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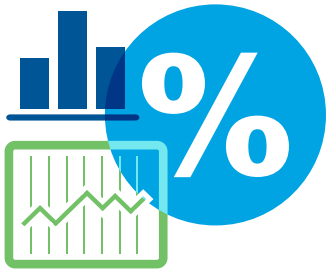

Financial Services Employment Arbitration Q&A

The Unique Role of Expert Witnesses in FINRA Employment Arbitrations

By Eric M. Steinert and Cameron A. Smith

Part I: An Overview

Despite the prevalence of expert witnesses in FINRA employment arbitrations, FINRA's arbitration rules are virtually silent on the topic. In contrast, expert witnesses in civil litigation are the subject of detailed statutes, procedural rules, and well-developed case law regarding their disclosure, discovery, reports, and the admissibility of their testimony.

This article explores the unique role of experts in FINRA employment arbitration and concludes with a brief Q&A with an experienced securities-industry expert, Jay Rosen.

Disclosure, Discovery and Qualifying as an Expert

In FINRA arbitration, there are no required early disclosures and no required reports. Expert discovery is typically nonexistent, because experts are rarely identified prior to the 20-day exchange, reports are rarely created before the discovery cut off, and depositions are generally prohibited.

Experts are typically disclosed simultaneously in the 20-day exchange, after which they are typically permitted to testify at the hearing as "experts" with no prior disclosures as to the subject matter or scope of their opinions. This is very different from civil litigation where the expert and his or her opinions are subject to detailed disclosures, required reports (in federal court and some states), written discovery, and depositions.

Qualifying as an expert is often rather perfunctory in FINRA arbitrations. An expert timely disclosed in the 20-day exchange will generally be allowed to testify as such at the hearing. Contrast this with the extensive use of *Daubert* motions in federal practice and various state-court pretrial challenges to an expert's qualifications and the scope of his or her testimony.

By the time an expert testifies in a civil trial, his or her qualifications and opinions will have been extensively challenged. But in FINRA arbitration, opposing counsel will have scant information before the evidentiary hearing regarding the subject matter and scope of the expert's testimony. Challenges to the expert's qualifications and opinions must all be conducted on cross examination, after the Panel has already heard the expert's testimony in full.

The Expert's Presence at Hearings

The expert's permitted presence at all evidentiary hearings is probably the biggest departure from the expert's role in civil litigation. FINRA Rule 13602(a) provides that experts "should be permitted to attend all hearings" absent "persuasive reasons to the contrary." The FINRA Arbitrator's Guide (at p. 51) explains that expert witnesses "express views, give interpretations and apply their standards of expertise to facts others have provided," and that they "should be permitted to attend all hearings" absent "persuasive reasons to the contrary."

Experts testifying in a civil trial are typically sequestered until their cameo appearance at trial. In FINRA arbitrations, however, the expert may sit through the testimony of all witnesses before testifying.

Scope of Opinions

The scope of expert opinions is another area of major divergence. For example, in federal and state-court civil litigation, an expert deemed sufficiently qualified in a particular field may offer an opinion, provided that expert's specialized knowledge would be helpful to the jury in understanding the evidence or determining a factual issues. (*See* Federal Rule of Evidence 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); California Evidence Code Sections 801-805).

For example, in employment cases experts often provide opinions in specialized fields such as psychiatry, to help jurors understand symptoms of emotional distress, or in economics to help jurors understand damages calculations or job availability in certain labor markets. Although their opinions may "embrace" an ultimate factual issue (*see* Cal. Evid. Code Section 805), experts typically may not directly opine on ultimate factual or legal issues (*e.g.*, the sufficiency of evidence to establish legal liability).

FINRA arbitrations are different. First, all FINRA arbitrations occur in the context of a heavily regulated industry, parts of which can be technically complex. In an employment arbitration, there is almost always some justification for an expert to explain the regulatory and compliance context of a particular employment decision, policy, or practice. In addition, there is often a greater need for quantitative testimony regarding the impact of an employment action on a Claimant's book of business. Similarly there may be a need for an expert to testify about certain industry standards regarding certain compliance or management practices.

Moreover, experts in FINRA arbitrations may – subject to the Chair's discretion – offer opinion testimony much closer to the line regarding ultimate factual or legal issues, such as the sufficiency of the evidence as it relates to an ultimate legal issue, or even the credibility of a witness' testimony. The argument in favor of this practice, however, is that the Panel may give the expert testimony whatever weight it chooses, and may be in a better position than lay jurors to do so given their level of experience and familiarity with the industry. Whereas the average FINRA arbitrator has sat through many arbitrations, the typical lay juror is usually sitting for his or her first and only trial.

Application of Attorney-Client Privilege and Attorney Work-Product Doctrine

Nothing in the FINRA rules speaks to whether attorney communications with experts are privileged, although as a general matter FINRA arbitrators treat communications with experts as privileged. This is consistent with Federal Rule of Civil Procedure 26, which was amended in 2010 to extend attorney work-product and attorney-client privilege protections to draft expert reports and communications between counsel and expert witnesses.

Although contrary to the federal rule and general practice at FINRA arbitrations, some states such as California do not extend work-product protection or attorney-client privilege to an attorney's communications with testifying experts. Since FINRA experts are typically engaged in both a consulting and testifying role – as they frequently sit through the evidentiary hearing with the party and counsel that retained them – the application of privilege and work product protection to this unique relationship makes more sense.

Conclusion

Experts play a unique and widespread role in FINRA employment arbitrations. This is true historically, although the role has changed over the years – particularly with the more recent de-emphasis of industry arbitrators, and the ongoing legislative and regulatory proposals to limit the role of industry arbitrators and even to limit public arbitrators with industry connections. The expert's role in FINRA employment arbitrations differs in many significant ways from civil litigation. Hopefully, this article has provided a helpful overview in understanding the role of expert witnesses in FINRA employment arbitrations.

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