

Evidence 101 for Arbitrators



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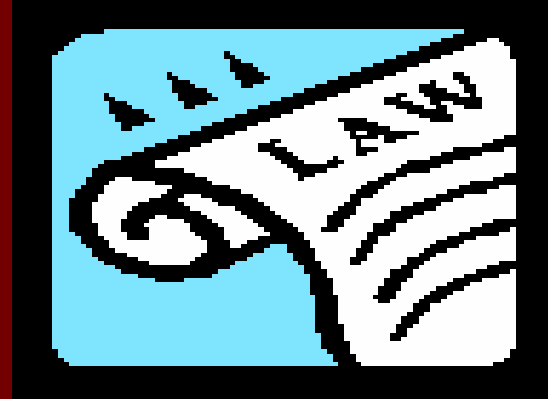
Scope of Arbitrator Discretion to Establish Procedures Governing the Arbitration

- Arbitrators have “broad latitude” with respect to procedures



Sources of Broad Authority

- The Federal Arbitration Act
- Typical Arbitration Clauses



Federal Arbitration Act

- Arbitration award may be vacated if:
 - there was evident partiality or corruption in the arbitrators, or any of them;
 - the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced

9 USC § 10 (2), (3)

Typical Arbitration Clause

"As a condition precedent to any right of action hereunder, any irreconcilable dispute between the parties to this Contract will be submitted for decision to a board of arbitration composed of two arbitrators and an umpire **The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross-examination and rebuttal shall be allowed. . . .**"

BRMA Clause 6B (Arbitration)



- Arbitrators' Authority is Broad,
But Not Unlimited
 - Have to provide a “fundamentally fair” hearing

Requirement that Hearing be “Fundamentally Fair”



- Arbitrators should hear all evidence “material” to issues in dispute
 - Doesn’t mean have to allow duplicative evidence

Requirement that Hearing be “Fundamentally Fair”



- Arbitrators should not receive evidence “ex parte”
 - Both sides should have an opportunity to be present

Requirement that Hearing be “Fundamentally Fair”

- Apply rules of evidence – to extent followed – in an even-handed manner



Evidentiary Issues Arising in Reinsurance Arbitrations

Burden of Proof

- Party with the “burden of proof” as to a claim or defense must convince the triers of fact of the correctness of its claim or defense



Burden of Proof, cont.

- General rule in insurance cases:
 - Insured has initial burden to show that its claim falls within the scope of its insurance policy
 - Once initial burden has been met, insurer has burden of showing exception or exclusion to coverage
- General rule in reinsurance cases:
 - Cedent has initial burden to show it suffered a loss within scope of reinsurance agreement
 - Where applicable, “follow the settlements” eases cedent’s burden

Strict Rules of Evidence Don't Apply

■ Arbitration vs. Litigation

- Arbitrators, not bound to follow strict rules of evidence, commonly allow parties to introduce categories of evidence that courts would exclude under applicable evidentiary rules, trusting in their industry knowledge and ability to filter out the unimportant information



- Even if rules of evidence not strictly followed, consideration of principles underlying the rules can contribute to a fair hearing

Rules of Evidence: Underlying Principles

- Basic principle behind all rules: want the trier-of-fact to have before it information that is useful and reliable to deciding the issues in dispute, and want to keep out information that is not useful or reliable

The Rules of Evidence

- Rules that are rarely used in reinsurance arbitrations
 - Authentication and Identification (FRE 901)
 - “Original document” rule (FRE 1002)
 - Note that even in court, duplicates are generally admissible to same extent as original
 - “Judicial Notice” (FRE 201)

Rules of Evidence: The Key Players

- Witnesses
- Relevance
- Hearsay

Witnesses

- Competence/"Personal Knowledge"
 - Company "mouthpiece" with no contemporaneous involvement
- Writings used to refresh memory
 - Either before or while testifying
 - Document must be produced to adverse party

Witnesses, cont.

