A BRIEF OVERVIEW OF THE USE OF EVIDENCE IN ARBITRATION

BY WILLIAM C. TURNER, ESQ.

In conducting arbitration, strict adherence to the rules of evidence is not only unnecessary, but may have an adverse impact on the effective and speedy resolution of the arbitration, particularly where the rules are used to obstruct and/or obfuscate the facts.

Arbitrators should seek to manage the application of evidence consistent with the purposes of arbitration and the expectations of the parties, rather than to allow the process to become managed by counsel or by the strict dictates of evidence and procedure. The knowledge and management of evidence and procedure by the arbitrator are essential to keeping the arbitration on track with the admission of the evidence that is materially relevant while excluding the evidence that it will be unnecessary for the arbitrator to consider. It is further imperative that the arbitrator and counsel confer and understand the basis for the use of evidence and the contractual rules that apply in their use prior to the initiation of the arbitration.

In formulating the use of evidence in arbitration, it might be helpful to consider a brief historical overview of arbitration's evolution and the development of the rules regarding the use of evidence in the same.

A reference in the Bible to the famous Judgment of Solomon is often referred to as one of the earliest uses of arbitration. As found in the biblical text, two "harlots" had given birth to newborns. When one woman's baby died in the night, she placed the dead baby on the other's bed and claimed the surviving baby as her own. In the morning, the other woman, recognizing the living baby as her own, implored the king for justice. King Solomon offered to split the baby in half and to award each woman one of those halves.

The woman whose baby had died agreed to this "compromise," (out of, the Bible says, jealousy and resentment) but the real mother, rather than have her baby die, offered to give the child up. Solomon awarded her the child, reasoning that the true mother would give her baby up rather than let her baby die. (King James Bible, 1 Kings 3:16-28.) This arbitration clearly identifies the hallmarks of arbitration: flexibility, fairness and an expeditious outcome, with the experience and wisdom of the king as arbitrator, utilized to apply principles of equity and law, to resolve the case.

Arbitration as an alternative method of resolving commercial disputes was recorded in the ancient Greek literature as a method of facilitating merchant trade in the Grecian city states (Magna Graecia). The word "arbitration" is derived from Roman practice and from the Latin word arbitrari, which means to examine or judge. Roman practice provided a method by which a private judge (judex) or a panel of arbitrators (arbitari) could reach a decision on matters without resorting to the complexities of the Roman legal system. The private judge or arbitrator was free to rely on matters outside the evidence, having great latitude to seek a just solution. The arbitrator was selected by the parties to adjudicate the matter (there were time limits) based on his knowledge of the

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subject matter and, presumably, his reputation for fairness.

During the 11th century, a developing trade among merchants and merchant guilds throughout Western Europe created a series of local and international trading fairs, where merchants would display and sell their goods. There was a need for a system of laws that would be based on the rendering of expeditious decisions, sometimes within hours, to prevent spoilage or other loss of goods. Private merchant courts developed, employing private arbitrators familiar with their practices and commercial traditions. The parties were free to choose what evidence and procedures to rely on or to reject, with the ultimate purpose being to avoid delay and to arrive at a fair but speedy decision without resorting to the formal laws or evidence of one or more European or English courts. The merchant court systems became, in part, the foundation of arbitration practice in English law and the later codification of the same in England and the United States (1925). Historically, arbitration provided a private and binding final method of dispute resolution, based upon the concept that arbitrators, selected by the parties themselves, would serve to quickly decide cases by employing their specialized knowledge of the subject matter. In doing so, the arbitrator was free to go outside the rules of evidence to reach a decision.

In Nevada, there are statutory, non-binding arbitrations in certain cases valued under $50,000. The statutory scheme reflects that arbitration should not be formalized and that the rules of evidence should be relaxed (Nevada Arbitration Rules (NAR) 8(A)). This is consistent with the court's belief, and the legislative intent, that these cases should be expedited and not delayed by applying formal rules of evidence or procedure (NRS 38.250).

Litigants are often also bound by pre-existing arbitration agreements, which may designate the forum and the law to apply. This is particularly true in construction, real estate, business, employment and securities law. Most such private arbitrations are binding, in order to give finality to the proceeding, thereby saving time, costs, legal fees and the possibility of appeal. More complex cases may have three arbitrators who are selected by varying methods, depending upon the agreement of the parties and/or the dictates of an earlier contractual agreement.

