

The Actuary as an Expert Witness



ACOPA

ASPPA® College of Pension Actuaries

Part of the American Retirement Association

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Agenda

- Types of experts
- Initial call
 - Conflicts
 - Billing
- Engagement letter
- Competency
- Your report
- Deposition
- The other side
- What else
- Roles of the actuary
- Expert as educator
- Good testifying expert
- Ineffective testifying expert
- Working with counsel
- Be ready
- Do and don't
- Examples of assignments
- Questions

Types of Experts

- Testifying expert
- Consulting expert
- Differences in roles and privilege

Initial Call

- Conflicts
- Issue
- Nature of proceeding
- Who is client: litigant or counsel; maintenance of privilege
- Competency
- Views on topic
- Timing
- Deliverables
- Budget issues; when does the meter start
- Available documents

Conflicts

- Need to identify:
 - Parties
 - Law firms
 - Experts
 - Other professionals (e.g., current actuary)
- Who recommended you?
 - Why are they not being retained?
- Why so critical – even before exploring issues?
- Practical conflicts – business issues
 - Conflicts with interests of other clients of your firm
 - Conflicts with positions of colleagues

Issue

- Get clear picture of:
 - Background facts
 - Issue being litigated
 - Positions of various parties
 - Expertise being sought
 - Type of engagement (testifying expert or consulting expert)

Nature of Proceeding

- Mediation
 - Name of mediator
 - Prior experiences with mediator
- Arbitration
 - Name of arbitrator
 - Prior experiences with the arbitrator
- Trial
 - Bench trial versus jury trial
- Venue

Who Is Client

- Litigant or counsel
- Maintenance of privilege
 - Method of communication
- Who will be responsible for payment of fees?
- Engagement letter

Competency

- Am I qualified for the assignment?
 - Remember: you will be cross-examined
 - Daubert hearing

Views on Topic

- Difference between an expert and an advocate
- ASOP 17:

Advocacy—There may be occasions when an actuary acts as an advocate for a principal when giving expert testimony. Nothing in this standard prohibits the actuary from acting as an advocate. However, acting as an advocate does not relieve the actuary of the responsibility to comply with the *Code of Professional Conduct* and to use reasonable assumptions and appropriate methods.

Views on Topic

- Your opinions are not for sale
- Honesty and integrity
- Reserve right to update views based on additional information
- Consistency with opinions and views expressed elsewhere
 - Other cases
 - Speeches
 - Articles and publications
 - Other communications

Timing and Deliverables

- Schedule for discovery, expert reports, depositions, and trial
- What is needed:
 - Analysis
 - Educating the client
 - Affidavits; reports; rebuttals
 - Deposition (yours and assistance with that of opposing expert; attendance at those of witnesses)
 - Trial
 - Appeals
- Do you have the time and capacity?

Budget Issues

- When does the meter start?
- How much do you invest before getting formally retained?
- Billing arrangement
 - Fixed fee for project or hourly rates
 - No contingency
 - Do hourly rates vary by nature of work?
 - Travel time?
 - Court time?
 - What expenses are billable?
 - Need to clarify in engagement letter
 - Frequency of billing and timing of payment

Documents

- What is available?
- Assist counsel with discovery request
- Publicly available documents

Engagement Letter

- Identify client and contact information
- Describe project
- Confidentiality
- Billing arrangement
- Reliance on client-supplied data and information
- Forum

Competency and Professionalism

- Qualification standards
- Actuarial Standards of Practice:
 - ASOP 17: Expert Witness
 - ASOP 41: Actuarial Communications
 - ASOP 23: Data Quality
 - Specific ASOPs addressing the issues at hand
- Documentation: DAMP
- Peer review: SAO

ASOP 17

However, an actuary providing expert testimony should comply with the requirements of the *Code of Professional Conduct*. In particular, the actuary should act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public, and should take reasonable steps to ensure that the expert testimony is not used to mislead other parties.

ASOP 17: Expert Witness

This standard applies to actuaries when they testify as actuarial experts at trial, in hearing or arbitration, in deposition, or by declaration or affidavit. This standard does not apply to actuaries providing litigation support other than the expert testimony itself. However, actuaries providing such litigation support may consider the guidelines in this standard to the extent that it is applicable and appropriate.

Your Report

- State the issues that you and the attorney have agreed will be addressed
- State your factual basis (cites)
- State your actuarial basis
- State your conclusions
- Append your work
- State your qualifications
- Do NOT claim credentials that you do not have!
- List documents relied upon

Deposition

- Moment of fame
- Work papers clean, in order, and in hand
- Avoid multiple versions of same documents
- Right to counsel
- Billable time
- Clarify who pays

The Other Side

- Review of depositions and documents
- Finding flaws in opposing expert's analysis and reports
- Identify sources of differences:
 - Assumptions
 - Data
 - Methods
 - Legal theories

What Else

- Opportunity to advise on settlement
- Advise on relative strengths and weaknesses of both sides' positions

Roles of the Actuary

- Educator
- Reporter
- Evaluator

Expert as Educator

- Challenge: most people have no idea of what an actuary is or does
- Actuary must educate the audience (attorneys, judge, arbitrator, mediator, or jury)
- The best experts can explain complex concepts in simple terms
- The best actuaries are not necessarily the best experts

Good Testifying Expert

- Can simplify complex concepts so that laypersons (e.g., typical juror) can understand and appreciate
- Concise
- Focused
- Doesn't quibble
- Direct and responsive

Good Testifying Expert

- Believable and trustworthy, truthful
- Consistent
- Exhibits thorough knowledge
- Uses graphics and analogies to make complex concepts understandable
- Confident, not arrogant
- Appears unbiased

Ineffective Testifying Expert

- Evasive
- Long winded, detailed explanations full of jargon
- Unfocused
- Argumentative
- Inconsistent
- Unprepared
- Appears biased

Working with Counsel

- Understand your client's theory of the case
- Know the difference between law and actuarial science
- Inform client immediately if you disagree with their theory of the case
- Advise in law as you know it, but recognize your limitations

Be Ready

- Assume opposition will research you
 - Internet
 - Prior testimony, reports, articles, speeches, quotes in the press
 - It's all fair game
 - It may be taken out of context
 - Do the same for opposing expert
- Be ready for loaded questions – compound questions
 - When did you stop beating your wife?
 - When did you stop abusing your children?

Do and Don't

- Don't make claims of actuarial (or other) credentials or experience that you do not have
- Do put the required qualification statement in your report
- Do get your work checked and peer reviewed
- Do allow adequate time to do the project
- Don't take a position that you do not agree with

Examples of Expert Witness Assignments

- Unfunded top-hat plan financed with individual life insurance policies – but covering rank and file employees
 - Plan sponsor and plan versus broker and insurance company
- Malpractice case against actuary – reasonableness of fees to effect corrections
 - Plan sponsor and plan versus former actuary
- Age discrimination – valuation of damages, if any
 - Former employee versus employer

Examples of Expert Witness Assignments

- Accuracy and completeness of data provided to underwriter
 - Insurance company versus employer
- Wrongful discharge – evaluating former executive's actions in amending executive programs to his or her benefit
 - Executive versus company
- Evaluating whether or not life insurance policy was an appropriate investment of a pension fund
 - Small business owner and pension fund versus broker and insurance company

Questions?