

# The Actuary as an Expert Witness

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## Introduction

Actuaries play a crucial role in society by assessing risk, ensuring companies maintain financial stability, and providing mathematical insight to decision-makers. Traditional actuarial roles typically entail pricing, reserving, or capital focused roles within the insurance industry. Actuarial experts are often called upon to opine on complex legal disputes, which is governed by various standards of practice and professional codes of conduct. In this whitepaper, we present:

- A definition of what constitutes an expert witness, highlighting the necessary qualifications, specialized knowledge, experience, and the distinction between consulting and testifying experts.
- Governance of actuarial expert testimony, outlining the professional standards and ethical codes, such as ASOPs and the Code of Professional Conduct.
- We examine the responsibilities of actuaries in providing expert testimony, including simplifying complex actuarial issues for courts and adhering to evidentiary rules.
- We provide examples of common legal disputes where actuaries are called upon, such as insurance pricing, pension disputes, and the cost of insurance adjustments.
- We explore the increasing demand for actuaries as expert witnesses, particularly in insurance and financial litigation

## Definition of an expert witness

An expert is an individual posing comprehensive and authoritative knowledge or skill in a specific area. Their expertise is recognized through substantial experience, education, and proven competency in their field. Expert advice is counsel provided by an individual who has extensively studied a subject or has significant skill in a particular profession. This advice is grounded in deep knowledge and proficiency, ensuring reliable and informed guidance. An expert witness is an individual authorized to testify in legal proceedings due to their specialized knowledge, skills, education, or experience in a particular field. Their role is to assist the court (judge and jury) in comprehending complex technical or scientific issues, thereby contributing to informed judicial decisions.

There are two types of expert witnesses:

1. **Consulting Expert:** This expert provides insight into the issues and facts pertinent to the dispute but does not testify in court. Their responsibilities include reviewing all discovery materials, advising attorneys on what should be presented to the testifying expert, and offering support through peer review of the testifying expert's work.
2. **Testifying Expert:** This expert submits reports to support the party they represent, undergoes deposition by the opposing side, and delivers testimony before a judge and jury.

### Governance

Actuarial expert consulting or testifying expertise is governed by numerous standards of practice, such as ASOP 17, as well as the Code of Professional Conduct.

An actuary offering expert testimony provides a vital service to their client, the judicial forum, and the public by clarifying complex technical concepts that are often essential for resolving disputes.<sup>1</sup> ASOP 17 supplements the Code of Professional Conduct (Code)<sup>2</sup> and is intended to provide specific guidance with respect to the actuary providing expert testimony. All Precepts of the Code require actuaries to adhere to high standards of conduct for the profession. The first three Precepts of the Code lay a crucial foundation for actuaries serving as an expert witness:

- Precept One: An actuary must conduct themselves with honesty, integrity, and competence, upholding the profession’s responsibility to the public
- Precept Two: actuaries should only perform actuarial services for which they are qualified
- Precept Three: actuaries shall ensure they perform actuarial services satisfying applicable standards of practice.

## The role of the actuary as an expert witness

An actuary as an expert witness is a person qualified to testify as an expert. The actuary providing testimony in a forum must demonstrate being qualified under the evidentiary rules applicable to the forum. Evidentiary rules determine what evidence can be admissible in a dispute. There are five general rules of evidence that need to be followed for evidence to be useful:

- Admissible
- Authentic
- Complete
- Reliable, and
- Believable

The “forum” may vary depending on the circumstances of the engagement as an expert witness. The forum for oral testimony may be at trial in a court of law, in a hearing for arbitration, or in a deposition outside of court; the forum for written testimony may be by declaration or affidavit.

Despite ASOP 17 §3.6, which suggests that an actuary may advocate for their principal when providing expert testimony, so long as it aligns with evidentiary rules and procedures, the primary role of an actuary in most disputes is to educate the court—both judge and jury—by elucidating complex technical issues central to the case. While the responsibility of delivering a favorable verdict rests with the judge and jury, actuaries, with their specialized education, training, and experience, are uniquely equipped to translate intricate insurance concepts into accessible language, helping non-experts grasp the key issues. This ability to clarify technical matters enhances the decision-making process.

