidence. It is only a slight exaggeration to say that each of us had our favorite candidate and thought someone else’s favorite should only be tried as a last resort. Given our sense that there is room for improvement, and recognizing that these options are not mutually exclusive and could to some extent reinforce each other, the Task Force generally supports experimentation with multiple approaches.
A. Educational Efforts for Judges, Jurors, Economists and Lawyers

A significant number of Task Force members would recommend greater education for judges about antitrust economics, given the limited antitrust and economics expertise that most judges bring to the bench when appointed. Educational efforts must, however, recognize that judges very rarely hear antitrust cases and have busy schedules. Judges are likely to be most interested in learning about antitrust law and economic principles when confronted with a major case, and materials must be easy to find and readily available through the ABA or the Federal Judicial Center.

Judges might also be encouraged to use tutorials, and counsel encouraged to recommend their use, to educate judges about key economic concepts in a particular case. Tutorials could be conducted early in a case, in a non-adversarial setting, just as technical engineering issues are sometimes explained in patent cases. Some believe that Daubert motions are sometimes used to educate the court about economic issues in the case; a tutorial may be a more efficient means to achieve that end.

The Section might also consider preparing a video which could be shown to jurors and/or judges at the beginning of antitrust cases, regarding antitrust law and economics. But that task would only be worth the effort if the videotape would be useful in a wide variety of antitrust cases and supported by both plaintiffs and defendants.

Greater education for lawyers and economists, through Section publications and programs on best practices in presenting expert testimony would also be supported by a majority of Task Force members. In addition, some would recommend that the Section consider developing programs for economists that teach practical skills for deposition and trial testimony, with an emphasis on clear articulation of economic analysis.

B. Discovery

The Task Force framed its discussion of discovery around the request from the Antitrust Section’s leadership for our views on the Litigation Section’s recommendation that the Federal Rules be amended to limit disclosure of experts’ draft reports, including notes, and communications between an expert and the attorney that has retained the expert. The members of the Economic Evidence Task Force were generally supportive of the Litigation Section’s proposal because they think it will reduce costs by making it easier for counsel to work with experts.

Lawyers on the Task Force that regularly represent defendants and those that regularly represent plaintiffs both said that they routinely enter into stipulations in antitrust litigation to limit expert discovery. There is a broad consensus among Task Force members that limiting discovery would avoid spending resources on what is generally a distraction from the merits and seldom fruitful. The lawyers and most economists on the Task Force thought that the changes would reduce inefficient, cumbersome practices currently engaged in by experts and counsel to avoid discovery, such as avoiding taking
notes and review of drafts only in person on a computer screen. Even counsel representing parties that can afford to hire separate testifying and consulting experts, when opposing parties can afford only a single expert, do not believe that the current system is ideal and would prefer to be able to consult with their testifying experts without fear of discovery of such communications. While current rules are often stipulated around, entering such stipulations takes time, and uncertainty often remains, which would be eliminated by reforming the rules.

Opinion on the Task Force is not unanimous and a minority said that discovery should remain broad to allow examination of draft reports and communications with counsel to prevent counsel from unduly influencing the views of experts and prevent experts from merely adopting the views of counsel. One Task Force member advocated complete transparency, allowing discovery of all expert report drafts shown to attorneys and all work product of support staff, in order to make it more difficult for experts and their lawyers to frustrate discovery. Most, however, said that what should matter in litigation is whether the expert’s views withstand scrutiny, not how the expert arrived at his or her views.

While the Litigation Section would not limit discovery of facts or data on which an expert is relying in forming his or her opinion, including alternatives considered by the expert, there is concern among Task Force members that the definition of “facts” and “data” is not sufficiently clear. In particular, there was concern expressed that economists’ preliminary calculations, computations, regressions, or other data runs be discoverable, even if notes, drafts, and other preliminary work created by or for an expert is protected from discovery. Cherry picking or data mining is perceived by some to be a significant problem that can be best discovered by reviewing preliminary statistical runs and alternative data sets that were developed. At least some Task Force members believe that lawyers should be able to discover preliminary data runs and question experts at depositions regarding what data they considered. But the Task Force is divided on this issue. Other Task Force members believe that access to all raw data that were collected should allow opposing economists to manipulate data as desired and identify cherry picking or data mining adequately, and therefore, there is no reason to exchange draft statistical runs, which may present the same concerns as exchanging draft reports or communications with counsel.

