



# When Experts Come From Different Planets: Tips for Maximizing the Value of Experts

Wednesday, June 14, 2017 – 12:00 noon (ET)

## **Speakers:**

Sherman Kahn  
*Commercial Litigator, Arbitrator, and Mediator*  
*Mauriel Kapouytian Woods LLP*

Theodore K. Cheng  
*Commercial Litigator, Arbitrator, and Mediator*  
*Fox Horan & Camerini LLP*

## **AGENDA**

<b>12:00 p.m.</b>	<b>Welcome and Introduction of Speakers</b>	(5 minutes)
<b>12:05 p.m.</b>	<b>Preparing for and Conducting the Preliminary Hearing</b> <ul style="list-style-type: none"><li>- Recognizing when expert testimony will be relevant</li><li>- Raising the issue with the parties and counsel</li><li>- Managing the process of exchanging expert reports</li><li>- Other case management issues</li></ul>	(15 minutes)
<b>12:20 p.m.</b>	<b>Preparing for and Conducting the Merits Hearing</b> <ul style="list-style-type: none"><li>- Presentation of expert testimony (timing, method, etc.)</li><li>- Roles of the panel chair and wing arbitrators during presentation</li><li>- Tools and techniques for finding common ground</li><li>- Bridging seemingly irreconcilable expert testimony gaps</li></ul>	(25 minutes)
<b>12:45 p.m.</b>	<b>Award-Writing and Other Post-Hearing Issues</b> <ul style="list-style-type: none"><li>- Reconciling expert testimony in the post-hearing phase</li></ul>	(5 minutes)
<b>12:50 p.m.</b>	<b>Conclusion and Questions</b>	(10 minutes)
<b>1:00 p.m.</b>	<b>Evaluation</b>	(5 minutes)
<b>1:05 p.m.</b>	<b>Adjourn</b>	

## **Theodore K. Cheng – AAAU Faculty Bio**

Theodore K. Cheng practices in general commercial litigation, intellectual property, and alternative dispute resolution (ADR). He heads the firm's Trademarks and Unfair Competition Practice and also focuses on copyrights, patents, trade secrets, and other intellectual property matters. With nearly 20 years of experience handling a broad array of business disputes in federal and state courts, he counsels high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, food and hospitality, retail, and financial services. He is the current Co-Chair of the New York Chapter of the Copyright Society of the U.S.A. and a member of the American Intellectual Property Law Association.

Mr. Cheng typically formulates and advises clients and their in-house counsel on litigation and dispute resolution strategy, often striving to suggest innovative and creative ways to resolve conflicts. In addition to achieving favorable outcomes through motion practice and trials in both federal and state courts, he has successfully resolved numerous matters through facilitated negotiations, mediations, and arbitrations, including commercial and business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and intellectual property infringement. Mr. Cheng is an arbitrator and mediator with a focus on intellectual property and technology disputes, having conducted over 275 arbitrations, mediations, settlement discussions, and inquests.

Mr. Cheng also received a 2013 AAA A. Leon Higginbotham, Jr. Fellowship and serves on the boards of the AAA and the Justice Marie L. Garibaldi American Inn of Court for ADR. He regularly speaks and publishes on intellectual property and ADR issues.

Sherman W. Kahn is an arbitrator and mediator with more than twenty years of experience with litigation and counseling in matters raising complex technological issues. Sherman has acted as sole arbitrator, chair and wing arbitrator in numerous arbitrations. The subject matter of these arbitrations has ranged from patent and trademark issues to IT outsourcing, construction, mining and commercial issues. Sherman also acts as counsel in international arbitration proceedings presenting complex technical and commercial issues and has arbitrated under the AAA, JCAA, ICC, and other arbitration and dispute resolution rules. He also provides advice to clients regarding structure of investments with respect to arbitration pursuant to bilateral investment treaties. and provides advice regarding clause drafting and pre-dispute issues in connection with major construction and infrastructure projects.

