CHAPTER 2

THE ROLE OF LANGUAGE IN ARBITRATION

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During the past few months, in preparing for this opportunity to address the 33rd Annual Meeting of the National Academy of Arbitrators, I have been talking with many of you about the role of language in arbitration. Each of you has argued that language is very important in your work, and each of you has, in turn, volunteered suggestions concerning in what ways you believe language plays a crucial role.

Obviously I can't address each of your suggestions. What I would like to do, however, is discuss with you three main areas which I, from my perspective as a researcher of language and an observer of arbitration, see language playing a significant role.

Part of what I say here will be obvious to some of you. After attending several dozen hearings over the last year with different arbitrators, it becomes clear that issues of language arise in slightly different forms over and over again. However, I hope that most of what I have to say will provide you with an expanded view of the role of language and with more specific information on how it relates to the arbitration process.

I will discuss three areas: the language of the grievance, the language of the hearing, and the language of the decision. I will dwell only briefly on the first area since it is probably the best known to most of you. I will concentrate primarily on the second area, the language of the hearing, since it is in this area that I believe language plays a most important and subtle role. I will outline the issues of the third area, the language of the decision, but will not go into any detail, primarily because there is very little research to report at the present time.

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The Language of the Grievance

Let us turn then to the first area, the language of the grievance. Here we have as the issue the particular terms of language found in the contract or in the statement of the grievance issue itself. In short, what we are concerned with is the language as it exists prior to the hearing itself; for example, the contract language or the statement of the issue. As one arbitrator commented to me, "It's often the careless or thoughtless use of words that creates many of these grievances, not the actions of the parties themselves." We might highlight the problem by referring to a conversation between Alice and Humpty Dumpty in Lewis Carroll's *Through the Looking Glass:*

> " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'
> " 'The question is,' said Alice, 'whether you can make words mean so many different things.'
> " 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

Though many of us might share the confidence expressed by Humpty Dumpty—that we control word meaning rather than the reverse—I suspect that reality dictates otherwise.

Consider, for example, a contract provision which reads in part that ". . . seven days after the posting of a position, the employer may fill the vacant position." On its face, this appears to pose no challenge. However, a hard look at this clause and the functions of the "may" will reveal that it can be interpreted as indicating (1) that after seven days there is some greater than zero probability that the employer will fill the position; (2) that after seven days the employer will face no union challenge if it fills the position; or (3) (analogous to the use of "may" in "You may go to your room this instant," spoken to a child) that after the seven days of posting, the employer is obligated to fill the position. Each of these positions was argued in one case, and the arbitrator was obliged to wade through a brief containing five pages of citations from various dictionaries and learned sources commenting on the various interpretations of "may."

Consider as a second example a case of a flight attendant grievant discharged for stealing liquor, who states that "I will admit I stole the liquor if I can have my job back." Was this an admission? A confession? Was this an offer of a settlement? If so, was there any consideration involved? Would it be fair to

argue that the loss of reputation sustained by an admission of theft was sufficient consideration for her utterance to count as a legitimate offer of settlement? What if, instead of the statement quoted above, she had indicated a consideration by saying, "I will admit I stole the liquor if I can be reinstated with a loss of back pay"? One main issue underlying the questions I have posed here is my suspicion that what counts as an admission, a confession, or an offer of settlement will differ substantively among those who rely on the legal definition, those who have dealt with the arbitration process over a period of time, and those speakers of ordinary language who are now entering the arbitration lists.

As a final example, consider the case of an employee who was discharged for threatening his immediate supervisor with physical violence based, in part, on his having been heard to say as he left the scene of the confrontation, "I know where you live!" Of course, the quoted utterance could have been intended as a threat, but we all make statements occasionally which could convey a threatening intent if the hearer wishes to hear it that way. Sometimes we are only joking; sometimes we are serious about the threat; sometimes we are serious for the moment, yet have absolutely no intention whatsoever of carrying out any subsequent action. And sometimes we don't intend a threat at all, merely a warning, or perhaps we aren't even sure that we meant anything other than that we were angry and felt the need to express it.

Threats can be a very serious kind of language use, and there are a number of statutes that deal directly with them. Perhaps the most notable is that concerned with threats to the President. Statute 18 U.S.C. 871(a) (1970), initially passed in 1917, provides penalties for anyone who knowingly and willfully makes any threat against the President. The position taken most often by the courts was established in *Ragansky* v. *United States,*[1] as follows:

> "A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him. . . . And a threat is willfully made if, in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent intention to carry them into execution."

[1]253 F. 643 (7th Cir. 1918).

Under this standard, there is no need to prove that the defendant intended to carry out his threat, or even that the defendant had any sort of bad purpose in making the statement which could reasonably be understood as threatening.

More recently, in *Roy* v. *United States,*[2] the court decided that the requirement of willfulness is met if the defendant intentionally makes a statement " . . . in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm . . . and that the statement not be the result of mistake, duress, or coercion." The view here is that the defendant need not intend to execute his or her threat or entertain any bad purpose in order to violate 871(a).

In one notable case, *Watts* v. *United States,*[3] an individual said, "If they ever make me carry a rifle, the first person I want in my sights is LBJ." He was originally convicted of threatening the President, but later the Supreme Court reversed the conviction, saying that this statement was a form of crude political hyperbole and, therefore, protected under the First Amendment. One wonders to what extent putative threats in the workplace enjoy the same hyperbolic latitude.

Through all of this, the Court left unresolved what is to count as a true threat as well as what constitutes willfulness. The Court has not made clear whether speakers must be understood as making a joke or hyperbole, or whether they may simply have intended to make a joke or hyperbole in order for their speech to be protected. If the Court's decision is interpreted to mean that the speaker must be understood as joking or exaggerating, there is really no substantive difference between the *Watts* standard and the original formulation in *Ragansky.* If, on the other hand, *Watts* is interpreted to mean that an utterance is protected speech and outside the statute if the speaker intended it to be a joke or exaggeration, regardless of the way it was understood, the interpretation that a particular utterance falls within the statute whenever it would be reasonably understood as a threat has serious problems.

