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The Importance of the Federal Rules of Evidence in Arbitration

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INTRODUCTION

The cliché about introducing evidence in arbitration is that there are no rules of evidence that apply, but arbitrators may take submitted evidence for what it is worth.[1] This notion of how evidentiary rules operates in arbitration is linked to principles—that the discovery phase of arbitration is intended to be efficient, proportional to the size of the dispute and complexity of issues presented and, ultimately, limited in scope.[2] Under many arbitration

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1. Bruce A. McAllister & Amy Bloom, *Evidence In Arbitration*, 34 J. MAR. L. & COM. 35, 53 (2003).

2. *See generally* Paul Radvany, *Recent Trends In Discovery In Arbitration And In The Federal Rules Of Civil Procedure*, 34 REV. LITIG. 705 (2015)_(contrasting

rule regimes, discovery is written to be fairly limited; yet after the discovery phase is concluded, there are few if any procedural safeguards against the subsequent admissibility of material discovered. Many arbitrators admit almost anything proffered as evidence, and these decisions are largely beyond review.[3]

Broadly speaking, however, this is a reversal of how discoverability and evidentiary admissibility work in civil litigation. In civil litigation, the discovery phase is intended to be broad, while the admission of evidence at trial is highly regulated, requiring evidence to be not only relevant,[4] but also reliable and not unfairly prejudicial.[5] Furthermore, many other rules of evidence—such as the hearsay doctrine, the rules surrounding experts and opinions, and requirements such as authentication and personal knowledge—serve to promote other important purposes simply not considered by the rules governing discovery. Evidence law serves as a procedural safeguard to limit the ultimate admissibility of material discovered.[6] It does this by balancing the discovery regime's initial desire to provide parties with the best opportunity to uncover information with a later set of hurdles, which ultimately promotes the resolution of cases on the most reliable information available.[7]

This article will examine the dichotomy between discovery and evidentiary admissibility in civil litigation and arbitration. It will suggest that, contrary to the idea that principles of evidence have no role to play in arbitration, those principles may in fact be important both for counsel to argue and for arbitrators to consider, regardless of whether or not evidence proffered will ultimately be admitted. This is because evidence law was created for the purpose of weighing the reliability of evidence and articulating how a certain piece of evidence may or may not be used. The attorney prepared to make evidentiary

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the philosophy of broad discovery, the upcoming revisions to discovery in the Federal Rules of Civil Procedure, and the intent for more limited discovery under the rules for various arbitration regimes).

3. *See* discussion *infra* Part II.a.

4. FED. R. EVID. 401. The term "relevance" is encountered both in discussion of civil discovery under the Federal Rules of Civil Procedure, as well as in evidence law, as described by the Federal Rules of Evidence. As will be discussed further, the term has differing meanings in the two settings. However, it is useful to point out that the scope of "relevant" material in the discovery sphere has undergone recent changes, with the enacting of the 2015 revisions to the Federal Rules of Civil Procedure. *See* Radvany, *supra* note 2, at Part II.C.1.

5. FED. R. EVID. 403.

6. *See* discussion *infra* Part I (discussing FED R. CIV. P. 26 and the scope of "relevance" in discovery).

7. *See infra* Part I (explaining the reasons particular forms of evidence or testimony are excluded).

arguments on issues raised by a proffered piece of evidence—despite the fact that in arbitration, the evidence will likely be admitted—is in the better position to control how much weight the arbitrator gives that evidence.[8] Thus, if inadmissible evidence may be admitted by an arbitrator "for what it's worth," it can be helpful if attorneys representing clients in arbitration are able to explain why that evidence would be otherwise inadmissible under the rules of evidence at trial. This explanation can be given in the form of an objection to the offered evidence or strategically placed within that attorney's closing argument.

Part I of this paper will outline the theory of the Federal Rules of Evidence, focusing on the idea that proffered evidence must satisfy certain qualifications to be admitted or be excluded as unreliable for one of several reasons. Part II will compare various arbitral rule regimes, showing how they largely do not lay out a framework for admission or exclusion of evidence. Rather, arbitrators may admit whatever they wish—with the expectation that they will give the evidence whatever weight they deem to be appropriate—provided that the evidence is relevant and material. Part II will also discuss the latitude that arbitrators have to admit or not admit evidence. Part III will discuss how arbitrators are affected by evidence that might be excluded under the Federal Rules of Evidence, and whether or not there are still reasons counsel might be interested in presenting evidence based arguments during arbitration.

I. THE THEORY OF EVIDENCE RULES

This section will outline the overall philosophy of, and some specific rules found within, the Federal Rules of Evidence ("FRE"). I begin by contrasting the FRE's constraints on admission of evidence discovered, with the relatively broad and unconstrained nature of the prior discovery phase itself. Thus, having provided for relatively broad access to material through discovery, the structured approach to evidentiary admissibility seeks to promote the resolution of the dispute

8. In contrast, some commentators have suggested that certain factors have developed the arbitral forum beyond being simply a venue where evidence rules are relaxed, and that arbitration has instead become, for some lawyers, a refuge the primary advantage of which is that evidence rules are rarely consciously acknowledged, and in many cases openly ignored. *See* discussion *infra* Part II (discussing the overall decline of jury trials, the relative litigation inexperience of present day litigators, the perception of evidence law as a discrete subject within the legal community, and the strengths and weaknesses of individual arbitrators).

on the more, rather than less, reliable forms of the information discovered.[9]

The FRE are comprised of eleven articles, which collectively regulate what documents, testimony, or physical evidence may be presented to the fact finder and how that presentation must occur.[10] The common-law evidence tradition underpinning the FRE — particularly the doctrine of hearsay—established certain policies about which forms of evidence are more reliable, less reliable, or whose reliability are contingent on other factors.[11] In general, the FRE require evidence to be authenticated on the record,[12] relevant to the merits of the legal dispute itself or the bias or credibility of witnesses,[13] not unfairly prejudicial,[14] and not derived from inadmissible hearsay.[15] A person must generally proffer testimony with personal knowledge about that which they are testifying.[16] Speculation and opinion by lay witnesses is generally prohibited.[17] However, subject to proper qualification, "expert" witnesses may be proffered and subsequently provide opinion testimony based upon their area of expertise to assist the trier of fact in situations where such knowledge is necessary to understand or determine a fact at issue.[18]

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9. *See generally* FED. R. EVID. 401, 402, 807; *see also* Tamara F. Lawson, *Can Fingerprints Lie?: Re-Weighing Fingerprint Evidence in Criminal Jury Trials*, 31 AM. J. CRIM. L. 1, 14 (2003) (characterizing FRE 401 and 402 as establishing a generalized "requirement of the Federal Rules of Evidence that only relevant and reliable evidence be admitted").

10. For a review of this, see PETER MURPHY, MURPHY ON EVIDENCE 18–19 (6th ed. 1996) ("Evidence is said to be admissible, or receivable, if it may be received by the court for the purpose of proving facts, when judged by the law of evidence.").

11. *See* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 370 (1991–1992) (discussing the principle that hearsay is considered less reliable than live testimony because live testimony is subject to trial safeguards that help the fact finder evaluate its trustworthiness and necessity).

12. FED. R. EVID. art. IX.

13. FED. R. EVID. art. IV.

14. FED. R. EVID. 403.

15. FED. R. EVID. art. VIII.

16. FED. R. EVID. 602.

17. FED. R. EVID. 701; *see also* Joseph Richard Ward III, *The Interpretation of Context: How Some Federal Circuits Are Bypassing the Familiar Requirement of Firsthand Knowledge for Lay Witnesses*, 15 LOY. J. PUB. INT. L 117, 120 (2013) ("Rule 701 limits lay opinion testimony to those opinions or inferences that are rationally based on the perception of the witness, helpful to a clear understanding of the witness's testimony, and not based on the type of specialized knowledge reserved for expert witnesses in Rule 702").

18. FED. R. EVID. 702.

The role of evidence law is relatively narrow; thus, the FRE identify only certain narrow, nuanced issues pertaining to specific pieces of evidence or testimony. Similarly, the FRE contemplate the exclusion of the evidence based upon those limited issues. Other phases of the American litigation process occurring prior to trial provide differing features and safeguards that ensure parties will have all material to which they are entitled to *attempt* admitting as evidence.[19] Specifically, the civil discovery process functions in a broad fashion, without reference to whether material discovered may ultimately be admissible at trial.

Civil discovery exists to give parties the opportunity to acquire the information necessary to substantiate the claims or defenses that comprise their case. The discovery phase of litigation, governed by rules found within the Federal Rules of Civil Procedure, is substantively over-inclusive, revealing to the parties more information than may ultimately be admissible. The 2015 Advisory Committee note to the newly revised Rule 26 states that "[i]nformation is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case" but does not reference evidentiary admissibility.[20]

The purpose of this rule is to give parties the best opportunity to discover the underlying facts and to construct the strongest, most complete case possible; the law of evidence resolves the evidence's admissibility at a later stage in the litigation process.[21] The rules thus establish a far-reaching ability to discover evidence that may not be admissible at trial. This is preferable because while lawyers are building their cases, it is unclear which facts they may be able to present at trial. Information made known to parties through discovery—even from inadmissible evidence—allows parties to seek out admissible evidence to show those facts.[22]

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19. *See* FED. R. CIV. P. 26 (providing various requirements governing disclosure during the discovery phase).

20. FED. R. CIV. P. 26; *see* Radvany, *supra* note 2, at 712 (indicating the particular changes made).

21. *See* Hickman v. Taylor, 329 U.S. 495, 507–08 (1947) (stating that the rules of discovery are to be accorded "broad and liberal treatment," because "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"); *see also* S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (recently applying and repeatedly citing to *Hickman* in context of securities litigation-related discovery issues).

22. In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1191 (10th Cir. 2009) (allowing discovery of information on a different model of tires than the model at issue in the case on the basis that it "could tend to lead to discoverable evidence").

Ultimately, the discovery/admissibility rule structure errs on the side of allowing parties to discover information that may not be admissible, rather than potentially preventing them from even knowing of the existence of such information.[23] Discovery takes place at a phase in the litigation process in which parties are both identifying issues and assessing the scope of those issues.[24] Thus, it is impossible to make even a threshold determination of what will ultimately be "relevant" in the evidentiary sense at a future trial on the merits. Therefore, the standard for "relevance" during the discovery phase must be broader, both (1) to accomplish the different purpose of the discovery phase of litigation, and (2) to prevent discovery from devolving into a premature trial-within-a-trial on the merits, particularly at a time when the scope of the factual inquiry is still developing.

During the discovery phase, for example, a witness may usually be deposed and asked about any relevant, non-privileged matter, although counsel may reach other agreements between themselves that limit the scope of a particular deposition.[25] The witness's answer at the deposition may implicate hearsay concerns, reveal a prior bad act, or cause the witness to conjecture or speculate.

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23. However, the most recent changes to FED. R. CIV. P. 26 did make certain changes to the "proportionality" requirement, although it remains to be seen how they will affect discovery in practice. *See* Radvany, *supra* note 2, at 737–38 (considering the outcomes that could result from these changes to Rule 26).

24. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) ("Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.") (citing *Hickman*) (internal citations omitted).

25. *See, e.g.*, In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 619 (D. Nev. 1998) ("A party may instruct a deponent not to answer *only* when necessary to *preserve a privilege*, to enforce a limitation on evidence directed by the court, or to present a motion") (emphasis added) (citing FED. R. CIV. P. 30(d)(1)); Rohrbough v. Harris, 549 F.3d 1313, 1329 (10th Cir. 2008) (Lucero, J., dissenting) (stating that the purpose of FED. R. CIV. P. 30 is to allow parties to be "safe in the knowledge that objectionable [deposition] questions and answers would not be admitted at trial."). *See also* Eric B. Miller, *Lawyers Gone Wild: Are Depositions Still A "Civil" Procedure?*, 42 CONN. L. REV. 1527, 1536 (2010) ("Under the Federal Rules of Civil Procedure, objections to the form of the question are proper if the question is: 1. Leading or suggestive; 2. Ambiguous or uncertain; 3. Compound; 4. Assum[ing] facts not in evidence; 5. Call[ing] for a narration; 6. Call[ing] for speculation or conjecture; or 7. Argumentative.") (internal marks omitted). *See generally* E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 U. CIN. L. REV. 1353, 1365–74 (2004) (discussing the history of objections during depositions).

