

# Hey! Wanna Buy My Brain?

*Expert witnesses in dozens of areas—including medicine, finance, construction, and the responsibilities of directors—sway juries and trigger settlements. Who are these people, and when can you trust them?*

“How are we supposed to know?” Chief Justice William Rehnquist asked an attorney making an argument before the top court. “You’re a lawyer, you’re not a doctor.” And so he was, being the legal representative of Merrell Dow Pharmaceuticals, who was arguing that there was no link between birth defects and Bendectin, a drug made by his client that pregnant women took to control nausea. Rehnquist was challenging the lawyer’s qualifications to offer scientific theory.

The 1993 case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, would become a legal landmark, making trial judges the gatekeepers in deciding what expert testimony would be admitted in court. And the late chief justice’s probing raised concerns obvious today to everyone who watches television drama. Some expert witnesses are as worthy and infallible as television’s Gil Grissom and his *CSI: Crime Scene Investigation* team. Others are frauds, hired guns toting junk-science ammunition and ready to say whatever they’ve been paid to.

Interviews with corporate and plaintiffs’ attorneys, law professors, and specialists in various fields indicate that expert witnesses are as diverse as any crowd of commuters on their way home at rush hour. At one end are the true experts, whose specialized knowledge enables judges, jurors, and the lawyers themselves to understand complex technical, scientific, financial, economic, or medical issues. At the other end are the purveyors of junk science and quack theories, such as recovered memory. In the middle are people whose vocations allow them to provide the best possible answers to such impossible questions as, “What is a lost life worth in future earnings?”

In a world where science and finance are increasingly complicated, it seems that no lawyer dare go into court without an expert witness, or two or three—not only to bolster his case, but to explain it. The pages of *The American Lawyer* magazine are bordered by ads for agencies that promise thousands of expert witnesses. One specializes in alumni of

Harvard Medical School; another features nurse consultants, many of whom testify to the quality of care in nursing homes and hospitals. And a website, [ALMExperts.com](http://ALMExperts.com), offers more than 15,000 expert witnesses in all categories. Good lawyers have their own methods of culling the credible from the sharks, but their clients and the rest of the public need more than a scorecard to tell one from the other. They need to understand what expert witnesses do, what qualifies them, what testimony will be permitted or excluded in court, and how to find and sort through this bewildering subset of the legal world.

## WHAT DO THEY DO?

The popular image of the expert witness has him taking the oath in court and citing his impressive qualifications. But only a tiny percentage of legal disputes go to trial. Expert witnesses are hired by lawyers long before that court date, first to educate the attorney. Is this a case worth taking? What are the main issues?

Budget permitting, the experts produce studies and estimates. They attend conferences with opposing counsel and its own expert witnesses; they are deposed; they recommend settlements. Law firms and their clients in major cases spend six- or seven-figure amounts on experts and their know-how. Says Merrill Hirsch, a partner with Ross Dixon & Bell in Washington, D.C.: “Particularly in antitrust cases, the type of analysis that experts do far outstrips the type of analysis corporations do in their due diligence when purchasing a company. They are more sophisticated, more complex. They’re the equivalent of Ph.D. theses.”

Since the law deals with almost every imaginable dispute, the most bizarre and arcane issues find their way down the hushed, carpeted corridors of law firms. Lawyers deal with damages arising from pharmaceuticals and farming, patent infringements of all kinds, and the value of lost lives, loves, and jobs. So an attorney’s first call is often to an expert. Many of these have advanced degrees from elite

institutions—they are doctors, engineers, computer experts, accountants, economists.

But the diploma-bearers don't have all the answers. Michael Sawicki, a Dallas plaintiffs' attorney, made news recently when he won one of 2005's largest jury awards: \$606.1 million (later reduced to about \$2 million) for the family of

valuable witness is the one who can explain complex matters clearly. College professors, who are expected to do that in the classroom, are a favorite. But they have a downside too, which Sawicki recalls learning the hard way early in his career. He hired a distinguished economist to calculate how much a plane-crash victim would have earned if he had lived.

"Think freshman class," Sawicki coached his expert. "Give the bottom line up front." When Sawicki asked for that bottom line in court, the economist said, "First I have to explain the formulas by which I reached this number."

"He went on for quite a while," says Sawicki. "I hadn't a clue what he was saying. Neither did the jury." Sawicki himself gave the jury the bottom-line figure and managed to pull out a win.

