Chapter 4

PSYCHOLOGICAL DYNAMICS IN INTERNATIONAL ARBITRATION ADVOCACY

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I. Introduction

One of the inherent strengths of the current system of international arbitration is the unique opportunity for advocates and students of advocacy from so many different cultures to learn from each other about ways to enhance the effectiveness of their arguments and presentations. Some approaches to effective advocacy that might at one time been seen as radical have become routine as they were tested and found to be effective, while other approaches once thought to be expected and normal have been abandoned.

In addition to cross-cultural learning, we are all benefitted by the influences of disciplines other than law as we work to improve the effectiveness of our advocacy. For example, scientific research in the field of psychology has provided valuable information about how to improve communications and persuasion in arbitration and other types of legal decision making, and thus, assist arbitration panels and individual arbitrators in better understanding the evidence and positions of the parties in an arbitration.

There is a substantial body of research and writing relating to the use of scientific methodology as applied in the context of both court trials and domestic arbitrations within the United States. For example, scientific methodologies have been used to study various aspects of lay jury and domestic arbitrator selection, lay juror and domestic arbitrator perceptions, the impact of using visual aids during the trial and arbitration process, and decision making
processes throughout court trial and domestic arbitration proceedings. The use of scientific methodology in preparing for court trials and domestic arbitrations in the United States is so widely accepted that the subject of such research has become popularized as exemplified by the success of the John Grisham novel and movie, *The Runaway Jury*. Conversely, until now there has been a dearth of research and writing related to the use of scientific methodology as applied to the study of advocacy and arbitrator decision making in international arbitrations.

One of the premises of this chapter is that scientific methodology can and should be used in the international arbitration process for the purpose of improving the quality and effectiveness of advocacy. As shown in the context of the United States, all of the participants in the decision making process – decision maker, party, and advocate – are likely to benefit greatly from resulting improvement in communication. The same human qualities that are exemplified in the court and domestic arbitration process are also at play within the international arbitration context.

In this chapter, we will explore some principles and findings that we have discovered through the use of scientific research dedicated to better understanding of the decision making processes of arbitrators as well as other type of legal decision making. In the process, we will also explore ways to make this information useful to every advocate for a party in international arbitration.

Science is a foundation for art. The more we understand the science of psychological dynamics, both of the self and of the group decision making process, the more skilled we become in the art of advocacy.

II. The Arbitrator-Oriented Approach to Advocacy

A. What is Arbitrator-Oriented Advocacy?

When we ask an arbitration panel to accept our arguments and to decide a case in our favor, we are asking them to allow us into their world. It is like asking them to let us come into their homes. They must be the one to unlock and open the door from the inside.
Arbitrators, like all people, are complex. They use their logic and emotions in varying degrees to make decisions that will help them to experience pleasure and avoid pain. One way in which all legal decision makers experience pleasure is to make decisions that make them feel good about themselves. This principle is absolutely true in persuading international arbitrators.

To motivate arbitrators to listen to us and to take action in our favor, we must understand their needs and what inspires them. Using the most correct and appropriate advocacy technique is not enough. Persuading arbitrators involves meaningful two-way communication between the lawyer and the arbitrator(s) he or she wishes to convince. When it comes to interaction between lawyers and arbitrators, lawyers cannot dominate the fact finders and decision makers. Lawyers can only inspire them and motivate them. The arbitrators choose for themselves how they will respond.

No matter who the arbitrators are in your cases, their individual perceptions and interpretations of the circumstances of the case are uniquely their own. For decades interviews of arbitrators have revealed that each of them develops their own version of a case story by the end of the arbitration. Most of them have begun to form the story before the end of the opening statement.

It is not our power as advocates that results in a favorable decision. It is the power within the decision maker that creates the magical experience and results in a decision.

As lawyers, we give homage to the power of the decision maker. We honor and respect their power and should not try to upstage it. To the contrary, one of our goals is to empower fact finders by acknowledging their supreme authority.

B. The New Age of Advocacy and Arbitration

The world around us is changing. The practice of advocacy is changing. Historically, we have depended solely upon self-reliance and intuition in developing and presenting cases in arbitration as we were taught to do. We have relied solely upon advocacy skills that we learned from law professors, seminar speakers, mentors, and
sometimes opposing advocates. We have developed our themes and case theories from ideas that sounded persuasive to us that we generated ourselves or that we borrowed from other sources.

However, despite our emphasis upon self-reliance, a revolution has occurred in how we develop and present cases to judges, juries, and arbitrators. This revolution began more than thirty years ago with the founding of the National Institute for Trial Advocacy (NITA) in the United States (www.nita.org), more recently with the founding of the Foundation for International Arbitration Advocacy (FIAA) in Switzerland (www.fiaa.com), as well as other teaching organizations that are dedicated to assisting lawyers in enhancing their trial and arbitration advocacy skills. NITA, FIAA, and these other groups believe that the ideals of our system of justice are furthered when attorneys work to develop their skills as advocates. The effect that these research and teaching organizations are having is profound.

One of the effects of the drive to become more successful as an advocate has been the need for more reliable and useful information about how our case presentations will be perceived by arbitrators. Scientific decision maker research is just one source of this information. There are many others.

As we learn more about how arbitrators make decisions, we discover new ways to apply this information to make every advocate’s work more effective and more useful for the arbitration panel. By focusing case presentations on the needs of the arbitrators to better understand cases and their meaning, they can do a better job of making appropriate decisions. In the final analysis, then, the arbitration advocacy system itself is improved.

In this chapter, we spend a great deal of time looking at the results of scientific research and how to apply what we have learned. In the process, however, we may sometimes fail to acknowledge that advocacy is an art. It is one of the highest forms of art. It involves the use of oratory and expression that focuses on the meaning of life’s circumstances.

Until now, we have spent years making sacrifices to learn this art. But now the basic learning is over. It is now time to use our skills
and all of the resources we now have to create a masterpiece that is meaningful in the lives of our clients and the arbitrators as well.

C. How Do We Inspire Arbitrators to Decide in Our Favor?

Being the most competent lawyer in arbitration is not enough. It takes more than oratorical skills and arbitration savvy to convince arbitrators to enter a decision for our client. To win a case, the substance of our presentation must be compelling, meaningful, and inspiring.

Some of the most brilliant lawyers across the world tell us that they view themselves as messengers. They tell us that fact finders are more persuaded by the message and content of their arguments. They tell us many war stories about trials and arbitrations in which a less skilled advocate defeated them because the substance of the winning argument was more compelling.

Developing an effective arbitration strategy that will make an arbitration panel enthusiastic about deciding in our favor is dependent largely upon framing an argument in a way that is meaningful and motivational to them. The themes and case theory we rely upon must be in accordance with their attitudes about specific issues in the case, relevant life experiences, and other characteristics of the decision maker which will influence their decision.

People do not make decisions in a vacuum. No arbitrator has ever made a decision without first taking into consideration their perceptions of the world around them and their previous life experiences.

D. The Secret to Motivating Arbitrators

The world of international arbitration advocacy is unique in many respects, but the fundamental dynamics of persuasion are the same everywhere. Because arbitration advocacy takes place within a legalistic environment laden with complicated rules and procedures, we sometimes forget the people we try to persuade in arbitration are the same people who spend most of their time outside the arbitration.
Whether we want to admit it or not, arbitration advocacy is selling. It is the highest form of selling in the sense that we are selling ideas that will affect people’s lives.

Why do people buy products or ideas? The answer is simple. They buy out of self-interest. Benjamin Franklin, a famous author, diplomat and scientist from the United States, once said, “If you would persuade, you must appeal to interest rather than intellect.”

The practice of persuading people in arbitration seems complex because of the hundreds of details that are present in every case and the fact that different arbitrators will view the case differently. Nevertheless, the objective is to frame the issues and presentation of a case to address the needs of the arbitrators. They want to learn as much information as they can and they need to make a decision that makes them feel good about themselves.

In essence, therefore, they make important decisions the same way you do. Think about how you go about making decisions about family matters, law practice matters, and other personal matters. Do you make important decisions completely rationally and considering only the information that someone tells you is admissible? Probably not.

The more we are sensitive to the needs of arbitrators to form a story about what happened and why things happened the way they did, the better equipped we will be to develop themes and messages in the case which are meaningful and powerful to them. They need to know the important aspects of the case as clearly and simply as possible. Drenching them with unnecessary details makes their work more difficult and can dilute the possibility of presenting a cogent and persuasive argument.

Therefore, the secret to motivating arbitrators is to understand the subject of the arbitration from their perspective and to appeal to their self-interest in a world as they see it. Arbitrators, like all legal decision makers, have strong senses of the importance or lack of importance of evidence and issues. Likewise, they have a strong sense of how to fashion a solution that makes them feel comfortable and fits contentedly into their view of the world.
There is also another important aspect of presenting a case that all successful lawyers must understand. Arbitrators will make their decision in your case based on their own attitudes about specific issues in the case, their own life experiences, and their own set of life’s influences.

III. The Dynamic of an Effective Advocate in International Arbitration

Advocacy is persuasion and psychology is the foundation for persuasion. Unfortunately, preparation for practicing law rarely includes instruction on the science and art of persuasion. Consider the amount of time devoted to communication theory and cognitive processing theory in legal education. Analytical reasoning is presumably developed through the legal education pedagogy but the study of the psychology of the advocacy process is rare. The goal of this chapter is to provide information and insights relating to the science of persuasion that is rarely found in legal education, legal literature, and legal training.