C. Expand Use of Daubert to Reject Unsupported Economic Testimony

Some members of the Task Force suggest primary reliance on Daubert and motions in limine to address concerns regarding unsupported economic testimony. They note that judges and litigants are generally satisfied with Rule 702, and its ability to weed out frivolous testimony. Our review of the reported cases suggests that the judges who chose to write published opinions understood the economic issues and made sensible decisions. As a result, Daubert likely deters at least some types of unprofessional economic testimony, particularly by encouraging efforts to match the economic argument with the facts of the case.
Others, however, argue that Daubert motions come at a high cost, relative to their benefit, with costs often creating a particular burden for antitrust plaintiffs. Daubert motions are seldom granted and often require substantial time and resources by the parties and the courts. Most believe that judges tend to exclude evidence only in the most egregious cases, allowing most evidence to be weighed by the fact-finder, either because they feel uncomfortable doing so given their own lack of economic expertise or in order to reduce the possibility that an appeals court would order a retrial. There is disagreement as to whether expert economic evidence should be foreclosed more often, and a particular concern that Daubert not be used to foreclose testimony based on novel theories or methodologies, even if they are appropriately employed in the case. Most economists surveyed preferred a number of other remedies to the more extensive use of pre-trial motions to exclude expert testimony.

While there have been a number of very good scholarly articles published on the use of Daubert in antitrust cases, our Task Force recommends that Section publications and programs pay additional attention to this topic. Recognizing that the Daubert factors are stated generally, to apply to a wide range of scientific fields, and that they do not preclude consideration of other issues in particular cases, we also recommend that an appropriate Section committee address what factors should be considered in deciding whether to exclude economic testimony in an antitrust case, with the goal of identifying antitrust-specific criteria courts should use and preparing recommendations for judges.

D. Experimenting with Court-Appointed Experts

A number of Task Force members would recommend that the Section encourage greater experimentation with neutral, court-appointed economic experts, to testify at trial, report without testimony, or advise the court informally. We explored this issue extensively, particularly through talking with court-appointed experts, and judges and lawyers involved in such cases. But the Task Force did not reach a consensus on this remedy; we sketch the pros and cons below, and make some related recommendations.

The promise of court-appointed experts is that they may help judges understand complex economic issues, encourage experts not to take extreme positions, and deter unprofessional testimony. The use of such experts may also promote settlement (a kind of economic mediation), although the evidence on that point is mixed. The lawyers we spoke with who were involved in two cases where such experts were appointed said that it slowed rather than sped up settlement, while the appointed experts said that it contributed to the quality of the economic analysis. There is widespread recognition that court-appointed experts generally do not have the financial incentive to tailor their testimony to a particular client’s preferred outcome. Several judges see a significant value in using

---

3 One surveyed economist suggested that the frequency with which Daubert is employed by defendants may discourage some good economists from working for plaintiffs.

4 The use of court-appointed experts was the favorite remedial suggestion of the economists surveyed, although the economists on our Task Force were split in their views.
such experts to clarify disputes, but others, including some we spoke to, are skeptical of their value.

The possibility of using court-appointed experts also raises concerns. One is that most experienced experts have staked out positions, and some believe that all economic experts have an inherent bias so there are no “true neutrals.” If so, identifying an expert acceptable to all parties and without a conflict may be very difficult. A second concern is that the use of court-appointed experts undermines the adversarial system, given the deference that would be paid to the conclusions of such an expert. Another concern is the cost of the court-appointed expert which under Federal Rule of Evidence 706 must be paid by the parties in such proportion as the court directs, and thereafter be charged in the same manner as other costs.

Our Task Force generally believes that to the extent court-appointed experts are employed, that their use would have the most value when a judge is less experienced with economics and antitrust, when complex econometrics or simulation modeling is involved, and when the party experts are far apart in their views. The Task Force also generally believes that court-appointed experts, if used at all, should supplement rather than replace party experts.

The Task Force also discussed the appropriate scope of the assignment. To the extent court-appointed experts are used, there was a general agreement that the court should have flexibility to tailor that scope to the needs of the case. Under some circumstances, a court-appointed expert could simply be asked to write a report for the judge, to which the parties and their experts could respond, without requiring that the court-appointed expert be deposed or subjected to cross-examination. In other settings, the court-appointed expert might be expected to provide an expert report, deposition and trial testimony with cross-examination. The court-appointed expert could be asked to take on some or all of a range of tasks. In some cases, the expert could simply be asked to clarify the economic issues and explain why the party experts disagree. In other settings, the court-appointed expert might be asked to do more: to assess whether the party experts have used appropriate methods, to evaluate whether the conclusions of the party experts are supported by the evidence, and even to work out and explain what conclusions are suggested by the application of other models, methods, or data analyses not adopted by the party experts. While some have suggested judges might hire economists, or lawyers with economic expertise, as law clerks when confronted with antitrust cases (and there may be precedent in judges on the Federal Circuit hiring lawyers with technical backgrounds to assist in patent cases), to provide private advice to the judge, most lawyers on the Task Force were concerned that this approach may not allow parties to confront arguments being advanced by such clerks that lack merit.

The Task Force believes that it would be useful to air these issues before a larger audience, and recommends that the Section develop a Spring Meeting program and articles in the Law Journal, Source or Magazine, or a monograph, on use of court-appointed experts in their scholarly writing.

