WHAT IS THE REAL DIFFERENCE?

Arbitration v. Jury Trial
By Persuasion Strategies

Two men, Steve and Jerry, enter a downtown office building, both heading for the 32nd floor. While similar in age and background, each man carries important differences onto the elevator. Steve is a carpenter and Jerry is an experienced trial attorney. Steve brings a GED education and years of specialized training. Jerry brings a legal education and 30 years of experience. Today, Steve is a juror and Jerry is an arbitrator, yet both have come to hear the same case.

The two arrive with a handful of others making up separate mock jury and mock arbitration panels. Both panels are about to hear and evaluate the same case in a climate in which you might say the jury is still out on ways that arbitration stacks up against jury trial. Once considered the hallmark of a fair trial, the jury trial has receded both in numbers and particularly as a proportion of all trial outcomes. Recent studies show that jury trials have declined more than 20% in the last four decades despite a quintupling of the number of cases in litigation. While thousands of cases still end up in front of a jury, among the several alternate venues for resolution, arbitrations have been on the rise. Those tracked by the American Arbitration Association nearly tripled between 1997 and 2002. Close to 160,000 cases go to AAA arbitration every year.

Part of the preference for arbitration over jury trial may come down to the expected differences between the two men in the elevator, Jerry and Steve. While jurors are thought to favor a common-sense outcome, arbitrators are seen as more likely to focus on a legally sound one. While jurors are perceived as addressing issues simplistically, arbitrators are believed to embrace greater sophistication and complexity. While jurors are viewed as more prone to rashly embrace high damages, arbitrators are seen as more reasonable and conservative. And while jurors are expected to have a pro-plaintiff or anti-corporate bias, arbitrators are trusted to be more fair and neutral.

Are these perceived differences borne out in practice? How do jurors and arbitrators compare in general outlook, and more specifically, how would jurors and arbitrators view the same case?
Exploring the answers to these questions was the goal of a project sponsored by Persuasion Strategies and InsideCounsel. To compare the two different routes to resolution, we conducted our Fifth Annual National Juror Survey in concert with a National Arbitrator Survey. We also conducted a simultaneous mock trial and mock arbitration in Denver in June 2007. Attorneys presented arguments to a panel of arbitrators and also a mock jury, and then watched the jurors and arbitrators provide feedback and deliberate to two separate verdicts. Then the attorneys, arbitrators, and Persuasion Strategies consultants determined the most effective ways to tailor a case for either arbitration or jury trial. Combining the nationwide data with the live test and adding the context of our 18 years of research provided an opportunity to look past the expected differences and evaluate how jurors and arbitrators actually compare.

Arbitrators and Jurors: Baseline Attitudes

Before the project’s start, Steve and the other 14 mock jurors are gathered in one room. Randomly recruited from Denver County, the group includes the mix of race, age, income, occupation, education, and political affiliation that characterizes most juries.

Meanwhile, Jerry Conover is in another room with two other mock arbitrators. Conover is a Fellow of the American College of Trial Lawyers with 10 years of experience mediating and arbitrating more than 200 disputes. The Honorable James Carrigan is an

The plaintiff, Harper Construction, Inc., is a family-owned Colorado company hired by defendant Solara USA to act as general contractor and construction manager for a condominium development near a Colorado ski resort. Solara is a nationwide development company based in Lake Tahoe, California. Its CEO, Ben Barstow, is a demanding personality directly involved in the details of the project. Harper agreed to the time-sensitive contract terms and guaranteed maximum price, participated in pre-construction planning and began construction.

Solara’s initial financing was four weeks late and its payments to Harper during the project were consistently late. It became clear to both parties that Harper would be unable to complete the project by the contracted completion date and that Solara would not have a model to show during the critical selling season.

One week before the contracted completion date, Harper sent a letter stating that it was terminating its contract with Solara. Despite reiterating its termination in a second letter a few weeks later, Harper never demobilized the construction site and continued construction for a few additional months. Solara kept working with Harper and responding to some of its requests for information. Eventually, Solara terminated in writing the contract with Harper. The contractor demobilized from the site but never received payment for some services rendered. Solara hired another contractor to finish the project, costing Solara additional money and a project completion a year after the original date. Harper claimed that Solara caused delays through its failure to demonstrate funding, properly research the site conditions, complete construction drawings and manage the frequent and drastic changes to the construction plans initiated by Barstow. Solara claimed Harper caused delays by failing to supervise and manage construction materials, equipment and subcontractors: handle change orders; follow contract procedures; communicate and its consistent failure to meet project deadlines.