The foundation for understanding the science of persuasion begins with the concept of internal roadmaps. A basic knowledge of internal roadmaps then provides a framework for discussing how the science of persuasion is applied in international arbitration.

A. The Internal Roadmap

Psychological roadmaps are the neural pathways along which the brain sends and receives information. The send/receive process operates primarily on two levels that we will refer to as surface structure and deep structure. Surface structure is what a person observes through the five senses: words, tonality, body language, visual images, and gestures. However, the information processed through the surface structure pathway is only factual data. The surface structure pathway does not give meaning or emotional value to the observation data. The meaning and emotional value to the observed data comes from the deep structure pathway. A person’s deep structure, on the other hand,
contains that person’s experiences, values, biases, prejudices, dreams, fears, and beliefs.

A simple illustration of the surface structure/deep structure dynamic is the “Ocean Test” as we refer to in teaching trial advocacy. The “Ocean Test” may be demonstrated by a comparison between a word’s definition (i.e., surface structure) with the images that use of the word conjures up (i.e., deep structure).

The necessity of understanding the differential between a fact (as presented by the advocate) and the image(s) that the fact generates in one’s mind of the arbitrator is what makes the surface structure/deep structure dynamic so critical in international arbitration advocacy. In the final analysis, then, the foundation for successful persuasion is understanding the significance of the arbitrator’s internal roadmap.

The interplay between the individual advocate, the arbitration panel, and scientific methodology can be exemplified by the geometric shape of a triangle. In 1816, Dr. A. L. Crelle, a German mathematician, described a triangle, stating that “[i]t is indeed wonderful that so simple a figure as the triangle is so inexhaustible in properties”. Specifically, the simple figure of the triangle here is: Side 1) the dynamic of an effective advocate, Side 2) the decision making processes of international arbitration panels, and Side 3) using scientific decision maker research in arbitration advocacy. (The triangle analysis has been used in the study of domestic lay jury and arbitration in the United States.) Side 1 (the advocate) and Side 2 (the arbitration panel) are both well-chronicled concepts in international arbitration. However, the international arbitration literature does not include discussions of the psychological dynamic of the effective advocate or of the arbitration panel. Also absent in the majority of literature regarding international arbitration is analysis of how to connect the two concepts (the advocate and the arbitration panel) through scientific research and, thus, to complete the triangle. The triangle

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analogy, with the sides identified above, may be illustrated in the following sections – demonstration what Crelle reasoned to be “so inexhaustible in properties.”

Consider the following diagram:

\[ \text{Advocate} \quad \text{Advocate or Arbitrator} \]

SS = Surface Structure
DS = Deep Structure

The diagram illustrates the complexity of an interaction between an advocate or opposing counsel – with an arbitrator – in an arbitration hearing. Each set of arrows represents an element of the interaction.

a. *Surface Structure to Surface Structure.*

The “factual” exchange between the advocate or opposing counsel and the arbitrator includes information gained by the advocate through words, gestures, tone, body language, and other observations sent/received through the five senses.

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*Id.*
The exchange between a person’s surface structure and another’s deep structure is perhaps the most underutilized and unrecognized of the three exchanges shown in the diagram.

It is underutilized because the information sent/received in this exchange often reveals information about fears, biases, dreams, and prejudices that people often have difficulty acknowledging about themselves. For example, perhaps the opposing counsel is wearing an ill-fitting suit that is unduly wrinkled. Remember, however, that an ill-fitting, wrinkled suit observation (surface structure) only identifies that the opposing counsel is wearing an ill-fitting, wrinkled suit. It is the observer’s deep structure that creates a meaning for that observation.

What does an ill-fitting, wrinkled suit mean? It could carry an infinite number of meanings because experience tells us that no two people have exactly the same life experiences and perceptions, and therefore, there is little chance that the deep structures of two different arbitrators, even though they may have similar backgrounds, will be alike. To one arbitrator, the meaning suggested by the images might reveal a negative bias or prejudice the observer has about individuals who wear ill-fitting, wrinkled suits. To another arbitrator, the meaning might be that the advocate is “down-to-earth”, self-confident, and more credible than an advocate dressed quite fashionably.

The simple example of the “ill-fitting, wrinkled suit is useful in understanding a much more important concept – that every detail of the evidence or of an argument has the potential to be interpreted differently by different arbitrators and to be applied differently by each arbitrator in interpreting the circumstances of a case and making an important decision. Therefore, the need for thorough and objective study of likely arbitrator perceptions is of enormous importance.

One of the most curious aspects of this constant dynamic taking place during an arbitration proceeding is that most of the time neither arbitrators nor advocates recognize that this important underlying
interpretive process is taking place. In those instances where an arbitrator or advocate recognizes that some underlying interpretation is taking place, the ability to accurately identify it and articulate it is missing. In science, for example, we recognize a phenomenon we call “fundamental attribution error” where we attribute an event or outcome wrongfully to one factor when, in truth the event or outcome was caused by something else entirely.

As a result of a lack of understanding of the existence or pervasiveness of underlying interpretations and misinterpretations, neither arbitrators nor advocates question the meaning their deep structure gives to a factual observation. Simply stated, observers make assumptions about their observations.


If the exchange from surface structure to deep structure is mostly underutilized and unrecognized, then the exchanges between the deep structures of arbitrators and advocates are perhaps the most difficult to understand and deal with effectively.

The opportunity to persuade is dramatically increased when there is an exchange between the advocate’s deep structure and the deep structure of the opposing counsel or arbitrator. Because the deep structure holds the meaning for factual data, the advocate who understands how to create a deep structure exchange has an advantage. The difficulties in creating a deep structure exchange are: 1) individuals do not generally like to talk about their fears, biases, prejudices, goals, and dreams, 2) attorneys believe they only need the facts, and 3) it takes time and patience to develop the techniques necessary to create this exchange.

B. Effective Applications

A discussion of the science of persuasion is incomplete without exploring how the theory applies to the international arbitration hearing context. The applications are endless but, due to space limitations, the focus here will be limited to three of the most common applications: 1) the importance of narrative, 2) using scientific evidence, and 3) questioning witnesses.
(1) The Importance of Narrative

A narrative, for the purposes here, is the story of the case. The story of the case is often overlooked in the international arbitration context because advocates focus primarily on the factual data (surface structure) of the case. The use of an effective narrative, however, provides a context (deep structure) for the factual data. The context then creates an anchor point, or theme, for the advocate to use during the process of a hearing. It is important to note that a theme is not an emotional appeal but rather it is one way to create a deep structure to deep structure exchange.

For example, consider a shipping contract dispute between an Indian company and a Chinese company. The arbitration panel consists of arbitrators from Sweden, United States, and France. The way for an advocate to reach the deep structure of every person involved in this process is either to select a universal theme, an anchor point that transcends culture, or to develop separate themes directed to each arbitrator, but that are complimentary to each other. A possible single theme in this case might be “doing what is right”. While cultures differ in how “doing what is right” is applied, no culture is without a concept that mirrors this theme. An effective advocate would return to the “doing what is right” anchor point throughout the course of the hearing in order to continually remind the arbitral panel of the essence of the dispute.

Perhaps the most eloquent explanation of the role of narrative meaning (meaning in the context of a story) is reflected in the writings of Jerome Bruner, a famous educational and developmental psychologist, in his work *Acts of Meaning*. In this work, Bruner explains that the central concept of human psychology is meaning and the processes and transactions involved in the construction of meaning. Bruner states that culture shapes human life and the human mind and gives meaning to the events and behaviors by creating an interpretive system. He states that our interpretations and

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perceptions are highly individualized in many ways, but that they are highly influenced by forces around us. He refers to this interpretive system as folk psychology or common sense. Bruner writes that this folk psychology is a system by which people organize their experience in, knowledge about, and transactions with the social world.

The vehicle with which people learn, organize and relay meaning and understanding is the narrative or story as Bruner recognizes. In his work, Bruner states that the function of story is to create an explanation, to give understanding, and to rationalize events, behaviors, and mental states of other people with whom an individual interacts. In this way, an individual and group can compare acceptable and normal cultural patterns with actions which deviate in matters of legitimacy, moral commitment, and values.

Another interesting and provocative writer on this subject was Joseph Campbell, the great social philosopher and cultural anthropologist. In his work, The Power of Myth, Campbell explains his belief that the basic driving force for mankind is the search for meaningful experience. Throughout his lifetime he immersed himself into the cultural philosophies of human societies around the world and reached back into prehistoric times. Before his death in 1987, he stated in his last interviews and writings that he had reached the conclusion that it was not enough for man to discover the meaning of something intellectually in an objective way. He determined that it was more important for us to actually experience the meaning – to internalize it and feel its effects – a more subjective reaction.

The use of stories, myths, parables, and fables to proscribe acceptable behaviors and motivations is well documented in most every primitive and modern culture. Anthropologists who have studied dispute resolution in Western and non-Western societies have found clear and convincing evidence that laws or codes for conduct are represented and passed from generation to generation in the form of stories.

The conclusions of these authors are important to us in international arbitration in one significant respect – we must make

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the effort to develop and present a case presentation that offers real substantive meaning and experience for every arbitrator. Otherwise, we are simply going through the motions of advocacy and will wind up with a case presentation that offers neither meaning nor experience to which an arbitrator can identify and commit.

