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COURAGE: An Arbitrator's Thoughts on Making Decisions

"What Makes A Hottentot So Hot? What Puts The 'Ape' in 'Apricot?'"—The Cowardly Lion

By Stuart M. Widman


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It is very heavy, but it cannot be weighed. It is very large, but cannot be measured. It is very big, but cannot be seen.

It is the responsibility weighing upon every competent arbitrator to make the right decision. It exists in all cases, but especially where there is a lot at stake and where skillful advocacy of complicated facts and law make the decisions difficult.

Complex issues command tough calls. In turn, tough calls require the commitment to do the right thing, including investing all necessary effort and thought. It requires courage.

Parties and lawyers want their judges to have it. It gives the litigants the best decisions, even if disappointing. It gets them prompt decisions, even if too soon for bad news. It brings an end to uncertainty and unfortunate expenditures of resources, even if they wish the results were different.

For over 23 years, I have been a "judge"—not a federal or state court judge, but a private judge. Certainly, I do not equate myself with real judges who handle hundreds of cases annually. But I have been entrusted as an arbitrator with claims totaling more than $1.3 billion. Those disputes have been in a vast array of industries (telecommunications, pharmaceuticals, real estate, environmental, construction, securities, employment); they have asserted many types of claims (breach of contract, license infringement, theft of trade secrets, discrimination, class action, etc.); and they have sought varying relief (damages, injunction, specific performance, class certification, declaratory relief, attorney's fees, etc.). Much is at stake for the parties, corporate or individual. The lawyers, usually from the finest law firms, make cogent and compelling arguments. They are expecting, and deserve, complete dedication.

Being a "judge" is much different than being a commercial litigator, which I have been for more than 33 years. Litigators (and their clients) make strategic decisions based on the facts and law that is best for their side. Of course, that requires appreciation and insight of the opponent's case, as well as instinct about how to best pitch the presentation to the audience (judge or jury). But the lens, driven by zeal and positional gravity, is still primarily one-sided.

Still, litigating is easier work compared to the task of deciding the issues and claims as the "judge." Judging cannot be monocular. Judges must see wider-horizons—often, even beyond what the parties have presented. Thoughtful decision-making requires a deep and balanced understanding of both points of view, giving each side the proper weight it deserves. It requires a shift of vision; an ongoing, internal point/counterpoint; a repeated self-directed question: "Is that right?" As the "audience," I feel that expanded weight.

The change from litigator to "judge" presents both freedoms and challenges. Judges are freed from the what's-best-for-the-client approach. Or rather, the client changes. It is no longer a party; it is the entire dispute itself, the system and principles of justice, the muse of correct thinking. The challenge is to serve the new client.

In one important respect, the weight upon an arbitrator is even heavier than that upon a civil court judge. In litigation, parties can request reconsideration or even appeal, asking new eyes to review the initial decision. However, the avenues of reconsideration or "appeal" (vacatur) of an arbitration award are much narrower. Final merits decisions in arbitration can rarely be reviewed by either the arbitrator or courts. There generally is no backstop to a wrong arbitration award. It is the parties' only chance. The one call must be the right call.

Some decisions need to be made on the spot, even reflexively, such as evidentiary rulings at the hearing. Others—such as merits decisions—permit contemplation and deliberation. Some are made as part of a panel, where I am most often the chair, and thus the weight increases even more.

Many have been very challenging. For example, finding that not all class certification criteria were satisfied in the employment discrimination case hurt the plaintiff and his counsel, but their disappointment was not my concern. Concluding that the cutting-edge biotechnology development agreement had not been breached—and thus there was no forfeiture—meant that the two fighting companies had to continue working together, but divorce was not the answer. Holding that both parties—not just one side—breached a partnership agreement to manufacture food products meant that neither side got a big victory, but the evidence and law required that. Determining that I did not even have authority under the parties' arbitration agreement to resolve the claims of breach of multiple international contracts meant that the parties had to go back to court, but I could not justly expand my jurisdiction. Terminating a potentially lucrative telecommunications venture may have meant the end of claimant's business, but it was not my job to ensure its survival. Issuing a dissenting opinion to the majority's decision in the indemnity case was necessary because the other panel members took a shortcut to injustice. There were many others. I have explained them all in detailed orders or awards, because parties and counsel are entitled to full explanations of the reasons behind every decision.

Making the tough calls on complex issues and in close cases takes courage. All judges, public or private, need it to properly do the job entrusted to them. It arises from a combination of preparation, experience, knowledge, commitment and confidence. It cannot, in my view, be taught. The commitment to be courageous comes from within, and it must exist for each case from its beginning through award. There is no time for letdown, as important decisions, even on seeming lesser matters such as motions, scheduling, and rules interpretations, are required throughout a case. This commitment and intensity can be tiring, just as the pursuit of artistic perfection can be. But in both instances, the satisfaction of viewing the finished product, and knowing that justice has been served, is always worth the work.

Judicial courage is the intangible grease that keeps the wheels of justice turning smoothly with predictability and fairness. Without it, precedent becomes unreliable. Indeed, without it, bad law is made, losers become winners, and winners losers.

But the biggest loser is the system of justice. The absence of courage leads to criticism and a lack of confidence in the nation's dispute resolution systems.

King Solomon did not help the law or arbitrators. He may have wisely used psychology to find the true parental ties, but the myth unfortunately accultured a non-courageous way to decide a dispute where there should be a clear winner. Unless the merits truly compel it, a decision that "splits the baby," and thus hurts no party too much, still hurts one side disproportionately, and it offends the commitment to courage. Courage does not mean hard-hearted; courage means objective and authoritative.

The challenge, then, is to mix, match and weave the parties' arguments into a tapestry that reveals the true picture and, thereby, the correct answers. This melding and puzzle-solving is a discipline honed and developed over years, akin to surgical skills.

It is courage that drives this internal process. Courage presses a judge or arbitrator on to reach that sweet spot. Courage relentlessly holds up a mirror to an initial conclusion, forcing reevaluation and intellectual honesty. Verify the facts again; check the case holdings and discussion again to fully understand the nuances. Courage does not let go until the tough calls are made, as correctly as possible, only to move on to the next ones.

At that moment of resolution, there is a clarity—the judicial "aha!" moment. Not that all calls are free from all doubt. Tough and close calls can sometimes haunt. It is hard to not look back. Nonetheless, there is a sense of balance and alignment.

Courage is the "right stuff." It is the immutable key to skilled judging. I have ever more respect for our hard-working jurists who model this courage. ■

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