

**R-Speech.125)Persuading the Arbitration Panel: Keys to Make the Winning Presentation
at the Hearing**

Created on 11/14/2007 5:26:00 PM

R:\Dunn Forms\SPEECHES\FORMS\R-speech.125 - (revision) 11-14-07) Persuading the Arbitration Panel Keys to
Make the Winning Presentation at the Hearing.doc



5200 RENAISSANCE TOWER
1201 ELM STREET
DALLAS, TEXAS 75270-2142
PH: (214) 220.3888 ▲ FAX: (214) 220.3833

ROGGE DUNN

BOARD CERTIFIED
TEXAS BD. OF LEGAL SPECIALIZATION:

* CIVIL TRIAL LAW
* LABOR & EMPLOYMENT LAW

WRITER'S DIRECT DIAL: (214) 220-0077
WRITER'S E-MAIL: rdunn@trialtested.com

CENTER FOR INTERNATIONAL LEGAL STUDIES

EMERGING TRENDS IN DISPUTE RESOLUTION

Persuading the Arbitration Panel: Keys to Make the Winning Presentation at the Hearing

By Rogge Dunn

December 2 – December 8, 2007

Steamboat Springs, Colorado

I. RESEARCH YOUR ARBITRATOR

As with any presentation, knowing your audience is the most important aspect of your presentation. What persuades one individual or group of individuals may dissuade another group. This is particularly true when you are dealing some cultures and cross-border cultural considerations.

This applies to the *content* of your argument, including whether to concentrate on legal principles, case law, or on the equities and principles of justices. It also applies to the *presentation* of your argument so the delivery will be well-received.

A. Sources for Intelligence on Your Arbitrators

1. Services

Numerous services exist to provide the opinions of your arbitrators. These include:

Arbitration Law Online

Huntington, NY

Juris Publishing

<http://online.arbitrationlaw.com/online/>

Fully searchable database includes arbitral and judicial decisions; roster of arbitrators and jurisdiction specific information. A subscription service.

ArbSearch.com

Horsham: Penn

<http://www.arbsearch.com/arbsearch/splash.jsp>

Technical Support

1-800-333-2966

User/Research Assistance

1-800-515-4577, ext. 6511

Customer Service

1-800-341-7874

E-Mail

arbsearch@lrp.com

This fee-based web service is offered by LRP, publisher of the labor arbitration information system. It allows subscribers to search for information on over 4,000 arbitrators, including biographies, summaries of awards arbitrated, and statistical analyses by prevailing party of the awards. It links to summaries of their awards with citations.

Instant Computer Arbitration Search (ICAS)

Fort Washington, Penn.

(800) 341-7874, ext. 274

This fee-based service conducts searches on its database. It provides reports with information about individual arbitrators, including summaries of awards rendered, biographical data, and statistical analyses by prevailing party.

KluwerArbitration.com <http://www.kluwerarbitration.com/arbitration>
<http://www.internationalADR.com/arbitration/arb/default.asp>

Comprehensive subscription database of primary and secondary international arbitration materials, including case law and commentary.

LRP Publications

Dept. 420, 747 Dresher Rd.
Box 980
Horsham, PA 19044-0980
(800) 341-7874 ext. 274

Will search its data banks and produce opinions for a fee.

R.C. Simpson

5950 Fair View Road, Suite 604
Charlotte, NC 28210
(704) 553-0716

Will search its data banks and produce opinions for a fee.

Securities Arbitration Commentator

Contact: Cheryl
P.O. Box 112
Maplewood, NJ 07040
(973) 761-5880 (tel)
(973) 761-1504 (fax)

Will search its data banks and produce opinions for a fee.

WestlaweCARSWELL
(416) 609-3800
www.westlawecarswell.com

Databases cover rules, guidelines, legislation, awards, and decisions. Westlaw databases also include practice guides, journals and treatises concerning international commercial arbitration.

B. Publications

Smit's Guides to International Arbitration
Hans Smit and Vratislav Pechota, ed.

Juris Publishing
71 New Street
Huntington, NY 11743
(800) 887-4064

Roster of International Arbitrators
(Guide to International Arbitrators, 3rd ed.)