A further complication arose in the case of *United States* v.

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[2]416 F.2d 874 (9th Cir. 1969).
[3]394 U.S. 705 (1969), *rev'g* 402 F.2d 676 (D.C.Cir. 1968).

Patillo,[4] where a guard at a naval shipyard had told a fellow guard that he would "take care of Nixon personally." Here the court, in reversing the conviction of the guard, drew a distinction between threats where communication to the President was intended and where it was not intended, holding that where communication of the true threat is not intended to be communication to the threatened party (here, the President), the threat can form a basis for conviction only if made with a present intent to actually do injury.

I have somewhat belabored the background legal struggle to come to grips with the notion of a threat and the grounds for its knowing and willful commission because I see it to be but representative of many terms-of-the-art that pervade grievance issues today: threats, insubordination, an offer, sexual harassment, seniority, and the like. To the extent to which arbitration is moving from the comfortable, albeit effective, process of familiar faces dealing with familiar problems to new, legally trained advocates, unfamiliar with both the arbitrators and each other, the more conflict I envision on what these words, so familiar to the arbitration history, are going to mean. Will the interpretation from case law prevail? Will the advocates defer to the tried wisdom of the arbitrator? Will the interested parties insist on imposing their own, relatively untested interpretations of these terms on the process? I surely cannot hazard an informed guess, but the controversy I have observed over such issues suggests that when we encounter a word, it does not mean what we choose it to mean, neither more nor less.

The Language of the Hearing

My second area of concern in this paper is what I have called the language of the hearing. The focus here lies principally with the reliability of witnesses as they attempt to communicate to the arbitrator the sense and details of past events that they have seen, heard, or experienced in some way. It is my purpose in this discussion to create in you a sense of disquiet, to convince you that there is a serious risk in placing great reliability on the accuracy of a single given witness.

To begin, we should recognize that even the finest citizen is

[4]431 F.2d 293 (4th Cir. 1970).

frequently guilty of avoiding the truth, quite deliberately and consciously. One hears statements such as "I'm fine, thank you," "That's a lovely new dress; it looks fantastic on you," "Your paper was very interesting," "The check is in the mail," and "I am not a crook." The list can (and does) go on indefinitely. It is not that we always evade, equivocate, prevaricate, and downright lie without social repercussions; it is just that in certain situations such representation is quite acceptable and expected. (One doesn't respond to a greeting with "I'm terrible, I was sick last night" or "I have this pain right here.") During testimony, however, the ground rules permit absolutely no straying from the narrow truth.

For purposes of this discussion, I will exclude from consideration those witnesses who deliberately and intentionally create testimony which they believe deviates from the truth. There is very little I, as a linguist, can say about them.

I think we can best discuss the reliability of witness testimony by considering the transformation of facts that takes place between the actual occurrence of an event and its communication to the arbitrator. I will refer to the event itself as being composed of *real facts*—actions that did in fact occur with some structure and in some particular sequence. These are the facts we would observe were we to have available an instant replay such as that used to second-guess football referees.

However, when we experience an event, we do not record in our memory these real facts as a video recorder would. The Greek historian Thucydides, writing in the Fifth Century B.C., pointed out part of the difficulty when he wrote about gathering information: "The task was a laborious one because eye witnesses of the same occurrence gave different accounts as they remembered or were interested in the action of one side or another." More recently Justice Cardozo (1921) echoed this point when he stated, "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." We impose our own, and sometime unique, filter to the data that impinge on our sensory organs, thereby providing us with what we may call a set of *perceived facts* in order to construct the event for memory.

One way of characterizing this perceptual filter is to recognize that most of us, with the exception of those few (if any) individuals with total recall, organize events we experience into large, general categories from which the details flow in later recollec-

tion. One does not attend to details, especially small unfamiliar details, much less recast them accurately days or weeks later, without deriving them from some general categories in which they have been stored. For example, if you observe a man reading the mail on the supervisor's desk, the likelihood is that you will perceive the sex of the individual and not the height, weight, or complexion, and will, if queried on these, provide details that characterize your view of the average man, held in memory long before you ever observed the mail event.

To be sure, the real and perceived facts are often identical. A witness is unlikely to fail to identify that it was his supervisor who was arguing with a fellow employee, or that it was a mail truck rather than a motorcycle that struck him in the company parking lot. In such cases where the facts in question are thoroughly familiar to the witness and/or the facts are uniquely distinguishable from any competing facts, there is certainly little reason to doubt a witness who testifies immediately after the event occurred.

But we must consider the more frequent case of testimony where the witness is being asked to remember exactly where the grievant was standing, what he said, whether the phone call came before or after the argument, whether the supervisor lit the cigarette before or after he entered the paint shop, whether there was a pile of mail on the dashboard of the truck, whether there was any snow or ice on the ground on the day in question, and the like. Here we are not dealing with sets of real facts, or even the set of perceived facts, but with a set of *retained facts*—the reconstruction of the event after some period of time. Many factors can influence the congruence between perceived and retained facts, some of which we will detail below.

Finally, in testifying, the witnesses are asked to reconstruct the event for the arbitrator, and in doing so, they attempt to communicate to the arbitrator their recollection of the event. Here we are dealing with yet a fourth set of facts: *communicated facts.* As I shall indicate below, the arbitrator interacts in important and often nonobvious ways to assist in transforming retained facts into a different final set of communicated facts.

Let us discuss each of these four sets of facts in turn to get a sense of how each arises and may be transformed into the succeeding set. I must stress at the outset that I am reporting on research results—albeit fine examples of empirical research, but subject nevertheless to the criticism that they do not reflect what

actually occurs in the real world when people do indeed observe an event, try to remember it, and later testify about what they saw or heard. I don't think this should deter us from the examination, however, since the research results suggest the correspondence of real facts to communicated facts is remarkably poor. Moreover, recent work by Sanders and Warwick (1980), which I will report on below, suggests that the validity of the research is really quite good.