At trial, that same witness would be prohibited from providing the same testimony by the FRE, because the rules reflect a policy that evidence of that sort proffered in such a way is unreliable for the trier of fact or could taint their ability to reach a decision on the merits. During the discovery phase, however, such objections are prohibited at deposition because the witness's answer might, as discussed above, provide a party with the knowledge to derive admissible evidence establishing what the witness testified to, but from another admissible source.[26] Additionally, witness testimony given free from evidentiary objection gives the party questioning the witness the ability to delve into other avenues of inquiry which may subsequently establish that something to which the witness testified but which appeared inadmissible is actually admissible, but for a reason that is not immediately apparent.[27]

A second presumption that helps frame the policies of the FRE is the idea that the judge who rules on the admissibility of a piece of evidence is separate from the fact finder, and performs a "gatekeeper" function.[28] The reason the judge must exclude unreliable and unduly prejudicial evidence from the fact finder is because the fact finder cannot be trusted to accurately gauge reliability or may be prejudiced, and thus might be led astray; but at the same time, the reason the trier of fact, and not the judge, is intended to determine the ultimate outcome is because they have not been exposed to the unreliable evidence at all.[29]

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26. Although some objections are permitted during depositions and may be argued in front of a Magistrate Judge, counsel attempting to object to clearly relevant non-privileged testimony run the risk of sanctions. *See* First Tennessee Bank v. Fed. Deposit Ins. Corp., 108 F.R.D. 640, 640 (E.D. Tenn. 1985) ("It is well-settled that counsel should never instruct a witness not to answer a question during a deposition unless the question seeks privileged information or unless counsel wishes to adjourn the deposition for the purpose of seeking a protective order from what he or she believes is annoying, embarrassing, oppressive or bad faith conduct by adverse counsel.").

27. Several of the Federal Rules of Evidence, discussed later, provide that evidence may be inadmissible for one purpose, yet admissible for another; however, the proponent of the evidence has the burden to articulate his or her proffered admissible purpose once an objection has been made. *See infra* Part I.A, C (discussing FRE 404, 801, 803, 804).

28. The "gatekeeper" is most specifically spoken of in the context of the judge's responsibility to prevent the jury from seeing unreliable expert evidence. *See, e.g.*, Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV 217, 221 (2006) (characterizing the case of expert testimony as being subject to a "strong" judicial gatekeeper function).

29. *See* Kathryn Cameron Walton, *An Exercise in Sound Discretion: Old Chief v. United States*, 76 N.C. L. REV. 1053, 1080–81 (1998) ("[I]n the context of Rule

A. Relevance

The most fundamental substantive requirement for evidence to be admissible is that it be relevant.[30] Relevant evidence is any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence."[31] However, not all of the Article IV rules that discuss relevance are intrinsically concerned with the reliability or unreliability of evidence.[32] In many cases, the various Article IV exclusionary rules represent policy-based determinations about how certain evidence is likely to be perceived or used by jurors.[33] The exclusionary rationale of these rules presumes that the

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403, prejudice may not merely refer to an appeal to emotion. Rather, prejudice may occur when facts cause the jurors to base their decision on feelings, such as hostility or sympathy, and to disregard the probative worth of the evidence presented."). *Compare* Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 123–25 (2013) (discussing "Ironic Mental Processes" and "Mental Contamination" as reasons to separate the function of the judge from the function of the jury), *with* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1451–52 (2007) (describing the "presumption that jurors can understand and follow limiting instructions" as "plainly . . . a new legal fiction").

30. *See* David A. Schlueter, *Evidence*, 22 TEX. TECH L. REV. 573, 578 (1991) (characterizing relevance as "[t]he minimum threshold for any offered item of evidence").

31. FED. R. EVID. 401(a).

32. *See* 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 403:1 (7th ed.) ("Evidence which meets the standard of relevancy, Rule 401, may nevertheless possess attendant disadvantages of sufficient importance to call for its exclusion."). There is some disagreement amongst academics, however, about how to interpret the framework of a general rule of relevancy, and its subsequent modifications, limitations, and exclusions. *Compare* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1522 (1999) (arguing that the cumulative impact of Rules 401–403 works to "make economic sense") *with* Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1677–78 (2001) (arguing that contrary to pure economic sense, Rule 403 is designed to be "tilted towards admissibility," and that the "substantially outweighed" language "indicates that the drafters were not thinking in purely cost-benefit, much less economic, terms").

33. There is a distinction between rules that foster "epistemic" versus "extrinsic" goals in evidence law, the latter most classically showcased by rules such as the exclusion of subsequent remedial measures, liability insurance, or offers made in settlement negotiations. The "extrinsic" policies underlying such rules—that they "are designed to create the proper incentives for socially desirable out-of-court conduct"—are, in these cases, given priority above the epistemic goal of providing the finder of fact with as much relevant information as possible. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 167–68 (2006) (characterizing various policy-based rules of evidence as seeking "extrinsic" goals, designed to "create incentives for socially desirable out-of-court

process as a whole may benefit from exclusion of such evidence, despite that evidence being relevant (at least in part).[34]

Rule 403 excludes evidence that is relevant but substantially more prejudicial than probative, because of the danger that the fact finder will be unduly influenced by the inflammatory nature of the evidence, relative to whatever the actual relevant purpose of the evidence may be.[35] Evidence may also be excluded for reasons other than the inflammatory nature of the material,[36] but the rule is most classically invoked in the context of material or testimony which has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one," such as "bias, sympathy, hatred, contempt, retribution or horror."[37] That said, the fact that the standard for exclusion is "substantially more" prejudicial than probative means that this rule still favors admissibility of relevant evidence, with judges conducting Rule 403 balancing tests in favor of the proponent of the evidence.[38]

Rule 404 excludes character evidence, *i.e.* evidence that attempts to prove that a party acted in a certain way on a certain occasion, based on the party's actions on previous occasions, or based on a party's personality or tendency to act in a relevant way.[39] Rule

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conduct" as the "exception," in comparison to most of the exclusionary rules aimed at "increasing the accuracy and efficiency of fact finding").

34. *Id.*

35. *See* United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979) ("Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance."). *See also* 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 403:1 (7th ed.).

36. *See* 2 MICHAEL H. GRAHAM, § 403:1 (discussing "confus[ion of] the issues, misleading the jury, and considerations of undue delay, wasting time and needlessly presenting cumulative evidence").

37. *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 503 (1983) ("Current case law considers 'emotion' the hallmark of unfair prejudice."); 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 403:1 (7th ed.); *see also* Brandom v. United States, 431 F.2d 1391, 1398 (7th Cir. 1970) ("Inflammatory, irrelevant evidence is improper and inadmissible. Under appropriate circumstances, its admission may constitute reversible error.").

38. *See* United States v. Morris, 79 F.3d 409, 412 (5th Cir. 1996) ("Because Rule 403 requires the exclusion of relevant evidence, it is an extraordinary measure that should be used sparingly."); *see also* 1 JACK B. WEINSTEIN & MARGARET A BERGER, WEINSTEIN'S EVIDENCE MANUAL § 6.02(1) (2017) ("The trial court should strike the balance in favor of admission in most cases.)

39. FED. R. EVID. 404. The psychological consistency of the use of character traits has been under debate for some time, with scholars broadly acknowledging some basis upon which to measure future conduct, but disagreeing on how to apply

404—which codifies long-standing common law practice of excluding character evidence—stems from a traditional acknowledgment that there may be some marginal relevance to a person's propensity to act a certain way, but excludes evidence that is susceptible to that chain of inference alone.[40] This is because character evidence by definition does not serve as direct evidence of the specific act with which a given defendant is charged with, and it raises a substantial danger of prejudice.[41] A decision made on such a calculus falls quite short of the standards desired in legal decision making, despite the fact that character evidence is acknowledged to be, on some level, "relevant" under the rules.[42]

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any objective measurement apparatus to determine consistency. *See generally* David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26–29 (1987) (outlining various research approaches through the 20th century).

40. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, *even though such facts might logically be persuasive* that he is by propensity a probable perpetrator of the crime . . . [t]he overriding policy of excluding such evidence, *despite its admitted probative value*, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice" (emphasis added)).

41. Some have suggested that the danger of the jury simply inferring that, because of prior bad acts, the defendant is a "bad man" is in fact more severe than the drawing of a direct propensity inference. *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 525 (1983) ("[The greatest danger] is that [the jury members] will convict because their conclusion that defendant is a 'bad person' leads them to draw inferences concerning his likely conduct that are not reasonable or are believed with an unreasonable degree of certainty."); *see also* Michelson v. United States, 335 U.S. 469, 489 (1948) ("The common law has not grown in the tradition of convicting a man and sending him to prison because he is generally a bad man or generally regarded as one. General bad character, much less general bad reputation, has not yet become a criminal offense in our scheme. Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct."); United States v. Avarello, 592 F.2d 1339, 1346 (5th Cir. 1979) ("The danger inherent in evidence of prior convictions is that juries may convict a defendant because he is a 'bad man' rather than because evidence of the crime of which he is charged has proved him guilty.").

42. *See* Jones v. Southern Pacific R.R., 962 F.2d 447, 449 (5th Cir. 1992) ("The reason for the rule is that such character evidence is of slight probative value and tends to distract the trier of fact from the main question of what actually happened on a particular occasion."). The specific and long-standing mistrust of fact finders giving rise to this rule is such that the rule against "circumstantial" use of character evidence "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." *See* FED. R. EVID. 404, 1974 Advisory Committee Note (discussing

Rule 407 prohibits introduction of evidence that after an injury occurred, "subsequent remedial measures" were taken that would perhaps have made the initial injury less likely to occur, for a number of reasons.[43] Despite the fact that evidence of these measures would arguably tend to suggest some consciousness of guilt or the existence of danger,[44] the FRE opt to exclude such evidence based on a policy that if evidence of remedial measures was admissible, there would be a disincentive to fix potentially dangerous situations post–injury.[45] Further, evidence of taking subsequent measures to make something safer is not necessarily probative of whether or not the prior state was so unsafe as to be grounds for legal liability; the classic standard for negligence being reasonable—rather than elevated—care, based on the information or technology available at the time of manufacture.[46]

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criminal cases specifically, but also acknowledging that circumstantial use is also prohibited in civil actions). Despite the Advisory Committee's acknowledgement of "basic relevancy," commentators still disagree about the actual basis of excluding character evidence. *See* David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 30–31 (1987) (contrasting whether character evidence is "logically irrelevant," of "little," or of "no probative value.").

43. FED. R. EVID. 407.

44. *See* David A. Schlueter, *Evidence*, 22 TEX. TECH L. REV. 573, 587–88 (1991) ("The logical relevance of a subsequent repair is that it may amount to an admission of fault by the responsible party"). But, to the degree that such evidence cannot be admitted, courts have explained that even if admitted, such evidence would have relatively low weight. *Compare* In re Air Crash Disaster, 86 F.3d 498, 529 (6th Cir. 1996) (describing how Rule 407 excludes a class of evidence which is "very poor proof of negligence or defectiveness") *with* Rimkus v. Nw. Colorado Ski Corp., 706 F.2d 1060, 1064 (10th Cir. 1983) (stating as an example that some conduct "would also be consistent with an injury due to contributory negligence").

