Television Mirrors Reality:
MockArb Gains Traction as Arbitration Claims Expand

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On "Bull," CBS television's successful new weekly series, the fictitious Dr. Jason Bull is founder of a trial consulting firm that employs psychology, human intuition and high-tech data to understand jurors, lawyers, witnesses and defendants, and to construct effective narratives designed to help their clients win verdicts.

Although much of the courtroom drama and tactics showcased on "Bull" rely heavily on artistic license rather than realistic litigation strategy, the TV series' underlying premise does mirror one current reality: that the art and science of what influences and shapes human opinion is gaining application and respect within the legal profession. In fact, some of the television show's analytic methods are already being practiced, notably in commercial arbitration cases.

In the securities industry, for example, the increased market participation of institutional investors and high net worth individuals over the past decade has inflated both the average size and dollar value of transactions across all asset classes. Correspondingly, the economic stakes in legal filings for a broad range of infractions against broker-dealers and their investment advisors —frequently involving multi-million dollar claims— have fueled demand for a more strategic and thorough preparation for those arbitration proceedings, most of which are settled under the supervision of the Financial Industry Regulatory Authority (FINRA.)

Three years ago, in response to the growing number of FINRA arbitration claims in excess of $10 million, Capital Forensics developed a process to closely replicate arbitration (called "MockArb") designed to help the accused parties—primarily large financial institutions—to gain deeper and more reliable insights into how FINRA-approved arbitrators might view and respond to a particular matter, and how the respondents might apply those insights to their arbitration strategy.

How MockArb Works

MockArb is similar in theory to the use of mock trials for litigation preparation and negotiations; but unlike most mock trials or moot court tactics, MockArb can leverage detailed public records that contain meaningful information, including past decisions, of arbitrators who have participated in thousands of FINRA arbitrations. This information greatly enhances the ability to identify individuals for the mock proceedings who are similar, in important ways, to the actual arbitrators who are chosen for the case by FINRA.

The key component in MockArb, akin to Dr. Bull's jury replication system, involves the careful selection, engagement and evaluation of arbitrators who agree to participate in a process that's designed to test arguments, witnesses, evidence and responses in a controlled environment that very closely replicates the actual arbitration. Here's a rough summary of how a typical MockArb process works:

- *Strategy Development*— Diligent preparation in advance of the actual MockArb event —both in terms of ensuring confidentiality and assembling all of the relevant information and individuals—is absolutely essential, to increase the likelihood that the process will yield opinions and insights the respondent can apply to prepare their defense. Depending on the complexity of the case and the financial stakes, advanced preparation for a MockArb can range anywhere from 2 weeks to 2 months.

- *Arbitrator Selection* – A detailed analysis is conducted, covering every aspect of the actual arbitrators who have been assigned by FINRA to the arbitration panel. Using individual profiles – reflecting their professional experience, educational background, age, geographic location, and track record as an arbitrator – an extensive search and selection process is applied, with the goal of engaging a MockArb panel that will replicate, as closely as possible, the assigned arbitration panel. Care is taken to ensure that no conflicts of interest exist, and confidentiality agreements are required. In some situations, where the financial stakes are extremely high, two separate MockArb panels can be engaged.

- *MockArb Process* – There are several moving parts involved in the MockArb process, which depending on the matter's complexity and risks, can range from a single day to 2-3 days in duration. The physical setting for the process requires 2 large, physically and visually separated conference rooms (with audio / visual connection between the rooms), located in a facility that has no direct affiliation with the parties involved or with their outside counsel; typically, at the offices of another law firm associated with those attorneys who have agreed to role-play the parts of the plaintiff or respondent.

In advance of the actual MockArb, the members of the arbitration replication panel are sent redacted versions of the pleadings to review. Their initial task is to individually respond to a detailed written questionnaire designed to identify their initial impressions or conclusions, to screen for any factors that may influence their opinions, and to seek suggestions regarding evidence that the claimant or respondent will need in order to prevail.

Similar detailed questionnaires are used for all other key components of the MockArb process, and the replication panel members provide individual responses, without any discussion. For example, following the claimant and respondent opening and closing statements, each mock arbitrator is asked several questions, ranging from their propensity to decide in favor of either party, to most and least important facts that were presented, to questions that were raised by the statements, and even to the effectiveness of any PowerPoint presentations or exhibits that were used.

Additionally, following the presentation of each (actual or portrayed) witness for the claimant and respondent, panel members respond to questionnaires that rank and evaluate witness credibility, the quality of their responses and the overall impact of their testimony. Their comments regarding witnesses can cover style as well as substance, suggesting factors that might influence an arbitrator's opinion, even as detailed as advising that the witness not chew gum when testifying. The mock panel also assesses the questions presented by legal counsel for both claimant and respondent, and identifies additional questions that should have been asked by counsel.

Following their individual written responses to the closing arguments, the mock panel then deliberates openly for the first time. During those deliberations, and over the course of all prior stages of the MockArb, the respondent and legal counsel are able to discretely view the panel proceedings, via internal audio / video connection, from the privacy of the second conference room. During the open deliberation stage, the MockArb sponsors may also indirectly pose questions to the mock panel members, through private audio communication with a third-party moderator.

The key to the success of MockArb is its close adherence to the traditional scientific method: at every stage of the evaluation process – whenever a new witness or piece of evidence is introduced – the impact of that information or impression on the mock panel members is carefully evaluated before the process proceeds. The decision-making process is literally put under a microscope.

- *Evaluation / Application* – The detailed written responses from the mock panel questionnaires, combined with the video of the entire MockArb process can provide the arbitration respondent with a vast amount of qualitative and quantitative information on which to refine or entirely restructure its strategy for an actual proceeding. Or the insights might prompt the respondent to explore settlement options. Although this diligent level of planning provides no guarantee

that the MockArb will mirror real-time adjudication, it helps to address both opportunities and shortcomings that can increase the chances of a successful or "best-case" outcome.

MockArb: Not a Standard Practice

Perhaps the most enduring benefits of MockArb for legal counsel, beyond the specific case strategy involved, involve the direct insights that the process can provide into the human factors – individual personalities, established opinions and biases – that always influence the decision-making process. Very often, legal counsel are focused on the law and court procedures, and can sometimes underestimate or miss the intangible factors that will trigger an opinion or decision by an arbitrator, a jury or a judge. For lawyers, MockArb can help reinforce the inconsistencies of the human mind.

MockArb and other types of disciplined approaches to measuring and planning for human response to testimony and evidence will likely continue to grow, regardless of whether or not it's a topic that's covered on television. Given the rising costs related to litigation and formal arbitration, however, the more meaningful trend for most legal counsel may involve development of capabilities that facilitate resolution of conflicts well in advance of considering MockArb, or any other strategic planning tactic of last resort.

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