---

5 For example, Judge Richard Posner and Judge Lewis Kaplan have both advocated the use of court-appointed experts in their scholarly writing.
appointed experts in antitrust cases, with attention to the pros and cons indicated above. A Section litigation committee might also consider drafting a guide for those judges considering the use of court-appointed experts that reviews their past use, identifies the advantages and disadvantages, describes alternative models, and suggests the parameters for judicial scheduling orders.

E. Clarifying Expert Testimony

The Task Force considered several mechanisms to encourage or require testifying experts to clarify their differences. Some economist members were particularly attracted to this approach to improving economic testimony, although they differed in the idea they most favored.

One possibility involves allowing the experts to cross-examine each other, or requiring them to write a joint report to clarify their differences. Another is to encourage judges to hold economic pre-trial conferences, which might also have the benefit of educating the judge, and making Daubert motions less necessary. A third suggestion is to encourage more economic rebuttal testimony.

The promise of these approaches is that they may improve the fact-finder’s understanding of technical issues and they may promote settlement by leading the parties to appreciate better the strengths of the other side’s case. But there are concerns about whether opposing economists, placed in an adversarial role, would be able to work cooperatively to clarify differences in a way that is useful to the fact-finder. Most Task Force members were skeptical of allowing experts to cross-examine each other, because it would put experts directly in the role of an advocate without the corresponding duties lawyers have to the court to conduct their advocacy with candor and professionalism, and it would not be allowed by current U.S. rules.

The Task Force believes this could be a fertile area for Section programming and publications, and recommends that the appropriate Section committees be encouraged to consider it.

IV. Conclusion

Although the Task Force members expressed a range of views on the specific topics our report addresses, we are united in recognizing the importance of economic evidence in antitrust proceedings in the courts. We are also confident that the Section has an important role to play in fostering discussion of the interesting issues and remedial options that we explored during the past year. We encourage the Section to use its programming and publication forums to do so.

6 These possibilities have a family resemblance to the “hot tub” procedures used in Australia and New Zealand.
APPENDIX I

List of Persons with whom the Task Force Spoke

Gregory K. Arenson, Kaplan Fox & Kilsheimer, New York, New York
(plaintiff’s counsel in High Fructose Corn Syrup Litigation)
Hon. Michael Baylson, Eastern District of Pennsylvania, Philadelphia, PA
Robert E. Bloch, Mayer Brown & Platt, Washington, DC (defendant’s counsel in
CD Litigation)
Richard Braman, Executive Director, Sedona Conference, Sedona, AZ
Hon. Lewis Kaplan, Southern District of New York, New York, NY
Charles Kaufmann, Senior Vice President, CapAnalysis, former director of Starr
Litigation Services, Washington, DC (jury consultant)
Hon. Michael Mihm, Central District of Illinois, Peoria, IL
Mark Ryan, Mayer Brown & Platt, Washington, DC (York (defendant’s counsel in
High Fructose Corn Syrup Litigation)
Daniel Shulman, Gray Plant Mooty, Minneapolis, MN (Editor, The Sedona
Conference Commentary on the Role of Economics in Antitrust Law)
Hon. John R. Padova, Judge, Eastern District of Pennsylvania, Philadelphia, PA
Hon. Vaughn Walker, Judge, Northern District of California, San Francisco, CA
Frank Wolak, Professor, Department of Economics, Stanford University (court
appointed expert in High Fructose Corn Syrup Litigation)
Hon. Diane Wood, Judge, Seventh Circuit, Chicago, IL
Michael Whinston, Professor, Department of Economics, Northwestern
University (court-appointed expert in CD Litigation)
APPENDIX II

MEMORANDUM

To: Task Force on Economic Evidence

From: Jonathan Baker

Re: Economists’ Survey

The economics subgroup of the task force has surveyed antitrust economists about their views concerning economic testimony in antitrust litigation. This memorandum presents describes how we conducted the survey and what we learned.

Survey Instrument

Our survey instrument consisted of fifteen questions. The first eleven were multiple choice or short answer; the remaining questions called for narrative responses. The questions asked for views as to the contribution of economic testimony to the quality of antitrust analysis in litigated cases, observations of unprofessional economic testimony (that is, testimony that does not count as serious economics), observations of about uninformative economic testimony, and views as to how (if at all) to address any problems identified.

Administration and Respondents

The survey was administered through the Internet. Respondents were not selected randomly. Rather, we asked as many antitrust economists as we could identify to fill it out, by contacting consulting firms, government enforcement agencies and academic economists. Responses were anonymous, unless the respondent chose to identify himself or herself.

This was in no sense a representative, scientific survey. During late February and early March 2006, we received 32 responses. After discussion of the preliminary results, we decided to reopen the survey and encourage more economists to respond, particularly those with substantial experience working for private plaintiffs. We ultimately received 42 responses. Respondents were self-selected, and we do not know their motivation for filling it out. (At a guess, some were motivated by a general willingness to participate in service projects to the profession, some did so as a favor to the person who asked them, and others care particularly about the issues we are studying.) We do not know the fraction of those contacted that chose to respond.