45. *See* Rimkus, 706 F.2d at 1064 ("One of the general policies behind Rule 407 is that it encourages desirable repairs"); *see also* FED. R. EVID. 407 advisory committee's note to 1972 proposed rules ("[The more impressive] ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."). In this way, Rule 407 provides the classic case of a rule of evidence concerned primarily with promoting a substantive policy goal, specifically, public safety. *See* David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797, 803 (1992) (using the rule as the example of one that "has an intended positive effect on the important substantive policy of accident deduction but at some loss to the goal of accurate adjudication"); *see also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1531 (1999) (framing the rationale for Rule 407 economically and concluding that the benefits of encouraging repairs surpass the future evidentiary cost of exclusion).

46. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) ("The jury's attention should be directed to whether the product was reasonably safe at the time it was manufactured"); *see also* Columbia & P. S. R. Co. v. Hawthorne, 144 U.S. 202, 208 (1892) (explaining the rationale by reference to

Rule 408 excludes from relevancy any mention of compromise offers, settlement discussions, and statements made in negotiation.[47] Although such statements could tend to show acknowledgement of liability, the Advisory Committee specifically acknowledges that a desire to settle may well be motivated by ancillary concerns, rather than admission of fault, in which case evidence of the settlement offer would be irrelevant.[48] Moreover, a strong public policy seeking efficiency in the settlement of disputes is encouraged by Rule 408's protection of such discussions.[49] Somewhat similarly, Rule 411 excludes mention of whether a party carries insurance,[50] on the basis that a fact finder with knowledge that a party *either* (a) carries insurance, which would be obligated to pay any liability ultimately found, or (b) was injured, but has already been compensated by insurance yet is still seeking additional damages may be influenced by that knowledge.[51] Moreover, like with the making of subsequent changes under Rule 407 and the offering of settlement under Rule 408, courts have made the point that part of the rationale of Rule 411 is that the mere carrying of insurance is not direct proof of liability.[52]

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older English case law, which criticized the logic that "because the world gets wiser as it gets older, therefore it was foolish before") (citing Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869)).

47. FED. R. EVID. 408.

48. *See* Sternberger v. United States, 401 F.2d 1012, 1018 (Ct. Cl. 1968) ("An offer in settlement is ordinarily not admissible, for it is deemed to be an indication only of a desire for peace and not an admission.").

49. FED. R. EVID. 408 advisory committee's note to 1972 proposed rules. *See also* Perzinski v. Chevron Chemical Co., 503 F.2d 654, 658 (7th Cir. 1974) ("[T]he law favors settlements of controversies and if an offer of a dollar amount by way of compromise were to be taken as an admission of liability, voluntary efforts at settlement would be chilled."); Olin Corp. v. Insurance Company of North America, 603 F. Supp. 445, 449 (S.D.N.Y.) *on reargument,* 607 F. Supp. 1377 (S.D.N.Y. 1985) ("The purpose of the rule is to encourage full and frank disclosure between the parties in order to promote settlements rather than protracted litigation.").

50. FED. R. EVID. 411.

51. *See e.g.*, LaMade v. Wilson, 512 F.2d 1348, 1350 (D.C. Cir. 1975) ("[A]dmission of evidence concerning an injured party's receipt of collateral social insurance benefits constitutes reversible error, because it involves a substantial likelihood of prejudicial impact and the possibility of its misuse by the jury outweighs its probative value."); Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 758 (3d Cir. 1976) ("Knowledge that a party is insured may also affect a verdict if the jury knows that some of the loss has been paid by insurance or that it would satisfy a judgment against a defendant.").

52. *See* Cox v. E. I. Du Pont de Nemours & Co., 38 F.R.D. 8, 9 (W.D.S.C. 1965) (existence of liability insurance "can throw no light on the question of negligence or other circumstances of the accident").

B. Hearsay

Hearsay is an out-of-court statement being offered in court to prove the truth of whatever the statement asserts.[53] Hearsay most classically occurs when somebody is testifying in court for the purpose of establishing a fact which they know only based upon some other person relating that fact to them;[54] however, the doctrine expands to far more than mere oral testimony.[55] The reason it is desirable to exclude hearsay is because when a situation such as this occurs, it is impossible to go beyond taking the word of the original speaker for the fact of whatever the statement asserts.[56] However, the idea that parties have a right to interrogate, cross examine, and otherwise probe the testimony being offered against them has been central to the Anglo-American common law process ever since the repudiation of the "Star Chamber" and other such inquisitorial methods used to convict Sir Walter Raleigh.[57]

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53. FED. R. EVID. 801.

54. Michael S. Pardo characterizes the admission of such classic hearsay as essentially providing the jury with an epistemological surrogate for first-hand knowledge, if the statement related by the testifying witness were allowed to be admitted to establish the truth of the matter itself. *See* Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 150 (2007) ("From an epistemological standpoint, hearsay statements function like formal, in-court testimony.").

55. For the reason that documents are often comprised in whole or in part of statements and often are considered statements in and of themselves, a number of hearsay exceptions exist which refer to hearsay specifically in document-based form. *See, e.g.*, Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J. L. & TECH. 1 (2015) (discussing the "ancient document exception" in the modern context); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1415 (1987) (discussing documents containing statements of multiple declarants); Fred Warren Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 AM. J. TRIAL ADVOC. 229, 229 (1997) (discussing the "public records exception" for certain types of documents presumed to be reliable and therefore admissible); Thomas P. Egan & Thomas J. Cunningham, *Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques*, 30 DUQ. L. REV. 205 (1992) (discussing the "business records exception" for certain documents regularly produced in the course of business).

56. The common-law commentator on evidence James Bradley Thayer theorized the rationale for the hearsay rule as deriving from the fact that while jurors could construe evidence presented to them "in any way," witnesses "could testify only of what they had seen and heard." Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 918 (1937).

57. The existence of, and doctrines surrounding, the Confrontation Clause of the 6th Amendment of the U.S. Constitution are closely linked to hearsay concerns,

More specifically, hearsay is undesirable because whether or not the statement is reliable cannot be determined in the declarant's absence.[58] If John, an eyewitness to an accident, tells Shirley, who has just arrived at the scene and did not see the accident, that the truck which ran through the intersection and hit a pedestrian before speeding off was "a green truck" and only Shirley is available to testify at trial, the defense cannot conduct the cross examination that would reveal that John was colorblind.[59] Most testimony given by witnesses at trial is susceptible to at least one of the several testimonial infirmities: the passage of time since the event, precision of the witness's memory, verbal ambiguity from a witness's choice of words, insincerity, and sheer fault in perception.[60] The hearsay doctrine exists because while the testimony of a witness appearing under oath at trial can be tested against these, the statement of a non-appearing witness generally cannot.[61]

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to the degree that defendants have a constitutional right to confront witnesses who are the source of "testimonial" hearsay evidence offered against them. The Supreme Court has recently re-acknowledged the specific historical basis for this right. *See* Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015) (describing "the notorious use of ex parte examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as 'the principal evil at which the Confrontation Clause was directed.'" (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004))).

58. *See* Wm. Garth Snider, *The Linguistic Hearsay Rule: A Jurisprudential Tool*, 32 GONZ. L. REV. 331, 334 (1997) (suggesting that the hearsay rule exists as a means of "subjecting the credibility of the witness testimony to an analysis of the witness' perception, memory, and narration."). Commentators have further noted that the reliability of even a first-hand eyewitness can be questionable at best. *See* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1452–53 (2007) (contrasting the traditional Wigmorean view of eyewitness reliability with the more modern evidence challenging juror competence to weigh the reliability of eyewitness testimony, or factors weighing for or against eyewitness testimony).

59. Although the colorblindness example used here is the author's own variation, this example is broadly similar to the hypothetical provided by the *Handbook of Federal Evidence*, which characterizes circumstances similar to that described above as "the classic hearsay statement." 6 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 801:1 (7th ed.).

60. FED. R. EVID. 801 advisory committee's note to 1972 proposed rules. *See also* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (discussing the infirmities at play with hearsay testimony); Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 150 (2007) (referencing "the law's preference for in-court testimony" as more reliable in contrast to hearsay, based on the oath and threat of perjury, the ability of the jury to examine witness demeanor, and the possibility of cross-examination).

61. *See* United States v. Parry, 649 F.2d 292, 294 (5th Cir. 1981) ("[W]hen an out-of-court statement is offered as a testimonial assertion of the truth of the matter stated, we are vitally interested in the credibility of the out-of-court declarant. Because a statement made out of court is not exposed to the normal credibility safeguards of oath, presence at trial, and cross-examination, the jury has no basis for

Hearsay is perhaps considered to be a confusing doctrine because of the myriad intricacies—the several-dozen "exclusions" and "exceptions" to the rule—which modify the exclusionary effect of the doctrine for, at best, murky reasons.[62] Without going into detail, the basis of providing for admission of certain hearsay evidence under one of the various exceptions is that certain classes of evidence are considered to be less susceptible to the infirmities, and more likely to be reliable for one reason or another. Ultimately, hearsay *itself* is a simple doctrine: direct, rather than secondary evidence ought to be required to prove one's case. However, much scholarly ink has been spilt in the debate about whether the various "exceptions" themselves do, in fact, properly identify "more reliable" forms of evidence, in cases where secondhand evidence may be admitted; the following subsection will discuss a handful of these debated points.

C. Definitions, Exemptions, Exclusions, and Exceptions

Despite the apparently rigid doctrine of exclusion laid down by Rules 801 and 802, much evidence and testimony from secondhand evidence is admitted at trial. The definitions provided for the words "statement,"[63] "declarant,"[64] and "hearsay"[65] within Rule 801 as legal terms of art actually exclude from the very scope of hearsay many

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evaluating the declarant's trustworthiness and thus his statement is considered unreliable.")

62. *See, e.g.*, Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 882–83 (2015) ("The hearsay rule, a vexingly complex doctrine that purports to bar secondhand evidence in court, has received significant attention from legal academics, who have pored over its myriad intricacies in an effort to understand fully its contours and implications. The difficulties that legal academics have confronted in developing a coherent understanding of the hearsay doctrine is evidenced in part by their inability to agree on the rationale for the rule's existence."); *see also* Pardo, 82 TUL. L. REV. at 148 (describing "the Byzantine structure of the [hearsay] rules" as "a trap for the wary" that may either contribute or detract from just results); Glenn Weissenberger, *Reconstructing the Definition of Hearsay*, 57 Ohio St. L.J. 1525 (1996) ("Evidence professors seem to have a pathological compulsion to scrutinize and reorder the hearsay system.").

63. FED. R. EVID. 801(a) ("Statement. 'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.").

64. FED. R. EVID. 801(b) ("Declarant. 'Declarant' means the person who made the statement.").

65. FED. R. EVID. 801(c) ("Hearsay. 'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

things that would facially appear to be barred under the doctrine.[66] Perhaps most commonly, almost any "statements" made by "declarants" can be admitted for reasons which do not seek to "prove the truth of the matter asserted," if the mere fact that the statement was made, or that someone heard it, or some other reason makes the existence of the statement in and of itself relevant, under Rule 401.[67] Also, while many declarants make statements through documents—*i.e.*, communicated through a written medium—many documents contain "statements" which are made by machines, rather than "declarants;" under the definition, "declarants" must be "people."[68] Finally, many apparent statements are not actually considered to be statements under all circumstances, such as testimony that a potentially hearsay declarant asked the testifying witness the question, "How are you doing today?" Questions—and also imperative commands, such as "stay where you are"—may not contain an assertion of anything, in the way that the statement "The sky is blue"

66. *See* Glen Weissenberger, *Unintended Implications of Speech and the Definition of Hearsay*, 65 TEMP. L. REV. 857 (1992) ("[I]f conduct is not intended as an assertion, it cannot be hearsay. Likewise, conduct and oral communication intended to be assertive, but offered to prove something distinct from the intended fact to be communicated, are not hearsay. And, of course, where the evidence is not hearsay, it cannot be excluded by the hearsay proscription.").

