ESSAY

WHEN "GETTING IT RIGHT" IS WHAT MATTERS MOST, ARBITRATIONS ARE BETTER THAN TRIALS

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I. INTRODUCTION

Serving as an arbitrator since retiring from the bench[1] has inspired me to think about the quality of the adjudicative process in new ways—and to assess, from an insider's perspective, the pros and cons of trials (especially court trials) and arbitrations. The purpose of this essay is to share my thoughts on this subject—some of which have surprised me.

My perspective is micro. My "data" source is my personal experience in specific cases—on the bench and as an arbitrator. My goal is to pull ideas and specific lessons from my direct experience working on the ground level within these two different processes.

This is not a case study or a report from an ambitious collection of empirical data. Rather, it is an exploration of process—pure and simple. It compares trials and arbitrations as processes, abstracted from specific circumstances and from socio-political, economic, or strategic factors that can be very important when parties are trying, in a real case, to select between process options.

To compare processes as processes, it is necessary to make assumptions that equalize or neutralize variables that, in the real world, can be quite significant; for example, the competence and integrity[2] of a particular pool of judges, or a particular assigned judge, compared to the competence and integrity of the arbitrators who might be available for a given matter. In this essay, I assume that the decision-makers in court trials and in arbitrations are comparably intelligent and ethical. I also assume, unrealistically, that

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[1] The author retired from his position as a Magistrate Judge in the United States District Court, Northern District of California, in October of 2009, after serving on the bench for twenty-five years. He is now affiliated with JAMS.

[2] By "integrity" I mean not only freedom from corruption and bias, but also commitment to crafting decisions that are as "true" to the admitted evidence and the relevant law as possible.

the cost and speed of the processes I compare would be roughly equivalent for the same kinds of disputes.[3]

Thus, the case that I make for arbitration in this essay is not grounded in considerations that are commonly cited in support of arbitration (sometimes without much empirical support), considerations such as reducing cost and delay, speeding access to finality, or promising privacy. Nor do I wrestle with the important and controversial issues that surround the use of arbitration clauses to end-run the Seventh Amendment, or to build protections against class actions. My focus is narrower and on considerations that seem to have attracted much less attention. In this article I will identify features or characteristics that distinguish trials and arbitrations, and explore how the differences between the two processes can affect the relative quality of outcomes.

For reasons set forth below, I have concluded that, in many circumstances and for certain kinds of cases, arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than trials conducted by conscientious judges. By "higher quality," I mean, generally, decisions in which the findings of fact are better supported by the evidence and in which the conclusions of law are informed by reasoning about the dynamic between evidence and law that is deeper, more disciplined, and more subtle.

It is important to emphasize, at the outset, that no process can promise absolute accuracy in identifying historical facts,[4] especially historical facts about a person's mental or emotional state, or about her motives at the time she acted (these kinds of "facts" can elude even the actor herself). Similarly, no process can guarantee that the decision-maker will apply the controlling legal principles "correctly." The elusiveness of analytical correctness has many roots—some (especially in higher courts) in the role of quasi-political considerations, and some in the considerable elasticity and indefiniteness of many legal "rules," to say nothing of broader legal principles or concepts; for example, negligence, good faith, or the doctrine of reverse equivalents in patent law.

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[3] Lengthy arbitration hearings can be quite expensive, especially with three arbitrator panels. But pre-hearing expenses can be lower in arbitrations than in litigation, and parties can exercise some control over the ultimate cost of disposition by agreeing to limit the number of hearing days and the number of writing hours for which the arbitrator will be compensated.

[4] Before beginning my career in the law, I was trained as a historian (at the Ph.D. level). It was in the course of that training, and working on my dissertation, that I first began to understand how elusive historical facts can be, even when the "searcher" scours the evidence, cares about nothing but accuracy, and the facts the historian is pursuing are only about thirty years in the past. At best, the honest historical scholar can only say "I think this is what happened."