The respondents are on the whole very experienced with antitrust litigation. The median number of litigated antitrust cases they worked on during the past decade was
twelve. Slightly more worked as prospective testifying experts than as non-testifying support. More than three-fourths worked primarily on the defense side of private or government cases.

Contribution of Economic Testimony

The respondents overwhelmingly think that economic testimony contributes to the quality of antitrust analysis in litigated cases. But the respondents are split over the extent to which they think judges understand the economic issues in a case (24% say judges “usually” understand and 29% say “frequently,” but 38% say that only occurs “sometimes,” 5% say “rarely” and the rest “don’t know”).

Unprofessional Economic Testimony

We asked next about unprofessional arguments, which we defined as arguments so far out of the mainstream that they do not count as serious economics. (The survey sought to distinguish these from good faith arguments on the other side of a case with which the respondent disagreed, differences in opinion that simply reflect ongoing debate in the economics literature, or testimony that is flawed because it is unclear or confusing.) The dominant response, from 57% of respondents, was that this problem “sometimes” occurred. (More than 30% said “rarely” or “never” and 10% said “frequently” or “usually.”) A wide range of types of problems were observed. The most commonly cited were opinions inconsistent with the facts or lacking factual support (78%) and flawed use of empirical tools (68%). Three other types of problems—errors in economic reasoning, claims inconsistent with economic theory, and opinions offered outside economic expertise—were noted by a majority of respondents, and mutually inconsistent conclusions were reported by more than 40% of respondents.

These concerns were not raised solely by the defense-side economists responding to our survey. Of the three respondents who worked primarily for government plaintiffs, one said testimony was “usually” unprofessional, one said it was “sometimes” so, and the third said “never” but nevertheless went on to note some problems. Of the four respondents who worked primarily for private plaintiffs, and including two more who worked for private plaintiffs as much as for any type of entity, four said testimony was “sometimes” unprofessional and two said “rarely” so. Of the three respondents who worked primarily on the defense-side but still reported that 40% of their work was for private plaintiffs, one said testimony was “rarely” unprofessional, one said it was “sometimes” so, and one said “usually.” As a group, these twelve respondents that work primarily or significantly on the non-defense side of cases report seeing unprofessional arguments with a roughly similar frequency as did the remainder of the respondents.

The later narrative responses cited a wide range of specific examples, most of which, if correctly reported, could count as the kind of unprofessional arguments we asked about. A few seem to be close calls as to whether they represent unprofessional arguments as opposed to good faith analyses with which the survey respondent disagreed, and it is hard to be sure they are reported fairly without hearing the explanation of the
other side. More than half of respondents gave examples, but some were hard to
understand and a few were cursory. The most interesting examples are quoted here (with
identifying information deleted when necessary).

• The dropping of about 50% of observations from a large data base, all of which
directly involved the principal issue in the case, without explaining in the report
or in testimony (other than cross) that the observations had been dropped.

• An expert put in a 2 page statement that said only that he had interviewed the
president of the company that was the plaintiff, that man had said X was the
market and the alleged practice Y was anticompetitive, and, assuming the
president was right, X was the market and Y was anticompetitive. No other
evidence was mentioned and no economic reasoning was used.

• Arbitrarily truncated data to get desired results.

• Analysis that amounted to describing an upward slowing demand curve. Damage
analysis where predicted prices were less than shut down costs. Other examples
include unsupported benchmarks, econometric results devoid of statistical
significance.

• Econometric study in an expert report was obviously cooked: not robust to any
reasonable variation in model or variables, excluded appropriate variables
arbitrarily, claimed that a methodology was required to address an issue that did
not actually arise.

• The issue involved a damage estimate in a price fixing case and the expert was
using a methodology which just interpolated price during the conspiracy period,
and calling the difference between the actual price and the smooth, interpolated
price damages. There was no accounting for cost, demand shifts, etc. except
through the straight-line approach.

• Plaintiffs and their economists that refuse to lay out an actual theory of how their
alleged conspiracy actually operated; and keep changing the story in fundamental
ways as discovery proceeds. Economists testifying that certain types of behavior
are "consistent with collusion" when it is obvious that they are equally consistent
with interdependent oligopoly. Testifying about anticompetitive implications from
theoretical models with little or no attempt to see how well they might fit the
industry under consideration. Damage models that assume a simple dummy
variable model can adequately measure the effects of a complex set of conduct.

• [One expert] provided a report that even another economist on the same side, [a
well-known expert], disagreed with. It made a series of statements that
contradicted optimization by any party (that is, if any of several parties optimized
their behavior, [the first expert's] conclusions failed).
• [In one set of cases] the plaintiffs' expert submitted calculations of damages that by his own admission were so oversimplified that they used actual prices that it was known to him the members of the class did not pay.

