

## CHAPTER 31

### USING EXPERTS IN ARBITRATION

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#### I. Introduction

In litigation, the basic routine for working with experts involves several steps. First, counsel selects a witness who can qualify as an expert under the evidentiary rules and can communicate well to a judge or jury. The expert must possess sufficient knowledge, skill, experience, training, or education in the subject matter of the dispute.<sup>1</sup> Next, counsel considers whether to also retain a consulting expert for assistance and to shield all work product.<sup>2</sup> Counsel then asks the testifying expert to analyze the facts and data and prepare a written report on the opinion. Afterwards, counsel will prepare the expert to be deposed and to testify at trial. Finally, at trial, counsel will “qualify” the expert under the applicable evidentiary rules and present the expert’s opinion on either technical, scientific, or specialized matters to educate and persuade the trier-of-fact.

Arbitration differs from litigation.<sup>3</sup> The proceeding is more informal, the rules of evidence generally do not apply, and discovery is often

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

<sup>2</sup> A fundamental difference between consulting and testifying experts is that the work product of the former, including facts and data shared with counsel, is generally non-discoverable. See Fed. R. Civ. P. 26(b)(4).

<sup>3</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. Where such orders

limited.<sup>4</sup> Furthermore, especially in complex commercial disputes, arbitrators usually possess knowledge or experience in the subject matter of the dispute. As such, arbitration can have advantages over litigation, including greater opportunities to use and present expert evidence. A number of these opportunities are addressed below.

## II. Flexibility in Selecting Experts

Counsel has greater flexibility in selecting experts in arbitration because, unlike litigation, there is no requirement that a witness qualify as an expert under strict evidentiary rules before giving an opinion. So long as the expert can offer relevant and material testimony, the expert should be able to testify at the arbitration hearing. That testimony should be admitted and given as much weight as the arbitrator deems appropriate.<sup>5</sup>

Counsel also has more flexibility to select experts because the failure to admit relevant evidence may be a ground for reversal or modification of an arbitration award.<sup>6</sup> As a result, many arbitrators admit purported expert testimony into evidence and then give that testimony more or less weight as appropriate.<sup>7</sup> The testimony of a witness who can be shown to qualify as an expert under strict evidentiary rules, however, may well carry more weight.

The greater flexibility to select expert witnesses is an advantage when technically qualified witnesses are scarce, more than one witness is needed, the most desirable witness has a conflict of interest and therefore

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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-32(a), (b) (arbitrator may exercise discretion to vary conduct of proceedings).

<sup>4</sup> *See* AAA Commercial Rule R-34(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>5</sup> *See* AAA Commercial Rule R-34(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>6</sup> *See* 9 U.S.C. § 10(a)(3) (reversal for “refusing to hear evidence pertinent and material to the controversy”). *See also* *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (affirming order vacating arbitrator’s ruling where the arbitrator refused to consider material evidence and prevented a party from presenting additional evidence by misleading it into believing it need not present the evidence).

<sup>7</sup> *See* T.H. OEHMKE, 3 COMMERCIAL ARBITRATION § 93:7 Westlaw CMLARB (database updated May 2015) (fundamental fairness dictates that arbitrators hear purported expert evidence).

cannot participate in the arbitration, or the client's budget precludes high-end experts.

### **III. Other Considerations in Selecting Experts**

An expert selected by counsel to testify in court must explain his or her opinion and analysis in simple, easy-to-understand terms with persuasive force. In arbitration, this is less necessary because arbitrators often have backgrounds in the subject matter of the dispute and do not require the same type of basic explanation. The expert can instead focus on more technical, and sometimes dry, matters because arbitrators can better understand them.

Arbitrators often question witnesses, including experts. More so than litigation, an expert should be able to “think on his feet” to respond to probing questions by arbitrators who have familiarity in the field in dispute. An expert only experienced in testifying on direct and cross-examination may not be comfortable with the idea of open questions from a knowledgeable arbitrator.