Moreover, which process is most likely to yield the most accurate factual determinations can vary with the kinds of facts in issue. Juries might be better able than judges or arbitrators to determine whether a live witness is trying to tell the truth, or juries might be better at making judgments rooted in common sense or in wide and general life experience. Judges and arbitrators, by contrast, might be more likely to draw accurate inferences that turn on evidence from esoteric or technical fields, or on systematic analysis of relationships between large numbers of documents.

It also is important to acknowledge that sometimes the quality of the decision-making that informs the disposition of a case is not what is most important to lawyers and clients trying to decide which process-option best suits their circumstances or seems most likely to advance their objectives—which sometimes have precious little to do with the merits of a dispute. Occasionally, for example, the parties' choice of process is dominated by the pursuit of publicity, or by the hope that the outcome will be fueled by a fact-finder's anger, or political or social agendas or biases.

But, when it is important to maximize the odds that the decision-maker will get it right (on the facts and the law), a strong argument can be made that the best process is arbitration. In short, a good arbitration offers greater promise than a good trial (court or jury) that the disposition will turn on the merits.[5]

II. Getting More Evidence on the Table and Illuminating Its Probative Cut More Clearly

A. *Tone: Invitation Rather Than Intimidation*

A trial takes place in a courtroom. 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. Ac-

[5] The decision best supported by clarity of understanding and unassailability of reasoning is not necessarily the "correct" or "right" decision. What is "correct" or "right" in litigation outcomes, or even in determinations of what the law is, might be most accurately characterized as a *social* factum, not something ascertainable by anything approaching a scientific method. The targets of legal inquiry can be elusive and chameleon-like, and the archers are human beings who are encumbered by limitless limitations and who are called upon to make "judgments" that are likely to be influenced by a host of factors, some of which are invisible even to their hosts. There are lots of close games in this business (5-4, 4-3, 2-1, 1-0) for a reason. And reason will never eliminate this reality.

curacy and subtlety can be the victims when lawyers and witnesses must press the pure, or complicated, or nuanced content that exists in their minds through the strainer of courtroom formalisms. People often experience life as a complex fluidity that eludes capture when "reported" through prescribed courtroom conventions and rigid rules.

Arbitrations do not take place in courtrooms. They take place in conference rooms, i.e., rooms dedicated to informal conferencing. Informality invites liberation of mind, liberation from preoccupation with *how to frame* communications (questions or answers). Liberated from preoccupation with *how* to speak, lawyers and witnesses can focus on *what* they want to say. Witnesses can feel freer to reach directly into their internal view of reality and to use that view to inform their testimony. Lawyers can feel freer to scour the big piles of information in their heads in search of data or ideas that can inform more telling questions and more sophisticated lines of reasoning.

In my most recent sizeable arbitration, the lawyers and I succeeded in creating an environment that enabled all of us to focus on content, largely free from distractions or interruptions by formalities and from "gaming" through theatrics, silly evidentiary objections, or other forms of verbal posturing. Respect was the dominant theme and force—respectful treatment of all people and a deep respect for the seriousness and difficulty of my overriding responsibility: to get it right. By example, and by swift but tempered (respectful) interjections, I made it clear at the outset that posturing and verbal sparring (with witnesses or between lawyers) simply would not be part of our process. Counsel followed suit.

My objectives were to subject the lawyers and witnesses to as little artificial or procedural pressure as possible, to create an environment that was as hospitable to thinking as possible, and to encourage everyone to concentrate on what counts (evidence and reasoning).

Setting this tone and fixing this focus freed the lawyers and witnesses to concentrate on the substance of their evidence and lines of reasoning. It created the psychological and procedural space everyone needed to get to what mattered—and eliminated the distraction and waste of time that are the chief products of canned adversarial conduct and friction.