Turning to the set of real facts, we can point to certain aspects of an event which, independent of the nature of the witness, can influence the ability of the witness to report accurately. Some of these are obvious and reflect common sense. The more time a person has to look at a face, for example, the more reliable the person will be in recognizing that face from among others and in recalling specific details. Frequency of the event is another aspect. The more times a person observes an event, the more likely he is to report the details accurately. Salience of the event is another common-sense aspect that plays a role in accurate recall. If there is something special or unusual about an event, you are much more likely to attend to it and its surrounding details than if the event is commonplace. For example, if a grievant at the hearing is wearing a yellow shirt with a purple tie, you will be likely to remember and perhaps comment on this. On the other hand, even though you have looked at the telephone countless times, it is unlikely that you can recall which letters are associated with each of the ten digits or, even more telling, which letters are missing. Significantly, although one might argue that a face of a racial type other than that of the witness is different and the witness would be more apt to attend to these details, just the reverse occurs. Whites are relatively poor at identifying black as opposed to other white faces, and vice versa. Moreover, it is not surprising that what counts as a highly salient aspect of an event often differs for men and women (Powers et al. 1979).

Less obvious is the relative ease with which a type of fact is recalled. Is the witness being asked to remember the height of an individual, his weight, the speed of an automobile, the details of a conversation, or the location of the pickets outside a factory? Different types of facts are not equally easy to perceive and recall, though it is difficult to set down any firm rules.

In 1895 Cattell asked his students a variety of ordinary questions whose answers they might be expected to know—for ex-

ample, "What was the weather a week ago today?" He concluded, "It seems that the average man cannot state much better what the weather was a week ago than what it will be a week hence." He found that students divided about equally on whether a horse stands with its tail to the wind (it does) or whether apple seeds point away from the stem (they don't), and that they were consistently low in estimating weight or time, while high in estimating distance.

More recently Marshall (1969) asked Air Force personnel to estimate the speed of a moving automobile. They knew in advance that they would have to provide this information; yet estimates ranged from 10 to 50 mph, when in fact the car was moving at only 12 miles per hour. Bookhout et al. (1975) staged an assault by a distraught student on a professor in front of 141 witnesses. While the attack lasted only 34 seconds, the average time reflected in the sworn statements from witnesses was 81 seconds—an error of nearly two and one-half times. Finally, Johnson and Scott (1976) had subjects for an experiment, who were waiting in a room, overhear a violent argument nearby. Suddenly one of the arguers came into the subjects' room and then left, having spent about four seconds with them. Male subjects estimated the duration to be seven seconds, while females reported the time as 25 seconds. Clearly, witnesses tend to greatly overestimate the duration of an event. Estimates of height, weight, and color also vary widely, but not consistently in one direction. One must conclude, however, that reliability is very low.

More variable, and perhaps more crucial to an accurate set of perceptual facts, are what I will call witness factors: those aspects of the witness that influence the initial construction of the event in memory. I will discuss but a few.

The first of these involves the stress felt by the witness when perceiving an event. The general tendency, first noted in 1908 by Yerkes and Dodson, is that strong motivational states such as stress facilitate learning and, hence, recall up to a point, after which additional stress causes a deterioration. In short, perception is most effective at some moderate level of arousal. The difficulty, however, lies in identifying what this moderate level is for a given witness *and* whether the witness was enjoying this level during the observation of the incident at issue. Moreover, certain categorical facts, such as the race of a participant in an incident, is more likely to be remembered under heavy stress

than is a fact with internal structure, such as the participant's phone number. One result of increased stress is the narrowing of focus by the witness. Work by Easterbrook (1959) suggests, for example, that if there is one aspect of an incident that is particularly salient, such as a gun, a video portapak for recording activities, or unusual attire, this may receive most of the witness's attention to the detriment of many other details.

A second witness factor that plays an important role in witness perceptions is what I will call social expectations. Simply put, these are stereotypes an individual holds—fairly or not—about a social group or social behavior. Generalizations, such as "Germans are dogmatic," "Blacks are promiscuous," "Scots are thrifty," "British are up-tight," "Academics are intelligent," and "Arbitrators are . . . ," are often widely accepted, often grossly inaccurate, but frequently relied upon.

A classic investigation of this phenomenon is that of Allport and Postman (1947) who showed a subject a picture that contained many details. Relevant is the fact that one of the individuals in the picture was a black man dressed in a three-piece suit facing a white man, casually dressed but gesturing with one hand and carrying a straight razor in the other. This first subject was asked to describe the picture to a second, the second to a third, and so on until the sixth subject described the picture to the experimenter. The majority of the sixth subjects, drawn from many walks of life, reported that the black man was brandishing the razor, threatening the white man.

Another factor that plays a role in reliability is the witness's expectations based on past experiences: if it is usually one way, it probably is this time. As Allport and Postman comment, "Things are perceived and remembered as they usually are. Thus a drugstore situated in the middle of a block . . . moves up to the corner of two streets and becomes the familiar 'corner drugstore.' A Red Cross ambulance is said to carry medical supplies rather than explosives, because it ought to be carrying medical supplies. The kilometers on the signposts are changed into miles, since Americans are accustomed to having distance indicated in miles" (p. 62).

In a later experiment, Bruner and Postman (1949) showed subjects an arrangement of 12 playing cards—12 aces from all four suits—and asked for a report. After glancing briefly, most subjects reported that they saw three aces of spades. In reality, there were five aces of spades, but two had been colored red.

Some subjects, aware of this deviation from their expectations, reported the colored aces as "purple" or "rusty black." Clearly, the subjects' behavior "can be described as resistances to the recognition of the unexpected or the incongruous" (p. 222).

As a final factor in witness perception, we can consider personal bias, truly a difficult aspect to assess. If the witness has a low opinion of women, a female grievant may be seen as negative rather than neutral; if the witness feels hostility toward the employer, he will be less likely to perceive an event in an objective way.

