# Improving Your Arbitration Presentation With a Mock Arbitration: Two Case Studies

By Edna Sussman

*"Who speaks to the instincts speaks to the deepest in mankind, and finds the readiest response."*

Amos Bronson Alcott, American Educator and Philosopher (1799-1888)

With the recent blitz of scholarly and popular works on the science of judgment and decision making,[1] attention has begun to focus on the decision making of arbitrators. Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision making processes. Indeed it is precisely because arbitrators are not all the same that many have argued that the party-appointed system for arbitrator selection is a *sine qua non* if arbitration is to prosper. While legal principles and precedents are an overlay that clearly influences final decision making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. Thus a party's selection of the arbitrator most likely to come into the arbitration with unconscious predilections favorable to that party's position can be an important factor in maximizing the chances of winning. Similarly, counsel's framing of the dispute and the theme developed to tell the story to evoke a positive response from the arbitrators is known by all to be essential to a persuasive presentation.

The routine employment of jury consultants is a response to the importance of selection and messaging. However, the arbitration community is just beginning to explore how counsel can strategically respond to arbitrators' inherent frames of mind. These discussions and explorations have led those versed in the fields of psychology and arbitration to conclude that "the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study."[2]

The mock arbitration will not suffer from what is known as the "good subject" response or from confirmation bias, unlike vetting with colleagues at the firm or with an arbitrator hired as a consultant to advise on procedure or strategy. Rather, independent arbitrators similar to those who will actually hear the case will evaluate themes and facts without knowing which party is presenting. These neutrals can provide a road map (with the aid of social scientist consultants) on such matters as how to refine or revise the theme developed to tell the story more sympathetically, which legal theories to emphasize, whether particular kinds of graphics would be helpful and what kind of expert explanations would be most useful. Recalibration of the case based on these insights should result in the most persuasive presentation to the real arbitrators. If social science tools are used early in the process to assess potential arbitrators, they can also serve to assist in the selection of arbitrators more likely to be receptive to the party's submissions.

The use of mock arbitrations to enhance the likelihood of successful outcomes in larger cases is likely to grow significantly in the coming years as those in the arbitration community become more familiar with the availability of these tools and their benefits. The globalization of commerce and the increased participation of arbitrators from many different cultures is likely to make such a process even more valuable as counsel seek tools to assess how best to persuade arbitrators with different backgrounds.

There are many different system designs for a mock arbitration process and each process must be crafted and tailored to the specifics of the case. I offer vignettes from my experience with mock arbitrations as examples of two system designs. Both were orchestrated by consultants well versed in developing appropriate protocols with years of experience employing these social science tools in other litigation contexts as well as increasingly in arbitration.

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## The Matching Surrogate Panel Model

The call came from an ADR consultant: can I serve as a surrogate arbitrator to participate in a one-day mock arbitration in Washington, D.C. in a multi-million dollar dispute? I was told that I was selected as a good match for one of the arbitrators in the real arbitration. Two others had also been chosen as good matches. We were not told who the real arbitrators were or what factors were considered in our selection. All of us had been suggested by one of the arbitral institutions as fitting the characteristics provided of the real arbitrators along with others who were reviewed by the consultant before our selection was made.

After signing a very stringent confidentiality agreement, the three of us were given materials to prepare. To control costs we were told to limit our review of the papers to 5 hours. We were also asked to respond to a short series of questions to gauge our initial reactions. The mock arbitration followed at a law firm's offices. We were not told which side of the dispute that law firm was representing. I was asked to chair the panel. Lengthy arguments by both sides were presented with power point presentations.

We were asked to hold our questions to the end. The room had a see-through wall on one side so that the consultant and others could observe the proceedings.

Following the argument, and without conversing, we were asked to respond to another set of written questions and then were offered the opportunity to ask counsel questions. Panel deliberation followed and was observed through the one-way see-through wall. We came to a consensus relatively quickly and counsel came in, debriefed us and sought reactions to various strategy options, including such fundamental questions as which legal theories to pursue and whether some should be dropped, whether the industry witnesses they were planning to use would be persuasive and how to deflect some troublesome facts. A lengthy productive dialogue between the surrogate arbitrators and counsel completed the day.

Subsequently the lawyers called me to tell me that the mock arbitration had been very helpful to them. There ensued a more traditional consultation process with counsel seeking guidance from me as an arbitrator but in this case as an arbitrator who had been selected by the ADR consultant as a match for one of the real arbitrators. I was asked to review the initial prehearing submissions, both the briefs and the very extensive fact and expert witness statements, so that I could advise them as to what I thought was most important to rebut and what to highlight in the reply papers. A consultation session followed to review my recommendations and to try to predict how the real arbitrators might react on specific issues. Subsequent consultation sessions were held to discuss how to present the evidence most persuasively, which witnesses to emphasize and in what order, how to allocate time in what was to be a chess clock arbitration, and other strategic and practical hearing considerations.

## The Multiple Arbitrators Model

Another call came from an ADR consultant asking if I could serve as a mock arbitrator in a one-day session. This time I was to be one of about 40 arbitrators gathered from around the country to participate in the mock arbitration hearings. The case concerned a structured financial product with respect to which I gathered there was an expectation of many claims being brought. The confidentiality agreement, again one of the most stringent I had ever seen, required a commitment not to take any arbitrations subsequently involving that specific structured product.

Forty of us gathered in midtown Manhattan where we had breakfast and were presented as a group with a one-hour presentation on the basic facts of the case using facts as they related to a single fictional investor. We were not given any materials in advance. Unlike the first mock arbitration, it was pretty easy to guess that it was the company which sold the financial product that had brought us together.

We were divided into panels with 5 arbitrators on each panel and seated in 8 separate rooms, each with a one way see through wall. Lawyers, we later learned from different firms, presented their arguments for the defense. We were permitted to ask questions but were asked not to limit them in order to allow time for the lawyers to present their arguments.

Panel deliberation followed, again observed through the one way see through wall. After consensus was reached, we were debriefed by in-house counsel for the respondent both as to our views of the merits of the case and various specific facts and arguments made by counsel.

We learned that the mock arbitrations were being used for several purposes: It was a beauty contest for 8 law firms competing for the business of defending the expected hundreds of claims. Each lawyer had independently developed his or her own approach to the defense. Performance and success at persuasion at the mock arbitration was to play a major role in the selection of counsel. The mock also served the more traditional purposes of identifying the most successful strategy and assisting in analyzing the settlement values that would be appropriate for the claims.

## Conclusion

As we strive to maintain arbitration as a more streamlined process than litigation, the value of the case is an important consideration in determining whether embarking upon a mock arbitration process is indicated. However, with the growth of high value arbitrations in recent years, the additional expense incurred in a mock arbitration may well be justified in particular cases. We can expect that parties and counsel will increasingly avail themselves of this process for improving their odds of winning as information about the possibility of mock arbitrations and their utility becomes more widely known.

## Endnotes

1. Recent best-selling books on the subject include Daniel Kahneman, Thinking Fast and Slow (Farrar Straus and Giroux 2011); Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions (Harper Perennial 2010); Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (Penguin Books 2009).

2. Richard Waites & James Lawrence, *Psychological Dynamics in International Arbitration*, in The Art of Advocacy in International Arbitration 69, 118 (Doak Bishop & Edward Kehoe ed., Juris 2010).

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