

# USING *experts* IN ARBITRATION

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The evidentiary rules and discovery requirements in arbitration are far less onerous than in a courtroom. As a result, lawyers who represent parties in arbitration have more opportunities to use and present expert evidence. This article addresses some of those opportunities.

**I**n traditional litigation, the basic routine for working with experts involves several steps. First, counsel selects one or more experts who can communicate well to a judge or jury and qualify as experts under judicial evidence rules.<sup>1</sup> Typically, this means that experts must possess sufficient knowledge, skill, experience, training, or education in the subject matter of the dispute.<sup>2</sup> Next, counsel considers whether to retain one or more consulting experts to shield work product and attorney-expert communications.<sup>3</sup>

Counsel then asks the expert who will testify to prepare a report on the opinion, but to limit the number of drafts and other written exchanges because of liberal discovery rules. Afterwards, counsel will prepare this expert to be deposed and to testify at trial. Finally, when the trial takes place, counsel will “qualify” the expert under the applicable evidentiary rules by asking certain questions and then soliciting the expert’s opinions on various technical or scientific matters to educate the uninformed trier-of-fact.

Arbitration differs from litigation in a variety of ways.<sup>4</sup> The proceeding itself is more informal, the rules of evidence generally do not apply, and discovery is limited.<sup>5</sup> Furthermore, especially in construction and commercial disputes, arbitrators usually possess experience in the field of the dispute and technical knowledge of the subject matter. For these reasons, arbitration has many advantages over litigation, one of which is that it offers greater opportunities to use and present expert evidence. A number of these advantages and opportunities are addressed below.

#### **Flexibility in Selecting Experts**

Counsel has greater flexibility in selecting experts in arbitration because, unlike courtroom litigation, there is no requirement that an expert witness qualify as such under strict judicial evidentiary rules. So long as the expert chosen can offer relevant and material testimony, he or she can testify as a witness at the arbitration hearing and render and introduce an expert opinion. That testimony can be admitted and given as much weight as the arbitrators desire.<sup>6</sup>

Counsel also has more freedom to select expert witnesses because the failure to admit relevant evidence is a ground for reversal of an arbitration award under federal and most state arbitration laws. As a result, many arbitrators admit purported expert testimony into evidence and then give such testimony more or less weight as they deem appropriate.<sup>7</sup> The testimony of a witness who can be shown to qualify as an expert under judicial evidentiary rules may well carry more weight.

The greater freedom to select expert witnesses is an advantage when technically qualified wit-

nesses cannot be found, or more than one witness is needed, or the witness has a conflict of interest and therefore cannot participate in the arbitration, or the client’s budget precludes retaining expensive experts.

#### **Other Considerations in Selecting Experts**

An expert selected by counsel to testify in court must be able to explain his or her opinion and reasoning in simple, easy-to-understand terms and deliver the testimony with emotional force. In arbitration, this is not necessary because arbitrators often have backgrounds in the subject matter of the dispute and therefore do not require the same type of explanation. The expert in arbitration can instead focus on highly technical matters because arbitrators can understand them.

Because some arbitrators feel it is appropriate to question witnesses, experts in arbitration should be able to “think on their feet” in order to respond to probing questions by arbitrators who have expertise in the field in dispute. An expert experienced in testifying on direct and cross-examination who is uncomfortable with the idea of being questioned by someone knowledgeable in the area is not the best choice of witness for an arbitration proceeding.

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#### **Freedom in Preparing Experts and Their Reports**

Counsel has more freedom in preparing an expert to testify in arbitration and fashioning the expert’s written report.

In traditional litigation, anything a testifying expert witness considers in forming an opinion—even communications between the expert and counsel—is usually fair game for discovery,<sup>8</sup> despite legal privileges such as the attorney-client privilege or the work-product doctrine. This is why lawyers retain consulting experts who will not testify: because what counsel tells them is work product and not discoverable.<sup>9</sup> However, there is no need for this in arbitration because arbitration is normally a private affair<sup>10</sup> and discovery is much more limited. In arbitration, the parties typically need only identify their experts and exchange the

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final expert reports and related exhibits.<sup>11</sup> (Occasionally, experts may be deposed, but only if ordered by the arbitrators or agreed to by the parties.) Thus, counsel should provide expert witnesses with as much information as possible, however sensitive, relevant or damaging, and freely exchange thoughts and ideas with the expert in order to focus the expert report and opinion.