C. Free Data Banks

AAA Arbitrator Data Report Search

The 1281.96 CCP Collection Data Report will provide you with awards a particular arbitrator rendered. To obtain this info, do the following:

1. Go to home page at www.adr.org
2. Click the small "search" icon on homepage
3. Type in "Form 1281" and select "search all words"

4. Let it search
5. In the results section, select the pdf titled “CCP Collection Data Report” [It will show current quarter and past quarters. Select the Q you want.] The report is about 2000 pages – it will take a long time to load.
6. Once loaded you search the arbitrator by doing a CTRL F [find function] and typing in arbitrator’s name.

CISG Database

<http://www.cisg.law.pace.edu/>

Pace database on the CISG and International Commercial Law. The CISG is the United Nations Convention on Contracts for the International Sale of Goods, the uniform international sales law of countries that account for two-thirds of all world trade. Go to <http://cisgw3.law.pace.edu/cisg/text/caseschedule.html> for an overview description of case material and guidance in the use of the case schedule and search forms.

FINRA Arbitration Awards Online Database

<http://www.finra.org/ArbitrationMediation/ResourcesforParties/FINRAArbitrationAwardsOnline/index.htm>

ICSID Cases

<http://worldbank.org/icsid/cases/cases.htm>

International Court of Arbitration (ICA)

<http://www.iccwbo.org>

D. Other Attorneys who Handle Arbitrations

In addition to checking databases, call attorneys, arbitrators and persons who may know the arbitrator to determine the arbitrator's proclivities.

E. Google and Internet Searches

Google and other internet searches through various search-engines can reveal articles describing the arbitrator's activities, backgrounds and other personal data that can be very helpful in determining "what makes the arbitrator tick."

F. Free Online Legal Research

Bureau of International Labor Affairs	www.dol.gov/dol/ilab/
Equal Employment Opportunity Commission ("EEOC")	www.eeoc.gov
Federal Mediation and Conciliation Service	www.fmcs.gov
Findlaw Labor and Employment Law	www.findlaw.com
Online Law Library	www.fplc.edu/ollie.htm
Nolo Legal Encyclopedia	www.nolo.com/encyclopedia/index.html
WWW Virtual Law Library	www.law.indiana.edu/law/v-lib
Internet Legal Resource Guide	www.ilrg.com
HR Internet Guide	www.hr-guide.com
FindLaw.com: Publications	www.findlaw.com/01topics/27labor/publications.html
Institute of Civil Justice	www.rand.org/ici/

II. THE ARBITRATION PROCESS

A. Summary Filing Before Initial Conference

B. Pre-Hearing Brief

1. Timing
2. Show all your “aces” up front?

C. Court Reporter

1. Do you request court reporter transcription?

III. THE HEARING

A. Approaches

1. Dealing with a sophisticated and educated arbitrator

- a. Listen carefully to the arbitrator
- b. Considering ordering “dailies,” if hearing is transcribed
- c. Follow-up on arbitrator’s questions and subtly include in your questions and theme’s points raised by arbitrators

2. “Fairness” Approach

- a. Don’t fight what you can’t win
- b. Don’t fight what doesn’t hurt you
- c. Don’t fight what you shouldn’t win, unless its crucial
- d. W.W.A.L.D. What would Abe Lincoln do?

B. Opening Statement

1. Style During the Opening

- Issue: formality vs. informality
- Standing vs. sitting presentation
- Variety approach
 - Movement breaks monotony
 - Movement emphasizes key points

2. “Coming Clean” with Bad Facts and the Theory of Sponsorship

- Current jury research validates revealing bad facts to “inoculate”
- “Inoculate,” but don’t commit Hare Carey

3. Content

- Key Facts and Themes
- Don’t Create Information Overload
- Don’t Rehash the Pre-hearing Brief

4. Visual vs Auditory Learning and Retention Rates

- Powerpoint
- “Seeing is Believing”
- Story boards

5. Your Voice

- Tone/Pitch
 - Gerry Spence: speaking exercise soothing vs. sharpness
- Volume
 - when it’s hard to hear - - on occasion - - people listen intently
- Clarity
 - Demosthenes: rocks and the river exercise
 - Gave speeches while running
- Ms. Rainey: whisper on stage but project to be back of the auditorium