Based on this, Harper sued for breach of contract and breach of duty of good faith and fair dealing, arguing that it was entitled to $3.3 million in damages, including payment for services completed and billed, and that it was also owed lost profits it would have earned had Solara not breached the contract. Solara countersued and argued that Harper breached the contract and its duty of good faith and fair dealing, and claimed damages totaling $9.5 million for capital losses, loss of market, unnecessary costs to complete the project, and additional overhead costs for carrying the property.
active arbitrator, a retired U.S. District Judge for the District of Colorado and a retired Justice of the Colorado Supreme Court. Al Jongeneel is a principal of Demand Construction Services, an arbitrator specializing in construction cases, and a member of the National Panel of Arbitrators.

The jurors and the arbitrators are purposefully kept apart so that neither group is aware that they are being compared to the other. The comparison relied on three levels of data. First, the national surveys provide an excellent source of data on jurors’ and arbitrators’ general attitudes. (See “The Persuasion Strategies National Survey Projects, 2003-2007”.) Second, before hearing any case information, we surveyed the jurors and arbitrators on their general attitudes. Finally, we probed them about their specific attitudes after hearing the facts of the case in the attorney arguments. Taken together, the responses provided several lines of comparison.

Arbitrators’ and jurors’ attitudes toward the law and toward typical litigants are a useful initial comparison. Arbitrators have the advantage of a legal background, creating the expectation of a more legal approach—an expectation our data supports. When personal ethics and the law conflict, arbitrators are more likely than jurors to say they would follow the law. (See Chart 1.) Still, even among average Americans surveyed, most say that they would follow the law.

When assessing corporate litigants, arbitrators are more likely to agree that “business executives share my values.” Mock jurors participating in the live project held attitudes that were generally consistent with the trend of anti-corporate attitudes measured in the national survey. For example, ten mock jurors agreed that “executives often try to cover up the harm they do.”


Persuasion Strategies’ 2007 National Juror Survey is the fifth annual scientific public opinion poll examining the jury-eligible population’s attitudes and opinions regarding legal issues. As in past years, all 500 randomly selected jury-eligible respondents (over 18 and/or a licensed driver and registered voter) completed a telephone survey responding to measures of corporate perceptions, and jury damages awards, as well as their attitudes toward resolving complex problems. In 2007, respondents also considered and rendered their preliminary leanings in eight different brief legal decision-making scenarios. The National Juror Survey project now includes over 2,500 total participants and continues to identify important trends in public attitudes toward corporate conduct and legal responsibility.

Persuasion Strategies’ 2007 National Arbitrator Survey is its first poll of 310 arbitrators’ opinions of attorneys, attorney performance, jury decision-making, and legal decision-making scenarios. Recruited from a large list of arbitrators practicing nationwide, arbitrators responded to a brief online survey designed in part to track with the National Juror Survey in order to allow for comparison on relevant legal issues. The arbitrator sample is overwhelmingly white (98%) and male (89%). Eighty-nine percent were 45 years or older with 37% reporting they have presided over 20 or fewer arbitrations and 19% have presided over more than 100 arbitrations.

Any references to specific relationships between the variables in these surveys are based on statistical significance at a .05 level or lower. For complete survey results, visit us at www.persuasionstrategies.com.

(Compared to 90% in the national survey) and nine agreed that “if someone sues a corporation, the case must have some merit” (compared to 80% in the national survey).

These mock jurors are about to hear a typical construction case involving a real estate developer client and a construction contractor. After hearing just a snapshot of a client versus contractor dispute, jurors and arbitrators both are likely to favor the client. It may be surprising to learn that arbitrators were somewhat more likely than jurors to favor the client in this type of dispute. While 58% of prospective jurors said they would favor the construction client, 67% of the arbitrators said the same. (See Chart 2.)