Sherman has litigated dozens of patent cases as well as other litigation involving technological issues such as computer copyright, trade secret and IT outsourcing disputes. He also has experience litigating “soft-IP” issues such as trademark and copyright. Sherman’s practice is international. He practiced in Tokyo for five years. During that time he was licensed as a gaikokuho jimusho bengoshi and a member of the Dai-Ni Tokyo Bar Association.

Sherman also advises clients regarding information security and privacy issues for compliance and in privacy-related regulatory proceedings and litigation. He has represented clients in numerous FTC and state attorney general investigations of privacy and information security practices

Sherman also acts as a mediator and assists counsel and parties with resolving complex technology disputes as well as other commercial issues.



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*When Experts Come From Different Planets*

June 14, 2017

Patricia D. Galloway, “Using Experts Effectively & Efficiently,” *Dispute Resolution Journal*  
(August/October 2012), at 27

J. Christian Nemeth and Lisa Haidostian, “The ‘Hot Tub’ Method of Taking Expert Testimony is  
Gaining Steam: What You Need to Know,” *Arbitration News* (February 2014), at 91

George Ruttinger and Joe Meadows, “Using Experts in Arbitration,” *Dispute Resolution Journal*  
(February/April 2007), Vol. 62, No.1, at 46

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## Institutions, associations and procedure

# The ‘hot tub’ method of taking expert testimony is gaining steam: what you need to know

**T**he concurrent presentment of expert testimony – often dubbed the ‘hot tub method’ – is gaining popularity in international arbitration. Some consider the hot tub method an efficient and effective way to present complex expert issues, while others dismiss it as a procedure that forces attorneys to surrender precious control over their own proceedings. In any event, since attorneys are increasingly likely to encounter the hot tub method, they must understand its advantages and drawbacks in order to thrive in any scenario regarding experts that arises in the course of the proceedings.

Under most procedural rules, either the tribunal or a party may suggest using the hot tub method, the details of which are usually determined on a case-by-case basis prior to the hearing. The hot tub method includes situations where expert witnesses are sworn and provide their testimony at the same time, often sitting together at a table or in the witness box. The experts challenge and question one another, and the panel often questions the witnesses directly, engendering a direct dialogue between experts and the tribunal, with counsel’s role sometimes limited to stating objections. In another type of hot-tubbing, the experts may meet prior to the hearing (without counsel) to pinpoint the areas of disagreement, discuss the relevant issues, and often prepare a joint report.

Although hot-tubbing was originally popularised in Australian courts, it is gaining momentum worldwide. For example, the Singapore International Arbitration Centre (‘SIAC’) conducted a survey in September 2013 of senior arbitration practitioners from Singapore and found that 61 per cent of the participants have noted an increase in the use of hot-tubbing over the past five years. (*SIAC Survey on Hot-Tubbing, Videoconference, Teleconference and Documents-only Proceedings in International Arbitration*, September 2013.)

The 2010 IBA Rules on the Taking of Evidence (‘IBA Rules’) specifically provide for concurrent presentment of expert testimony during evidentiary hearings. The Rules state that the tribunal, upon request of a party or on its own motion, may allow ‘witnesses [to] be questioned at the same time and in confrontation with each other (witness conferencing).’ Art 8.3(f), adopted 29 May, 2010.

Proponents of the hot tub method contend that it bolsters the tribunal’s comprehension of the evidence, since inconsistencies in the experts’ testimony or intricate areas of disagreement can be hashed out (and sometimes even resolved) at one time. Additionally, testimony on complex topics becomes more palatable because it is not separated by days or even weeks during the pendency of the hearing, as can often be the case during the traditional taking of expert testimony. Additionally, proponents claim that the hot tub method helps to narrow expert testimony down to only the most crucial issues, as opposed to bogging down the tribunal with minor areas of disagreement. One US tax court recently noted in an opinion that it ‘[could] not overstate the importance of concurrent witness testimony in these cases,’ and that such testimony allowed the court to ‘more easily separate the reliable portions of the expert reports from the unreliable, and consequently, to expedite [its] decision-making process.’ *Crimi v Comm’r*, TC Memo 2013-51 (TC 2013).