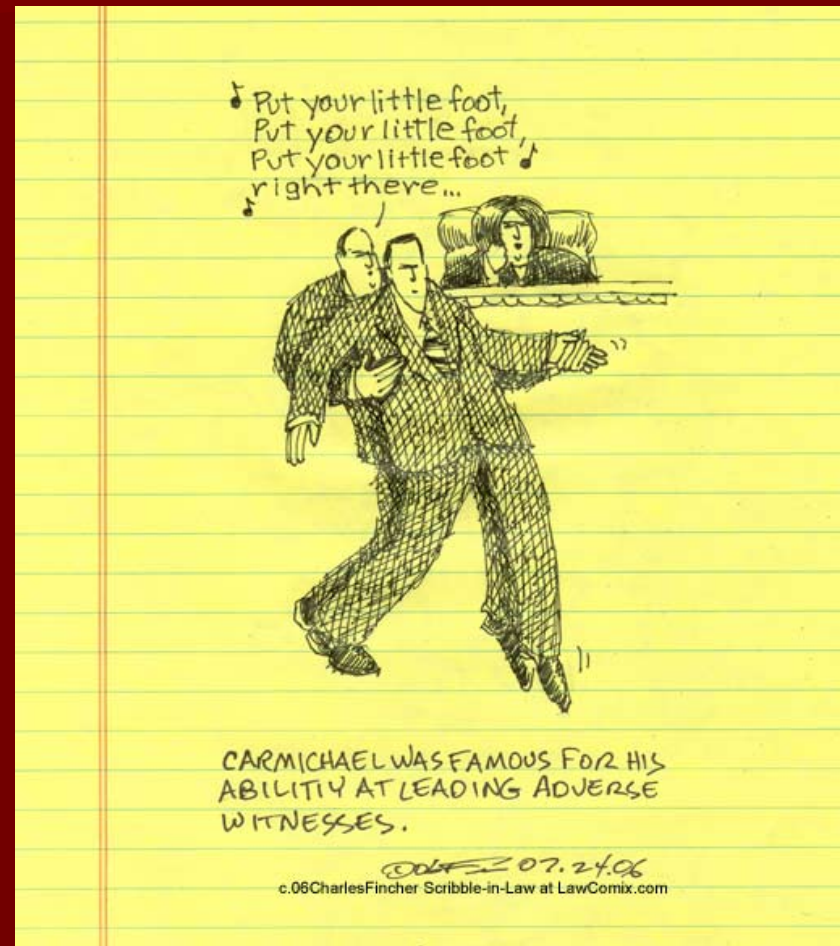
- Form and Order of Questions
 - Leading Questions
 - Scope of Cross Examination

Witnesses, cont.

- Leading questions
 - Questions that suggest the answer
 - Limited to
 - cross examination; and
 - as necessary on direct to develop witness' testimony on background issues and non-contested facts

Witnesses, cont.

- Leading questions
 - Rationale for rule: suggestive powers of the leading question are as a general proposition undesirable
 - want to hear the witness testify; not his or her lawyer



Witnesses, cont.

- Cross Examination
 - Limited to Scope of Direct
 - Rule tied to limitation on leading questions
 - Generally not applied in arbitration
 - Considerations of efficiency

Witnesses, cont.

- Expert testimony
 - Permitted when “scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue”