In addition to the question of possible bias, litigants might also wonder whether arbitrators and jurors differ in their tolerance for complex information. Results are generally consistent with expectations. Based on our national surveys, arbitrators are more likely to embrace complexity. Arbitrators responding to our national survey believe themselves to be better-equipped than jurors to render decisions in complex and emotional cases, and better at determining damages. (See Chart 3.)

One critical area of anticipated difference between jurors and arbitrators lies in the area of damages. The narrative of a jury losing a sense of proportion in awarding undeserved damages fits better our assumptions better than thinking that people with the presumably conservative influence of legal training are doing the same. However, experimental research shows that in several contexts, a single deciding judge is more likely to award higher damages than a deliberating jury.

Logically, that trend also could apply to arbitrators. One explanation for arbitrators awarding higher damages in some contexts is simple desensitization. They are simply more likely than the average juror to deal with large numbers. As a result, damages that are “about right” to arbitrators are considered “excessively large” to the juror-eligible population. Likewise, prospective jurors themselves are likely to be sensitized to the narrative of “out-of-control” jury damages awards. (See Chart 4 and Chart 5, page 7.)

So as the arbitrators and mock jurors begin this unique project, the national data creates the expectation that mock jurors will be somewhat more likely to favor ethics and distrust companies, more skeptical of high damage amounts, and slightly less able to manage complexity. The best test, however, will be jurors’ and arbitrators’ reactions to case facts.

Reactions to Attorney Presentations

To provide a context for evaluating our baseline attitudes in comparison to national averages, we created a case scenario based on a typical pattern of failures that lead to litigation: poor communication and management, missed deadlines, and late payments. (See “The Mock Case,” page 3.) Two attorneys
presented live to the jurors while the arbitrators watched via closed-circuit television.

Kevin Bridston, a partner with Holland & Hart LLP whose litigation practice is primarily construction, real estate and commercial cases, presents for the plaintiff, Harper Construction. Advocating on behalf of a Colorado construction company in a mountain-condominium deal gone bad, Bridston builds his case on the failures of the defendant, Solara USA, a California developer. Jurors and arbitrators hear that Harper was a victim of Solara’s disorganized leadership, poor planning, delayed financing and late payments before Solara ultimately walked out on the deal.

Following the plaintiff’s presentation, both jurors and arbitrators favor the plaintiff, Harper. On a scale of 1 to 7, with 1 being “Completely Favor Plaintiff” and 7 being “Completely Favor Defense,” the jurors average 2.9, while among the arbitrators, two arbitrators select a 2 on that scale while one arbitrator, Jongeneel, wants to keep his leaning at the “completely undecided” midpoint. Two-thirds of the jurors and all three arbitrators also agree that “Solara legally breached the contract” and that “Solara is more at fault than Harper for missing deadlines.”

Rick Bailey, a partner and trial attorney with Holland & Hart focusing on complex business disputes, presents Solara’s defense. Bailey emphasizes the level of project knowledge and control wielded by Harper, arguing that Harper was in the best position to guarantee timely performance on the contract, but instead repeatedly delayed completion of the project. Using the example of the “Extreme Home Makeover” television program to illustrate what contractors can achieve, Bailey also empha-
sizes that “Solara was the customer” and should have expected better follow-through from the company it hired.

This appeal is partially successful in encouraging jurors and arbitrators to apply their expectations as consumers and place more responsibility on the hired contractor, Harper. Now jurors’ average leanings move toward the midpoint, but only four jurors moved from a previous pro-plaintiff position to a pro-defense position. One of those jurors is Clarence, a 40-year-old with construction experience. He notes that a strong point for Solara is that “they show how Harper lacked the manager experience needed to keep things flowing on time.” While jurors move toward the middle (an average of 4.3—just on the defense side of the midpoint), the arbitrators do the same: all three register “completely undecided” in response to the question on leaning. Arbitrator Jongeneel notes that Harper’s participation at the design stage meant that design problems could not be placed solely on Solara’s doorstep.

One indication of this uncertainty is that both arbitrators and jurors are less likely to agree with statements like “Solara legally breached the contract” or “Harper has met the spirit of the contract.” While two-thirds of the jurors and the arbitrators agree with these statements after the initial presentation, only one juror and one arbitrator agree with these statements after hearing Solara’s argument.

