

Street Scene

LEGAL BEAT

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More and More, Expert Witnesses Make the Difference

TRIAL lawyers may be the peacocks of the courtroom, strutting before a judge or jury and making arguments with a sense of drama and style, but often these days it's a tweedy professor, explaining some impossibly arcane subject in plain English, who may make the difference.

Consider the six expert witnesses who testified in the legal war between the board of the Walt Disney Company and shareholders furious over the \$140 million paid in severance to Michael S. Ovitz, who served as the company's president for 14 months.

Chancellor William B. Chandler III described aspects of testimony and reports by the three plaintiffs' experts as of "very little" benefit, "little value" and "unpersuasive" respectively. Yet while one of the defendants' experts was "troublesome," the other two were "of significant value to the court" and "well supported by the evidence."

Last week the judge ruled that the Disney directors did not violate their duties to shareholders in allowing the severance payment. Although the defendants' victory was not solely because of experts' testimony, one lesson of the case is that experts do matter.

"The business problems that often result in litigations have just become more complicated, harder to understand, and the dollars involved are often very significant," said Martha Samuelson, chief executive of the Analysis Group, a consulting firm in Boston that provides litigation support and help with expert witnesses.

Lawyers are also using experts in different ways, not just as academic resources, said Jack C. Auspitz, a lawyer in the New York office of Morrison & Foerster. For example, experts may

argue that a lawsuit should not be converted into a class-action case because possible plaintiffs have different kinds of claims.

"You can argue that there is no class," Mr. Auspitz said.

Finding the right expert is not necessarily simple. A number of companies help law firms locate experts, either by referring a lawyer to an academic in the company's database or by recommending an expert on the company's own staff. Different companies have different strategies.

One witness in the Disney case worked for National Economic Research Associates, known as Nera, a subsidiary of Marsh & McLennan, the insurance broker. Nera's growth has been driven by providing expertise in support of litigation, said Richard T. Rapp, its president.

Demand for Nera's services "grows with refinements in the law and the requirement that courts use an understanding of how markets work in order to resolve complex litigation," said Mr. Rapp, who holds a doctorate in economics. The reports produced by Nera's economists — the organization has about 400 of them — do more than just express an opinion on, say, whether Disney's board complied with its duties. They might explore what impact Mr. Ovitz's hiring at Disney had on the company's stock price, for example — a numbers-crunching task.

The Round Table Group operates differently. Rather than retaining a staff of economists or doctors on staff, the company refers lawyers to experts of all sorts in its 65,000-person database, said Russ Rosenzweig, its chief executive and co-founder. Round Table is paid if one of its experts is hired.

"We do things like, we search New York Times archives for articles that may have been written on that topic, then we'll call the expert," Mr. Rosenzweig said. The company also sends out e-mail messages to university professors, asking if they would like to serve as experts, he said.

But a good expert has more than expertise, and lawyers will spend considerable time getting to know potential witnesses to make sure they are clear and can hold up under questioning. A good expert witness, who can command \$900 an hour or more, must be able to explain obscure subjects to a lay audience.

"As the issues become increasingly complex, it's increasingly important to find experts who can simplify the issues," said Mark Kirsch, a lawyer at Clifford Chance who waged a successful legal battle against a Florida pension fund that sued his client, Alliance Capital Management Holding. A critical issue in the case was, How do investment managers normally choose what to buy? Mr. Kirsch was helped by the Analysis Group to find experts to answer that question.

A tricky situation can arise if an expert does not reach a conclusion that supports the client's legal position. The lawyer can choose not to use that expert, in which case any work by the expert remains privileged, or can modify the arguments to be made in the case. But just ignoring a trusted expert's views is generally unwise, lawyers said.

"If you have an expert you believe in, who says your view of things is just dead wrong," Mr. Kirsch said, "the first thing you do is strongly take that into consideration when reviewing your case."