It is much more difficult to create this kind of environment in trials, especially in jury trials, where pressures and emotions run higher, where pursuit of stratagems is more intense, and where the

temptation to stray into theatrics is greater. The formalities, rituals, and rules by which trials (to juries or judges) tend to be dominated make it much more difficult for lawyers and witnesses to "relax into content," i.e., to feel a psychological freedom that can clear pathways to more reliable memory and to the sustained clear thinking that will explicate best the evidence and law.

Freedom from time constraints that would have been imposed by the needs of the court system helped us sustain this environment. As an arbitrator from the private sector, I felt neither the backlog pressure nor the acute impatience that can distort the pace of proceedings and infect the tone in a sitting judge's courtroom. I did not have to worry about attending to higher priority criminal matters or ruling on motions in other cases. I did not have a host of judicial administrative and committee responsibilities. I was freed to listen, to learn, to ask questions, and to clarify—so I could do my job, which was to do my best to get it right.

This is not to suggest that we meandered—or that the parties and I were not committed to completing the hearing efficiently. Expense serves as an important source of discipline in arbitrations—and one of the critical obligations of the arbitrator and counsel, working together, is to fix time constraints that appropriately balance, independently for each particular case, efficiency and fairness. Arbitration's advantage is that it empowers the parties to fix this balance, based on their interests and resources, rather than locating this power entirely in the court, which must give full consideration to its institutional interests and resources.

B. *Process: More Open to Relevant Evidence & More Thorough In Examining Its Implications*

Another important source of our ability to sustain the "teaching/learning" tone of our arbitration was being liberated from a strict or mechanical application of the rules of evidence. Counsel (and I) did not have to worry 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. In a court trial, lawyers and judges worry about such things. In so doing, they sometimes lose track of the main evidentiary chain.

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 (or even the existence) of this prohibition (elastic as its exceptions might sometimes leave it). In Europe, the evidence simply comes in and the decision-maker decides how much, if any, probative weight it deserves. To help her make that determination, the European decision-maker is expected to actively ask questions—to probe on her own initiative—and is not left to hope that the cross-fire between the lawyers discloses everything she wants to know before assessing the credibility of the hearsay.

Arbitrators, unlike sitting judges, can take pages out of the European playbook. Without searching for a neatly applicable exception, arbitrators can admit hearsay. And they are free to ask the questions, if not posed by counsel, that will equip them to make better decisions about how much significance, if any, to ascribe to any given testimony or document (whether "hearsay" or not).

Arbitrators also can liberate witnesses and counsel, in measured ways, from some of the other conventions and rules that can artificially constrain the presentation of evidence at trial and that can increase the risk that the trier of fact will be misled or confused. In arbitrations, versions of events can be presented in the first instance in narrative form[6]—enabling a witness (percipient or expert) to describe, holistically, the circumstances in which she acquired the information or made the perceptions she is reporting, or the process by which she reasoned to the conclusion she reached (e.g., about what happened or why). Cross-examination can be more coherent and telling after an initial narrative presentation by a witness because the cross-examiner can go back through the story systematically, exposing, one at a time, every juncture or step in the process that is infected by some infirmity. The arbitrator also can probe the links in the story line—with less fear than a trial judge might have of encroaching on territory considered off-limits (to a passive fact-finder) under traditional views of the adversarial game.

Arbitration can offer additional procedural flexibilities that are much less likely to be available in a trial. After an evidentiary hearing has been completed, counsel are more likely to persuade an arbitrator than a judge to consider a prompt request to re-open

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[6] A common variation on this theme consists of presenting direct testimony through a percipient witnesses' affidavit or an expert's report—which the arbitrator (or judge in a court trial) can read in advance. Live testimony can then be dedicated, more tellingly, to cross-examination and re-direct. An arbitrator is likely to spend more time than a busy trial judge studying affidavits and reports, and is more likely, both before and during the hearings, to formulate analytically significant questions.

the evidentiary process for a specific and limited, but well-justified, purpose. Similarly, arbitrators are more likely than judges to permit additional post-hearing briefing—at least when it seems likely to improve assessments of evidence or to identify additional relevant legal authorities. Moreover, while rarely used, an arbitrator may be given authority, on her own initiative, to submit follow-up questions to counsel (after a hearing has been presumptively closed and the briefs are in), or even to re-open a hearing to address a specific evidentiary issue or to pose questions to an especially important witness (and then to permit follow-up questions by counsel). Trial judges are extremely unlikely to take any such steps, which are essentially foreclosed by constraints on judicial resources and by assumptions about the limited role judges are to play in the adversary system.