Hastorf and Cantrill (1954) showed a film of the hard-fought 1951 Dartmouth-Princeton football game to students from each campus and asked them to note any infractions (there were numerous) and their nature. Princeton students saw Dartmouth players make more than twice as many infractions as their own team, and the Dartmouth infractions were seen as more flagrant. Dartmouth students saw the frequency of infractions as about equal, but with the Princeton violations being more flagrant. (Incidentally, Princeton won.) To cite but one final example of personal bias, Allport (1958) showed a display of photographs of women's faces to a group of male subjects with the instruction that they rate them on positive feelings toward each. Some time later, the same photos were shown to the same subjects for evaluation, but with the added condition that the ethnic background (e.g., Jewish, Italian, Polish, British) was indicated for each. The results were strikingly different.

Moving on, we now want to consider the third construction of the event, the retained set of facts. One might assume that the set of facts available after a period of time is influenced only by a general loss of memory. After all, there is ample evidence that recall of detail deteriorates rapidly with time. Shepard (1967), for example, tested subjects for recognition of pictures after intervals of two hours, three days, one week, and four months. While many subjects evidenced a 100 percent recognition after two hours, the average was 57 percent after four months. This is about at the level of chance—simply guessing.

But time is not the only factor influencing retention. Foremost among these others is the postevent information to which a witness is subjected. It is quite common, for example, for witnesses to discuss an event shortly after it has occurred, particularly if the incident is recognized as significant. What was initially perceived by a witness as a casual gesture may well become

a threatening one if fellow witnesses have seen it that way. I have heard an early witness testify to icy, treacherous, snow-covered walks on the day in question, while a later witness, having heard this testimony, disowned his first-step statement describing a nearly snowless walk to conform.

Loftus and Palmer (1974) had subjects watch a series of film clips of car collisions and then asked them a series of questions, one of which concerned the speed of the moving car. For one group, the question was, "How fast was the first car going when it smashed into the second?" For the other group, the verb "smashed" was replaced with "hit." A week later the two groups were asked another series of questions, one of which was, "Did you see any broken glass?" Twice the number of subjects whose original question about speed included the word "smashed" reported glass, compared to those whose original question included "hit." (There was no broken glass.) Almost any object can be (and has been) introduced into a set of facts, particularly if it is consistent with the witness's overall reconstruction of the event. Even facts at variance with the reconstruction will be integrated with sufficient motivation (e.g., the broken-glass case above).

Of course, in most of these cases, the arbitrator has no way of knowing what information has been provided to a witness following an event, or in preparation for the hearing, and under what conditions. Loftus et al. (1978) suggest:

> "In general, longer retention intervals lead to worse performance; consistent information (provided post event to the witness) improves performance and misleading information hinders it; and misleading information that is given immediately after an event has less of an impact on memory than misleading information that is delayed until just prior to the test [testimony]" (p. 67).

Interestingly, the introduction of postevent information can influence a witness's subjective reaction to an event: noisy events can become quiet; violent events can become retained as relatively placid; passive participants can be recalled as aggressive. In addition, nonverbal cues to the beliefs of one party may influence a witness: the length of a gaze, the degree of confidence evidenced by one witness, or the demeanor of the person taking the information have all been shown to contribute to the retained reconstruction of an event. Finally, just as a high frequency of an event can usually insure a more accurate recollection, the more often a witness is asked to recount his version of

an event, the more confidence he gains in the "truth" of his version.

From the above it should be clear that the experimental research indicates that eyewitness errors are prevalent; anecdotal accounts suggest that real-life eyewitness errors occur more often than not. Unfortunately, we do not know yet the extent to which this and similar research actually mirrors what happens under actual, real-life circumstances.

On the one hand, the experimental error rates may reflect a greater willingness of witnesses to make judgments in research situations than under conditions of a true incident—for example, in the company manager's office or even in a police station. The fact that one agrees to be a witness usually entails the commitment to spend additional time in court, and certainly the problem of living with fellow employees on a day-to-day basis, whether or not the person you identify is ultimately found guilty. Under experimental conditions, no such involvement is felt. In addition, in a real situation a mistake can cost another dearly; in the experimental condition, the only effect is the level of significance reported in the result section of the forthcoming paper. Finally, there is a long precedent for witnesses to avoid testifying in actual cases, sometimes by conveniently forgetting what they saw. Such a position would not be appropriate in an experimental situation. In short, there is every reason to participate in the experimental situation, and this may contribute substantively to the high rate of errors.

On the other hand, one might take the position that the incidence of errors is as high or even higher in the real as opposed to experimental situations. The level of anxiety created in a real situation might lead to impaired perception and/or recollection, while this is highly unlikely in the experimental paradigm. Second, the number of influencing variables in a real situation may combine to bias the perception of the witness; for example, the very presence of a large automatic revolver has been shown to detract seriously from the ability of witnesses in robbery situations to recall general physical characteristics of the thief. Experiments are designed to reduce to a minimum any extraneous variables. Finally, witnesses in real situations surely appreciate that their testimony is crucial to the outcome of any given proceeding. Why else would anyone bother asking them to testify? Consequently, they might very well attempt to provide a thorough account of what they saw or heard, filling in with plausible

details that they couldn't quite remember beforehand. No witness under oath and before colleagues wants to admit that he can't remember which door the grievant entered by, whether the phone call from the supervisor came before or after the grievant had left, or what exactly the grievant said as he threw the key down on the desk and stalked out of the room.

