

## EFFECTIVE USE OF EXPERTS IN ADR

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**The engagement of an expert can be a vital step in assessing the issues, strengths and weaknesses of a case. The practice of litigation counsel is frequently to hold the evidence obtained from an expert close to their vest until late in the proceedings. This article examines whether there are ways to use experts early and more effectively to resolve those disputes that primarily turn upon expert evidence.**

In most complex cases, it is inevitable that expert evidence will be required to assist in a determination of the issues. Indeed in certain cases, such as products liability or construction defect cases, expert evidence may be critical to determining the outcome of the case. While experts are frequently used at trials and arbitrations, are there effective ways to deploy experts for ADR purposes without having to proceed through to a trial or arbitration? Can experts be effectively used at a mediation?

Some key factors to consider in using experts to assist in the resolution of disputes are as follows:

### 1. Retention of Experts

Experts should be engaged as soon as possible. In certain cases, it is beneficial to involve them even before preparing your pleadings. Early on an expert can assist legal counsel with an analysis of the pleadings; assess the strengths and weaknesses of the case; aid with providing industry or product knowledge; or analyze damage claims and accounting or financial issues. All of these are important issues in determining whether, when and how a case can be effectively resolved. Finally, an expert may be able to assist in the mediation process itself or identify a suitable mediator or arbitrator.

### 2. Use of an Expert for the Purpose of Preparing for a Mediation

For the purpose of a mediation, an expert can assist in identifying key issues; organizing your presentation for the mediator; and enhancing the credibility of your position. More specifically, the expert can provide opinions regarding key issues (e.g., product defect issues or damage causation issues), damage calculations, valuations of businesses or losses, etc. Experts can also provide an evaluation of the position of the opposing party, which is useful in assessing the resolution strategy on behalf of your client.

### 3. Expert Attendance at a Mediation

In certain cases, consideration should be given as to whether it would be beneficial to have an expert attend the mediation, even for a limited purpose. To be effective, the mediator may very well want to hear directly from the expert (as opposed to reviewing an expert report) to better understand the technical issues and to obtain an explanation from a third party source.

#### **4. Importance of an Underlying Mediation Agreement**

Most non-binding mediations are confidential and conducted on a without prejudice basis such that the information gained during the mediation cannot be used for other purposes. Depending upon the stage of the litigation, expert reports may not yet have been exchanged between the parties. Therefore, consideration needs to be given as to whether to include an expert report when the mediation is conducted and how that may impact the ongoing litigation strategy. If it is thought highly beneficial to have your expert present, even for a limited purpose, then this should be addressed in any mediation agreement.

#### **5. Concurrent Expert Evidence or Hot-Tubbing of Experts**

One final consideration in complex, multi-party litigation is whether it would be beneficial in seeking resolution to have concurrent expert evidence or “hot-tubbing”. This can involve a more collaborative process where experts provide their evidence concurrently while allowing for questions from all the applicable parties, including potentially other experts. In those cases that depend largely upon expert evidence, there may be a benefit to creating an ADR process where several experts are present to discuss the issues. This could be an effective way of identifying the issues and the real areas of dispute, and determining where there is any commonality and whether there are creative solutions, outside of a traditional monetary payment or damages. Again, care will need to be given to the rules and agreement behind such a process, including any confidential aspects and how any evidence can later be used outside the mediation process should the matter proceed to trial.

While engaging experts may be costly, they can also play a significant role in assisting with the resolution of a case at an earlier juncture, particularly where assistance can be given in the development of more creative solutions for the parties.

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