Through the greater freedom they enjoy to shape and sequence proceedings, and to participate in the fact-finding process (selectively, and with restraint), arbitrators in the United States are positioned to selectively combine the fact-finding advantages of the adversary system with the fact-finding advantages of continental procedures. The arbitration process that results is far from inquisitorial, but the arbitrator can be analytically active when she does not understand something, or when she senses that there is more to the story than a witness or a lawyer has made clear—and learning what that subterranean "more" is could improve the accuracy of her fact finding and the soundness of her judgment.

In short, the dialectics about evidence and law in an analytically robust arbitration can be richer than they are in the vast majority of trials—even in trials to the court, which can be appreciably less constrained than jury trials by formalisms and by judicial fear of crossing a Seventh Amendment line. Instead of being limited to refereeing exchanges across party lines (a simple bi-directional dialectic), an arbitrator, through measured engagements, can convert the process into a more illuminating and penetrating "trialectic." The odds of the arbitrator "getting it right" go up, sometimes considerably, when her mind is added to the active engagement mix, i.e., when the parties permit her to ask questions, or for additional evidence or information, or to request that complicated materials be re-packaged or that their implications be re-framed graphically. Through such activity the arbitrator is more likely to understand the evidence, can build a stronger foundation for assessing its pro-

bative cut, and can position herself to weigh more reliably the persuasive power of counsels' arguments.[7]

III. Quality of Decision Making

The quality of the analysis that leads to findings of fact and conclusions of law can be higher in arbitrations even than in trials to a judge.[8] Why?

A. *Two Commonly Acknowledged Advantages of Arbitration*

Two advantages of arbitration are widely recognized—so need be mentioned only briefly here.

The first is control by the parties over who will conduct the analysis and draw the conclusions in their case. Parties cannot choose their judge, and their ability to affect who sits as jurors in their case is quite limited. In sharp contrast, parties in arbitration are empowered to choose the person or persons in whom they will place ultimate decision-making power. They can select for intelligence, conscientiousness, thoroughness, impartiality, integrity, experience as a decision-maker in litigated matters, and, of course, for subject-matter expertise. In some kinds of cases, having decision-makers with subject-matter expertise can improve the efficiency and fairness of the proceedings—both at the case-development stage and during the hearing. In addition, neutrals with subject-matter expertise are less likely to err en route to findings as a result of misunderstanding or confusing field-specific precepts, concepts, or terminology.

The deployment of three arbitrators, instead of one judge, is the second commonly acknowledged advantage of arbitrations over court trials. Other things being equal, three actively engaged minds probably are more likely to get it right than one. Three minds bring three different life experiences to the task of under-

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[7] Some litigators may believe that the process just described sacrifices their ability to expose testimonial lying by non-linear, unpredictable cross-examination. The substance, question-sequencing, pace, and predictability of cross-examination are not restricted in the process envisioned in this essay.

[8] For a sophisticated and multi-faceted exploration of this proposition in the context of international arbitrations, see William W. Park, *Arbitrators and Accuracy*, 1 J. Int'l Disp. Settlement 25 (2010).

standing words, actions, influences, and motives. Drawing on three different life experiences reduces the risk of making inaccurate inferences caused by mistaken assumptions or subconscious biases. Moreover, three actively engaged minds are more likely than one to raise analytically significant questions, to perceive and understand all the material components of the evidentiary and legal landscape, to draw inferences based on an appropriate weighing of evidence, and to follow tight logical paths to findings and conclusions.