6. More Dynamic Approach, Subtle Storytelling Without Histrionics

- Think and work like a filmmaker
- Create good and evil early on
- Let analogies lead the arbitrators, don’t tell them the conclusion, like a “know-it-all” would
- Speak in the present tense
- “Set the hook”

- Create anticipation
- Make it interesting

7. **Burden of Proof**

- Very weak defense for Respondents/Defendants
- Claimant's/Plaintiff's quick counter to Respondent's/Defendant's Burden of Proof defense

C. **Damages: Setting Expectations**

“Pigs get fat, hogs get slaughtered”

What is the Claimant's case worth?

- There is often no way to quantify
- Arbitrator often has no idea as to case value
- Does anybody know the value of the case?

D. **Evidence**

1. **Producing the Evidence**

- Proof and the Theory of Sponsorship

2. **Sacrificing Some Evidence**

3. **Audio Recordings**

- “hear for yourself”
- Warning the negative impression of people who tape
- Be prepared to provide a good reason why tapes exist

E. **Basic Persuasion Techniques**

Two plus two equals what?

Issue: How arbitrator perceives the evidence

Henry Kissinger said “reality is not as important as the perception of reality.” We always look at issues from our perspective. Worse, we look at it from a lawyer’s perspective. Never forget to look at the issues, and hone your presentation, from arbitrator’s perspective!

Truism Approach: $2 + 2 = 4$

Plaintiff’s attorney says: Defendant fled the scene after the collision. Obviously, anybody with common sense would stay. That’s the law. That’s the honorable thing to do. No doubt Defendant left the scene because he was at fault.

Better: Create a Thought Process:

There was a crash. Defendant says its not his fault, yet he immediately speeds away. Wonder why?

Why Would Someone Flee?

- drinking?
- at fault?
- didn’t want to miss *Gilligan Island* re-runs?

Study after study indicates nobody likes being told what to do, or how to think. Make the arbitrator reach a conclusion himself. Require the arbitrator to

process the information. If an arbitrator thinks he thought of it, she will be more likely to be persuaded to your viewpoint. And, the arbitrator will be likely to advocate for that position on a panel of arbitrators. Finally, the arbitrator is much more likely to remember your evidence or themes because she went through a reasoning process.

F. Theory on Objections

A. You Must Consider Context in Which Objections Will be Heard

B. Limit Objections

1. “Poo poo” the evidence
2. Subtly make a speaking objection
3. Get your theme of the case in through the objection
4. “I apologize, I’ve been patient, but

G. Cross Examination Generally

A straightforward attack often ineffective Dryden said the best satire is satire aimed at the target’s neck that is so razor thin that the victim does not realize his head has been severed from his body and keeps talking.

Compare: “You are a liar”

With: any other parts of your story change.....after hired atty

Rufus Choate, from New York, was one of the greatest American trial lawyers of the early 1800's. Choate represented a stockbroker who sued a defendant customer for collateral pledged for stock purchased on margin. The husband/Defendant pledged wife's bonds and claimed he had no authority to do so. Choate was the attorney for the broker/plaintiff.

Choate contended that even if the bonds belonged to the wife she had either consented to her husband's use of the bonds, or was a partner in the transaction. Both of these contentions were denied by the husband/Defendant.

The actual trial transcript reads as follows:

Mr. Choate: When you ventured into realm of speculations in Wall Street. I presume you contemplated the possibility of market going against you, did you not?

A: Well, No, Mr. Choate, I went into Wall Street to make money, not to lose it.

Mr. Choate: Quite So, sir, but you will admit, sometimes the stock market goes contrary to expectations?

Witness. Yes, I suppose it does.

Mr. Choate: You say the bonds were not your own property, but your wife's?

A: Yes, sir.

Mr. Choate: And you say that she did not lend them to you for purposes of speculation, or even know you had possession of them?

A: Yes, sir.

Mr. Choate: You even admit that when you deposited the bonds with your broker, as collateral against your stock speculations.

You did not acquaint him with the fact that they were not your own property?