The hot tub method can reduce costs and the time necessary for a hearing. Indeed, the commentary to the IBA Rules notes that witness conferencing can ‘make the proceeding more economical,’ since ‘[e]xperts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards

finding areas of agreement.’ Notably, more than 77 per cent of the participants in the SIAC study stated that ‘hot-tubbing of expert witnesses, if used in appropriate circumstances or if properly conducted by a prepared and experienced tribunal, is an effective and viable means of saving costs and reducing timelines.’

However, critics of the hot tub method state that it sometimes strips lawyers of their ability to control the presentment of expert testimony. Although counsel can usually still cross-examine witnesses to a certain extent, the exercise can be significantly more limited in scope. Some lawyers have also stated that without pointed direction from counsel, the opposing experts’ testimony can sometimes devolve into an unwieldy argument. Additionally, experts who are honest and skilled but simply lack strong advocacy skills can be pushed to the wall and their opinions may, in such circumstances, not be afforded adequate weight.

In short, as the hot tub method shows no signs of abating in the international arbitration arena, it is important for attorneys practicing in this area to anticipate the procedure. There are several key factors and considerations that counsel should evaluate to effectively use the hot tub method, or to determine whether to use it at all.

### Know your expert

An attorney must first consider the one crucial inquiry when considering whether to proceed under the hot tub method: the strength of his or her expert. Regardless of the type of testimony at issue or the type of concurrent expert witness testimony that will be used in a proceeding, attorneys with expertise in these proceedings uniformly agree that the assertiveness, knowledge and tenacity of one’s witness are the most important factors in deciding whether to use the hot tub method. Also critical is your expert’s level of expertise as compared to the other side’s; for example, as appears below, a less established expert could be more likely to defer to the more established expert, either due to the relatively informal nature of the hot tub or in an effort to maintain his reputation among peers.

Because the strength of his or her expert is of utmost importance, counsel should attempt to run a mock hot tub simulation with his or her witness before even agreeing to use the hot tub method. This is a critical

way to evaluate how the witness performs in that type of setting. Does he hesitate to tackle the other expert’s position? Does she appear nervous when being challenged by a peer? Necessary questions like these can only be answered at a mock proceeding.

### Evaluate the timing

It is also important to consider the timing of your case. For example, consider that you are the plaintiff and your expert’s testimony would be presented first. Perhaps the defendant’s expert has strong testimony that you do not want being presented late in the proceeding and left fresh in the tribunal’s mind prior to its deliberation. On the other hand, perhaps you anticipate a devastating cross-examination of the defendant’s expert and under the traditional presentment of witness testimony, that cross-examination will make a crucial late impact on the tribunal.

Alternatively, consider if you are the defendant and you believe expert issues are important to your case. Perhaps you plan to call your expert toward the end of your case so that his or her testimony will have the maximum effect on the panel’s decision. Using the hot tub method could deprive you of that opportunity. Thus, attorneys should analyse whether the change in timing that will necessarily follow from using the hot tub method will impact their case positively or negatively.

### Know your case

As with so many arbitration strategies, the question of whether to use the hot tub method will often turn on the particulars of each case. One factor to consider is whether the expert topics in dispute are of the sort where experts could arrive at a ‘middle ground’, and just as importantly, whether such a result would be acceptable to counsel. If the divergence in the experts’ opinions on a core issue is simply irreconcilable, the optimal strategy could be to attempt to proceed under the traditional presentment of expert testimony, as there may be fewer gains to be made via the hot tub. However, if the issue is one of more art than science, the process of expert witness hot-tubbing could shift the experts’ opinions to the middle. If such middle ground would be satisfactory in the case, the hot tub method could be ideal. If not, it should be avoided.

