Chapter 10

THE BATTLE OF THE EXPERT WITNESSES IN LABOR AND EMPLOYMENT ARBITRATION: DOES EXPERT TESTIMONY HELP OR HINDER THE PROCESS?

A PANEL DISCUSSION

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Epstein: Plaintiffs need all the help we can get. We are the ones with the burden. As one means of sustaining that burden, in the near future, you will see a wave of individual lawyers presenting expert testimony to you. As for the admissibility of such testimony, the Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals* (1993), departed from its earlier[1] single standard test of *general acceptance*, in favor of a five-factor, nondispositive, nonexclusive, "flexible" test[2] as to the validity (and hence admissibility) of scientific evidence. In applying Rule 702 of the Federal Rules of Evidence, the Court declared that the trial judge must act as a "gatekeeper" and evaluate the proffered testimony to ensure that it is at least minimally reliable; i.e., concerns about expert testimony cannot be simply referred to the jury as a question of weight. In essence, the task of the arbiter is to determine whether

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[1]The 1923 Supreme Court ruling in *Frye v. the United States*: that scientific evidence had to have *general acceptance* in the scientific community. In non-Federal suits, Pennsylvania still adheres to this antiquated test.

[2]The five-part test is (1) whether the technique or theory has been tested; (2) whether the theory of technique has been the subject of peer review or publication; (3) whether the potential rate of error is known; (4) whether standards and controls exist; and (5) the degree to which the theory or technique is generally accepted in the scientific community. These aren't the only factors that are to be considered, and no single factor is to be dispositive.

the facts and data of the expert witness are shown to be reliable and whether they support his opinion. Care must also be taken to confine the expert's testimony to the field of expertise and to recognize that expertise does not necessarily imply formal education but, rather, expertise in the subject matter being testified about, which expertise may have been gained through experience. Since most labor and employment arbitration is conducted under the auspices of Federal law, you arbitrators will be adhering to the new version of Rule 702. You will be the arbiters of what expert evidence is to be admitted under the *Daubert* standards. Neither Federal Rule 702 nor any state rules prescribe a specific procedure for determining the admissibility of expert testimony. You can hold what is called a *Daubert* hearing—a separate hearing on the admissibility of proposed expert testimony—or you can accept it during the course of the hearing, reserving the decision about the weight it will be given.

The arbitration rulings on the admissibility of expert testimony are too few in number to draw a conclusion as to the rate of its acceptance. But, in the courts, the general rule is that that expert is going to be accepted much more than that expert is going to be rejected, rejection being the exception. The expert testimony that has been accepted has not been strictly scientific, and has included statistical experts, vocational experts, experts on promotional testing, human resources and employment practices, psychology, and sociology.[3] Experts can also be helpful in formulating remedies, including the tax ramifications.

The foregoing having been said, here are the top five specious excuses for not using an expert in labor and employment arbitration:

5. Expert testimony is not generally accepted in labor and employment arbitration; it should be dismissed out of hand. Solution: Give it a shot and listen carefully.

4. I don't how to qualify an expert. Solution: Plaintiffs should come prepared to furnish you, as a neutral lay person, with requisite information. Again, give it a shot and listen carefully.

3. Experts are difficult to prepare and control. Solution: Sometimes, yes. But that's the responsibility of the advocate.

[3]As an example of the last, in one arbitration, sociological testimony of how Europeans and African-Americans in this country stereotypically view Asian individuals was germane to proving the existence of a hostile work environment.

2. The arbitrator is not impressed with an expert's testimony. Solution: Experts can be enjoyable. Let them in.

1. The counsel who does not consider the use of expert testimony enjoys losing.

DiNome: In a discipline case, management bears the burden of proof, and that is the circumstance under which an employer might consider utilizing an expert witness. Nonetheless, trepidation is warranted.

By the time that the termination was implemented, the employer should already have fully developed the underlying reasons for the action. If you can't explain the reasons for the discharge pretty easily, you're likely walking into trouble. The fact that you are invoking an expert witness after-the-fact (who was not engaged before-the-fact) may undermine the argument that just cause was fully investigated and ascertained prior to the discharge having been issued. It should not be necessary to bring a third party into the hearing to explain what happened, and doing so may complicate your case.

