COURTROOM OR CONFERENCE ROOM: CONSIDERATIONS FOR JURY TRIALS V. ARBITRATION

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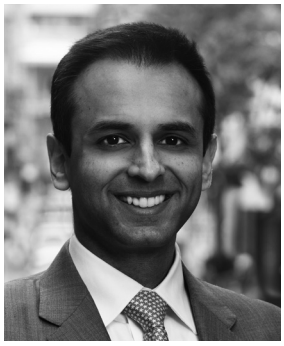

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In the minds of many, jury trials define the American justice system. They are protected by the Sixth and Seventh Amendments to the U.S. Constitution and are the focus of almost every courtroom drama (including the TV show *Suits*, which gives clients lots of interesting ideas about the actual practice of law). However, as we frequently explain to those who have retained us, unlike on TV, only a small percentage of cases in the United States are actually heard by a jury. (See Smith et al., *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?* (2017) 101:4 Judicature 26.) More importantly, we also explain, an increasing share of business cases are resolved through negotiated settlements or arbitration.

In this article, we describe a framework we use to educate clients about the important differences between a jury trial and arbitration, and we offer some tips on presenting a client's case in either forum based on our experience. For the purposes of simplicity, we do not address bench trials in this article because they can be viewed — in some respects — as a hybrid between these two options.

WHAT'S THE BIG PICTURE DIFFERENCE?

As all lawyers, but not all clients, know, a jury trial is a legal proceeding in which a group of U.S. citizens (typically six to 12 people from a broad spectrum of the population) decides questions of fact while the judge decides questions of law (whereas, in a bench trial, a judge makes all decisions on questions of fact and law).

In contrast, arbitration involves a private trial by a neutral decision-maker selected and paid for by the parties. Because there is no champion of arbitration that readily comes to mind — no Clarence Darrow or Atticus Finch of the conference room — we sometimes have to provide more context for clients with less litigation experience, particularly because arbitration has become increasingly popular as a cost and time efficient dispute resolution mechanism for businesses today. Commercial contracts that include an arbitration clause and a waiver of the parties' right to trial by jury have been repeatedly upheld and supported by the U.S. Supreme Court and the Federal Arbitration Act (FAA, 9 U.S.C. §§ 1-16) expresses a preference

for arbitration by contract. (See, e.g., *Granite Rock Co. v. Teamsters* (2010) 561 U.S. 287, 298-299 ["[W]here … parties concede that they have agreed to arbitrate some matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration."].) In California, contractual arbitral awards can be enforced by obtaining judgment based on the award in a court of law under either the FAA or the California Arbitration Act. (CAA, Code Civ. Proc., §§ 1280-1294.2.)

WHO IS THE DECISION-MAKER?

When outlining the differences between the two processes to our clients, we like to be clear about who is deciding the case and what that means.

THE ARBITRATOR. As we explain, arbitrators typically have specialized training, substantial experience, and make a living out of adjudicating disputes. Many are former judges. On the other hand, in complex disputes involving highly technical subject matter, such as a trade secret theft claim involving the comparison of software code, or a patent case relating to the biomolecular composition of a pharmaceutical product, the parties may select an industry expert who is well-versed in the subject matter of the dispute instead of a judge who lacks the technical expertise to fully understand the issues. A seasoned lawyer or judge is trained to be objective and provide a well-reasoned decision, whereas an industry expert could render an award that resolves the intricacies of the issues at stake. Most arbitral institutions like JAMS and the American Arbitration Association (AAA) will provide a list of potential arbitrators that have relevant expertise and experience relating to the subject matter of the dispute.

It is also important for the client to understand that the choice of arbitrator can make or break a case. A poorly performing arbitrator may cause unwanted delays, require excessive and inefficient procedures, fail to act decisively, or cause delay in issuing a decision. A litigant in federal and state courts can extensively research the judges that are adjudicating their disputes, but parties considering arbitration must pick an arbitrator based on their resume, marketing materials, and informal references alone. Arbitral decisions are typically not made public and there is no consistent record of an arbitrator's performance. Ultimately, because arbitrators are neutral professionals who are trained to be objective decision makers, and often with prior experience on the bench, we encourage our clients not to overthink the decision and we work closely with them to identify an arbitrator based on our collective insights, experience, and instinct.

