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Conflict Resolution and ADR Program
Louis Stein Center for Law and Ethics**

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12th Annual Fordham International Arbitration Conference

**Facing the Future in International Arbitration:
Evolving Issues, Practices and Solutions**

**Session 2: A Mock Arbitration for Your Case:
Optimizing Your Strategies and Maximizing Success**

Moderator:

Edna Sussman

Independent Arbitrator

Panelists:

Doak Bishop

King & Spalding LLP

James Lawrence

University of Houston

Philip Anthony

DecisionQuest

Claudia Saloman

Latham & Watkins LLP

Dr. Mohamed Abdel Wahab

Cairo University and Zulficar and Partners Law Firm

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MS. SUSSMAN: Moving on to our program about mock arbitration, some of you may have thought we were going to be doing a mock arbitration, presenting a pretend arbitration, as you see in many programs. That is not what we are doing. We are talking about – maybe we should have called it “mooting your arbitration” –trying out your real arbitration to see how you can improve your presentation, your performance, your theory of the case, etc. That is the purpose of this particular session.

The idea of working on assisting advocates with how to present to decision makers started with the Harrisburg Seven trial in 1972, when people started doing jury work to try to help the advocates. So the idea of working with advocates to improve performance with particular decision makers got its genesis in the jury context. It has been developing over the years and now has become much more common in arbitration.

I thought to lead off maybe I will just read

you a few quotes.

First, I have Philip Anthony, who I will introduce shortly. He published an article in our New York State State Bar Dispute Resolution Section publication a few years ago. and I am just going to read one sentence from that: "The systemic study of decisions which analyze for the purpose of understanding how decision makers process information presented to trial has been dramatically refined and improved over the years and can effectively enhance, sometimes dramatically, trial presentation strategy, often giving lawyers a convincing communications edge." Then he describes how you can improve performance by figuring out how to present and what you should say.

To highlight the importance of how one presents a thought he quotes Mark Twain who is reputed to have said, "The difference between the right word and almost the right word is the difference between lightning and a lightning bug." We can all learn from

that. How we phrase a point, how we frame an argument, can be critical, and advocates who utilize mock arbitrations can be assisted by insights from others on presentation.

Jim Lawrence published a chapter in Doak Bishop's book, *The Art of Advocacy in International Arbitration*, in a chapter on psychology and arbitrator decision making. He and his co-author concluded, "The most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study."

If you are going to think, *Well, these are two guys just trying to make a living so they're telling us this is a great process*, I thought we should review a few quotes from practitioners like us, who are arbitrators or arbitration counsel.

Lucy Reed gave a talk in Hong Kong on this subject. She said: "What mock arbitration does is to change the lawyers' biases about their own cases. It allows them to see whether what they think are the

most important points to make or are not as good as they think, and therefore whether their clients are likely to win or not." So that is Lucy Reed. We all have a lot of respect for Lucy.

Neil Kaplan for whom we also have a lot of respect said: "There is no better tool with which to prepare an arbitration case than a mock arbitration before a practicing arbitrator or someone who is familiar with the actual decision-making process of an arbitrator."

Last but not least, Klaus Sachs, another well-known name in arbitration circles said : "The use of mock arbitrations in international arbitration is an emerging trend that will surely only become more and more popular as parties seek to find an all-important edge over their opponents."

As you know, Jim Lawrence and I conducted a survey. Many of you were kind enough to complete it. One of the questions we asked counsel who had never used mock arbitrations, was why not? The answer they

flagged most often was, "We never thought of it."

It is a subject that has not gotten much attention in the arbitration world, which is why we are addressing it. Our intention is to educate counsel so they can make an informed decision as to whether it would be helpful for their case to conduct a mock arbitration and arbitrators with information, sitting from that side of the table, about what it is all about, so if they get a call to sit as a mock arbitrator, they know what it is and what to do.

From all the pointing I did to the various people on the podium, obviously I have just the right people at the table for this discussion. I am going to start at the far end, and I am going to do very brief introductions because you have the program with the biographies. And everybody has a website, so you can always get further information.

Doak Bishop is a Partner at King & Spalding. He is a co-editor of the book that I mentioned, *The Art of Advocacy*, and has for a long time had a very

strong interest in decision making.

Claudia Saloman is a Partner at Latham & Watkins. She is global co-chair of their international arbitration practice and published an article in *Global Arbitration Review (GAR)* in May of 2017 on the subject of mock arbitrations.

So we have the two U.S. counsel who have done mock arbitrations, who have thought about the subject, and can bring the counsel perspective to bear in terms of how to organize the mock and how it can be useful.

Mohamed Abdel Wahab is a professor at Cairo University and the founder of Zulficar & Partners. He is the Vice President of the International Chamber of Commerce (ICC) International Court. He is also on the American Arbitration Association (AAA) International Centre for Dispute Resolution (ICDR) Advisory Council, and he is here to give a perspective from practitioners outside the United States, where they may not be as familiar with the process and to speak

from a civil law/non-U.S. perspective and give us a little bit of a flavor from jurisdictions outside the United States.

Then we have our two social scientists who actually do this work.

Philip Anthony is the Chief Executive Officer of DecisionQuest, which is the largest trial consulting and communications firm in the United States that does jury-consulting work. His organization has had experience with between 600 and 700 mock arbitrations. So they are happening, and we should all learn more about them.

Jim Lawrence is the Executive Director of the Blakely Advocacy Institute at the University of Houston Law Center. He is the Principal of Trial Science Solutions, which is also a very successful advocacy consulting firm that assists with trial preparation and jury consulting. He wrote the chapter in Doak's book on the psychology of decision making focused on arbitration specifically.

So I think we have the ideal panel for this session.

The format we are going to use is that each speaker will speak for seven minutes. We will then have a five-minute panel discussion. We are going to try to stay very much on time, and then we have left some time open at the end for audience questions.

We are going to start with Doak, who is going to give you an introduction from counsel perspective.

MR. BISHOP: Thanks, Edna.

I think over the past fifteen years I have probably participated in roughly a dozen mock arbitrations, and over the twenty years before that I participated in roughly a dozen mock jury trials, so I have had experience in both. I think I have worked with both Phil and Jim in various mock arbitrations. They are excellent, and I highly recommend both of them to you.

I conceive mock arbitrations as an extension

of the work that they have done in mock jury trials. It is a way of relatively scientifically testing your case before you actually have to go out and present it to your real arbitrators. So you get an opportunity before mock arbitrators to present the case, to test your presentations, to test your arguments, sometimes to test your witnesses or experts if you want to go that far.

But the first question that you should ask yourself before you start planning, at the very outset, is: What do you expect to get out of this mock arbitration? What are your goals, what are your objectives, and what can you realistically expect? Now, if you expect that you are going to find out what the real arbitrators will really do at the end of the case, you may be disappointed in that.

