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NO STRICT EVIDENCE RULES IN LABOR AND EMPLOYMENT ARBITRATION

Michael Z. Green†

Since arbitrators are not bound by the strict rules of evidence applicable in court, there originally developed a practice of admitting hearsay 'for what it is worth.' As various texts and many arbitrators have stated, 'Rarely do the parties know what it is worth, at least not at the hearing.' I would add, nor in the preparation of their briefs. As far back as 1967 a prominent group of arbitrators concluded: 'Unless corroborated by truth-tending circumstances in the environment in which it is uttered, it (hearsay) is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and more filtered.' This statement strengthened the underpinnings of the practice of receiving hearsay, but limiting its probative value. It is reflected, e.g., in the following comment on the 'for what it is worth,' if anything, concept: In accepting it, however, the arbitrator is expected to have the expertise and experience to properly evaluate the evidence and to accord it the appropriate weight dependent upon the corroborating circumstances surrounding it.[1]

I. Introduction[2]

The quote at the beginning of this Essay, from an arbitration decision issued by arbitrator Stanley Kravit, highlights the difficulties that advocates in both labor arbitration[3] and employment arbitration[4] ex-

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† Professor of Law and Associate Dean for Faculty Research & Development, Texas Wesleyan University School of Law. I would like to thank the members of the Texas Wesleyan Law Review who coordinated the conference on February 13, 2009, where this Essay was presented, "Alternative Dispute Resolution: Exploring the new standard of diligent settlement advocacy facing today's litigators." Also, I am grateful for the research assistance provided by LaJoi Murray and Keri Ward and the financial assistance provided by the Texas Wesleyan University student research assistant program.

1. Barton Center, 121 Lab. Arb. Rep. (BNA) 249, 253 (2005) (Kravit, Arb.) (citations omitted).

2. Initially, the Author must highlight that while this Essay was in draft form, he became aware of a pending publication that is very helpful in bringing forth some of the issues highlighted herein. The Author commends it to you for reading as it was published shortly before the presentation that resulted in this Essay. Edwin R. Render, *The Rules of Evidence in Labor Arbitration*, 54 Loy. La. L. Rev. 297 (2008).

3. Labor arbitration typically results as a final step in a grievance process for resolving disputes under a collective bargaining agreement between an employer and a union representing the employees of that employer. *See* Russell G. Pearce, *The Union Lawyer's Obligation to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex. L. Rev. 1095, 1100 n.23 (1996). Labor arbitration has been in existence for many years and goes back as far as the early part of last century. Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator's Several Roles*, 44 Md. L. Rev. 873, 873–75 (1985) (discussing the role of labor arbitrators as labor arbitration has evolved since the early 1900s and with further key developments at the time of the Second World War and early 1960s); *see also* Laura J. Cooper et al., ADR in the Workplace 6–15 (2d ed. 2005) (describing the early development of labor arbitration).

perience regarding evidentiary rulings. As an evidence law professor and a labor and employment arbitrator, I have examined the complexity in applying the rules of evidence[5] in an arbitration setting. My experience and research revealed a clear need to identify the appropriate considerations when applying the rules of evidence in arbitration proceedings. Both advocates and arbitrators can benefit from this clarity.

II. Arbitration or Bench Trials: Are Evidence Rules Unnecessary Without A Jury?

Whether an arbitrator applies the rules of evidence usually depends on whether the parties have contractually agreed to do so.[6] Some commentators have already explored the propriety of applying the rules of evidence when there is no jury, as in a bench trial.[7] As a noted commentator on arbitration, Thomas Carbonneau has explained: "The arbitral hearing is not unlike a bench trial in which the absence of a jury alleviates the need for elaborate rule frameworks through

