A Question and Answer with JAMS Arbitrator

Hon. Jackson Lucky (Ret.)

We are so happy to have a question and answer with the Honorable Jackson Lucky, Ret. of JAMS. Judge Lucky joined JAMS in 2021 after 13 years as a judge with the Riverside County Superior Court. He presided over thousands of family law and unlimited civil cases and served as the supervising judge of the family law division for four years, developing multiple ADR programs, one of which settled 90% of its cases annually. In his civil assignment, he was a member of the court's ADR Committee, helping to develop and participate in various settlement programs, and settled hundreds of family and civil cases.

Judge Lucky has been recognized for his distinguished service and leadership, receiving the Outstanding Jurist Award from the Leo A. Deegan Inn of Court, Judicial Officer of the Year by the Riverside County Barristers, and the Family Law Legacy Award by the Riverside and San Bernardino bar associations. As the first Korean-American and first AAPI judge in Riverside County, he earned the Trailblazer Award from the Asian Pacific American Lawyers of the Inland Empire. Lawyers have described him as meticulous, well-reasoned, courteous, and approachable. Judge Lucky brings a passion for the law, exhaustive preparation, and persistence to his mediation and arbitration practice at JAMS.

OCTLA: What are the differences between a court bench trial and arbitration?

Judge Lucky: There are several key differences. First and foremost, in arbitration, you can pick your neutral. This means you have some control over who will make the decision, which can be reassuring compared to the often random assignment of judges in court. You can choose a subject matter expert if your case involves a specialized area like intellectual property or medical malpractice.

Second, arbitration allows for flexibility in procedural and substantive rules. The arbitration agreement sets the baseline, but parties can agree to different rules that best fit their case. For example, parties might choose to use federal procedural rules but state evidence codes, tailoring the process to their needs.

Third, arbitrators can devote more focused attention to your case. Unlike judges, who manage a heavy docket and multiple cases simultaneously, arbitrators can control their schedules and focus solely on your case. This undivided attention can lead to a more thorough and considered decision-making process. In court, a heavy law and motion calendar, such as having to hear three motions for summary judgment on the same day as critical testimony, can impact the judge's focus on your case. In arbitration, there are no such distractions.

Another significant difference is the level of formality and flexibility in arbitration compared to court trials. Arbitration tends to be less formal, which can make the process more efficient and less intimidating for the parties involved. For instance, the rules of evidence in arbitration are often more relaxed, allowing for a broader range of information to be considered. This can be particularly beneficial in complex cases where strict adherence to evidentiary rules might exclude relevant information.

Additionally, arbitration proceedings are typically private, which can be an important consideration for parties who value confidentiality. In contrast, court trials are public, which means that sensitive information may become part of the public record. This privacy can be particularly advantageous in business disputes or cases involving proprietary information.

OCTLA: How should lawyers present in arbitration? Do you prefer trial-like presentations or more matter-of-fact approaches?

Judge Lucky: I appreciate good advocacy and don't mind some emotion. What tends to be less effective with arbitrators is an appeal purely to emotion. For example, if it's an arbitration involving real injury, it's totally appropriate to use some colorful language to convey the severity and impact. However, in cases involving purely economic damages, such as lemon law cases, it's usually better to be more matter-of-fact unless the situation involves a life-changing experience for the client. Hyperbolic language in these scenarios is less effective.

On the other hand, in workplace harassment cases that involve severe emotional distress or actual assault, using more jury trial-like language to discuss general damages and emotional trauma is appropriate and can be very effective. The key is to match the tone and style of your presentation to the nature of the case and the type of damages being sought. For instance, in cases of significant personal injury or severe emotional distress, it's important to highlight the human element and the real impact on the client's life. This can involve using more emotional and impactful language to convey the gravity of the situation to the arbitrator. However, in cases that are more about financial losses or economic damages, a more straightforward and fact-based approach is typically more effective. This doesn't mean you should completely strip your presentation of any emotional appeal, but it should be balanced and appropriate to the context of the case.

OCTLA: Do you prefer the parties waive opening statements or give them?

Judge Lucky: I always permit opening statements. My philosophy is that you know your case better than I do, so I'm not going to tell you how to try it. However, if you're seeking attorney fees afterwards and you've spent an extensive amount of time on an opening statement in a straightforward factual case, that will be taken into account.