"When juries don't understand the substance of what the expert is saying, they decide in favor of who seemed more sincere or better qualified or who was more humorous," Bergman says. "They take refuge where they can."

#### WHAT TESTIMONY WILL BE ALLOWED?

Given the jargon genuine experts engage in, it is no surprise that sham and "soft" science can slip into the witness chair. The most famous example of what is now dubbed junk science is probably the "Twinkie defense" used in the 1979 trial of Dan White, a former San Francisco city supervisor who fatally shot Mayor George Moscone and Supervisor Harvey Milk. At trial, one of the five psychiatrists and psychologists who testified to White's diminished capacity said that he had become unkempt and that eating junk food, including Twinkies, instead of his usual health-food diet was evidence of depression. White got off with a lighter-than-expected sentence, but it was based on his suffering from a major mental illness. The cream-filled cakes were no more than a footnote to the case—"a throwaway line," defense attorney Douglas Schmidt has said—despite the immediate fame that attached to the Twinkie defense.

Not long after came cases in which questionable psychological experts apparently coached children to give false accounts of sexual abuse at day-care centers and other venues, and cases in which therapists testified to the "recovered memory" of adults who alleged that they had been abused decades earlier, creating a trail of ruined lives. On a corporate level, experts battled it out in product-liability lawsuits. Junk science became a major issue for corporations

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an 82-year-old man who had died because of an overdose of chemotherapy. Sawicki recalls another, decade-old case for the family of one of Reba McEntire's backup singers, who was killed in a 1991 plane crash. How much was her life worth? To evaluate her future earnings and the possibility of her becoming a solo star, Sawicki called on a record executive whose qualification consisted of years in the music business: "He produced records for Winona

Judd and Stacia Twain. And he said, 'I think this woman [the backup singer] could have been a superstar.'" Sawicki says he won more than \$3 million for the singer's estate.

#### WHAT QUALIFICATIONS DO THEY NEED?

"An expert witness has to meet the test," says Michael Coyne, a Boston trial lawyer who teaches evidence at the Massachusetts School of Law. "Does he or she have the background, education, experience, and training that will aid the jury's understanding of the events?" Says Paul Bergman, a professor at UCLA School of Law: "When you want to know when a rutabaga crop should have been picked, you put a rutabaga farmer on the stand."

A good expert witness not only is well qualified but also has a gift for communicating with ordinary people, like the 12 who occupy the jury box. The

and conservative think tanks. The 1990s would be remembered as “America’s decade of junk science,” wrote Doug Bandow, a former senior fellow at the Cato Institute in Washington, D.C.

Paul Bergman notes that certain fields, such as toxic torts, are “attack-based. Statistics can be bent in any shape for enough money. It can be a form of extortion. Prepare a lawsuit, find a couple of experts who do some statistical analysis of accident rates or cancer rates, and file a suit. The publicity is horrible for the company, and there’s pressure to settle without knowing whether the claims are valid or not.”

He adds, “Trials rely on science, but science goes at its own incremental pace. In science you don’t have to give an answer before you’re ready, but the legal system demands an answer now. People have been injured, and they say you’re at fault. You can’t tell the plaintiffs to come back in 30 years.”

But many lawyers believe it all comes out in the wash. Boston attorney Michael Coyne points out that Twinkies were just one small piece of the evidence in the White case: “There was other ample evidence. Juries can sift out silly information.”

The sifting process was the issue in the case that came before the Supreme Court in 1993, when Chief Justice Rehnquist challenged the man who was “a lawyer, not a doctor.” Two San Diego boys, Jason Daubert and Eric Schuller, had been born with severe limb deformities. Their mothers had taken Bendectin to reduce nausea while they were pregnant. The question before the justices was not whether Bendectin caused birth defects; that issue had already been decided by trial courts, which had thrown out all but a few of the Bendectin cases. In *Daubert v. Merrell Dow*, the Supreme Court was to consider a bigger legal issue. Should a judge be able to exclude soft or speculative scientific testimony? Or should the jury be trusted to hear and sort out what some called junk and others considered cutting-edge science? In *Daubert*, the plaintiffs had presented animal studies to support their case. Merrell Dow responded with human studies, presumably more relevant. The justices came down on the side of gatekeeping by the trial judges and established what are now known as the Daubert standards. In doing so, they upheld the verdict of California federal appellate judge Alex Kozinski, who had dismissed testimony by expert witnesses for the plaintiff and ruled in favor of Merrell Dow.