In rebuttal, Bridston again addresses the jurors and arbitrators, this time responding to Solara’s accusations of lateness by placing the initial responsibility for lateness solidly on the owner.

Bridston also briefly targets the best defense argument: that Harper had terminated the contract first through a letter that it sent announcing an intention to terminate.

Once jurors hear the plaintiff’s rebuttal, many return to their initial pro-plaintiff stance. The arbitrators react similarly, with all three registering a “Pro-Plaintiff” leaning after the rebuttal. Arbitrator Carrigan concludes that “Harper was trying to complete the job when forced out by Solara,” which is consistent with jurors’ views. Stanley, a 76-year-old business manager, describes Harper as “an honest company trying to do what is right.” Entering deliberations, 10 jurors feel that Solara breached contract, and 11 feel that Solara breached its duty of good faith and fair dealing. In the final measure of individual attitudes prior to deliberations, 12 jurors enter damages in favor of Harper (with a median level of $1.3 million), while only six jurors award damages in favor of Solara.

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Several communication practices transcend case types and are critical to effectively persuading arbitrators and addressing their need for information. Based on arbitrators’ responses in our mock arbitrations and our National Arbitrator Survey, here are five tips for effective persuasion in arbitration.

1 KNOW THE ARBITRATOR’S WORKING VOCABULARY. Recent data from our arbitrator survey and our specific three-person arbitration panel confirm our mock arbitration research finding that attorneys must realize the sophistication of the audience and present a tailored message at the appropriate level of comprehension. Many surveyed arbitrators responded that the biggest mistake attorneys make in arbitrations is directly related to what they either presume or ignore regarding an arbitrator’s level of knowledge of the case, the subject area, and relevant law. (See Chart 7.) Either presuming arbitrators know more than they do about the details of a particular topic or treating the arbitrator as a naïve juror can have negative consequences for the presenting attorney. Learn as much as possible about an arbitrator’s education, training and experience in relevant topic areas to best meet the arbitrator at his or her own level of knowledge and comfort before expanding from that base and presenting the details of those facts as they fit in the case story.

2 EXPLAIN YOUR STORY. We have yet to meet an arbitrator who does not appreciate the value of an effectively communicated case story. Yet many arbitrators tell us that attorneys skip past the case story too quickly. Presuming that arbitrators only want straight facts and can properly organize and assign to them the appropriate meaning and motivation on their own ignores the inherent nature of human information processing. Even sophisticated and systematic thinkers need a framework for information, and a clear thematic case narrative still provides the best framework. For example, in our latest mock briefs assessment, we tested versions of a client reply brief that told the factual story of the case complete with theme. Based on the feedback, we submitted the revised brief to the arbitration panel. After our client prevailed in the arbitration, the opinion cited one of the reasons for their victory was the concisely told story in the written brief. Survey data supports this finding.

However, data also demonstrate arbitrators’ tendency to see cases as puzzles to be solved. Don’t expect arbitrators to simply accept or reject a case narrative—expect them to dig into the details that underlie your narrative. To accommodate, tell your story in a way that incorporates the critical details arbitrators are likely to use in their decision-making.
process. This may mean pausing at points to provide more detailed explanations or by outlining a greater number of dots to connect than you might provide to jurors. The details, however, can and should be presented in the context of your case story and theme. We have witnessed arbitrators’ willingness to fill in the gaps of the case story in mock arbitrations. Arbitrators are less likely than jurors to apply their own loosely similar experiences to your case facts. Instead, they will look for the information needed to make informed and accurate interpretations. In a panel, they will turn to the arbitrator with the most relevant experience. If they don’t receive that information they will fault the presenting attorney for leaving gaps in the case.

Satisfy arbitrators’ need for information with a story that includes the context necessary for arbitrators to use the facts to form their own version of what happened in your case and to understand your position as fair and just.

**Show Your Story.** As one arbitrator put it immediately following an arbitration session, “Why is it that attorneys think we have any less need for demonstratives than juries do? We need to be educated on the case facts just as badly as jurors do.” As human beings, your arbitrators need to be engaged through many mediums—including show and tell.