67. "A statement may be logically relevant in two ways: (1) the mere fact that it was made, or heard, by a particular person, regardless of its truth [or] falsity, may tend to establish an ultimate fact in the case; or (2) the statement may be relevant only if the statement is true." Norman M. Garland, *An Overview of Relevance and Hearsay: A Nine Step Analytical Guide*, 22 Sw. U. L. Rev. 1039, 1052 (1993); *see also* Dutton v. Evans, 400 U.S. 74, 88 (1970) ("The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements."); United States v. Bursey, 85 F.3d 293, 296 (7th Cir. 1996) ("[S]tatements that are offered not to prove 'the truth of the matter asserted,' but for some other legitimate purpose, do not qualify as hearsay.").

68. "A printout of machine-generated information, as opposed to a printout of information entered into a machine by a person, does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement." People v. Dinardo, 801 N.W.2d 73, 79 (2010) (discussing police breath test machine). However, the testimony of Police Officer A that Police Officer B told him or her, "This breath test machine was inspected this morning for use and is properly calibrated" would be hearsay, if it was necessary to show not only that the breath test machine indicated that the driver was drunk but also that it had been recently inspected and calibrated.

clearly asserts some putative truth.[69] Thus, such oral declarations may in fact fail the "statement" part of the definition of "hearsay."[70]

Conversely, however, some of those definitions confusingly *include* things that would facially appear outside the purview, or contain nuances that appear to go directly against the examples laid out above. For example, under certain circumstances, the attempt to admit the lack of a statement—silence—can be deemed hearsay.[71] A report containing many readouts of machines compiled by a lab tech who uses those readouts to reach some further conclusion now contains an asserted truth value, predicated on the inferential statements of the lab tech. Finally, Rule 801(d) lays out a host of things which, despite meeting the definitions in 801(a), (b), and (c), are nonetheless "Statements That Are Not Hearsay."[72]

The nuances of what is or is not even *subject* to the hearsay bar from the outset, under Rule 801, is emblematic of why hearsay is

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69. *See, e.g.*, United States v. Rodriguez-Lopez, 565 F.3d 312, 314 (6th Cir. 2009) ("[I]f the statements were questions or commands, they could not—absent some indication that the statements were actually code for something else—be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false."); United States v. Thomas, 451 F.3d 543, 548 (8th Cir. 2006) ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay."); United States v. Wright, 343 F.3d 849, 865 (6th Cir. 2003) ("[A] question is typically not hearsay because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content."); Quartararo v. Hanslmaier, 186 F.3d 91, 98 (2d Cir. 1999) ("An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement.").

70. In a case where a U.S. marshal testified that he overheard a witness tell the defendant that the price of his favorable testimony was $10,000, the effect of what was overheard was merely the demand of "give me $10,000," and the issue therefore becomes only the credibility of whether the marshal was reporting the demand correctly. *See* United States v. Montana, 199 F.3d 947, 950 (7th Cir. 1999) ("Performative utterances are not within the scope of the hearsay rule, because they do not make any truth claims. Had the marshal overheard Dodd tell Montana, 'your father has promised me $10,000,' Dodd's overheard statement would have been hearsay, because its value as evidence would have depended on its being truthful, that is, on such a promise having actually been made.").

71. *See* Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 708 (2016) ("[S]ilence in response to a statement by someone else can qualify as a defendant's adoption of that statement for purposes of the exemption of a party's own admissions from the hearsay prohibition."); *see also* United States v. Hove, 52 F.3d 233, 236–37 (9th Cir. 1995) ("Silence may constitute an adoption or belief in the truth of a statement if, under the circumstances, an innocent person would have responded to the statement."); but see Jackson v. United States, 250 F.2d 897, 900 (5th Cir. 1958) ("Silence, in the absence of a duty to speak, is not an admission.").

72. FED. R. EVID. 801(d).

somewhat of a contentious subject. The "bar" on hearsay in 801 appears rigid, but only to the degree that it is clear to what 801 applies, which is a matter altogether more complicated. Then, in 801(d), several things are summarily excluded from the definition, for reasons that appear to have little to do with reliability,[73] or the reliability of which is questionable at best.[74] But even further, to the degree that the later rules—Rules 803 and 804—appear to subsequently establish specific, equally rigid "exceptions" to hearsay based upon the supposed "reliability" of some hearsay statements made under certain circumstances, the wisdom of the "reliability" in *those* rules is somewhat questionable. Satisfaction, however, of one of the exceptions often leads to relatively easy admission of hearsay testimony.

The vagueness of what is or is not hearsay under 801, compounded with around thirty subsequent exceptions whose wisdom and rationale are equally vague, has resulted in decades of scholarship and multiple conflicting, entrenched camps of practitioners, academics, and judges, supporting every possible combination of the following positions: whether the doctrine serves the purpose of promoting reliable evidence or not; whether the doctrine should be changed or not; whether the doctrine is in fact internally consistent or not; and whether their own or others' personal, individual comfort with the practical application and effective use of the existing doctrine plays any role whatsoever in the state of the present hearsay system.[75]

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73. The defendant's own statements are almost universally admitted against the defendant under 801(d)(2), on the rationale that the defendant must own their own words, and may elect to take the stand and deny or place into context the potentially problematic statements they themselves have made.

74. The statements of a "coconspirator," admitted under 801(d)(2)(E), bring up the questions of the applicability of the rule itself and how to prove by extrinsic evidence that the declarant witness is, in fact, a coconspirator. *See* Bourjaily v. United States, 483 U.S. 171, 176 (1987) (discussing the "preponderance of the evidence" standard rendering the coconspirator exception operable). There is also the further question of whether or not the potential motives of those who are in fact coconspirators may lead them to make wholly unreliable false statements in many or even most cases.

75. *See generally* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1 (2009); Marilyn J. Ireland, *Deconstructing Hearsay's Structure: Toward A Witness Recollection Definition of Hearsay*, 43 VILL. L. REV. 529 (1998); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203 (1995); Mueller, *supra* note 12, at 368; Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849 (1991); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974); Ted Finman, *Implied Assertions As Hearsay: Some Criticisms of the Uniform Rules*

Turning specifically to the two rules providing exceptions to hearsay, Rule 803 provides exceptions that apply whether or not the original declarant is "available" as a witness,[76] and Rule 804 provides exceptions that only apply under circumstances where the declarant is considered to be "unavailable," as defined by the rule.[77] Both Rule 803 and Rule 804, as described by the Advisory Committee, represent the codification of principles that evolved out of the common law of hearsay;[78] however, it is some of these venerable exceptions that draw the sharpest criticism from commentators.

Under Rule 803, the theory is that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."[79] Three of the most venerable common law exceptions—old enough to still commonly be referred to in Latin as the *res gestae* exceptions—are 803(1)'s "Present Sense Impression," 803(2)'s "Excited Utterance," and 803(3)'s "Then-Existing Mental, Emotional, or Physical Condition" rules. A present sense impression is a statement "describing or explaining an event or condition, made while or immediately after the declarant perceived it."[80] An excited utterance is a statement "relating to a startling event or condition, made while the declarant was under the stress of excitement that [the event] caused."[81] Statements of then-existing mental, emotional, or physical condition are those which describe the declarant's then-existing "state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."[82]

These three rules are classic examples of hearsay exceptions that are widely criticized as being based on unsubstantiated assumptions about what may make a statement "reliable," enough so

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of Evidence, 14 STAN. L. REV. 682 (1962); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

76. FED. R. EVID. 803.

77. FED. R. EVID. 804

78. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules; FED. R. EVID. 804 advisory committee's note to 1972 proposed rules.

79. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

80. FED. R. EVID. 803(1).

81. FED. R. EVID. 803(2).

82. FED. R. EVID. 803(3).

to relieve it from the harsh, exclusionary definition of 801.[83] The rationale for the present sense impression rule is that "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."[84] Similarly, the rationale for the excited utterance rule is that the effect of a shocking, exciting, or otherwise extreme event upon a declarant "stills the capacity of reflection," and that statements they therefore make are unlikely to be consciously fabricated.[85] The "Then-Existing" rule of 803(3) is predicated upon similar ideas,[86] that the declarant is likely to be reliable in relating their immediate mental, physical, or emotional state.

However, the idea that contemporaneity in time and excitement of circumstance leads to reliability is "questionable at best,"[87] and even if assumed to be true, it remains difficult to establish what those two nexuses in fact were in any objective fashion. The Advisory Committee themselves even acknowledges that "the theory of Exception [paragraph] (2) has been criticized."[88] Also, there is no

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83. *See, e.g.*, Angela Conti & Brian Gitnik, *Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay*, 14 ST. JOHN'S J. LEGAL COMMENT. 227, 250 (1999) (arguing that 803(2)'s "excited utterance rule" is "a legal doctrine based upon a psychological theory, and modern psychology has proven its core element to be a falsehood."); Moorehead, *supra* note 75, at 227–42 (arguing that neither excitedness in the context of 803(2) nor contemporaneity under 803(1) or 803(3) are reliable guarantors of trustworthiness or impossibility of fabrication); Aviva Orenstein, *"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 180 (1997) (questioning the psychological basis for the excited utterance exception, and proposing a specific hearsay exception for survivors of rape and crimes involving sexual violence); *cf.* Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 914 (2001) (arguing that because present sense impressions poses only two of four potential hearsay risks, they are sufficiently reliable to warrant exception).

84. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

85. *Id.* In a recent criticism of the rationale that such shocking or exciting statements are not susceptible to conscious fabrication, Prof. Alan G. Williams has recently argued that the statement from the famous scene in the movie *Casablanca* where Captain Louis Renault, seconds after Rick Blain shoots a Nazi officer, falsely says "Major Strasser has been shot—round up the usual suspects!"—a statement that would be admitted as substantive proof that Blain did not shoot Strasser, under the excited utterance exception. Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717 (2015).

86. The Advisory Committee calls Exception (3) "essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility." FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

87. Moorehead, *supra* note 75, at 228.

88. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

reason to believe that this truly reduces any of the previously discussed testimonial infirmities which hearsay seeks to exclude.[89]

Rule 804 requires a showing that the declarant is "unavailable," but upon showing that they qualify as unavailable, certain statements may be admitted. Declarants are "unavailable" when the subject matter of testimony is privileged, when they defy a court order to testify, when they affirmatively testify that they do not remember the subject matter, when they are physically absent despite the proponent of the statement's reasonable attempts to procure their presence, or most classically, when the declarant is unable to testify at trial because they are infirm, ill, mentally incapable, or deceased.[90]

The classic exception within Rule 804 that raises questions of reliability is the "Statement Under the Belief of Imminent Death" exception, which allows "a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."[91] The classic, common-law basis for admission of such a statement is that no declarant "who is immediately going into the presence of his Maker, will do so with a lie on his lips."[92] However, similarly to the justifications for the *res gestae* exceptions to 803, it seems facially clear that there is no particular reason to believe a declarant will lose all ability to lie or misrepresent something, and in fact, there exist conceivable reasons why they could do the exact opposite; here, the Advisory Committee once again specifically acknowledges that "the original religious justification for the exception may have lost its conviction for some persons over the years."[93] Also as stated above, with this exception as well as the *res gestae* 803 exceptions, there is no particular reason to assume that their

89. *See* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 965 (1974) (discussing and critiquing the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory).

90. FED. R. EVID. 804(a)(1). *See also* Glen Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1081 (1987) (highlighting 804(a)'s distinction between unavailability of the declarant's person, and the testimony itself).