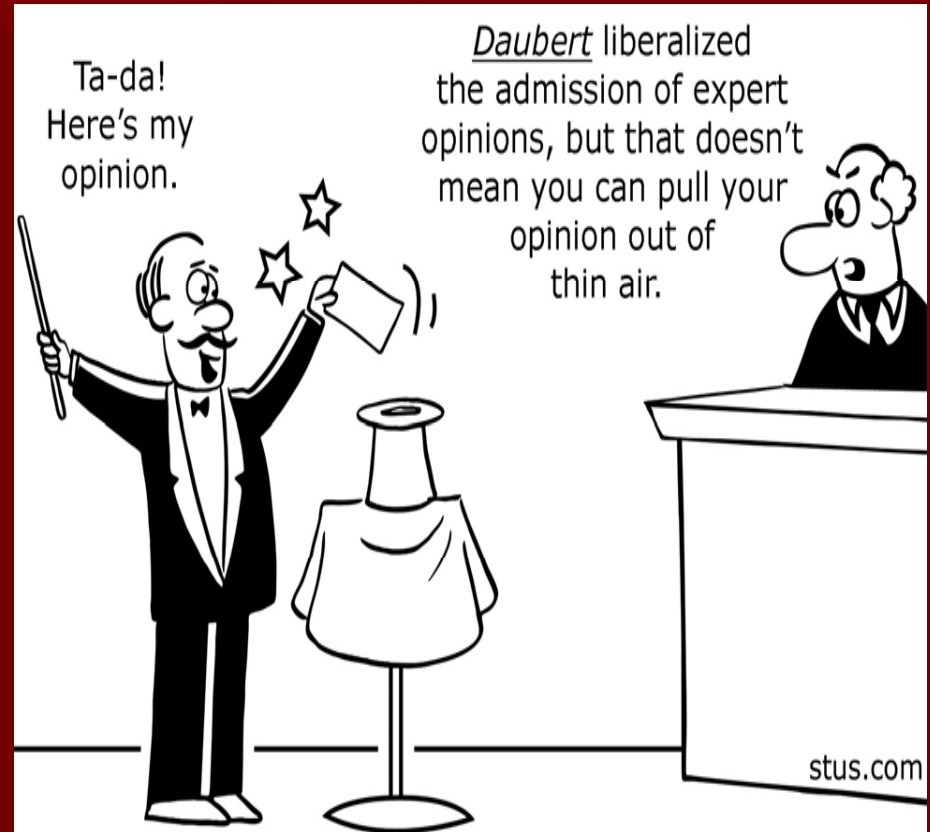
Witnesses, cont.

- Expert must be “qualified as an expert by knowledge, skill, experience, training, or education”



Witnesses, cont.

- Expert testimony must be based upon “sufficient facts and data” and be “the product of reliable principles and methods” that are applied reliably to the facts



Witnesses, cont.

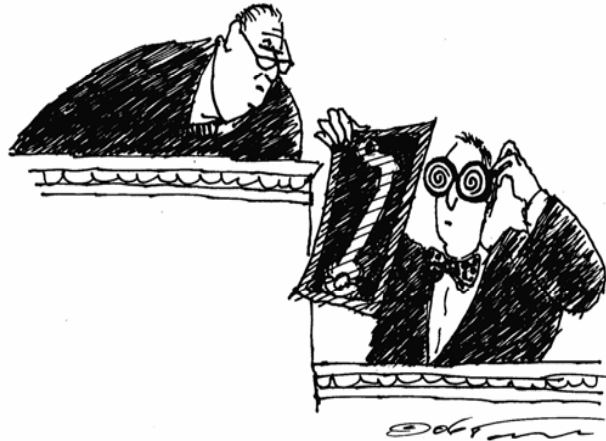
- Historically, reinsurance arbitrations conducted without resort to expert testimony
 - Arbitrators generally chosen because of their own expertise and experience
 - Underwriting experience
 - Actuarial experience
 - Claims experience
 - Arbitrators generally well-versed in reinsurance “custom and practice”
- In recent years, becoming more common for parties to offer expert testimony

Witnesses, cont.

- Court appointed experts
 - Must “advise the parties of the witness' findings, if any,”
 - May be deposed by any party,
 - May be called to testify by any party, and
 - Are subject to cross-examination by any party, including party calling the witness
- Panel appointed experts – same standards should apply

Witnesses, cont.

- Procedural and Strategic Issues Related To Challenging Expert Testimony



It was clear that a challenge to the expert witness' qualifications would occur when he put on those mail-order, X-ray glasses to read the film.

c.06CharlesFincher10.18 Scribble-in-Law at LawComix.com

Witnesses, cont.