A: I did not mention whose property they were.

Mr. Choate: Well, sir, in the event of the market going against you and your collateral being sold to meet your losses, *whom did you intend to cheat, your broker or your wife?*

The Defendant's attorney then objected as Argumentative. The court overruled the objection. But even if the Court had sustained the objection, Choate had proved his point and destroyed the witness.

Further, the creative way that Choate destroyed the witness no doubt drove the point home to the decision maker. The line of questions creates interest and builds drama and momentum right up to the time that Choate asks the penultimate question. No matter how the witness answers the question, and even if an objection to the question is sustained, the point has been emphasized.

H. Cross Examination of Expert

1. Careful Game Plan

It is important to approach cross-examination with specific goals in mind. By definition, the expert witness possesses a distinct advantage over the cross-examining attorney regarding the knowledge of the subject matter.

Instead of attempting to win a debate against the expert witness, focus on assisting the arbitrator in discovering the failings in the expert's assumptions, methodology or conclusions. The cross-examination should have a beginning, middle and end. The cross-examination should focus more telling your story and theme and getting the arbitrator to question the expert's credibility and testimony. Do not debate on the grounds the expert wants.

Tell your case to the arbitrator by using opposing counsel's expert witness.

\$Sell your theme to the arbitrator;

\$Direct attack on what expert says may be difficult;

\$Not necessarily disproving what expert says;

\$Taking what expert says and proving As what;”

\$Try to prove your case and themes through the expert;

\$Take what expert says and use it to show that it actually proves your client's point;

\$Theory of sponsorship works great here; and

\$(e.g., As a Defendant, I don't usually hire economist expert in employment cases).

2. Post Daubert, Joiner and Huhmo Tire Analysis

(a) *Daubert v. Merrell Dow Pharmaceuticals, Inc*

For almost seventy (70) years, *Frye*¹ was the legal evidentiary standard regarding expert testimony. The *Frye* test turned on whether the expert's methodology was generally accepted within the scientific community. In 1993, the United States Supreme Court released the Arigid@ stranglehold *Frye* had on the courts and transferred the role of gate-keeper exclusively to the bench. *Daubert* held that the Federal Rules of Evidence, and not *Frye*, provide the standard for admitting expert scientific testimony. In reality, *Daubert* placed exclusive responsibility in the laps of the courts to (arbitrators) determine the reliability of expert evidence and its admissibility.²

(b) *General Elec. Co. v. Joiner*

In 1997, the United States Supreme Court put the last nail in *Frye*'s coffin.³ The Court held that a trial court's exclusion of expert testimony may not be second

¹ *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

³ *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

guessed by an appellate court unless such exclusion rises to that of an abuse of discretion. The Court admonished the lower court for not giving the trial court the deference that is the hallmark of abuse-of-discretion.⁴ In other words, *Joiner* gave the trial court broad discretion in admitting or excluding testimony.

(c) ***Kuhmo Tire Company, Ltd. v. Carmichael***

Finally, the United States Supreme Court held that *Daubert* factors apply not only to scientific testimony, but also to all expert testimony.⁵ Specifically, the Court held, *It is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that establishes a standard of evidentiary reliability.*⁶ The Court also considered, *It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a "gatekeeping" obligation depended upon a distinction between the "scientific" knowledge and "technical" or "other specialized" knowledge, since there is no clear line dividing the one from the others and no convincing need to make such distinctions.*⁷ Practically, *Kuhmo*

⁴ *Id.* at 517.

⁵ *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

⁶ *Id.* at 138.

⁷ *Id.*

Tire granted trial courts wide latitude to decide whether to grant the parties and evidentiary hearing on a *Daubert* challenge.

3. Using the Eight Different “Gates of Admissibility” to Cross-Examiners Advantage

Courts now recognize that there are eight basic gates that an expert witness and her testimony must satisfy in order to be admitted into evidence:

1. Helpfulness;
2. Qualifications;
3. Relevancy;
4. Methodology;
5. Connective Reliability;
6. Foundational Reliability;
7. Reliance Upon Inadmissible Evidence; and
8. Satisfaction of Rule 403.