It seems clear that there is a serious need for a careful examination of the relationship between the type and frequency of errors in experimental conditions and real situations. Unfortunately, at the moment we do not have the information to draw any conclusions on this issue, with the exception of a very recent paper by Sanders and Warwick (1980) which does present the results of an experiment in which all the judges viewed the act of cheating on a scholarship examination. Half of the judges were told the cheating was just part of the experiment and were asked detailed eyewitness questions; the other half were led to believe that the cheating was real and unanticipated, and they were asked the same questions, having been told that if they could identify the cheater in the lineup shown to them, they would go with the experimenter to the dean of the college, confront the cheater, and participate in his removal from the competition. There were no important differences in *any* aspect of the ability of the two groups to remember any details of the situation nor in their ability to identify the cheater. This is, of course, not conclusive, but it does suggest that empirical research may have a high predictive value. If so, one must be even more skeptical of relying on the accuracy of single eyewitnesses testifying on details.

We now turn to the fourth and final set of facts—the facts communicated by a witness to the arbitrator. There are two parts to this final transformation: what set of facts the witness attempts to communicate, and what reconstruction of the event the arbitrator makes of them.

There are at least three aspects of witness interrogation that play a role in what facts are presented. First among these is the type of retrieval requested of the witness. In general, if a witness is asked narrative questions ("Tell us what happened"), the report is more accurate but with considerably less detail than if he were asked for a yes/no answer ("Did you see the picket line?"). Clearly, more errors occur when witnesses are forced to decide on details than when they decide which details to provide. Psychologists seem to agree that if both completeness and

accuracy are sought, the narrative approach to questioning should come first. This is particularly relevant in light of the previous discussion in which we noted that postevent information could alter the retained information. Suppose, for example, that a witness decided his recollection of a conversation between the grievant and his superior would be in a narrative form and he is then asked, "Did you smell alcohol on the grievant's breath?" If he did recall this, but had neglected to mention it in his narrative report, he can fairly report it now. But if the witness has been initially asked, "Did you smell alcohol on the grievant's breath?" he is certainly now likely in a subsequent narrative account to recall an earlier consideration of alcohol and include it now as a fact.

The way a question is put to a witness is also crucial in determining what fact is elicited. I have already mentioned research that showed that the use of "smash" in questioning witnesses to an automobile collision creates broken glass when none existed. Relevant here is the fact that the estimate of the speed for the "smashed" subject was more than 25 percent higher than for the "hit" subject! Similarly, if you ask a witness "How tall?" or "How heavy?" or "How large?" instead of "How short?" or "How light?" or "How small?" you are establishing a different frame of reference for the answer. Loftus (1979) reports that she asked about the frequency of headaches in two ways: "Do you get headaches frequently and, if so, how often" and "Do you get headaches occasionally and, if so, how often?" The "frequent" respondents reported an average of 2.2 headaches a week, while the "occasional" respondents had only 0.7 headaches weekly. To ask "How often did he bring food to the inmates? Every day? Once a week? Once a month?" sets up different expectation for an acceptable answer from "How often did he bring food to the inmates? Daily? Several times a day? Continuously?" Though such questions might not be objected to during a hearing, they are clearly *leading* in a very subtle way.

Or consider the alternate ways of asking about a stack of mail: "Did you see any letters on the desk?" or "Did you see a bunch of letters on the desk?" or "Did you see the bunch of letters on the desk?" The first question leaves open the existence of letters, more or less a bunch. The second implies that there was a bunch of letters and there is good reason to think they were on the desk; it does not, however, commit the questioner to their being there. The third form, using "the," requires the response

to deal with the questioner's commitment to the presence of a bunch of letters on the desk. If the advocate "believes" the letters to be there, the witness who answers "no" is taking an opposing position. Even if the third question were used but objected to, the implication of the letters being there has been made.

In addition to the above issues concerning the type of question asked, and the words used to introduce certain inferences by the listener, one hears questions which seem quite straightforward but are deceptively complex, and hence the answer elicited is potentially misleading. This might be even more the case when the witness is relatively inexperienced in dealing with arbitration hearings. One instance reported to me concerned the management counsel questioning the union shop steward. He asked, "Is it not true that the proposal is inconsistent with past practices?" to which the witness quickly replied "No." If the questioning had stopped there, or turned to another topic, the impression would be left that the proposal at issue was consistent with past practice. However, the advocate, for whatever his reasons, pursued the questioning with "Was the proposal consistent with past practice?" to which the witness gave, again, a confident "No." The point here is not that witnesses, particularly inexperienced ones, are likely to give conflicting and false testimony, but that it is very difficult to determine from a single question, certainly a question which has several negatives or which has an imbedded conditional clause (e.g., "Was there any —if you can recall whether or not you were there on the day— mail lying on the table when you arrived at work?"), whether the witness has fully understood what information the advocate intends to elicit.

The third aspect of witness interrogation involves the identity of the questioner, in particular the degree of status and authority he enjoys. Marshall (1969) found that when narrative reports of an incident were presented in front of a high-status person, the reports were consistently longer, although their accuracy did not differ. Marquis et al. (1972) looked at a different but related issue: To what extent does a supportive questioner lead to a more accurate or complete report by a witness? Interestingly, they found that although a suggestive questioner—one who nodded affirmatively, smiled, leaned toward the witness—did create a more favorable and positive attitude on the part of the witness toward the interview, accuracy and completeness did

not change significantly as a function of the questioner's demeanor.

Let us now turn to the second part of what is communicated by a witness to an arbitrator. Here we are concerned with the perceptual filter imposed by the arbitrator on the entire presentation. Both the verbal and nonverbal performance of a witness play an important role in which data are actually internalized by the arbitrator as the facts from which he or she must now reconstruct the event. I shall look at nonverbal factors first.