91. FED. R. EVID. 804(b)(2).

92. Regina v. Osman, 15 Cox Crim. Cas. 1, 3 (N. Wales Cir. 1881) (Lush, L.J.).

93. FED. R. EVID. 804 advisory committee note. Some commentators, however, have argued that despite the relative secularization of society in the modern era, "powerful psychological forces" still come to bear upon a declarant at the moment of death, giving rise to increased reliability of such deathbed statements. *See* Glen Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1107 (1987) ("In the more secular world, however, this rationale for the [deathbed] exception has largely been supplanted by the theory that the powerful psychological forces bearing on the declarant at the moment of death engender a compulsion to speak truthfully").

words will be less susceptible to the testimonial infirmities, even if it is assumed that the imminence of death does indeed have some effect upon the declarant's motivation to lie.

D. Opinions and Experts

Article VII of the FRE limits the ability of lay witnesses to give opinion based testimony, and regulates the "expert" witness who may give such testimony and the circumstances under which they may do so. Rule 701 states that unless a witness is testifying as an expert, opinion testimony is limited to that which is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[94] Rule 702 states that a witness "who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion."[95] However, they may do so only if their scientific, technical, or otherwise specialized knowledge is necessary for the fact finder to understand the evidence or determine a fact at issue; if their testimony is based on sufficient facts or data; if the testimony is the product of reliable principles and methods; and the expert has reliably applied those principles and methods to the facts of the instant case.[96]

Fact finders are not expected to be doctors, engineers, chemists, or to otherwise possess any preternatural abilities to understand the facts of any given case laid before them.[97] However, establishing the proof of one or more elements of many cases may require such specialized knowledge. As such, the law permits qualified individuals to come before the fact finder and explain to them how—based on the expertise generally relied upon by experts who *do* understand the technical or specialized subject matter—those facts should or should not be construed.[98]

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94. FED. R. EVID. 701.

95. FED. R. EVID. 702.

96. *Id.*

97. "(I)t is not to be inferred that the opinions of ordinary witnesses are competent as to subjects which require special study and skill and which are proper for the testimony of the expert as distinguished from the ordinary witness." Randolph v. Collectramatic, Inc., 590 F.2d 844, 847 (10th Cir. 1979) (quoting 2 BURR W. JONES & SPENCER A. GARD, JONES ON EVIDENCE, §14:3 (1972)).

98. In the forum of arbitration, however, this functions somewhat differently, as multiple arbitrator panels often include industry specialists, such as in construction arbitrations.

A lay person may testify to their "opinion" in circumstances where they testify to their state of mind at a particular point in time, based upon "relevant historical or narrative facts that the witness has perceived" which led them to believe a certain thing, and that state of mind is itself relevant.[99] In such a situation, testimony of the state of a lay person's mind at a time when they drew an inference based upon facts is "not the expression of an opinion within the meaning of the rule."[100]

The sharp divide between lay witnesses and experts shields the fact finder from accepting conjecture from sources other than those who have been shown to present some reliable basis for positing conjecture. The statement of a lay witness that is based "solely upon his own opinion, and which is merely a conclusion of an ultimate fact in issue, has no probative value."[101] The statement of a qualified expert, however, may be truly necessary in order to prove certain elements—causation, typically—which require not only facts to be established, but moreover interpreted or explained. In an insurance subrogation case subsequent to a restaurant fire, the insurer sought to recover from a company whose fluorescent light "ballast" arguably caused the fire; expert testimony was necessary, however, to explain a particular scientific principle which would have made it possible for ballast burning at 340 degrees to ignite a nearby stockpile of wood, which was shown to require an ignition temperature of 400 degrees or above.[102]

However, the requirements to certify the expert themselves provide another important shielding of the fact finder from unreliable opinion. In the above-mentioned dispute about causation of a fire, the expert testimony seeking to introduce the scientific theory explaining the difference in ignition temperature was excluded, on the basis that the proffered theory was "insufficiently reliable even for trained experts," under FRE 702.[103]

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99. Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403 (3d Cir. 1980).

100. Phillips v. United States, 356 F.2d 297, 308 (9th Cir. 1965) (admitting lay witness opinion in a mail fraud case, where lay witnesses testified about their belief in the suitability of land for residential, recreational, and sound investment purposes, based upon the representations about the land in the fraudulent sales materials).

101. Schott Optical Glass, Inc. v. United States, 468 F. Supp. 1318, 1325 (Cust. Ct. 1979).

102. Truck Insurance Exchange v. MagneTek, Inc., 360 F.3d 1206, 1215 (10th Cir. 2004) (discussing "pyrolysis").

103. *Id.* at 1216.

Relatively recent Supreme Court cases[104] have expanded the realm of who and what may be considered an "expert," as well as the subject of expert testimony. Echoing those cases, Rule 702 provides important safeguards against charlatans, mystics, and hacks masquerading as experts, as well as against perhaps-legitimate experts who nonetheless peddle scientific theories of questionable veracity.[105] Although *Daubert* opened the doors to testimony that might not yet be "generally accepted" as practice in whatever the field of expertise was, the acceptance of a theory—alongside other checks such as peer review and replication of results—remains relevant under 702. *Kumho* expanded the definition of what constituted "expert testimony" beyond simple scientific testimony, allowing many individuals whose purported area of expertise may not require an advanced degree to nonetheless be qualified. However, the requirements that "experts" and the testimony they provide be avouchable in some way—whether by general acceptance, peer review, known error rate, repeatable process—and that the expert performed some specific application of their knowledge to the facts of the instant case ensures that the fact finder is not exposed to opinions which are either wholly unreliable, or not necessarily meaningful in the context of the specific case.

E. Authenticity & Personal Knowledge

Two other rules within the FRE concern principles that underlie all evidence that may potentially be offered. Within Article VI, which concerns "Witnesses," Rule 602 states that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[106] Within Article IX, Rule 901 states that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[107]

There is a close relationship between authenticity and the need for personal knowledge, and each of the previously discussed

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104. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

105. *See* Truck Insurance Exchange v. MagneTek, Inc., 360 F.3d 1206, 1216 (10th Cir. 2004). (referring to the excluded testimony about the "pyrolysis" theory, the court somewhat apologetically acknowledged that "[t]hough the theory of long-term, low-temperature ignition of wood is an interesting one that eventually may be sufficiently tested and researched to serve as the basis for an expert opinion under Rule 702 . . . the foundation for pyrolysis has not yet reached that point").

106. FED. R. EVID. 602.

107. FED. R. EVID. 901.

principles of evidence law. "Authentication and identification," the Advisory Committee acknowledges, "represent a special aspect of relevancy."[108] The personal knowledge requirement guarantees that a witness actually did *witness* an event described, or perceived in some way the thing to which they testified. Personal knowledge bridges important gaps, such as those created by the hearsay exceptions; a witness who did not see an event—but who heard a declarant's statement about the event—has the level of personal knowledge necessary to give testimony about the statement. That testimony will be admissible if the statement is outside the definition of hearsay or falls within one of the exceptions or exclusions.

II. EVIDENCE RULES IN ARBITRATION

This Part shall discuss the various rules within different arbitration rule regimes. Arbitration is a creature of contract law, and parties have the option to exert significant control over the process. However, many parties opt to use bodies of rules promulgated by a variety of different mediation and dispute resolution organizations. These organizations have, over the years, provided rule regimes, each of which has some rule or series of rules describing how the arbitrator may control the introduction of evidence, and suggesting how to consider evidence entered when making their awards.

The treatment of evidence among arbitral regimes exhibit broad similarities in that arbitrators are generally given relatively wide latitude to admit what they wish. The specific treatment of evidence within the various bodies of rules, however, differs: some regimes cabin discussion of evidence to its own rules, while others package it within rules governing the overall conduct of the arbitration hearing. Unlike the FRE, none of these rules or rule regimes, however, provide a comprehensive framework for analyzing evidentiary admissibility. While some regimes reference the FRE, it is only to distinguish the need to follow them, rather than an incorporation of the explicit concepts of evidence law in the arbitral forum.

Prior to discussing the rule regimes, however, it is necessary to explain the federal statutory scheme within which those rules function.

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108. FED. R. EVID. 901 advisory committee's note to 1972 proposed rules.

A. *The Federal Arbitration Act, and Arbitration Generally*

In civil litigation, failure to properly apply the FRE can sometimes, although rarely, lead to reversal on appeal.[109] Arbitrations, however, largely exist to provide a means of dispute resolution where the result is final and non-appealable. Arbitration is "a matter of contract,"[110] which is further governed by a federal statute, the Federal Arbitration Act of 1925 ("FAA").[111] A party seeking to vacate an arbitration award based upon some purported error in the arbitrator's conduct or admission of evidence must, therefore, frame the challenge to state a claim under the FAA.

The FAA lays out certain statutory bases for judicial review of arbitral decisions. Also, under common law principles, which still arguably survive in some circuits, an arbitrator's decision can be reversed for "manifest disregard" of the law.[112] Under *Oxford Health Plans LLC v. Sutter*[113] and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[114] courts may only vacate in "unusual circumstances,"[115] because maintaining a limited judicial review is essential to preserve the efficiency value of arbitration as a method of dispute resolution.[116] Arbitration awards are not generally reviewable

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109. There is generally wide discretion under the FRE allowing impeachment of credibility to establish bias of witness. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988) (partial exclusion of an incomplete letter found to be "clear abuse of discretion"); United States v. Abel, 469 U.S. 45, 54–55 (1984) ("The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion").

110. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)

111. 9 U.S.C. § 10(a)(3) (2015). Because arbitration is also a creature of contract law, a flaw in the arbitration clause or the contract itself may give rise to a collateral attack, premised upon some substantive contract law doctrine. This form of attack is, however, beyond the scope of this article, as attacking the underlying validity of the contract or the clause under contract law does not take into account the conduct or process of the arbitration itself.

112. *See, e.g.*, Dewan v Walia, 544 F App'x 240, 242 (4th Cir 2013) (vacating an award that was the product of manifest disregard of the law).

113. 133 S. Ct. 2064, 2068 (2013).

114. 559 U.S. 662, 693 (2010).

115. *See* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 693 (2010) (both quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).

116. *Oxford*, 133 S. Ct., at 2068 (interpreting Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008)).

for errors of either law or fact.[117] Section X of the FAA provides four exclusive grounds for vacatur, which collectively hinge on providing a fundamental fair process, rather than strict procedural mandates. Section 10(a)(1) vacates awards "procured by corruption, fraud, or undue means;" Section 10(a)(2) vacates awards where there was "evident partiality" in the arbitrators towards a given party; Section 10(a)(4)—the section giving rise to the "manifest disregard" doctrine—permits vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[118] The final section is Section 10(a)(3), which I will discuss in more depth.

Out of the four sections, only section 10(a)(3) provides that arbitrators may be overturned for "refusing to hear *evidence* pertinent and material to the controversy."[119] Section 10(a)(3) is a significantly limited basis for reversing an arbitration decision.[120] Overall, reversal of an arbitral decision for any reason is rare, and in many cases where an arbitrator has made an evidentiary decision the court has upheld the decision regardless of whether the evidence was admitted or excluded.[121] Courts have interpreted the FAA to mean that although

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117. *See* Stolt-Nielsen S.A., 559 U.S. at 671 ("[I]n order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error."); *see also* Seed Holdings, Inc. v. Jiffy Int'l AS, 5 F. Supp. 3d 565, 585 (S.D.N.Y. 2014) ("Arbitration awards are not reviewed for errors made in law or fact.").

118. 9 U.S.C. § 10(a)

119. 9 U.S.C. § 10(a)(3) (2015) (emphasis added).

120. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 746 (1996) (characterizing all 10(a) grounds as "extraordinarily narrow," and subsequently discussing 10(a)(3)).