• Argument that implied an upward sloping D curve in class cert matter; (different case) argument that assumed 1) Cournot behavior characterized market 2) firms had equal costs and 3) unequal division of market output; (different case) argument changed substantially 3 times (3 different expert filings) without any change in underlying information available to expert by the way, in the first case, the court certified despite the egregious error; in second matter, expert was disqualified on Daubert motion where judge came to understand enough about Cournot model to understand the logical inconsistency; in third case, judge disqualified expert after he testified commenting that the expert was "nothing but a hired gun."

• Testimony that price discrimination could not be present without collusion.

• Offering an expert opinion with no factual analysis. Opinion was based solely on personal experience living in the area

• A defendant’s expert ... proffered an efficiency defense that was very broad and vague, and offered up no factual support. Ultimately, he was so damaged in rebuttal reports and deposition, the defense never put him on the stand before the judge.

• An economist testified in direct contradiction to an accounting witness for the same defendant that the accounting witness had conducted a ‘stand alone’ economic analysis upon which the economist relied. In fact, the accountant testified that he had simply ‘allocated’ certain costs based on a percentage factor and had no knowledge whatsoever of stand alone costs.

• ‘But-for’ estimates based on clearly inappropriate benchmark and insufficient data, to the point they were almost fabricated.

• Claiming that simply because a business was large it necessarily had monopoly power. Seemingly making a claim that simply because two firms were negotiating an arms length supply contract that they must be colluding.

• Opposing expert’s purposeful misdirection in trial exhibits and oral testimony in hopes of evading recognition that damage analysis rested upon nothing other than an assumed but-for market share with no factual underpinning.

• Claim that the expert could devise a single classwide econometric formula for measuring damages across a highly diverse class of over 10 million ranging from rural consumers to the largest US corporations.
When asked whether unprofessional economic testimony is a problem sufficiently significant that it calls for a remedy, the respondents split about evenly. When asked to suggest remedial possibilities for consideration, two-thirds of the survey respondents (including some who did not think the problem called for remedy) suggested providing the judge with independent expert support (in addition to party experts), and half suggested that judges should generally receive more resources or greater education in antitrust economics (regardless of the cases in their docket). A substantial minority favored encouraging greater use of motions in limine (31%), restricting discovery of economists’ draft materials (31%), and providing neutral tutorials to judges on the issues in the case (36%). (But two respondents wanted to expand discovery of expert work materials in cases.) One-quarter favored encouraging judges to apply Daubert standards to exclude more expert testimony, and 22% suggested allowing experts to cross-examine each other or allowing the jury to ask questions of experts. A few supported lengthening trials to permit more extensive examination of experts. (There were no obvious systematic differences in responses between the overall averages and the views of the subgroups with extensive private or governmental plaintiff experience.)

Some interesting narrative responses to this question are listed below:

- Much time and energy is wasted when drafts have to be preserved. Quality could be improved without requiring sharing of drafts.

- I think it may be a great idea to appoint experts for the court, who write his own opinion, which the court may use or not.

- The courts should force economists to be much clearer in specifying how an alleged conspiracy is assumed to have operated; what was the agreement, when was it reached? how was it monitored and policed? Provide multiple examples of each factor, etc. Plaintiffs should have to clearly lay their cards on the table at least by the time of summary judgment motions.

- Judges with independent experts seem like the most valuable improvement. I don't mean experts hired by the parties, but by the judge. [Remainder of response deleted]

- The major problem with the current rules is that Daubert is applied in such a way that it too often disqualifies economists offering opinions when engaged by plaintiffs, clearly discouraging quality economists from accepting plaintiff cases.

- Neutral experts are needed to discipline the party experts and help the fact finder sort out conflicting testimony.

- Daubert challenges impose substantial costs that probably outweigh the benefits since they are now routine and force judges to screen based on limited information and, perhaps, limited understanding; they are also problematic when the focus is narrowly on what is "scientific"; motions in limine strike me as a
more refined instrument for dealing with specific problems with an expert ....
[Part of response deleted] In non bench trials, educating the judge in re the economics would matter only if one believed that this would allow him/her to make better decisions in response to pre-trial motions (e.g., SJ) or objections, motions, etc. in re what came before the jury. I'm skeptical that educating judges about the economics involved in a case would make much difference since, if there is a trial, the real need is to educate the jury; additionally, if judges are going to listen to independent experts, then it also strikes me as more sensible to have them assist with the questions the judge faces (per option h) than a general tutorial.

- Most bad testimony that I have seen was by accountants or MBAs trying to write an economic report.

- Let economists ask questions of experts in depositions

- There is adequate opportunity to refute poor testimony in the current litigation process. But it still is unfortunate (and a waste of many people's time and money) that so much poor testimony occurs in the first place. This seems to happen so much because litigators have such limited exposure to testifying economists that they frequently make poor choices at the outset. This 'information asymmetry' conceivably could be addressed by the Section creating a 'market for information.' Attorneys who work directly with testifying economists could rate the performance of economists after the fact, perhaps with written comments included. There is a 'public goods' problem with creating such a market, but even a highly imperfect information base of this sort would be better than the current state of affairs.