<sup>1</sup> ASOP 17§3, [https://www.actuarialstandardsboard.org/wp-content/uploads/2014/07/asop017\\_087.pdf](https://www.actuarialstandardsboard.org/wp-content/uploads/2014/07/asop017_087.pdf)

<sup>2</sup> [https://www.actuary.org/sites/default/files/files/code\\_of\\_conduct.8\\_1.pdf](https://www.actuary.org/sites/default/files/files/code_of_conduct.8_1.pdf)

Typical cases or actuarial methods on which actuaries are asked to opine

Appendix 1 of ASOP 17 outlines the various practices where actuaries may be called upon to provide expert testimony. These encompass a wide range of issues, including but not limited to:

- Actuarial present values of retirement or other benefits
- Actuarial values incident to a divorce
- Adequacy or appropriateness of reserves, premium rates, pricing or underwriting procedures, or provision for administrative costs
- Cost impact of claims-made or claims-paid financing
- Cost impact of risk classification systems, tort liability decisions, or legislative/regulatory proposals
- Actuarial reviews of provider reimbursement amounts, provider network adequacy, provider comparison studies, provider quality reviews, and contractual provisions for various health care services
- Lost earnings of a decedent or injured person and the actuarial present value of such lost earnings
- Malpractice of an actuary
- Actuarial equivalency or other technical provisions in the design or administration of defined benefit pension plans
- Erroneous or issue-prone plan design, administration or communication of amendments to defined benefit pension plans
- Financial impact on a defined benefit plan of alternative interpretations of, or amendments to, disputed plan provisions
- Relationships between risk and return on investments
- Value of an insurance company or other entity
- Withdrawal liability assessments under multiemployer benefit plans.

## Additional relevant ASOP's

ASOP 17 is not the sole Actuarial Standard of Practice (ASOP) relevant to actuaries serving as expert witnesses.

As noted earlier, all Precepts of the Code of Professional Conduct apply, particularly Precepts One, Two, and Three. Additionally, ASOP 17 is pivotal, but ASOP 23 and ASOP 41 are equally significant in expert testimony scenarios. Other ASOPs, depending on the specifics of the dispute, may also be relevant (e.g., for COI adjustments, in addition to ASOP 17, 23, and 41, ASOP 2, 7, 12, 24, and 25). Furthermore, actuaries must adhere to all applicable federal, state, and local laws, regulations, case law, and other binding legal authorities that govern the actuarial work being performed.

ASOP 1 defines the purpose of ASOPs as providing guidance on what should be considered, executed, documented, and disclosed when rendering actuarial services. Importantly, ASOPs are not intended to shift the burden of proof or production in litigation; rather, they are designed for actuaries qualified through education and experience to apply them effectively. ASOPs are binding on members of U.S.-based actuarial organizations when delivering actuarial services within the U.S. However, they are not the sole considerations influencing an actuary's work. Other factors include legal and regulatory requirements, professional standards set by employers or actuarial bodies, evolving practices, and the actuary's own professional judgment, all informed by the specific nature of the engagement. The ASOPs serve as a foundational framework that accommodates these broader considerations, as do the Code of Professional Conduct and regulatory obligations.

This creates a unique challenge: actuaries serving as expert witnesses on opposing sides of a dispute rely on the same ASOPs, the Code, and regulatory frameworks to support their respective attorneys' positions. ASOPs establish broad, principle-based guidance for the work performed, but the interpretation and application of these principles depend on the actuary's professional judgment. The actuary's critical role as an expert witness is to translate these principles and apply them to the specific issues in litigation or arbitration, playing a key part in the resolution of the dispute.

## Opportunities for actuaries to serve as an expert witness

Insurance is a legally binding contract between two parties: the insured and the insurer. This agreement is formalized through an insurance policy, which explicitly outlines the obligations of each party. The insured is responsible for providing truthful information during the application process and consistently paying premiums to keep the policy active. The insurer, in turn, evaluates the applicant's risk, assigns a risk classification, accepts the applicant's representations as incontestable after two years, and ensures that the policy remains in force while fulfilling benefit obligations.