B. *The Less Commonly Acknowledged Sources of Quality Decision-Making in Arbitration*

1. Protection Against Delegations of Decision-Making

Arbitrations can yield higher quality decisions than court trials even when there is only one arbitrator. In arbitration, unlike in a court trial, the parties can protect themselves against the risk that much (or all) of the fact finding and legal analysis that dictates the outcome will be done by a law clerk or by an advocate, not by the judge. Especially in busy urban courts, judges must spend significant percentages of their time on the bench (literally). When they are on the bench, they are not analyzing evidence and legal authorities in cases that are under submission. They may be compelled, more often than they would like, to relegate front line responsibility for much of this kind of analysis to law clerks. Even more problematic, busy state court trial judges who do not have law clerks sometimes must draw more than they would like on findings and conclusions that local rules require the parties to submit.

Trial judges who so use law clerks, or findings submitted by parties, usually will have developed during trial (or shortly thereafter) their own thoughts and instincts about the direction that analysis of a case should take or about the outcome that is most consistent with the evidence and law. If they have a law clerk, they will communicate these thoughts to their clerk and expect him or her to be guided by them when they work through the evidentiary record and formulate proposed findings and conclusions. A judge who does not have a law clerk for such tasks will use the thoughts and instincts with which she emerged from the trial (and from any post-trial briefing) to help choose between (and sometimes edit or adjust) the findings that are proposed by the parties.

Moreover, busy state court trial judges who know that each trial on their calendar is likely to be separated only by a few days (or less) will feel pressure to begin forming outcome-determinative opinions during the active course of each trial. A decision-making process whose course is directed (or heavily influenced) by impressions and instincts developed during a trial, or whose outcome is essentially dictated by such impressions and instincts, can be less reliable than the decision-making process a good arbitrator has time to adopt. Unlike in a trial, arbitration allows the parties to exercise considerable control not only over when the outcome will be announced, but also over how much time the decision-maker devotes to making the decision and how much post-hearing briefing will inform her work. At the most obvious level, the parties can agree to compensate the arbitrator for the number of hours they think an appropriately careful decision-making process should consume. Less obviously, in an especially significant or time-sensitive matter, in their retention contract the parties could bar the arbitrator from conducting arbitration hearings in other cases until she has issued her findings in their case, or could require her to devote a specified number of hours, within a specified time frame, to assessing the evidence and argument in their matter and writing her opinion.

As important, and as noted above, the parties in an arbitration, unlike the parties in public litigation, can dictate who in fact studies the evidence, who in fact makes the findings, and who in fact draws the legal conclusions that fix the outcome of their case. The parties can require the arbitrator herself to do all this important work, forbidding her to delegate any of it to a law clerk or assistant. Or the parties can limit the tasks that their arbitrator can assign to a law clerk, and limit the number of hours by a clerk or assistant for which they will pay. Of course, in smaller or less complicated matters, formally imposing limitations on delegating decision-work usually would be unnecessary, as all the participants in the process will share an understanding that it is the arbitrator herself who will be making the decisions from the evidentiary ground up.

2. How Requiring the Decision-Maker to Conduct the Analysis Can Enhance the Quality of the Decision

Why is it important (to the goal of getting it right) to have the arbitrator do essentially all of the decision-work? I believe that the dispute resolution process is appreciably more likely to yield high

quality outcomes when the decision-maker herself (the arbitrator) works her way carefully through the exhibits and the recorded testimony and builds, from the ground up, her own analytical pathway—after all the evidence is in and after all the briefs have been submitted. My experience has taught me that the decision-making devil really is in the details. Specifics, carefully considered, really make a difference. A decision-maker who does not know the evidentiary and legal details does not know the case.

By "details" I mean two things: the evidentiary specifics and each element of or step in the legal tests or standards that the law requires the decision-maker to apply to the evidence.