**Organize and Prepare Appropriately.** It is clear from our data that attorneys too frequently consider arbitration to be “trial light” and fail to sufficiently organize and prepare their arbitration case. Attorneys presenting unexplained or unfocused arguments are the mistakes arbitrators cite most frequently.

Arrive prepared, focused, and appropriately organized for arbitration. Being appropriately prepared and organized means appreciating arbitration as a dispute resolution alternative. In this exercise, arbitrators perceived the case as requiring significant attention to certain details—expert witnesses, testimony corroborating exhibits, thorough oral arguments, and the like. Arbitrators expect that counsel will take the arbitration seriously and will be prepared, focused, and organized exactly as they should be—for the arbitration process in their particular case.

**AIM WITNESSES TOWARD YOUR ARBITRATOR.** Our mock arbitration research has found that arbitrators tend to judge the credibility of a witness much as a jury would—by observing the witness’ demeanor and words on the witness stand. Instruct your witnesses to aim eye contact and vocabulary toward the arbitrator. Engage the arbitrator in “discussion” of the answer just as you would a jury. In our experience, witnesses who testify before an arbitration panel receive less instruction and can be more intimidated than when testifying before a jury. To the contrary, arbitration witnesses should develop examples, analogies, demonstrations, and teach, teach, teach the arbitrator. Take advantage of the relaxed rules of the arbitration setting. If possible, get the witnesses out of their chair and on their feet with pointer in hand. Prepare to handle on-the-spot questions from the arbitrator by running them thorough mock examinations.
Deliberating to a Verdict

Ultimately, the jury and the arbitration panel reach the same basic conclusion: both parties should be held responsible, but the owner, Solara, bears the brunt of the responsibility. In the end, arbitrators find that Solara breached its contract with Harper, and that Solara is liable for $1.75 million in unpaid costs to Harper. Importantly, the panel deliberates on whether or not to hold Harper liable for a breach of contract as well. They decide to award damages only to Harper, because the contractor was out-of-pocket for work actually performed.

Like the arbitrators, the jury finds that Solara breached its contract with Harper. While unified on that point, jurors engage in spirited deliberation of whether or not Harper also breached the contract. One woman, Marina, is a strong defense juror. She fully accepts Bailey's consumer analogy and argues that Solara should have been able to expect more timely performance from Harper despite the owner's missteps. Several jurors find a “pox on both their houses” rationale to be attractive. Yet jurors still generally agree that Solara's failures regarding initial planning and prompt payments were the first and most important failures in the deal, and for that reason, Marina is the only juror who would have awarded damages to Solara. To acknowledge Harper's mistakes and its responsibility, jurors discount Harper's damages by 25% and ultimately arrive at a total verdict of $1,125,000. Other than the jury holding Harper somewhat responsible and discounting some of the damages, both groups arrive at the same decisions on liability and damages, driven largely by a desire to compensate Harper and its subcontractors for out-of-pocket expenses.

There were some important similarities and differences in the paths that jurors and arbitrators took to reach their conclusions.

First, audience members observing the deliberations of the arbitrators and jury were struck by the difference in communication styles. The jury was noticeably less systematic in its approach. Jurors openly expressed their opinions and articulated positions, sometimes several at the same time, without
always reaching clear closure on a point before moving on.

The arbitrators, on the other hand, were clear, collegial, and systematic. They did not stake out positions so much as they posed questions to one another, pointed out strengths and weaknesses for both parties and sought agreement among themselves. Even in the restricted deliberation time, the arbitrators were able to easily find consensus. As Conover noted, “It’s interesting how based on this limited a record and the limited presentation, we all had the same kind of instincts.” Carrigan replied, “That shows how innate arbitration is.”

The jurors’ process played out differently. They began by sharing their overall impressions of fault, then taking sides and attempting to persuade others. Consistent with their own experiences as employees, jurors saw late payments as Solara’s critical weakness. To the jury, the late payments were an immediate and insurmountable hurdle for Solara. Steve argued that payments even a day late meant that Solara “breached the contract from the get-go,” seeing the late payments as the first domino that set in motion further problems down the road. As Clarence explained:

> When your contractors first get on the job and they are already getting paid late, that already creates problems. Because as a contractor you don’t want to do a lot of work and not get paid for it, so you do slow down a bit.