### **IV. 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 litigation, anything a testifying expert witness considers in forming an opinion — facts, data, and sometimes communications with others — can be fair game for discovery.<sup>8</sup> For this reason, counsel may hesitate to share

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<sup>8</sup> See Fed. R. Civ. P. 26(a)(2)(B) (“facts or data” considered by testifying expert is discoverable). Prior to the 2010 amendment to Rule 26, “data or other information considered” by a testifying expert was discoverable. The words “other information” were broadly interpreted to cover all information provided to testifying experts, including attorney work product, regardless of reliance by experts. The 2010 amendment extended protection to drafts of expert reports and communications between counsel and the expert, subject to the following three exceptions: (1) expert compensation, (2) facts or data provided by counsel that the expert considered in forming opinions, and (3) assumptions provided by counsel that the expert relied upon in forming an opinion. Fed. R. Civ. P. 26(b)(4)(C). Despite this change, the Advisory Committee noted that “facts or data” should be “interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients,” including facts or data not ultimately relied upon by the expert. Committee Note to 2010 Amendment to Rule 26. See also *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 293

information or strategy with the testifying expert for fear of having to turn that over. Counsel may also hire a consulting expert as an extra measure of work-product security.<sup>9</sup>

Expert discovery is more limited in arbitration. Parties typically disclose the identity of their experts along with expert reports and related exhibits. Unless ordered by the arbitrator or agreed to by the parties, parties often do not depose experts.<sup>10</sup> Thus, counsel should feel more comfortable providing experts with all information, whether sensitive, relevant, or damaging, and exchanging thoughts and ideas with the expert. This approach can lead to a focused and powerful expert report, a well-prepared expert, and reduced costs for consulting experts or other mechanisms designed to protect otherwise discoverable work product.

Given these considerations, counsel should actually participate in drafting expert reports or detailed outlines. While such practice may not be advisable (or even allowed in some jurisdictions) in litigation, it can be a best practice in arbitration. Counsel can help make the final expert report more persuasive and less subject to attack on cross-examination. Counsel may even continue to refine the expert's opinions after the reports are exchanged. Facts or data may change or new information may surface. Since experts are less frequently deposed in arbitration, changes to final reports (if even allowed) may not be as damaging as they would be in litigation, where experts are typically deposed and any report changes are fully exposed on cross-examination.

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F.R.D. 568, 577 (S.D.N.Y. 2013) (“Thus, even after the 2010 Amendment, the scope of expert discovery contemplated by Rule 26 is still expansive.”).

<sup>9</sup> See *supra* n. 2.

<sup>10</sup> See AAA Commercial Rule R-22(a) (exchange of necessary information managed by the arbitrator to achieve “an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party’s opportunity to fairly present its claims and defenses) and Procedures for Large, Complex Commercial Disputes (LCC) rules L-3(f) (depositions may be ordered by arbitrators upon showing of good cause in “exceptional cases”). See also *Rintin Corp., S.A. v. Domar, Ltd.*, 374 F. Supp. 2d 1165, 1170 (S.D. Fla. 2005) *aff’d*, 476 F.3d 1254 (11th Cir. 2007) (“[D]iscovery is not guaranteed in arbitration and arbitrators have broad discretion as to grant or deny the ability to obtain discovery.”); Stephen J. O’Neil, *Managing Depositions in Arbitration to Minimize Cost and Maximize Value*, 69 DIS. RES. J. 15, 17 (2014) (noting there is no express authorization for depositions in the AAA Commercial Rules and some arbitrators view depositions as the exception, not the rule).

## V. Presenting the Expert

### A. *At the Hearing*

Parties arbitrate disputes because of speed and cost factors. The hearing (or arbitration trial) happens within months of the initial demand and is often limited in duration. Counsel should gauge how much time will be spent on the expert.