I had a case about ten or twelve years ago that was an international arbitration. We agreed to mediate the case, so we went to mediation. The other side came in, I think, very cocky. They told us

during their presentation that they had mock arbitrated the case four times; they had won the case every time. There was only a little bit of money that had been given to my client in their mock arbitrations, so they were very confident in their case. They made a very small offer, they would not move, and basically they said, "We are going to go kick your ass at the arbitration."

We went to the arbitration a month later. It took two weeks. At the end of it, the arbitrator gave us a \$71-plus million award, which was every single penny we asked for in the case. So it came out quite differently from what they expected.

I never got an opportunity to go back and ask them, but I always wanted to ask them some questions, like: Who were your mock arbitrators that kept giving you those verdicts and those decisions? How much time did they actually spend on the case reading the materials? Did they see the evolution of the arguments over time; for example, they obviously

did not see the evolution of the arguments at the hearing itself? Who presented the other side's case, my case? – obviously, they were not that good or not as good; but that is a realistic question. And then, Were the mock arbitrators biased by knowing who had hired them in that case?

Lesson number one that I take out of all this is do not expect that the result you get from the mock arbitrators will be the same as the result you get from the real arbitrators. I have had at least a couple of experiences where the result from the mock arbitrators was almost diametrically opposed to what the real arbitrators did. So I do not think expecting the result to be the same is a realistic expectation.

Lesson number two is use the mock arbitration to test and refine your arguments and your presentations. That is what I think you can realistically get out of a mock arbitration. Does an argument, for example, that seems strong to you resonate with the mock arbitrators?

I have had several experiences where I thought I had a really killer argument, really strong, went in and presented it, and the mock arbitrators went, "Eh, okay, that's fine. What's your next argument?"

You learn from that. You start to realize that an objective third party who has not lived with the case as much as you have, coming in and hearing it for the first time, is not necessarily going to be impressed by the same things that you think they should be impressed by. That is an important learning tool.

Other issues that come up in mock arbitrations include what I think is a fundamental question, whether to use witnesses and expert witnesses in front of your mock arbitrators, whether to put them on. I have had cases where we have done that and many cases where we have not. I think the issues and concerns are whether that constitutes a rehearsal of the witnesses, which may be a real

ethical concern, a credibility concern, for some arbitrators, for example from the United Kingdom or from Commonwealth countries.

And, of course, your witnesses or experts could potentially be cross-examined about the mock arbitration.

Those are real concerns to me. So my strong preference is never to use witnesses or experts at a mock arbitration but always use it simply to test the lawyers' arguments and presentations.

Another issue that comes up is whether to use multiple mock arbitrations. We have had cases where we put one presentation to two different mock tribunals and had them deliberate separately. That is one way to do it.

Another is to videotape a presentation and provide it then to multiple tribunals to see how they react to it.

There is still a third, which I have also used, which is to have multiple mock arbitrations in

the same case over time, at different phases of the case, so that you get feedback on how the case has evolved, how the arguments have evolved, at the different stages.

I had another case two or three years ago that involved a baseball-style arbitration where each party has to present one damage number and the arbitrators have to pick just one number; they cannot split the baby between the two. Our client wanted to test – this was a large case – the damage numbers to see which one they should go with.

What we did was we had one presentation in the morning before two mock tribunals who then deliberated separately. Then we had the same presentation in the afternoon to two other mock tribunals and let them deliberate separately. So we had four different results, and we felt that we came up with a common number that we could use and that we could have confidence in using before the real arbitrators.

Another issue that comes up is confidentiality with the arbitrators. I think you need to get a confidentiality agreement with the arbitrators as consultants at an early stage.

Finding the mock arbitrators is always an interesting issue, whether you use companies like Phil's or Jim's to go out and find arbitrators who will be similar to the real arbitrators, or whether you just go in-house to partners, which is what we often wind up doing.

In conclusion, let me just say that I do believe that mock arbitrations can be very valuable, but you are only going to get out of them what you put into it; and at the very outset you need to define what it is you expect, what it is you want out of it, and then plan the process to achieve that goal.

Thank you.

MS. SUSSMAN: Any reactions?

MR. ANTHONY: Doak, I would be curious to know in your fun story about the claimant who boasted

about having done four mock arbitrations what either did you learn or did you perceive the real neutrals thought about those comments? Aside from the fact you won, do you think they were miffed? Do you think they were nonplused by it? How do you think the real neutrals reacted to that statement?

MR. BISHOP: When you say "the neutrals" -

MR. ANTHONY: The arbitrators.

MR. BISHOP: It was not put to the arbitrators. It was just put to the mediator.

MR. ANTHONY: Oh, I see.

MR. BISHOP: It came to us in the mediation. I think the mediator thought it was interesting and worth listening to, but I do not remember a reaction to it.

In that particular case, I thought the liability portion of the case was overwhelming. The damages was where I thought we had a struggle. Frankly, part of the reason we won everything is because they tried to argue about every single thing.

They took liability issues where they had no real case and tried to make everything out of them, and they lost credibility before they even got to damages.

MS. SALOMAN: I was just going to comment in connection with how you choose your mock arbitrators and whether to use in-house capability or to actually get people who are not within your firm. That is a theme I think that will be part of our discussion for the full session.

We had a case where we had thought the client would be cost-sensitive and had proposed using lawyers from other offices who have significant experience as international arbitrators. We also had a former judge on our tribunal and we have a former judge within Latham & Watkins, so we thought that would be a really great offering to the client.

In that situation, the client had a lot of experience with mock juries, liked that the lawyers went through the process, they considered it to be essentially good preparation for every case, and they

wanted the outside lawyers to be the mock arbitrators. They considered that to be money well spent.

In that type of consideration, it really becomes client-driven, but I think it is important to offer the alternatives to the client and then let them make that decision.

MS. SUSSMAN: Michael McIlwarth, who works for GE in Milan said that at GE for every significant case they have they do a mock, and often multiple mocks, because they find it to be incredibly useful in developing the case and in understanding the case better. So they always do it.

My two experiences may be of interest, just to show how different mocks can be:

One was perhaps the classic low budget, although the arbitration involved a claim for one billion dollars in the pharmaceutical sector; we were given four hours to prepare and convene for a one day presentation and discussion. We were selected as doppelgänger and were actually quite good matches for

the real arbitrators. Following the presentations various methodologies for giving feedback were utilized both before, during and after and both oral and written. The lawyers actually called me back in subsequently to help them with the rejoinder and how they should present their case at the hearing, so it appears they found the exercise useful. That mock was probably not that expensive, because they strictly limited how much time we could spend on it.

The other one must have cost hundreds of thousands of dollars. It concerned allegations about a structured financial product that had a truly dreadful name from the defense perspective. They engaged forty Financial Industry Regulatory Authority (FINRA) arbitrators from across the country to come to New York. There is a building right near the City Bar Association that has multiple rooms with one-way mirrors. There was no preparation in advance; we were just given a one hour tutorial about the case when we arrived. They split up into groups of five to hear

argument. The process was used as we understood it not only to assess settlement value but also as a beauty contest to choose who they would retain as counsel. They had different lawyers presenting in each of the rooms and were going to make a determination.