Unlike litigation, where the parties do not select the judge who will hear their case, in arbitration, the selection of the arbitrator can take into account the arbitrator's experience and knowledge of the particular industry, thereby obviating the need for expert testimony.

In every case, the usefulness of an expert witness is a matter of whether the expert is addressing the ultimate question at issue. There are circumstances in which an expert witness can be beneficial to an employer's case. The first is to rebut the testimony of opposing counsel's expert, where such rebuttal is needed. A second may be toxicologists in a drug case. And a third is a computer expert, where computer forensics are an issue: cases involving voicemail, e-mail, Intranet, the Internet, and the use of the computer for illicit or improper purposes or to transmit improper communications.

Brogan: The first question you should ask yourself before you go into the cost of retaining an expert witness is whether your arbitrator is already expert enough. In hiring an arbitrator, you are retaining an adjudicator who is already an expert in the field of labor and employment, including those related principles of the common law of the shop and issues related to just cause. And it may be presumed that those arbitrators who hear employment law cases already understand employment law and do not need

an expert testimony on the subject. The advocates themselves can educate the arbitrator in any specialized knowledge that might be required for the arbitrator to understand the substance of the dispute.

In employment arbitration, the use of expert testimony is discussed in the case management conference but, in labor arbitration, when you bring an expert in, it's usually a surprise. If it is, then you should expect that the arbitrator will afford the other side an opportunity to respond: the chance to retain and then present their own expert. And, if they do so, then what have you gained for the couple of additional days of hearing that you've bought?

An expert witness can sometimes be helpful in determining damages and structuring remedy but, even in that event, those issues can be bifurcated from the merits of the case and addressed as needed. As for expert testimony pertaining to the merits, well, gosh darn, we usually do let it in, don't we? The question is what we do with it after we have let it in. I'm not saying that there aren't times for an expert to be used. But I would think once or twice or maybe ten times before I would use one, most especially in labor arbitration. And if one is to be used, plenty of advance notice should be given, so as not to delay the hearing process.

Sands: I come to this topic from the standpoint of what I sell. As an arbitrator, I sell curable ignorance. I come into the room with no idea whatsoever about what the case is about, about what the facts are, what principles are at work for evaluating those facts, and how I'm going to apply those principles to the facts to reach an outcome.

It's the parties' job to educate me as to what I need to know to make an intelligent decision in the case, because that's the best they can hope for. Expert testimony has been useful to me, as an arbitrator, when people who are qualified to have an opinion about the matters in issue can assist me in understanding and deciding issues of fact or law. The primary challenges that the use of experts pose to me as the arbitrator have to do with case management issues.

When Howard introduced us, he said that I would be talking about how managing expert testimony is like herding cats. No, my point is that if you *don't* manage your experts, it will be like herding cats. And that's true for about anything to do with hearings, where there are adversaries at work trying to affect the record on which you are going to be making a decision.

As Margie correctly said, you have got to get expert testimony in early. If you offer an expert and the relevance of the expert's testimony is not immediately apparent, I'll ask how is this going to help me decide the case, because that's my first consideration. And I'm going to be evaluating the expert's testimony, the expert's credibility, and the credibility of his or her conclusions, just as people evaluate my decisions and my conclusions.

Experts identify relevant facts, identify relevant governing principles, and apply those principles to the facts to produce their opinions or conclusions. I then evaluate the reliability of the expert's opinions and conclusions with respect to that process: Are the facts that they have identified as relevant reliable? Are the principles that they have identified understandable? And have they applied those principles to the facts in a credible way?

If there are going to be reports, have them exchanged and then rule that the direct expert testimony will be deemed to consist of those reports. During the hearing, after a brief introduction of the expert who will testify on the report, start with the cross-examination of its substance. This approach saves loads of time. Client service should be the supervening consideration; the arbitrator should serve the arbitration process.

"Dueling experts" should not be sequestered. They should be in the room, hearing each other, so that they can respond to each other. My practice is that, after the experts have each concluded their direct and cross-examinations, if I think it's necessary, I have the two of them sit in adjoining chairs and have a conversation based on the questions that I have. Frequently, if there is true expertise on both sides, they will come to a general agreement as to what are the relevant facts and what are the governing principles, and I will be able to narrow, as much as possible, exactly where they differ on how the principles should be applied to the facts. Then it's a question of the credibility of each of their approaches to that reduced concrete issue.