My own sobering experience is the basis for my belief that immersion in the detail of evidence and reasoning is critical to reliable decision-making. At the close of the evidence-taking and oral argument stage of arbitrations, I usually have a general sense of how things are going to play out in the opinion I will write. More than occasionally, this general sense is wrong. It always rests on wobbly legs.

I have found that legs that support a good decision acquire muscle in three ways. First, by assessing the post-hearing briefing and doing my own legal research, I develop a much crisper, more precise understanding of the structure of the analysis the controlling legal norms mandate. I make an outline of this structure.

Second, using this structure as a guide, I work my way carefully back through the evidence for the purpose of isolating the documents and testimony of probative significance and mapping their relationship to other evidence and to the controlling legal norms. To tighten my grasp of the evidence, sometimes I ask the parties to provide me with two sets of the documentary exhibits. In one set, the exhibits are presented in the order they were identified and used during the pre-hearing and hearing stages. In the second set, the documents are presented in chronological order. Chronology improves coherence. It can expose relationships and connections, some of which a party is not always pleased for me to see. By itself, it often does not teach causation. But, in combination with explications based on counsel's selection of evidence to support arguments, or to disclose interplays that otherwise would elude the trier of fact, chronologies can add illumination, reduce confusion or misunderstanding (sometimes promoted intentionally by counsel), and serve as a check on or tool for testing the parties' contentions.

The third and most telling tool for adding muscle to the legs that support a solid decision is the process of *writing* the opinion. The process of writing conserve as the greatest single source of intellectual discipline in the decision-making process. Trial judges in busy state courts often do not write the opinions they sign. When they do write, they work under time pressure that can force them to sprint. They simply do not have time for the sustained critical examinations that are necessary to support analytical incisiveness or subtlety. Trial judges in busy federal courts often delegate much of the initial drafting of opinions to law clerks. But, in my experience, it is in that drafting, that hard initial thinking and re-thinking about the evidence and law, that critical insights occur and connections are made—insights and connections that might well elude the less experienced, less worldly mind of a law clerk.

An arbitrator can be given the time to do the writing job herself and to do it right. The great source of insight and intellectual discipline in arbitration decision-making is the vigorous play between the process of writing, and the requirements that the decision-maker (1) lay out the analytical path that the controlling legal norms require her to follow, (2) identify the evidence that she has decided is material, (3) expose her assessment of that evidence, and (4) explain her outcome to the people most knowledgeable about the subject and most acutely concerned about the character and result of her work.

i. How the Process and Act of Writing Can Increase Accuracy

How can the process and act of writing enhance the quality of decision-making?

To write, one must think. In expository writing, the thinking that precedes the creation or construction of each sentence or point requires the writer to decide what she wants to say or communicate in that sentence or point. Often this "pre-writing" thinking is tentative, exploratory, indistinct, or broad-brushed. In this setting, with only partially formed ideational objectives, the writer often begins by identifying several candidate words. To select from among these, she must make micro-decisions, choices that can refine her understanding or that could re-direct her mind toward different thought-routes.

In making each significant word choice she must test, or at least make sure, that she understands the relationship between each candidate word and the other words that 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 the mental experiments that involve identifying and assessing candidate words—and then trying out different configurations of relationships between them—that the writer has access to new insights and deepens her understanding of what she is doing.

The disciplined, engaged writer goes through this process one sentence at a time. At the end of each sentence, she must decide what comes next, where to go from here. She must ask herself, which candidate thoughts seem to follow from the one I have just crafted? Very 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 well 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 earlier had committed, or only if she added a new, bridging thought.

There is a very significant additional dimension to these facts about good expository writing that emerges when we focus on the process of reaching and explaining a neutral's decision in an adjudicated matter. When writing an opinion that sets forth the bases for the outcome of a litigated case, the critical parts of the process of selecting between candidate words or inferences does not turn on logic in vacuuo, but on evidence. Critically, choosing between candidate inferences of fact requires the decision-maker to re-identify, re-assess, and then carefully compare the strength of the evidence that could support each competing inference. Reliability resides in this most granular component of the process of constructing a dispositive opinion. Decision-making depth can be achieved only through the re-examination of evidence that the conscientious neutral must undertake in order to make choices between competing candidate inferences. Lawyers sometimes worry that their trier of fact will get lost in the proverbial evidentiary weeds. But good decision-makers understand that it is only by crawling through those weeds slowly that they can accurately judge the promise that each alternative pathway forward seems to offer.