Additionally, attorneys should consider the

weight they want to place on expert issues in their case. Using the hot tub method could convey to the tribunal that expert issues are of heightened importance, especially considering that the method is still relatively novel, and its use could leave a more lasting impression in the tribunal's mind. On the other hand, if counsel believes the case should not turn on expert issues, he or she should consider whether using the method could unduly highlight those issues to his or her disadvantage.

### **Weigh the risks of ceding control**

Finally, lawyers who use the hot tub method must be prepared to relinquish a degree of control over the examination process, which will almost certainly introduce more risk into the proceeding. Practitioners who take comfort in fastidiously orchestrating their examinations may find the hot tub method leaves too much room for error or missteps. Practitioners may also determine that the guidance and structure of their direct examination would more effectively elicit their own expert's testimony, or that a full cross-examination would more effectively discredit the other side's witness.

Counsel must also consider the risk that

his or her expert could begin to acquiesce to the other expert's position – a worst-case-scenario that is uncommon but certainly not unheard of, and made more likely because the expert is often primarily engaging with a peer as opposed to an opposing lawyer, who feels like a direct adversary. A witness could be particularly susceptible to such a disastrous result if he is less experienced in his field than the other expert(s).

### **Conclusion**

There are advantages and disadvantages to proceeding with the hot tub method of taking expert testimony, and its suitability for use will depend upon the particulars of your case. Confidence in the abilities of your expert witness is the paramount factor to consider before deciding if this approach should be favoured over the more traditional approach. Most importantly, in light of evidence suggesting that the hot tub method is gaining popularity, practitioners should be aware of the procedure and how it could benefit – or hinder – its case.

### **Notes**

Special thanks to Sabine Konrad, Sarah Columbia, Amy Doehring, Roger Jones, and Stefano Mechelli for contributing their expertise and insights to this article.

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# USING *experts* IN ARBITRATION

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BY GEORGE RUTTINGER AND JOE MEADOWS

*George Ruttinger is a partner and chair of the Government Contracts Group in the Washington, D.C., office of Crowell & Moring LLP. He specializes in contract litigation and counseling. He has represented clients in state and federal courts, arbitration proceedings, minitrials, mediations, and federal administrative agencies. Joe Meadows is a counsel in Crowell & Moring's Washington, D.C. office, where he practices commercial litigation.*

**The evidentiary rules and discovery requirements in arbitration are far less onerous than in a courtroom. As a result, lawyers who represent parties in arbitration have more opportunities to use and present expert evidence. This article addresses some of those opportunities.**

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**I**n traditional litigation, the basic routine for working with experts involves several steps. First, counsel selects one or more experts who can communicate well to a judge or jury and qualify as experts under judicial evidence rules.<sup>1</sup> Typically, this means that experts must possess sufficient knowledge, skill, experience, training, or education in the subject matter of the dispute.<sup>2</sup> Next, counsel considers whether to retain one or more consulting experts to shield work product and attorney-expert communications.<sup>3</sup>

Counsel then asks the expert who will testify to prepare a report on the opinion, but to limit the number of drafts and other written exchanges because of liberal discovery rules. Afterwards, counsel will prepare this expert to be deposed and to testify at trial. Finally, when the trial takes place, counsel will “qualify” the expert under the applicable evidentiary rules by asking certain questions and then soliciting the expert’s opinions on various technical or scientific matters to educate the uninformed trier-of-fact.

Arbitration differs from litigation in a variety of ways.<sup>4</sup> The proceeding itself is more informal, the rules of evidence generally do not apply, and discovery is limited.<sup>5</sup> Furthermore, especially in construction and commercial disputes, arbitrators usually possess experience in the field of the dispute and technical knowledge of the subject matter. For these reasons, arbitration has many advantages over litigation, one of which is that it offers greater opportunities to use and present expert evidence. A number of these advantages and opportunities are addressed below.