(2) Using Scientific Evidence

Scientific evidence may, at first glance, seem to be merely a factual (surface structure) element of a dispute. Indeed, from an intellectual point of view, scientific evidence includes data, findings, and perhaps discoveries that should be useful in helping the arbitration panel understand an important point(s). We also know from historical practice that in order to be considered useful, scientific findings must offer reliability which may be defined as the consistency of a measurement, or the degree to which an instrument measures the same way each time it is used under the same condition with the same subjects.

However, providing scientific evidence to support advocacy is much more than an intellectual exercise. To the arbitrator, scientific evidence must not only have scientific reliability and validity, but it must also have meaning in a much deeper sense that supports the overarching themes and narrative of the case. In this sense, the use of scientific evidence, including the way it is presented, creates a higher level of meaning and application for the data to support the advocacy points.

When an advocate uses scientific evidence, the reliability aspect of the evidence accesses the element of assurance in a person’s deep structure. Assurance is important in the science of persuasion because it creates confidence that the conclusive outcome will be the same each time the data is processed. Confidence in the conclusive outcome of scientific evidence establishes elements of trust and rapport – both of which are components of a deep structure to deep structure exchange.

In practice, therefore, a successful advocate will want to develop ways to persuade arbitrators that the scientific evidence supports the
advocate's positions on central themes and narrative of the case. Presentation and discussion of the detailed aspects of the actual scientific research questions, methodologies, research designs, and findings should be as brief, concise, and comprehensive as necessary, but without unnecessary discussion and detail. Only in this way can the advocate help the arbitrator to understand the important meaning that the scientific evidence has for the entire case.

We might look at the example of a communications technology issue in a patent dispute. The plaintiff might argue that the defendant was aware of the plaintiff's patented technology and specifically tried to design the defendant's technology in a way that would skirt the claims in the plaintiff's patent. Focusing on a possible defense strategy, the defendant could bring forth a stream of reputable scientists all of whom might claim that the defendant's technology was unique and did not mirror the plaintiff's technology. The defendant could bombard the arbitrators with a steady stream of evidence focusing only on the scientific evidence for weeks, which in the end might overwhelm the plaintiff's expert witnesses and cause a pro-plaintiff decision, if the arbitrators were still interested in the case.

However, in the minds of the arbitrator in our example, the plaintiffs have actually brought a patent infringement dispute that is grounded in allegations of deception by the defendant, thus focusing on the defendant's character, which was not addressed in the steady stream of scientific evidence. Query whether it might be helpful for the defendant to address the deception allegation first and then go on to show with more concise proof that the defendant's technology is different from that of the plaintiff. The defendant might offer the actual inventor of its own technology to show the world-class trend-setting expertise of the defendant's inventor and the independent process by which the defendant's technology was developed. Furthermore, instead of offering a mind-numbing string of experts, to offer only 2-3 selected world-class experts to support the defendant's contentions with casual mention of others who would concur.
Therefore, in the final analysis, it is best to squarely meet the core issue(s) from the arbitrators’ perspective which usually involves issues that give meaning to the behavior of the parties in the evidence and give meaning to the dispute as a whole and how best to create a decision that gives meaning and significance to their decision.

(3) Questioning Witnesses

Asking questions is an essential skill for an attorney, regardless of whether the context is in an office setting, a trial setting, or an arbitration setting. However, many attorneys focus on the factual information (surface structure) because they do not know how to access information from a witness’ deep structure that can effectively provide information to enlighten and persuade an arbitrator’s deep structure. Accessing information from one’s deep structure requires discipline and willingness for the attorney to seek information rather than simply establishing power or control.

The most effective technique for accessing information from the deep structure of a witness, arbitrator or even another advocate is with clean questions. A clean question is one where the questioner refrains from including any personal bias, prejudice, or preconception in the question. Examples of clean questions are “what is important about…”, “tell me more about…”, and “what else is important about…” When a clean question is presented, it requires the answerer to reconsider an initial answer and give more information than in the initial answer. Each reconsideration pushes the answerer further into the deep structure and so as the exchange continues, the questioner begins to learn more and more about the meaning (deep structure) of the factual information (surface structure).

No discussion about clean questions is complete without a brief explanation of the technique of “looping”. Looping is taking a part of the answer and using it in the next question. The technique communicates that the questioner is listening and that what the answerer said is important. When the answerer feels that what has been said is heard and is important, the willingness to give more information increases significantly.
The following is an example of a Q & A where the technique of asking clean questions is combined with the technique of looping.

Q: Why did your company include this clause in the contract?
A: We wanted to know that we could count on receiving the widgets in a timely fashion.

Q: What was important about your company receiving the widgets in a timely fashion? (an example of a clean question with looping)
A: We had a deadline to meet and we couldn’t meet the deadline if we didn’t have the widgets.

Q: What was important about meeting your deadline? (an example of a clean question with looping)
A: If we didn’t meet the deadline, we’d have to pay a penalty.

Q: What else is important about meeting the deadline? (an example of a clean question with looping)
A: This is our first contract with this company and we’ve worked hard to get their business. We’d like to do more business with them and if it looks like we aren’t dependable, then they may not want to sign additional contracts with us.

As this exchange demonstrates, using clean questions in combination with looping creates the rapport necessary for the questioner to get in-depth information from the answerer that is useful to address the needs of an arbitrator’s deep structure.

IV. The Decision Making Processes of Arbitrators

A. Overview of the Communication/Persuasion Process

The persuasive process begins with basic communication as we have noted. Let’s begin our discussion of the communication and persuasion process with an analysis of the communication process as it relates to persuasion and then examine the core principles involved in effective persuasion.
B. The Process of Communicating

(1) Basic Characteristics of Effective Communication

Because communication is inherently interactive, the communicator and the observer are both interdependent. In each of our communications with arbitration panels, we are dependent upon the arbitrators for response, whether spoken or unspoken. Otherwise, the interaction rapidly disappears.

Certainly some conversation is interactive but not necessarily communicative. Quite often in arbitration, for example, people say things that are meaningless and intended only to fill silence. Sometimes these meaningless interactions detract from the message to be communicated and sometimes they do not.

The best communicators, however, remain true to their message. They remain focused on the idea to be communicated. They work hard to make sure that all of their words, actions, and tools communicate pure messages without any distractions.

Regardless of the culture or setting, we think and communicate in symbols. A symbol is a sound, behavior, letter, or visual image that stands for something else. The most highly organized symbols we usually call language. A typical arbitration is filled with symbols, each of which will mean something special to one or more arbitrators. Therefore, we have to pay attention to the symbols we use and project so that the correct message is presented, and hopefully received.

(2) Inner Selves and Communication

Our internal states are both the beginning and the end of communication. The perceptions and mental state of the communicator are the source of the information to be communicated. Conversely, the perceptions and mental state of the listener form the end product of the communication.
One might argue that the things in our environment about which we are communicating are definite and that perceptions of the same object must be identical. After all, the sky is usually blue and trees are usually green. However, our memories and perceptual systems are highly selective about what they let in, and even more selective about the information that is stored in temporary or long term memory. Each person perceives the sky or a tree in a very unique way. In this sense, our perceptions are not directly tied to specific events or objects, but are created by our individual perceptual systems.

(3) Tools for Creating and Changing Perceptions

There are actually many interesting tools that humans have created or used over the millennia to create, maintain, and change perceptions. These tools are derived from our understanding about our cognitive (thinking) processes and our affective (feeling) processes. We will look at three of these tools that are most useful in arbitration. They are language, schema and affect.

Language is a powerful communication tool in many respects. In a very basic way, it helps us to organize our thoughts and information in systematic ways. Language can be used in the form of words, concepts, or style of expression. Words convey meaning and concepts and the same words can be spoken or displayed in many ways. Language is flexible and, in this sense, is a tool, not a constraint.

As children, we acquire language early on as symbols and concepts. It is not until later that we learn the spelling of the words and the rules of grammar. For this reason, in presenting a case in arbitration, it is more important to be concerned about the concepts and the connotations of our presentation, than the actual words used. Once the concepts are right, then the words will follow.

However, many times as lawyers we perceive language as a technical construct rather than a free flowing medium of communicating. We tend to be hyper-technical about our use of particular words that fit legal patterns rather than focused on central concepts and messages that arbitrators will need to hear and see that positively affects their deep structure if we are to be persuasive.
As human beings, we tend to form preconceptions and expectations around our previous life experiences. Technically, psychologists refer to these preconceptions and expectations as schemas.

A schema is a group of concepts and perceptions and the systems we use to organize them. They are a type of mental shorthand. Schemas help us to quickly make sense of the things that are happening around us. For example, when we are following a car down the freeway and the car begins to swerve from a blown tire, we consult our schemas to try to understand what is happening and what, if anything, we need to do about it. Our brains tend to store information in an order that seeks to make sense or order out of life’s events and to avoid disorder or inconsistencies.

When arbitrators are listening and observing your presentation, they are constantly testing and comparing the thoughts and messages in your presentation with their own life experiences in order to make sense out of the presentation. If there is an identical match between arbitrators’ schemas and the messages in the presentation, they will readily accept the new information (matching schemas is an example of a deep structure to deep structure exchange). If the arbitrators’ schemas are different from the messages or ideas in the presentation, they will generally feel uncomfortable with them and may even reject them. If the arbitrators have no schema with which to compare the ideas in the presentation, they will consider the attendant circumstances and how much they trust the presenter in order to form a new schema. Or they might reject the ideas in the presentation altogether.