Brogan: I have a reservation about how much an arbitrator should interpose in the parties' case. As I see John, he's engaging in the conversation with the experts. John's dueling experts approach might be a good idea, but I'm not sure how much I would engage in the conversation.

Sands: I would engage in the conversation only *after* the parties have finished all of their examination, cross-examination, redirect, and re-cross. But arbitrators as potted plants drive me nuts. When an arbitrator does not manage the case, take responsibility

for allowing in only relevant, factual material that's going to help decide the case, that's how a one-day hearing becomes a five-day hearing.

That does not mean that I want to take over the advocates' case. For example, if I were an advocate and knew that the other side was not going to be able to fulfill an essential element of its case, and I was going to rest at the end of the other side's case, I wouldn't want the arbitrator to ask the question that would raise the absence of that essential element.

But at the same time, my first responsibility is to make sure that I have a record on which I can make an intelligent decision. You get that by managing the prehearing process, managing the hearing and, of course, having a record on which you can make an intelligent decision.

Epstein: I disagree with both arbitrators. My job as an advocate is to get your ear, hold that ear, make you deaf to the other side, and create an atmosphere where I control that room. Not you, not the opponent, but me. And I can do that with help. And sometimes that help comes in the form of an expert witness who will be a new voice in the process. That expert may be able to say just what the arbitrator already knows from many days sitting in that arbitration. Or that expert may add to the arguments that were made by counsel, bringing to that table something that nobody had looked at before, or looked at it in a different way. If I can use an expert to get your ear and to hold that ear, then that expert is valuable to me.

I don't mind the arbitrator interceding in the expert witness's testimony at any point, or taking on the expert. In fact, I encourage it. I want the arbitrator to become involved and immersed in what my expert is saying. Nor do I mind if they take on the opposing expert. That's my job—to cross-examine that expert and render his or her voice smaller than that of my expert. All I want from the arbitrator is to listen.

Alan Symonette[4] (from the floor): If an expert testifies about something of which you already have knowledge, and you conclude that the expert's testimony is wrong and is impeached, how and when, if ever, should you make that disclosure?

Brogan: I think that an arbitrator has a duty to disclose a special expertise that she has. I would say, "I'm sorry. I need to disclose

[4]Alan Symonette is an NAA member.

here that I understand this in a different manner. If I'm wrong and maybe you need to educate me, but I think I'm right."

James Harkless[5] (from the floor): There are circumstances in which the arbitrator needs to be proactive. Experts are there to prove the case for the party who hired them, and have a tendency to give you what their client wants you to hear and to omit what they don't want you to hear. The arbitrator's responsibility is to question that expert, to be clear about what the expert is telling them. Two examples: statistical experts in a disparate impact case and medical doctors. I'm not a statistician or a doctor. I must ask questions in order to accurately assess their testimony.

Catherine Harris[6] (from the floor): One approach that's worked well for me is to encourage the parties to let their experts talk to each other outside the hearing room. I found this to be especially effective with computer experts. When they subsequently take the stand, they will tell you where they agree and where they differ, and the areas of disagreement are what I want to hear about. Also, the parties are generally more receptive to letting their experts talk to each other outside the hearing room than they are to the idea of the experts talking to each other on the record.

Sands: Let me focus on something Alan just said. When, as an advocate, I came into a hearing, I knew that there was a center of gravity in the hearing room that I would be fighting against my adversary to control. In fact, it's the arbitrator's job to control that and, if the arbitrator doesn't control it, then the advocates will fight over that center of gravity.

When, as an arbitrator, I see that happening and I'm about to intercede and reclaim control, I'll say, "Gentlemen" (because it usually is gentlemen), "I like theater as well as the next person, but understand this is not great theater."

On that same note, I quote our colleague, Rosemary Townley, who relates that, in one of her NFL cases, a coach very aggressively said, "It's my team. This is how it's going to be." To which she replied, "It's my hearing. This is how it's going to be." The coach was a pussycat for the rest of the day. Managing the hearing, managing the process is very important. It serves the parties' interest in getting, ultimately, an intelligent decision.

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[5]James Harkless in an NAA member.
[6]Catherine Harris is an NAA member.