4. Employment arbitration typically results as an agreement between an employer and an individual employee to have their future employment disputes resolved by binding arbitration when imposed by the employer on the employee as a condition of employment. *See* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L. Rev. 1247 (2009). Employment arbitration is a relatively new method of dispute resolution compared to labor arbitration because employment arbitration only really arrived on the scene over the last two decades after the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See generally* Richard Bales, *Normative Consideration of Employment Arbitration at* Gilmer's Quinceañera, 81 Tul. L. Rev. 331 (2006) (discussing the development of employment arbitration law since *Gilmer* in 1991); Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 Clev. St. L. Rev. 233, 257–58 (2008) (describing the evolution of employment arbitration under the FAA as one of the "new forms of arbitration"); American Arbitration Association, Employment Arbitration Rules and Mediation Procedures (effective June 1, 2009), *available at* http://www.adr.org/sp.asp?id=32904 (explaining how the American Arbitration Association which has existed since 1926 did not establish employment arbitration rules until June 1996 and only after the Due Process Protocol was developed by individuals representing various constituencies including labor, management, employment, civil rights, private administrative agencies, government, and the American Arbitration Association in 1995 to discuss a fair process to arbitrate employment claims after the courts opened the door to enforce employment arbitration agreements in the early 1990s).

5. The Federal Rules of Evidence are the primary rules of evidence referred to herein. *See generally* Fed. R. Evid. 101–1103; Christopher B. Mueller & Laird C. Kirkpatrick, Evidence Under the Rules: Text, Cases, and Problems 3 n.2 (6th ed. 2008) (listing the forty states that have developed evidence rules based upon the federal rules of evidence).

6. *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 Geo. Wash. L. Rev. 461, 473 (2007); *see also* Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 Loy. L.A. L. Rev. 837, 847–850 (1992).

7. *See, e.g.*, Frederick Schauer, *On The Supposed Jury-Dependence of Evidence Law,* 155 U. Pa. L. Rev. 165, 165–66, 166 n.3 (2006) (addressing the question of whether there should be rules of evidence if there is no jury).

which information is filtered."[8] Because arbitration proceedings and bench trials are similar – as contrasted with jury trials[9] – the analysis involving application of evidence rules during a bench trial provides an excellent analytical tool to assess the use of the rules of evidence in arbitration.

The rules of evidence focus primarily on preventing juries from being swayed by certain types of evidence.[10] Professor Frederick Schauer has noted that in most other countries where a jury trial right is in decline or is not available, the law of evidence does not really exist.[11] This finding supports the proposition that the existence of a jury represents a significant aspect in the development and need for compliance with evidence rules. Other scholars have also asserted that the goals of exclusionary evidence rules do not have the same value or need for application when there is no jury to consider.[12] Accordingly,

8. Carbonneau, *supra* note 4, at 243 n.39.

9. *See generally* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 130–31 (2004); Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 957 (2005).

10. *See* Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 464–66 (2008) (noting mistrust of jurors as a primary motivation for evidentiary exclusionary rules); Schauer, *supra* note 7, at 168 (noting the position taken by some scholars that "most of the exclusionary [evidence] rules are designed with the jury in mind and with the goal of increasing the accuracy and efficiency of fact finding under circumstances of jury decision making"). *But see* Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 229–30 (1988) (finding that some scholarship asserts that the purpose of evidence rules was not for the control of juries but for the control of lawyers which supports why the rules are still used in bench trials); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 408 n.137 (1982) (noting that the "rules of evidence are designed to screen extraneous information from decision makers, but the rules are often applied less rigorously in bench than at jury trials"). Although outside the scope of this Essay, there are certainly a number of concerns about whether judges in bench trials who exclude certain pieces of evidence under the rules of evidence can still be able to act effectively as the decision maker when they are aware of the excluded evidence. *See, e.g.*, Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 443–44 (2009) (arguing that federal bench trials should be disbanded altogether and any notion that judges can divorce themselves from hearing excluded evidence is a myth); *see also* Jennifer L. Mnookin, Response, *Bifurcation and the Law of Evidence*, 155 U. PA. L. REV. PENNUMBRA 134, 134–35 (2006), http://www.pennumbra.com/responses/12-2006/Mnookin.pdf (discussing studies showing that judges have just as much difficulty ignoring inadmissible evidence as do jurors, except for when it involves a constitutional issue such as a suppressed search or improper confession).

