Effective Use of Experts in Mediation and Arbitration

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1. Why would a lawyer use an expert in mediation or arbitration?
   
   a. An arbitration is a trial; you may need an expert just as you would need one at trial
   
   b. In mediation, an expert can help:
      
      i. Evaluate the case to determine a reasonable range of value
      
      ii. Consider alternatives to monetary payment for resolution
      
      iii. Organize your presentation

   iv. Enhance the credibility of your position
   
   c. Examples of areas of expert work:
      
      i. Damage calculation—tort or contract
      
      ii. Damage causation issues—e.g., construction defect cases
      
      iii. Engineering or product defect issues
      
      iv. Analysis of financial records to prove fraud
      
      v. Valuation of a business—book value, market value, fair value
      
      vi. Environmental impacts and solutions

2. Why would a mediator or arbitrator want to hear from an expert?

   a. To get a clear explanation of scientific or technical issues
   
   b. To become informed about an esoteric area of law
   
   c. To obtain information from a purportedly independent source
   
   d. To be able to ask questions of a knowledgeable non-party
3. “Experts” here, for purpose of mediation, can include anyone with specialized knowledge regarding such matters as:
   i. Feasibility of proposed alternative resolutions—family member, regulator, third party with contract rights
   ii. Trade practices and industry custom
   iii. Confirmation of amount owed to creditor
   iv. Required regulatory approval and practices

4. At what point in the case should a lawyer involve an expert?
   a. As early as possible; sometimes even before submitting pleadings
   b. Early in a case, an expert can help the lawyer:
      i. Understand the product or industry
      ii. Understand specialized areas of law
      iii. Refine claims
      iv. Analyze potential types of damages so claims fit the damages
      v. Analyze contract issues, e.g., damages recoverable
      vi. Understand accounting or financial issues
      vii. Head off potential problems arising from how a claim is pled
   c. As a case proceeds, an expert can help:
      i. Draft well-crafted written discovery requests, depending on the level of discovery permitted
      ii. Analyze discovery responses for completeness and follow-up
      iii. Draft focused deposition, direct and cross-examination questions
      iv. Understand the strengths and weaknesses of your case
      v. Help select a mediator or arbitrator
      vi. All of these steps aid in the arbitration or mediation process
5. BUT WAIT: Isn’t all of this expert help expensive?
   a. Litigation expense is always an issue—experts, like lawyers, can be expensive
   b. The level of expert costs warranted may depend on the amount at issue
   c. Talk to the client about the importance of involving an expert
      i. Careful work with an expert can save costs by keeping the focus on necessary discovery
      ii. An expert can help focus your preparation on appropriate damage claims or rebuttal
      iii. If an expert will be needed at trial, at least preliminary consultation is warranted early on
   d. To help control expert fees:
      i. Get cost estimates from expert at key points and for discrete projects
      ii. Keep expert costs proportionate to the size of the case
      iii. Consider “unbundled” alternatives—e.g., retain the expert for preliminary consultation only to begin with and agree upon further work in segments
      iv. Do cost/benefit analysis as further work is proposed
      v. Get periodic reports of time being spent and costs incurred
      vi. Keep the client informed as the case progresses

6. Role of expert in any form of ADR
   a. Educating the mediator or arbitrator
      i. Technical information
      ii. Regulatory requirements and practices
      iii. Industry practice
      iv. Specialized area of law
      v. Terms of art
b. Organizing information persuasively and efficiently
   
i. Summary charts to present voluminous material
   
ii. Demonstratives that illustrate events or concepts
   
iii. Presentation of photographs

c. Providing an expert opinion on liability or damages

7. Using experts in arbitration

a. Role of expert similar to that at trial

b. Type of report provided may be different

c. Presentation may be different because of:
   
i. Relaxed rules of evidence
   
ii. Decision maker’s level of industry knowledge or subject matter expertise
   
iii. Size of the room
   
iv. Potentially lower level of formality
   
   v. Opportunity to connect more directly with decision maker
   
   vi. Demonstratives can also be more detailed and involved given the fact that no jury is involved
   
   d. Expect the arbitrator to ask pointed questions—certainly more than a judge would do in a jury trial and perhaps even more than in a bench trial—and prepare your expert accordingly

