

# **MEDIATION & ARBITRATION**

## **Business Assets or Traps?**

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# A RISK MANAGEMENT OVERVIEW

Let's look at the factors to consider...



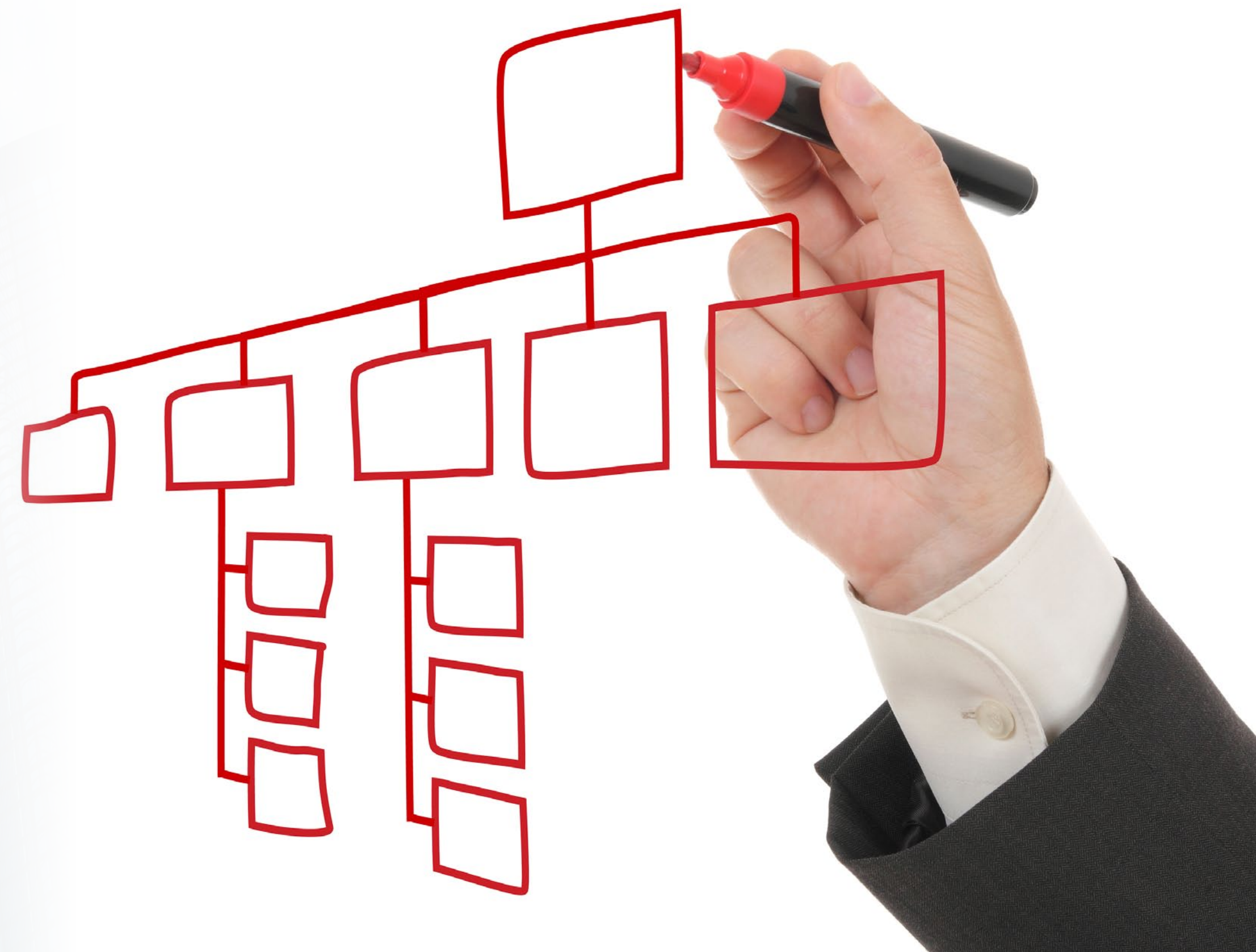
# **RISK MANAGEMENT CONSIDERATIONS**




- ▶ **Fact Assessment**
- ▶ **Logistic Assessment**
- ▶ **Performance Assessment**
- ▶ **Projection Assessment**
- ▶ **Financial Assessment**

# **MOST PROBLEMATIC INDUSTRIES**

- **Healthcare**
- **Financial Services**
- **Defense**
- **Publicly Traded Companies**





# **LITIGATE OR ARBITRATE?**

**The path forward**

# **RISK MANAGEMENT CONSIDERATIONS**

- ▶ **Diversification of Decision-Makers**
- ▶ **Trust - Skepticism - Hostility**
- ▶ **Privacy of Proceedings/Data**
- ▶ **Finality, and its Ramifications**



# NATIONAL SNAPSHOT

**EEOC Fiscal Year 2018**

**554,000+**  
inquiries about claims

**40,000+**  
intake interviews  
(some multi-claimant)

**67,860**  
claimants received  
“benefits” from  
claim resolution

**\$354 million** via mediation/settlement  
**\$ 53.5 million** via litigation

# OVERVIEW OF CLAIMS

- ▶ **51.6%**    **Retaliation**
- ▶ **32.3%**    **Gender**
- ▶ **32.2%**    **Disability**
- ▶ **32.2%**    **Race**
- ▶ **22.1%**    **Age**





# **SOME STATISTICS FROM THE AMERICAN ARBITRATION ASSOCIATION:**

Median arbitrator compensation,  
national figure, single  
arbitrator case

**\$31,866**

Days from filing  
to award, single  
arbitrator case

**497**

Discovery disputes  
occurred in

**75%**  
of cases.

Discovery scope was  
“rarely directly  
addressed”  
in the parties’  
contract.

**61%**

of cases had all discovery  
concluded by six months after  
initiation of the arbitration.

Healthcare and  
technology were  
given the highest  
marks when it came  
to efficiency and cost-  
effectiveness.

# AMERICAN BOARD OF TRIAL ADVOCATES

## MEMBER SURVEY - TRUST + CONFIDENCE

**76%**  
(nationally)

Reported **“somewhat or extremely high”** confidence in the state civil court system (75% for the federal civil court system).

**35%**  
(nationally)

Stated their confidence in the state civil court system had **decreased over the last five years.**

**74%**  
(nationally)

**“Agreed or strongly agreed”** that they believed state court judges sometimes consider things beyond the evidence and the law when making decisions.

**62%**  
(nationally)

**“Agreed or strongly agreed”** that they believed **prior ongoing relationships between and attorney and a judge** play a role in the case outcome.

**THAT CLEAR PATH FORWARD, BASED ON SOUND ANALYSIS,  
JUST GOT DERAILED!**

**California AB 51, signed October 1, 2019  
Effective January 1, 2020**

- Bars employers from requiring applicants and employees to arbitrate state-law discrimination, harassment, retaliation, and labor code claims, including wage and hour violations.
- Opting out of a waiver, or similar action, in order to preserve rights is deemed a condition of employment.
- Does not apply to FINRA, and similar federal matters.
- Does not apply to post-dispute settlement agreements or negotiated severance agreements.
- Applies to contracts of employment entered into, modified, or extended on or after January 1, 2020.

# THE MEDIATION PROCESS



- **Convening**
- **Preparing**
- **Participating**
- **Concluding**
- **The Importance of BATNA**

# WHAT THE PARTIES WANT FROM A **MEDIATION:**



**FULL, COMPLETE,  
FAIR, RESPECTFUL  
CLOSURE**

**BEST WISHES  
FOR A GREAT  
2020**

**THANK YOU.**