11. Schauer, *supra* note 7, at 174–75.

12. *See* Kenneth Culp Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1363 (1970) (asserting that there is little need for evidence rules in bench trials); Kenneth Culp Davis, *An Approach to the Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723 (1964) (asserting that evidence rules should not apply in bench trials or nonjury proceedings); Comment, *Exclusionary Rules of Evidence in Non-Jury Proceedings*, 46 ILL. L. REV. 915, 923–25 (1952); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1804–05 (1980) (noting that the hearsay rule exclusion is aimed at controlling juries' use of evidence to make certain inferences). *Contra* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 518–19 (1987) (as-

when arbitration occurs, as with bench trials, the need for strict compliance with the rules of evidence is obviated by the fact that there is no jury to be shielded from certain types of evidence.

III. Balancing Arbitration Concerns With Using Strict Evidence Rules

In the arbitration process, there is ongoing tension between the need for the process to be informal and the need for some structure and clarity in how evidence will be admitted and evaluated. In general, the need for informality in arbitration has led to the belief that the application of the rules of evidence should not operate as a "straitjacket" as arbitrators should be allowed to "receive any evidence 'for what it is worth.'"[13] However, this approach of allowing all evidence in by taking it *for what it is worth* has also led advocates to complain that they have "no guidance as to whether the arbitrator considers the evidence relevant and, if so, the weight it will receive."[14] Essentially, arbitrators need to balance concerns about informality, lack of legal therapeutic value, difficulties in obtaining witnesses, lack of legal representation, and the complexities of workplace disputes with the principles of supporting the evidence rules that exclude certain forms of evidence as unreliable or because of policy reasons.

For example, it has been argued that because of the therapeutic value of arbitration as a form of workplace dispute resolution, employees should be allowed to have some voice by telling their story even if it involves some aspects of information that would be excluded

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serting that the hearsay rules support the general concept of fact finding whether by judge or jury by requiring proponents of evidence to provide sufficient foundation witnesses with *live testimony* rather than allowing parties to flood the proceedings with hearsay); Schauer, *supra* note 7, at 198–99 (asserting that if distrust of jurors' cognitive abilities is the reason for excluding evidence, similar concerns should apply to judges and these concerns may help explain why the rules of evidence still apply as a whole even in a non-jury trial proceeding); Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1323 (2005) (finding that judges are just as swayed as jurors by the items that the rules of evidence tend to exclude); Mnookin, *supra* note 10, at 135–139 (calling for bifurcation where one judge rules on admission of evidence and another evaluates it because judges have difficulties in completely devaluing evidence that has been excluded under the rules since they have heard it and have to go through the process of "unringing the bell").

13. Render, *supra* note 2, at 299–300. I was presented this very argument a couple of years ago while at training for labor arbitrators who are members of the National Labor Arbitration Panel for the American Arbitration Association. At this training session, advocates for both employers and unions complained that one of their pet peeves was that arbitrators do not give them guidance by actually ruling on their evidentiary objections.

14. *Id.* at 300 & n.6 (asserting that the confusion amongst advocates based upon the take it for what it is worth approach leads them to feel that they must "'throw in the kitchen sink' in order to assure themselves that they are introducing all the evidence on a point that the arbitrator might later consider significant" and can "lead to lengthy, contentious, and confused hearings").

under the rules of evidence.[15] However, this therapeutic value should also be balanced with the arbitrator's obligation to provide a fair and efficient hearing to all parties. The arbitrator should not allow all forms of evidence merely for its therapeutic value when this action could be perceived as acting with partiality to one side or to the arbitrator who benefits by receiving more compensation by extending the time for the hearing.[16]

Also, the fact that the advocates for the parties, or even the arbitrator, are more likely to not be lawyers familiar with the rules of evidence represents another reason to not apply the strict formalities of the rules of evidence in arbitration.[17] The strict application of the rules of evidence to pro se parties may prevent the true story from being told. Under federal arbitration law, one of the narrow exceptions allowed to overturn an arbitrator's award includes failure to allow a full hearing on evidentiary matters.[18] If strict application of the rules of evidence were applied to parties without lawyers, they may be denied a fair hearing.