So a mock arbitration can be structured many, many different ways.

Do you find many that mock arbitrations are often conducted with a doppelgänger, where they engage people who are very similar to the actual arbitrators, and what role do you play in helping them find such individuals?

MR. ANTHONY: There are a couple of answers to that, Edna.

First of all, we do, in fact, try to mirror the characteristics of the actual arbitrators and the people selected, so that is true. That is not a perfect science, of course, that is very subjective, but the notion is to try to mirror some of the key characteristics.

Secondly, typically these mock arbitrators receive documents about the case in advance, and they are asked not only to review those documents but typically to write in their own words their responses to those documents, so that when they come to the mock arbitration, or whatever the exercise may be, they come with a mindset that is closer to that of perhaps the real arbitrators, where they are already focused.

Now, FINRA is a little different, of course. But notwithstanding that fact, in most of these exercises we want the surrogate neutral to take on the personification of the neutral as best as possible. That generally means they are not coming in cold and that they have more of a vested interest not in the outcome but in being an arbitrator and being a neutral.

MS. SUSSMAN: This could explain those four bad results.

MR. BISHOP: I was just going to ask, how much time do they spend; how much do they read in

advance to prepare?

MR. ANTHONY: In our experience, I would say the general rule of thumb is that they might devote twenty hours of their time. It varies greatly, of course, depending upon the nature of the matter. But they spend whatever the parties feel is a necessary amount of time, and similar in time to what the real arbitrators are likely to have done, so that they come with the same mindset.

Part of it, Doak, as you have experienced, is if you are going to go through the energy of having a mock arbitration, the surrogate neutrals ought to at least be in the same position as the real neutrals are in. So we want them to read similar materials.

MR. BISHOP: But twenty hours is almost nothing.

MR. ANTHONY: Again, it depends on the circumstance. It can be a small amount of time; it can be a great amount of time. I was trying to hit a balance with that answer. But you are correct, it

depends on the volume of materials in terms of how much time is needed.

MS. SUSSMAN: And the budget, I imagine.

MR. ANTHONY: And the budget, yes.

MS. SUSSMAN: Claudia?

MS. SALOMAN: I just wanted to go over what I consider to be some key strategic and logistical issues you should think about when organizing mock arbitration. There really is no "one size fits all." There is a list of key strategic points that you want to think about to make the mock arbitration meet your needs – to go back to Doak's point, what is it you want to get out of it? – and then structure the mock arbitration in that way.

The first point I want to address is confidentiality, again to build on what Doak was saying. There are multiple points and issues you have to address in the context of confidentiality.

One is in the context of just the engagement letter, making clear that the work that they are doing

they maintain as confidential.

But one needs to think about whether there is, in fact, a protective order governing the arbitration; and, if so, do you need to have the mock arbitrators then signing on to the protective order; and then making sure, if you are going to do a mock arbitration, when you draft the protective order or think about the language of the protective order, that consultants can have the confidential information provided they sign on to the protective order.

That also then goes into the question of how you actually engage your mock arbitrators. We structure them as consultants to Latham. It sounds like that is what King & Spalding does as well.

In order to avoid client bias, you have to make sure you are structuring the engagement letter without letting them know who the actual client is.

So, there are multiple steps in maintaining confidentiality while also assuring that there is not client bias if you want to actually not reveal who

your client is in the context of the arbitration.

That builds into the second key point, which is: how do you actually present the arguments to the mock arbitrators? We talk about it as a blue team and a red team. The blue team is the team that is representing your client's side; the red team is the adversary side.

The next question is: Who should make the arguments? Should the lawyer, the lead counsel who is going to do the opening argument at the arbitration, do the opening argument at the mock?

Then, who is the person who should do the other side's argument? It may be that giving a more junior lawyer, a junior partner or senior associate, the opportunity to have on-the-feet experience and time in what is still a rather stressful and sensitive situation is a benefit to that lawyer and to the client. On the other hand, maybe you want to have someone who has the same level of seniority and experience, to make sure that there is actually a very

experienced advocate arguing the other side.

What I have done as well is step into the shoes of my adversary and give another partner or junior lawyer on the team the opportunity to argue our client's case. That is an incredibly challenging experience, but it is an incredibly fruitful experience. To get into the shoes of the adversary, focus on the real strengths of their case and the weaknesses or ours, has incredible benefits for thinking about the arguments in the future.

With that red team and blue team, what should be the level of coordination? Should you really be off in two separate war rooms and building up your arguments and having all the energy that comes into prehearing preparation independently as long as you are still covering the same topics? Or is there benefit in that pre-mock hearing preparation to have coordination and then, as the red team is identifying weaknesses in your own case or the blue team's case, having them address that in advance?

I do think there is great benefit in having the teams separate and having a bit of surprise, to the extent that there can be, of what the red team will say, because then the advocate for the blue team really has to be on their feet and address those issues and see what the reactions will be by the mock arbitrators.

Timing really goes to Doak's point of what is it you are trying to get out of the arbitration. It is a little bit like Goldilocks: you do not want it to be too early, but you do not want it to be too late.

It really fundamentally depends on whether you are testing out new arguments. If you are too early, maybe you do not have significant written submissions to provide the mock arbitrators. On the other hand, if you are really trying to test out themes, it might be better to have a bit of a mock oral argument to see if those themes should get woven into your written submissions.

If it is later, then it becomes much more about practicing and testing out the emphasis on particular points, even though your written submissions are already obviously locked in.

The last point to mention is just how you structure feedback. There are so many different ways to do it. I think there is in my mind value to allowing the tribunal to deliberate some on their own and then giving oral feedback to the counsel.

Some mock arbitrations are structured where there are written questions to the mock arbitrators. I think that is a lot of work for the mock arbitrators, and you may not get as candid feedback if they actually have to write things down.

In the context of feedback, it is really important to not have the client bias. So you have to make sure that from the engagement through to the mock arbitration they are not seeing, for example, your client only sitting at one side's table; but maybe, if there are multiple in-house lawyers, they are each

sitting with the red team and the blue team, so you are really trying to give as much of a sense that this is a real arbitration and that the mock arbitrators are not just dancing around criticism if they feel like they do not want to criticize the law firm that engaged them.

MS. SUSSMAN: Jim, what do you see used most often in terms of tools for feedback – a writing, all oral, or a combination, or what?

MR. LAWRENCE: It is mostly a structured conversation between the counsel and the mock arbitrators. There is, I think, some real utility to using some forms throughout the mock arbitration to get a sense of what the mock arbitrators are thinking at that time. But the benefit, as we found from the survey, primarily has to do with that conversation and debriefing where counsel gets to ask the mock arbitrators what they thought about this, what they thought about this, and can they make this stronger. Basically, those are the two key types of gathering

data.

