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Litigating to the Decision-Maker: *Strategy Across Courts, Juries, and ADR*

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The Audience Determines the Outcome

The same set of facts can produce dramatically different outcomes depending on who decides them. A serious injury case that carries substantial verdict risk before the right jury may resolve for a fraction of that amount before an experienced commercial arbitrator who has seen hundreds of similar claims. A contract dispute turning on statutory construction may be decided more efficiently and reliably in a bench trial than before twelve laypeople unfamiliar with commercial law. A regulatory compliance defense that resonates with a seasoned federal judge may miss entirely with a jury panel inclined to view large companies with suspicion.

These are not random results. They reflect a fundamental truth of civil litigation: the forum and the decision-maker shape the outcome as much as the merits do. Advocacy that succeeds in one setting may fail in another, not because the facts changed, but because the signals of credibility, clarity, and persuasion differ by audience. A lawyer who prepares and delivers the same argument regardless of who is listening is conceding a meaningful advantage to counsel who does not.

This paper examines how that dynamic operates across the three primary adjudicative forums in civil litigation: jury trials, bench trials, and arbitration. It also addresses mediation, which, while not an adjudicative forum, demands its own strategic discipline and its own form of persuasion. The goal is not to survey each forum but to offer a practitioner's framework for adjusting advocacy strategy as the audience changes.

The Forum Selection Decision

Before counsel can tailor advocacy to the decision-maker, the decision-maker must be identified. In many commercial cases, that choice is made before litigation begins. Arbitration clauses in commercial contracts are broadly enforceable under the Federal Arbitration Act, and courts have construed those clauses expansively. Where no contractual provision dictates the forum, the selection decision is often the most consequential strategic choice in the case. It deserves the same deliberate analysis that lawyers devote to discovery strategy and expert development, and it should be revisited as the case develops and the factual record takes shape.

Assessing the Case

Effective forum selection requires an honest assessment of three factors: the legal posture, the factual narrative, and the equities. These rarely align perfectly, and the forum that best exploits a case's strengths is seldom the same one that best minimizes its weaknesses. The goal is to identify the forum that does more of the former than the latter.

From the defense perspective, cases involving close factual questions, sympathetic plaintiffs, or corporate conduct that invites moral judgment by lay jurors are high-risk and the strongest candidates for a forum that removes that dynamic. Cases that depend on technical statutory construction, complex regulatory frameworks, or affirmative defenses that require careful legal credentialing tend to favor a bench trial or arbitration. Cases involving significant damages exposure, confidentiality concerns, and parties whose preference is a prompt resolution often belong in arbitration.

A proper analysis must account for jurisdiction-specific variables. The composition of the likely jury pool matters. The identity of the assigned judge matters even more. Some bench trial judges are effective fact-finders who engage carefully with complex evidence; others manage heavy dockets that limit the attention any single case can receive. The value of experienced local counsel in making these assessments accurately cannot be overstated.

The Jury Trial

Jury trials remain the dominant forum for personal injury and tort litigation and are common in business disputes involving fraud, breach of fiduciary duty, and contract claims with significant damages. Their advantages are well-documented. Juries bring lay perspectives, respond to narrative and emotion, and can award substantial verdicts unrestricted by what a judge or arbitrator might consider reasonable.

Those same features carry risk. Juries are less predictable. They are vulnerable to confusion in complex commercial disputes, to anchoring effects in damages arguments, and to sympathy for parties who tell compelling personal stories regardless of the legal merits. For defense practitioners, the jury trial is a high-variance forum. Estimating case value must account for both the upside of a low verdict and the tail risk of a result untethered from the actual damages. That risk calculus has shifted in recent years. Plaintiffs' firms have become increasingly sophisticated in jury selection, theme development, and strategies anchored in corporate wrongdoing narratives.^[1] The "reptile theory" approach, which invites jurors to view corporate defendants as threats to community safety, has produced verdicts in venues across the country that bear little relationship to actual harm. Defense practitioners who treat the jury trial as the default forum without accounting for these dynamics are taking on risk that careful forum selection might avoid.

The Bench Trial

A bench trial before an experienced judge offers predictability, legal rigor, and procedural efficiency. Judges apply the rules of evidence, issue written findings of fact and conclusions of law that create a reviewable record, and often decide cases by applying legal standards rather than moral intuition. For parties whose best arguments are legal rather than factual, a bench trial is often a meaningful strategic advantage.

