

When Experts Testify – Exploiting the Advantages of Arbitration

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Experts can be a major cost in litigation, especially when technical or scientific testimony is critical. The Supreme Court's recent decision in *Kumho Tire Co v. Carmichael*,¹ – requiring judges to rule on the validity of any expert's methodology before permitting opinion testimony – increases the potential cost of using experts in litigation. It also creates new grounds for appeal whenever an expert testifies.

Arbitration can reduce your client's cost of expert testimony, without compromising your ability to argue the case. Arbitration has significant advantages over litigation when expert testimony is critical to your case. First, the parties can choose a decision maker who is an expert in the field (such as a Ph.D. biochemist) or has familiarity with the field (such as intellectual property lawyer). Second they can design a process for introducing expert testimony that will ensure its admissibility while reducing its cost. After briefly reviewing the constraints imposed by *Kumho* and its predecessor *Daubert v. Merrell Dow Pharmaceuticals*,² we can examine these advantages in greater detail.

The Legal Setting

In *Daubert* the Supreme Court specified the "gatekeeping" role it expected federal judges to perform before admitting an expert opinion based on scientific knowledge. It assigned judges the task of conducting a two-part analysis. First, the court must decide the validity of the methodology the expert used in reaching an opinion. Second, the court must decide whether the opinion testimony is relevant to the argument and would therefore assist the trier of fact.

Justice Stephen Breyer's opinion in *Kumho* makes it clear that judges are to perform this gatekeeping role even when the expert opinion is based on technical or other specialized knowledge. Justice Breyer evaluated specific expert testimony, demonstrating how the trial court should examine the technical expert's methodology. His rigorous methodological analysis sets a high standard.

Kumho also holds that both the trial court's decision on how to review the expert's methodology, and its ultimate conclusion on the admissibility of the evidence, are subject to judicial review.³ In a concurring opinion, Justice Antonin Scalia warned the lower courts that their discretion to examine the expert's methodology was "not discretion to perform the function inadequately." Why the warning? Perhaps, in light of the deferential standard of review, Justice Scalia feared that some judges might not be inclined to conduct the rigorous

examination of an expert's methodology necessary to insure the reliability of opinion testimony.⁴

Choosing The Decision Maker

By arbitrating, rather than litigating, a dispute involving expert opinion, you can choose a decision maker whose education, training, temperament or experience gives you confidence. There are two types of arbitrators you can choose to hear a dispute with critical "expert" issues: (1) the arbitrator who is a professional expert in the field who will decide the central issues in the case and (2) the professional arbitrator who is familiar with the field and can quickly grasp the technical issues and rigorously test the validity of the expert's methodology. The type of arbitrator you choose may be dictated by the nature of the dispute.

Types of Expert Arbitrators

Sensory Experts

When a dispute is about the intangible qualities of a particular product, you may want an arbitrator who is a sensory expert to determine the issue, without the need for party experts. The sensory expert has an inherent skill that has been professionally exercised over time. Perfume blenders, wine makers, and butter testers use their nose and palates to offer opinions about the quality of products. These experts rely directly on their senses. Once the expert tastes the butter or smells the perfume, the process of assessing these products is internal; the methodology used to assess them is neither easily explicable, nor subject to close examination or challenge. If a case is about whether a perfume is a "knock off" of a trademarked product, a perfume blender could use his nose to settle whether the allegedly infringing product is likely to fool the consumer.

The textile industry has used sensory experts as arbitrators for many years. These experts are usually textile manufacturers; they use their eyes and hands to judge fabric quality. The criteria for choosing textile experts were developed by an industry group, the General Arbitration Council of the Textile and Apparel Industries. Its rules require arbitrators who "have been active, within the 10- year period prior to appointment, in the textile/apparel business." At the American Arbitration Association, where the arbitrations conducted under the council's rules are held, there is a special device used by these arbitrators to examine bolts of cloth. Expert arbitrators have used it to resolve disputes for over 60 years.

The *Kumho* decision suggests that the sensory expert's preparation can be examined by the court, but offers no further insight. It may be that the expertise of a sensory expert is best validated by examining who has relied upon the expert, and for what purpose.⁵

Technical and Scientific Experts

Technical and scientific experts have training and experience in a particular profession, business, or industry. The technical expert applies a set of rules from the field to a specific set of facts. For example, an accounting expert may determine that a balance sheet is an accurate representation of the company's financial condition under Generally Accepted Accounting Practices. A materials expert, using principles from metallurgy, may conclude that a ladder failed because certain manufacturing defects reduced its load-bearing ability.

The way in which the expert applies these rules constitutes the methodology that can be challenged.