Five of these gates are an extension of *Daubert* and are intended to confirm that the expert=s testimony is reliable. The remainder focus on procedural issues. The alert cross-examiner will use these eight barriers to his or her advantage in an effort to disqualify, exclude, or most likely, discredit the professional expert=s testimony.

(a) **Helpfulness**

Rule 702 requires that an expert witnesses have scientific, technical or other specialized knowledge that will assist the trier of fact in understanding the evidence or to determine the fact issue. A qualified expert witness may testify thereto in the form of an opinion or otherwise. However, even though an expert=s qualifications may be impressive, the expert testimony must still assist the jury. Simply put, is the expert=s knowledge, experience or testimony beyond that of an average arbitrator and if so, would it help them? Please note that this Ahelpfulness@ standard is a liberal one.

Although this Ahelpfulness@ standard is a liberal one, for some expert witnesses, this first hurdle may be the highest. Where the expert=s testimony may be readily ascertainable through the every day life experiences of an average arbitrator, the cross-examiner should challenge and the court may exclude the need for such Aexpert@ testimony. Look closely at whether the expert=s testimony is truly helpful or is the testimony just “overpriced common sense.”

(b) **Emphasize the Arbitrator’s Interests**

Don=t underestimate the intelligence of an arbitrator. Sometimes counsel for all parties involved make this mistake.

Consider emphasizing the angle of the arbitrator's knowledge and experience. One might ask the expert "surely you don't expect this educated panel to believe that theory?" Follow-up on the arbitrator's questions. "Zero in" your follow-up questions to the expert so they relate to the question asked by the arbitrator.

(c) **Attack when the Expert Goes Beyond His Expertise**

When testifying on direct under questioning by opposing counsel, be alert for attempts by the expert to exceed or go outside the scope of her expertise or designated areas of testimony on a question-by-question basis.

The expert may enter or leave the realm she is qualified to testify during the course of her testimony. Have a clear understanding of the issues involved compared to the issues the expert is opining. The expert's testimony may be challenged on a particular point or is outside the bounds of the witness' expertise.

(d) **Attack the Purely Theoretical Expert**

Attack the ivory tower academician expert!

\$He never built anything;

\$Doesn't get his hands dirty;

He=s never had to worry about practical applications;

Teaching world v. real world experience; and

AMonday morning quarterback.@

(e) **Reliable Methodology**

Instead of focusing on the expert=s credentials, the cross-examining attorney may focus on the scientific test or process. By focusing on the process, the arbitrator can visualize how the expert formed her testimony. Additionally, this focus on the process may also alert the arbitrator what essential elements were left out (e.g. lack of control group, peer review, etc.).

Take the time to explore the expert=s methods step-by-step. Don=t forget the steps of the scientific method.

Ask the expert if he is familiar with the scientific method.

Did the expert use a control group?

Did the expert position a hypothesis first?

Did the expert have his theories and conclusions peer reviewed?

Did the expert use the same or industry standard process of testing?

§Did the expert rule out other potential causes?

Other cases where the court excluded expert testimony on the basis of qualification:

(f) **Connective Reliability**

The United States Supreme Court held that the reasoning underlying the expert=s opinion and the application of the expert=s methodology must both be reliable.⁸ The proponent must show a valid connection to the case. Furthermore, the trial court must examine whether there is simply too great an analytical gap between the data and the opinion proffered.⁹ This connective reliability analysis is more narrow than the *Kuhmo Tire Co.* analysis of methodology.

Failure to explain the expert=s reasoning process could be fatal. Examine whether the expert failed to show how her observations supported her testimony.

§Did the expert attempt to explain relevant factors observations?

§Did the expert explain or exclude other possibilities?

§Is the expert=s opinion no more than subjective belief or unsupported speculation?

⁸ See *Daubert*, 509 U.S. at 592-593.

⁹ See *Joiner*, 522 U.S. at 146.

IV. CONCLUSION

A. Pay Attention to the Arbitrator

1. Watch her or his body language
2. Listen to the Arbitrator's questions
3. Let the Arbitrator reach his or her own conclusions (that you subtly lead him or her to)
4. In sum, it's all about the Arbitrator (with a capital "A")