Truth or Myth?

Dear Ms. Bader:

In the September 2007 article by Solange E. Ritchie, *Arbitration myth busting: What every attorney and client needs to know* – she stated that one of the myths about arbitrations is that arbitrators do not make fair decisions. But this is not a myth. I practice employment law for the employee. My experience is that AAA arbitration is biased for the employer. Other lawyers who represent employees tell me they have had the same experience.

Justice Kennard observed,

> [T]he fact that the business organizations imposing the arbitration clause is a repeat player in the arbitration system, while the consumer or employee is not, raises the potential that arbitrators will consciously or unconsciously bias their decision in favor of an organization or industry that hired them regularly as an arbitrator.

(*Engalla v. Permanente Medical Group, Inc.* (1997) 64 Cal.4th 843, 988; see also, *Acorn v. Household Intern., Inc.* (N.D. Cal. 2002) 211 F.Supp.2d 1160, 1172; *Cole v. Burns Intel. Sec. Services* (D.C. Cir. 1997) 105 F.3d 1465, 1476-770.).

Ms. Ritchie debunked the myth on the ground that if arbitrators make biased decisions, attorneys and clients will tell their friends and colleagues and eventually that reputation will catch up with them. We should all live to be so old. In the last two arbitrations in which my clients were the victims of AAA arbitrations, there were no decisions on the Internet or anywhere else by the arbitrators that would have revealed anything about them. Privacy, you know, is one of the virtues of arbitration. Only after it was too late did I learn that the arbitrators had been AAA arbitrators for years, and they had been careful not to disclose their true colors. My advice – if you are stuck with AAA arbitration, watch out for someone who has been at it for very long.

I advocate that arbitrators should have to disclose their prior decisions. There could be redaction to protect privacy. Then we could see what is myth.

Very truly yours,
M. Van Smith

A note from the editor –

In a recent study released by Public Citizen, which reviewed 34,000 arbitration cases, it was noted that companies usually initiated the arbitrations and used arbitration firms they know will rarely rule in favor of the consumer.

The report studied cases handled in California by the Minneapolis-based National Arbitration Forum. Out of 19,300 cases, the arbitrators ruled in favor of the consumer approximately five percent of the time, resulting in big wins for companies such as MasterCard, Visa, Discover Financial Services and American Express Co. in a whopping 95 percent of the disputes. In 15,000 other cases, there was either a settlement, the customer dropped the dispute, or filed for bankruptcy.

The article published in the Seattle Post-Intelligencer and written by Phuong Cat Le, noted that Arbitration Forum managing director Roger Haydock disagreed, believing arbitration was an affordable and efficient way to result disputes, and consumer outcomes in arbitration were similar to the results achieve in court. Find this article at http://seattlepi.nwsource.com/money/333453_arbitration28.html.

– *Ed.*

Some perspective from one who is not a "plaintiff's lawyer" per se

To the editor:

After your e-mail prompted me to read your premiere issue of Plaintiff, I'm delighted I did. I once had a $1.8 million attorney fee award reversed on appeal as being excessive (none of the appellate judges had to put up with either my client, or the defendant), and a sprinkling of contingency fee settlements enhanced the family net worth every few years. However, that hardly qualifies as a "plaintiff's lawyer."

Early on, I became aware that while "plaintiffs' attorneys eat steak, defense lawyers eat every day." Besides, I found the competition far less on the defense side. What evolved was a sound career of civil litigation that funded more than 670 bi-weekly payrolls over the best and worst of times, enabled me to travel the world and perhaps most important of all, to walk my kids to school when they were little.

While not a "plaintiff's lawyer" per se, the mainstay of my practice was insurance defense and this enabled me to work with and against the best and worst of what our nation has to offer as plaintiffs' attorneys. In addition, a fair number of my "insurance company clients" wrote professional errors and omissions coverage. In addition to the usual array of architects, engineers, real estate brokers, medical doctors and accountants, lawyers accounted for a significant share of my case load.

Since the lawyers who seem to get sued the most are those who represent individuals, and tend to be solo or small firm practitioners, I ended up defending a fair number of plaintiffs' attorneys. Over the years, I became the guy to call when one of my colleagues in the plaintiff's bar was looking for a suitable young associate to add to his or her staff. Even judges called for recommendations as to who among the plaintiff's bar would be best for representing their family members.

I was especially heartened to see that you extended to your readership the opportunity to have articles published. Decades ago, there was a NEWB radio show, *California Girls*, moderated by DJ

Don Chamberlain that was breaking all records for popularity. It was the first of the "women only" sex talk shows. As part of the their media empire, the Chamberlain group launched California Girls magazine. As a new young lawyer with more time than clients, money or good sense, I wrote an article that appeared in that publication. I think my total pay was a couple hundred dollars and the promise of a free subscription. However, over the next two decades, I would from time-to-time be contacted by publishers wanting to republish that article. In all, I think I've made about $4,000 - $5,000, which isn't bad for a few hours one Saturday afternoon while home sick with the flu. I hope some of your readers have the insight and foresight to take advantage of the opportunity you've provided them.

The *Lets Talk Marketing* article by Geri Wilson, along with *Surviving the Legal Profession* by Michele Magar is material I hope your readership will take to heart. From defending, hiring, occasionally suing, supervising, consoling, counseling and educating lawyers for all these years, some patterns have emerged that separate those attorneys who succeed from those who end up in my office as defendants or are otherwise burdened with inadequate revenue, community stature, time, or respect to live the good life.

The greatest common denominator is that, as a class, lawyers are woefully lacking in business acumen. In fact, a lawyer that understands business is such a rare oddity as to be a newsworthy event. This is evidenced by the mere presence of *The Strategic Lawyer* appearing in the July, 2005 issue of the ABA Journal. Arguably, one of the easiest to remedy voids in "applied business practices" is marketing.

As Ms. Wilson touches on, the "business lunch" is not only useful for everything from finding the best place to buy software, to finding clients, financing your cases and locating a physical home for your business; it is, from my perspective, the most overlooked marketing tool in all of business. If handled with the finesse that all business strategy deserves, the business lunch can be a panacea for handling all manner of business concerns. In my situation, I used it strategically. I wanted a business where I picked my clients as opposed to clients picking me. Further, I did not want clients to drop-in the office unannounced. For me, the solution was to use the business lunch as a strategic marketing tool for securing clients headquartered in distant places. Once I secured the clientele, the business lunch was a great source of being fed the knowledge I needed to stay ahead of my competition.

Lastly, having read your premiere edition after first reading this month's ABA Journal and California Lawyer, I want to express my appreciation for your willingness to take the risk and time to address that segment of practicing attorneys who, for the most part, are only an afterthought in those publications.

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