The same principles apply to reinsurance transactions. A reinsurance treaty, also a legal contract, governs the relationship between the cedent (the insurer transferring risk) and the reinsurer (the party assuming risk). Under the terms of the treaty, the cedent is required to issue and maintain business in accordance with the agreement and pay reinsurance premiums. The reinsurer agrees to assume the cedent's business risk, accept premium payments, maintain appropriate reserves, and meet benefit obligations.

Disputes often arise when one party believes the other has violated the terms of the contract. For example, if the insured is found to have made false statements within the first two years of the policy, the insurer can void the contract. Similarly, if the insured fails to pay premiums within the grace period, the insurer can terminate the policy. Universal life (UL) policies, in particular, can give rise to litigation when insurers increase the cost of insurance (COI) rates or fail to reduce them in accordance with policy terms, leading to potential class action lawsuits by policyholders.

In the reinsurance context, if the cedent fails to comply with the terms of the treaty, the reinsurer can terminate the treaty for future business or demand recapture of improperly issued business. Conversely, if the ceding company fails to pay Yearly Renewable Term (YRT) premiums, the reinsurer can withhold benefit payments. If the reinsurer does not properly assume the cedent's business or maintain adequate reserves, the cedent can terminate the treaty and recapture the business. Any failure by the reinsurer to meet benefit obligations or unauthorized increases in YRT rates can lead to arbitration between the parties.

The evolution of UL products in the 1980s marked a significant shift in the insurance industry, separating the savings and protection components of traditional whole life policies. Policyholders paid premiums into the savings component, which earned interest at no less than a guaranteed rate, while the COI charge applied to the protection component, calculated as the net amount at risk (NAR). While the COI and other charges were deducted monthly from the savings component, UL policies also introduced non-guaranteed elements (NGEs), such as variable interest rates and COI charges, subject to certain limitations. Early UL policies restricted COI rate changes to adjustments in mortality expectations, but by the 1990s, insurers had expanded these adjustments to reflect changes in interest rates, persistency, and expenses.

For many years, insurers refrained from adjusting the cost structures of UL products. However, starting in the early 2000s, prolonged low interest rates and deteriorating mortality experience at older ages prompted insurers to modify COI rates. While policyholders had grown accustomed to fluctuating interest rates, COI rate adjustments—particularly after policies had been in force for 10 to 15 years or more—were often met with surprise and resistance, leading to numerous class action lawsuits.

In parallel with the introduction of UL products, reinsurers began pricing UL reinsurance on a YRT basis. Cedents, seeking mortality risk coverage, leveraged the reinsurers' lower mortality assumptions, and YRT reinsurance was commonly issued on a 90/10 quota share basis. Although YRT premiums were non-guaranteed beyond the first year, cedents generally assumed that rates would remain stable, especially after decades of no adjustments.

Over the past two decades, numerous COI and YRT rate adjustments have occurred, sparking a wave of litigation and arbitration. COI disputes have resulted in class action lawsuits by policyholders, while YRT disputes have often led to reinsurance arbitrations. These complex cases have created significant demand for actuaries to serve as expert witnesses, offering lucrative opportunities for experienced professionals in this specialized field of practice.

## Conclusion

The role of actuaries as expert witnesses is increasingly critical in resolving complex legal disputes, particularly within the insurance and financial services industries. Armed with specialized knowledge and governed by strict professional standards, actuaries provide indispensable insights that help courts and arbitrators make informed decisions on intricate technical matters. From insurance pricing and pension disputes to cost of insurance adjustments, the expertise of actuaries enhances the legal process by translating complex financial concepts into clear, understandable terms. As legal demands continue to grow, actuaries have a significant opportunity to contribute their skills as expert witnesses, reinforcing their crucial function in both business and society. The guidance provided by ASOPs and the Code of Professional Conduct ensures that their testimony maintains the highest standards of accuracy, integrity, and reliability, further elevating the profession's impact on the judicial system.

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