121. *See, e.g.*, Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 453 (2d Cir. 2011) (upholding award despite arbitrator's exclusion of testimony regarding certain events significantly prior to the dispute as "too remote"); Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646, 584 F.3d 513, 559 (3d Cir. 2009) (upholding award after arbitrators considered, but subsequently deemed evidence from certain witness statements "irrelevant"); Howard Univ. v. Metro. Campus Police Officer's Union, 512 F.3d 716, 721 (D.C. Cir. 2008) (upholding award despite arbitrator's arguably erroneous exclusion of union chief negotiator's testimony based upon attorney-client privilege), *and*; Hudson v. ConAgra Poultry Co., 484 F.3d 496, 504 (8th Cir. 2007) (upholding award despite arbitrator's refusal to hear evidence of plaintiff's tort claims after arbitrators heard argument from both parties, and determined that such claims were barred by *res judicata*); Robbins v. Day, 954 F.2d 679, 685 (11th Cir. 1992) (upholding award where arbitrators excluded testimony of brokers as "unimportant" and "cumulative"); *cf.* Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.), INC., 846 F. Supp. 2d 298, 304 (D. Me.), *aff'd*, 695 F.3d 181 (1st Cir. 2012) (upholding arbitration award despite panel's "procedural irregularity" in relying

arbitrators "must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments,"[122] they are "not required to hear all the evidence proffered by a party."[123] Arbitrators have indeed been upheld for decisions to exclude significant evidence, based on reasons similar to policies found within the FRE. In *Rai v. Barclays Capital Inc.*, an arbitrator's decision was upheld after not only refusing to postpone a hearing based upon a witness's inability to appear and testify, but moreover deciding to exclude that witness's affidavit on the basis that cross-examination was not possible.[124] In *LJL 33rd Street Associates, LLC v. Pitcairn Properties Inc.*, an arbitrator's decision to exclude hearsay evidence about the valuation of a property based specifically on the fact that the evidence was hearsay was upheld.[125]

Conversely, an arbitrator has "substantial leeway to admit any evidence that [they] find[] useful—even hearsay evidence."[126] In *Raiola v. Union Bank of Switzerland, LLC*, an arbitrator decided to admit handwritten notes over objections that they were hearsay and did not qualify for the business record exception.[127] The court upheld the arbitrator's decision to admit the evidence on the basis that the notes were clearly material and pertinent to the conflict.[128] In *Raiola*,

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upon evidence outside the record to construe an ambiguity in parties' contract). *But see* Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 850 (5th Cir. 1995) (vacating arbitration award where arbitrator prevented employer from presenting additional evidence—the discharged employee's cigarette stub found in discharged employee's vehicle which tested positive for marijuana—after justifying the exclusion by telling the employer that the chemical report confirming the presence of marijuana had been admitted as a business record, but then citing the employer's failure to present evidence the employer had been told not to present as a predicate for ignoring the results).

122. Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003) (confirming arbitral award despite refusal to compel production of certain financial documents).

123. Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (confirming arbitral award despite exclusion of testimony by company official).

124. Rai v. Barclays Capital Inc., 739 F.Supp.2d 364, 374–75 (S.D.N.Y. 2010).

125. LJL 33rd St. Associates, LLC v. Pitcairn Properties, Inc., 725 F.3d 184, 187 (2d Cir. 2013) (holding that arbitrator's exclusion of hearsay was not abuse of discretion, and confirming award).

126. ARMA, S.R.O. v BAE Sys. Overseas, Inc., 961 F. Supp. 2d 245, 263 (D.D.C. 2013) (explaining further that "An arbitrator may likewise opt to expedite a proceeding by excluding evidence and testimony that it finds irrelevant or duplicative").

127. Raiola v. Union Bank of Switzerland, LLC, 230 F. Supp. 2d 355, 360 (S.D.N.Y. 2002) (holding that admission of the notes did not deprive adverse party of fundamentally fair trial).

128. *Id.*

the court also observed that the arbitrator's findings on credibility were non-reviewable.[129] In *Farkas v. Receivable Financing Corp.*, the court made direct reference to the AAA commercial rules in holding that arbitrators "did not exceed their powers by considering hearsay evidence."[130] Arbitrators are also permitted to admit evidence that is speculative in nature.[131]

Ultimately, however, arbitrators do not automatically expose themselves to vacatur "in refusing to hear evidence pertinent and material to the controversy."[132] Section 10(a)(3) "cannot be read . . . to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award."[133]

Parties contracting to resolve disputes by arbitration can mutually agree to any governing rules or procedures in advance, or, at the time of the arbitration, make preferences known to the arbitrator.[134] Many parties, however, opt to utilize various bodies of rules already available and promulgated by nonprofit and private entities specializing in various forms of alternative dispute resolution. The discussion will now shift to an examination of some of the well-known rule regimes and how they deal specifically with the admission of evidence in arbitration.

B. The American Arbitration Association ("AAA")

The American Arbitration Association ("AAA") is a private organization specializing in offering various forms of dispute resolution services. As one of those services, the AAA promulgates a

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129. *Id.* ("[I]t is not within this Court's authority to question that determination.").

130. Farkas v. Receivable Fin. Corp., 806 F. Supp. 84, 87 (E.D. Va. 1992) (upholding arbitration award in employment dispute arbitrated under AAA rules); *see also* Petroleum Separating Co. v. Interamerican refining Corp., 296 F.2d 124 (2d Cir. 1961) (per curiam) (upholding arbitrator's decision in payment amount dispute to admit hearsay evidence from both parties, in context of an arbitration subject to AAA rules).

131. D.E.I., Inc. v. Ohio and Vicinity Regional Council of Carpenters, 155 F. App'x 164, 170 (6th Cir. 2005).

132. Century Indem. Co. v. Certain Underwriters at Lloyd's, London, Subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646, 584 F.3d 513, 557 (3d Cir. 2009).

133. Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968).

134. *See* Radvany, *supra* note 2, at 729, 741 (discussing party choice).

number of rule regimes for different kinds of arbitrations.[135] Under the rules for commercial arbitration, R-34 discusses "Evidence."[136] The text of R-34 reads:

> (a) 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 and determination of the dispute. *Conformity to legal rules of evidence shall not be necessary.* All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
>
> (b) The *arbitrator shall determine the admissibility, relevance, and materiality* of the evidence offered and *may exclude* evidence deemed by the arbitrator to be *cumulative or irrelevant.*
>
> (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
>
> (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.[137]

R-34 presents a fairly typical example of how evidence is handled in arbitration. The rule does not explicitly direct arbitrators to ignore evidence law but specifically states that adherence is not required. The only guiding principle specifically stated within the rule in the (a) section is "relevance" and "materiality" and the only basis

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135. *See Rules, Forms & Fees*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/Rules (last visited March 29, 2017) (Commercial Arbitration Rules and Mediation Procedures, Construction Industry Rules and Mediation Procedures, Consumer Arbitration Rules, Employment Arbitration Rules and Mediation Procedures, Labor Arbitration Rules, International Dispute Resolution Procedures).

136. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-34 (2016) [hereinafter AAA COMMERCIAL ARBITRATION RULES].

137. *Id.* (emphasis added).

of exclusion specifically stated in the (b) section other than lack of relevance is evidence that is cumulative.

AAA R-35 discusses "Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence," and is worth noting because some of the provisions suggest that the AAA rules are at least cognizant of some other evidentiary concerns.[138] The (a) section of the rule requires that parties give written notice for any witness who has given a written statement.[139] If that witness fails to appear for examination in person at the arbitration, "the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable."[140] The (b) section of the rule goes on to provide fallback provisions for the situation where a witness who is "represented by a party to be essential" is unable to testify. The (a) section of R-35 appears designed to bolster R-32, "Conduct of Proceedings," the (c) section of which requires that in the presentation of evidence through a witness, the arbitrator "provide an opportunity for cross-examination."[141]

C. JAMS

Founded in 1979, JAMS is the "largest private alternative dispute resolution (ADR) provider in the world" and employs almost 300 full-time neutrals, including retired judges and attorneys.[142] JAMS arbitration and mediation services provide various sets of rules and procedures to govern arbitrations.[143]

JAMS provides several arbitral rule regimes, such as the "Comprehensive," "Streamlined," and "Employment" rules. All of these regimes discuss evidence, but within the context of a broader rule. In both the "Comprehensive" and "Employment" regime, Rule 22 governs "The Arbitration Hearing," while in the "Streamlined" regime the same name is attached to Rule 17. Under "Comprehensive" and "Employment" Rule 22(c) and "Streamlined" Rule 17(c), "[t]he

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138. *Id.* at R-35.

139. *Id.* at R-35(a).

140. *Id.*

141. *Id.* at R-32(c).

142. *About JAMS*, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/aboutus_overview/ (last visited Apr. 5, 2015).

143. *ADR Clauses, Rules, and Procedures*, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/adr-rules-procedures/ (last visited Apr. 5, 2015) (referring to specific rule bodies, the "Comprehensive" and "Streamlined" rules. JAMS also features "Class Action," "Construction," and "Employment" arbitration rules, which are not discussed in this Article).

arbitrator shall require witnesses to testify under oath" if requested by a party or at the discretion of the arbitrator.[144]

Evidence is specifically discussed in the (d) section of both Rule 17 and Rule 22. Similar to AAA, JAMS directs arbitrators that "[s]trict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product."[145] However, JAMS goes further than AAA in suggesting to the arbitrator how to manage the evidence offered, affirmatively directing the arbitrator that they "shall consider evidence that he or she finds relevant and material to the dispute, *giving the evidence such weight as is appropriate*."[146] Under the plain language of this rule, it would seem that JAMS forbids the absolute exclusion of any evidence which satisfies the general requirement of relevancy and materiality, instead charging the arbitrators to simply give it "appropriate" weight, which may be none. The JAMS rules do not specifically say that an arbitrator may not exclude evidence, except for cases where the evidence is "immaterial" or "unduly repetitive." This once again appears to echo the AAA rule, which speaks of exclusion of cumulative evidence.

The plain language reading of the rule, however, may be somewhat tempered by the fact that the rule does provide that "[t]he Arbitrator may be guided in that determination [of "relevant and material"] by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence."[147] This appears to allow arbitrators some leeway when determining whether or not to allow certain evidence to be admitted. In each of the three rule bodies—Comprehensive, Streamlined, and Employment—the text of the rule is identical. In all three versions of subsection (f), the JAMS rules preclude parties from offering, and arbitrators admitting as evidence, prior settlement offers made by parties. This parallels FRE 408, which prohibits introduction of similar evidence on the basis within the Article IV "Relevance" framework.

Even if this is the case, however, it would still be a powerful exclusionary provision; an arbitrator who looks within Article IV of the FRE and nowhere else can still exclude improper character evidence, evidence of subsequent remedial measures, evidence of

144. JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES Rule 22(c) (2014); JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES Rule 22(c); JAMS STREAMLINED ARBITRATION RULES & PROCEDURES Rule 17(c) (same quoted material).

145. *Id.*

146. *Id.* (emphasis added).

147. *Id.*

insurance, and many other things which the FRE frame within "Relevance and its Limits." Thus, it is at least arguable that an arbitrator, functioning under the JAMS rules could—if so inclined—exercise substantial discretion to exclude proffered evidence, and yet not violate the apparent policy of the JAMS rules to admit all evidence that is "relevant and material." By using the FRE as a guide, the arbitrator could exclude from the definition of "relevant and material" those things that, under the FRE, are excluded by Article IV.