Counsel might shorten the presentation to the ultimate opinion without factual basis or detail, or, in lieu of direct testimony, submit only the written expert report and/or an affidavit from the expert.

Counsel might prefer to submit only a written expert report or affidavit due to other concerns. The expert may not present well live, the opinion may cover a small issue, or the expert may have to travel to the hearing. The trade-off is that the arbitrators will likely give written expert reports less weight than live testimony, particularly when there has been no opportunity for cross-examination.<sup>11</sup>

Mode of questioning is another consideration. 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 hearing, as comments during it, or as part of concluding remarks? Arbitration rules do not prohibit leading questions or counsel providing the client's views of the issues, including expert issues, during the hearing. Some arbitrators may actually welcome these approaches to narrow the areas of disagreement and move the hearing along.<sup>12</sup> Another approach is to have the expert make a presentation with demonstrative aids, rather than a typical question and answer format.

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<sup>11</sup> Note, however, that a party may request that the arbitrator order a witness, including an expert, whose testimony is represented by a party to be essential to appear in person for examination before the arbitrator. *See* AAA Commercial Rule R-35(a) ("If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing...either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.").

<sup>12</sup> *See* AAA Commercial Rule R-32(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.").

Counsel who has confidence in the expert may invite the arbitrators to question the expert directly on controversial matters before 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.

Parties may also agree to have the opposing sides' experts on, for example, damages, appear on a panel together in a practice referred to as expert witness conferencing or "hot-tubbing."<sup>13</sup> In this scenario, "dueling" experts present their opinions on a particular issue in a direct point-counterpoint manner. In this format, they may be questioned on their dueling opinions by both sides' counsel and the arbitrators. By agreement of the parties, they may even question each other, giving the arbitrators real-time insight into the competing views on the most contested issues. This format can narrow the issues in dispute between the parties, increase comprehension of the issues and reduce costs and time needed for a hearing. It can also provide additional benefits for the side with the stronger, more aggressive expert witnesses.<sup>14</sup>

### ***B. After the Hearing***

In litigation, a testifying expert has one opportunity to present the opinion: while on the stand. In arbitration, a testifying expert has additional opportunities.

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<sup>13</sup> "Hot-tubbing," also known as the "Australian approach" to expert testimony, originated in Australia to reduce expert partisanship and has been implemented in other jurisdictions, including a few U.S. federal courts. See David Sonenshein, Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 55, 56 (2013); Frances P. Kao et. al, *Into the Hot Tub...A Practical Guide to Alternative Expert Witness Procedures in International Arbitration*, 44 INT'L LAW. 1035, 1037 (2010).

<sup>14</sup> Although used less frequently, witness panels are also available in 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 litigation to "improve the judge's understanding and reduce the tensions associated with the expert's adversarial role").

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For example, the expert may re-present his or her opinion as part of the post-hearing oral argument. This may help clarify issues or alleviate concerns that arose during the hearing. The expert might also testify again in bifurcated cases on damages or in post-hearing proceedings on the parties' proposed award of damages, such as in baseball arbitration. Often, the expert may be regarded as more knowledgeable on the subject of damages than counsel, especially in complex matters.

### **VI. Conclusion**

More opportunities exist for using and presenting expert evidence in arbitration than in litigation. 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:

- expanding or limiting expert discovery at the outset and within the arbitration agreement is possible;
- rules for qualifying experts in litigation are not mandatory in arbitration;
- use of consulting, non-testifying experts are unnecessary in arbitration;
- disclosing work product to an expert in arbitration is less problematic;
- counsel can play a more active role in drafting the expert report and focusing the expert opinion;
- counsel can choose alternative methods of presenting expert evidence, for example, offering an expert report or affidavit only, presenting a panel of experts, or agreeing to “dueling” expert panels; and
- expert testimony can be re-presented after the hearing.

The lesson here is that counsel 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 arbitration is probably leaving something valuable on the table.

