## Panel:
## Trials - Retaking High Ground

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# Trials:
# Retaking High Ground

Wheeler Trigg O'Donnell LLP

# Panelists

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- **Scott Etish**
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- **Bobby Hood, Jr.**
  Hood Law Firm (Charleston, SC)
- **Eric Lent**
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- **James Meyers**
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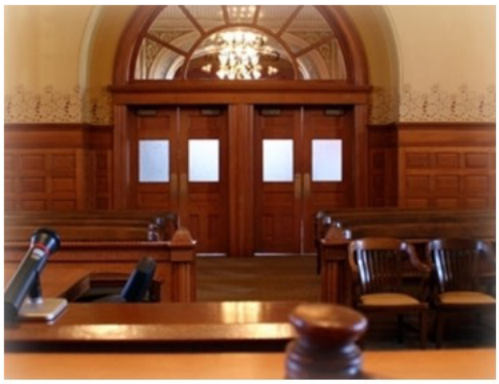
# Question #1

Arbitration or Trial?

## Question #2

Take the Case through Trial or Settle?



## Hypothetical


This paper will examine various issues related to litigation that must be decided at the outset of a formal dispute, namely, whether the litigant should proceed to trial or arbitration; and once that decision is made, whether to settle the matter or try the case through the merits.

**To Arbitrate or Proceed in Court**

At the outset, and if presented with the opportunity to do so, a litigant must decide whether to proceed in court or to utilize an arbitration process. Typically, arbitration must be demanded through a written agreement between the parties or alternatively, the parties can agree to arbitration. In deciding whether to proceed to trial or arbitration, a litigant may wish to consider the pros and cons of arbitration described below. The pros of arbitration include:

- Finality: It is typically difficult to appeal an arbitration ruling even if the arbitrator misapplied or used the incorrect law. An arbitration allows the parties to come to a final resolution and move on from their dispute.
- Speed: Although it is not always the case, arbitrations sometimes move more quickly than matters in courts. Usually, arbitration rules are more streamlined and the arbitrators are typically private practitioners without large caseloads or political pressures.
- Tailoring: Arbitrations can also be tailored to the nature and subject matter of the case through the selection of arbitrators who have specific, relevant subject-matter knowledge. Additionally, the rules may be tailored to fit the needs and demands of the case.
- Cost: Because arbitrations tend to move more quickly than court cases, arbitrations tend to be a more economic way to resolve disputes.
- Fairness: Typically, arbitrations afford the parties a sense of fairness as often arbitrators are selected by both parties or if they cannot agree, the selected arbitrators chose a third arbitrator. While not always the case, no single party controls who the arbitrator will be.
- Simplicity: Arbitration rules are typically more streamlined than court rules with the goal of providing a result more quickly than the court process. Additionally, arbitration rules typically place limitations on the form, scope and number of discovery devices.
- Confidentiality: Arbitrations are typically private matters not conducted before the public like trials in open court. Additionally, transcripts are not typically made unless requested by a party. Also, public precedent is not set with an arbitration decision.

Arbitrations may not be the best option for all matters, however, for the reasons described immediately below:

- Cost: While possible cost reductions may be a benefit in an arbitration, costs can also be a detriment to the extent arbitrations continue on for an extended period or if the matter is a complex one. If this is the case, an arbitration may involve the same amount of discovery and expense of a trial. Additionally, an arbitration may be nonbinding which may allow the losing party to take their issue back to court, which would essentially add the cost of litigation to the cost of the prior arbitration. Also, arbitrations with panels of multiple members may actually be more expensive, given that multiple arbitrators will be incurring expenses.
- Lack of Peer Input: One of the hallmarks of an arbitration is that no jury is involved. While this may be good for a particular type of defendant, most consumers and/or individuals may desire to have a jury. Additionally, the lack of disclosure may chill settlement discussions due to the lack of fear that issues may become public.
- Fairness: Depending on the nature of the arbitration clause and the dispute, one party may be at a disadvantage if, for example, the clause provides for arbitration in the opponent's backyard. Additionally, arbitrators, while bound to ethics codes, are not necessarily responsive to the political process or retention requirements.
- Location: The arbitration clause may set a location which is inconvenient for one of the parties, which may raise the cost and difficulty for that party.
- Lack of Appellate Right: The losing party may not have a right to appeal, even if the arbitrator makes a mistake of fact or law.
- Ambiguity of Decision: Arbitration decisions may not be based on legal precedent or conventional legal principles, but rather on more ambiguous concepts of justice and equity, which may diminish the predictability and reliability of the decision.
- Future Arbitrator Desires: While hopefully not overt, an arbitrator may base a decision on a desire for additional business from a litigant or litigant's counsel, which may result in a compromise of the result.