#### **Flexibility in Selecting Experts**

Counsel has greater flexibility in selecting experts in arbitration because, unlike courtroom litigation, there is no requirement that an expert witness qualify as such under strict judicial evidentiary rules. So long as the expert chosen can offer relevant and material testimony, he or she can testify as a witness at the arbitration hearing and render and introduce an expert opinion. That testimony can be admitted and given as much weight as the arbitrators desire.<sup>6</sup>

Counsel also has more freedom to select expert witnesses because the failure to admit relevant evidence is a ground for reversal of an arbitration award under federal and most state arbitration laws. As a result, many arbitrators admit purported expert testimony into evidence and then give such testimony more or less weight as they deem appropriate.<sup>7</sup> The testimony of a witness who can be shown to qualify as an expert under judicial evidentiary rules may well carry more weight.

The greater freedom to select expert witnesses is an advantage when technically qualified wit-

nesses cannot be found, or more than one witness is needed, or the witness has a conflict of interest and therefore cannot participate in the arbitration, or the client’s budget precludes retaining expensive experts.

#### **Other Considerations in Selecting Experts**

An expert selected by counsel to testify in court must be able to explain his or her opinion and reasoning in simple, easy-to-understand terms and deliver the testimony with emotional force. In arbitration, this is not necessary because arbitrators often have backgrounds in the subject matter of the dispute and therefore do not require the same type of explanation. The expert in arbitration can instead focus on highly technical matters because arbitrators can understand them.

Because some arbitrators feel it is appropriate to question witnesses, experts in arbitration should be able to “think on their feet” in order to respond to probing questions by arbitrators who have expertise in the field in dispute. An expert experienced in testifying on direct and cross-examination who is uncomfortable with the idea of being questioned by someone knowledgeable in the area is not the best choice of witness for an arbitration proceeding.

***So long as the expert chosen can offer relevant and material testimony, he or she can testify as a witness at the arbitration hearing and render and introduce an expert opinion. That testimony can be admitted and given as much weight as the arbitrators desire.***

#### **Freedom in Preparing Experts and Their Reports**

Counsel has more freedom in preparing an expert to testify in arbitration and fashioning the expert’s written report.

In traditional litigation, anything a testifying expert witness considers in forming an opinion—even communications between the expert and counsel—is usually fair game for discovery,<sup>8</sup> despite legal privileges such as the attorney-client privilege or the work-product doctrine. This is why lawyers retain consulting experts who will not testify: because what counsel tells them is work product and not discoverable.<sup>9</sup> However, there is no need for this in arbitration because arbitration is normally a private affair<sup>10</sup> and discovery is much more limited. In arbitration, the parties typically need only identify their experts and exchange the

final expert reports and related exhibits.<sup>11</sup> (Occasionally, experts may be deposed, but only if ordered by the arbitrators or agreed to by the parties.) Thus, counsel should provide expert witnesses with as much information as possible, however sensitive, relevant or damaging, and freely exchange thoughts and ideas with the expert in order to focus the expert report and opinion.

As a result, in arbitration, counsel can eliminate the need for consulting experts, still protect work product, and save the client a considerable amount of money.

Since counsel's thoughts, impressions, and work product can be exchanged with experts without having to be produced to the adversary, counsel should take an active role when it comes to drafting expert reports and preparing experts for depositions or the actual hearing. If necessary, counsel should participate in drafting expert reports to make them persuasive and less subject to attack on cross-examination.

Counsel should also work with the expert on the foundation for the opinion. This work should continue up to the commencement of the hearing so that if a material change is required, it can be made. Since experts in arbitration are rarely deposed, a change might not be as damaging as in traditional litigation, where experts are usually deposed and changes are fully exposed on cross-examination.