Consider this example. If a lawyer tries to paint his corporate client as a company that makes decisions based upon their business interest in keeping customers happy, arbitrators will likely accept the message, assuming there is supportive evidence. This message will make sense to them, based upon their own life experiences. On the other hand, if the lawyer tries to paint his corporate client as a company that makes decisions solely on the basis of humanitarian considerations, arbitrators will likely reject the message. Their experience tells them that this message is not true.
When there is a match between the arbitrators’ schemas and the messages, the relationship between the arbitrators and the lawyer is enhanced. When arbitrators reject a message, however, the relationship between the arbitrators and the lawyer suffers.

One of the primary reasons for conducting pre-arbitration decision maker research is to identify the schemas that arbitrators will use to process the case and reach a decision. We have learned through experience that when we try to guess the schemas that arbitrators will use, we are often wrong. Scientific mock arbitration panel research also helps us to identify which of the schemas arbitrators will use that will be dominant in reaching a decision.

Arbitrators, like the rest of us, often form schemas around subjects. Consider the example of banks. With reference to banks, arbitrators expect to see a bank president, loan officers, tellers, vaults, cash drawers, expensive rugs, and elegant wood paneling. We expect banks to make loans to people, companies, and governments with good credit and to deny loans to those who have bad credit. We often expect bankers to be more interested in making money than benefiting society. Besides these perceptions, each of us has many other perceptions of banks and the people who work there. If an arbitration involves a bank or banking issues, these schemas will possibly come into play. The question, then, in pre-arbitration development of the case is to discover ahead of time how these schemas and representations will figure into arbitrators’ thinking.

Schemas are formed primarily by perceptions and ideas that have been related to us by others. Socialization is perhaps the most powerful influence on how schemas (and stereotypes) are formed, maintained and changed. The significant people in our lives have a profound influence on how we view the world.

Arbitrators’ perceptions are highly individualized. Even when the facts of a case are not disputed, each arbitrator will likely have a different version of the same schema to figure out what happened, why things happened as they did, and what the decision should be. Since arbitrators’ schemas are pre-existing, therefore, the objective for a lawyer is to set the stage with powerful messages that will cause an arbitrator to put these schemas into motion.
Interestingly, within the framework of our schematic structure often lies the key to changing attitudes or perceptions. Our value structure forms the backbone of our belief system and can often be of great use to a lawyer who wishes to change the perceptions that arbitrators might have at the outset of arbitration.

The last tool that we will discuss is affect. In contrast to our thinking processes, we share other experiences with arbitrators through our feelings. To demonstrate the differences, let’s assume that you missed an important filing deadline. On one hand, you know what happened factually from your cognitive processes. On the other hand, you are probably quite upset and perhaps even frightened about the possible consequences. These emotional reactions or emotional states we call affect.

In our example, the cognitive processes brought about the emotional state because we have learned because of our experience to associate the two together. In other words, we have learned to link certain cognitive thoughts and perceptions to certain sets of emotions (which form our deep structure). The emotions only come as a result of our perception that a certain state of events or facts exist.

Now let’s work on changing the perception and observe what happens. What would happen if the arbitration panel extended the deadline? The facts have now changed. Our perception of the state of the world has changed. And of course, our mental state changes from anxiety to calm.

Let’s see what happens when we apply these principles to a particular case. This time let’s consider a contract and fraud dispute between two businesses. One company is a Fortune 500 company that manufactures computer hardware and software. The company uses small companies to manufacture certain parts of their computer equipment. One such small company complains that the big company promised to order one million parts a year for 10 years. It claims that in reliance on this promise, it borrowed and spent money to expand its plant size and machinery capacity. It also complains that the big company now orders only 200,000 parts per year. The big company replies by saying that the one million parts number was only a projection, not a promise. Furthermore the big company says
that it would order more parts when the economy in the industry improved and its customer demand increased.

What will arbitrators think? How will they feel about the big company? Will they mistrust the officers of the big company under the assumption that officers of big companies will tell a lie just to protect their jobs? Will they feel sorry for the small company because it had less power and control? Will they believe that the drop in the number of parts ordered was due solely to the unexpected changes in the industry, and therefore, not a breach of contract or result of fraud?

To be sure, each new set of facts and circumstances in the case will prompt different cognitive and emotional responses from arbitrators based upon their attitudes, life experiences, personality traits, values, and demographic influences. The keys to success, therefore, lie in understanding the arbitration panel’s attitudes, life experiences, and beliefs with respect to specific issues in the case. By understanding which attitudes, life experiences, and beliefs will dominate the arbitration panel’s thinking, we have a better chance of developing a targeted presentation that will be persuasive. In addition, by understanding the breadth and depth of thinking or feeling about the issues that an arbitration panel will experience, we can shape the arguments and communication opportunities so that they coincide with arbitrators’ schemas as well as their cognitive and affective processes. This important information about arbitrators is also one of the objectives of pre-arbitration decision maker research.

The construction of a powerful argument is the product of systematic analysis and methodical development of messages and information that can be communicated effectively.

(4) Measuring Effectiveness of Communication

There are generally two ways to measure the effectiveness of communication. The first is to judge the quality of the communication by comparing the actual communication to its purpose. The second, is to observe whether the recipient of the communication is motivated to behave in accordance with the purpose of the
communication. The first measure is a more subjective measurement, while the second is more objective.

Regardless of how you judge effectiveness, the central question is Does the communication have its desired effect?

The reason this topic is so important for lawyers is that the effectiveness of advocacy is so often measured subjectively (i.e. whether the lawyer believes he or she did a good job in presenting the case), rather than the more objective standard. As a result, the communication efforts of the lawyer are often ineffective even though the lawyer has communicated with great social skill.

C. The Importance of Listening and Making Arbitrators Want to Listen

Some people say that listening is an art. Perhaps that is true. Certainly one of the best ways to understand another person is to listen to them. But the ability to listen is also a skill that can be enhanced with understanding and practice. Listening is an active behavior, not a passive one. Our success in listening to judges and arbitrators and getting them to listen to us can be markedly improved once we consider how the listening process works.

(1) How Listening Works

Listening in arbitration is critical to the process of communication and persuasion. Arbitrators must listen to understand the case. Lawyers must listen to arbitrators in order to understand arbitrators’ perceptions and to measure how well the case is being presented and accepted. Lawyers must listen to them in order to pick up procedural cues.

However, as human beings, we do not listen to everything we hear and not everything we hear is important enough to seriously consider. Many things affect our listening ability. For example, we are sometimes accused by others of selective listening. Sometimes the selection process is deliberate and other times it is unconscious.
As attorneys, we have an obligation to train ourselves to listen carefully to arbitrators, witnesses, and other lawyers and to minimize the selectivity that we might be tempted to use outside the arbitration. Arbitrators, on the other hand, do not have the same motivations. They feel quite free to listen when they want, or alternatively, not to listen, either consciously or unconsciously. Selective listening by judges, juries, and arbitrators is not the result of any disrespect to the presenter, but is a coping mechanism that legal decision makers use to survive the decision making process and make a decision based upon the most important evidence and ideas presented to them.

The average person’s attention span is approximately 10-12 minutes. Therefore, during a 5 day arbitration, for example, any particular arbitrator would have “tuned in and out, then tuned in again” roughly 200 times. Given the monumental amount of detail in most international arbitrations, the struggle of an arbitrator to remain focused on the important aspects of the case (in the perceptions of an arbitrator) is a mighty struggle indeed.

For the most part, arbitrators will listen to the things which coincide with their self-interest in knowing about the case and making a decision which makes them feel good about themselves. They will generally listen to a lawyer unless the lawyer has made them angry or created some other obstacle to acceptability.

Arbitrators, like most people, also listen selectively due to unconscious attitudes about the subject, the speaker, or some other element of the case. In addition, there are always competing stimuli in an arbitration.

By and large, however, the biggest obstacle to communication in the middle of arbitration is the striking difference between the presentation rate of information and the assimilation rate with which arbitrators absorb information. Most speakers talk at a rate of between 80 and 120 words per minute. However, arbitrators, like most people, can absorb words, images, and pieces of information at a much faster rate.

The difference in the presentation rate with which most arbitration teams present their cases and the assimilation rate at
which arbitrators absorb it generally leads to some difficulties. Daydreaming, sleeping, and sometimes even frustration and anger are often the result of arbitration presentations, which are unnecessarily detailed and could be presented in more interesting and efficient ways.

(2) Memory and Retention of Information

Retaining information long enough to make a decision is an essential part of arbitration panel decision making. Retention involves memory. To better understand how memory works try this exercise. Answer the following questions using your memory:

1. What is the name of the street you live on?
2. What was your mother’s maiden name?
3. What major cities in the world are located on a coastline?

To be able to answer these questions, the answer must have been encoded, stored, and retrieved. Memory refers to our ability to acquire, retain, and use information or knowledge.

Arbitrators retain information in several ways. Memories are stored in either short-term memory or long-term memory. Short-term memory is that part of our memory which is currently active and can change quickly when our focus of attention is shifted. We usually keep short-term information active in our minds for less than ninety seconds. For example, you might be trying to remember a telephone number when suddenly a friend asks you a question such as, “What time does the train arrive?” You may instantly forget the telephone number you were trying so hard to remember.