THE JURY. Clients generally have more exposure to juries (who hasn't seen *Law & Order*?). That said, it can be helpful to remind clients that juries are intended to represent a cross-section of the community and are not called for service based on specialized knowledge of the issues or facts. Entire books (many of them) have been written on how to select a jury and we do not usually go into that level of detail with the client in the beginning. We do explain, though, that jury selection is an art and a science. The process of selecting the individuals who will decide the case happens in a relatively short period of time and the people who are empaneled will be the faces we and the client see — and try to read — for the duration of the trial. As with arbitrators, the jury *will* make or break a case.

We also like to explain to clients that juries have to come to an agreement on not only the liability at issue, whether unanimously or by majority, but they must also come together to determine the award. This means that our presentation of evidence must help the jurors understand why the client should win the case. Our job, we explain, is to empower those who are inclined toward our side to argue in our client's favor behind-the-scenes.

We also explain to clients that jurors are released from their obligations once the trial is finished. Unlike a judge or an arbitrator, they are not concerned about appeals or posttrial briefing. This gives them more freedom in their decision, but also opens up more uncertainty.

THE COURT OF APPEAL. A critical difference between trials and arbitrations is the ability of a party to appeal. This is something clients don't often consider, and we like to highlight it from the outset. Under the law, a party can appeal posttrial on the basis of a prejudicial error (e.g., challenging an improper legal ruling by the judge) or because the decision lacked substantial evidence to support it. (For a simple explanation, the California Courts' website on appeals is a good place to start. [See, e.g., www.courts.

ca.gov/12431.htm?rdeLocaleAttr=en#:~:text=The%20appellate%20court%20just%20decides,overturn%20the%20trial%20court's%20decision].) Often, parties will use postjudgment appeals as a tactic — to delay paying the judgment, to reduce the award, or to get the prevailing party to settle while the appeal is pending.

In contrast, while a party can challenge an arbitration award, such a challenge has very limited grounds. Those grounds include, for example, if the award was obtained by fraud, the arbitrator was corrupt/"evident partiality," exceeded his/her powers, or engaged in scheduling and evidentiary misconduct. (See 9 U.S.C. § 10(a).) The Supreme Court has also ruled that parties cannot expand these narrow grounds. (*Hall St. Assocs., L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 584.) Practically, this means that arbitration awards are almost always final, which often comes as a relief to our clients.

CHOOSING ARBITRATION OR JURY TRIAL, IF IT'S AN OPTION

When our corporate clients are drafting contracts, we help them assess whether to require arbitration or a public trial to resolve disputes arising out of those contracts. We outline the salient differences between the two options to create a framework for this decision. Below are some of the key issues we recommend addressing, with what we consider to be the most important talking points.

CONFIDENTIALITY. Litigation can draw attention from the public and media, particularly for our larger clients, which makes confidentiality a key consideration in the choice between jury trials and arbitrations.

As many bigger corporate clients know, jury trials are typically open to the public unless the parties request a closed courtroom. At the federal level, public access to civil proceedings is constitutionally protected by the First Amendment. (See, e.g., *Westmoreland v. Columbia Broad. Sys., Inc.* (2d Cir. 1984) 752 F.2d 16, 23 [concluding that "the First Amendment does secure to the public and to the press a right of access to civil proceedings"].) In California, the Code of Civil Procedure provides that "the sittings of every court shall be public," which establishes a presumption of access to civil court proceedings. (See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, citing Code Civ. Proc., § 124; see also Cal. Rules of Court, rule 2.550 [requiring court records to be open to the public unless there is an overriding interest that overcomes the right of public access and justifies sealing the record].)

The court may "seal" some of the proceedings or records, thereby preventing access by the public, in limited circumstances such as grand jury proceedings, whistleblower actions, when issues of national security are involved, and to protect the identity of juveniles. (See Reagan, *Sealing Court Records and Proceedings*: A Pocket Guide, Federal Judicial Center (2010).) In the commercial world, the court will frequently seal proceedings and records in trade secret theft litigation to preserve the value of the asset in dispute. In the interest of promoting judicial transparency and accountability, judges are careful when exercising their power to seal the courtroom and will exercise this power only to the extent it is necessary. A judge is more likely to seal the courtroom for a limited duration to protect confidential or sensitive information instead of excluding public access for the entirety of the trial.

In contrast, arbitration proceedings are typically held in private, evidence is exchanged under the umbrella of confidentiality, and there is no public record or repository of all arbitral decisions. But, again, privacy and confidentiality can cut both ways. In some cases, the party asserting claims may prefer the public nature of jury trials if they are looking to set an example as a deterrent to similar conduct. For this reason, many of our clients in IP-heavy industries strongly prefer the inclusion of arbitration provisions in their contracts.