Nonverbal Factors

Nonverbal communication is best viewed as characteristically augmenting or perhaps modulating the verbal message. The speaker is making an important positive point and shows a smile, leans forward, and gestures widely with his hand. The point is silently emphasized by his body language. There are, of course, examples we might point to where nonverbal communication is greatly at variance with the verbal message; these, however, seem to occur in cases where the speaker is under considerable stress or suffers from certain psychological difficulties. Relevant for our purposes here, however, are those cases where the verbal and nonverbal messages are somewhat in conflict—for example, the speaker who is testifying on an important factual point and at the crucial moment looks down or away, suggesting perhaps to the hearer a lack of sincerity; or the witness who presents the details of an industrial accident in which the grievant was injured, but who has a smile, perhaps really a smirk, throughout the entire testimony; or the grievant, discharged for habitual tardiness, who testifies that he had a second job that sometimes finished late, that this job was necessary for him to meet the expenses of his wife and family, but who appears at the hearing dressed in a three-piece suit, Gucci shoes, and a Cartier watch; or the witness who asserts repeatedly under oath that he did not light up a cigarette in the paint shop, contrary to earlier testimony, but who chain-smokes throughout the hearing and whose fore and middle fingers show yellow nicotine stains.

It is probably safe to say that one can seldom make any definite generalizations about these and hundreds of other conflicting situations that arise in a hearing or, for that matter, in our everyday social intercourse. We often ignore the conflicts, particularly under the pressure to act or respond; or if we do take

note of them, we quickly make some decision with respect to how they fit into the emerging or former picture of the person we are dealing with and then go on about our business. Unfortunately, it is all too easy to permit ourselves to draw conclusions that are based on inaccurate information, or inaccurate stereotypes.

A variety of studies have been carried out involving what aspects of nonverbal communication are more indicative of the speaker who is trying to conceal information. The most notable is that by Ekman and Friesen (1969) who have studied what kinds of body movement are more allied with the misinforming verbal message. If there is any conflict, they contend that observers are likely to catch the "true" message by attending more to the body than to the head and face cues. (This, of course, might be difficult at a hearing, particularly when the arbitrator is involved in note-taking.) Facial movements, analogous to speech, are more consciously controlled and will "leak" less information than will other parts of the body. They suggest that the legs and the feet are the most informing limbs, and conclude:

> "The availability of leakage and deception clues reverses the pattern described for differences in sending capacity, internal feedback, and external feedback. The worst sender, the legs/feet, is also the last responded to and the least within ego's awareness and thus a good source of leakage and deception clues. The best sender, the face, is most closely watched by all, most carefully monitored by ego, most subject to inhibition and dissimulation, and thus the most confusing source of information during deception; apart from micro expression it is not a major source of leakage and deception clues. The hands are intermediate on both counts, as a source of leakage and in regard to sending capacity and internal and external feedback" (p. 100).

The main point I wish to make is that not only do we find some conflict between the perceived verbal and nonverbal message and often do not recognize why we feel that something is "wrong," but we usually forge ahead and draw a conclusion. Let me use an extreme example to make my point. Krout (1942) studied a variety of emotions and the conventional postures that different cultural groups assume to convey them. He claimed, for example, that Americans are relatively unlikely to show humility in any guise (whether this is true today I leave unaddressed), but suggested that should they seek to do so, they might utilize a slight downward tilt of the head and a lowering

of the eyes. Chinese, on the other hand, would join hands over the head and look down (signifying "I submit with tired hands"), Congolese might stretch the hands toward the person and strike them together, Sumatrans might bow while putting the hands between those of the other person and lifting them to the forehead, while Botokans often throw themselves on their backs, roll from side to side, and slap the outside of their thighs. Whatever the culture, there are greater or lesser differences that may be totally uninterpretable, or interpreted as one might a strictly American gesture. A belch after a good meal in Japan, for example, signifies the diner's great satisfaction; an American hostess would make a very different inference.

To get a feeling of how verbal and nonverbal communication can create dissonance, one need only go to a French movie in which the dialogue is a specially taped version of the script in English read by native English-speakers. Although the English words are timed and even shaped to fit the lip movement of the French actors, they do not accord with the total body gloss as represented by facial expressions, gestures, and posture. French actors, for example, are seen gesturing in the tight restricted French manner while seeming to say English words that require broad loose gestures. Observers often feel amused or irritated, but the case of the imbalance is so subtle that few are able to identify the source of their irritation.

Far more subtle, though yet crucial, cues arise when the speakers are Americans but from differing subcultures or social groups. Eye contact between two white middle-class Americans is fairly well defined: Speakers make contact with the eyes of the hearer for about a second or two, then look away as they talk, periodically returning to reestablish eye contact, then moving away again, and so forth. The hearer, however, ordinarily keeps his eyes on the speaker, ever ready for the return of eye contact to assure the speaker that he is a good listener. If the hearer is looking away when the speaker attempts recontact, the speaker assumes the hearer is disinterested and will often pause until contact is reestablished or will terminate the conversation. One needs only to try to carry on a conversation with another person who is wearing dark glasses to appreciate the nature of the cues given off by the eyes.

Davis (1975) and LaFrance and Mayo (1978), among others, suggest that the eye behavior patterns differ in important ways among the subcultures of native Americans. For example, peo-

ple maintain less eye contact in poor black families than in middle-class white families, but with no less respect for the speaker nor less attention to the content of the conversation. In some cases, black adolescents have been observed to reverse the pattern of who looks at whom, when, and for how long. Whereas white middle-class children are taught to "look me in the eye when I'm talking to you," black and Hispanic American children are often instructed to look down in the face of authority. This age gesture is taken within these groups as a sign of deference, not a furtive avoidance signal. The point I am making is that an eye-contact pattern may simply be one that is different from that of the speaker and little significance may be fairly attributed to it. It may mean that the speaker is lying through his teeth and is anxious about the possibility of being caught doing it; equally, it might reflect the social norms prevalent in the subculture of the speaker; or it might signify something else. In any case, it is highly unlikely that the arbitrator can find out which of these obtains.

As a final point on the influence of eyes in nonverbal communication, Argygle (1975) writes of research by Hess in which he observed that when people look at something that is pleasing to them, their pupils dilate measurably; conversely, when they regard something that is displeasing or repugnant, their pupils constrict. Curiously, people appear to respond to pupil size when they interact with each other conversationally, albeit at an unconscious level. Hess showed a display of photographs, including two of the same pretty model, to a group of male subjects. However, in one of the photos, the pupils of the model had been enlarged through a retouching process. The response of the male judges, as indicated by the increase in their own pupil size, was more than twice as positive to the picture of the girl with the dilated pupils.

