

# **EFFECTIVE ADVOCACY IN ARBITRAL HEARINGS: MANAGING EVIDENCE, WITNESSES AND TRIBUNAL ENGAGEMENT**

**TRAINING PROGRAMME FOR STATE ATTORNEYS UNDER THE OFFICE OF THE SOLICITOR GENERAL**

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# Expert Defined

The Royal Institution of Chartered Surveyors ... provides an apt definition for an expert witness:

***‘An expert witness is a person engaged to give an opinion based on experience, knowledge, and expertise. The overriding duty of an expert witness is to provide independent, impartial, and unbiased evidence to the court or tribunal.’***

***By Charles O’Neil, The Duties and Responsibilities of Expert Witnesses.***

# Use of Expert Evidence

**“Evidence from an expert is used when the evaluation of the issues in dispute involves technical or other subject knowledge that only real experts would have and that would likely be outside the knowledge of laypersons and those trying the case”.**

# *Experts – Overview*

- **Role:** An expert witness is a person engaged to give an opinion based on experience, knowledge and expertise in a given field
- **Evidence presented:** An expert witness should provide independent, impartial and unbiased evidence to the court
- **Purpose:** An expert witness should assist the court in understanding the evidence or determining a fact in issue

# ***Experts – Types***

- **Scientific Experts**

- Those who base their testimony on scientific tests and methods

- **Training and Experience Experts**

- Those who base their testimony on their given training, personal observation, and experience

# ***Experts-Types Cont'd***

- **Forensic scientists**

- Morphology

- DNA

- **Forensic accountants**

- **Animal veterinarians specializing in wildlife**

# ***Experts-Types Cont'd***

- **Wildlife officers**
- **Medical professionals**
- **Environmental scientist**

# **Expert Witnesses Overview**

- Experts address technical or financial issues**
- Their independence is crucial**
- Expert evidence carries significant weight**

# Legal Basis for expert Witnessess

- *The Evidence Act 1967 (the “Act”)*
  - Governs the admissibility of evidence in Tanzanian courts
    - Note: admissibility – whether or not a piece of evidence can be accepted by the court
  - Sets out procedures for introducing certain kinds of evidence including, for example, documentary evidence, photographic evidence, and expert evidence

# Legal Basis for expert Witnesses

- Evidence may be given as to the existence or non-existence of every fact in issue, and any other facts declared relevant in the Evidence Act (section 7 of the Act)
- *“Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess”* – **Stephen Kinini Wang’ondu v The Ark Limited [2016]**

# EXPERT EVIDENCE UNDER PCA RULES REVISED

## 2010

### Article 29:

1. After consultation with the parties, the **arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.** A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence.
3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them.

# EXPERT WITNESSES UNDER ARBITRATION ACT, CAP 15

- 44.–(1) Unless otherwise agreed by the parties-
  - (a) the arbitral tribunal may-
    - (i) appoint experts or legal advisers **to report to it and the parties;** or
    - (ii) appoint assessors to assist it on **technical matters,**and may allow any such expert, legal adviser or assessor **to attend the proceedings;**
- (2) The **fees and expenses of an expert** appointed by the arbitral tribunal for which the arbitrators are liable **shall be expenses borne by the arbitrators.**

# **EXPERT EVIDENCE UNDER PCA RULES REVISED 2010... cont'd**

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the **parties, which shall be given the opportunity to express, in writing, their opinion on the report.**

5. **If a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of the report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue.**

# Expert Witnesses and the Law of Evidence Act

- *“The competency of all expert witnesses should, in all cases be shown before his evidence”* – **Francis Mugambi N’Chuke VR [2009]**
- Facts not otherwise admissible are admissible if **they support or are inconsistent with the opinions of experts**, when such opinions are relevant ( section 48 of the Act)

# *Examination of Expert Witnesses*

- Court to decide as to the admissibility of evidence (section 145 of the Act)
  - Relevance and reliability of the expert testimony
- Expert may refresh his memory by reference to professional treatises (section 170 of the Act)
  - Note: treatise – reliable authority in a given field

# *How to use experts more effectively*

- **Speaking with an expert early will help to clarify the evidence and understand the facts**
  - Provide documents to your expert early for a complete analysis
  - Experts can advise on other possible evidence that you should seek
  - Expert opinions can inform your charging decisions or plea negotiations
  - Do not wait until trial to speak with your expert

# *How to use experts more effectively... cont'd*

## ■ **Listen to your expert**

- Engage with your expert. Do not have them testify simply because it is required.
- Be flexible with your case theory and listen to critiques.
  - Remember experts are impartial. Do not expect your expert to fit into your case theory.
- Listen to warnings from the expert. Any flaw ignored can be an argument for the opposing side.
  - Be careful what your expert puts in writing.