As a result, in arbitration, counsel can eliminate the need for consulting experts, still protect work product, and save the client a considerable amount of money.

Since counsel's thoughts, impressions, and work product can be exchanged with experts without having to be produced to the adversary, counsel should take an active role when it comes to drafting expert reports and preparing experts for depositions or the actual hearing. If necessary, counsel should participate in drafting expert reports to make them persuasive and less subject to attack on cross-examination.

Counsel should also work with the expert on the foundation for the opinion. This work should continue up to the commencement of the hearing so that if a material change is required, it can be made. Since experts in arbitration are rarely deposed, a change might not be as damaging as in traditional litigation, where experts are usually deposed and changes are fully exposed on cross-examination.

### **Effective Expert Presentations**

Parties agree to arbitrate disputes for a variety of reasons, one of which is the speed (and hence reduced cost) of the proceedings. To this end, the hearing itself is often limited in duration with each side given equal time to present its case.

Because an arbitration hearing is less formal than a trial, counsel can decide to forego *voir dire* concerning an expert witness's expertise if that subject is a problem area. This decision will also be part of the process of gauging how much time to take to present the expert's testimony.

If less time is required, counsel might shorten the presentation to the ultimate opinion without detail, or submit only the written expert report and/or an affidavit from the expert. Arbitration rules on submitting declarations or affidavits are not limited to percipient witnesses.<sup>12</sup>

Depending on the circumstances (e.g., time, cost, strength of witness, issue materiality), counsel might prefer to submit a written expert report or affidavit in lieu of live testimony. The trade-off is that the arbitrators may give such evidence less weight than if the expert testified live.

If more time should be spent presenting expert testimony, counsel could present additional ex-

perts, some of whom may be less qualified than others, but whose testimony, together with the more qualified expert, will have a collective impact.

Counsel should also determine the mode of questioning as well as the questions to be asked. For example, should counsel use leading questions to focus the expert's testimony, save time, and/or control a talkative expert? Should counsel supplement the expert's testimony with the client's views of the factual and legal issues, either as an introduction to the testimony, as comments during it, or as part of concluding remarks? There is no prohibition against counsel providing the client's views of the issues during the hearing. Some arbitrators even prefer to hear these views to narrow the areas of disagreement and move the hearing along.<sup>13</sup>

Counsel who has confidence in the expert may invite the arbitrators to question the expert directly on controversial matters before the other side's cross-examination. Having arbitrators question the expert witness at this time may lessen the impact of a skillful cross and provide valuable insight into the direction the arbitrators are leaning. In addition, it provides counsel with an opportunity to make mid-course corrections if needed.

Counsel can also make choices concerning the form of the expert presentations. More than one expert may be presented at the same time using a panel of expert witnesses. This approach works well if more than one expert is necessary to address the same subject matter or if the individual experts would not make strong witnesses.

All counsel can agree to have both sides' experts present testimony at the same time. In this scenario, "dueling" experts may question each other, giving the arbitrators real-time insight into the competing views on the most contested issues. This format can benefit the side that has the stronger expert witnesses.<sup>14</sup>

### **Opting to Re-Present the Expert**

Outside of rebuttal testimony, an expert who testifies at a trial has one opportunity to present an opinion: that is, while on the stand during the case-in-chief of the party who retained the expert. In an arbitration, however, opportunities exist for experts to present their opinions more than once.

For example, counsel can decide that an expert who testified during the hearing should re-present his or her opinion as part of the closing or post-hearing oral argument. This may help the arbitrators understand certain concerns or invite their further questioning.

Or counsel might decide that the expert should be recalled to explain the rationale for a

party's post-hearing proposed award of damages, such as in baseball arbitration. In complex matters, the expert may be regarded as more knowledgeable on the subject of damages than counsel.