To the extent that a witness is needed for cross examination under the rules of evidence, that concern should also be balanced with the

15. *Id.* at 302–04 nn.15–23, 306 (providing arguments that strict application of the rules of evidence is "inimical to the purpose of arbitration" as it prevents "witnesses in an arbitration from 'getting things off their chest'" in arbitration, the parties have an "expectation that their story will unfold without the need to worry over common exclusionary gambits invoked by advocates in a courtroom" and strict application of evidence rules "has a chilling effect, preventing lay witnesses from simply telling their stories as they understand them") (citations omitted); Kirkpatrick, *supra* note 6, at 844 n.41 (noting that "arbitrators sometimes allow clearly irrelevant evidence as a form of catharsis for the parties to the dispute" and arbitrators acknowledge "the necessity of listening to irrelevant matter when it serves to release pent up emotions" because allowing an employee "his day in court and being able to tell the other side exactly what is on his mind may be as important to a disputant as winning a case"); *see also* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960) (finding that in labor arbitration, "even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware"). The arbitrator's obligation to provide a fair hearing is also required as an ethical obligation. Render, *supra* note 2, at 299 n.2 (describing the requirement under the Labor Arbitrator's Code of Professional Responsibility that the arbitrator "provide for a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument").

16. *See* Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93, 100 (1989); *see also* Marvin F. Hill, Jr. & Tammy M. Westhoff, "I'll Take It For What it is Worth"—The Use of Hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal, 1998 J. DISP. RESOL. 1, 34–35 (1998) (noting that it is of no benefit to allow everything to be admitted for what it is worth in arbitration as it sends the wrong message to the advocates through its ambiguity and requires that the advocates repeatedly object at every point further in the proceeding to preserve the record).

17. Hill & Westhoff, *supra* note 16, at 9.

18. *See* Marvin F. Hill, Jr. & Tammy Westhoff, *"No Song Unsung, No Wine Untasted"—Employee Addictions, Dependencies, and Post-Discharge Rehabilitation: Another Look at the Victim Defense in Labor Arbitration*, 47 DRAKE L. REV. 399, 438 (1999) (discussing the propriety of erring on the side of admitting evidence instead of being overturned for failing to allow certain evidence to be heard).

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fact that it is much more difficult for the parties to subpoena witnesses to attend the arbitration process than a court proceeding related to a workplace dispute.[19] In some instances arbitrators have found that "hearsay is the only evidence available in the workplace setting, and the automatic exclusion of same could result in an incomplete record and a failure to accomplish a just result."[20]

Regardless of the concerns that the evidentiary rules need to address, another major concern with strict enforcement is that courts will likely not review an erroneous evidence exclusion even if it affects the outcome of the case. Enforcement of labor arbitration agreements has traditionally been resolved under Section 301 of the Taft-Hartley, Labor Management Relations Act (Section 301).[21] The primary method for enforcing employment arbitration agreements occurs pursuant to the Federal Arbitration Act (FAA).[22] Whether enforcement occurs under Section 301 or the FAA, courts tend to defer to an arbitrator's decision making in order to enforce the parties' agreement to have their dispute resolved in arbitration.[23]

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19. Hill & Westhoff, *supra* note 16, at 30 ("[P]arties to an arbitration hearing do not have the ability to subpoena witnesses and must utilize the witnesses and evidence they can conjure up on their own accord. The arbitrator must be able to fill in any gaps with his own good judgment, and hearsay evidence is frequently that filter."); Render, *supra* note 2, at 316 (finding that there will be situations in workplace disputes where the parties may find it extremely difficult to get first-hand witnesses, the arbitrator may still apply the reasons for the evidentiary rules to decide whether to accept testimony without first-hand witnesses and what weight to give to it).