### Effective Expert Presentations

Parties agree to arbitrate disputes for a variety of reasons, one of which is the speed (and hence reduced cost) of the proceedings. To this end, the hearing itself is often limited in duration with each side given equal time to present its case.

Because an arbitration hearing is less formal than a trial, counsel can decide to forego *voir dire* concerning an expert witness's expertise if that subject is a problem area. This decision will also be part of the process of gauging how much time to take to present the expert's testimony.

If less time is required, counsel might shorten the presentation to the ultimate opinion without detail, or submit only the written expert report and/or an affidavit from the expert. Arbitration rules on submitting declarations or affidavits are not limited to recipient witnesses.<sup>12</sup>

Depending on the circumstances (e.g., time, cost, strength of witness, issue materiality), counsel might prefer to submit a written expert report or affidavit in lieu of live testimony. The trade-off is that the arbitrators may give such evidence less weight than if the expert testified live.

If more time should be spent presenting expert testimony, counsel could present additional ex-

perts, some of whom may be less qualified than others, but whose testimony, together with the more qualified expert, will have a collective impact.

Counsel should also determine the mode of questioning as well as the questions to be asked. For example, should counsel use leading questions to focus the expert's testimony, save time, and/or control a talkative expert? Should counsel supplement the expert's testimony with the client's views of the factual and legal issues, either as an introduction to the testimony, as comments during it, or as part of concluding remarks? There is no prohibition against counsel providing the client's views of the issues during the hearing. Some arbitrators even prefer to hear these views to narrow the areas of disagreement and move the hearing along.<sup>13</sup>

Counsel who has confidence in the expert may invite the arbitrators to question the expert directly on controversial matters before the other side's cross-examination. Having arbitrators question the expert witness at this time may lessen the impact of a skillful cross and provide valuable insight into the direction the arbitrators are leaning. In addition, it provides counsel with an opportunity to make mid-course corrections if needed.

Counsel can also make choices concerning the form of the expert presentations. More than one expert may be presented at the same time using a panel of expert witnesses. This approach works well if more than one expert is necessary to address the same subject matter or if the individual experts would not make strong witnesses.

All counsel can agree to have both sides' experts present testimony at the same time. In this scenario, "dueling" experts may question each other, giving the arbitrators real-time insight into the competing views on the most contested issues. This format can benefit the side that has the stronger expert witnesses.<sup>14</sup>

### Opting to Re-Present the Expert

Outside of rebuttal testimony, an expert who testifies at a trial has one opportunity to present an opinion: that is, while on the stand during the case-in-chief of the party who retained the expert. In an arbitration, however, opportunities exist for experts to present their opinions more than once.

For example, counsel can decide that an expert who testified during the hearing should re-present his or her opinion as part of the closing or post-hearing oral argument. This may help the arbitrators understand certain concerns or invite their further questioning.

Or counsel might decide that the expert should be recalled to explain the rationale for a

party's post-hearing proposed award of damages, such as in baseball arbitration. In complex matters, the expert may be regarded as more knowledgeable on the subject of damages than counsel.

### Conclusion

More opportunities exist for using and presenting expert evidence in arbitration than in litigation. This is yet another advantage of arbitration. To best serve their clients, counsel should know the differences between the two forums and how they affect the presentation of expert evidence. For example, counsel in arbitration should know that:

- the rules for qualifying experts in litigation are inapplicable to arbitration;
- consulting experts are not needed in arbitration;

**Depending on the circumstances (e.g., time, cost, strength of witness, issue materiality), counsel might prefer to submit a written expert report or affidavit in lieu of live testimony.**

- disclosing work product to an expert in arbitration does not present a discovery problem;
  - counsel can play a more active role in drafting the expert report and focusing the expert opinion;
  - counsel can choose the most effective method of presenting expert evidence, for example, offering an expert report or affidavit only or even a panel of experts, as appropriate and necessary;
  - expert testimony can be represented during closing or post-hearing oral argument.
- The lesson is that counsel to parties in arbitration should think creatively about how best to use and present expert evidence. A lawyer who is still following litigation rules when working with experts in an arbitration proceeding is probably leaving something on the table. ■

### ENDNOTES

<sup>1</sup> See Fed. R. Evid. 702.