- Opinion Testimony by Fact Witnesses
 - limited to opinions/inferences that are:
 - Based on firsthand knowledge, and the perception of the witness,
 - Helpful to understanding witness' testimony or deciding a fact in issue, and
 - Are not based on scientific, technical, or other specialized knowledge

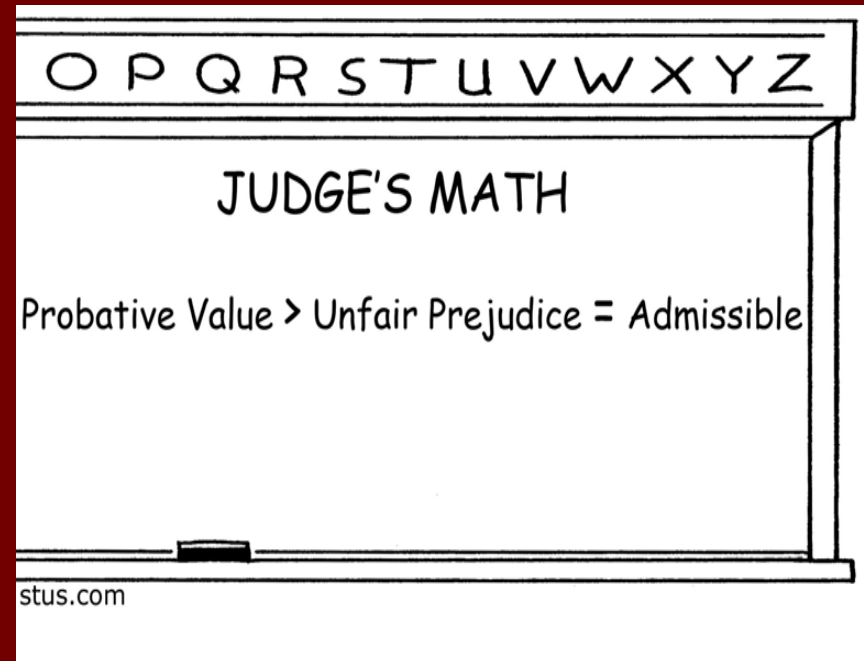
Relevance

- Does the evidence tend to make the existence of any fact that is important to the panel's determination of the merits more or less likely than it would be without the evidence?
 - Threshold question



Relevance, cont.

- Courts may exclude relevant evidence if relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation
- No jury to confuse in arbitration but panel may exclude relevant evidence if it is duplicative and admission would unduly prolong the hearing



Relevance, cont.

- Character Evidence
- Habit Evidence
- Settlement Discussions

Relevance, cont.

- General Rule:
Character Evidence
not admissible to
prove conduct
 - Exception: Character
evidence used to
attack the credibility of
a witness



Relevance, cont.

- Habit/Routine Practice
 - Relevant to proof acted in conformity with habit/practice on a particular occasion

Relevance, cont.

■ Settlement Discussions

- Evidence of settlement, offers to settle, or statements made in the course of settlements not admissible when “offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction”

Relevance, cont.

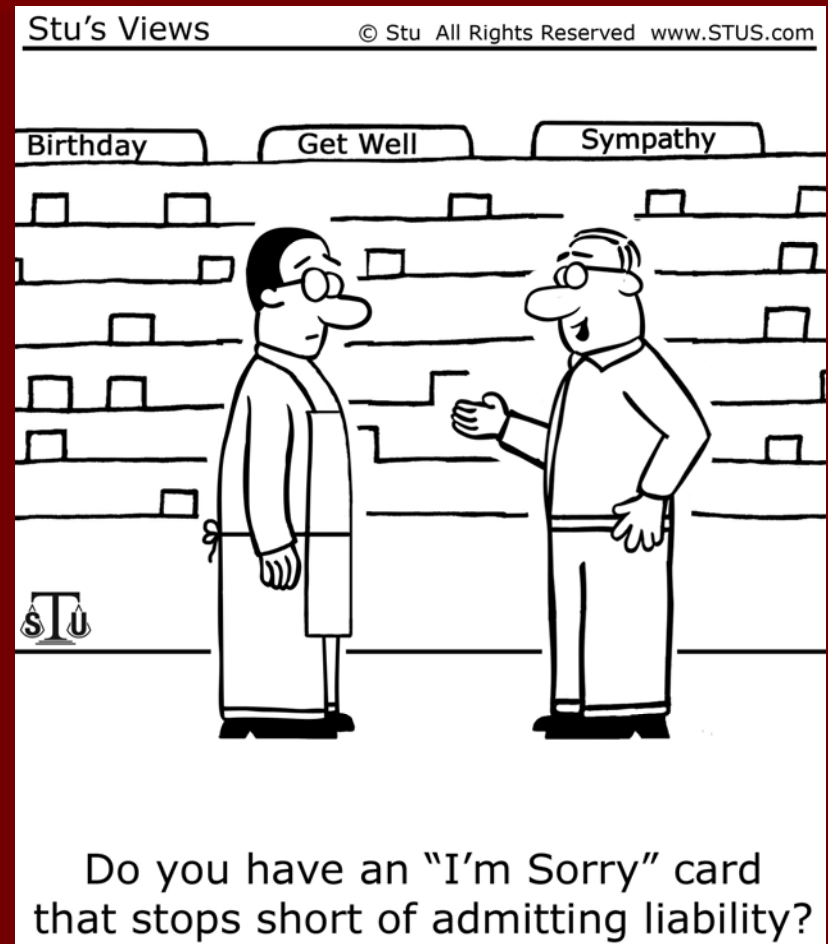
- Settlement Discussions: What is excluded?
 - evidence of settlement, offers to settle, or statements made in the course of settlements