20. Hill & Westhoff, *supra* note 16, at 30 & n.135 (citation omitted).

21. 29 U.S.C. § 185 (2006); *see also* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 451, 455 (1957) (finding that Section 301 established federal common law regarding enforcement of collective bargaining agreement arbitration provisions). In 1960, in three cases collectively referred to as the Steelworker's trilogy, the Supreme Court further explained the importance to the collective bargaining labor process of the federal policy favoring arbitration and enforcement of arbitration agreements. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567–68 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–81 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596–97 (1960).

22. 9 U.S.C. §§ 1–15 (2006); *see also* Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) (reiterating that the FAA has broad and preemptive authority in enforcement of arbitration agreements); Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 287–88 (2002) (discussing broad enforcement of agreements to arbitrate statutory employment discrimination claims under the FAA but finding those agreements do not prevent the EEOC from suing an employer in court since the EEOC is a prosecuting agency not a party to such agreements); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (establishing that employment agreements to arbitrate statutory employment discrimination claims as a condition of employment are generally enforceable under the FAA except for a narrow exception applying only to transportation workers); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (establishing the enforcement of an agreement to arbitrate a statutory employment discrimination claim).

23. For labor arbitration, *see* Carbonneau, *supra* note 4, at 253, 253–54 n.83 (describing the court's deference to the arbitrator's award under the common law and Section 301). *See, e.g.*, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36–39 (1987); Major League Baseball Players Ass'n v. Garvey, 532 U.S.

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This deferential standard essentially removes any judicial review of an arbitrator's evidentiary rulings as a matter of law.[24] The courts tend to find that the parties in arbitration have submitted their resolution to an arbitrator "they trust, and it is for the arbitrators to determine the weight and credibility of evidence . . . presented . . . without

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504, 505 (2001) (per curiam); E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 62–63 (2000). For employment arbitration, the Supreme Court has not addressed specific standards for enforcement of an arbitrator's award in employment arbitration, but the lower courts have developed deferential standards pursuant to the FAA. *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 397–98 (2006) (describing the doctrine of enforcing the agreement to arbitrate employment disputes as long as the employee may "effectively vindicate" his employment claim and how this doctrine arose as a creature of the court's application of the FAA to allow statutory claims to be arbitrated); Carbonneau, *supra* note 4, at 248 & n.62 (describing the limited bases for challenging an arbitrator's award under Section 10 of the FAA). Also, under FAA jurisprudence, the theory of *manifest disregard of the law* in employment arbitration allows an arbitrator's award to be overturned if the arbitrator knew the law was clear on the subject and still chose to disregard it. *See, e.g.*, Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998); *see also*, Carbonneau, *supra* note 4, at 242 n.33 (citing cases involving the "manifest disregard of the law" as grounds for vacating an arbitrator's award and decision). The United States Supreme Court decision in *Hall Street Associates LLC. v. Mattel Inc.*, 128 S. Ct. 1396 (2008), has called into question the continuing viability of the manifest disregard of the law theory by unequivocally finding that only statutory grounds identified in the Federal Arbitration Act may be used to vacate an arbitration award. *See* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight From Arbitration?* 37 HOFSTRA L. REV. 71, 105 n.164 (2008) (noting that some courts have found that manifest disregard of the law, a common law theory, is no longer applicable after the *Hall Street* decision because the Court specified that only statutory grounds may be used to vacate arbitration awards); Justin Kelly, *Confusion About "Manifest Disregard" After* Hall Street v. Mattel, 63 DISP. RESOL. J. 4 (2008) (describing the confusion about manifest disregard of the law being in question after *Hall Street* because it is a non-statutory ground for vacating an arbitrator's award and describing judicial opinions that assert the theory is dead versus opinions that assert it still exists). Regardless of the supposed death of manifest disregard of the law theory, the Author cannot see how one might apply this doctrine to overturn an arbitrator's decision with respect to an evidentiary ruling. Courts tend to provide judges some discretion with evidentiary rulings and it would be difficult to show that the law was clear and the arbitrator chose to ignore it in making an evidentiary ruling when many times whatever the evidentiary ruling made by the judge will be correct. *See* Alleyne, *supra* note 16, at 97 n.23 (noting that given the discretion involved in admitting evidence, it is "virtually impossible for a trial judge in a nonjury case to commit reversible error by receiving incompetent evidence") (citation omitted); Mnookin, *supra* note 10, at 140 (noting the discretion provided to judges in making evidentiary rulings and how "there are enormous number of evidentiary determinations in which either answer would be allowed – not only because of the harmless error doctrine, but because neither judgment would be error at all").