D. Financial Industry Regulatory Authority ("FINRA") Arbitrations

FINRA is a private, self-regulatory organization ("SRO") that, in 2007, consolidated the regulatory functions of the NASD and the NYSE. FINRA conducts arbitrations in securities disputes, under its own regime of rules and procedures, typically between investors and broker dealers, or disputes between two industry parties.[148] FINRA arbitration is largely compulsory, as securities brokers and dealers must be members of FINRA in order to participate in the securities arena. Members of FINRA submit to FINRA arbitration when disputes arise between themselves. Correspondingly, FINRA broker dealers typically require customers to similarly submit to arbitration and include an arbitration clause in their account opening statements.[149]

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148. While FINRA does promulgate two sets of rules, this subsection refers only to the set which governs disputes between investors and individual entities registered with FINRA, such as cases between investors and brokers or broker dealers. This set of rules is referred to as the "Customer Code." The rules governing disputes between two industry parties are referred to as the "Industry Code." FINRA MANUAL, FINRA RULES Rules 12000, 13000 (2017), http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=607 [hereinafter FINRA RULE].

149. *See* Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597, 599 (2014) (discussing the "ubiquitous arbitration clause" in customer agreements from brokerages); *see also* North American Securities Administrators Association, *Mandatory Binding Arbitration: Is it Fair and Voluntary?*, at 1 (Sep. 15, 2009), http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Arbitration-Statement-9.15.09.pdf ("Today, almost every broker-dealer includes in their customer agreements, a predispute arbitration provision that forces public investors to submit all disputes that they may have with the firm and/or its associated persons to mandatory arbitration"); Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 426 (2006) (outlining the development of the use of the pre-dispute arbitration clause).

FINRA also provides arbitration services, governed by a rule regime that discusses the admission of evidence. For arbitrations involving customer disputes, Rule 12604 states that:

> (a) The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.
>
> (b) Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.[150]

The FINRA evidence rule does not specifically provide for exclusion. However, the fact that it draws a distinction between material produced and material that may or may not ultimately be admissible at the hearing suggests that circumstances exist whereby some material may be excluded. More importantly however, the discussion of state or federal rules of evidence in the negative—for example, that the panel "is *not* required to follow"—arguably implies something other than mere rejection of the FRE principles. One reasonable construction is that arbitrators should start from such rules, but may then use their discretion to diverge from them in appropriate circumstances. Alternatively, it could be construed that arbitrators may generally do what they please, but when a party makes an objection predicated on policies contained in such rules, they should at least consider the basis of the objection—to the degree that it stems from the rules of evidence—to carry some weight, despite the fact that they may still admit the evidence.

E. CPR Arbitrations

The International Institute for Conflict Prevention and Resolution Arbitrations (CPR) is an independent nonprofit organization that helps global businesses prevent and resolve commercial disputes efficiently and effectively.[151] Under Rule 12 of CPR's rules, "Evidence and Hearings," the arbitral tribunal has control over the form of proceedings, and is empowered to "determine the

150. FINRA RULE, *supra* note 148.

151. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION ARBITRATIONS, https://www.cpradr.org/about (last visited September 15, 2016).

manner in which the parties shall present their cases."[152] Parties may be permitted to submit briefs or pre-hearing memorandums, stating the facts, claims, applicable law, and requests for relief.[153] However, this must also include "[a] statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony."[154] The tribunal may ultimately determine whatever method of presentation of evidence it deems appropriate.[155] When it does so, the tribunal "is not required to apply any rules of evidence used in judicial proceedings, provided, however, that the tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable."[156] Regardless of what evidence is submitted and whether a party asserts privilege or work product immunity, it is ultimately the Tribunal who "shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered."[157] Finally, CPR's rules provide that the Tribunal may require further evidence from the parties, and appoint neutral experts to give testimony and be subject to cross examination and rebuttal.[158] Thus, CPR allows the arbitrator to determine the admissibility of evidence while not requiring him/her to apply any formal rules of evidence. This allows for some flexibility as an arbitrator can use his/her discretion when deciding whether or not to exclude proffered evidence.

III. PRESENTING EVIDENCE IN ARBITRATION

This part will examine the differences between the regime of evidentiary admissibility under the FRE, and presenting evidence within arbitration as described by arbitration rules.

As the foregoing makes clear, arbitration largely examines whether evidence is (a) relevant and material and (b) not unduly cumulative, while characterizing the other prominent doctrines and issues dealt with in the FRE as questions of weight, not admissibility. An arbitrator or an arbitral tribunal is entrusted to decide the impact of

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152. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION ARBITRATIONS, CPR PROCEDURES & ARBITRATION CLAUSES: ADMINISTERED ARBITRATION RULES Rule 12.1, *available at* https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules [hereinafter CPR RULE].

153. *Id.* Rule 12.1.

154. *Id.* Rule 12.1(e).

155. *Id.* Rule 12.2.

156. *Id.*

157. *Id.*

158. *Id.* Rule 12.3.

such evidence, and what, if any, weight to give it when making his, her, or their decision. Correspondingly, greater emphasis on evidentiary principles in arbitration may be more useful to counsel in arbitration, as the ability to make evidence arguments about material—regardless of whether or not it will be admitted—can meaningfully impact the weight given certain pieces of evidence by arbitrators.

A. The Federal Rules versus Arbitration Rules

There is little doubt that the FRE and case law interpreting the Rules provide a significantly more nuanced framework than the various arbitration rules for the admission of evidence. The various articles of the FRE take account of numerous different issues of admissibility.[159] The arbitration rule regimes surveyed typically apply only to the thresholds of "relevance" and "materiality."[160] Without the strictures of the FRE, arbitrators will often admit evidence that would be inadmissible in federal courts. A witness at an arbitral hearing may testify to hearsay or double hearsay, or a document may be produced during discovery and subsequently admitted with no witness to provide the proper foundation for the document.

The difference in the rigor and application of evidentiary rules between arbitration and civil litigation controlled by the FRE stems from different considerations. One is the fact that because arbitrators are typically lawyers and therefore trained in evidence, they are perceived to be more "trusted"[161] than jurors and more able to perform in a role similar to that of a bench trial judge.[162] Also, there is a notion

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159. *See generally* discussion *supra* Part I (discussing relevance, hearsay, opinions and experts, personal knowledge).

160. *See generally* discussion *supra* Part II (AAA Rules, JAMS rules, FINRA rules, CPR rules).

161. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 15–16 (1827) ("Where is the consistency between this utter distrust of juries, and the implicit faith bestowed, with so much affection, on the decisions they are permitted to give on such evidence as they are permitted to receive?").

162. *See, e.g.*, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 165–66 (2006) (discussing how "[n]umerous American trial judges" have resisted application of formal evidence law principles in non-jury trials); Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 243 n.39 (2008) ("The arbitral hearing is not unlike a bench trial in which the absence of a jury alleviates the need for elaborate rule frameworks through which information is filtered. In fact, especially in California, arbitrators often are retired judges who have extensive familiarity with legal procedures for trial."); Michael Z. Green, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 TEX. WESLEYAN L. REV. 533, 535 (2009)

that arbitration should be an efficient, cost-effective process.[163] This notion informs the discovery regime at work within arbitration as much as it informs the evidentiary regime. The broad discovery regime of Rule 26 unearths substantial amounts of relevant and material information.[164] However, that regime is expensive to administer and time consuming to navigate for litigators; moreover, the information discovered is susceptible to all the various problems the FRE were designed to guard against.

Arbitration, however, benefits from its own substantially more limited perspective on how to administer a discovery regime. The various arbitration rule regimes typically feature significantly more limited discovery than what would be permitted under Rule 26, with one arbitration regime, FINRA, even using pre-made "Discovery Guides,"[165] which specify certain documents or types of documents that are presumed to be discoverable.[166] Also, in discovery, arbitrators are arguably supposed to exercise a more "managerial" role in controlling discovery, for the purpose of limiting time and expense.[167]

The limited nature of arbitration discovery provides one way to understand the apparently liberal approach to evidence. In the

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("[A]rbitration proceedings and bench trials are similar—as contrasted with jury trials"); Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 464–65 (2008) (arguing that one of the primary purposes of evidence law is to "carefully screen the evidence to which jurors are exposed, frequently withholding relevant information *on the basis of fears that jurors would use it in an irrational or legally impermissible manner*.") (emphasis added). However, it must also be noted that while many arbitrators come to be selected for their experience within the field derived from years of practice, this does not necessarily imply intrinsic competence with evidence law, a subject that many lawyers struggle with in practice. *See* James A. Wright, "The Use of Hearsay in Arbitration," *Arbitration 1992: Improving Arbitral and Advocacy Skills*, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 290–91 (1992) ("Many advocates are unskilled in the intricacies of hearsay evidence. Even many lawyers are unable to determine whether an offered item is hearsay.").

163. *See generally* Radvany, *supra* note 2, at 749 (describing the efficiency and financial value of arbitration).

164. *See* discussion *supra* Part I.

165. *See* FINRA RULE, *supra* note 148, at Rule 12506(a) (requiring Director to notify parties of the location of the FINRA Discovery Guide).

166. The list of documents, however, is not dispositive; counsel in FINRA arbitrations may request further discovery, or raise objection to documents contained within the Discovery Guide. The Guide simply provides a useful starting point, which often saves time or even provides sufficient discovery to resolve the dispute. Discovery beyond, or objection to discovery within the terms of the Guide may be granted upon showing of appropriate cause by the party requesting or opposing discovery under the Guide.

167. *See* Radvany, *supra* note 2, at 734 (providing the AAA rule requiring the arbitrator to manage information exchange with a view to achieving an efficient).

course of providing limited discovery in arbitration, the arbitral process itself limits the ability of parties to conduct discovery in a the same manner as they would if the case were being litigated in court. Parties can discover evidence in an inadmissible form through wide discovery, but they can also use that knowledge to find the same evidence in an admissible form or otherwise find a means of admitting the evidence within the FRE. In arbitration, however, a party may not be able to call a witness to provide authentication testimony to put a document into a non-hearsay context, because the arbitrator might limit its presentation of witnesses. Allowing a process similar to civil litigation would also take significantly more time and increase the expense of arbitrating that dispute. In arbitration, however, the intent of the process is largely concerned with saving both time and expense.

Thus, in arbitration, it is necessary for the relatively relaxed application of the rules of evidence. Limitation of discovery leads to circumstances where much of the evidence in arbitration may raise hearsay concerns, may not come with a certifying witness, or may not have witnesses knowledgeable or willing enough to testify.

B. Dangers of Admission or Exclusion

Though under the FRE much of the evidence typically utilized in arbitration would be excluded, arbitrators admit such evidence frequently. A 2012 survey of 401 arbitrators found that in response to the question, "Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum rather than take the evidence and give it such weight as you deem appropriate," 33.9% of arbitrators would "never" exclude such evidence, while 55.2% would "sometimes (i.e., around 25% of the time)" exclude such evidence.[168]

The decision-making of arbitrators can arguably be tainted by the admission of evidence that is subject to evidentiary problems. To one degree or another, arbitrators and judges are similar—both are exposed to evidence that would be inadmissible under the FRE. With respect to judges, courts and commentators have long scrutinized the ability of judges to remain unaffected by such exposure. A study by Andrew Wistrich, Chris Guthrie, and Jeffrey Rachlinski concluded that judges who heard favorable-but-inadmissible evidence were

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168. Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487, 491 (2013). Sussman also elaborates further upon the methodology of the survey. *See id.* at 491, n.22 (concluding that while her sample is not completely representative of the overall population of arbitrators, it provides a useful benchmark).

significantly more likely to rule in favor of the proponent of the inadmissible evidence.[169] Outside the context of judges, judges like Learned Hand and Justice Robert Jackson have called the attempt to ignore inadmissible evidence in general as "mental gymnastic[s]," and "unmitigated fiction."[170]

Thus, based on the fact that within arbitration much evidence is admitted despite the fact it would not pass muster under the FRE, there is little doubt that arbitrators are at least somewhat at risk of being influenced by questionable evidence. Although the arbitrator is directed to "weigh" evidence "for what it is worth,"[171] such a directive presumes that an arbitrator has the ability to do exactly what some commentators and judges are highly skeptical of: not be misled by evidence of questionable veracity.