Relevance, cont.

- Excluded when offered:
 - “to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount” or
 - “to impeach through a prior inconsistent statement or contradiction”

Relevance, cont.

- Rationale for rule excluding evidence of settlement discussions:
 - Promotes settlements by encouraging uninhibited settlement discussions
 - Questionable relevance of settlement offers and settlements to establish liability



Relevance, cont.

- Evidence relating to settlement discussions admissible if:
 - Offered for some other purpose than to prove liability for, invalidity of, or amount of disputed claim
 - Examples: to prove a witness' bias, to negate contention of undue delay, bad faith, breach of settlement agreement

Relevance, cont.

- Application of Settlement/Compromise Rule
 - Admissibility at reinsurance arbitration of cedent's conduct and statements during settlement negotiations with insured
 - Admissibility at reinsurance arbitration of settlement negotiations between cedent and reinsurer
 - Admissibility of settlement offers and negotiations at mediations and court-mandated settlement conferences where parties have signed agreements concerning non-disclosure of statements or offers
 - Discovery of settlement offers and negotiations

Hearsay

- A statement, other than one made by the person making the statement while testifying at the hearing, offered to prove the truth of the matter asserted

Hearsay, cont.



Hearsay, cont.

- General rule: hearsay is not admissible in a federal or state court trial or hearing

Hearsay, cont.

- Practice in arbitrations: commonly admitted without objection



Hearsay, cont.

- Rationale for rule excluding hearsay:
 - where the statement is offered for its truth, the perception, memory and sincerity of the person who made the statement cannot be tested through cross-examination



Hearsay, cont.

- Prior statements that are not hearsay
 - Statements that are not offered for their truth
 - Examples:
 - Statements offered to show effect on the listener
 - Statements that have their own significance merely because they were made (whether or not they are true)
 - Witness' own prior statements
 - Admissions by party-opponent

Hearsay, cont.

- Some categories of hearsay are admissible because:
 - Circumstances give statement some indicia of trustworthiness (i.e., the person making the statement is not likely to be lying), and
 - The question of whether the statement was in fact made can be tested by cross-examination of the testifying witness who allegedly heard the out-of-court statement

Hearsay, cont.

- Key Exceptions to Hearsay doctrine
 - Present sense impressions
 - Excited utterance
 - Then existing mental, emotional, or physical condition
 - Recorded recollections
 - Business Records
 - Absence of Business Record (to prove nonoccurrence or nonexistence of the matter)

Hearsay, cont.

- Hearsay, key exceptions
 - Public records and reports
 - Absence of public record
 - Statements in ancient documents
 - Applies to documents in existence at least 20 years
 - Market reports, commercial publications
 - published compilations, generally used and relied upon by the public or by persons in particular occupations

Evidentiary Issues Arising in Reinsurance Arbitrations

Common (and Uncommon)
Scenarios