24. Carbonneau, *supra* note 4, at 242 n.33 (identifying three narrow bases under the common law for challenging an arbitrator's decision as manifest disregard of the law, irrational determinations, and public policy violations); Hill & Westhoff, *supra* note 16, at 17 (describing how courts have established that there is a deferential standard of review regarding an arbitrator's decision because "federal courts may not second guess an arbitrator's interpretation of a collective bargaining agreement" including "the arbitrator's rulings with respect to his views on hearsay and admissibility of evidence").

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restrictions as to the rules of admissibility."[25] With this broad power to make admissibility decisions, arbitrators should be careful in too easily deciding to exclude evidence based upon application of the rules of evidence given that a horrendous evidentiary ruling cannot be changed through some judicial appeal.[26]

Furthermore, a particular arbitrator who may even be a lawyer may not be well-steeped in the nuances and complexities of the rules of evidence. Even judges who must apply these rules on a regular basis may have difficulties, for example, in navigating the rule on hearsay and its various exceptions,[27] in applying the character evidence rules,[28] or in discerning the differences between impeachment by prior bad acts not resulting in convictions versus impeachment by convictions.[29]

By placing too much focus on the rules of evidence, it takes away from some of the key reasons that parties agree to pursue resolution of their disputes through arbitration including informality, shorter time, and less costs. If the rules of evidence had to be strictly applied, this would make the arbitration process much more formalistic and it would add to the time and expense of completing the process which detracts from the purported benefits of arbitration.[30]

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25. Hill & Westhoff, *supra* note 16, at 33 (citation omitted).

26. One of the few limited bases for challenging an arbitrator's decision under the Federal Arbitration Act may arise when the arbitrator refuses to allow the parties to present evidence. *See* 9 U.S.C. § 10(a)(3) (2006) (stating that one of the narrow bases for challenging an arbitrator's decision and award includes "misconduct . . . in refusing to hear evidence pertinent and material to the controversy"). However, an arbitrator may be justified in excluding some evidence without violating the FAA. *See, e.g.*, Supreme Oil Co. v. Abondolo, 568 F. Supp. 2d 401, 407–409 (S.D.N.Y. 2008) (finding that exclusion of employer's counsel from testifying did not warrant overturning the arbitrator's award under FAA Section 10 for refusal to allow pertinent evidence because there were legitimate reasons to not allow the attorney to testify and the employer could have obtained the same evidence without having the employer's counsel testify); *see also* Kirkpatrick, *supra* note 6, at 844 ("There is a greater danger of inviting judicial challenge to the arbitration award where the arbitrator admits too little evidence rather than too much."); Hill & Westhoff, *supra* note 16, at 22–23, 22 nn.99–100 (describing a case where the court overturned the arbitrator's decision pursuant to Section 10 of the FAA due to the arbitrator's "failure to consider evidence presented" when the arbitrator misled an employer into believing that a document was not hearsay when it was admitted for what it was worth and prevented the employer from establishing on the record that the document fit a hearsay business records exception and then in the decision the arbitrator "spent five pages of his decision in a diatribe on the unreliability of hearsay").

