



# The State of ADR

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# Trial The Ideal

# Protect the Jury Trial

- Hundreds of Years of History
- Mentioned Five Times in Constitution
- Pure Democracy
- Symbol of Civilization

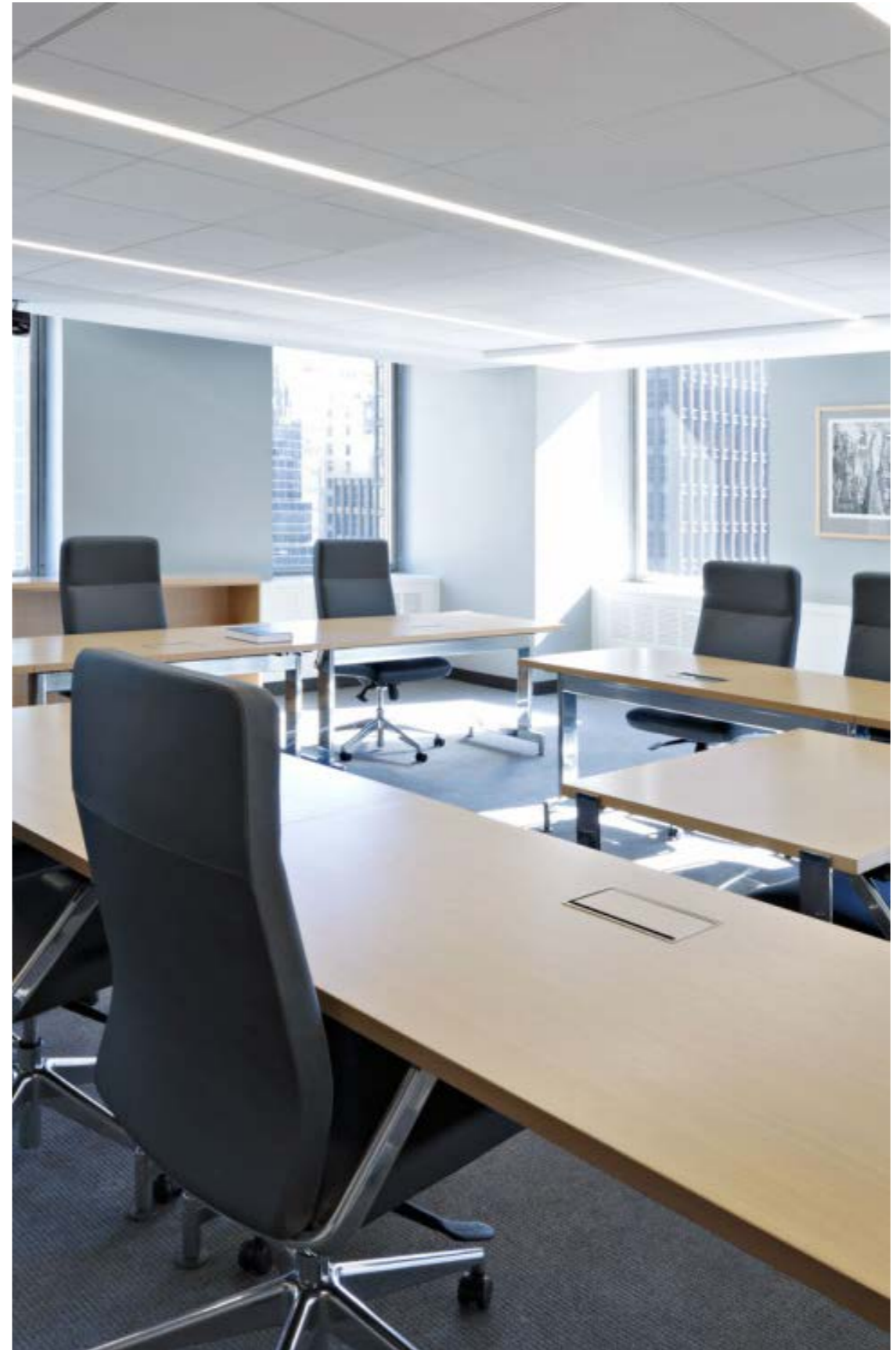


# Arbitration

1992 Employee Win  
Rate with AAA

**78%**

Mark D. Gough  
35 Berkeley J. Emp. & Lab. L. 91  
(2014)



# Two Factors in 1992

- Predates Due Process Protocols (1995)
- Higher percentage of manager and executive claims

# Arbitration

Alexander Colvin, Cornell University, 2011

	Employment Arbitration	Federal Court Employment Discrimination	State Court Non-Civil Rights
Employee Win Rate	<b>21.4%</b>	<b>36.4%</b>	<b>57%</b>
Mean Damages	<b>\$109,858</b>	<b>\$336,291</b>	<b>\$467,301</b>
Mean including zeros	<b>\$23,548</b>	<b>\$143,497</b>	<b>\$328,008</b>

# Arbitration

Economic Policy Institute

Alexander Colvin, Cornell University 2018

- 53.9 percent of nonunion private-sector have mandatory arbitration procedures. (67.9 percent in Texas).
- Of the employers who require mandatory arbitration, 30.1 percent include class action waivers.
- Mandatory arbitration is more common in low-wage workplaces and in industries disproportionately composed of women workers and African American workers.

# FAA § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any **maritime** transaction or a contract evidencing a transaction involving **commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.



# FAA § 1. “Maritime transactions” and “commerce” defined; exceptions to operation of title.

“**Maritime transactions**”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction;

“**commerce**”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

# Two Best Defenses to a Motion to Compel Arbitration

- Contract Formation
- Waiver

# Contract Formation

- No presumption favoring arbitration. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).
- Movant has burden of proof. *Id.* at 228.
- Must meet all elements of a contract: offer, acceptance, meeting of minds, consent, execution and delivery. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (2018).

# Waiver

Substantially invoking the judicial process to the other party's detriment or prejudice.

*Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008)

## Factors

- Movant knew of arbitration clause
- How much discovery has been conducted
- Who initiated it
- Whether it was related to the merits rather than arbitration or standing
- How much of it would be useful in arbitration
- Whether movant sought judgment on the merits.

# Arbitration Trial Tips

## **Judges are Humans, Too**

- Start and end with jury charge
- Do not waive opening.
- Do not waive closing.
- Keep the facts simple.

# Mediation Suggestions

- Demand monetary and signature authority.
- Negotiate proposed written agreement in advance.
- Do not waive opening.
- Do not leave without final agreement.

# The Other ADR

## Trial

- Plaintiff presents case first and last.
- Plaintiff cross-examines after testimony.
- Plaintiff may subpoena rebuttal witnesses.
- Demeanor of witness matters.
- Fact finder can give zero weight (especially if interested).

## MSJ

- Defendant (movant) presents first and last.
- Plaintiff may guess at cross in a prior deposition.
- No subpoena after discovery deadline.
- Demeanor does not matter.
- Judge considers even if witness has interest at stake.

“A bad system will beat a good person every time.”

– *W. Edwards Deming*



“I’ll let you write the substance. . .you  
let me write the procedure, and I’ll  
screw you every time.”

– *Rep. John Dingell*



# Protect Trials