Scientific experts include not only “hard” scientists, but also engineers.⁶ These experts apply scientific principles and the “scientific method” to the known facts. Unlike other experts, the methodology of science experts has often been scrutinized through peer review. Sometimes their methodology represents an accepted way of manipulating data (e.g. SUDAAN, a software program widely used for manipulating large data sets.)

When a technical or scientific expert is used as the sole arbitrator in the dispute, the parties must both (1) identify the expert and 2) agree on the methodology the arbitrator will apply to resolve. This agreed upon methodology can be embodied in a stipulated submission agreement, which recites that the parties are explicitly limiting how the arbitrator can decide the case. If the arbitrator uses a different methodology, that is a ground to vacate the award, since the arbitrator would have exceeded his powers.⁷

Using an expert arbitrator in this way eliminates the need for costly party experts to testify. It also eliminates the possibility of post-arbitration disputes over whether the methodology was valid. In addition, if the parties memorialize their agreement as to the methodology, that will give them some assurance that the agreed-upon methodology will be followed.

The Arbitrator as Arbiter of Party Experts

You may prefer to have party experts testify before the arbitrator in a highly technical or scientific case. In this case you may choose a professional arbitrator who is knowledgeable in the field, and has demonstrated an ability to quickly comprehend complex problems and make reliable decisions. There are three advantages to choosing this type of arbitrator: (1) the experts who testify will not have to over-simplify their testimony; (2) the arbitrator should be able to more rapidly judge the validity of the methodology used by the party experts; and (3) because the testimony will probably come in more quickly, it will save on expert costs.

Customizing the Process

Unlike litigation, arbitration is a highly malleable process. In a predispute arbitration agreement the parties can create a unique hearing procedure tailored to the technical, scientific or sensory disputes they are likely to encounter. In arbitrations under AAA rules, customizing the process can be achieved during the prehearing conference. Although the possibilities for customization are almost limitless, I will describe only five approaches: (1) adopting a different standard for expert testimony, (2) prequalifying” experts, (3) serial decision making, (4) tripartite arbitration, and (5) using expert advisors.

Adopting a Different Standard

Although arbitrators are not legally required to follow technical rules of evidence, professional arbitrator generally use those rules to guide them and to provide predictability for the parties. But the parties can agree to any rules they want, including rules regarding the admissibility of expert testimony.

Thus, even if a professional arbitrator would ordinarily follow the teaching of *Daubert* and *Kumho* when faced with a challenge to an expert’s opinion testimony, the parties can

stipulate at the prehearing conference to waive any threshold argument about an expert's credentials or methodology. Furthermore, they can agree that (1) the arbitrator will accept relevant expert testimony, and (2) any demonstrated failures in the expert's methodology will go to the weight the arbitrator gives the testimony.

This allows both sides to engage experts knowing they will be permitted to testify. If a party shows flaws in the methodology of the opponent's expert at the hearing, the arbitrator may choose to give little weight to that expert's opinion. This arrangement can only be achieved through arbitration. By changing the standard for admissibility of expert testimony, the parties save the cost of pre-hearing motions. In addition, since arbitration awards are not reviewable for errors of law, both sides save the potential cost of appeals based on alleged failures to apply *Kumho*. Thus, after the award is issued, they have the certainty necessary for making future business decisions.

"Prequalifying" Experts

The pre-hearing conference is an ideal place to resolve issues about the expert's methodology. If issues relating to the expert arbitrator's qualifications or an expert witness's credentials or methodology are not waived in this conference, you can propose a cost-effective way of deciding them. For instance, in a case involving sensory experts the arbitrator might require the parties to provide the credentials of their proposed experts. If one party asserts its opponent's proposed expert is unqualified, that could be argued as a motion – well before the hearing on the merits. If the arbitrator agrees with the party challenging the expert's credentials, the party proposing that expert still has adequate time to find another expert, change its approach, or settle the case.

In cases involving technical or scientific experts, the parties can agree at the prehearing conference to submit detailed summaries of how their proposed experts will examine the data and construct an opinion. By a date certain, either side can challenge the methodology to be employed by the other side's expert. If no challenge is timely made, the potential issue is waived. If there are challenges, the arbitrator can hold a preliminary hearing on the proposed methodology. There may be a second hearing to examine a different methodology. Alternatively, a party may simply decide to attack the other party's expert opinion at the hearing, argue that the opinion deserves little weight,⁸ or settle the case.

If there is no challenge to a party expert's methodology, or the arbitrator finds a challenged methodology to be valid, the parties could agree that any minor deviations from that methodology will go to the weight the arbitrator accords the expert's opinion, and that a complete failure to adhere to the methodology can result in exclusion of the testimony.