Smiling, a sign of pleasure and contentment in Anglo culture, is not appropriate under conditions of duress. We do not expect to find a student smiling during a particularly difficult examination or a witness smiling when he is being cross-examined and clearly being caught in contradictory testimony. Yet smiles under both sets of conditions would not be surprising if the student or witness were Hispanic. Americans from Puerto Rico, for example, frequently smile under situations of considerable anxiety and embarrassment, whereas their Anglo counterparts would be expected to frown or perhaps flush and weep. I at-

tended one hearing where the witness, a police chief from a relatively well-to-do town, testified with an expression that ranged from a sneer to a smile. The content of his testimony was relatively bland; the facts, according to the arbitrator later, were not crucial to the issue to be decided. Yet the cross-examination questions and the arbitrator's questions were pointed and even hostile. The arbitrator commented later that "there was something 'dishonest' about the witness," even though he could not put his finger on it.

Verbal Factors

The verbal performance—how the witness presents his account of an incident—is perhaps even more influential as a determinant of how the arbitrator will "hear" the facts. Again, the variables are many and I will mention only a few.

The effect of the speed at which someone speaks is stereotypically captured by the aphorism, "Beware of the fast talker." As folklore dictates, the fast talker is trying to con you, trying to sell you a bill of goods, much like the barker at a circus or a used-car salesman. Curiously, however, several recent research efforts (e.g., Miller et al. 1976) have demonstrated that fast talkers are more persuasive than their slow-talking counterparts. This was found to be true even when the topic was on the dangers of drinking coffee and the credibility of the speaker was varied by telling one group of judges that he was a locksmith and the other than he was a biologist. Thus, the "beware" cited above might better caution the arbitrator to consider if he is being persuaded to believe the fast-talking witness. Why this phenomenon should be the case is unclear, although the most frequent explanation appeals to the well-established doctrine that added effort to process and comprehend a message enhances the believability of a speaker.

A second aspect of verbal performance is the particular dialect spoken by the witness. Whether or not any bias is acknowledged by a given listener, educated English speakers consistently rate speakers of a nonstandard (noneducated) dialect as less intelligent, less friendly, and, most important, less trustworthy and less honest (Fraser 1975). Of course, this is not an obligatory conclusion, but how is one to know if a dialect difference is, in fact, subtly biasing one's view of a witness? It was not by chance that the Dodge commercial of several years ago arranged for the

southern sheriff to speak as he did to engender a certain antagonism in northern TV viewers. Nor is it fortuitous that the late Martin Luther King, Jr., chose one English dialect for his major civil rights addresses, quite another for his preaching to fellow black Americans. Each served its purpose, but had he reversed the dialect, he would have lost respect and enjoyed less success.

O'Barr (1976) and his colleagues at Duke have worked for several years to determine the effect of yet another aspect of witness language performance. He suggests that two poles can be identified: the style of the powerful and the style of the powerless. The powerful style reflects direct assertions, little equivocation, few hesitations, and brevity, while the powerless style includes frequent hedge words (sort of, kind of, about), meaningless filler words (mmmmm, you know, I guess), vague intensifiers (very, really), and terms of personal references (very good friend, Mrs. Smith). The common effect of all of these stylistic features is reduced assertiveness. Although such language style has often been equated with "women's speech," O'Barr and his colleagues note that this is a false conclusion. Indeed, many women do tend to use this style, but it is used by both men and women who occupy a low social status—the poor, the uneducated, the unemployed.

In a series of experiments (O'Barr 1976), actual court transcripts were altered to reflect either powerful or powerless features (everything else being unaltered). The subject jurors consistently found both men and women witnesses expressing themselves in a powerful style more credible than those speaking in a powerless style. These differences in style are often very subtle and go unnoticed in ordinary conversation or at a hearing, but research of this sort suggests that the speaker of powerless language may start with a handicap, independent of his veracity or recall.

In another series of experiments, the effect of hyper-correct speech on jurors was examined. Although a courtroom or hearing demands a sense of formality, the language resulting from the inexperienced or anxious witness may become rather stilted and unnatural. For an ambulance driver with little education to refer to an unconscious accident victim as "semi-comatose," for him to refer to someone slightly injured as "not in a very dire condition," or to comment that the accident happened "very, very instantaneously" were all shown to contribute to a diminished level of credibility. Again, the features are subtle and often not consciously attended to.

My list of potential influences on the most sensitive arbitrator does go on, but I will not. I do wish to point out once again that each feature of verbal or nonverbal performance may not always be present, and when they are, there may be little or no unwarranted effect on the arbitrator. But how is one to know?

The Language of Discussion

I now wish to turn to the third and final area of language in arbitration, the language of discussion. I actually have very little to say now beyond what is certainly obvious: to write a good discussion, it is necessary to know for whom you are writing and then to choose your structure and style accordingly. I cannot presume to determine to whom a decision ought to be addressed, although the advice of Aristotle in his *Rhetoric* seems appropriate for all occasions: "Style to be good must be clear, as is proved by the fact that speech which fails to convey a plain meaning will fail to do just what speech has to do. . . . clearness is secured by using the words . . . that are current and ordinary."

In reading dozens of arbitration decisions, I have found very few that seem to violate general canons of logic and style, although the following excerpts would belie this claim (quoted with no editorial changes):

> "The Union feels that if the grievant is reinstated he will become an excellent employee and that he had just been married two weeks before and was suffering from a sickness that young, newly married men have when they are tired out, feet drag, and lose all pep . . . and this soon leaves them after the honeymoon is over." (Case of an employee discharged for sleeping on the job.)
>
> "An employee who successfully passed his probationary period then failed in his performance could never be removed for incompetence once established [sic] is presumed to continue until the contrary is established. The union claims that the 30 day suspension is too severe and warrants a modification of the 30 day suspension penalty, that the punishment is too severe and want the suspension set aside, and that the remedy sought exoneration of all charges. . . . It is recommended by the Arbitrator that a 30 day suspension is a corrective and proper disciplinary action for his ineptness and poor conduct on late case of the dead deer." (Case of a grievant who was discharged for failure to do his duty to investigate a report of an injured animal.)

