Daily Journal
VERDICTS & SETTLEMENTS
www.dailyjournal.com FRIDAY, SEPTEMBER 23, 2016

When getting it right matters most

By Wayne Brazil

Trials aren't perfect tools for delivering outcomes that are fully faithful to the merits of cases. Neither are arbitrations. But not all imperfections are equal — and when compared *as processes*, arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than jury or judge trials.

Tone: Invitation Rather Than Intimidation

A trial takes place in a courtroom — and by design, a courtroom commands formality. Commanded into formalism, lawyers, witnesses and judges in courtrooms attend carefully to matters of form. Attention to form can compromise attention to content. A trial's formalities, rituals and rules make it difficult for lawyers and witnesses to "relax into content" — to feel the psychological freedom that clears pathways to more reliable memory and more coherent thinking. Accuracy and subtlety can be the victims when lawyers and witnesses must press the content that exists in their minds through the strainer of courtroom formalisms.

Arbitrations, in sharp contrast, take place in rooms dedicated primarily to informal conferencing. No one in uniform monitors the proceedings. The arbitrator does not don robes — and a good arbitrator sets a respectful but informal tone for proceedings that feel flexibly focused on getting the job done. A respectful informality discourages silly evidentiary objections, verbal posturing and gaming. Informality invites liberation from preoccupation with *how to frame* questions or answers, freeing lawyers and witnesses to focus on *what* they want to say. Witnesses feel freer to reach directly into their internal view of reality and to use that view to inform their testimony. Lawyers feel freer to scour the piles of information in their heads as they search for evidence or ideas to shape more telling questions or lines of reasoning. Reducing canned adversarial conduct and frictions frees all participants to get to what matters.

Process: Open to More Evidence and More Effective Probing

Compared to a trial, an arbitration offers parties opportunities to get more evidence on the table and provides parties with more flexible tools for illuminating its probative cut.

In arbitrations, counsel and the neutral need not obsess about arcane rules and the multitudes of exceptions that a court of appeal might insist were misapplied, or about waiving objections by not making them.

Among externally imposed strictures in U.S. courts, the hearsay rule is the biggest single source of constraint and complexity. In continental Europe, legal communities are mystified by the power of this prohibition. In Europe, almost all relevant evidence is admitted. It is only after hearing all the evidence and argument that the judge decides how much, if any, probative weight each element of admitted evidence deserves. To be better positioned to make this determination, the European judge can probe evidence and argument by asking questions on her own initiative; she is not left to hope that cross-party sparring will disclose everything she needs to know.

In the United States, arbitrators are much freer than sitting judges to take these pages out of the European play book. Through thoughtful participation in a hearing, an arbitrator can help convert what would be a stylized, sometimes sterile process (in a trial) into a more illuminating "trialectic."

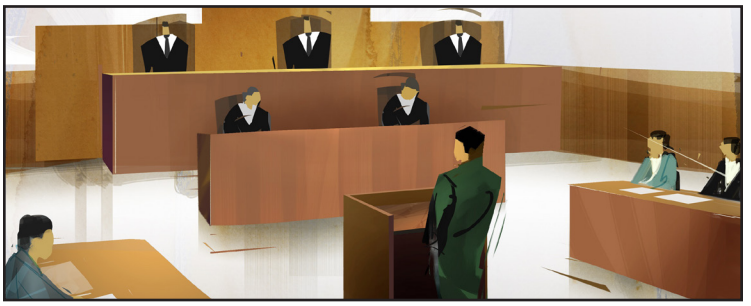
Quality of Decision-Making

The quality of the analysis that leads to findings of fact and conclusions of law can be higher in arbitrations than in trials, even when the 'decider' is a judge.

Two advantages of arbitrations are commonly recognized: the ability of the parties to select the person or persons who will determine their fate and the opportunity to have three minds, rather than one, actively engaged in making the important decisions.

But there are many additional reasons to expect higher quality decisions from arbitrations. In an arbitration, unlike in a court trial, the parties can protect themselves against the risk that much of the fact finding and legal analysis will not be done by the judge, but by a law clerk or by an advocate (in the form of proposed findings of fact and conclusions of law).

Moreover, busy state court trial judges are likely to feel pressure (because of heavy dockets) to begin forming outcome-determinative opinions *during* the course of a trial. A decision-making process whose course is directed (or heavily influenced) by impressions formed *before* all the evidence is in and all the arguments have been heard is vulnerable to error. Post-hearing immersion in all the evidence, accompanied by non-delegable responsibility for crafting the analysis that supports the outcome, are critical to reliable decision-making but can be guaranteed only in an arbitration, not in a trial.



Shutterstock

A trial takes place in a courtroom — and by design, a courtroom commands formality. Commanded into formalism, lawyers, witnesses and judges in courtrooms attend carefully to matters of form. Attention to form can compromise attention to content. ... Arbitrations, in sharp contrast, take place in rooms dedicated primarily to informal conferencing. No one in uniform monitors the proceedings.

The process of writing the opinion that lays bare the analytical path to the outcome is the greatest single source of intellectual discipline in the decision-making process. Trial judges in busy state courts often don't write the opinions they sign. When they do write, they work under pressure that can force them to sprint. Subject to much less calendar pressure, an arbitrator can engage in the hard re-thinking about evidence and law that is essential to generating critical insights and making elusive connections between pieces of evidence.

The most sophisticated and reliable thinking begins in a tentative and exploratory mode.

With only partially formed objectives, the thinking-writer moves forward at each important juncture by identifying several candidate words. In making each significant word choice, she tests the relationship between each candidate word and the other words she already has chosen, or that she can foresee considering down the analytical path. It is through this most foundational dimension of the process of writing, through these micro-analytical experiments, that the writer has access to new insights and fleshes out her understanding.

The disciplined, engaged writer goes through this process one sentence at a time. At the end of each sentence, she must ask herself which candidate thoughts seem to follow from the one she has just crafted. Most significantly, she must ask herself why the next sentence or thought she selects would follow from the last. As she presses herself to answer these questions, she might see that particular candidate thoughts do not in fact follow, or would follow only if modified, or only if she modified the thought to which she had committed herself earlier, or only if she added a new, bridging thought.

It is by digging in these intellectual trenches that decision-makers have new ideas, acquire new perspectives, and detect errors in the thinking that informed their initial instincts or seemed, at first, to support findings or conclusions they might initially have been inclined to make. Arbitrators can be instructed and expected to labor in these trenches; judges cannot.

In Sum

The parties to an arbitration can empower their neutral to enrich the process by which the relevant evidence is explored and the relevant law is explicated, then can create the space and provide the incentives for their neutral to do the job right. Parties in a trial can do neither.

Wayne Brazil *is a mediator, arbitrator, and special master with JAMS. He served as a magistrate judge in the US District Court for the Northern District of California between 1984 and 2009. You can reach him at wbrazil@jamsadr.com.*