This procedure allows the parties to know before engaging their experts (and paying for their preparation) that they will be permitted, or not permitted, to testify. This can save a significant sum for the client because it occurs early in the process. If the expert's methodology is accepted by the arbitrator, that decision is unreviewable. There is no potential for an appellate court to disagree with the decision and require the entire case to be re-heard.

Serial Decision Making

Sometimes the issue requiring expert testimony is a threshold issue in the case. Arbitration offers the possibility of serial decision makers. If the narrowest question in a trade secrets

case is whether using a particular type of fastener is common knowledge among engineers, it may be most economical to have a jointly chosen, well respected engineer decide only this point. If the engineer decides it is common knowledge, the issue is eliminated and the parties may be able to negotiate or mediate an overall solution. If the engineer finds it is not common engineering knowledge, the consequences of that determination could be argued and decided in a second arbitration with a non-engineer arbitrator. Alternatively, the hearing could be bifurcated, with the same arbitrator deciding the threshold and underlying issues. If there is a failure of evidence on the threshold issue, no further hearings need occur.⁹

Tripartite Arbitration

You can also make experts part of a broader decision-making process using “expert tripartite arbitration.” Its distinguishing characteristic is that each side’s “party- appointed” arbitrator is an expert in the scientific or technical field at issue. These experts, with the advice of counsel, choose a neutral arbitrator who is not an expert in the field, but who has demonstrated an ability to comprehend scientific and technical disputes. All decisions are made by a majority vote. In all the deliberations the experts can advise the neutral arbitrator about what weight to give expert testimony.

If the predispute arbitration agreement does not call for tripartite arbitration, the parties can agree to it after the dispute occurs. The arbitrator may even suggest it in the prehearing conference. The parties would then appoint their partisan expert arbitrators, having already chosen the neutral arbitrator.¹⁰

Using Expert Advisors

In the pre-hearing conference the parties can agree that the arbitrator will be assisted by an expert advisor. This expert provides advice on scientific and technical issues to the arbitrator, but does not otherwise participate in the decision-making process. The expert advisor can be agreed to by the parties, or chosen by the arbitrator from a group of names submitted by the parties or by some other means. Recently the American Association for the Advancement of Science began a project to help the courts find experts to provide neutral scientific advice. The Court Appointed Scientific Experts Project identifies people who are highly respected in their field to serve as neutral experts.¹¹ These same experts would undoubtedly be available to act as advisors in arbitration.

The problems that often burden expert testimony – improper extrapolation, anecdotal evidence, too small a sample, false analogies, and the *post hoc* fallacy – can all be addressed at the prehearing conference before the parties have invested heavily in their experts. Perhaps most important of all, the expert’s methodology and conclusions can be carefully scrutinized so that only reliable expert testimony is admitted. In the wake of *Kumho*, when expert testimony is critical to your case, arbitration’s advantages are compelling.

¹ 119 S. Ct. 1167 (1999).

² 509 U.S. 579, 113 S. Ct. 2786 (1993).

³ In *General Electric Co. v. Joiner*, 522 U.S. 136, 138-9 (1997), the Court held the standard of review is abuse of discretion.

⁴ As Judge Kozinski said in the *Daubert* remand, judging the validity of a scientific methodology when it is disputed among scientists themselves is a "heady task." *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1316 (9th Cir. 1995).

⁵ Starbucks may rely upon its chief taster to make decisions about buying millions of pounds of green coffee beans. If a great deal of money is spent by a knowledgeable business based upon the opinions of a sensory expert, that may be an indicator of the expert's reliability.

⁶ One headline announcing *Kumho* read: "Court Views Engineers as Scientists," 284 *Science* 21 (April 1999).

⁷ 9 U.S.C. § 10(4).

⁸ Methodological weaknesses that do not become apparent until the hearing can also reduce the weight the arbitrator gives the expert's opinion.

⁹ Some would argue that the better practice is to have different arbitrators decide the two issues. That eliminates the possibility of contaminating each decision-making process with knowledge about other aspects of the case, or any financial interest in hearing the entire case.

¹⁰It is important to distinguish between multiple neutral arbitrators and tripartite arbitration. With multiple neutral arbitrators all of the arbitrators are expected to act as neutrals and all can be challenged and disqualified by either side. In tripartite arbitration the party appointed arbitrators are not expected to be neutral; they are aligned with the side choosing them. They cannot be disqualified because of that alignment.

¹¹ See 284 *Science* 1600 (July 1999). This project is only for the courts.