

# The Actuary as an Expert Witness

CAS/AAA Casualty Loss Reserve Seminar

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# Agenda

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- Types of Expert Testimony by Actuaries
- Definitions
- Process
- Professional Guidance
- Pointers

# Types of Expert Testimony by Actuaries

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- Rate hearings
- Legislative reports and hearings
- Regulatory reports and hearings
- Insurance disputes
  - Damages estimates – claims, reinsurance recoveries
  - Premium rates
  - Insurance or reinsurance claims

# Types of Expert Testimony by Actuaries (cont.)

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- Actuarial malpractice litigation
- Tax court
- Bankruptcy court
- Arbitration/mediation
  - American arbitration association (AAA)
  - AIDA reinsurance and insurance arbitration society (ARIAS)
  - Bermuda arbitration rules
- Fact witness (w/ expert quals.) vs. expert witness

# Definitions

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- Expert
  - Qualified under “evidentiary rules” of the “forum” where actuary testifies
  - Applicable in the “forum” (court, regulatory hearing, legislative hearing, etc.)
  - Presumes actuary will accepted be as “qualified“ to testify and will actually testify
  - Understands the applicable “rules of evidence and procedure”
  - Federal Rule 26 – for expert reports <http://www.law.cornell.edu/rules/frcp/>
- Testimony
  - Communication of “opinions or findings”
  - “Oral or written”

# Definitions (cont.)

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- Forum
  - Trial
  - Hearing or dispute resolution
  - Deposition
  - Declaration or affidavit
  - Other

# Process – Consultation and Written Testimony

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- Agreement/rules of engagement as an expert
- Document review/consultation
  - Engaged as a potential expert (or engaged as a litigation support advisor initially)
  - By a principal directly or through lawyers representing the principal
- Advocating for your principal as an expert
- Expert report (written)
- Deposition
  - Oral in front of lawyers from both sides – in person or on Zoom
  - Court reporter types up everything said “on the record”
  - May also be video-recorded and/or audio-recorded
  - Not in a court with judge nor with hearing officer
- Review of opposing expert report
- Rebuttal report (written)

# Process – Oral Testimony

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- Direct testimony (in court or on Zoom)
- Cross examination (in court or on Zoom)
- Redirect (in court or on Zoom)
- Rebuttal (in court or on Zoom)



# Professional Guidance

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- Code of Conduct
- ASOP No. 17 – *Expert Testimony by Actuaries*
- ASOP No. 41 – *Actuarial Communications*
- ASOP No. 21 – *Responding to or Assisting Auditors or Examiners*
- ASOPs No. 20, 36, 43 – *Reserve Estimates and Opinions*
- ASOPs No. 12, 13, 25, 29, 30, 38, 39, 53 – *Rates, Risk Classification & Related Topics*
- ASOP No. 56 – *Modeling*
- ASOP No. 1, 23 – *Introductory ASOP (Actuarial Soundness), Data Quality*

# Professional Guidance – Other Guidance

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- Applicable laws and regulations
- Judicial procedural requirements
- American Academy of Actuaries – practice notes
- Accounting guidance (financial reporting)
- NAIC guidance and sample guidance from leading states
- “Peer Review – Concepts of Professionalism” discussion paper 2005 – American Academy of Actuaries
- Other guidance or precedents – authoritative or common practices

# Pointers – Written Testimony

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- The best testimony is very clear, understandable and brief
  - Long, wordy explanations are double-edged swords
- Arrange for peer review and tech review, when possible
  - Engage with your peer reviewer; use a peer reviewer who has limited or no role in deciding your findings or opinions
- Know that whatever you put in writing (even electronic notes) may be discoverable
  - No single standard for legally "discoverable"
- Make sure you understand what should NOT be put into any type of electronic record or communication – even deleted items

# Pointers – Written Testimony (cont.)

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- When in doubt, only discuss live (unrecorded) with your principal's legal counsel
  - Avoid texts, emails or any electronic notes (throw away handwritten notes and marked-up drafts once report is issued)
- Reader is not an actuary
  - Write to a non-actuarial, non-technical, non-insurance audience
  - Avoid being long-winded – nuances of actuarial practice are difficult for lawyers/judges to grasp clearly
- Actuarial jargon – easily misunderstood or ignored
  - Words like “credibility” and “expected value” can have a very different meaning to a judge, hearing officer or jury
  - Define (or avoid) acronyms and short-hand expressions (e.g., “IBNR,” “tail claims,” “pure premium,” “risk transfer”)
  - Take care to avoid or explain similar words with more than one meaning (e.g., “reasonably possible/probable”)

# Pointers – Written Testimony (cont.)

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- Documents reviewed or relied upon
  - Sometimes the list can be very long and include references the testimony of others
  - Be exhaustive – don't leave something out; you may need it later (cross examination, rebuttal report/testimony)
  - Note: you usually do not rely on everything you review (in forming your opinions)
- Look for references to prior testimony of opposing experts (when they are public or approved documents)
- What you discuss with your attorney – **is not protected** – you can be asked what discussions you had

# Pointers – Oral Testimony

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- Make sure you know what key points you (and your counsel) want to get on the record
- Rehearse or at least talk through your main points – how you will respond to questions
- Get your key points drilled into your short-term memory
- Listen carefully
  - Ask for the question to be repeated
  - Think before you speak (pause)
- Breathe – don't rush an answer
- Hydrate (usually allowed to have a bottle or glass of water on the stand)
- You can (and should) ask for a break when challenged or a bit confused

# Pointers – Oral Testimony (cont.)

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- You are not typically speaking to an audience with actuarial or insurance knowledge (except maybe in an arbitration)
  - You may well be the only actuary in the room
  - Speak plainly
  - Avoid jargon and acronyms
- Respond to help the judge understand
  - The judge is your audience, not the opposing attorney who is questioning you
- Note: An opposing attorney's nod may indicate your answer helps them rather than what you were trying to get across to the judge
  - Make sure your attorney knows to follow up in redirect questions for you

# Pointers – Cross Examination

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- Listen extremely carefully
- Opposing attorneys often make slight wording adjustments that make statements no longer correct
- Yes/No questions – this is a tactic to close off your ability to explain
  - Your attorney can (should) then ask you to explain later
  - Have some signal so your attorney knows you want a chance to explain your answer at the appropriate time
- Okay to say you don't know, you can't answer the question or you have not considered that question
  - DO NOT GUESS OR ASSUME
- You could be questioned about anything you have ever said in a public forum or wrote in a publication
- Don't engage in a debate on the stand
  - An attorney may (will) try to antagonize you with pointed questions
  - If you engage, or debate with them, you might be disqualified as a witness



# Pointers – Rebuttal

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- Written rebuttal reports
  - Allows you to read the opposing reports and rebut their statements or analysis with the reasons or explanations
  - You will likely be cross-examined about your rebuttal report
- Other expert reports – from all sides
  - Read the other expert reports, if you are allowed access to them
  - Listen intently to all experts who testify
    - Even those you are not expecting to rebut
- Help your attorney(s) focus on main rebuttal points
  - What will materially help the person(s) judging or hearing testimony to decide
  - Trying too hard to be persuasive on small issues could diminish how convincing you are on more critical points for their decision

# Questions?



# Thank You!

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