27. *Compare* FED. R. EVID. 801(a)–(c), 802, *with id.* 803–805, 807.

28. FED. R. EVID. 404–405; *see also* Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 783 (1998) (discussing the difficulties in understanding the character evidence rules).

29. *Compare* FED. R. OF EVID. 608(b), *with id.* 609.

30. *See* Alleyne, *supra* note 16, at 107 (proposing complete abolition of objections to documentary evidence at labor arbitrations and all objections to testimony, except relevance and privilege objections, to make sure that arbitration maintains its benefits of being a quick and informal resolution).

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IV. Principles Behind the Rules Should Still Be Employed and Explained

In some instances, the parties, especially their advocates, complain that failure to literally apply the rules of evidence in arbitration makes it very difficult to prepare. This complaint resonates with advocates when an arbitrator's typical response to an objection based on the rules of evidence has been: "I'll take it for what it's worth."[31] Advocates lose confidence in the fairness of the process and feel uncertain about arbitration when arbitrators allow evidence that is hearsay or prejudicial or in violation of some other evidentiary rule and say they will take it *for what it is worth*.[32]

If an advocate objects to the admission of a document on the basis of hearsay and the arbitrator overrules the objection and merely says, "I'll take it for what it's worth," the advocate still has no indication as to whether the document will ultimately be considered as valid evidence or dismissed as unreliable hearsay. The advocate must continue to put forth other evidence to challenge the impact of the document without knowing whether the initial hearsay objection will ultimately carry the day on the matter. To the advocate, this uncertainty is counterproductive to the goals of certainty along with the relatively inexpensive costs and speed in choosing arbitration to resolve the dispute.

In response to these concerns, arbitrators must say more than "I'll take it for what it is worth."[33] Instead, arbitrators should tell the parties what he or she feels about the quality of the evidence based upon the arguments presented. An arbitrator could say the following in response to a hearsay objection: "Under the circumstances, this evidence will be admitted. However, based upon the arguments presented, this evidence will have little weight given its unreliability as hearsay that appears to have no appropriate exception." With this approach, the evidence is still admitted and considered by the arbitrator. But the parties do get a feel for how to proceed thereafter rather than first discovering the arbitrator's real view of the evidentiary objections in the written decision issued well after the hearing.

The arbitral process should encourage the parties that they must provide the most reliable evidence they can. If the advocates only rely on hearsay or other unreliable evidence or evidence that represents

31. *See generally* Hill & Westhoff, *supra* note 16, at 1–2; Schauer, *supra* note 7, at 166 & n.3 (finding that many judges in non-jury trials respond to evidentiary objections by stating: "I'll let it in and give it the weight it deserves" after hearing all the evidence).

32. Hill & Westhoff, *supra* note 16, at 2 (noting that the arbitral process is not served by admitting all evidence and "taking it for what it is worth" because absent witnesses make testimony unreliable).

33. Alleyne, *supra* note 16, at 98 (noting that the finding by some arbitrators that they will receive a document for what it's worth is a "somewhat meaningless pronouncement").

public policy concerns upon which the exclusionary rules of evidence are based, the parties should know that the arbitrator will not think highly of this evidence. However, the parties should not expect to give or hear lip service regarding the arbitrator's obligation to strictly adhere to the rules when such a reality would not make practical sense for labor and employment arbitration.[34]

By admitting and considering the evidence for its limited value and communicating that to the parties, the arbitrator does not unnecessarily exclude evidence based upon rote application of the rules of evidence. The arbitrator also recognizes the underlying principles of various rules of evidence and informs the parties of how those principles may guide the arbitrator in assessing the evidence presented during the hearing.[35] In adopting this approach, strict compliance with the rules of evidence would not be a component of arbitration. But, arbitrators could certainly apply the principles underlying the rules of evidence and respond to thorough evidentiary objections made by the parties' advocates by giving guidance as to how those principles will shape the arbitrator's consideration of the evidence in issue at the hearing.[36] Then the benefits of informality, less costs, and certainty