# *How to use experts more effectively... cont'd*

- **Research your expert**

- Know your experts background and where they stand among their colleagues
- Is your expert's opinion consistent with the majority of experts?
- Anything in your experts past that may reduce their credibility?

# *Choosing an Expert*

- **Not every expert is an effective expert witnesses.**
- **Experts more persuasive if they are:**
  - Knowledgeable
  - Well prepared
  - Impartial
  - Dynamic
  - Confident

# *Expert's Testimony*

- **An experts' communication skills are essential**
  - Be brief, no long narratives
  - Use simple language, avoid technical and shorthand terms
  - Use visual aids
  - Use examples and analogies
  - Speak as equals, not as someone with superior knowledge

# Preserving witness credibility before tribunals

If from Laboratories should have records of:

- The systems, protocols, and control processes for each analytical method employed;
- Equipment calibration and maintenance; and
- Personnel qualifications and training.

# Preserving witness credibility before tribunals... cont'd

- **Individual test methods should be controlled by standard operating procedures that define:**
  - How a test should be performed
  - How the results should be analyzed and interpreted,
    - Consideration of possible sources of error and conditions that may affect the accuracy of the results
    - History of false-positives
- **All test methods should have documented validation protocols and reports**

# Preserving witness credibility before tribunals... cont'd

- **Contamination of forensic material may occur anywhere between the scene of crime and the laboratory**
- **Therefore, it is imperative everyone in the Chain of Custody follows proper procedures when:**
  - Collecting
  - Packing/Storage
  - Transporting
  - Analyzing/Testing

# Preserving witness credibility before tribunals... cont'd

- The expert can be the person who conducted the analysis or another expert similarly qualified
- Discuss the significance of the findings with an appropriately trained expert witness
- Check the qualifications of your expert(s)
  - Insufficient expertise may be a cause for challenge

# ***Examination in Chief of Expert Witness - Lay the foundation***

- Introduction, credentials, and qualifications
  - Years of study and relevant degrees
  - Years of experience with relevant matters
- Expert's opinions
- What the expert did
  - Analysis, test results, etc.
- Bases for opinions
  - Explain and support conclusions

# *Cross-Examination of Experts*

## ■ **Expert's Qualifications**

- Has the expert attained the highest degree in that field?
- How much hands on experience do they have?
- Is their expertise in a different area than the one involved in the trial?

## ■ **Bias and Interest**

- Whether the expert widely advertises his services
- How much money he makes from testifying
- Primarily testifies for plaintiffs or defendants or a particular lawyer or law firm

# *Cross-Examination of Experts...cont'd*

- **Data Relied On**

- Accuracy of information or sources given
- Assumptions made

- **What the Expert Did Not Do**

- Identify all the procedures and tests that can be done and show some were never done

- **Prior Inconsistent Statements**

- Commit the expert to her testimony, credit the impeaching source, confront the expert with the prior statement

# Generally cross examining Experts

**Probe methodology**

**Challenge assumptions**

**Compare with opposing expert**

# ***Common Challenges-Experts***

- Improperly obtained evidence
- Gaps in the chain of custody
- Contamination
- Methodology for testing and analysis
- Inconclusive results
- False positives
- Credibility or qualifications of expert

# Concurrent expert evidence (“hot-tubbing”) in arbitration

**“a technique in which two or more fact or expert witnesses, presented by one or more parties, are questioned together on particular topics by the arbitral tribunal and possibly by counsel.”**

- ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, 2012

# **Why Concurrent expert evidence (“hot-tubbing”) in arbitration**

**Overall, the idea is that through hot tubbing the experts are able to identify:**

- where they agree on issues;**
- where they disagree, and, why;**
- The court or tribunal will be better positioned to understand the complex technical issues in dispute.**

# Why Concurrent expert evidence (“hot-tubbing”) in arbitration... cont’d

- Experts offer their analysis in a setting where **opposing experts can question or challenge their conclusions immediately and directly.**
- Hot tubbing **allows experts to identify inaccuracies** in the opposing expert’s testimony immediately and
- **Experts engage in a discussion** concerning the inaccuracies **in front of the court or tribunal** rather than days or even weeks later.