Long-term memory, on the other hand, is the repository of everything that we know. Generally, any piece of information that we hold onto in our brains for more than an hour is considered to be long term. Long-term memory is virtually limitless. However, memory can fool us. Sometimes we remember things differently than the way they actually were. On the other hand, sometimes we fail to remember things that we thought we knew very well.
In these ways, human memory is different from computer memory. Computers store information digitally in exactly the same form that was input. Computers do not create nuance or context without being instructed. Computers do not make judgments. Computers do not color memory with emotional responses. On the other hand, human memory does all these things.

Computers can generally recall every bit of data that was input even once. Human beings only store information in long-term memory that appears to be important or useful for future reference.

What is the benefit of short-term memory in arbitration? The most effective communicators are usually good at short-term listening. For example, during interactions with the arbitrators and during examination of witnesses, listening to the other person’s responses is important in creating a productive flow of conversation.

In persuasion, we attempt to activate an arbitrator’s long-term memory in a number of ways. The most typical ways involve association and repetition. The general idea is that if we can associate new information with information already stored in an arbitrator’s long-term memory, storage of the new data will be facilitated. In addition, if new data is repeated long enough, it will usually be transferred to long-term storage.

The psychological messages that are the most persuasive and powerfully compelling in arbitration are those which are reflected already in an arbitrator’s long-term reference memory. For this reason, some attorneys and trial scientists have mused that a case is decided before arbitrators ever come to the arbitration hearing.

D. How Persuasion Works - The Elements of a Persuasive Argument

Persuasion is communication that is intended to reinforce, shape, or change responses of the audience. In terms of arbitration persuasion, a lawyer or advocate is trying to reinforce, shape, or change attitudes and behavioral intentions (decision making) of the arbitration panel and individual arbitrators. This idea implies that persuasion is more than just communicating objective facts and
information as we noted in our discussion of surface structure and
deep structure. If persuasion in arbitration simply consists of relating
the facts of the case, we wouldn’t need lawyers and arbitrators. We
would simply type in the facts to a computer and the computer
would decide who wins the case.

Human beings are more complex, however. For the most part,
persuasion takes place when a credible source of information
presents an idea or attitude that differs from the ideas or attitudes
already held by the audience in some way. The audience may have no
preconceived ideas about the topic or may have different ideas or
attitudes about the same topic. As a result of the presentation of a
new or different idea, the audience will feel momentary tension that
produces a kind of dissonance or incongruity. Because of the
discomfort that the audience feels, they are motivated to try to
remove the dissonance by either accepting the new idea readily, or
rejecting it, or reconciling it with previously held ideas and attitudes.

Realistically, most arbitrators will have pre-existing attitudes and
opinions about some or all of the topics that will arise in the
arbitration. Nonetheless, there seems to be a great deal of extra space
available for new ideas and attitudes for most arbitrators. As long as
these new ideas or attitudes conveniently fit in with previously held
ideas and attitudes, the job of persuasion is relatively simple. On the
other hand, sometimes these new ideas or attitudes run head-on
against an arbitrator’s pre-existing beliefs. In that case, the job of
persuasion is more challenging. In other cases, the difficulty of the
task falls somewhere in between, such as when new ideas or attitudes
do not actually conflict with pre-existing beliefs, but some adjustment
is required. Indeed, where one set of beliefs is bad for your case, you
should identify a different set of beliefs that provide a more helpful
framework for your case. In other words, you will want to reframe
the case and change the perspective.

Attitudes are visceral and implicit for most people. Clearly the
best option in the face of a pre-existing attitude is to try to find a way
to reconcile it with the new idea that we want the audience (the
arbitration panel) to accept. For example, if we want arbitrators to
believe that our corporate client has a justifiable defense to the
claimant’s demands to punish the corporation, we would find it quite difficult to make an arbitrator believe that punishment is not justified in a case where a corporation has acted badly. On the other hand, if we state that we agree that punishment can be justified in the unusual instance where a corporation has acted badly, but that this particular corporation has demonstrated its contrition and punishment is not necessary, the persuasion process becomes easier.

E. The Elements of Persuasion

In order for us to be persuasive in arbitration, we must understand the elements that make up a persuasive communication. There are essentially four elements to a persuasive presentation: the communicator, the message, how the message is communicated, and the audience.

(1) The Communicator and Credibility

Credibility of the advocate and the advocate’s message is important in persuasion. Credibility or the lack of it is the result of the arbitrator’s observations of the quality and integrity of an advocate’s character and behavior. Arbitrator perceptions of credibility are a threshold through which they all will pass before an arbitrator can ever seriously consider an advocate’s arguments.

Source credibility (i.e. the credibility of the source of a piece of information) often diminishes over time and the message may fade as the source of the message is forgotten or even dissociated from the message. Conversely, the effect of a message sometimes increases over time even though the messenger may not have had perceived credibility (no perceived expertise or trustworthiness). It may be, for example, that one of the advocates is obviously young or inexperienced, but has a powerful message, while the opposing advocate is obviously more experienced and steady in arbitration. In these instances, arbitrators will often tend to remember the message longer than the messenger. We sometimes refer to this as the sleeper effect.
In discussing expertise and persuasiveness, it is important to note the difference between similarity and credibility. Have you ever noticed that when people are buying things in the hardware store, they will rely upon other people who have experienced the same problem before they will trust the word of an expert? On the other hand, when discussing a more technical topic such as the composition of ozone, people tend to rely solely upon experts and will scoff at the opinion of a neighbor down the street.

After much research we now understand that in some cases similarity is more important than credibility. If the topic relates to a subjective preference (i.e. personal choice), people tend to prefer the opinion of someone who shares their personal values, tastes, or way of life. But when making judgments about facts or objective reality, such as whether Madrid receives more rainfall than Rome, people prefer the opinion of someone with objective credibility.

Research in social psychology has supported the principal that only a credible speaker (someone hard to discount) can cause marked change in an arbitrator’s thinking when advocating an idea that is greatly discrepant (different) from the preexisting attitude held by an arbitrator. It is also helpful to couple a difficult argument with other persuasive tools to help an arbitrator feel more comfortable considering an argument that seeks to cause an arbitrator to adjust his or her views.

One of the most important goals for an attorney at the outset of arbitration is to gain credibility as soon as possible. It is like building up the balance in a bank account before spending the money. Experience tells us that no matter how strong an argument appears to be, there will come a time during the arbitration when an advocate will need the extra credibility to get over a difficult spot in the arbitration.

(2) The Content of the Message

When we talk about the content of a message, we are referring to the substantive information that is being transmitted as well as the style with which it is being conveyed. There are many lively debates
in arbitration advocacy about a number of issues that relate to the content of our messages. Consider the following questions.

1. Which is more persuasive - a carefully reasoned message or one that arouses emotion?

2. Is it better to advocate an idea that is slightly different from an arbitrator’s or to advocate an extreme point of view?

3. Should a message express only one side of the argument, or should it try to refute the opposing view?

The answers to these questions are found in the great body of published and private scientific research available to us as arbitration advocates.

In the reason versus emotion debate, the correct answer comes from an understanding of the particular audience. If an arbitration panel is comprised of well educated or analytical people, the rational appeal will usually obtain better response than with less educated or less analytical people. Thoughtful and involved arbitrators are generally more responsive to reasoned arguments. Arbitrators who are not interested in the subject tend to make their decisions based upon their perceptions of the communicator and the message, as opposed to the logic of the argument.

The content of messages also becomes more persuasive if it is associated with good feelings. Likewise, happy (contented) people tend to make fast decisions and unhappy people tend to make decisions more slowly. Therefore, if you cannot make a strong case, it would be smart to put the arbitration panel in a good mood. It does not always work, but if both cases have equally powerful messages, the odds are better that you will win.

Conversely, some messages are very effective by invoking negative emotions. For example, fear and anger are strong motivators.

How do you handle a situation when you know in advance that some arbitrators will find one of your arguments hard to accept? Do you try to soft peddle the new idea or do you present it head on in its most blunt form? We know that some new ideas or attitudes will
produce discomfort and sometimes discomfort causes people to change their opinions in response to the new idea. So, we might argue that a more direct and bold approach is preferable. On the other hand, sometimes a message that is uncomfortable causes the lawyer to lose credibility or interest of the arbitrator.

For example, there have been many instances where politicians and news reporters have taken positions different from a listener and the listener then interpreted the speaker as biased, inaccurate, and untrustworthy. For the most part, therefore, people are most open to conclusions within their own range of acceptability. Greater disagreement between the new idea and the listener's pre-existing attitude will produce less change in the arbitrator's attitude.

Research has indicated that arbitrators who are deeply involved in the subject of the arbitration will be able to accept only a narrow range of perceptions and attitudes. To these people, a moderately different message may seem radical, particularly if the message argues an opposing view to that of the arbitrator as opposed to an extreme version of the view the arbitrator already holds. Therefore, if you have gained credible authority and the arbitrator is only moderately involved in the issue, you should feel freer to advocate a more radical position.

One final thought about advocating a different view from an arbitrator. Most arbitration panels consist of people with widely ranging views on most topics. The smart advocate will construct an argument that will appeal to people from all these different perceptions. To be in a position to do that, it is most important to identify these widely ranging viewpoints using scientific arbitration panel research or other research techniques and to experiment with the combinations of messages that will form a stronger composite argument.