MS. SUSSMAN: Or it could be done multiple times: after you read the materials, something short in writing individually; and then you do it again after the argument on your own; and then you do it again after you have had some deliberation within the panel. So they can get several reactions, depending on how much you have been exposed to, and they can get a feel for what they have done as an advocate that may have moved the needle over in terms of the reactions that they are getting. There are lots of ways to do it.

MR. LAWRENCE: Sure.

The other thing that Claudia mentioned that I think is a real key component to remember as you are setting up your mock is the bias. It is not just client bias; it is selection bias. The closer the person is to you who is going to be serving as your mock, the more likely they are to have an unconscious bias. So the further removed from you they are, the

less likely there is to be a bias.

The same has to do with presentation. If you are in a relaxed atmosphere with your senior partner, it is not going to have the same dynamic as if the person on the other side is somebody you are really in conflict with.

So in setting up your mock, make sure you consider and, as best you can, control for those types of bias.

MS. SUSSMAN: Thank you.

Mohamed, I think go next to give us a little bit of a perspective from other jurisdictions, civil law jurisdictions. What is your reaction to this whole idea?

I thought it was interesting. Doak said that he never uses witnesses because he thinks they could be cross-examined on it, which is interesting. We are going to get a report later from Jim as to what we heard from our survey in terms of whether people did actually present witnesses. But that is certainly

an issue.

Mohamed?

DR. WAHAB: Thank you very much, Edna. It is a pleasure to be here, and I guess I will build on what Doak and Claudia have mentioned.

I am very glad the Claudia mentioned the statement I have written, "no one size fits all," because this is precisely the point. And Doak mentioned that he has been involved in mock arbitrations where the outcome was possibly diametrically different from what has been advised to either the other party or to himself in some cases. That is precisely my point.

I think what I am going to address in the next few minutes relates to mock arbitrations, but goes well beyond that, because we have a traditional inclination to look at civil and common law as two blocks that have the same exact distinctive features that fit all civil law jurisdictions and that fit all common law jurisdictions, and that is a misconception.

Let me give you an example. When you sit with a civil law practitioner from Switzerland, not necessarily from Italy, the same outcome from Spain, from the Arab region; and from Southeast Asia, Japan or China, for example. So it is quite interesting to see these differences.

I think when we speak about mock arbitrations, profiling is of paramount importance, and how to get the proper profile. I guess you need people on the ground who have firsthand experience as to the arbitrators to try and mimic the exact features or characteristics of those arbitrators.

Now, that said, I think culture is a very important thing. When I hear people addressing culture in conferences, it is normally the idea of looking at nuances of gestures, greetings, facial expressions. I think it goes well beyond that. My intention is to go in depth with certain procedural and substantive aspects that will define the value of mock arbitration, and indeed the anomalies and

commonalities and differences between legal systems.

A perfect example of that is looking at due process. We all agree – and I think Ina mentioned in the earlier session people talking about due process – yes, we all agree, but the boundaries of due process and how this impacts the proceedings is perceived differently in different jurisdictions. For example, is it equality and the principle of contradiction; is it equality done quantitatively or qualitatively? Those are again different perceptions. People think *Has a party been given full opportunity or reasonable opportunity?* – again, different perceptions on that.

One specific point that I think is quite pertinent to this discussion is the tribunal's role in ascertaining the content of the applicable law on the merits. In many instances we face, colleagues from the common law world would leave that to expert opinions and counsel would rely on expert views in expressing and defining the content of the applicable law; whereas in civil law jurisdictions, in many

instances, and again on a macro level rather than a micro level, they would think that it is the duty of the tribunal. The principle of *iura novit curia* (the court knows the law) or *iura novit arbiter* (that the arbitrators know the law) manifests itself on different levels.

Let me give you a clear example. In an investment arbitration just ten days ago in Paris, sitting with colleagues, one from a common law background and one from a civil law background, the idea put before the tribunal was a provision that a party, the claimant, is relying on certain provisions in a bilateral investment treaty (BIT); whereas the tribunal thought that there was a pertinent provision in the BIT not invoked. Would you flag that, or would you steer away from this?

We had different views, because if you actually flag that, you will be aiding a party to change possibly its case and claims. The other party said, "Well, out of due process we are going to reason

the award; we want to understand whether this provision has any room to apply." Again, this is a point where you have different cultural perspectives in this regard.

The idea in civil law generally is applicable law would be part of the pleadings, not necessarily expert opinion. In fact, I can tell you that – which could be quite heresy – it could be a mark of incompetence on counsel to rely on an expert opinion on the law whereas we should be pleading the law. So in some cultures it goes as far as that; whereas in others it is perfectly sensible to rely on expert evidence to be convincing to the tribunal – experts are expected to be neutral, understand their duties toward the tribunal – rather than counsel pleading its own case and stating what it thinks represents the law.

On the perspective again, another procedural matter in relation to witness preparation and examination. I am sure you are familiar with the

adversarial, inquisitorial type of thing - I am not going to go into that - witness preparation, that everyone speaks about common law practitioners being well-versed in this art, in cross-examination as well; whereas civil lawyers would not do as good a job.

Again, profiling is important, because there are civil lawyers who do a perfectly good cross-examination, perfectly good witness preparation, and in some cultures, even though it is quite against the law to prepare witnesses sometimes.

Maybe in international arbitration - and I heard Art yesterday at the dinner for the speakers talking about this, that in international arbitration there is a degree of convergence - it is perfectly sensible to have witness preparation and engage with mock cross-examinations and stuff like, so that is perfectly fine. But in some jurisdictions and for some civil law practitioners, this is met with some skepticism, because you have in one way or the other influenced the witness in a certain way.

Now, going to the more substantive issues in the next few minutes that I have - and I am mindful that I have a minute - is basically weighing the evidence, documentary versus witness evidence. In civil law the general view is that you more rely on the documentary evidence rather than witness evidence. In common law this might not be the case. So that is again one area which might impact the outcome of a mock arbitration in a way.

I think the most pertinent area today is contract interpretation, literalist versus intent-driven approaches.

I recall again in London, in a tribunal composed of three preeminent English Queen's Counsels, where at the point of departure they said, "Well, tell us how the law is different from the law of England, where English law is not the applicable law." But their comfort zone was, "We start from the premise that English law - this is what we know. Tell us how the applicable law is different? This is a reversal

of the burden of proof, a reversal of the order of analysis. It is simply unacceptable in a way."

The whole idea is that contract interpretation and determining the applicable law really defines the outcomes in many cases.

I think the final thing is the approach to judicial decisions and precedents. I think again civil and common law, because we rely on decisions for persuasive value; whereas in common law it is a system of precedent *stare decisis*. So again, this defines the outcome of the case one way or the other.

Perhaps during the Q&A we will have more opportunities to shed light on certain aspects.

Thank you very much, Edna.

MS. SUSSMAN: It is very interesting, because when you think of the *doppelgänger*, you think of getting somebody of the same gender, the same age, the same general background.