The limitations are real, however. Judges are busy. A commercial bench trial judge will be managing dozens of other active cases simultaneously and cannot devote to any single matter the focused attention a jury gives it during deliberations. And unlike arbitrators, judges preside over their assigned cases regardless of subject matter expertise. A complex commercial fraud case before a judge whose docket is heavy with criminal, family law, or garden variety tort claims may not receive the careful engagement the parties need and expect. Written submissions, particularly proposed findings of fact and conclusions of law, become essential tools for compensating for the time pressures judges face.

Arbitration

Arbitration has become the default forum for many commercial disputes, driven by broad contractual arbitration clauses and the Federal Arbitration Act's strong policy in favor of enforcement.^[2] Its advantages are genuine: confidentiality, speed relative to the civil docket, limited discovery, decision-makers with relevant subject matter experience, and a degree of finality that reduces post-award litigation costs.

Its risks are equally real. Grounds for vacating an arbitration award under the FAA are narrow and do not include legal error, even manifest legal error, as the Supreme Court confirmed in *Hall Street Associates, L.L.C. v. Mattel, Inc.*^[3] This finality changes the risk profile of the proceeding significantly. There is no appellate safety net, and the outcome is effectively unreviewable on the merits. Practitioners who take cases to arbitration should do so with that constraint clearly in view.

For commercial defense practitioners, arbitration is often favorable when the case involves complex facts that a lay jury might misunderstand, when the defendant is a large entity that might attract unfavorable jury dynamics, or when the potential verdict exposure justifies the cost. It is less attractive when the legal defenses are strong and a judge would be expected to apply them rigorously, or when the client needs the precedential value of a

published ruling.

Advocacy Before a Jury

Theme Development and Narrative Architecture

Effective jury advocacy is built on themes, not arguments. A theme is a short, memorable proposition that captures the defensive narrative and can be stated in a sentence a juror would repeat in deliberations. Research in cognitive psychology has consistently found that people process complex information by fitting it into preexisting narrative frameworks.^[4] Arguments that map onto a coherent story are processed more readily and retained more durably than abstract legal propositions.

On the defense side, theme development requires a clear-eyed assessment of what narrative the defense can credibly deliver. The best themes are grounded in objective evidence, not attorney argument. They must be capable of delivery through witness testimony, documents, and physical evidence, not just through opening and closing. They must also be accurate. Juries penalize overreach, and a theme that collapses under cross-examination or contradictory evidence causes more damage than no theme at all.

A single overarching theme can build a clean narrative but risks oversimplification. Adding a few subnarratives is important to support and round out the argument. Each theme must be reinforced consistently throughout the trial, and the closing argument should return to and complete every theme introduced in opening. Inconsistency between the opening narrative and the closing argument is one of the most common and costly errors in jury advocacy.

Credibility Signals Before a Jury

Jurors evaluate witnesses primarily on credibility, and credibility assessments form early and resist revision.^[5] The implications for witness preparation are significant. Expert witnesses retained by the defense carry a credibility risk that has grown more pronounced as jurors have become more skeptical of paid opinion testimony. An expert who appears financially motivated, overly eager to advocate for the retaining party, or dismissive of contrary evidence will likely be discounted. The most effective experts are those who acknowledge appropriate uncertainty, concede points where concession is warranted, and present as educators rather than advocates.

Lay witnesses carry different credibility signals. Consistency, specificity, and the absence of apparent motive to fabricate are the most important factors. Witnesses who answer questions directly rather than evasively, demonstrate genuine knowledge of relevant facts, and avoid scripted-sounding responses tend to be the most credible. Witnesses who appear coached, answer questions with stock phrases, or contradict themselves under cross-examination can undermine an otherwise strong factual defense.

Demonstrative Evidence and Visual Advocacy

Jurors are visual processors. Studies of jury decision-making consistently show that evidence presented visually is better understood, better retained, and more persuasive than the same evidence presented through testimony alone. This is not simply a function of evidence complexity; even straightforward factual propositions are communicated more effectively through well-designed visual aids than through oral recitation alone.

For commercial litigation, this means investing in timeline exhibits, organizational charts, damages summaries, and document call-outs that allow jurors to follow complex transactions without reconstructing the narrative from memory. The goal is accessibility, not slickness. Jurors who feel they are being talked down to will discount the message along with the messenger. The best trial graphics are those that look like they were designed to help

the jury understand, not to impress the jury with the sophistication of counsel.

Practitioners should resolve the evidentiary status of key demonstratives well before trial. Exhibits used as demonstratives during argument raise different admissibility questions than documents offered as substantive evidence. These distinctions should not be sorted out in front of the jury.