8. Use of experts in mediation can take many forms

a. Behind the scenes
   
i. Case preparation to put you in a strong position
   
   ii. Pre-mediation case evaluation—essential
   
   iii. Evaluation of opposing side's positions
   
   iv. Bolstering the evaluation you provide the client
b. At the mediation, you can:

i. Include your expert’s report in your confidential mediation statement

   1. Make it clear whether or not the report has been disclosed to the opposition

   2. State plainly whether or not the mediator may discuss the expert opinion with the opposition (Note: The report is pretty useless if the mediator can’t discuss the opinion with the other side)

ii. Provide the mediator with charts or demonstratives prepared by your expert for the purpose of the mediation (see 1. and 2. above)

iii. Have your expert available for private consultation during the mediation

iv. Have your expert make a presentation in person, by Skype, or by telephone

   1. To the mediator alone

   2. To the other side—pros and cons

v. May have expert available throughout the mediation to reinforce certain points to further explain or elaborate complex issues

vi. Ask questions of experts

vii. Obtain further information if facts are missing—during or during a recess in the mediation

9. Some alternative ways to use experts

   a. Joint expert or advisor

      i. Paid and agreed to by both parties

      ii. Usually for limited fact-finding role—e.g., accounting or valuation

      iii. Have clear written agreement regarding such items as:

         1. Confidentiality

         2. Scope of work

         3. Independence
4. Ability to consult with opposing sides independently

5. Disqualification from acting as expert for one side only

6. Use of opinion

b. Neutral advisor to mediator/arbitrator
   i. Can be useful if subject matter is highly scientific or technical
   ii. Can provide information on obscure area of law
   iii. Have clear written agreement as such items as:
       1. Payment of costs—e.g., equal or per arbitration decision
       2. Cap on costs
       3. Scope of work
       4. Access to opinions
       5. Confidentiality

c. Allowing competing experts to discuss issues and try to reach agreement themselves
   i. May include employees serving similar roles in opposing companies—e.g., book-keepers, software developers
   ii. Clearly define the issues to be resolved
   iii. Have clear agreement as to use and disclosure of information learned during the process
   iv. Requires parties and counsel to give up some control of the process

10. Some words of caution regarding using experts in mediation

   a. Confidentiality of mediation process

      i. C.R.S. § 13-22-307 protects all mediation communications from disclosure at trial or otherwise.

      ii. “Mediation communications” are “any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding . . .” C.R.S. § 13-22-302(2.5).
iii. These provisions can raise issues such as:

1. Is an expert who obtains confidential mediation communications disqualified from testifying at trial?

2. Can the expert change his or her opinion based on what is learned at the mediation?

iv. These questions are unanswered. See, e.g., Warner v. Calvert, 258 P.2d 1125 (N.M. App. 2011). Parties to a mediation engaged a joint expert to perform a business valuation for the purpose of mediation. The expert prepared a report that was used at mediation. The expert did not personally participate in the mediation. The New Mexico Court of Appeals held that the report was a confidential mediation communication that could not be used at trial. The court also ruled, however, that under the statute and the parties’ written agreement, the expert could start over with the underlying documents available to all parties, prepare a new report, and testify at trial.

v. So be careful about what information you give your expert.

1. Don’t provide your mediation statement to your expert

2. Don’t talk to your expert about what was said at the mediation

3. Provide underlying documents, not information about what was said at the mediation

vi. Think twice before you allow an expert to be present at the mediation except for a very limited time and purpose.

b. If using joint expert who will be present at the mediation or prepare a report for use at the mediation, consider whether to waive confidentiality of mediation communications or work product. See C.R.S. § 13-22-307(2)(a) (providing that disclosure of mediation communication is permitted if and to the extent that all parties to the dispute resolution proceeding and the mediator consent in writing).
c. The problem of dueling experts

   i. An expert who is an obvious shill won’t be persuasive to an arbitrator or mediator—choose and prepare your expert carefully

   ii. An expert opinion at mediation as to a matter on which reasonable experts can disagree is not as effective if the opposition has an opinion from an equally qualified expert

   iii. The expert opinion is still important to support your case in the confidential mediation statement, but it won’t carry the day

iv. How mediators can deal with the problem

   1. Diffuse the conflict

      a. Get the parties and counsel to acknowledge the difference of opinion

      b. Don’t try to get either side to agree that the other expert is correct or better qualified

   2. Ask questions:

      a. How can the experts come to such different conclusions?

      b. What do you think a decision-maker new to the dispute will do when faced with the divergent opinions?

      c. Do you think there is a range of results that could result from a decision-maker hearing both opinions?

   3. If the resolution can be other than simply monetary, see if the parties can use the information from both sides to think of potential solutions—e.g., methods of repairing damage

   d. The expert who tries to take control

      i. Remember that a mediation is the parties’ process.

      ii. Acknowledge and appreciate the expert’s opinion (particularly since counsel retained the expert and the party paid good money for the expert’s work

      iii. Continually turn the focus of the discussion back to the party and his or her counsel
11. Conclusion

   a. Used wisely, experts can be an effective tool in resolving cases through arbitration and mediation

   b. As with any work, the key is thoughtful preparation and strategic use.