Jim, can you tell us a little bit, if you remember, about the attributes that people were really

looking to in terms of matching? I think it was not gender, age, and being a partner of a big firm or being on your own; it really was pretty much exactly what Mohamed was talking about.

MR. LAWRENCE: Right. In the survey, the two key attributes that they tried to match were legal background and professional background. So they are looking past the demographic information and really trying to find a match in the mock arbitrators to more of the thought process and decision-making process of the mock arbitrators.

MS. SUSSMAN: Good to remember if you are looking for your mock.

One question that has come up in the context of the survey: Arbitrators have asked me, "What kind of disclosure do I have to make" – and this audience might be interested – "if I have participated in a mock arbitration?" I think the concern being that if they are doing mocks for the same firm two or three times, all of a sudden they are going to get boxed out

of serving as an arbitrator a really good arbitration because they will be perceived as being too close to counsel.

As counsel, what do you think that disclosure should look like; what can they do to protect themselves; and can they be hired by the organization that is organizing it instead of the law firm, and, if they are, do they still have to disclose in the same way? What do you think? Several people asked me that question, and I would be interested in your opinions.

MR. BISHOP: I am concerned about it. I have had concerns about that, in thinking about whether to act as a mock arbitrator, whether I would have to disclose a relationship with one of the parties.

I have actually seen at least one, maybe two, mock arbitrations where they changed the names so the mock arbitrators would not know who the real parties were, which I thought was kind of interesting.

I suppose that is one way to do it. But I think it is a real concern.

Does the consultant relationship, Claudia, change that, do you think?

MS. SALOMAN: There is still a financial relationship between the law firm and the mock arbitrator.

We have had situations where somebody has disclosed that they have served as a mock arbitrator for a law firm on a number of occasions, and that gave us pause. We did not go through the full analysis of whether that would have been a basis for a challenge, but it certainly made us consider whether we would want that person as an arbitrator in a case where the counsel was on the other side.

MS. SUSSMAN: Mohamed, do you have a reaction?

DR. WAHAB: I think it is disclosable. If we are going to be candid, I think it is disclosable, and I fully agree with Claudia that the financial

situation that exists merits disclosure in a way.

I was going to ask Doak and our colleagues, when you claim costs, do you factor in the mock arbitrations as a separate thing or just under the heading of case preparation? That is quite interesting, to see whether costs of mock arbitrations can be awarded or not.

MR. BISHOP: I have never tried to claim the costs of a mock arbitration. I think the counsel fees probably get included in it, but not everything else.

DR. WAHAB: So it is included but not specifically stated then?

MR. BISHOP: That's right.

MS. SUSSMAN: There is a little bit of a danger if you mask the name. I was at a program and I asked an in-house counsel if he had done mocks. He said yes. He said once the arbitrator in the real case turned out to be the one who had heard the mock. So if you mask the name, that could happen, which would not be very unfortunate right?

On the ones I did, we knew the real names. The nondisclosure agreements that I had to sign in both of those – and I do not know what yours looked like – were the most stringent NDAs I have ever seen actually.

What do you do with your arbitrators in terms of nondisclosure agreements?

MR. ANTHONY: In our case, there is a little bit longer answer to it, which I am going to get to in a moment.

But, first of all, I think one of the most important things from the social scientist perspective is that the surrogate arbitrators be retained on a blind-study basis. In terms of subject bias, which exists in all kinds of things, but particularly in a research setting where there is advocacy involved, in our opinion you really want the surrogate neutrals to not run the risk of having any bias, either intentional or unintentional bias. That means when they are retained in our environment, they are

retained on a blind-study basis.

They know the names of the parties in the arbitration – to Doak's point, sometimes the names are fictitious names, but mostly they are the actual names – but they do not know which side has retained them, and they are specifically instructed in advance that they are not going to know which side has retained them, if in fact either side has retained them, and that they are to serve truly as a neutral in that sense.

They sign generally an extensive agreement that has provisions for nondisclosure. Sometimes a protective order is involved, as Claudia mentioned earlier. Generally speaking, though it is not our role as a social scientist to control this, it is expected that they are going to disclose in the future the fact that they have participated as surrogate neutrals in a study and that they are going to divulge the names of the parties involved in the study. Obviously, if they were contacted for some other

purpose related to the arbitration, clearly they could not serve in any capacity. Those are generally the ground rules.

Our experience is that individuals, arbitrators or otherwise, who are willing to serve as surrogate neutrals do not take exception to that set of rules and they are not bothered by the fact – in fact, I think in some cases they are relieved – that they do not have to know which party has retained them because, as one would think, they can really be more themselves and not try to be someone for a particular audience.

MS. SUSSMAN: You are actually on, so that could be part of your statement.

MR. ANTHONY: Did I just use some of my time?

MS. SUSSMAN: You did.

MR. ANTHONY: I did? Okay. All right.

If I may, let's start just with the mechanics of what I will loosely call "mock

arbitrations.”

There are many ways to conduct research in advance of an actual arbitration. Just generally speaking, and as has been discussed to some degree here, the first step is for people like us to recruit a group of surrogate neutrals. In our instance, we have a database of about 2000 individual who have agreed to participate in what we will call mock arbitrations or similar events. That is not the entire universe, but that is a database we have. There are other sources as well.

As has been discussed, those folks are generally recruited on the basis of trying to match to what we perceive to be the decision-making process of the actual arbitrators. Now, that is a very soft science kind of challenge because you are never really going to understand in total the decision making of any one individual.

Decision making is a very complex topic. The human mind is fluid and dynamic, and you can never

totally understand it. But, notwithstanding that fact, the goal is to recruit people who have similar disciplines, similar approaches, similar philosophies, and, in turn, that is theoretically meaning similar decision-making processes.

Generally then, those neutrals, as we talked earlier, are sent some materials in advance to review. Generally, we then develop and design a questionnaire from a social science perspective that is administered to those surrogate neutrals in which we ask them a wide variety of questions, ranging from their reactions to the factual issues to just their feelings, if you will, about what is being presented to them, the issues which they might be confused about or most interested in.

That is generally, I am just going to say, good information for the trial teams because it is a body of information that up to that moment in time probably the trial teams have not considered other than in the privacy of their own thoughts amongst one

another. So that is generally a good body of information.

Then the surrogate neutrals typically come into a central testing facility. Again, at least from a social scientist's perspective, it is good that that testing facility not be one of the law firms. I know people can disagree on that viewpoint, but from our perspective it is better that it really is a neutral facility and that the facility has a formality to it, and there is not a perception that the facility is connected to one party or the other. And, lastly, it gets the surrogate neutral in the proper frame of mind to participate in the exercise as they would in a real arbitration.

They come into a central testing facility, and then, over the course of a day or two days or sometimes more days than that, they are presented typically with the overview statements from each party, which can be any length they need to be. Doak was commenting to me the other day that he sometimes

has half-day statements in his real arbitrations, which, as a social scientist, I think is phenomenal, because people do in fact make decisions based upon their initial impressions of any body of information. So I think that is phenomenal.