While the contractual provisions of an agreement to arbitrate often provide that the laws of Nevada shall apply, this general statement does not necessarily assist the arbitrator in his or her use of evidence in the arbitration. The arbitrator should look to other, more specific provisions of the contract, if they are present, incorporating governing rules such as the Uniform Arbitration Act (NRS 38.206), the Rules of the American Arbitration Association or the Federal Arbitration Act. These rules give broad authority to the arbitrator in both the management of discovery and evidence. They incorporate the expectation that arbitration will be guided by the specialized experience and skills of the arbitrator, rather than by a more formal and rote application of evidentiary law and procedure.

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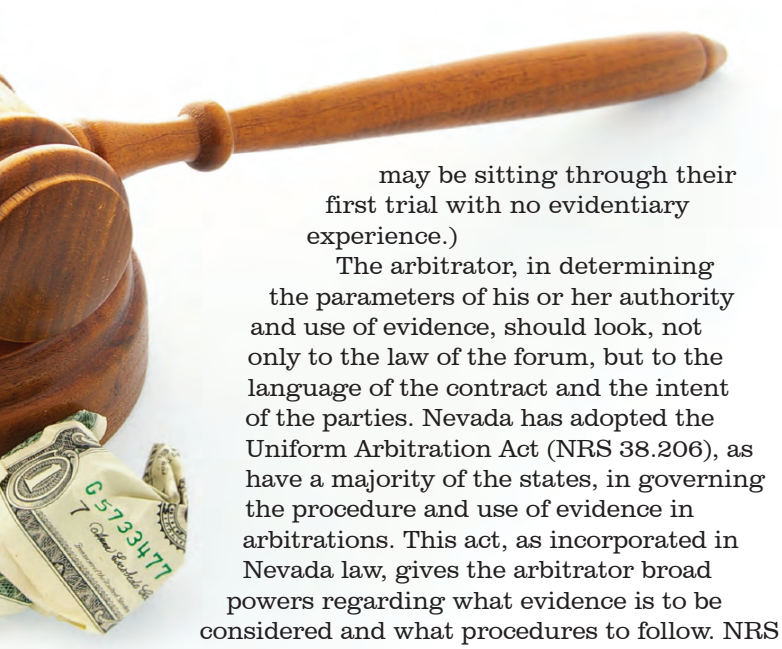
Arbitrators applying the letter of the evidentiary rules, as well as the formalities of procedure, can often create unnecessary delays and further protracted litigation that neither assist the parties nor serve the fundamental purposes of arbitration. After 41 years of litigating and arbitrating cases, I have found that the parties expect that the arbitrator will use the rules of evidence and procedure as tools of effective resolution, but will relax them sufficiently so as to allow the parties to present relevant material testimony to assist the arbitrator in reaching a fair, legal and equitable resolution. Because the arbitrator is both the finder of fact and judge of the law, and has specialized knowledge of the field in which he is arbitrating, he may more easily allow evidence to be admitted (or excluded), giving it the weight it deserves, unlike a jury, which may, in fact, become confused by such evidence and without specialized knowledge be rendered unable to fairly weigh or balance the same. (Arbitrators with many years of trial or other judicial experience can clearly weigh the credibility and admissibility of hearsay testimony better than can a jury, who



may be sitting through their first trial with no evidentiary experience.)

The arbitrator, in determining the parameters of his or her authority and use of evidence, should look, not only to the law of the forum, but to the language of the contract and the intent of the parties. Nevada has adopted the Uniform Arbitration Act (NRS 38.206), as have a majority of the states, in governing the procedure and use of evidence in arbitrations. This act, as incorporated in Nevada law, gives the arbitrator broad powers regarding what evidence is to be considered and what procedures to follow. NRS 38.231(1) states that an arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expedited disposition of the proceeding. The authority conferred upon the arbitrator includes the power to, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

The American Arbitration Association (AAA) has been a major factor in the arbitration of local, national and multinational disputes in Nevada for many years. Construction and commercial contracts in Nevada often have a provision that the parties utilize the AAA's administrative services and apply the American Arbitration Rules in conducting arbitration.

