

WHO'S LISTENING ANYHOW? THE EXPERT WITNESS AND THE ARBITRATION PROCESS

Frank J. Barrett, Esq.
(402) 397-7300

The arbitration process, though not without faults, is in my opinion particularly well suited to accommodate the parties' wishes and needs with regard to multiple parties cases, cases involving highly technical issues, large dollar amounts, numerous witnesses and documents and complicated fact situations.

In such matters the involvement of expert witnesses on behalf of the parties is a given. Before the increased utilization of arbitrations in insurance and reinsurance matters, the courts dealt with the subject of utilization of expert witnesses, deciding the subject matter and the admissibility of such testimony. The courts, both state and federal, do indeed limit the use of expert witnesses. A majority of the courts have adopted the following principles defining the use of expert testimony: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine an issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. There are a variety of tests the courts use to determine admissibility of such testimony.

Judge Harvey Brown discussed admissibility of expert witness testimony.¹ Some of the tests mentioned are:

1. The expert's testimony must assist the trier of fact.
2. The expert must have qualifications.
3. The expert's testimony must be relevant with a valid connection to the pertinent inquiry.
4. The expert's testimony must be reliable.
5. The trier of fact must insure that the expert's extrapolation from the basis of his or her opinion to his or her conclusion is sound.
6. There must be a showing that the foundation of the expert's opinion is reliable.
7. The testimony must be based on foundational data. By this it appears the courts mean the expert opinion is based on evidence that would be admissible.
8. The expert's opinion must pass the test that it is not unfairly prejudicial.

The admissibility of expert opinion testimony is most often based on the theory that experts have knowledge, training and experience enabling them to form a better opinion on a given state of facts than that formed by those not so well equipped. In the case of a trial, the trier of fact is the ordinary juror. In the case of a bench trial, the trier of fact and law is the judge. In the case of an arbitration, the panel is the trier of both fact and the application of the law.

In preparing for this article, I sought a response to an informal non-scientific survey from over 30 individuals who are active in the arbitration field as arbitrators, umpires or counsel. The response was most gratifying, the results diverse. The individuals I contacted have served in over 980 arbitrations, umpired over 449, were expert witnesses in 278 arbitrations, and participated as counsel in over 287 arbitrations. I was overwhelmed by the response. A vast majority of those who received the survey responded. I thank them for their enthusiastic and thoughtful cooperation.

Question One: *Have you participated in an arbitration where an expert witness testified?* A substantial majority of the responses were "yes." No surprise here due to the complex, complicated issues that face insurance and reinsurance arbitrations.

Question Two: *What was the subject of the expert witness testimony?* Examples of responses were:

- ☞ custom and usage
- ☞ rating financial reinsurance
- ☞ number of occurrences

- ☞ loss adjustment experience
- ☞ interpretation of language contained in a written contract
- ☞ state law relating to environmental pollution
- ☞ continuation of defense obligation under CGL and umbrella when primary coverage is exhausted
- ☞ reasonableness of commutation
- ☞ allocation
- ☞ declaratory judgment coverage
- ☞ actuarial loss reserve evaluation
- ☞ underwriting standards applied to a specialized book of business
- ☞ retrospective rating standards for premium determination
- ☞ late notice
- ☞ relationship of a MGA to an insurer
- ☞ whether commutation language was global or only covered certain lines
- ☞ follow the fortune issue

Question Three: *Was the expert testimony helpful to the panel in making a decision?* A vast majority of the respondents indicated “no,” with some remarks such as “not particularly,” “helpful but not decisive,” “not sure,” “somewhat,” with a few responding “yes” and one or two saying, “extremely helpful.” Remember that many of those who responded have served in the role of expert witnesses.

Question Four: *Is there a particular issue or subject where you feel an expert witness is helpful in the decision making process?* Again the answers were quite varied. Examples mentioned in the responses where expert witnesses could be helpful:

- ☞ reviewing court decisions which may apply
- ☞ depends on the issue being arbitrated and the background and experience of panel
- ☞ in special instances where the panel could not or did not have had experience
- ☞ where the panel had no scientific background in pollution
- ☞ very technical issues where the panel may have some general knowledge but little experience
- ☞ actuarial projections
- ☞ determining appropriate levels for IBNR reserves
- ☞ results of audits
- ☞ technical matters not part of everyday reinsurance operations; for example, actuarial analysis
- ☞ reinforcing custom and usage

Question Five: *Was the expert helpful to the party who called him or her to testify?* The responses were lukewarm; most said no or marginally helpful. Some interesting remarks where both parties had experts — “one was helpful, one wasn’t helpful;” “some were, some weren’t;” “rarely.” Two of the many thoughtful and articulate responses regarding expert witnesses were:

1. “The expert is often helpful to counsel in bringing in an authoritative voice on a particular issue rather than the attorney having to present the matter again and again as counsel for the party.”
2. “Experts are helpful because they tend to articulate a position in a non-legal manner that frequently does advance the party’s arguments.” That same respondent, however, cautioned that objectivity, though sought, is somewhat illusive in that “whose bread I eat, whose song I sing.”

Finally, the following was a rather common response to the above question:

“Generally in complex cases there is not just one expert, there oftentimes are many, and thus the panel is presented with two positions on the same issue. Therefore, both sides oftentimes have an articulate “advocate” as opposed to just an expert witness.”

Additionally, a number of respondents felt that the cross-examination by counsel oftentimes “dismembered the expert” and that the panel’s questions quite often were such that the expert’s position became less forceful and persuasive as he or she testified.

Question Six: *Have you participated as an expert witness in an arbitration?* As stated, many of them have and on a variety of subjects. A number of those issues upon which they testified are found in responses to Question Four. For example, custom and usage, results of audits and pollution issues.

As I view the results of the survey, they were rather illuminating in that many of the respondents did not feel that expert witnesses were particularly helpful in the decision making process by the panel. Also, many of the respondents felt that the expert witness was not helpful to the party for which they were called to testify.

Conclusion

My conclusion differs somewhat with many of my colleagues in the arbitration field. On a variety of technical and legal subjects, depending on the expertise and qualifications of the panel, I believe expert testimony can be helpful to the trier of fact and law.

In considering use of an expert witness, the parties should (1) take into account the experience and expertise of each of the panel members; (2) consider the nature of the testimony which is to be elicited from a qualified expert; (3) weigh the expected responses when cross-examined by opposing counsel and the experienced or, for that matter, inexperienced panel members; and (4) consider advising the panel members early in the proceedings as to whom the parties are considering as expert witnesses and the subject and nature of the testimony sought. I am not suggesting that counsel need seek the approval of the panel as he or she must prepare their case as they believe is in the best interests of the client. But the panel’s early reactions could be helpful to counsel in the preparation of the case. Hopefully, the responses to this survey will provide each of us with a perspective, particularly the attorneys who must decide whether to use expert witnesses and how.

The courts have given those of us in the arbitration process an excellent blueprint for the use of expert witnesses. If the individual has knowledge, experience and training which can be clearly demonstrated to the panel on a subject matter that one or all the panel members may not have experience, then I believe such expert witness can be helpful to the panel in its decision making and, thus, serve the arbitration process.

Endnotes

1. Houston Law Review, Fall 1999.