But in our exercises generally the openings are maybe anywhere from an hour and a half to two hours in length, at most. Sometimes there is extrinsic evidence presented in addition to the statements. For all the reasons already discussed, sometimes that is desirable; sometimes it is undesirable.

Many times our solution to the issue of confidentiality or procedure with a witness is to simply prepare the body of evidence that witness is going to testify to and have that presented by some third party who is not the witness to the surrogate neutral. So they get the flavor of the extrinsic evidence without having the burden of us having to deal with what the witness has been exposed to. That

is one solution.

Then, typically there are some kind of closing remarks made.

Now, here is the key part from the social scientist perspective. Then the surrogate neutrals – whether there are three or four or five or whatever; usually it is more than one – whatever the numbers are, are then sent to individual rooms and they are interviewed.

Now, why is that? A very simple reason. With most neutrals, if you get them in a room together and that is their first exposure to being able to talk about the matter, what happens is most neutrals do not want to offend their fellow neutrals and they end up deferring to their fellow neutrals. So if someone makes a comment, another neutral or two says, “I commend that thought, and here is something I would add to that.”

But the problem is that they are not really ever telling you what they really think, because they

are already in a frame of mind and a process by which everyone is interacting, and that becomes a collective decision-making process rather than us learning what is really driving the individual.

So, long story short, we want the surrogate neutral to be able to express themselves in private, in what they perceive to be a secure environment so they can be candid.

They are asked a whole variety of questions, again same kinds of questions: What did you think? Why did you think it? What were you most interested in? What else would you like to learn about that you feel you did not hear? Where do you see the strengths, the weaknesses, the pitfalls? – and so forth, all those kinds of things. Those interviews are generally an hour to an hour and a half in length.

Finally, the surrogate neutrals, as has been discussed by the panel, are brought together at the end of the day, and then they have a chance to “deliberate amongst themselves,” and they do. But

many times they revert to their natural habitat and behavior, which is that they end up deferring to one another and they are very gentle in how they express things.

From the social scientist perspective, you are taking what you hear in the group discussion and you are juxtaposing it to what you heard in their private discussions, and you are trying to make sense of that and trying to understand: "Well, the neutral said this, but we already know what they really meant was something different because they expressed that to us previously." That helps us to inform our thought as to how the decision-making process is working, more than anything.

That is the objective. The bias subject is very important.

MS. SUSSMAN: Can you talk about cost a little bit?

MR. ANTHONY: Yes, I can.

There is that kind of exercise.

We also have a web-based platform, I am going to say – and this feeds into what Edna just asked me about the cost aspect – in which we have a group of surrogate neutrals that have agreed to participate in web-based studies. They log into a website. They have already read documents; they see the case presented to them over the Web – it is all secure, of course. Then they respond in writing in a group dynamic environment, where you can see the various surrogate neutrals on a screen together, they can see one another, and they again deliberate about the matter.

That is very cost-efficient. Why would you do that? Because it is cost-efficient. The surrogate neutrals do not have to travel anywhere. They can do the work in the privacy of their own home and time and all those things, and it dramatically lowers the price.

Overall, in closing, the costs of these kinds of exercises from our little corner of the

world, juxtaposed to what everyone else is doing, might be anywhere from \$15,000 for help organizing the Web-based kind of exercise, up to maybe \$40,000, somewhere in that range.

Then there are costs. The biggest cost is paying the surrogate neutrals, because generally they want to be paid their hourly rate, whatever it may be. That is generally the biggest cost, which eclipses generally the fees from the social scientists.

That is the general format. I had better stop. I am out of time.

MS. SUSSMAN: Mohamed, having heard a process described by a social scientist who does these things, do you think it is going to spread outside the United States much?

DR. WAHAB: I think actually we have a situation where this has happened. But, of course, I think, having heard that — and I am very much into this part of social sciences because I firmly believe in these cultural nuances and psychology and

everything – I think it will spread, and it is happening.

The only problem is that there are no guidelines, no rules, beyond the realm of the United States. Possibly you have experience.

Let me give you a clear example of an outrageous situation, where a mock arbitration has happened but was not disclosed, where they went to a partner within the firm, because he knows the actual arbitrator and how he thinks and how he acts and he has seen him working. They thought that was a perfectly fine situation, to seek out a colleague who is possibly even working with him. That type of practice I think is very dangerous and risky in a way.

That is a situation which begs the question, whether you need – I am not saying regulation, but at least guidelines on how to conduct mock arbitrations – what to expect and what not to expect, what to do and what not to do. I think that is much needed beyond the United States, across the Atlantic, in a way.

MS. SALOMAN: For me, the notion that you would not disclose the parties to somehow avoid some sort of disclosure or conflict check I think could be quite dangerous. In that initial stage, where you are disclosing the parties to assure that there is not a conflict, that would preclude somebody from reaching out to somebody that would in fact have a conflict.

If you are not disclosing the parties, then the case would have to be so scrubbed that there could be no risk that the mock arbitrators would have any idea who the party is. But if it turned out that they actually do have a conflict, I think that could create some incredibly dangerous situations.

MS. SUSSMAN: By the time it is scrubbed that much it may not resemble the case enough to be useful.

Jim, do you want to tell us a little bit about the survey?

MR. LAWRENCE: Sure. We conducted a survey - we being Edna and I - with your help.

I want to start off by having a show of hands. How many of you have participated in a mock arbitration as counsel? Raise your hand.

[Show of hands]

All right.

How many of you have participated as a surrogate or mock arbitrator in a mock arbitration? Raise your hand.

[Show of hands]

All right.

How many of you have never participated in a mock arbitration either as a counsel or as a mock arbitrator?

[Show of hands]

Right. Okay. That is exactly what the survey is telling us.

I want to tell you a little bit about how we came to the survey.

MS. SUSSMAN: You have to say what the most common reason was - "I've never done it because," and

because "I never thought of it." So we are here to tell you about it.

MR. LAWRENCE: We decided, as Edna and I were talking, that mock arbitration was an underused process, and perhaps a misunderstood process, and so we wanted to set out to figure out a way to improve the process and improve the knowledge about mock arbitrations.

Some of you in here may have taken the survey. If you have not, I will tell you it is not too late. We can get you the link and you can fill out the form.

We designed the survey to address three different perspectives: (1) counsel in arbitration; (2) the perspective of the mock arbitrator; and (3) those who have never conducted a mock arbitration.

We have to date 478 responses from around the world. Twenty 20 percent of those are counsel in arbitration, 40 percent are mock arbitrators, and 40 percent have never participated in a mock arbitration.

Without going into all the little numbers, because there is a lot there, I want to give you some of the most important points, the highlights of the survey that we know so far. We are just now beginning to unpack some of the data and to see how it is going to reflect and interact with other pieces in the survey.