Both jurors and arbitrators also closely scrutinized Harper’s actions, a trend Persuasion Strategies has noticed in all types of cases: Plaintiffs have a positive burden to show that they acted responsibly and that they controlled what they could. Much of the jurors’ discussion focused on what Harper should have done differently.

Jurors agreed: Harper would have been better off if it had not been bluffing in their threats to terminate the agreement. Jurors brainstormed many other things that Harper could have done differently, including more and better communication, weekly meetings, and more involvement by the project foremen. Jurors translated Harper’s responsibility directly into reduced damages.

While the jury spent far more time scrutinizing the plaintiff, arbitrators also evaluated Harper’s choices, applying their greater understanding of contracts by admitting that terminating is easier said than done because once work stops, it is hard to start again.

A third question relates to perceptions of the relative power held by each party. When asked who had more control, jurors’ first answer was “Solara,” because the owner provided the plans and the money. The arbitrators shared a similar perspective. When arbitrators were asked who had the most power, they agreed that Solara had more power because it was Solara’s project. For both the jury and the arbitrators, this uniformity spelled doom for Solara: if it unambiguously had more power in the relationship, then the company carries more responsibility for the result by default.

Yet another question relates to use of evidence versus experience: Did jurors and arbitrators base the case just on the evidence, or did they allow their personal experience and views to creep in? On that score, jurors and arbitrators both were likely to apply their own knowledge. For instance, while arbitrators relied on a collective understanding of the contractual responsibilities in this case, they also relied a great deal on the arbitrator who was most experienced in construction matters. Jongeneel fielded questions: “Are change orders in a project like this common?” “Who was responsible for change orders?” “What is the process?” Just as jurors tend to make use of those in the panel with relevant experience, arbitrators do as well.

Both jurors and arbitrators found it hard to reconcile Solara’s portrait of Harper as a bumbling company with the knowledge that the company had been in business for 41 years. As Jongeneel explained:

> The question that kept bothering me was, this contractor has been in business 41 years, and is experienced in mountain development and according to Solara, the guy can’t even start at the starting line. … I mean, a contractor doesn’t stay in business for 41 years by not performing well. It just doesn’t happen.

And in the jury room, Steve the carpenter voiced the same opinion: “You’ve got to
convince me that a 40-year-old company shouldn’t be out there doing it” on a contract like this one, “and that would take a lot of convincing.”

For jurors, however, the more salient frame of experience was as employees, and jurors frequently relied on those and other experiences to fill evidentiary gaps. Many jurors could not get past the information that Solara was late on every payment, which amounted to an early and concrete violation of the terms of the deal, reduced Solara’s credibility, and justified a breach-of-contract decision. In other instances, jurors referred to case documents—the contract in particular—and used information and arguments never provided during the case presentations. Ultimately, jurors and arbitrators both voiced the opinion that the case comes down to credibility and believability: a test that will always involve the basic exercise of human judgment and experience.

Finally, jurors and arbitrators also applied their common sense. As we would expect, jurors and arbitrators both anchored on the damage amounts offered by the parties, and then scrutinized the figures for any hints of exaggeration. Jurors wanted to avoid “windfall” damages, making sure that Harper was not paid for work it didn’t perform. Similarly, arbitrators were reluctant to award “unearned profits” under the law. The terminology differs, but the motivations are parallel.

Supported by the data, the jury was more conservative in its damages award. In this case, jurors’ more conservative tendency makes sense: The jury contained the greater number of decision-makers, thus creating a greater need for compromise. In fact the jury compromised on damages to satisfy the wishes of one or two strong pro-defense jurors.

Despite the surface differences in arbitrator and juror communication during deliberation, and despite the vast differences in demographics, this exercise reinforced the national survey data by confirming that jurors’ and arbitrators’ experience in arriving at a verdict may have more similarities than differences. Both wanted to see the most complete picture, both applied basic human tests of credibility, both started from the question of ‘who had the most power,’ and both were willing to apply their own experiences on the question of how construction projects and deals in general ought to function.