As for addressing the opponent's arguments, there is no one common sense answer. There are times when we run the risk of weakening our own argument and confusing the audience. On the other hand, our message might seem more fair and perhaps even disarming if it recognizes and then refutes the opposition's arguments.
(3) How the Message is Conveyed

Technically speaking, there are many methods with which to convey a point of evidence or argument. The primary considerations for determining which method(s) to use include: 1) whether the arbitrators will pay attention to the message embedded in the information communicated, 2) whether they will understand the information and the point to be made, 3) whether they will believe what they see and hear, and whether they will behave accordingly.

Perhaps one of the most frustrating aspects of communication and persuasion is that rarely does one medium of communication seem to be the most powerful. Let’s consider for example, the spoken word. Over the years we have heard, and perhaps delivered, stirring and powerful speeches and lectures. But try as we might, words are fleeting and memories fade. In addition, only approximately 30% of people rely primarily on the sense of hearing to learn new information. For most people, including arbitrators, however, the message in the speech is more powerful and lasting than the speech itself.

With respect to written words, we know from experience and research that arbitrators rely heavily on the words contained in written agreements and communications. However, in the scheme of things, arbitrators make their decisions based upon the overall messages that stimulate their belief systems. On the other hand, written words in evidence and demonstrative aids that convey messages are more powerful than written words that have no message, despite their being technically accurate. Therefore, a lawyer or advocate would be well advised to use words judiciously and to use words in visual aids that convey messages and mental pictures.

With respect to graphics and video presentations, research has indicated that the messages that are simple to understand are most persuasive when supported by some type of video presentation. Complex or difficult messages are more persuasive when written (they force the listener to think through the idea). Therefore, the level of difficulty of the message interacts with the medium to determine how persuasive the message is.
Regardless, it would be wise to use more than one medium to convey the most powerful messages in a case. There is a powerful anchoring effect that builds confidence in a message when they see and hear it repeated in different forms in different media.

(4) The Audience - The Arbitration Panel

Regardless of the audience, it is important to have an understanding of the decision making and perceptive characteristics of members of the audience before developing or presenting a persuasive argument. The characteristics to consider generally fall into five categories: attitudes about specific issues in the case, life experience relevant to specific issues in the case, personality traits, general values/beliefs, and influential demographics.

Attitudes and life experiences relevant to specific issues in a case are often significantly or moderately related to decisions. Research by social psychologists has found that the relationships between the attitudes or life experiences and the attitudes about specific issues in a case that exist for an individual arbitrator are perhaps the most important characteristic to know about the arbitration panel before attempting to persuade them. One of the many advantages to performing scientific mock arbitration panel research in advance of arbitration is to identify the case specific attitudes and life experiences that will shape the listening and mental processing of the likely arbitration panel in the case.

For the most part, general personality traits of arbitrators will not predict their responses to an argument. A particular trait may enhance the effectiveness of one argument or another or, alternatively, may work against it.

The characteristics most often used (although least reliable in predicting behavior) are demographics. As a general subject, the demographics of arbitrators are not helpful in predicting how they will process the case or how they will vote. But a demographic characteristic can often raise a question or create a hypothesis in a particular case that can be helpful in forming a composite understanding of an arbitrator. Consider this example of an
arbitrator’s demographics. In a case that involves technical issues, such as patent, trade secrets, or toxic waste, an arbitrator who has a background in science may find it easier to comprehend the details and arguments, but may also have preexisting ideas that favor one side or the other of the argument.

There are certain hypotheses that can be formed by knowing a limited amount of information about the audience. However, until enough information is obtained which confirms or refutes the hypotheses, it is best to keep all options open.

**F. Cultural Differences and Arbitrator Decision Making**

Although a great deal of attention is focused on the legal and procedural differences between the cultural customs, approaches, and styles of arbitrators and advocates from different countries and continents, perhaps the most frustrating issues for many participants are the differences in the methods of communication, meaning of communications, mental interpretations, and behavioral expectations that arise for arbitrators and advocates who come from different cultures.

It is beyond the scope or capacity of this chapter to fully explore the precise differences that exist between international arbitration participants from different parts of the world. However, we will discuss some of the thornier issues and recommend ways of preparing to effectively deal with them in a particular case.

To illustrate how the issue of cultural differences appears in the course of an arbitration, we note the observations of Pierre Lalive, a senior partner and founder of Lalive, a Swiss law firm in Geneva, and one of the world’s leading specialists in international disputes. Professor Lalive has over fifty years of experience in international law and arbitration and has acted as arbitrator or counsel in several hundred international arbitration proceedings.

“Cultural differences or even conflicts between such a counsel and the international arbitrator(s) are, as a result, numerous and sometimes costly, all the more so when the
arbitrator also is lacking in international or comparative outlook. The task of counsel being to persuade the arbitration panel (i.e. the majority of its members, in particular its chairman), a rather elementary condition of success would seem to be for an attorney to understand the arbitrator’s background and culture, both legal and non-legal.

…

“I have stressed on other occasions the “need to pay more attention to questions of communication between the arbitration panel and the representatives of the parties” and mentioned a few practical examples which, hopefully, could serve as a warning against the prevailing habit of so many lawyers of “transposing”, sometimes most undiplomatically, national practices and forensic attitudes to the field of international arbitration.

“I shall always remember my embarrassment when, many years ago, as I was acting as junior counsel to a distinguished New York attorney in an international arbitration in Europe, I was summoned by the chairman (a former law professor of mine), who bluntly asked me whether my New York colleague considered him and his fellow arbitrators as either stupid or untrustworthy, since he had pressed the tribunal to adopt his draft of a very detailed set of procedural rules, presumably hoping thereby both to protect himself and help the tribunal!

“In another case, a famous French arbitrator became increasingly irritated, over months of proceedings, by the practice of an English counsel of answering in detail every single letter or point of the other side, presumably on the assumption that, unless every point made was expressly refuted, even when marginal or irrelevant, it would be considered as conceded. Similarly, it appears that many
experienced arbitrators, particularly Europeans, complain about the lack of “synthetic spirit” or mere courage to select arguments or documents, of certain litigators, in particular American, an attitude which results in the arbitration panel being submerged by tons of (partly irrelevant) documents.

“A last example, known amongst specialists of arbitration, may be taken from the manner in which arbitral proceedings are conducted: plaintiff’s counsel was an English barrister, while defendant’s counsel was a French avocat. Both of them, returning to their respective offices, were questioned about the proceedings and gave the same answer: “Well, I was asked two questions by the chairman!” This identical answer conveyed in that case two completely different meanings. The Frenchman was surprised, if not shocked, that his well-structured “plaidoirie” should have been interrupted at all, while the Englishman was dismayed to have received so little reaction or guidance in his presentation from the arbitrator!”5

The identification and objective analysis of the ways in which cultural differences manifest themselves in a particular arbitration are difficult and sometimes frustrating for most arbitrators and advocates at one time or another. However, there is a great deal that can be learned from science about how to deal successfully with the differences that arise from divergent languages, practices, interpretations of meaning, or some other culturally based aspect of mental processing and behavior.

From a psychological perspective, the study of the differences between cultures extends into two separate approaches. The first is a field we refer to as cultural psychology which is the study of the way cultural traditions and social practices regulate, express, and transform human behavior and mental processes within separate and

distinct cultures, resulting in a focus on ethnic divergences in mind, self, and emotion.\textsuperscript{6} Cultural psychology includes the study and impact of culture, tradition and social practices on members of any particular culture. The second is a more recently developed field we refer to as cross-cultural psychology in which psychologists generally use culture as a means of testing the universality of psychological processes across cultures while at the same time determining how local cultural practices shape psychological processes. For instance, a cross-cultural psychologist would focus on the aspects of social interaction that are universal across a variety of cultures, whereas a cultural psychologist would be interested in how the social practices of a particular set of cultures shape the development of cognitive processes of members of a culture in different ways.

To further our work in understanding and utilizing information helpful in successful international arbitration, we borrow information and study methods from both of these branches of psychology. The most important principle here that international arbitration advocates can learn is that deeply held mental and behavioral differences between arbitration participants from different cultures does exist in a way that can be studied and understood scientifically. The awareness that is created from this principle should serve to remove the issue of cultural differences from a subjective analysis that fosters continued misunderstandings and to place it squarely on the examining table to allow for more objective analysis for use in any particular setting.

Once we accept that decision making and successful persuasion can be studied using scientific methodologies, we can then utilize the tools that science offers us to study ways to enhance the effectiveness of advocacy in international arbitrations. By objectively studying the cultural differences that are likely to play a dynamic role in an arbitration, the knowledge gained through the use of a scientific approach is also likely to enhance the experience of arbitrators, advocates, and parties.

V. Psychology and the Decision Making Process of the Arbitration Panel

Every day professional men and women sit as arbitrators in international arbitrations. Each of them has a private story to tell about their successes and failures in life. Each of them has a family history that has helped make them who they are. Each of them has a unique life outside the arbitration that influences the way they will view the issues during arbitration.

This section will explore some of the things we know about the mental processing of arbitrators in arbitration and how it affects their behavior when deciding how a case should be resolved. We will discuss what common sense for arbitrators really is and how we can understand how it will be applied by a likely arbitration panel in a given case. We might even discover something about ourselves in the process.