### Conclusion

More opportunities exist for using and presenting expert evidence in arbitration than in litigation. This is yet another advantage of arbitration. To best serve their clients, counsel should know the differences between the two forums and how they affect the presentation of expert evidence. For example, counsel in arbitration should know that:

- the rules for qualifying experts in litigation are inapplicable to arbitration;
- consulting experts are not needed in arbitration;

**Depending on the circumstances (e.g., time, cost, strength of witness, issue materiality), counsel might prefer to submit a written expert report or affidavit in lieu of live testimony.**

- disclosing work product to an expert in arbitration does not present a discovery problem;
  - counsel can play a more active role in drafting the expert report and focusing the expert opinion;
  - counsel can choose the most effective method of presenting expert evidence, for example, offering an expert report or affidavit only or even a panel of experts, as appropriate and necessary;
  - expert testimony can be represented during closing or post-hearing oral argument.
- The lesson is that counsel to parties in arbitration should think creatively about how best to use and present expert evidence. A lawyer who is still following litigation rules when working with experts in an arbitration proceeding is probably leaving something on the table. ■

### ENDNOTES

<sup>1</sup> See Fed. R. Evid. 702.

<sup>2</sup> See *id.*

<sup>3</sup> A fundamental difference between consulting and testifying experts is that the work of the former, including communications with attorneys, is considered non-discoverable work product.

<sup>4</sup> This article assumes a commercial arbitration under the American Arbitration Association (AAA) Commercial Arbitration Rules without specialized orders or agreements governing expert discovery and/or the presentation of expert evidence. (Hereinafter, unless otherwise indicated, all rule references are to these rules including the AAA Large Complex Case (LCC) Rules.) Where such orders or agreements exist, some of the opportunities discussed in this article are obviously unavailable. See AAA commercial rule R-1(a) (parties may agree to vary arbitration procedures) and R-30(a),(b) (arbitrator may exercise discretion to vary conduct of proceedings).

<sup>5</sup> See AAA commercial rule R-31(a) ("Conformity to legal rules of evidence shall not be necessary."). See also Jay E. Grenig, 1 *Alternative Dispute Resolution* § 8:60 (3d ed. 2006) (same).

<sup>6</sup> See AAA commercial rule R-31(a) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.").

<sup>7</sup> See 9 U.S.C. § 10(a)(3). See also T.H. Oehmke, 2 *Commercial Arbitration* § 95:6 (2006) (fundamental fairness dictates that arbitrators hear purported expert evidence).

<sup>8</sup> See Fed. R. Civ. P. 26(a)(2)(B) ("data or other information considered" by testifying expert is discoverable). See Oehmke, *supra* n. 7. See also *Regil Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714-717 (6th Cir. 2006) (following the "overwhelming majority" rule that all information provided to testifying experts is discoverable, including attorney work product and regardless of reliance by the experts). As a result, litigators are generally loathe to communicate with experts by letter or e-mail because such written communications are usually discoverable. See G.P. Joseph, "Trial Evidence in the Federal Courts: Problems and Solutions," ALI-ABA Course of Study (Oct. 20-21, 2005) (available on Westlaw at SL044 ALI-ABA 93) (advising lawyers to curtail written communications with experts).

<sup>9</sup> See *supra* n. 3.

<sup>10</sup> See AAA commercial rule R-23 (hearings are private unless otherwise provided by law). While it is true that protective orders may be obtained in a court proceeding to protect confidential information, courts are generally reluctant to issue such orders and the orders themselves can be difficult to administer.

<sup>11</sup> See AAA commercial rule R-21(a), (b) (discovery limited to identification of

witnesses, production of documents, and exchange of exhibits), and LCC rules L-3(e) (exchange of witness reports), and L-4(c), (d) (depositions upon agreement or as ordered by arbitrators upon showing of good cause). See also *McCrary v. Byrd*, 559 S.E.2d 821, 826 (N.C. Ct. App. 2002) ("Discovery during arbitration, as opposed to litigation, is designed to be minimal, informal, and less expensive. Thus, contrary to a civil case, where a broad right of discovery exists, discovery during arbitration is generally at the discretion of the arbitrator.").

<sup>12</sup> See AAA commercial rule R-32(a) (submission of witness declarations or affidavits).

<sup>13</sup> See AAA commercial rule R-30(b) ("The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.").

<sup>14</sup> Although used less frequently, witness panels are also available in traditional litigation. See Fed. R. Evid. 611. See also David H. Kaye & David A. Freedman, *Reference Manual on Scientific Evidence* 89 (2d ed. 2000) (discussing witness panels and narrative testimony in traditional litigation to "improve the judge's understanding and reduce the tensions associated with the expert's adversarial role").