The Moral Defense

Juries are not primarily legal decision-makers. They are moral decision-makers. Jurors want to reach a verdict that feels fair, and they will bend legal frameworks to achieve results that conform to their sense of justice. This is not a criticism; it is a description of how the system works.

For defense practitioners, this means that even a technically strong legal defense may fail before a jury if it appears morally unjust. A defendant who appears to evade accountability for clear harm, or who hides behind contractual provisions to avoid responsibility that the jury believes is real, will likely pay a premium for that perception in the verdict. The legal defense must also function as a moral defense. Both narratives must be woven into the trial presentation from the first moment of jury selection through closing argument.

Advocacy Before a Judge

What Bench Trial Judges Actually Want

Judges who preside over bench trials have different professional habits than jurors and different processing constraints. They evaluate legal arguments, apply rules of evidence, and are expected to produce written decisions that can withstand appellate review. They are also pressed for time. A judge managing a commercial bench trial may be simultaneously presiding over dozens of other active cases. Presentations that respect that constraint are more effective than those that do not.

Effective bench trial advocacy begins with efficiency. Stipulating to undisputed facts, eliminating witnesses who add nothing material, and presenting the legal theory cleanly from the outset are not signs of a weak case; they are demonstrations of professional competence that most bench trial judges will notice and reward. A trial lawyer who treats a bench trial as a jury trial, complete with extended demonstratives, emotional witness narratives, and dramatic pacing, is misreading the audience.

This does not mean that bench trial advocacy should be mechanical. Judges are human beings who respond to well-organized narrative and to lawyers who demonstrate genuine command of their cases. The difference is emphasis and pacing. Drama gives way to precision. Emotional appeals must be grounded in factual specificity. The case still needs a coherent beginning, middle, and end, but the telling is faster and the structure is analytical rather than dramatic.

The Written Record

In bench trials, written submissions carry weight they do not carry in jury practice. Pre-trial briefs, proposed findings of fact and conclusions of law, and post-trial briefs are often the primary analytical frameworks through which the judge reaches a decision. Oral testimony informs fact-finding, but the written record frequently structures how those facts are organized, weighed, and applied.

Proposed findings of fact should be drafted in a form the judge can adopt with minimal revision, organized to track the legal elements of each claim and defense, and supported by specific record citations. Proposed conclusions of law should state the applicable standards clearly and apply them to the specific findings with

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analytical precision. Judges who adopt a party's proposed findings substantially verbatim have, in practical terms, been written into the advocacy. That outcome requires careful preparation but is achievable in well-trying cases.

Post-trial briefs deserve the same investment as summary judgment briefs. A judge who was following the evidence but not yet fully persuaded during the hearing will frequently turn to the post-trial briefs to resolve the close questions, and those briefs should be written with that function in mind.

Motions as Bench Trial Advocacy

A distinctive feature of bench trial practice is the strategic weight of pretrial motions. Motions to exclude expert testimony, motions in limine on contested legal issues, and motions to bifurcate give parties tools to shape the scope of the bench trial in ways that are not available to the same degree in jury practice. A successful Daubert or Robinson motion before a bench trial, for example, may effectively end the opposing party's damages case, because the judge who decides the admissibility motion is also the judge who will decide the merits.^[6]

Practitioners should invest early and heavily in expert challenges in bench trial settings. The pretrial process is part of the advocacy, not a separate administrative exercise. A well-framed motion to exclude a damages expert can accomplish more before a bench trial than the most effective cross-examination of that same expert at a jury trial.

Advocacy in Arbitration

Knowing Your Arbitrator

The single most important difference between arbitration advocacy and all other forms is that the decision-maker can be researched in advance. The arbitrator is not an anonymous juror or an assigned judge over whom the parties have no selection influence. In commercial claim, the arbitrator is a person chosen through a process in which both parties typically have a meaningful voice, and whose prior decisions, publications, and professional history can be investigated before the hearing.

That investigation should inform every aspect of hearing preparation. Research on a proposed arbitrator should include published awards and any available written decisions; academic or bar association publications; professional reputation among practitioners in the relevant field; prior representations in similar disputes; and any patterns in procedural rulings that are accessible. An arbitrator known for splitting the difference on contested issues signals a different strategic approach to the damages ask than one known for principled all-or-nothing positions.

In multi-arbitrator panels, the dynamics change again. A three-arbitrator panel typically includes one arbitrator nominated by each side and a neutral chair. Understanding the potential alignment of the panel and structuring the hearing to persuade the neutral while not unnecessarily alienating the opposing party's nominee, requires a different calculation than single-arbitrator cases. The neutral is usually the audience that matters most, and the hearing strategy should reflect that priority.