SPEED. A confidential arbitration proceeding is often faster than court proceedings, as it typically involves fewer formalities. As a result, the parties have more control over the process. For example, the attorneys and witnesses have more control over when and where the proceedings will take place and can more easily accommodate scheduling interruptions. A study focused on arbitrations administered by AAA found that the average U.S. district court case took more than 12 months longer to get to trial than the average arbitration (24.2 months v. 11.6 months). (See Weinstein et al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* (published by Micronomics Economic Research and Consulting, Mar. 2017).) If the case involved an appeal, district court

cases required at least 21 months longer than the average arbitration. (See *ibid.*) This is because, in part, a jury trial involves a formal process for selection of jurors and strict rules for what evidence can be presented before a jury, to minimize the potential for bias.

COST. Even though arbitrators typically charge an hourly fee (whereas juries and judges are compensated by the state), arbitration can be less expensive than a jury trial because it avoids the costs associated with discovery and has a more streamlined format. The evidentiary rules in arbitration are subject to the arbitrator's discretion and are typically less formal. Parties can agree on rules that limit the extent of discovery such as putting a cap on the number of document requests, disallowing interrogatories and requests for admission, or presenting witnesses' direct testimony by written affidavit. Third party discovery is typically not allowed in arbitration unless the parties explicitly provide for it in the contract. (See *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 399.) The rules of most commercial arbitration institutions also provide for dispositive motions to resolve the case fully or partially prior to the evidentiary hearing.

However, the streamlined procedure in arbitration can cut both ways. The parties save time and costs associated with burdensome discovery and formal presentation of evidence, but there is a risk that the arbitrator will consider evidence that wouldn't be permitted in front of a jury. As the above example illustrates, arbitrators often prefer to allow more evidence to "come in" and assign it a lower weight rather than excluding it altogether. As a result, we see more arbitration clauses that provide for the fullest extent of discovery available in court, which undercuts some of the cost benefits of arbitration.

We also remind clients that arbitrators can set the rules for their proceedings and will often require the party seeking discovery to provide a reasonable justification for what they are seeking. While attending the preliminary conference with the arbitrator, it is vital to have a discovery plan to efficiently gather evidence for all issues that must be proved in support of the client's claims and/or defenses.

PRESENTING THE CASE

Alongside our conversations with clients, over the years we have found a few practical reminders that help us and our colleagues properly calibrate our cases to our audience. For example, it's good to remember that the legal arguments that one might make to a judge in a motion for summary judgment may fall flat when argued to a jury during a trial.

As we prepare for an arbitration or trial, we like to remind ourselves of the following questions:

- Who is listening?
- What do they want to do?
- Who will hold them accountable?

In a jury trial, people take time out of their busy lives to resolve our client's dispute. This is an awe-inspiring power. It enables average citizens to decide cases and, in a recent trial our firm handled, it allowed them to hold a billion-dollar company accountable when no one else could. As a result, individuals on a jury take (or should take) their responsibility very seriously and, in our experience, also want to do what is right. Cheap tricks that might seem clever in a conference room — like using an unflattering photo of the plaintiff in a timeline — fall flat in the courtroom. So too can "gotcha" moments that are untested beforehand.

For example, in that recent trial of ours, opposing counsel tried to paint our client as a "rich" individual by bringing up an e-mail on direct about his personal plane. On redirect, our co-counsel Jon Chally masterfully used his time to make clear that the defendant's lawyers were not being honest about who our client was. Below is that redirect:

Q. Mr. Vance, are you a pilot?

A. I'm an airplane pilot.

Q. For how long have you been a pilot?

A. I've been a pilot for 25 years.

Q. Do you have an airplane?

A. I do, a single engine airplane.

Q. And can you tell the jury about that?

A. I can talk all day about that plane. It's a small plane, a Beechcraft Bonanza, that I work on myself and try not to kill myself so my wife won't be right about it.

Q. Is it a jet?

A. It is not a jet.

Q. Does it have air conditioning?

A. It does, Mr. Chally, have air conditioning. It doesn't work, but it's there.

Q. And how do you use this plane, Mr. Vance?

A. Carefully. I use it to fly family on vacations. I'm teaching my son and daughter to fly, which is one of the most rewarding things I have ever done. And I also use it for an organization called Angel Flight.