The significance of this danger comes from the fact that evidence that would be excluded under the FRE is no less misleading

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169. *See generally* Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251–52 (2005) ("We conclude that judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware."). Other commentators have described a similar "backfire" effect, occurring specifically when jurors are given limiting instructions. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 689 (2000) ("The backfire effect occurs when jurors pay greater attention to information after it has been ruled inadmissible than if the judge had said nothing at all about the evidence and allowed jurors to consider it.").

170. *See* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Judge Hand describing limiting instructions for the jury as recommendations in mental gymnastics); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (Justice Jackson describing as "unmitigated fiction" the idea that prejudicial effects can be overcome by instructions to the jury). Most discussions of this take place in the context of jurors and the questionable efficacy of limiting instructions. *See, e.g.*, Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 212 (2004) (proposing that reviewing courts should take account of the fact that "instructions have been misunderstood [by jurors] in significant numbers," contrary to the presumption of juror understanding); Joel D. Lieberman & Jamie Arndt, *supra* note 166, at 686 ("With few exceptions, empirical research has repeatedly demonstrated that both types of limiting instructions are unsuccessful at controlling jurors' cognitive processes.").

171. An approximation of the "for what it's worth" phrase is encountered in the JAMS Rules. *See* JAMS Comprehensive Rule 22(d) ("The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate."). However, the recurring use of the phrase by numerous commentators makes it impossible to determine the original source of the phrase, only that it is widely known and used throughout the arbitration community.

simply because it is admitted in arbitration, and many of the same situations can arise within arbitration as within trials. Some FRE rules are admittedly less likely to directly surface within arbitration. For example, Rule 404 character evidence is primarily a concern in criminal trials, although it is possible to make character evidence objections within civil trials.[172] Nevertheless, certain character evidence situations could in fact surface in arbitration, such as the past conduct of an employee offered to show the employee's conduct on the occasion in question. Some of the other FRE rules of exclusion with primarily policy-based rationales, such as FRE 407, 408, and 411, also have the potential to surface in arbitration, given the fact that arbitrators—operating in the interest of efficient disposition of disputes—may be privy to settlement talks and negotiations between parties, due to the decreased formalities of arbitration or an individual arbitrator's more managerial approach to arbitrating a dispute. There is no basis to think that their knowledge of those discussions would not trigger similar risks to the admission at trial of evidence of an offer to compromise. Thus, some arbitrators already take account of 407-, 408-, and 411-type concerns and refuse to accept such evidence.[173]

Arbitrators do have the power to exclude certain evidence without being reversed. However, the nature of arbitration has led to the widely held belief that arbitrators almost never exclude evidence.[174] Discussing the refusal of arbitrators to receive evidence, an American Law Reports article even concedes that "in effect, it is assumed that the evidence should, or at least could, have been properly received, with the courts determining whether the refusal to receive it is fatal to the award."[175] However, the case law from the Supreme Court interpreting the FAA—specifically, the paucity of cases affirmatively vacating arbitration awards for evidentiary failures—suggests that vacatur based upon refusal to receive evidence is

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172. *See* discussion *infra* Part I.

173. *See* 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, 845–46 (1992) ("Many arbitrators refuse to admit evidence revealing pre-hearing negotiations and offers of compromise in order to encourage parties to engage in settlement discussions, thereby adopting the policy of Federal Rule 408.").

174. *See* Mary Jane Trapp, *How to Prepare Your Case for the Arbitrator*, GPSOLO, Jan./Feb. 2015, at 36, 38 (noting "most everything offered is admitted"); *see also* Kirkpatrick, *supra* note 173, at 847 ("[E]vidence offered by parties, provided it is relevant, should generally be received, with concerns regarding its probative force going to weight rather than admissibility.").

175. Alan R. Gilbert, *Refusal of Arbitrators to Receive Evidence, or Permit Briefs or Arguments, on Particular Issues as Grounds for Relief from Award*, 75 ALR.3d 132 (2015).

something of a rare occurrence. Thus, from the outset, if arbitrators were inclined to utilize their discretion more frequently to exclude evidence, it seems they would be able to do so reasonably, and without significant fear that their award will be vacated.[176] This corresponds to recent calls for judges in civil litigation to act in a similar fashion, but during the discovery phase of litigation, pursuant to the newly revised discovery rules in the Federal Rules of Civil Procedure.[177]

Some have called for arbitrators to exercise their authority to limit evidentiary presentations more frequently. Tracey Frisch, a Senior Counsel at AAA, notes that "[a]rbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration," and therefore that "[n]o informed arbitrator should shy away from their responsibility for fear of jeopardizing the award."[178] Thus, exclusion of evidence is one of the areas where arbitrators can exercise some discretion. However, others have argued how the burgeoning of ADR-style dispute resolution techniques have gone hand in hand with a liberalization of evidence philosophy, one that shies away from an increasingly exclusionary arbitral role.[179]

There are a number of reasons to believe that arbitrators are unlikely to significantly restrict evidentiary presentations. Arbitrations are, first, inherently party-controlled means of dispute resolution.[180] Parties contract for a certain set of rules, many of which are, as discussed, worded with wide latitude to admit evidence.[181] Both for fear of being vacated on appeal, and in hopes of giving parties the benefit of their bargained-for contract, arbitrators are unlikely to begin rigorously applying exclusionary doctrines. As a secondary matter, absent a change to discovery in arbitration, the narrow bounds of discovery are simply inconsistent with a narrow and structured regime

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176. Tracey B. Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide A Cost-Effective and Expeditious Process*, 17 CARDOZO J. CONFLICT RESOL. 155, 156 (2015) ("Judicial review of awards on the ground that arbitrators have refused to hear evidence is limited. Courts have confirmed awards so long as the arbitrators' refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing.").

177. *See, e.g.*, Radvany, *supra* note 2, 707–09, 708 n.10 (relating the motivation behind the 2015 revisions to dissatisfaction with judges' enforcement of discovery limitations among other things).

178. Tracey B. Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide A Cost-Effective and Expeditious Process*, 17 CARDOZO J. CONFLICT RESOL. 155, 178 (2015).

179. Kirkpatrick, *supra* note 173, at 852 (suggesting further that alternative forums of dispute resolution are places "where rules of evidence are not even formally recognized").

180. *See* Radvany, *supra* note 2.

181. *See* text *supra* Part II.

of evidentiary admissibility; unless parties were able to conduct more thorough and probing discovery, rigorous attention to evidentiary admissibility would likely affect parties' ability to make their case, which would again open the arbitrator up to vacatur.

C. *Evidence Has a Role, Regardless of Admissibility*

Despite the fact that arbitrators appear unlikely to begin applying a more exclusionary, litigation-style regime of evidence, the principles underlying the law of evidence should not be entirely disregarded during arbitration, simply because rules for ultimate admissibility have been relaxed. "[T]he chasm between an adjudicatory system with strict principles of evidentiary exclusion and a system where such principles go only to the weight of the evidence is not as wide as is sometimes assumed."[182] Many principles from evidence law apply to certain procedural matters, such as limiting the purpose of certain evidence, taking judicial notice, and the use of presumptions.[183] With regard to other doctrines such as hearsay, to the degree that the principles underlying the FRE do not simply vanish in a different forum, the weight that an arbitrator gives a piece of evidence could potentially be affected by the underlying rationale of exclusion because the underlying rules of exclusion "have a direct bearing on questions of weight."[184]

Making the arbitrator aware of such a rationale has potentially significant implications. Admittedly, the policy of generally admitting evidence may serve other important objectives of the arbitral process. Arbitrators are likely to continue the practice of generally admitting most evidence. Nonetheless, the arbitrator is still at risk of being affected by seeing that evidence, and, as discussed, the standing directive to the arbitrator to weigh evidence does not necessarily map well to arbitrators consciously doing so in practice with each and every piece of evidence. For example, a counsel who calls attention to multiple levels of hearsay within certain evidence forces arbitrators to consciously weigh the reliability of proffered pieces of evidence.[185]

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182. Kirkpatrick, *supra* note 173, at 848.

183. *See id.*, at 845 n.44 (discussing the arbitration procedures consistent with the FRE).

184. *Id.*, at 848.

185. *See* Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487, 493 (2013) ("Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.").

Legally trained arbitrators are often broadly familiar with the principles of evidence, and therefore are at least able to appreciate that a cognizable evidence-based argument about the weight of evidence should, indeed, affect the weight they give that evidence.[186]

Another reason counsel should take care to make certain evidentiary arguments is that on panels of multiple arbitrators, evidentiary decisions may be handled exclusively by a chairperson, who does have the opportunity to vet evidence before showing it to other members of the panel. This does not necessarily mean the single arbitrator charged with evidentiary decisions is more likely to exclude evidence, but it still raises the incentive for counsel to make evidence arguments. If a counsel can make clear the unreliable nature of a piece of evidence, there is a chance that only one out of multiple arbitrators will be exposed to the evidence at all, decreasing the potential danger of contamination.[187]

Finally, if arbitrators are more consistently apprised of evidence-based reasons to weigh evidence, the results of arbitrations could also become more predictable, and this would have other beneficial outcomes. Knowledge that an arbitrator has been apprised of FRE-based arguments about certain pieces of evidence and is likely to weigh evidence accordingly would foster faster resolution of cases by settlement. Attorneys capable of making evidentiary arguments in arbitration are better able to determine the value of both favorable and unfavorable evidence, articulate that value to an arbitrator, and be certain of the outcome that an arbitrator may reach based upon that evidence.

CONCLUSION

It is broadly true that most evidence proffered is likely to be accepted in arbitration. However, it is still important for counsel and arbitrators to appreciate evidence-based arguments in the context of arbitration for a number of reasons. Evidence and discovery function in different and inverted ways in civil litigation versus arbitration for reasons of efficiency, cost, and ease of dispute resolution. This does not, however, eliminate the underlying rationale of evidence law: to

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186. *See* Michael Z. Green, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 TEX. WESLEYAN L. REV. 533 (2009) (noting that arbitrators are "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").

187. *See supra* note 30 and accompanying text (discussing "Mental Contamination").

promote the resolution of disputes upon more, rather than less, reliable evidence.[188]

Therefore, although the interests of arbitration may be served by narrow discovery and open evidentiary admissibility, arbitrators should be made cognizant of evidentiary principles during arbitration. This can often be done during a summation, but should only relate to important pieces of evidence where, under the FRE, a judge would likely have excluded the evidence. It can also be done during the presentation of evidence by making a short spoken objection to proffered evidence. This should be done somewhat sparingly as arbitrators will lose patience if a party makes too many objections and thereby unnecessarily interrupts his or her adversary's presentation of evidence.

Failure to consider these principles can lead to situations where arbitrators lend greater weight to questionable or unreliable evidence by not taking the time to consciously "weigh" evidence properly. Use of evidence law during arbitration by counsel would serve to force arbitrators to do so. Thus, while an arbitrator may be able to admit almost anything during an arbitration hearing, the principles of evidence could nonetheless be used to inform how they should view and weigh the evidence they admit. Overall, it is possible that greater attention to the role evidentiary principles could play in arbitration should produce beneficial outcomes, such as increasing the reliability and predictability of arbitral outcomes. Although attorneys in arbitration may not be able to prevent unfavorable evidence from being admitted, the attorney able to place the proffered material into the proper evidentiary context is better able to influence how, if at all, that evidence will affect the arbitrator. As the rules of evidence hinge on issues such as reliability, prejudice, first-hand knowledge, and authentication, this paper suggests that making evidentiary arguments in arbitration can promote the determination of cases based upon more persuasive, rather than less persuasive evidence.

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188. *See* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1965 (2008) (arguing that since the 18th century, the central function of evidence law has been "to secure the best available evidence"); *see also* Michael L. Seigel, *Rationalizing Hearsay: A Proposal for A Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896 (1992); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988) (both modern proponents of the "best evidence"-oriented theory of evidence law).