Opening statements are helpful in cases where there are many factual intricacies and disputed facts because they help provide a framework. However, if I have a comprehensive trial brief, an opening statement might not be necessary. I've seen situations where, despite having a comprehensive trial brief and straightforward facts, someone still gives a 45-minute opening statement, which is probably not the most effective use of time.

For example, in a case with many layers of complexity, multiple parties, and numerous disputed issues, an opening statement can be very valuable. It sets the stage and provides a roadmap for the arbitrator, helping them to understand the key points and the overall narrative of the case. On the other hand, in simpler cases where the facts are clear and not heavily contested, a lengthy opening statement might be redundant and could be seen as inefficient use of time. In such cases, a concise and focused opening can be more effective. It's all about tailoring your approach to the specifics of the case and considering how best to assist the arbitrator in understanding and resolving the issues at hand.

OCTLA: In cases where attorney fees are available, like employment actions or lemon law cases, does a long opening statement or over-trying a case impact your award of attorney fees?

Judge Lucky: Absolutely. In some cases, attorneys have recovered nearly all the damages and penalties they sought, but I've cut attorney fees significantly due to unreasonable billing. For instance, in a three-day arbitration, an attorney billed 40 hours for drafting a closing argument, which is excessive. I've also seen cases where defendants conceded liability before the hearing, yet the attorney still spent significant time and resources presenting evidence on liability.

Once liability is conceded, continuing to present on that issue affects my view of the reasonableness

of your fees. It's not going to color the merits of the case but will certainly impact how I scrutinize attorney fees. If an attorney continues to argue liability when it's already been conceded, it not only wastes time but also resources, leading to higher costs which are ultimately passed on to the client. This kind of over-trying a case can also give the impression that the attorney is more interested in billing hours than in efficiently resolving the dispute. It's important to focus on the remaining contested issues and to present your case in a way that is both efficient and effective.

OCTLA: Is arguing liability in arbitration, when liability has been admitted, a good strategy?

Judge Lucky: It's not effective and could lead to reduced attorney fees. Focusing on issues that have already been conceded is irrelevant and will cause me to scrutinize attorney fees more carefully. The inclusion of irrelevant evidence is considered per se error under Fuentes versus Tucker, and presenting on conceded issues falls into that category.

In arbitration, it's crucial to focus on what remains contested and to streamline your arguments accordingly. Once liability is admitted, the focus should shift to the remaining issues, such as the extent of damages or the appropriate remedy. Continuing to argue a conceded point can not only frustrate the arbitrator but also undermine your credibility and efficiency in presenting your case. This approach can lead to a more favorable view of your overall handling of the case and may positively impact the award of attorney fees.

OCTLA: What are your thoughts on motions in limine?

Judge Lucky: It depends on the arbitration rules and the specifics of the case. Writing an extensive motion in limine on nuanced evidence law might not be valuable in cases where evidentiary rules don't apply. However, if arbitration rules explicitly incorporate rules of evidence, such as the Federal Rules of Evidence (FRE) or California Evidence Code (CEC), motions in limine can be useful.

They help highlight unreliable evidence, and even if I don't exclude it, it may affect the weight I give it. Motions in limine that broadly seek to exclude all hearsay, for example, are a waste of time. Specificity is key for these motions to be effective. For instance, a well-crafted motion in limine that targets specific pieces of evidence and provides clear grounds for their exclusion can be very effective. It helps to focus the arbitration on the most relevant and reliable evidence, which can streamline the process and improve the clarity and quality of the hearing.

On the other hand, overly broad or general motions that do not specify the evidence to be excluded or the reasons for exclusion are less helpful. They can be seen as a tactic to delay or complicate the proceedings rather than to genuinely improve the quality of the evidence being presented. The key is to be precise and focused in your motions, targeting specific issues that are likely to impact the outcome of the case.

OCTLA: Do you prefer closing briefs or closing arguments?

Judge Lucky: It really depends on the complexity of the case. For commercial arbitrations with many contractual provisions, counterclaims, and various theories of breach, a closing brief helps organize everything and ensures nothing is omitted. It helps me understand how the different causes of action and defenses relate to each other, aiding in the writing of a comprehensive award.