Coyne, who teaches the Daubert standards in his

evidence classes, tells his students, “If you’re going to say it’s science, it has to act, talk, and walk like science.” He boils the rules down to “four P’s and a T. It has to be based on the *principles* of science. The information has to be *published*. It has to be *peer-reviewed*. The *potential* for error has to have been examined. And the theory has to have been subjected to *testing*.”

Bergman notes that some of the Daubert requirements turned out “not to be doable or applicable, such as peer-review publication. The courts tried to apply it not only to science but to all testimony based on specialized information.

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There’s a huge range of expertise and theories that aren’t scientifically tested.”

The Daubert decision has given rise to the sport of what lawyers call “Dauberting out” expert witnesses. “Now lawyers have to be concerned about convincing the judge that the testimony is admissible, not just how the jury will see it,” says Ross Dixon & Bell’s Merril Hirsh. “It’s not so crystal-clear that you can predict.” The doubts have led to more settlements and fewer trials. “A weapon in settlement is that the plaintiff’s expert will never meet the Daubert standard,” Hirsh says.

One arena where attorneys have more leeway in presenting expert witnesses is the all-important step of setting economic damages, not only in settlement talks but also in the final phase of a jury trial that has delivered a verdict for the plaintiff. The defendant is at fault, it has been decided, but what is the dollar amount that will compensate for those sins and make the plaintiff whole? Enter the expert witness—usually an economist or accountant—who will take the litigants by the hand and lead them into the parallel universe of what might have been.

Attorney Daniel I. Davidson, now a senior partner at Spiegel & McDiarmid in Washington, D.C., recalls a four-decades-old case involving a conspiracy between General Electric and Westinghouse to fix the prices of electric generators. “The prices had always been fixed, since both companies began making the product,” says Davidson. “But we called on distinguished economists to tell us what electric generators, which had always been price-fixed, would have cost if they had never been price-fixed.” The

fixing had been going on for 60 years, he says, and the total prices, in present-day figures, were many billions of dollars higher as a result.

Such "would have been" questions are the stuff of many antitrust cases. "Everyone hires economic experts to do business studies creating a model of a world that would have existed without the

examination. Some of these guys have a strong résumé, and they suck you in. They know the system, but they don't do the work. They just look like they're working." He also cautions against overpaying. "The juror is getting \$6 a day, and this expert is sitting out there on a bench eating Life Savers, and he's getting \$4,000."

David Mazie, a Roseland, New Jersey, attorney with Nagel Rice & Mazie, says the fact that experts are paid doesn't matter to a jury. He won a \$135 million award from the concessionaire at Giants Stadium; the company was accused of overserving a

drunken football fan who later caused a car crash that paralyzed a 2-year-old child. "It's understood that both sides paid their expert witnesses," Mazie says. "They're not volunteering their time." But nearly all the attorneys interviewed agree that a witness "can't have a dog in the race," meaning that he can't be paid a percentage of the verdict instead of a flat or hourly fee.

Michael L. Kelly, the managing partner of Kirtland & Packard in Los Angeles, won a \$64 million verdict for a pilot who was wrongfully terminated by PrivatAir Inc., an international carrier that offers private charters, among other services. Kelly's favorite method of finding expert witnesses is to comb through verdicts in similar cases over the previous five years and cherry-pick the experts on the winning side. He found one such witness to challenge the PrivatAir investigation that led to the pilot's firing. The witness, a college professor who taught employment discrimination and workplace investigation, detailed 42 problems with the investigation of the pilot. The other side, Kelly notes, did not call its own experts on employment investigations. "The expert is the key tool, the advocate for your party. By closing statements, the jurors have already taken one side or another," he says.

Smaller firms with lower budgets than Kelly's often turn to agencies—like those advertising in *The American Lawyer*—that keep databases of experts in every imaginable field. Michele Clark is vice president for marketing at one of these outfits, 34-year-old Expert Resources Inc. in Peoria Heights, Illinois. "We network through attorneys and the Internet, and we build referrals," she says. Many attorneys now go online and find their own experts, but, says Clark, "it takes time, and we can provide niche expertise that no one else has." Among the specialists in her database are structural engineers

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conspiracy," Coyne says. He cites a recent case of his in which the jury listened to the damage estimates of dueling economists, who were paid in excess of seven figures. "After three days of deliberation, the jury came back and asked the judge if they had to accept either expert's figure or if they could just decide on their own. They did just that, coming up with a figure themselves, which was approximately 75% of what the plaintiff was looking for."