- Judges often show little interest in how economic analysis is actually done. However, this observation should not really be surprising since judges generally have little training or background in economics. A judge is typically most comfortable with 'evidence' and judges often have a difficult time accepting that hypothetical assumptions used, for example, to measure damages can or even should ever be considered as 'evidence.' This disconnect is one reason why Daubert motions have become such a source of abuse in recent years. Parties now use Daubert motions, not to test whether the expert is employing standard methodologies but whether the results of those methodologies should be presented to the jury. With competent cross-examination and, if needed, capable rebuttal, Daubert motions would become very uncommon, as they should. Daubert motions have already become one more opportunity to file a Motion for Summary Judgment under another name. The role of Daubert motions should be reduced dramatically and not expanded as this survey seems to suggest.

- Allowing experts to cross examine each other at deposition and, perhaps, bench trials would be valuable for exposing flaws and inconsistencies in testimony. I think it could be confusing to a jury and simply lead them to ignore the testimony.
• Daubert has become misused another offensive weapon on the part of counsel. In other words, it is being used to litigate merits issues rather than focusing on analysis that is not supported by the discipline of economics. The criteria for a successful Daubert should be narrowed. Beyond that judges would be better served with an independent expert and/or permitting experts to cross-examine each other.  2. Too much time is spent in game playing about the difference between final reports and drafts. Federal rules should be changed such that there is an automatic stipulation that only final reports and the substantive materials relied upon need to be produced.

• The adversary process keeps expert economic testimony on liability issues largely above-board and exposes differences in assumptions that usually lie at the root of differences between opposing experts. Damages testimony is often more fanciful because of the liberties that may be taken in but-for business forecasting.

• Current discovery rules actually hamper the research and communication necessary to develop sound economic conclusions; return to a “reliance” standard would reduce the gamesmanship, lower costs and improve the quality of economic evidence.

Uninformative Expert Economic Testimony

The survey also asked respondents about the frequency with which they observed oral or written economic testimony of adequate professional quality but that was so poorly or confusingly presented as to make it uninformative to the judge or jury on a significant issue in the case. A plurality (39%) said this was “rarely” a problem, but nearly as many (32%) said “sometimes.” “Never” (17%) was the third most common response.

The narrative responses included the following interesting comments:

• There are many examples involving the Merger Guidelines. It is common for witnesses to appeal to the concepts in the Guidelines and to then do something quite different.

• A damages estimate in a case involving a number of plaintiffs provided a two pages of text for each plaintiff describing the methodology used to calculate damages for that plaintiff. Formulas were not clearly set forth but merely described. Different methodologies were used for different plaintiffs, with no explanation of the differences. The acts alleged to have caused the damages were never specifically described. Sources were given for almost none of the numbers used or factual statements made. The specific quantities involved were not clearly described. For example, sales in the relevant market and total sales of the plaintiff would both be described as “Sales,” with no further explanation.
• In large part, testimony supporting class certification in Sec. 2 cases has little economic substance and often disregards how the market at issue operates. Explanations of regressions rarely make clear the importance of the sensitivity of important results.

• This is pretty subjective, but more often occurs (in my experience) on matters where PhD economists meet MA economists or accountants who opine on economic matters--typically, the testimony is either purposefully or inadvertently obscure and confusing and, in some cases, turns on very different understandings of, for example, what a relevant market is or how markets work.

• Testimony implying that only econometrics and not analysis of events can be used to determine if there is a relevant market

• Inability to explain the marginal conditions for a monopoly price

• Inherently difficult to describe: expert tried to explain how he could develop benchmarks for measuring ‘but for’ costs and profits in an industry that he admitted had many unique characteristics
APPENDIX III

Literature on Use of Economic Experts in Antitrust Litigation and Daubert


   “Interview with Judge Kathryn Vratil,” 19.


Lanzillotti, Robert F., McClave, James T., “Comment: Meeting the ‘Ambiguity’ Test Under Daubert,” 44.


**Literature on Court Appointed Experts**


Case Law on Court-Appointed Experts


In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 665 (7th Cir. 2002) (Posner, J.) ("We recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts.").


In re Compact Disc Antitrust Litigation; Master Docket File No. 1216 (JSL) (C.D. Cal.) (Dr. Michael Whinston has served as a neutral expert in a private CD price-fixing case presided over by Judge J. Spencer Letts, Central District of California).
APPENDIX IV

Daubert Antitrust Decisions


11. *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004)


13. *Group Health Plan, Inc. v. Phillip Morris USA, Inc.*, 344 F.3d 753 (8th Cir. 2003)


15. *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003)

32. Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc., 203 F.3d 1028 (8th Cir. 2000) (en banc)
33. Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 1999)
34. In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999)
35. Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 178 F.3d 1035 (8th Cir. 1999)

36. City of Tuscaloosa v. Harcros Chems., 158 F.3d 548 (11th Cir. 1998)

37. St. Louis Convention & Visitors Comm'n v. NFL, 154 F.3d 851 (8th Cir. 1998)


40. Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir. 1993)

41. Town Sound & Custom Tops v. Chrysler Motors, 959 F.2d 468 (3d Cir. 1991) (en banc)

APPENDIX V

MEMORANDUM

To: Economic Evidence Task Force
From: Howard Morse
Re: Court-Appointed Economic Experts in Antitrust Cases

This memorandum provides background on the use of court appointed experts to assist our discussion regarding the use of such experts in antitrust cases. The memorandum sets forth the governing rules and summarizes literature regarding the benefits and concerns with the use of court-appointed experts.

