I. PRACTICAL TIPS FOR THE USE AND CONSIDERATION OF EXPERT TESTIMONY IN ARBITRATION

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When May an Expert Witness Be Helpful?

An expert can provide specialized knowledge which may assist the arbitrator in interpreting the facts of the case and reaching ultimate conclusions. Even in the employment arbitration context, where arbitration awards are more likely to be subject to the scrutiny of a court's review, the arbitrator possesses a significant amount of discretion in deciding whether to permit the testimony of the expert. Practically speaking, however, even if the arbitrator allows such testimony, the question remains—is the expert worth the price? Obtaining the right expert, who will provide a persuasive opinion, can be a time-consuming and costly venture. Unlike a jury, the experienced arbitrator herself should be a general expert of labor and employment concepts. Limit your use of experts to those specialized areas which are necessary to prove up a material claim or defense and that are likely to be outside the arbitrator's generalized knowledge. For example, an expert may be essential in demonstrating statistical disparities or appropriate damages in employment discrimination cases, or comparable pay and the employer's ability to pay in interest arbitration cases. Where the testimony would enter an area reserved for the arbitrator's decision making, such as making credibility determinations, the expert's use to the arbitrator may be of questionable value. At the same time, arbitrators should be open to the consideration of helpful and persuasive expert testimony, even where it may tread upon territory traditionally reserved to an arbitrator.

Who Is Your Expert?

Make sure your expert witness is one who will be qualified in the subject area you need. An individual who may qualify as an expert in a particular field may not qualify in a related area, absent agree-

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ment by the parties. In addition, where the bona fide expert is also a fact witness in the case, you may have a practical problem. Putting aside the legal issue of whether an expert can also be a fact witness, does this person, wearing two hats, present issues of bias or credibility? Will your arbitrator be persuaded more by a disinterested expert than by an individual with some potential ax to grind?

How Should an Expert Be Used?

Labor Arbitrations

When considering the use of an expert in a labor arbitration, be mindful that the arbitrator is going to be concerned about the notice and the opportunity to respond afforded to the other side. Without such notice, the arbitrator may grant a continuance to allow your opposing party the opportunity to employ its own expert so it may (1) properly cross-exam your expert and (2) counter with a response. This may delay your hearing for weeks, if not months.

Where a sequestration order is imposed, the arbitrator and the parties should discuss how it will be applied where dueling experts are present. Allowing each expert to stay in the room while the other is testifying may assist the process. Alternatively, the parties could agree, or the arbitrator could impose an order directing, that the expert will be limited on direct to the contents of his or her report or written declaration and will only be subject to cross and redirect. This would afford an opportunity for each expert to review the findings and opinion of the other's expert, and would thereby provide helpful assistance to counsel for cross-examination. In this latter situation, each expert could be preserved for rebuttal.

Employment Arbitrations

The vehicle of the Case Management Conference, in advance of fact discovery and hearing, can provide the necessary structure and notice to each party, aiding in the expeditious resolution of the dispute. If an expert is to be utilized, there must be sufficient time built into the prehearing schedule to allow the parties to properly designate their experts, serve reports on the other party, and allow depositions of the expert, if needed. Also, if one or both parties want to preserve the right to file dispositive motions, the parties must develop a case management plan which allows time for the filing of any dispositive motion, so that such filing, and the hearing if ultimately needed, is not delayed.

Suggestions for the Case Management Conference

- The arbitrator should inquire as to whether experts are going to be utilized. In the absence of such an inquiry, counsel should advise the arbitrator that they will be using an expert, or that they reserve the right to do so, with final determination to be made after some fact discovery. In a situation where the right is reserved, the arbitrator should set a date certain when the party must apprise the other side that it is using an expert, along with an offer of proof of what the party hopes to establish through the use of the expert. This should be done sufficiently in advance of the date for the designation of the experts so that the other side may make an informed decision as to whether they also will be employing an expert.
- The arbitrator should schedule the designation of the experts either immediately before or after the fact discovery cutoff date. Waiting until discovery is substantially concluded is a cost-saving measure, as information acquired in discovery may lead counsel to make the informed decision that the expert is not necessary.
- The arbitrator should schedule the production of expert reports and the deadline for depositions. Typically, these schedules are staggered to allow for the initial export report, and responding report, if needed. Even if a party does not believe it will be answering with its own expert, it is better to build such dates into the schedule, so that the right is preserved and delay is avoided.
- The parties and the arbitrator should explore the issue of whether dispositive motions may be filed. The Motion for Summary Judgment (MSJ) filing deadline should be sufficiently in advance of the hearing to allow for a response to the MSJ by the other side, and for ruling by the arbitrator prior to hearing. If the parties wish to delay their decision—as to whether an expert will be utilized—until after the MSJ ruling, enough time must be built into the case management plan to allow for the expert witness schedule to take place in advance of hearing.
- If the potential expert would be opining on the issue of damages, one approach is to request a bifurcation of the merits portion of the case from the damages portion. The parties would then go to hearing on the issue of liability and, only in the event that the arbitrator sustains the claim or counter-

claim, the parties would go to a second hearing phase on damages. An expert schedule could then be arranged in advance of the damages hearing.

- In the Case Management Conference, the parties might agree, or the arbitrator might order that the direct examination of an expert testimony be limited in duration and that the parties rely on the expert's report, if there is one, or on a written declaration furnished to the other side in advance of the expert's testimony.
- Either in the Case Management Conference or at the outset of the hearing, the issue of sequestration of dueling experts should be resolved, as outlined above.

In conclusion, in the appropriate circumstances and with fair notice to the other party, a qualified expert may assist the arbitrator, the trier of fact, in the understanding of evidence or the determination of a fact in issue. However, arbitration is meant to be an expeditious form of dispute resolution. The use of third party expert testimony may lengthen a case, and will certainly make it more expensive. Opposing counsel may feel compelled to enlist the aid of an expert as well, causing more delay and possibly leading to unnecessary argument on issues that could have been best resolved by the arbitrator, without the aid of an expert. An expert should not be called upon unless an advocate concludes that their case would be enhanced, and not derailed, by opening up the hearing to a potential battle between dueling experts.