A. An Overview of a Panel's Decision Making Process

For many centuries, collective (small group) decision making in both private and public affairs has been a hallmark of most societies. The conventional wisdom is that small groups of individuals who share a common purpose make better quality decisions than individuals acting alone. To better understand group decision making in an arbitration setting, one must analyze the social structure and process within an arbitration panel as they affect each individual arbitrator and the arbitration panel as a whole.

The influences that will shape the way an arbitrator feels and thinks about a case begin long before arbitration. As a result, the decision making process for an arbitrator in any particular case begins as soon as he or she enters the arbitration and begins making assessments of the people and the information that are presented.

Researchers who have studied the decision making behavior of arbitrators have identified three levels of analysis. The first level refers to the decision making behavior of individual arbitrators. The second refers to the social events that occur before and during the
deliberation of the case. The third level of analysis is a review of the
cognitive and affective experiences of individual arbitrators in the
context of social interaction before and during deliberation (i.e. how
the arbitration panel as a whole reaches a decision).

Understanding how an arbitration panel reaches its decision
requires a review of each of these levels, so we should explore each
one separately. The practical reason for doing so is that the most
effective arbitration presentations should incorporate powerful
themes that appeal to both individual arbitrators and the arbitration
panel as a whole.

(I) Arbitration Panel Decision Making Model for
Arbitrators

Scientific research into arbitration panel decision making and that
of other legal decision makers has concluded that there is a three
stage model which best describes the process a typical arbitrator goes
through on his or her journey to making a decision. First, the
individual arbitrator evaluates the facts, arguments, and technical
evidence and constructs a mental summary in the form of a narrative
story. Second, the arbitrator comprehends the questions to be
answered at the end of the arbitration concerning the legal decision
alternatives that are available as decision categories. Third, the
arbitrator attempts to find a match between his or her story of the
case and a decision category in order to classify the story in the
category it best fits. Upon completing this mental procedure, the
arbitrators then interacts with the rest of the arbitration panel to
negotiate a solution that helps each arbitrator to reach the maximum
goal of making a decision that gives meaning to their experience and
helps them to feel good about themselves.

This general three-stage model for decision making is referred to
by social scientists as an explanation-based model. Within this mental
structure, the arbitrator attempts to summarize the case by forming an
explanation and creating a story of the case which is used in reasoning
toward a decision. This process begins as soon as the arbitrator begins
learning about the case from direct and indirect cues in arbitration.
There are both cognitive (thoughtful and intellectual) and affective (emotional) processes which occur during this first stage of individual arbitrator decision making. This formation of a summary of the evidence is the same process that occurs when each of us tries to make sense of the other events we encounter in everyday living. Beginning during the initial stages of the arbitration presentation, arbitrators assign meaning to the case by incorporating or over-laying on the actual case one or more reasonable explanations or narrative stories that explain the events that the lawyers and the witnesses have talked about. This search for meaning is perhaps the most profound explanation for why arbitrators decide cases as they do as we have already discussed.

A typical arbitrator concludes the initial stage of the decision making process with a single dominant story in mind. In fact, researchers have determined that a sizable percentage of arbitrators and other legal decision makers have established a clear leaning in the case by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case – to either confirm or to alter their original notion of what the case story really is.

### How Arbitrators Make Decisions

1. Form a story of what happened
2. Filter through the evidence to find support
3. Compare their story to the allegations
4. Try to make them fit together
5. Negotiate with other arbitrators

As we have discussed, in the course of determining the narrative story of the case, each arbitrator will refer back to their life experiences, stereotypes, schemas, attitudes, and any other references
in their minds that will help them to understand and find meaning within the particular facts and issues in the case. Arbitrators’ cognitive structures (everything they know and how they reason) are fairly inflexible and they will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed.

(2) Direct Influence of Attitudes in Decision Making By Arbitration Panels

Every arbitrator evaluates what transpires in arbitration on the basis of his or her life experiences, attitudes, and pre-dispositions. Arbitrators obviously do not come to the arbitration with blank minds. Their beliefs, values, attitudes, and morals are well entrenched, and everything that is heard and experienced will be filtered and colored by them.

Research in the field of cognitive psychology has indicated that attitudes take on a role of directing or guiding human behavior in one direction or another, as opposed to motivating particular behavior. Therefore, attitudes may be considered to enter the picture predominantly at crucial decision junctures. There are literally thousands of published scientific studies designed to understand the formation, maintenance, and change of attitudes that are available to us as reference tools.

In the context of decision making in arbitration, salient beliefs and attitudes will guide individual arbitrators and the entire arbitration panel to reach a decision which conforms to their beliefs and attitudes about the specific issues present in the case.

(3) How Arbitrator Attitudes and Beliefs Are Formed and Changed

Understanding the role of attitudes in arbitration panel decision making requires an acknowledgement that individual arbitrators bring their life experiences (including ideas they have learned as well as their learned thinking processes) with them in their roles in
arbitration. It is beyond the scope of our discussion to explore the myriad of earlier life experiences which arbitrators bring with them into the decision making process. However, it is important to explore the role these experiences play in the decision making process as well as the role that socially shared experience plays in arbitration decision making process.

As we have seen, the results achieved by recent social science studies have clearly demonstrated that an arbitrator’s cognitive life experiences have shaped the arbitrator’s emotional processing, personality, persuadability, perceptions of causal attribution, perceptions of damages and reactions to attorneys and witnesses. It is equally clear that individual arbitrators and the arbitration panel as a whole are influenced by emotional or affective processing despite their inability to recognize and articulate it.

An arbitrator’s appraisals of attitude objects (e.g. people, events, institutions, etc.) are likely to influence their subsequent emotional reactions to them. Conversely, an arbitrator’s emotional reactions to an attitude object can yield information for us by inducing thoughts about it. In practical terms, it does not matter if the sequence is either a) emotion influences thoughts or, alternatively, b) thoughts influence emotion, the result is the same: an attitude which influences the outcome of a decision is, as a rule, based on an arbitrator’s emotional and intellectual experience.

Arbitrators’ attitudes and beliefs are formed in response to information learned through personal experience, through information relayed by other people, and through personal observation. The formation of attitudes and beliefs is an arbitrator’s way of understanding and experiencing the rest of the world around them. As a result, in order for us to understand how arbitrators perceive the issues, parties and facts of our case, we must make the effort to identify the likely attitudes and beliefs of arbitrators and understand how they were formed, why they have been maintained, and how they might be changed if necessary.

Attitudes are comprised of affect (emotions and instincts), cognition (perceptions, thoughts, and interpretations), and behavior (intention to act in accordance with the attitude). For example,
consider an arbitrator’s reaction in a trade secret case. An arbitrator may feel strongly that anyone who steals a secret and sells it to someone else is a bad person (feeling), that anything that a company keeps private is a secret (perception), and if given a chance to punish someone for stealing a secret, he would do so (behavioral intention). This same pattern can be adapted to any attitude about any subject.

In scientific mock arbitration panel research, we closely study these types of patterns in order to identify areas of weakness and strength of a particular issue in a case. We want to understand arbitrators’ attitudes, the life experiences that are associated with them and the role they will play in arbitrator decision making about the case. By studying attitudes, we learn a great deal about how to successfully deal with the attitudes that likely arbitrators will have. We will learn about the attitudes that may come into play that are beneficial to us as well as those that are not and how to disarm or change them.

This brings us to an interesting observation about attitudes: arbitrators will only apply those attitudes that are salient. Salient attitudes are those that are actually prompted to appear in arbitrators’ minds by the case presentation as opposed to attitudes that we forecast should apply to the case, but which arbitrators do not find to be applicable. Every arbitrator, like every other person, has thousands of attitudes about something. The question is always, “Which ones will you encounter in this case?”

The only way to know which attitudes, beliefs, values, life experiences, and mental processes likely arbitrators will utilize to decide a particular case, is to conduct some kind of pre-arbitration research (whether scientifically conducted or not) to identify them, to understand them, and how to work with them to develop a powerful and persuasive case. There are many different methods to conduct such research that will be discussed in a separate chapter on scientific arbitration panel research.

For the most part, arbitrators form attitudes that are consistent with their view of the world around them and consistent with their other attitudes and beliefs. Arbitrators have many belief systems
about almost every object, person, institution, life challenge, etc. that they have encountered in their lifetimes.

Lest one be frustrated by attitudes that at first appear to be insurmountable, there are a number of important characteristics of attitudes that are important for a lawyer or advocate to understand. While it is true that arbitrators are committed to their own perceptions, it is also true that there are a number of weaknesses in the attitude formation process that make many of them more susceptible to adaptability and change.

The first is that there is a value hierarchy that most people have in their overall belief system that often allows one attitude to be trumped by another, more important, attitude. Let’s imagine a case against a major financial news publisher which involves allegations that the newspaper wrongfully published a critical expose’ of an investment brokerage company. The company alleges that the article was based upon false or misleading information, and, as a result, that the company had to close its doors due to the adverse effects of the article on its reputation. At arbitration, the claimant argues that the author of the article and the publisher had bad motives that interfered with objectivity. The claimant argues that the publisher knew the kind of effect that critical articles could have on such a company. It argues that because of the loss of the company, 100 innocent employees lost their jobs at a company they loved working for.