Q. And what is Angel Flight?

A. Angel flight is a charity where what we do is that we fly sick children to their — to operations, and burn victims. Georgia, the State of Georgia — once you get outside of Atlanta, it's very poor and a lot of people there don't have access to airports to get to where they need to go, and most of the hospitals are focused in metropolitan areas. So what we'll do is we will take the plane out, load a patient up, and bring them to surgery. It's all free. We pay for the time and the gas and the insurance."

What this excerpt cannot capture fully is how this played in the courtroom. Our client was genuinely moved by his work helping these sick children and burn victims, actually tearing up as he testified. You could hear a pin drop. I (this is Evangeline) watched the jury visibly impacted by our client's testimony and his emotion. Based on earlier reactions to our client's testimony, the jury seemed already on his side, but this sealed it.

A judge or an arbitrator, by contrast, may have been emotionally moved by the testimony and may have liked our client more for his charitable actions, but the feeling emanating from that jury — that a slick lawyer had tried to trick them with an email taken out of context — was palpable. I'm confident that the jury awarded our client more than $25 million because of the legal wrong committed against his company; I am similarly confident that these seven people felt comfortable coming to that decision because our client was — and is — a genuinely good person.

In arbitration, we will remind ourselves and the client that the Rules of Civil Procedure and the Rules of Evidence do not apply unless specified by the contract. Instead, the proceedings are governed by the rules of the governing arbitral body (e.g., AAA or JAMS). It is therefore critical for us to understand and base our decisions on the arbitrator's approach to discovery and case management. By not being bound by the formalities of the Federal Rules, arbitration proceedings can be streamlined, allowing for a quicker resolution of disputes. This can save parties both time and money.

The private nature of the proceedings coupled with relaxed evidentiary rules can engender a sense of collegiality amongst the participants — the arbitrator(s), the lawyers, and the witnesses — because all are (usually) aligned and focused on achieving an efficient resolution of the case. Generally, parties are incentivized to cooperate with each other and make efficient use of the reserved time. At the hearing, arbitrators will often question the witness directly during the course of their examination to clarify their understanding, particularly when experts are testifying regarding a complex subject matter. When this happens, our clients are typically pleased that the arbitrator is invested in the case and feel assured that the arbitrator is aiming to deliver a well-reasoned award.

However, collegiality and cooperation should not be mistaken for a casual approach, which can lead to carelessness and complacency. In other words, the lack of formality can make some witnesses *too* relaxed, resulting in speculation or, even, wild accusations. This is something we have to remind our clients as well. Even though we are in a conference room, this is still a legal proceeding.

In a recent arbitration, I (this is Nitesh) witnessed a remarkable exchange at the evidentiary hearing, when the primary respondent started making outlandish claims. Specifically, he claimed to have a close friend in the police department who was conducting a private investigation into the dispute at issue in the arbitration. When asked to provide the name of this detective, he refused, claiming it was an "anonymous investigation."

The witness's testimony was remarkable because it came out of the blue in a commercial dispute between business partners. And, while we cannot know for sure, I strongly suspect that the police are not holding up their investigations on account of private arbitrations. At this stage, the witness's lawyer objected to this line of questioning, which prompted the arbitrator to put an end to the testimony, stating the testimony was simply not relevant.

Before a jury, this witness may not have felt as comfortable revealing his wild speculations. Also, this exchange may have completely undermined this witness's credibility, whose testimony was vitally important for the respondents' case. But, in the private setting of a conference room, the arbitrator was willing to give the witness some leeway. Ultimately, based on the outcome of the case, the arbitrator wrote off the testimony as a collateral outburst in a hotly contested dispute. This exchange took place on the fifth and last day of the evidentiary hearing, at a point when the witness had been testifying for about five hours. The arbitrator had instructed the lawyers to refrain from objections and encouraged the witness to testify at length. This approach is common. As a result, when witnesses hit their stride in testimony, which was the case here, they can tend to slip into a conversational rhythm and offer unintended or inaccurate testimony. But not all arbitrators are as patient or forgiving.

We like to remind our witnesses of the context and nature of the arbitration proceedings goes a long way towards ensuring that the witness is presenting a true, accurate, and complete account of facts necessary to resolve the dispute.

IN THE END...

Most attorneys don't have a choice as to whether they end up before a jury or before an arbitrator — that is decided by the nature of the case or the contract. But we have found it is most important to set clients' expectations early and clearly, and to carefully tailor our message to our audience. Too often, attorneys can get stuck thinking about a case from one perspective and have difficulty being nimble with their presentation. And in litigation, as we *and* our TV watching clients know, if you lose your audience, you lose your case.

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