To mix metaphors, it is in these intellectual trenches that depth of understanding and quality of analysis is achieved. It is by digging in these trenches that decision-makers have new ideas, acquire new perspectives, and detect errors that informed their initial instincts or infected earlier findings or conclusions. Arbitrators can be instructed to labor in these trenches; judges cannot.

The second, and fully complementary, source of quality in an arbitrator's decision-making is the knowledge that she will be required to explain, fully and clearly, to the parties who chose and paid her, how she reached her decision. She knows, as she is writing, that step by step she must lay bare the analytical path that she has followed to reach the result that she knows will be scrutinized knowledgeably and vigorously by the parties. She knows, while she is constructing her decision, that the parties expect her to describe and defend how her mind moved from the evidence to each finding of fact, from each element of the applicable test to the next, or why she ascribed the weight she ascribed to each factor or element in a balancing analysis.

In order to explain to others, she must first explain to herself. If, at any important juncture, she cannot explain to herself, she stalls. Stalling forces her to re-examine what she has already done or the working assumptions that got her to the place where she is stuck. Stalling leads to re-examination, to more searching, more probing. Aggressive re-examinations can lead to tighter analyses and more reliable understandings. These, in turn, can yield changes in findings or conclusions, sometimes even moving the arbitrator toward a different outcome.

In theory, trial judges work along similar lines with similar objectives. In addition, they must worry about public reaction to and possible appellate court scrutiny of their work. But, there often is considerable distance between theory and practice in trial courts—especially in major urban centers, where most trials occur. Only a small percentage of dispositions (which include rulings on motions) of civil cases by state trial courts are appealed—a fact well understood by the trial bench. And only a tiny percentage of dispositions of civil cases by state trial courts receive any public attention. These circumstances, and the high volume of work they are expected to complete with what often feel like woefully insufficient resources, conspire to force many judges in busy state courts to be satisfied with appreciably less searching and painstaking work on their judgments and opinions than arbitrators can be empowered to devote to these important tasks.

ii. One Unnerving but Instructive Example

I will describe one case in point. After a full two weeks of taking evidence in an arbitration hearing, I had to make very difficult "judgments" about the credibility (truthfulness and accuracy) of testimony and the legal implications (under imprecise general

norms) of a great deal of documentary evidence. There is no reason to believe that a law clerk and I would have made the same such judgments. But, what is most telling is what happened as I worked through the evidence en route to writing my opinion.

The evidence included some thirteen bankers' boxes of documents, multiple deposition transcripts, and ten days of hearing-testimony. The post-trial briefs were good. Using them and some additional research, I prepared a detailed outline of the relevant law. Then I turned to the evidence, committing several days of painstaking time to careful assessments of the evidentiary terrain. Based on these efforts, I drew conditional conclusions about findings and outcome.

Then I started writing. When I was about three-fourths of the way through this process, after several days of hard analytical labor, I got stuck when I was trying to explain how I had provisionally resolved a particular issue in one direction. I got stuck because when I tried to set forth, in detail, the reasoning that I had intended to present to explain this finding, that reasoning felt soft, a little wobbly. I realized that the jump I had planned to make from "evidence" to "finding" was neither short nor sure. So, I dove back into the evidence on this point. The harder I thought, the less sure I got. After struggling for a time, I changed my mind—by 180 degrees. This change had a considerable effect on outcome. In the end, I felt that my changed finding was supported by a more accurate reading of the pertinent evidence and by more demanding reasoning from it. I could never be positive I had gotten it right—but I was sure that I had given the effort everything my mind could deliver.