Perhaps the authors of the above ought to suffer the remedy told of an English chancellor who in 1595 decided to make an example of a particularly prolix document filed in his court. The chancellor first ordered a hole cut through the center of the

document—all 120 pages of it. He then ordered that the author should have his head stuffed through the hole and then be led around to be exhibited to all those attending court at Westminster Hall.

In the foregoing, I have attempted to indicate how the language of the grievance, the language of the decision, and particularly the language of the hearing may influence the arbitration process. That each of the language aspects discussed here will not be present in a given hearing is certainly obvious. However, I hope it is equally apparent that many will be and may contribute to an accurate understanding of the case and the rendering of a fair decision.

To conclude, let me draw on the well-known adage that the judicial process deals with probabilities. To the extent to which this is an accurate appraisal of the arbitration process, you who are arbitrators are betting men and women, betting that you can gather the accurate facts, determine what was and is now meant by the parties, and fashion the best possible decision in a timely manner. I submit that with language playing such a vital role, any movement of the probabilities in your favor is to your advantage as arbitrators, to the advantage of the parties, and to the advantage of arbitration in general. Let me leave you with the suggestion that a more critical sensitivity to language and its role in the arbitration process will have immediate payoff.

REFERENCES

Allport, G. The Nature of Prejudice. Garden City, N.Y.: Doubleday, 1958.

Allport, G. W., and L. J. Postman. The Psychology of Rumor. New York: Henry Holt & Co., 1947. Also in Readings in Social Psychology, eds. E. E. Maccoby et al. New York: Holt, Rinehart & Winston, 1958.

Argygle, M. Bodily Communication. New York: International Universities Press, 1975.

Birdwhistell, R. Kinesics and Context. Philadelphia: University of Pennsylvania Press, 1970.

Bookhout, R., et al. *Eyewitness Identification: Effects of Suggestions and Bias in Identification from Photographs.* Bulletin of the Psychonomic Society 6 (1975): 71–74.

Bruner, J. S., and L. Postman. *On the Perception of Incongruity: A Paradigm.* Journal of Personality 18 (1949): 206–23.

Cardozo, Benjamin N. The Nature of the Judicial Process. New Haven, Conn.: Yale University Press, 1921.

Cattell, J. M. *Measurements of the Accuracy of Recollection.* Science N.S. 2 (1895): 761–66.

Danet, B., et al. *Accountability for Verbal Offenses: The Case of Threats to the Life of the President.* Working Papers No. 2, NSF Grant SOC-74-23503 to Boston University, 1975.

Davis, F. Inside Intuition. New York: Signet Books, 1975.

Easterbrook, J. A. *The Effect of Emotion on the Utilization and Organization of Behavior.* Psychological Review 66 (1959): 183–201.

Ekman, P., and W. V. Friesen. *Nonverbal Leakage and Clues to Deception.* Psychiatry 32 (1969): 88–106.

Fraser, B. *Some Unexpected Reactions to Various American Dialects.* In Language Attitudes: Current Trends and Prospects, eds. R. Shuy and R. Fasold. Washington: Georgetown University Press, 1973.

Hastorf, A. H., and H. Cantrill. *They Saw a Game: A Case Study.* Journal of Abnormal and Social Psychology 97 (1954): 399–401.

Johnson, C., and B. Scott. *Eyewitness Testimony and Suspect Identifi-*

cation as a Function of Arousal, Sex of Witness, and Scheduling of Interrogation. Paper presented at the American Psychological Association, Washington, D.C., 1976.

Krout, M. H. Introduction to Social Psychology. New York: Harper & Row, 1942.

LaFrance, M., and C. Mayo. Moving Bodies: Non-verbal Communication in Social Relationships. Monterrey, Calif.: Brooks-Cole, 1978.

Loftus, E. F. Eyewitness Testimony. Cambridge, Mass.: Harvard University Press, 1979.

Loftus, E. F., and J. Palmer. *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory.* Journal of Verbal Learning and Verbal Behavior 13 (1974): 585–89.

Loftus, E. F., et al. *Semantic Integration of Verbal Information into a Visual Memory.* Journal of Experimental Psychology: Human Learning and Memory 4 (1978): 19–31.

Marquis, K. H., et al. *Testimony Validity as a Function of Question Form, Atmosphere, and Item Difficulty.* Journal of Applied Social Psychology 2 (1972): 167–86.

Marshall, J. Law and Psychology in Conflict. Garden City, N.Y.: Anchor Books, Doubleday, 1969.

Miller, N., et al. *Speed of Speech and Persuasion.* Journal of Personality and Social Psychology 34, 4 (1976): 615–24.

O'Barr, W. M., and J. M. Conley. *When a Juror Watches a Lawyer.* Barrister 3 (1976): 8–11, 33.

Powers, P. A., et al. *The Eyewitness Accounts of Females and Males.* Journal of Applied Psychology 64 (1979): 339–47.

Sanders, G., and D. Warwick. *Truth and Consequences: The Effect of Responsibility on Eyewitness Behavior.* Ditto, SUNY-Albany, 1980.

Shepard, R. N. *Recognition Memory for Words, Sentences, and Pictures.* Journal of Verbal Learning and Verbal Behavior 6 (1967): 156–63.

Yarney, A. D. The Psychology of Eyewitness Testimony. New York: The Free Press, 1979.

Yerkes, R. M., and J. D. Dodson. *The Relation of Strength of Stimulus to Rapidity of Habit-Formation.* Journal of Comparative and Neurological Psychology 18 (1908): 459–82.