The thing that Edna brought up is that for the 40 percent of those who have never conducted or participated in a mock arbitration the primary reason that they did not is because they did not think about it. Now, that is curious to me as a jury consultant, because over 70 percent of our responses were from the United States, where jury science is a pretty well-practiced, well-known process.

The second reason that people did not conduct mock arbitration is that they thought it was too costly.

We got those two pieces of information from people who have not participated in a mock

arbitration.

But I want to now jump to a couple of pieces of information from the people who have participated in mock arbitration.

One of the pieces I found most interesting was that there does not seem to be a cost issue or a mounting controversy issue that decides whether or not someone is going to do a mock arbitration. We think that the larger the amount in controversy, the more likely that there would be a mock arbitration.

But the initial results show that it does not really matter. We had seven categories of amounts in controversy, starting at \$1 million and going all the way up to bet the company. The responses were almost even across the board for each of the seven categories. That is one thing that I thought was quite interesting.

The reason that was stated for not doing a mock arbitration was "too costly," so we wanted to know how do you limit the cost. The three primary

things for limiting cost: (1) limit it to one day; (2) limit the materials that are reviewed by the mock arbitrators, the amount of time they are going to charge for their hourly rate preparing for this mock arbitration; and (3) then have a mock arbitration without using any sort of outside resource.

The problem that comes in there is that you have sort of what I call a "presentation bias": how much time and energy do you want your mock arbitrators to put in to being ready, and how much time and energy do you as the counsel put in to preparing and presenting your case in a way that is as close to the way you are going to present it as possible?

I will go back to Doak's comment, "You get out of it what you put into it." The presentation bias is a real concern, especially – and I know Phil can talk about that some, too – getting people to prepare, to be up to speed, so that the results you get are as true to science as possible.

In terms of using an outside consultant –

because that is where we are, I will talk a little bit about that – the majority of the respondents did not use an outside consultant. I think maybe 60-some percent did not use an outside consultant.

The few that did use an outside consultant, of that number, 88 percent found it to be very, very helpful. I think, just based on what we have discussed here, you see the reasons for that. It provides a shield between the mock arbitrators and the counsel, because of those people who have participated in a mock arbitration over half of them said they knew who the client was. So you get that bias of, “Well, I am here because you asked me to be here, and since you asked me to be here” – unconsciously – “I may not decide exactly like I would if I did not know that I was here for you.” That is a real consideration to keep in mind.

Most of the respondents did not mock more than once. Doak seems to have a pretty good process for maybe doing it more than once.

And you have to know what your reason is for doing it, because if you want to get a result, then you have to control for result bias – the four times that they mocked and then went to the real arbitration and it was completely opposite.

Controlling for result bias is really important, especially for the client. As the attorney, you can manage that; but if the client hears a certain result, then that is something else that you have to be aware of.

MS. SUSSMAN: For that one, do you remember from the survey how often people did have their client actually present or not? That was one of our questions.

MR. LAWRENCE: Yes. Usually, from the survey, about a third of the time, 36 percent of the time, the client was present.

I have one minute. I actually think I have covered everything as a whole.

Do you have other thoughts?

MS. SUSSMAN: I thought what we would do is go down the line, people on the panel will have thirty seconds to say something about anything that they would like to say on the subject, and then we could do five minutes of Q&A.

Starting with Doak and just coming down – no more than thirty seconds each, though.

MR. BISHOP: What I would mention is the red team, picking the red team, using the red team. We have had different cases where it was all associates. But you do have a certain question about bias: for example, where the mock arbitrators are going to see all partners on one side and all associates on the other, is that going to affect what they do?

We were involved in one case, a very large case, where we were brought in as the red team – we were not involved in the case – for the mock arbitration. That particular client asked for five partners to be involved in a three-day mock arbitration with witnesses and experts, and it was

quite expensive for them, not surprisingly.

There is so much you can do, but you really need to think about what you are doing, what the result is going to be in terms of bias and such, and know that upfront.

MS. SUSSMAN: Mohamed?

DR. WAHAB: I will volunteer my thirty seconds to the audience because I want them to engage in the discussion.

MS. SUSSMAN: Claudia?

MS. SALOMAN: I think this whole question of how you select mock arbitrators is crucial, just like selecting actual arbitrators. I echo the previous comment, that you are not going to have a perfect match, so there is no way in which you can expect the outcome of the mock to be the outcome of the actual arbitration.

But there is clearly a desire for more information from the legal community and the arbitration community about arbitrators generally and

how to select them. Yet, in large law firms, I think we think that we have a lot of this information because of our experience, and so we are not looking at just the external factors, like civil law versus common law, gender, specific background, but much of the art, as opposed to the science, of who the individual people are based on our experiences.

So the question of whether you have an outside consultant or you select those mock arbitrators on your own becomes much more about whether you feel that you really know who the arbitrators are and who might be good replacements. On the other hand, if you do not have access to that kind of information, having somebody help you with that will be hugely valuable.

MS. SUSSMAN: Philip?

MR. ANTHONY: Arbitrators are people, too, and people when asked to make decisions do so typically on the basis of their own attitudes, values, experiences, and beliefs. That is the nature of the

human thought process.

If you approach a mock arbitration from that perspective, there is a high likelihood you are going to learn something of value about how a typical person processes information, even when that person is sophisticated, as most neutrals are. So it can be an informative process.

MS. SUSSMAN: All right. I think we have five minutes for questions.

Art?

QUESTION: I noticed that when you spoke of those who had participated you did not mention witnesses. I am not sure why. I have taken part as a witness, the idea being to test how the arbitrators would come out if a particular witness appeared or a particular witness did not appear, and it turned the result completely around. I wonder why you have not mentioned witnesses.

MR. LAWRENCE: Because I forgot. [Laughter]

MS. SUSSMAN: We did ask that question, and

I think it was something like 20 or 30 percent of the respondents said they did use witnesses at the mock. It does raise many ethical questions and disclosure questions and cross-examination questions. Some folks consider whether to use a surrogate witness to act the part— it is complicated. Do not walk away with 30 percent and say, "Oh, I'm going to do this." Think it through.

MR. LAWRENCE: Over 50 percent of the respondents said they did not use real witnesses in their mock arbitrations. It is sort of a fifty-fifty mix.

MS. SUSSMAN: What some people do actually — if this is international arbitration, you are not going to see it — is they will use the video depositions, if there are any, and use those as a proxy, which could work.

QUESTION: Thanks Edna. Stephen Strick, independent arbitrator.

What I am not hearing in the process is the

factor of time between the two experiences, between the mock and the real. In the course of a real arbitration, a sole arbitrator or a panel will have a period of time within which to reflect, look at the evidence, look at it again, change his or her mind three or four times, go back to the evidence again, and then sometimes go to sleep and wake up with the answer. I am not hearing this in that process, and I would like to hear your thoughts on that.