34. Since arbitration occurs as a result of the parties' agreement, Kirkpatrick, *supra* note 6, at 844 ("[P]arties can stipulate in the arbitration clause or submission that the hearing be conducted pursuant to the formal rules of evidence."), the parties could always make sure that the evaluation of the evidence and the determination of which evidence should be heard by the evaluator could be bifurcated. Mnookin, *supra* note 10, at 141–142. Although bifurcation would permit the two roles, ruler on admissibility of evidence versus evaluator of evidence, to be kept separate, the additional time and costs involved in selecting and paying for a different person to take on the second role would represent a great deterrence to arbitration's overall value as an alternative to court resolution. *See* Schwartz, *supra* note 4, at 1326–27 (discussing some of the purported benefits of arbitration in that "[i]t is generally assumed that arbitration is faster and cheaper than litigation.")

35. *See* Kirkpatrick, *supra* note 6, at 847–50 (describing Jeremy Bentham's preference for evidentiary principles rather than rules and how the ADR movement is an expansion of that development because the principles behind the rules help give guidance in evaluating the evidence); Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC L. REV. 813, 852 (2003) ("When arbitrators agree to hear evidence 'for what it's worth,' one needs to be able to argue about what evidence *is* worth, which demands a deeper understanding of the rationales and values, including epistemology, behind our rules of Evidence, as much as checklists of foundational elements to introduce a document.") (citation omitted); Michael S. Winograd, *Rules of Evidence in Labor Arbitration*, 55 DISP. RESOL. J. 45, 83–84 (2000) (describing how principles behind the rules may be used in a limited way by an arbitrator but there should not be a strict application of evidence rules in labor arbitration).

36. *See* Hill & Westhoff, *supra* note 16, at 34–35 (finding that "the arbitration system is not well served by a rule that allows everything into the record" and there is "no infirmity" in an arbitrator declaring at the hearing that out of court statements made by witnesses who do not appear but corroborate other in-court testimony is hearsay that does not carry the same weight as in-court testimony but it is still probative and worthy of serious consideration); Render, *supra* note 2, at 310 ("When an arbitrator has a question about evidence being confusing or misleading, the arbitrator should resolve that question at the hearing, if possible").

can still be adequately achieved in arbitration while recognizing that lack of judicial review, a focus on juror considerations, and the need for flexibility demands that literal application of the rules of evidence should not occur in labor and employment arbitration.

V. Conclusion

Allowing strict application of evidentiary rules could prevent the parties from having a fair and effective hearing. Whether the parties need informality along with the therapeutic opportunity to tell their story or whether their advocates or the arbitrator are not sophisticated in the nuances of the evidentiary rules, strict application of the evidentiary rules would tend to be a harsh result. Furthermore, unlike a judge in a jury or bench trial, when the arbitrator is asked to rule on the legal aspects of the dispute including the law of evidence, there is usually no appeal to a review court to determine whether erroneous, but outcome-determinative, rulings should warrant overturning the arbitrator's decision.

However, arbitrators should not just allow anything to be admitted into evidence *for what it is worth* because this approach confuses the advocates and adds unnecessary costs and delays to the arbitration process. Instead, arbitrators need to strike an appropriate balance between letting everything in and strict application of the rules.

Arbitrators in labor and employment arbitration can provide consistency by using the underlying principles behind the rules of evidence as a tool to inform the parties at the hearing whether evidence offered is not only going to be admitted but what weight the arbitrator will give to it. Then the parties will have the guidance they need to take advantage of the benefits of the arbitration process without being subjected to unwieldy evidence expectations and uncertainty by being informed that the arbitrator will only take it for whatever it is worth. While not strictly applying the rules of evidence, the arbitrator will still be able to benefit by offering a fair framework to achieve better fact finding and evaluation of the evidence presented through an efficient hearing.[37]

37. *See* Render, *supra* note 2, at 349–51.