I. The Rules

FRE 706

Appointment of an expert pursuant to Federal Rule of Evidence 706 anticipates the expert will function as a testifying witness, to present evidence to the trier of fact. The rule specifies procedures for appointment, assignment of duties, reporting of findings, testimony, and compensation.

The Federal Rules of Evidence provide, in Rule 706, for appointment of court-appointed experts, giving the court broad discretion to act at the request of a party or on the court’s own motion, whether or not agreed to by the parties (so long as the expert agrees to the appointment). The witness’ duties are not specified in the rules, but must be put in writing:

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate.

The rule provides that any appointed expert witness must advise the parties of the witnesses’ findings, if any, provides that the witness may be deposed by any party, and
the witness may be called to testify by any party or by the court and shall be subject to cross-examination:

A witness so appointed shall advise the parties of the witness’ findings, if any; the witness’ deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

F.R.E. 706 provides further, for “reasonable compensation” to the expert, to be paid by the parties as the court directs, with each party typically paying half, subject to reimbursement by the losing party at the conclusion of the litigation, like other costs:

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. ... In [most] civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

F.R.E. 706 also provides for disclosure to juries of the fact that the court appointed the expert, in the court’s discretion.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

Finally, F.R.E. 706 makes clear that the rule does not limit any party’s ability to call its own expert:

(d) Parties’ experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

FRCP 53

Federal Rule of Civil Procedure 53, which gives courts the ability to appoint special masters, may also be used to give courts assistance on technical issues. FRCP 53 provides for appointment of a “master”, defined to include a “referee” or “assessor”.

Thus special masters have been used to make preliminary assessments of technical or scientific evidence:

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules, the word “master” includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this
provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. ... 

Under the rule, a special master can only be appointed in complicated or exceptional circumstances.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

The order of reference to the master may specify the master’s powers and may direct the master to report on specified issues:

(c) Powers. The order of reference to the master may specify or limit the master’s powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master’s report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master’s duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

Witnesses may be subpoenaed to appear before a master.

The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45.

The master shall prepare a report which generally is served on each party.

The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action
to be tried without a jury, unless otherwise directed by the order of reference, the
master shall file with the report a transcript of the proceedings and of the evidence
and the original exhibits. Unless otherwise directed by the order of reference, the
master shall serve a copy of the report on each party.

In non-jury actions, parties may serve objections to the master’s report:

In an action to be tried without a jury the court shall accept the master’s findings
of fact unless clearly erroneous. Within 10 days after being served with notice of
the filing of the report any party may serve written objections thereto upon the
other parties. Application to the court for action upon the report and upon
objections thereto shall be by motion and upon notice.... The court after hearing
may adopt the report or may modify it or may reject it in whole or in part or may
receive further evidence or may recommit it with instructions.

In jury actions, the master’s finding may be read to the jury:

In an action to be tried by a jury the master shall not be directed to report the
evidence. The master’s findings upon the issues submitted to the master are
admissible as evidence of the matters found and may be read to the jury, subject
to the ruling of the court upon any objections in point of law which may be made
to the report.

Inherent Judicial Authority

Finally, courts may use their inherent authority to retain advisors, including
technical advisors to consult during the decision making process. See generally In re
Peterson, 253 U.S. 300, 312 (1920) (“Courts have (at least in the absence of legislation to
the contrary) inherent power to provide themselves with appropriate instruments required
for the performance of their duties”); United States v. Green, 544 F.2d 138, 145 (ed Cir.
1976) (“the inherent power of a trial judge to appoint an expert of his own choosing is
with the unusual complexity and difficulty ...., the court appointed [name] as technical
advisor to the court pursuant to the inherent discretion of the court”).

The role of the technical advisor is to give advice to the judge, not to give
evidence and not to decide the case, and such appointments are very rare, used as a “near-
to-last resort” to address “problems of unusual difficulty, sophistication and complexity,
involving something well beyond the regular questions of fact and law with which judges
must routinely grapple.” Reilly v. United States, 863 F.2d 149, 154, 157 (1st Cir. 1998).