In loss-of-life, employment-termination, and environmental cases, economic experts often testify from the twilight zone of the priceless. Roscoe Trimmier Jr., a partner at Ropes & Gray in Boston, remembers a toxic-dumping case in Los Angeles where the dumping caused, among other damage, a decline in the population of protected fish and birds. During a conference call, a well-regarded MIT economist was asked to evaluate the damage. "It's a bird," he said. "Chicken is \$2.49 a pound."

**HOW DO LAWYERS HIRE EXPERT WITNESSES?**

Despite the occasional laugh, finding and hiring expert witnesses is serious business. Lawyers at major firms use their own roster of experts and turn to trusted colleagues when they need a referral. Trimmier has a kitchen cabinet of specialists who advise him on which experts to hire and who act as mediators, translating what the experts say for the lawyers and explaining the relevant law to the experts.

Dallas attorney Michael Sawicki likes to use academics not only because "they're used to communicating with students" but also because "they're perceived as unbiased. You can put them in front of a jury." Preferably, they have some élan; his ideal is the attorney and Harvard professor Alan Dershowitz. Sawicki stays away from experts who advertise: "He'll take a case about Vioxx, sore knees, anything, and he won't hold up under cross-

who specialize in multiple-story malls (they testified in a collapsed-mall lawsuit), an expert on electric fences used to confine cattle (he took part in a case in which a child was electrocuted by a fence), and an expert on underground tanks (he was called in for a case in which a tank's contents had leaked into the water supply).

Most of the agency's experts, Clark says, are "back-office. That is, they consult with the attorney to let him know if he should stay in the case or not. If the case goes forward, the expert coaches the attorney for depositions and trial." When a testifying witness is needed, someone else with more courtroom charisma may be found.

The commission Clark's agency receives is built into the fee it charges the lawyer for the expert. The expert gets whatever the going rate is, according to his or her field and experience.

#### ARE THEY SIMPLY HIRED GUNS?

There is a thriving business in courses, books, and workshops that train professionals to be expert witnesses. They include *The Expert Witness Marketing Book* (\$49.95), the Advanced Marketing Clinic for Expert Consultants (tuition: \$495), and the National Expert Witness Conference (tuition: \$795, plus \$395 for individual workshops such as "Testifying Skills").

Michael G. Kaplan, a forensic accountant with the Los Angeles firm Kaplan Abraham Burkert & Co., has been teaching the craft of expert-witnessing to other accountants and financial advisers for 16 years, preparing them to testify, as he does, on economic damages, forensic accounting, and business valuation. "In the wake of Enron and Arthur Andersen, financial testimony is a hot area," Kaplan says. He teaches a series of courses for the National Association of Certified Valuation Analysts that include mock live courtroom appearances, testimony before a jury, mediation, and depositions. The package price for the four-day program, with an exam and certification, is "about \$2,000," says Kaplan.

The course participants can make their tuition buck quickly. Expert-witness fees can go as high as \$1,200 an hour, but that is a rate usually reserved for the likes of Nobel Prize winners. The more common price for "an experienced expert with a good reputation would be in the range of \$500 to \$600 an hour in a major metropolitan area," says Charles L. Miller Jr., a partner with Dickstein Shapiro Morin & Oshinsky in Washington, D.C. "The rates could reach down to \$300 an hour for someone of lesser stature."

Does this make the testifying expert a hired gun,

willing to say whatever he is paid to? Spiegel & McDiarmid's Daniel Davidson recalls interviewing an economist who changed sides within 45 minutes in response to the tenor of his questions. Davidson was a young associate at the time; a senior partner who sat in on the interview said, "The red light of 'prostitute' over his head is too obvious. We can't use him."