In defense, the publisher states that it had no ill intent and that if the information was false, the fault lay with the sources of information, not the publishing company. The publisher also infers that the reason for the failure of the company was poor management.

Even the most experienced lawyers and advocacy consultants cannot always accurately predict which of the attitudes and belief systems of a likely arbitration panel will be activated in a particular case without conducting empirical arbitration panel research before arbitration. However, once the attitudes and perceptions of an arbitration panel are activated, they will most surely influence the arbitration panel’s decision in the case.
B. Individual and Group Decision Making in Arbitration

At the heart of the decisions reached by an arbitration panel are decisions which are made by individuals which make up the group. In this context, it is important to understand the cognitive and affective factors which affect the decisions of each individual as well as the entire arbitration panel group.

(1) Role of Individual Arbitrators in Panel Decision Making

It is difficult if not impossible for a single arbitrator to comprehend all of the facts, events, and nuances contained in an arbitration case presentation. No matter how intelligent or experienced an arbitrator is in making important decisions, every arbitrator, like every person, has limitations. For example, individual arbitrators engage in a variety of coping mechanisms which “filter” information and shape perceptions so as to create understanding and comfortable feelings and to minimize dissonance. Individual arbitrators are also limited in their decision making abilities by varying emotional reactions, differing assessments of attribution, varying intellectual capacities, varying abilities to recall, differences in cultural views and sensitivities, widely varying life experiences, and many other factors.

As a result, arbitrators construct different stories or assessments of cases even though every arbitrator was exposed to the same facts, evidence and arguments in the case. They construct their own version of the facts and motivations with respect to each of the arbitration participants. This process of applying an arbitrator’s understanding of life and the creation of a narrative or story for the case being presented to them in arbitration is the driving force behind an individual arbitrator's decision about the case as we have stated. Once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened, although they will occasionally change their minds about how the events in the case should be legally classified.
Ironically, the same limitations and characteristics of arbitrators which give meaning to individuality are also strengths with which the arbitration panel group as a whole can arrive at a fair and equitable decision. Differing insights and differing views of events and motivations provide the group with a more complete perspective out of which better quality decisions can be made.

(2) Group Influences on Individual Arbitrator Decision Making

There are a number of ways in which various processes within an arbitration panel influence another arbitrators' individual decision making. For example, in the context of group decision making, information is exchanged as a by-product of the social interaction which occurs within the group. Knowledge may be acquired that might not have otherwise occurred to individuals without the interaction because of inexperience or lack of knowledge. It is in this critical point in the arbitration panel deliberation process, for example, that arbitrators with relevant life experience will generally speak up, and sometimes apply their own expertise in the subject matter of the arbitration.

It is human nature for arbitrators to talk to each other about the case during the arbitration and certainly during deliberations. But regardless of when the substantive interaction begins, each member of the group typically begins with a set of ideas about his or her own goals and the alternative choices.

The information exchanged by members of the group includes both cognitive and affective information (i.e. how each of the arbitrators thinks and feels about the issues in the case). The differences in the effects of each are interesting and profound. As a practical matter, it is difficult if not impossible to separate one’s thinking about a set of circumstances from one’s emotional reaction to them. However, in the process of sharing cognitive and affective information, the recipient of a shared idea will likely react differently than the originator, although the recipient may be motivated to act in complete concert with the originator. As a
result, arbitrators will often (if not usually) arrive at the same conclusion, although their thoughts and feelings (rationale) about the case may be different.

Similarly, in the quest to comprehend and solve any dilemmas presented in a case, arbitrators almost always learn and understand the case more completely only after discussion within the panel. There are many reasons which form the basis for this principle. For example, the panel as a whole usually has a more complete data base than any of its members for problem-solving. It is not likely than any individual member of the arbitration panel has acquired or has access to all of the pieces of information needed to solve the group's problem.

Because of the limitations that an individual arbitrator experiences in the formation of a story which explains the case, a narrative which at first appears to be complete to those of us on the arbitration team, is often determined to be inadequate or inappropriate once expressed before the rest of the arbitration panel. The checks and balances offered by a multiple person arbitration panel are intended to insure what is often referred to as justice.

Finally, the interaction between members of a panel can provide motivation to arrive at a more complete and morally supportable decision than one individual arbitrator acting alone. Interpersonal energy among arbitrators, either positive or negative, tends to enliven and stimulate more complete and acceptable discussion and results.

C. Comparing the Decisions of Arbitration Panels with Those of Lay Juries

As we have noted, there are virtually no known scientific studies of the decision making behavior of arbitrators in international arbitration. However, there are some significant studies of domestic arbitrations in the United States which have been organized in the same fashion as most international arbitrations. One such study was conducted by Professor Donald Wittman of the Economics Department at the University of California at Santa Cruz, California
in the United States. By way of background, the State of California has provided for court-annexed arbitration in certain kinds of cases. This essentially means that before a case could be tried to a jury, it must be tried to an arbitration panel. The arbitration decision would not be binding.

Wittman’s study looked into a number of questions, including, “How do the decisions made by arbitrators compare to the decisions made by juries?” To answer this question, the researchers reviewed the decisions made by professional arbitrators and juries in 383 automobile accident cases that were tried in the State of California over a nine year period. The results of the trials were published in a publication entitled Jury Verdicts Weekly. The researchers studied the average awards, the percentage of pro-plaintiff (pro-claimant) verdicts and possible explanations for any variances.

The results of this study are consistent with the studies of other researchers who have compared the decisions of arbitration panels and lay juries. They found that arbitrators ruled in favor of the plaintiff ninety-eight percent (98%) of the time while juries ruled in favor of the plaintiff seventy-three (73%) of the time. In addition, they found that the average arbitration verdict was $22,521, whereas the average jury verdict was only $19,227. In other words, arbitration verdicts were on the average seventeen percent (17%) higher than jury verdicts.

In statistical terms, the correlation between jury awards and arbitration awards in Professor Whitman’s study was seventy-four percent (74%). (This means that a jury award and an arbitration award would be the same seventy-four percent (74%) of the time.) The data from the study also indicates that twenty-six percent (26%) of the time, the arbitration award would be higher or much higher than a jury verdict.

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8 Id.
9 Id.
The differences in the decisions between arbitrators and juries may be understood in a number of ways. Before relying on any hypothesis, however, a more in-depth review of the actual arbitrators’ characteristics and their likely perceptions in the case would be advisable.

VI. Scientific Research and Mock Arbitrations

Decades of scientific research in the fields of psychology, marketing, social science, and others have allowed us to develop scientific research designs and methods that are directly applicable to studying likely perceptions of arbitrators in an upcoming arbitration. The most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study. A mock arbitration panel study is conducted in an arbitration hearing style setting using mock arbitrators who have characteristics which match those of the actual arbitrators in a case. Such research studies are created and conducted in a laboratory setting as if the case were going to hearing the day of the study.

Recruiting mock arbitrators requires attention to detail. The recruiter will need to match the type of practice, academic background, demographics, general attitudes about the issues in the case, and as many other characteristics as possible after researching the backgrounds of the actual arbitrators.

Procedures for setting the agenda (which will mirror the actual anticipated proceedings) and for collecting and analyzing useful, accurate, and reliable data from the mock arbitrators should be instituted. The information gathering stage of the research study will include each mock arbitrator’s views in the case prior to the proceedings (based upon the written documents) and after the mock presentations for each of the opposing parties. The mock arbitrators will discuss the case using the anticipated actual format selected. The trial team and client can observe the discussions either by audio link or audio-visual link as preferred by the trial team and the mock arbitrators. Afterwards, the research scientist will engage the mock arbitrators in a qualitative interview similar to that of a mock trial.
study, often followed by a live and frank discussion directly with the advocacy team.

In general, scientific mock arbitration research offers a unique opportunity to bring the arbitration process into the laboratory for study and analysis that can be used to improve the advocacy process. Successful mock arbitration research takes into account the peculiarities of the arbitration process in a particular case, while at the same time providing a rigorously scientific process for objective study. Thirty years of mock arbitration research has taught us that there are a number of special steps that must be taken to insure a smooth and productive process.

Because normally only three research arbitrators are used in such research, it will be hard to generalize their decision to the actual case unless you have conducted extremely conscientious sampling in choosing who the research arbitrators will be and strictly followed scientific protocols. If the mock arbitrators are an almost identical match to the real arbitrators and strict scientific study methods are used, the perceptions and decisions which the mock arbitrators reach in the mock arbitration study will be more likely to forecast the perceptions and decision of the actual arbitration panel.

The degree to which there are differences in characteristics may or may not indicate that there will be differences in the perceptions of the actual panel. Nonetheless, experience tells us that there is much inherent value in conducting the mock arbitration panel study. Many, if not most, of the perceptions of the mock arbitrators will be close enough to those of the actual arbitration panel that the data will be valuable in developing recommendations for themes, case story, and other aspects of the actual presentation.

VII. Conclusion

In this chapter we have devoted most of our discussion to creating an awareness of the psychological aspects of the complex decision making processes that exist in all international arbitration. We have described the importance of arbitrator-oriented advocacy in the successful quest for a favorable decision. We have suggested
principles and methods for every advocate to use in understanding the likely perceptions of arbitrators in a particular arbitration. It is our hope that the information here is useful in helping an advocate to create a powerful and positive persuasive experience for arbitrators and clients, and indeed, for the advocate.