In straightforward cases, an oral closing argument may suffice, but when writing the award, I often regret not having a written closing argument. So, while I don't prefer reading closing arguments, they are valuable in avoiding mistakes in complex cases. In more straightforward cases, oral closing arguments can be effective, especially if they are well-organized and concise. They provide an opportunity to emphasize key points and to directly address any questions or concerns the arbitrator may have.

However, in more complex cases, written closing briefs are often essential. They provide a comprehensive and detailed analysis of the evidence and arguments, which can be invaluable when the arbitrator is writing the final award. They help to ensure that all the important points are covered and that the arbitrator has a clear and complete understanding of your case.

OCTLA: Do you prefer having a court reporter present?

Judge Lucky: Yes, I prefer having a reporter for accuracy and fact-checking. Without a reporter, hearings go faster, but it can be challenging to retain details and ensure accuracy. Having a single source of truth is beneficial for all parties involved. However, not having a reporter means hearings can proceed faster because attorneys tend to speak more quickly, but the arbitrator's retention might be lower.

Personally, I slow down when notes need to be taken to ensure clarity and accuracy. The presence of a court reporter ensures that there is an accurate and complete record of the proceedings, which can be crucial for resolving any disputes about what was said or presented

during the hearing. It also provides a reliable reference for the arbitrator when writing the final award.

On the other hand, the absence of a court reporter can speed up the proceedings, as there is less need to pause for note-taking and other administrative tasks. However, this can also increase the risk of misunderstandings or inaccuracies, as the arbitrator must rely solely on their notes and memory.

OCTLA: Any advice for attorneys in arbitration?

Judge Lucky: First, don't withhold discovery. Under JAMS rules, failing to disclose can lead to exclusion of evidence. This is a stark contrast to the CCP, where an evidentiary sanction requires a prior order to disclose. I vigorously enforce this rule, so turn over all necessary information. Transparency and cooperation in discovery are crucial in arbitration, as they help to build trust and ensure that the process runs smoothly.

Second, favor informality and resolve issues through meeting and conferring to avoid motion work. I don't do a lot of motion work because I prefer to resolve issues informally. This approach makes the process less stressful and more efficient for everyone involved, especially your clients. Meeting and conferring to resolve issues before they escalate into formal motions can save time and resources, and it often leads to more satisfactory outcomes for both parties.

Additionally, it's important to be flexible and open to compromise during these informal negotiations. Arbitration is designed to be a more efficient and less adversarial process than traditional litigation, so taking a collaborative approach can be highly beneficial. By working together to resolve disputes, parties can often find creative solutions that might not be available in a more rigid court setting.

Finally, understand your arbitrator's preferences. Research arbitrators through lists and feedback, and tailor your approach based on their style. Ask questions about procedures and give feedback on what might work best for your case. This ensures a smoother and more effective arbitration process. Each arbitrator has their own preferences and style, so taking the time to understand these nuances can help you to present your case in the most effective way possible.

For example, some arbitrators may prefer detailed written submissions, while others might value concise oral arguments. Understanding these preferences and adjusting your strategy accordingly can make a significant difference in the outcome of your case. It also helps to build a positive relationship with the arbitrator, which can lead to a more favorable and efficient resolution of the dispute.

OCTLA: Any final thoughts?

Judge Lucky: Know your arbitrator. Research them, ask questions, and adjust your strategy based on their preferences. This makes for a less stressful and more effective arbitration process. Tailoring your approach to the arbitrator's style can significantly impact the outcome and overall experience.

Additionally, it's important to be well-prepared and organized. Arbitration is often a faster process than traditional litigation, so being able to present your case clearly and efficiently is crucial. This includes having all your evidence and arguments well-organized and ready to present in a concise and compelling manner.

Another key aspect is to be mindful of the costs and time involved in arbitration. While arbitration is generally more cost-effective and quicker than litigation, it's still important to manage your time and resources effectively. This means being strategic about how you present your case, focusing on the most important issues, and avoiding unnecessary delays or expenses.

Finally, always keep your client's best interests at heart. Arbitration, like any legal process, is ultimately about achieving the best possible outcome for your client. This means not only winning the case but also doing so in a way that is efficient, cost-effective, and satisfactory to your client. By focusing on these goals and being flexible and adaptive in your approach, you can help to ensure a successful arbitration process.