Strategic Differences in Arbitration Hearings

Several features of commercial arbitration hearings call for a materially different approach than either jury or bench trial practice.

Discovery limitations

Most commercial arbitrations involve significantly less discovery than litigation. This creates important choices

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about which evidence to develop and which to forgo. Where document discovery will be limited, early investment in witness preparation and expert development is essential, because live testimony will bear more of the evidentiary weight than it might in a case with an extensive documentary record.

Evidentiary latitude

Arbitrators typically apply relaxed evidentiary standards, admitting hearsay and documentary evidence subject to arguments about weight rather than admissibility. This cuts both ways. Favorable evidence that might be excluded at trial may come in through arbitration; so may unfavorable evidence that a party might have successfully kept out in litigation. Hearing preparation should assume that most proffered evidence will be admitted and plan accordingly.

Inquisitorial engagement

Arbitrators frequently ask questions during both direct and cross-examination in a manner more active than is common in U.S. trial practice. Witnesses who have been prepared for opposing counsel's questions but not for direct engagement from the decision-maker are poorly prepared for arbitration. Preparation sessions should specifically simulate arbitrator questioning, including on points where the arbitrator is likely to be skeptical or to need clarification.

Finality

Unlike a bench or jury verdict, an arbitration award is effectively final. The FAA provides for vacatur only in narrow circumstances, including arbitrator misconduct, fraud, or excess of authority.^[7] Clear legal error, even manifest legal error, does not meet that standard under federal law. Arguments designed primarily to preserve issues for appellate review have no comparable function in arbitration and should not consume hearing time that could be spent on the merits.

Pre-Hearing and Post-Hearing Briefs

Arbitration practice places unusual importance on written submissions. Unlike bench trial judges, who have often been presiding over a case for years by the time of trial, an arbitrator may be reading the pre-hearing brief as her primary introduction to the dispute. A well-constructed pre-hearing brief organizes the facts, identifies the key legal issues, previews the witnesses and exhibits, and gives the arbitrator a framework for evaluating the hearing as it unfolds. It is not a formality, and it should not read like one.

Post-hearing briefs are similarly critical. The award in a commercial arbitration frequently follows the post-hearing brief more closely than any other submission. The brief should organize the record evidence by legal element, cite the hearing transcript with specificity, address the opposing position directly, and state the requested relief precisely. A post-hearing brief that reads like a well-organized summary judgment brief with transcript citations is more likely to be adopted wholesale than one that recites facts narratively without analytical structure. Because no appeal corrects legal error in arbitration, the post-hearing brief is also the final opportunity to make the arguments on which the award will rest. Practitioners who treat post-hearing briefing as a recap of the hearing are leaving significant advocacy on the table.

Mediation as a Strategic Forum

Mediation Is Advocacy

Mediation is not an adjudicative forum, but it demands advocacy. The audience differs from a judge, jury, or arbitrator, and the goal differs as well. In mediation, counsel is not trying to win a decision; she is trying to move

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the opposing party and, through the mediator, create conditions for a negotiated resolution. Understanding that distinction is essential to using mediation effectively.

Effective mediation advocacy requires a clear theory of why the opposing party should want to settle, grounded in an honest assessment of the litigation risk they face. Overstating the case in mediation is consistently counterproductive: experienced commercial mediators recognize position inflation, discount it, and communicate the discount to the other side. The most effective mediation positions are built on candid, credible risk assessments that are persuasive because they are accurate.

Using the Mediator as a Channel

A mediator in a commercial dispute is not a neutral conveyor belt for settlement offers. Experienced commercial mediators evaluate litigation risk independently, often share their own assessments with each party in private session, and push back on positions they regard as unrealistic. A mediator who tells the opposing party that the damages theory is credible and the liability exposure is genuine is more persuasive in the caucus room than any brief counsel could file.

Cultivating the mediator's confidence in the client's position is therefore a distinct component of mediation strategy. Doing so requires well-organized pre-mediation submissions, a direct and credible presentation of the liability facts, and a frank acknowledgment of the case's weaknesses alongside its strengths. A mediator who trusts the accuracy of counsel's assessment will be a more effective advocate in the opposing caucus than one who regards counsel as an unreliable narrator.

Timing the Mediation

The timing of mediation matters and should be deliberate. Commercial cases typically settle most efficiently in mediation when enough discovery has occurred for both sides to understand the central facts, but before the full cost of expert development, depositions, and trial preparation has been incurred. Agreeing to mediate before the defense has fully developed its case can produce settlement on terms that undervalue the defense position.