Strategic Advice from the Decision-Makers

The last step of the process is to get feedback on ways to present the case more effectively. Persuasion Strategies wrapped up the day with separate interviews with the jurors and the arbitrators. The strategy discussion conducted at the close of the arbitrators’ interview focused on ways the case could be improved, from a defense perspective, for an audience of either arbitrators or jurors.

Themes are important. Both the jury and the arbitrators were sensitive to a perception of style over substance. Conover noted:

There were a couple of themes of Harper right from the start, you know trying to show the big California developer as a “big California Developer,” and they couldn’t follow up on that, so I thought, “Now is that effective or not?” I think it could be effective, and ultimately we ruled against the big California developer, so perhaps it was. It was a little, not over the top, but it was an argument that if you couldn’t prove it, it was a little hard — we could have perceived it as a substitute for a good argument.

Carrigan agreed, arguing that “trying to pose the old David versus Goliath theme” is a tactic more suited for a jury. Having a
theme that backfires is a risk with jurors as well. Steve the carpenter, for example, noted that the defense chided the plaintiff for “playing the blame game,” then immediately blamed Harper for the project’s failures.

While attorneys should avoid themes that smack of empty or self-serving rhetoric, they still need good themes, and more generally, good communication for either audience. In our national arbitrator survey, 61% felt that attorneys did a “good” job of communicating, but a bare 6% felt that attorneys did an “excellent” job. Attaining that excellence lies in coming up with a clear narrative and a memorable theme that reinforces the substantive merits of your case.

In his initial questionnaire response, Jongeneel described attorneys’ biggest mistake as a “failure to simplify a complex case into digestible elements.” A majority (53%) of arbitrators responding to our nationwide survey also agreed attorneys need to do more to use case themes. (See Chart 6, page 8.)

I think that theme is important because many construction cases that go to arbitration are complicated. They are very complicated. So I think if you have a theme to present, you know your case, the history and the facts, it just makes it simpler to digest it.

Second, the perception of power is critical to both audiences. In this type of case, counsel should encourage arbitrators as much as jurors to see power as a factor that cuts both ways. In defending the owner in this case, counsel should be sure decision-makers have a clear understanding of the contractor’s level of knowledge and control, the “boots on the ground” in this case, as well as the number of options available to Harper. As noted, jurors and arbitrators agreed that Solara was the party with the greater level of power because it had the design responsibility, the money, and the ability to issue change orders. A central challenge for the defense in this case is to fill in the other side of the scale: What could the plaintiff control? Here, the jurors’ greater level of scrutiny on Harper and particularly on the project manager is useful. With greater emphasis, and perhaps a side-by-side chart contrasting “What Solara Could Control” with “What Harper Could Control,” this argument could be made more memorable and more salient for either set of decision-makers.

Finally, jurors and arbitrators were highly motivated by an appeal to equity and effects on third parties. Harper’s claim of unpaid out-of-pocket expenses was compelling, as was the implication that third-party subcontractors had not been paid. Fairness has long been an important factor in developing effective jury arguments, and this exercise confirms our experience that even arbitrators rely heavily on a sense of equity when making decisions, especially when both parties have demonstrable fault. In this case, a concern for innocent subcontractors became a key tie-breaker. The clear lesson: businesses and their representatives should be keenly aware of how conduct may affect third parties and influence perceptions of equity.

These and other lessons make clear just how close arbitrators’ and jurors’ decision-making preferences may be. When the arbitrators and the jurors left the building that evening, Jerry and Steve could not have known that over the course of the day they had remarkably similar experiences. While a world of difference separates their backgrounds, when preparing a case for either audience, the advocate’s most important challenge is to find a way to build a credible impression of one’s client, introduce doubt and scrutiny of the adversary, reinforce the power and choices possessed by that adversary, and package it all together in a narrative that is comprehensible and thematic.
When you find yourself in arbitration, it is easy to assume that the experience of presenting to professionals who are qualified in your field will be much different from the experience of presenting to a jury. That assumption may lead to communication problems that adversely affect your outcome. A key element in effective communication is the visual one. The design and display of good graphics can create a favorable tipping point for either an arbitration panel or a jury.