These rules, consistent with the weight and tradition of practice, reflect the philosophy that experienced arbitrators should be given broad latitude in their application of procedure and determination of evidence in a case. Rule 33 of the American Arbitration Rules of Construction gives broad authority to the arbitrator regarding the consideration of evidence. Rule 33 states that "the parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding of the dispute. Conformity to the legal rules of evidence shall not be necessary." Rule 31(a-d) of the AAA's Commercial Arbitration Rules is the same. The rules do recognize that there are rules that should be adhered to, including the applicable principles of privilege (such as confidentiality of client-attorney communication). (R-31c)

In large, complex commercial cases, the AAA rules give very wide latitude to the arbitrator regarding the management and application of

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evidence (L 4 a-e). Rule (L-4 a-b) states that an arbitrator shall take such steps "to avoid delay and to achieve a just, speedy and cost effective resolution of Large Complex Commercial Cases." The arbitrator shall manage the discovery and production of documents so that such production is not overly burdensome or irrelevant, but is consistent with the goal "of achieving a just, speedy and cost effective resolution of Large Commercial Cases." (See also Rule 24 of the American Arbitration Association, involving the resolution of employment disputes).

The Federal Arbitration Act (9 U.S.C. 1-14), by its brevity alone, also gives broad power to the arbitrator to apply and interpret the rules of evidence. Rule 7 gives discretion to the arbitrator to be the sole judge of the materiality of the evidence. Under the Act, decisions of the arbitrator will not be reviewed except for limited purposes. The Supreme Court refused to expand the limited basis for review under the Federal Arbitration Act (10(1-4)), even where the parties had agreed in the contract for such review. Manifest disregard of the law was not, in the court's opinion, an additional basis for review. *Hall Street Associates v. Mattel, Inc.,* 552 U.S. 576 (2008). The Supreme Court gives great deference to the decisions of arbitrators including the right to determine the suitability for arbitration of a specific case. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967)(expanding it to state law as well in *Southland Corp v. Keating,* 465 U.S. 1 (1984)).

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The Nevada Supreme Court also limits the review of an arbitrator's decision, holding that a review of an arbitrator's actions "is far more limited than an appellate court's review of a trial court's actions." *Bohlmann v. Printz and Ash, Inc.,* 120 Nev. 543, 548 (2004). The Nevada Supreme Court has limited review of arbitrator's decisions (outside of fraud or bias) in regard to whether or not they were arbitrary and capricious, outside the scope of his or her authority or in manifest disregard of the law. The court has defined manifest disregard of the law as the intentional act of the arbitrator, with specific knowledge of the law, to disregard that knowledge. Misinterpretation of the law does not qualify. *Clark County Education Association v. Clark County School District,* 122 Nev. 337 (2006).

Courts are reluctant, it would seem, to review arbitrators' decisions because it would change the historical independence of the private arbitration and further burden the courts and appellate courts with additional cases, brought in from outside the judicial system. This is true in Nevada, where the Nevada Supreme Court has an ever-growing caseload and no intermediate appellate court system to assist in their case's resolutions.

An arbitrator, in applying the rules of evidence, should consider the fundamental purposes that have shaped the evidentiary scheme. Most evidentiary rules, both as common law and as statutorily incorporated, have been created for the purpose of preventing the jury or fact-finder from being misled, wrongfully prejudiced or confused and for the prevention of redundancy and unnecessary delay in the trial of the matter. (See NRS 48.035 and FRE Rule 403.) Ultimately, fairness, clarity and consistency are goals that the rules of evidence seek to protect.

The arbitrator should seek to protect these goals. To do so, it is incumbent on the arbitrator to ascertain, at the beginning of the hearing, that counsel and the involved parties understand the arbitration and evidentiary process. While arbitrators certainly may, and should, follow evidentiary rules based on public policy (such as privilege) or those rules

the parties stipulate to, the arbitrators' experience and knowledge of the policies behind the rules of evidence should guide them in their application.

CONCLUSION

The arbitrator should seek to use the evidentiary rules in determining the ultimate facts and truth of the claims presented, rather than to obfuscate, obstruct or delay the proceedings. In applying the rules to the admission of evidence, the arbitrator should seek to find the evidence that will reach the merits and truth of the claims, and defenses to those claims, in a way that will require the parties to be precise in their offers of proof and avoid unnecessary delay while maintaining an open ear to the facts and law presented. As both the fact-finder and law-giver, the arbitrator has accepted broad powers in the consideration, admission of or exclusion of evidence and should use those powers to serve the parties best interests in the speedy but fair resolution of the case. ■

WILLIAM C. TURNER served as a Federal prosecutor in Las Vegas for 12 years, and is a former member of the State Bar of Nevada's Board of Governors as well as former chair of the state bar's ADR Section. He has extensive experience as an arbitrator, mediator, CLE instructor and author of numerous articles on ADR. He may be reached at billtlaw@cox.net.

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