Roscoe Trimmier doesn't mind an expert who works his way through different theories of a case in the privacy of the office. "It points out the strengths and weaknesses of the case," he says. "What matters is where he comes out after extensive review." But,

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**A LAWYER SAID OF ONE PROSPECTIVE EXPERT WITNESS.**

he adds, "he shouldn't write up every theory, leaving a written trail by which he reached his conclusion." Indeed, one expert witness interviewed for this article would not speak for attribution because, he said, "anything I say could be retrieved and used against me in a courtroom someday."

Trimmier and other attorneys caution against hiring a witness who consistently testifies for either the plaintiff or the defense: "It shows bias and undercuts their credibility." But Harvey Wolkoff, Trimmier's partner at Ropes & Gray, sees a good reason why some experts take the same side in many trials. "It's a way of thinking," he says. "A plaintiff witness sees ironclad rules. A defense witness sees nuances, complexity, unsettled interpretations. It's a chicken-egg difference. I don't know which came first, their way of thinking or their involvement in plaintiff or defense testimony."

Forensic accountant Michael Kaplan says, "I am an advocate for my own opinion. I'm not swayed by what the client needs. And I have resigned from cases when I couldn't give the opinion they were looking for."

But clearly some experts are for sale. "There has developed a market for testifying experts who do nothing but offer themselves for hire," says



Trimmier. "It's most common in medical malpractice, patent infringement, and securities fraud. They will take the facts and tailor their views to fit the case."

"It's driven by the adversary system," says law professor Paul Bergman. "The system says, 'Find someone to support your position. If Expert A won't,

who would say there is no set rule on the matter. Just because the accounting was improper doesn't mean that there was intent on the director's part; the rules are arcane and difficult; and so on." Other lawyers add that the credibility of expert witnesses can be undermined in small ways. "There isn't an *aha!* moment like on television," Sawicki says. "It's death by a thousand cuts."

But sometimes there is an *aha!* moment. New Jersey attorney David Mazie urges litigants to check for skeletons in the closets of expert witnesses. He recalls a case against a prison brought by an inmate whose neck had

been broken: "The other side called an expert who had been a prison warden in Pennsylvania. It came out that he had been forced to resign because there were so many violations in his prison that he was known as the Hitler of wardens." The people who had trotted him out had second thoughts and settled.

Of course, at bottom, solid facts can beat expert testimony. Experts can testify only about what would or should have happened. In the case Mazie won against the Giants Stadium concessionaire, both sides called experts. "One of their experts was much more renowned than ours," says Mazie. But testimony by the defense expert about the absence of visible signs of intoxication that should have been noticed by the vendor was trumped by ordinary people who were eyewitnesses. They said the man looked drunk. As simple as that. ☉

**"A REPUTABLE EXPERT WON'T LIE OR TESTIFY TO SOMETHING HE DOESN'T BELIEVE, BUT HE WILL MOLD HIS POSITION TO FIT THE NEEDS OF THE CASE."**

go to Expert B.' A reputable expert won't lie or testify to something he doesn't believe, but he will mold his position to fit the needs of the case."

Most lawyers want seasoned witnesses who won't be rattled by cross-examination, but they are wary of using "professional" expert witnesses who do nothing but testify. Yet the amount of expert work required for some cases is so great that it can become a full-time job. Michael Wagner, a Palo Alto, California, financial analyst who testified for the investor Ronald Perelman in a billion-dollar lawsuit against Morgan Stanley, spends all his working hours testifying and preparing financial analyses for legal disputes. "I haven't had to market myself for 15 years," says Wagner, who bills at \$595 an hour.

In the Morgan Stanley case, Perelman sued the financial giant for aiding fraud in the sale of Coleman, a camping-gear company. Wagner testified to the worth of Morgan Stanley so that punitive damages could be assessed, and the jury awarded Perelman \$1.45 billion. The case is on appeal; Perelman has not received any money yet. Wagner will not disclose his fees, but says they "were modest compared to my average assignment." He says his firm devoted about 1,000 hours to the case, and he personally about 100.

Defending against an experienced expert witness like Wagner or Kaplan can become scary for corporate officers or directors who are being sued for malfeasance, fraud, negligence, or failure to carry out fiduciary duties. Harvey Wolkoff points to one such recent case that he says was settled confidentially. During the deliberations, he says, an expert witness testified that the accounting transactions were so fraudulent that no reasonable board member acting in good faith and in the best interests of the company could have approved them.

"To counter this kind of testimony," says Wolkoff, "the officer or director should hire their own expert,