Developing verbal and visual themes that tie together the evidence and support your position is every bit as important during arbitration as it is in a jury trial.

The importance of effective graphics for any fact-finder lies in the basics of brain structure and information processing: understanding and retention are exponentially increased when a listener's visual and verbal channels are both engaged. New brain scan research shows that when someone is listening and hopefully learning, there are at least four different areas of the brain that are active: those areas associated with hearing, vision, short-term cognition, and long-term memory. New research shows that successful presentations maximize activity in each area without overloading any of them. For example, only three verbal ideas or visual images can be held and “digested” at a time. In other words, a listener can process and retain six pieces of information at once only if three of the ideas are visual and three are verbal, but not six if they are all verbal. In fact, overloading one channel can lead to a neural short-circuit and actually lower information intake.

Physiologically, engaging both the verbal and the visual simply allows you to communicate more to jurors, judges, and arbitrators.

Based on this known capacity of short-term memory, the ideal method for information presentation is the Rule of Threes: a main theme should be developed in no more than three parts. When complementing these parts with graphics, design a basic look which reinforces your case theory and is unique to your side so that the arbitrator or juror will instantly identify graphics as being yours. Include in your main demonstrative design three main variations to complement the sub-elements of your case theme.

Even within the 30-minute time of the Denver exercise, each side used a key visual that served as a useful reference for each panels' deliberations, both having to do with the critical element of timing. The plaintiff used a timeline with...
explosive shapes demonstrating how late payments, slow responses, and changes in the middle of construction blew up the contractor’s planned schedule. The defense used a chart with color and photos to emphasize the radical differences between completions “as promised” versus “as built.” The question is, did these demonstratives work, and did they work equally for arbitrators as well as jurors?

There are several ways that the defense could use these mock trial results to strengthen their visual case. One misconception, fostered through the rampant use of PowerPoint, is that by selecting a very large font size, words become a graphic. Although highlighting and enlarging segments of evidence is very effective, studies show that bullet points or text in a box may not work as well. Reading words on the screen naturally engages the eyes and vision center, but brain activity shifts and slows while the message is then transferred to the verbal center for processing.

Testing has shown that groups who hear oral narration without the words on-screen scored 28% better in retention and 79% better in their ability to apply what they learned than did groups that heard an oral narrative supplemented by words on-screen: The verbal/visual message actually hurt retention when it relied upon language alone.

For example, consider the visual message that the Construction Manager was in the position of most power and therefore more responsible.

To undermine the plaintiff’s strengths, the defense needed a graphic to counter the damage done by the evidence of change orders and slow responses to requests for information. While the arbitrators probably don’t need an explanation of critical path, the jury could have benefited so they could sort out whether the requested changes really would have caused enough delay to knock the whole project off course, as the plaintiff asserted. Humanizing the defendant could be accomplished in the same graphic by including a friendly picture of key officers, to blunt the negativity associated with Ben Barstow, who plaintiff chose to most demonize.

Finally, the defense will want to focus on the basics: the case theme and design scheme. The theme advanced by defense was promises broken. While it may not be easy to visually represent a “promise,” it is easier to represent the “break.” The image of a broken contract visually places the clear onus on the plaintiff. But arbitrators and jurors repeatedly mentioned that both sides entered into the contract with equal input and eyes wide open. To reverse the perception that the defense was in charge and tip the balance in favor of the corporate client, the defense could include a broken contract icon in each graphic to drive the point home in a way that appeals to the visual center of understanding.

Ultimately, both arbitrators and jurors benefited from the graphics created for this case. A mock trial exercise has the advantage of allowing you to test the graphics that you’ve developed and to see how they work with your decision-makers. The need for visual reinforcement applies to both arbitrators and jurors, and careful attention to the messages at both the verbal and visual levels of understanding will maximize your chances for a successful outcome.
Think outside the (jury) box.

Beyond juries, there are judges, arbitrators, mediators, boards and other vital factfinders—all of them deciding complex cases and all of them requiring persuasion in order to see your case in its best light. Persuasion Strategies helps corporate counsel persuade all legal decision-makers by bringing together the best in your visual and your verbal message.

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