This experience has taught me, more powerfully than any I had on the bench, how fragile the decision-making process can be, how important the details (of evidence and law) are, and how the level of resources available to the decision-maker can significantly affect the quality of the thinking that supports outcome.

Juries are unlikely to have the resources, the inclination, or the time to undertake this kind of careful analysis. They neither explain nor write—so this potentially difference-making source of discipline in reasoning is not likely to be at work in their deliberations. And trial judges in busy urban courts rarely will have the time to engage in labored, trench-level scrutiny of evidence or retesting their own reasoning. In short, they will rarely have the time to impose on themselves the kind of demands and detail orienta-

tion that are essential to empowering the writing process to serve as such a critical source of intellectual integrity.

Instead, trial judges often are forced to rely on instincts, on gestalt impressions, on relatively quick cuts through the evidence, or on proposed findings submitted by a party. Even in federal courts, where the judiciary generally is supported by more resources, trial judges more than occasionally rely to a considerable extent on assessments of evidence and legal analyses performed by clerks who, while often quite bright, lack the judge's intellectual maturity or worldly experience.

Arbitrators, by contrast, can be instructed to work through the evidence and explicate their reasoning at a level the parties feel is appropriate for the intellectual difficulty and the significance of their case. Thus, a good arbitrator working with appropriately measured resources can bring a level of care and depth to the decision-making process that trial judges very often would not be in a position to match.

IV. Conclusion

Nothing is perfect. Trials are not perfect tools for delivering outcomes that are fully faithful to the merits of cases. Nor are arbitrations. But, not all imperfections are equal—and I contend that, when compared *as processes*, arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than trials conducted by conscientious judges (or trials to conscientious juries).

Compared to a trial, arbitration offers parties opportunities to get more evidence on the table and provides parties with more flexible tools for illuminating its probative cut. Unencumbered by process formalities and conventions, arbitration can create less distracting pressure on lawyers and witnesses, and can free up all their intelligence and knowledge for use during hearings. Freedom from strict application of the rules of evidence, especially the hearsay rule, can enable lawyers to draw on a wider range of material to make their case and can provide the decision-maker with access to more information as she tries to assess, thoroughly, the probative power of evidence and the persuasiveness of argument.

Moreover, by granting the arbitrator greater freedom to affect how the record is developed, to contribute to framing issues and formulating questions, arbitration can convert what would be a

stylized and sometimes sterile dialectical process in a trial into an informationally and analytically richer and more illuminating "trialectic."

As significant, the quality of the thinking that informs the disposition of disputed issues in arbitration can be appreciably higher than it is likely to be in a trial, at least in busy urban courts. In arbitration, the parties can prescribe which mind, in the first instance and in the last, works through the evidence, analyzes its significance, and decides which inferences it supports. In arbitration, the parties can require that the mind that does this important, front-line work be the mind of the arbitrator they have selected for her experience, intelligence, and analytical acumen—not the mind of a clerk or an advocate.[9] In arbitration, the parties can be sure that the mind that decides what the relevant legal tests consist of, and the mind that works its way carefully through the steps those tests prescribe, is the mind of the arbitrator, not the mind of a clerk or of an advocate.

Quite significantly, in arbitration, the parties can require the arbitrator to do all the writing from the first tentative drafts through the final award that will explain and justify the outcome. The act and process of writing can enhance considerably the quality of the thinking that supports the neutral's decision—but that benefit can be lost, or at least much diluted, if the decision maker is forced by pressures on her time to delegate much of the writing to others, or to sprint through the process, or to rely heavily on submissions by the parties. In short, the parties to arbitration can create the space and provide the incentives for their neutral to do the job right. Parties in a trial can do neither.

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[9] The mind of an advocate can take over this process, or exercise considerable influence in it, when a trial judge feels constrained to rely on findings of fact or conclusions of law that counsel have submitted, or when a trial judge adopts whole sections of briefs to explain and justify the disposition of an issue, claim, or case.