

3 Tips To Supersize Your Expert Witnesses' Contributions

By **Caroline Simson**

Law360, New York (August 31, 2016, 7:14 PM ET) -- Testimony from an expert witnesses can often be the deciding factor in the outcome of an international arbitration, underscoring the importance of ensuring that you've chosen the right witnesses to back your client's claims and that those witnesses are properly prepared.

To the uninitiated, choosing an expert witness to help convince an arbitral tribunal that the law is on your client's side may seem like an easy task — just choose the expert with the most expertise in the area that you need. And indeed, ensuring that the expert you choose has the appropriate expertise should be among a lawyer's top considerations.

"It goes without saying, but it's worth stating because it's so important," said Kwadwo Sarkodie, a partner in Mayer Brown LLP's London office. "Parties need to be wary of appointing a jack-of-all-trades."

But not only is finding an expert with the exact knowledge needed not as easy as it sounds, it's also not the only consideration that lawyers should keep in mind. Here, experts share with Law360 their tips for making sure that the experts you choose won't be a liability.

Expertise Is Key, But the Inquiry Doesn't End There

As with buying any professional service, determining whether an individual's expertise is exactly what will be needed during an arbitration can be a tricky business.

"Expertise is obviously the most important thing, but it's hard for an attorney to know whether the person who's talking, who sounds terribly complex and impressive, is really top-drawer or not," said James Searby, a senior managing director in FTI Consulting Inc.'s economic and financial consulting practice who has given evidence before both courts and arbitral tribunals.

To ease the task, attorneys can turn to experts' publications and reputations in the field to guide them to appropriate candidates.

Even so, once attorneys have determined that an expert has just the expertise needed for their arbitration, that doesn't mean the search is over.

"The first, second and third test for any expert witness is credibility," said Joe Profaizer, the head of Paul Hastings LLP's international arbitration practice. "Just like real estate is 'location, location, location,' with

expert witnesses, it's 'credibility, credibility, credibility.'"

When searching for a credible witness, lawyers should turn to individuals who have mastered their fields and an ability to present their knowledge in articulate, clear and persuasive ways, Profaizer says.

That credibility can be reflected in the way that expert witnesses present testimony. It's important to ensure that expert witnesses have critical thinking skills, according to Sharon Johnson. Johnson is the co-head of the international arbitration and litigation practice of Cornerstone Research, a firm that provides economic and financial analysis in arbitrations and other proceedings.

"A good expert should not be dogmatic. It should be somebody who's thoughtful in approaching his or her analysis," she said. "I usually recommend that people try to either interview an expert in person or by video conference, so they can see them and see how they respond to questioning."

Effective Communication Is Essential

Expertise and credibility are key for expert witnesses in any proceeding, but when it comes to choosing an expert witness for an international arbitration, there are additional considerations to keep in mind.

"A key feature of arbitration is that tribunal members can be selected for their knowledge and expertise in the area of the dispute; party-appointed experts can provide an important means by which this benefit may be further enhanced and supplemented," Sarkodie said.

Expert witnesses should be able to tailor their comments to be most effective for the tribunal members to whom they will be presenting their evidence, he says.

In addition, it's far more likely for members of the tribunal to hail from different legal backgrounds and experiences, so the ways experts will most effectively speak to the tribunal members will be different, according to Profaizer.

As a result, it's critical that expert witnesses know whether their testimony is finding its mark, Johnson says.

"It's not just what comes out of their mouth, but also what they see, and being able to read the audience to ensure that their testimony is being understood and is on point," she said.

Finally, when dealing with a proceeding that is, by its nature, international, having experts who can effectively converse with others will be essential in ensuring that they understand the situations behind the arbitrations. That might mean speaking with employees at the scene, or poring over relevant documentation, according to Sarkodie.

Prep Your Witness, Then Get Out of the Way

Now that you've found the perfect expert witness for your arbitration, what's the next step?

While it's frowned upon in international arbitration to get too involved in the preparing of expert witnesses — for example, telling them how to present their testimony or which aspects to comment on — one of the worst mistakes lawyers make is providing their witnesses with only a small picture of what's at stake in the dispute, or to not provide the expert with all the documentation that they might

be presented with by the other side or the tribunal.

"There's nothing worse than sitting in the witness box and being confronted with a document you haven't seen before, or a piece of new evidence that you're unfamiliar with," Searby said. "You don't want your expert to be surprised."

To avoid that, it's imperative to ensure that experts have deep understanding of the cases, according to Profaizer. It's likewise important to ensure that their expert opinions are well-documented and that they provide a comprehensive understanding of the issues involved, which will assist the tribunals in making decisions, he says.

That said, once you're confident that your expert witness has enough of an understanding as possible of the issues to avoid being broadsided before the tribunal, it's equally important to get out of the way. Expert witnesses who are perceived by tribunals to be independent from the parties that appointed them will be far more effective than any "hired gun."

"Independence is really key, because anybody can say, 'Well, I've lost a million dollars.' But when an expert sits there and says, 'Yes, they have really lost a million dollars,' that testimony has greater weight and it has greater weight if the expert is independent," Searby said. "An expert who sounds like an advocate for a party can undermine the weight of their own testimony."

--Editing by Katherine Rautenberg and Rebecca Flanagan.