MR. ANTHONY: I might just lead off and say, again from the social science perspective, I am glad you raised that. Actually, many times we phone the surrogate neutral back, sometimes several weeks after the exercise, and ask them something that approximates the question you just posed, which is, "Now that you have had time to reflect upon it, any other issues coming up, anything else you are curious about?"

I am not suggesting that necessarily captures everything that happens at the real arbitration, but that is our approach and solution to

that issue.

QUESTIONER [Mr. Strick]: The difference that you may want to consider is that the real arbitrator is living with that evidence over that time. Your mock arbitrators are there and then not doing so.

MR. ANTHONY: Agreed.

MR. ANTHONY: I will say that, somewhat in response to your question, cost controls. It is a marriage of how much you want to pay for this to be as realistic as possible. A lot of times you have to manage the results and the expectations based on the cost.

MS. SALOMAN: On the point that I think we have highlighted, which is that there is no expectation that this can be a replica of the actual arbitration or expect that the outcome in the mock is going to be the same, I do think that the mock arbitration serves in some ways different functions. You are really testing out arguments much more than

expecting to determine whether you are going to win or lose.

QUESTION: Mikhail Solatenko, Straus Institute for Dispute Resolution, Pepperdine University. Thank you for your very interesting discussion.

My question would be: It was pointed out on many occasions that we need surrogate arbitrators for the mock arbitration. However, there is an alternative point of view, that it does not matter, and the main aim of mock arbitration is not to predict but to eliminate bias toward the counsels and to make a case stronger. Therefore, maybe in some cases it is better to have arbitrators with robust critical thinking rather than to find surrogates, which is very hard sometimes and, as was already said, it is harder to predict the result. Thank you.

MR. BISHOP: I agree with that. In most of the mocks that we have had, we have not tried to match the mock arbitrators to the real arbitrators. We have

gotten sometimes in-house people, sometimes people from other firms who are experienced arbitrators, but not gone through any matching process, because precisely what we wanted was the feedback on our arguments and on our presentations, not trying to get the same result.

DR. WAHAB: Can I just add one thing? Just looking into the future, and to build on what Doak and Claudia mentioned about not looking at the outcome but rather a rehearsal of some sort and testing the arguments, the use of artificial intelligence will take that to a different level because you can actually possibly, based on predictive justice, sometimes predict the outcome.

If you study the actual arbitrator's decisions over time, his behavioral pattern, there are currently programs that would analyze that and would generate the likely outcome. It would be very difficult to think that it is not going to be accurate, because what happens, again based on

studies, is that people cannot easily change their way of thinking but they can change the outcome. When you analyze that, you can predict.

That is a very scary field, that currently you have applications that can give you insight about the likelihood of what the outcome would be, the behavioral patterns, and, all the more, allow you to prepare for what to expect during the hearing and deal with that. That is, frankly, a very interesting area.

MR. BISHOP: Phil, is that the future of your field?

MR. ANTHONY: That is the future of our field. I will not be here next year; it will be a hologram. [Laughter]

MS. SUSSMAN: Actually, we started the conversation on artificial intelligence at this conference last year, but we have a long way to go.

Reg, a very short question because we have to do lunch. Go ahead, please.

QUESTION: Reg Holmes. I am an independent

arbitrator in national practice.

I want to go back to just pick up something that Claudia introduced but did not resolve, and that is the "Goldilocks period." I have done of these. I thought it was a little premature. They wanted to do it before discovery. Where is the Goldilocks period, the best time, from any of you, to actually have the mock arbitration?

MS. SALOMAN: How is this? It depends on each case and what you are striving to achieve. I do think when written submissions have been made and you are in the process of preparing for the hearing, that can be a particularly useful time.

DR. WAHAB: Preparing for the hearing, yes.

QUESTIONER [Mr. Holmes]: So closer to the hearing?

DR. WAHAB: Closer to the hearing.

MS. SUSSMAN: I see two people that I know, so this is hard. So, Jim, Charlie, thirty-second questions and thirty-second responses, and then we

have to have lunch.

DR. WAHAB: So you are biased to the people that you know. [Laughter]

MS. SUSSMAN: Well, they happen to be the ones with their hands up.

AUDIENCE: Edna knows everyone here.

MS. SUSSMAN: Jim?

QUESTION: Jim Reima. Very quickly, we were discussing the issues with respect to witnesses in mock arbitration. Are those issues different than in a mock trial?

DR. WAHAB: Great question.

MR. ANTHONY: I would say no. I do not profess to know all the rules of the various conferences in arbitration, but certainly in a jury setting I know those pretty well, and I would say the rules are the same. In a jury trial you do not want your witness asked on the stand, "Have you ever been in a mock jury exercise?" That is the last thing you want. So you have to apply the same discipline and

thought process to how you make use of your witnesses.

MS. SUSSMAN: Charlie? Thirty seconds.

QUESTION: Charlie Moxley. A very quick question. I know we are all trying to get to lunch.

I understand using this kind of approach to see what your arbitrators might do when you have picked them and you can get arbitrators, as a number of you have mentioned, who are very similar to your actual arbitrators. And I understand doing it kind of on a cross-section, as Doak said, to see how good the case seems to be.

But what I have not heard – and what those of us who spent a lot of our lives as litigators used mock juries for was to figure out the kind of juror we wanted – is the approach used where you get a group of people – you get an experienced litigator, you get a deal guy, you get a professor, you get a whole range – to figure out what kind of person you might want to select?

MS. SUSSMAN: Do you remember what the

survey came out with on that question?

MR. LAWRENCE: Yes. The survey said that that was rarely used as a way to choose arbitrators.

But it certainly would be a very viable process. The problem with that is the timing. When do you select your arbitrators and how far into the case are you? Can you present the case well enough to actually test the arbitrator?

QUESTIONER [off-mic][Mr. Moxley]: It normally to test the concept.

MR. LAWRENCE: Yes, the concept, absolutely.

MR. ANTHONY: We have sometimes been asked to answer the question you just raised about what kind of arbitrator might we think about requesting. But it is rarely done, and you have the problems that Jim just mentioned about how far in advance you can do it.

MS. SUSSMAN: First of all, I gather that people do not know how to get their CLE material, and there is really very excellent CLE material for all these sessions, including this one - an article by

Phil, an article by Claudia, an article by me, and other materials. Apparently, you go on FordhamCLE, and we will try to give you a better description later, if you Google it now and you cannot find it. But supposedly it is all there. Number one.

Number two, if you would like to do the survey, we have not closed it, so we would be delighted to have people do the survey. I guess I will tell you later how we can do this. Maybe we can send all of you an email, which would be the easiest, if Fordham can do that. I will check on that. But if you do get the email to do the survey, please, please, please do it.

Finally, we are really honored to have The Honorable Charles Brower as our keynote speaker. These are box lunches. They are very easy to bring back inside, and I want you in your seat at 12:40. He will be speaking at 12:45.

Wait, we have to thank the panel. Thank the panel.

[Session adjourned: 12:11 p.m.]