Pre-mediation discovery planning — including identifying the specific information most likely to move the opposing party toward resolution — can make the difference between a productive session and an unsuccessful one. Counsel should also be deliberate about which client representative is present. The decision-makers in the mediation room frequently determine whether a case settles, independent of the legal arguments being made outside it.

Cross-Cutting Principles

Technology and Visual Persuasion Across Forums

The appropriate use of technology differs meaningfully across forums. Before a jury, rich visual storytelling pays dividends. Animation, video, and graphics that make complex events accessible to lay decision-makers are appropriate and often decisive. Investment in high-quality trial graphics and demonstrative development is typically justified by the return in comprehension and persuasion.

Before a judge in a bench trial, simpler and more analytical visual aids are appropriate. A timeline that tracks key contract events with specific dates and document citations is more useful than a stylized graphic. A damages calculation exhibit that shows the methodology and arithmetic is more effective than a chart that states only the bottom line. Judges appreciate precision over presentation quality.

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Before an arbitrator, the appropriate approach typically lies between the two. Arbitrators who are former litigators tend to respond well to organized documentary presentations. Those from more academic or regulatory backgrounds may require more educational framing. In all forums, demonstratives should be tested with internal audiences before use at hearing. A visual that confuses the internal audience will confuse the decision-maker.

Adapting Witness Preparation by Forum

Witness preparation is universal, but its emphasis should vary by forum. For jury testimony, the preparation priorities are clarity, accessibility, and the credibility signals that jurors respond to most reliably. For bench testimony, they are precision, concision, and command of the technical facts. For arbitration testimony, they are the ability to respond to direct questioning from the decision-maker, who will likely be far more engaged than a typical bench trial judge.

Expert witnesses require particular attention to forum-specific credibility expectations. An expert who would succeed before a jury with clear, accessible explanations may underperform before an arbitrator with relevant subject matter expertise who expects engagement at a sophisticated technical level. Preparation sessions should simulate the actual hearing environment, including the type and style of questioning the decision-maker is likely to use.

Building the Record with the Forum in Mind

Whatever the forum, practitioners should think about the record they are building from the outset of the case. In litigation, the record supports potential appeal and informs the framing of post-trial motions. In arbitration, the hearing record is the basis for the post-hearing brief and may be the only evidence relevant to a vacatur challenge. In mediation, representations about case value made in prior sessions can affect credibility in later proceedings if mediation fails and litigation continues.

The discipline of record-building also serves a risk management function that extends beyond individual case outcomes. Clients who understand the reasoning behind strategic choices — including why a particular forum was selected, which discovery was prioritized, and how experts were developed — are better positioned to evaluate results and less likely to second-guess counsel when outcomes do not match expectations.

Conclusion: Read the Room

Effective commercial litigation practice requires more than command of substantive law and procedure. It requires the discipline to read the room accurately and the flexibility to adjust as the audience sends signals. A judge who interrupts opening argument with a pointed question about jurisdiction is communicating something important. A jury panel that stops taking notes during a technical expert's testimony is sending a message. An arbitrator who engages closely with a piece of documentary evidence on the second day of hearing is telling counsel where the case is being decided.

The fundamental skill is perspective-taking: the ability to see the case as the decision-maker sees it, not as counsel does. That discipline is built through careful preparation, honest case assessment, and the intellectual honesty to recognize when a case does not look from the outside as strong as it looks from inside counsel's office.

The forum is not a neutral container for the merits. It shapes the outcome. Selecting the right forum, preparing with that forum's decision-maker in mind, and executing at hearing with attention to the signals the decision-maker is sending are disciplines that distinguish practitioners who consistently produce good results from those who occasionally get lucky.

Endnotes

1. See David Ball & Don C. Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009). For academic discussion of nuclear verdict dynamics, see also Valerie P. Hans & Neil Vidmar, *Judging the Jury* 200-22 (1986).
2. 9 U.S.C. §§ 1 et seq. See also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (describing the FAA's "liberal federal policy favoring arbitration agreements").
3. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584-86 (2008).
4. Nancy Pennington & Reid Hastie, A Cognitive Theory of Juror Decision Making: The Story Model, 13 *Cardozo L. Rev.* 519 (1991).
5. Neil Vidmar & Valerie Hans, *American Juries: The Verdict* 160-63 (2007).
6. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
7. 9 U.S.C. § 10(a).