II. Notes to the Federal Rules

The 1975 Advisory Committee’s Notes to Federal Rule of Evidence 706 note that
“[t]he inherent power of a trial judge to appoint an expert of his own choosing is virtually
unquestioned.”
The Notes also describe the principle arguments for and against appointment of independent experts, including: (1) the bias of experts hired by the parties, who may “shop” for an expert to support their positions, (2) concern that court-appointed experts may be perceived to be infallible. The rules also suggest that the possibility that the court appointed an expert may restrain the parties’ own expert:

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony--Revisited, 34 Temple L.Q. 416 (11961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The Notes explain that Rule 706 is derived from Federal Rule of Criminal Procedure 28, adopted in 1946, that compensation of court-appointed experts from public funds was rejected by the Judicial Conference in 1953.

III. Experience with Court-Appointed Experts in Antitrust Cases

We are aware of only a limited number of circumstances in which independent economic experts have been appointed in antitrust cases. These include:


In re Compact Disc Antitrust Litigation; Master Docket File No. 1216 (JSL) (C.D. Cal.) (Dr. Michael Whinston has served as a neutral expert in a private CD price-fixing case presided over by Judge J. Spencer Letts, Central District of California).


In re High Fructose Corn Syrup Antitrust Litig., MDL No. 1087, Master File No. 95-1477 (C.D. Ill.), Judge Mihm appointed Frank Wolak as expert, on remand from 295 F.3d 651, 665 (7th Cir. 2002)
Use of court appointed experts has been encouraged by appellate judges in a number of cases, including *General Electric v. Joiner*, 522 U.S. 136, 149-50 (1997) (Breyer, J. concurring) (encouraging use of court-appointed experts), and *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (Posner, J.) ("We recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts," given the staggeringly large record and huge volume of technical evidence in the case and concern about the "absorptive capacities of judges and juries").

Sources suggest that the judge will generally have to initiate the appointment process. The parties, however, may be asked to nominate candidates or give guidance concerning the characteristics of suitable candidates, and may be allowed to strike names of unacceptable candidates for other parties' lists. Candidates must disclose all engagements, publications, statements, or associations that could create an appearance of impartiality.

**IV. Benefits of Court-Appointed Experts**

The literature identifies several benefits of court-appointed experts:

1. it limits the battle of parties’ experts, when evidence is presented or interpreted by paid experts;
2. a court-appointed expert will be untainted by partisanship, retain his or her objectivity, and avoid focus on competence and integrity;
3. it avoids concerns that experts may cancel each other out, leaving the fact-finder without guidance to adjudicate a complicated dispute;
4. judges and jurors will know that the expert has no axe to grind, and so will be able to take his or her testimony on faith, even when they do not understand the expert’s testimony.

**V. Concerns with Court-Appointed Experts**

The literature also identifies several concerns with use of court-appointed experts:

1. there may be no such thing as a truly impartial expert, because experts bring their own perspectives, even if not influenced by compensation from one party;
2. there may be concern that court-appointed experts acquire an aura of infallibility to which they are not entitled, which may predetermine the outcome of a case, and thus confidence placed in neutral experts may undermine rather than promote the objective of better reasoned outcomes.
3. Ex parte communications between the court and its expert may undermine the adversarial system.
(4) Some have also expressed a concern about collecting the costs of the expert from the parties.

The concern that even respected economists tend to be either “hawks” or “doves” on antitrust issues, so there may be no neutral expert. See, e.g., R. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1484 (1999).

VI. Additional Information

The American Association for the Advancement of Science (AAAS) has sponsored a demonstration project, entitled Court Appointed Scientific Experts (CASE), intended to assist district court judges identify qualified scientists and engineers to serve as court appointed experts in cases where the judge believes that such assistance will serve the interests of a complete, balanced and objective perspective on science and technology issues. The Project has published a “Handbook for Judges” on “Court Appointed Scientific Experts,” Version 3.0 (2002).

The CASE Handbook states:

“In seeking ‘independent experts,’ CASE intends to provide judges with individuals disinterested in the outcome of the litigation at issue. In reality, very few experts are completely neutral regarding adherence to one scientific theory over another. The experts’ overriding objective, therefore, is not to approach the scientific issues in the case without opinion, but to educate the judge and/or jury on the scientific issues while being disinterested in the case’s outcome.”

Rather than assemble a list or roster of scientists from which names are pulled, CASE believes that it can best fulfill a judge’s request by initiating a specific search in response to the court’s needs. CASE relies on scientific and engineering societies and educational organizations as well as a recruitment and screening panel. It has also developed a questionnaire to address potentials sources of bias and conflicts of interest.

Outside the antitrust area, there has been innovative use of court-appointed experts. In 1996, for example, Judge Sam Pointer, Jr., of the Northern District of Alabama, appointed four scientists under Rule 706 to serve on a panel of court-appointed experts. The panel submitted a joint report, with chapters authored by each of the experts, after which the panel members were subjected to depositions and were cross-examined. Judge Jones of the District of Oregon also appointed a panel of experts to assist him in ruling on a motion to exclude plaintiff’s expert testimony in breast implant products liability cases, but did so as technical advisors. After considering their reports, the judge granted motions in limine to exclude plaintiff’s expert testimony.