The decision whether to arbitrate or take a matter to trial is not one that should be taken lightly. This initial decision may decide the outcome of the matter, and will certainly contribute to whether the matter is considered and resolved in a timely and economic fashion. There is no litmus test for all matters, but each matter must consider the pros and cons of arbitration on a matter-by-matter basis.

**To Settle or Not to Settle**

After the decision is made whether to pursue the claim before a tribunal or via an arbitration, a party must also decide whether to pursue the matter through the entire process of trial or arbitration or whether to settle the claim prior to that time. It is estimated that up to 92% of cases settle before trial.[1] But is settlement always the right option or should a party push a resolution of a case through trial?

1 M. Galanter "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," Journal of Empirical Legal Studies, Vol. 1, Issue 3, 469-570, November 2004.

There are many benefits to settling a matter before trial, which may include:

- Reduction of expense: A party may be able to avoid attorneys' fees and costs associated with going to trial such as travel fees, witness fees, expert witness fees, and extensive discovery expenses, such as those associated with electronic discovery and depositions.
- No public disclosure of private information: If a matter is settled, it may be that the parties can agree to keep the matter and record of the case confidential. If there has been any wrongdoing, or inferences of wrongdoing by either party, settlement may be a way to avoid any implications from such disclosure.
- Finality: Parties to a lawsuit in court may wait as much as three years before going to trial. An early settlement of a matter will be not only crystalize the issues, but it will also bring closure of the matter for the parties. Additionally, the losing party at trial will always the right to pursue an initial appeal and sometimes a secondary appeal to a higher court. A settlement will preclude that right.
- Human capital: Parties to a lawsuit, whether individuals or entities, expend time, monetary resources and personal resources on pursuing or defending a case. An early settle may reduce stress on the individuals involved.
- Certainty: A settlement will bring a certain resolution to the matter. The trial process, however, is necessarily unpredictable, and the parties must wait for the judge or jury to reach a decision. Once received, that decision may be further subject to appeal, thus clouding the end result for an additional time.
- Creativity: A settlement can afford the parties the opportunity to achieve a resolution to the matter that may not be possible in trial. For example, the parties to a settlement may agree that one side apologize to the other which would not be possible in court.
- Lack of admissions: If a matter is resolved through trial, one side will win outright or partially, which may either be an outright decision or implication of guilt or wrongdoing. A settlement, however, may permit the parties to deny any wrongdoings which would allow the defending party the opportunity to settle without admission.

Settlement however, is not always a viable alternative, and may not make sense in a particular matter. For example, a case seeking to implicate a constitutional right of a party would not make sense to be settled pre-trial as no precedent would be created through settlement, nor would there be any effect on public policy. Settlement may also not be a reasonable option if the settlement terms demanded by one side are so unfair and unreasonable so as to make settlement impossible.

Like the decision to proceed to arbitration or through the court system, the decision to proceed to trial or settle must be made on a case-by-case basis. The precedential value, the cost of the case, and the nature of the parties are all factors that must be considered before making this important decision.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Mark Clouatre has extensive litigation experience both in and out of the courtroom. He focuses his practice on complex commercial litigation, including franchise litigation. He also handles product liability, toxic tort, employment, malpractice defense, and general tort cases. Mark's clients include nationally recognized automotive manufacturers, airlines, shipping providers, and professional service firms.

Mark has successfully tried more than 20 complex cases before judges and juries in trial and appellate courts and before administrative agencies in 11 states from Alaska to Florida. Mark also oversaw and co-managed, with one other firm, the litigation of over 400 arbitrations in 48 states for Chrysler Group during a seven-month span following the bankruptcy of the former Chrysler LLC in 2009. He personally arbitrated eight of the matters in California and Texas.

**Practice Areas**
- Mass Torts
- Franchise and Distribution
- Professional Liability
- Toxic Torts
- Product Liability
- Commercial Litigation
- Appellate

**Industries**
- Oil & Gas
- Trucking
- Automotive
- Consumer Products & Services
- Financial Services
- Professional Services
- Real Estate
- Medical Devices & Pharmaceuticals

**Articles/Presentations**
- "Cost Control 101: Managing Litigation Costs Before and After a Suit is Filed," presented at the ACC In-House Counsel Forum, (April 24, 2013).
- "A Roadmap for Successful Arbitration," presented to the Association for Corporate Counsel Colorado Chapter, (May 3, 2012).
- "Keeping Your Head Above Water in the Rising Tide of Corporate Litigation Costs," presented at PricewaterhouseCoopers General Counsel Forum, (October 28, 1999).
- "The Legacy of Continental Airlines v. American Airlines: A Re-Evaluation of Predatory Pricing Theory in the Airline Industry," 60 J. Air L. & Com. 869, (1995).

**Education**
- Southern Methodist University Dedman School of Law, J.D.,1995, cum laude; SMU Law Review Association, President; Teaching Assistant Instructor of Trial Advocacy Course
- University of Colorado, B.S., 1992, Finance; President's Leadership Class