<sup>2</sup> See *id.*

<sup>3</sup> A fundamental difference between consulting and testifying experts is that the work of the former, including communications with attorneys, is considered non-discoverable work product.

<sup>4</sup> This article assumes a commercial arbitration under the American Arbitration Association (AAA) Commercial Arbitration Rules without specialized orders or agreements governing expert discovery and/or the presentation of expert evidence. (Hereinafter, unless otherwise indicated, all rule references are to these rules including the AAA Large Complex Case (LCC) Rules.) Where such orders or agreements exist, some of the opportunities discussed in this article are obviously unavailable. See AAA commercial rule R-1(a) (parties may agree to vary arbitration procedures) and R-30(a),(b) (arbitrator may exercise discretion to vary conduct of proceedings).

<sup>5</sup> See AAA commercial rule R-31(a) ("Conformity to legal rules of evidence shall not be necessary."). See also Jay E. Grenig, 1 *Alternative Dispute Resolution* § 8:60 (3d ed. 2006) (same).

<sup>6</sup> See AAA commercial rule R-31(a) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.").

<sup>7</sup> See 9 U.S.C. § 10(a)(3). See also T.H. Oehmke, 2 *Commercial Arbitration* § 95:6 (2006) (fundamental fairness dictates that arbitrators hear purported expert evidence).

<sup>8</sup> See Fed. R. Civ. P. 26(a)(2)(B) ("data or other information considered" by testifying expert is discoverable). See Oehmke, *supra* n. 7. See also *Regil Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714-717 (6th Cir. 2006) (following the "overwhelming majority" rule that all information provided to testifying experts is discoverable, including attorney work product and regardless of reliance by the experts). As a result, litigators are generally loathe to communicate with experts by letter or e-mail because such written communications are usually discoverable. See G.P. Joseph, "Trial Evidence in the Federal Courts: Problems and Solutions," ALI-ABA Course of Study (Oct. 20-21, 2005) (available on Westlaw at SL044 ALI-ABA 93) (advising lawyers to curtail written communications with experts).

<sup>9</sup> See *supra* n. 3.

<sup>10</sup> See AAA commercial rule R-23 (hearings are private unless otherwise provided by law). While it is true that protective orders may be obtained in a court proceeding to protect confidential information, courts are generally reluctant to issue such orders and the orders themselves can be difficult to administer.

<sup>11</sup> See AAA commercial rule R-21(a), (b) (discovery limited to identification of

witnesses, production of documents, and exchange of exhibits), and LCC rules L-3(e) (exchange of witness reports), and L-4(c), (d) (depositions upon agreement or as ordered by arbitrators upon showing of good cause). See also *McCrory v. Byrd*, 559 S.E.2d 821, 826 (N.C. Ct. App. 2002) ("Discovery during arbitration, as opposed to litigation, is designed to be minimal, informal, and less expensive. Thus, contrary to a civil case, where a broad right of discovery exists, discovery during arbitration is generally at the discretion of the arbitrator.").

<sup>12</sup> See AAA commercial rule R-32(a) (submission of witness declarations or affidavits).

<sup>13</sup> See AAA commercial rule R-30(b) ("The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.").

<sup>14</sup> Although used less frequently, witness panels are also available in traditional litigation. See Fed. R. Evid. 611. See also David H. Kaye & David A. Freedman, *Reference Manual on Scientific Evidence* 89 (2d ed. 2000) (discussing witness panels and narrative testimony in traditional litigation to "improve the judge's understanding and reduce the tensions associated with the expert's adversarial role").