EVIDENCE AND DISCOVERY IN ADR

Issues in Mediation and Arbitration

State Bar of Texas
Advanced Evidence and Discovery Course 2005

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Legal Experience

Ms. Rivers is Board Certified in Civil Trial Law, Civil Appellate Law and Family Law by the Texas Board of Legal Specialization. Ms. Rivers is a trial and appellate litigator who handles cases involving family, fiduciary, professional liability and general business issues.

Specific Matters of Representation:

- Specializes in family law matters, including divorce, child custody and significant property division issues, business and professional practice valuation and division issues, post-divorce modification issues, and premarital and marital agreements
- Handles legal malpractice litigation and medical malpractice coverage and case oversight responsibilities
- Significant experience in trials before the court and before juries involving family law, fiduciary claims, professional liability, commercial disputes, breach of contract, and insurance coverage issues
- Appellate expertise in both state and federal court cases
- Personally tried cases referred from other trial lawyers
- Experienced in handling arbitration hearings involving professional practice and family law matters
- Utilizes various alternative dispute resolution procedures, including mediation and guided settlement conferences, where appropriate

Education

- Doctor of Jurisprudence, The University of Texas School of Law, 1976
- Bachelor of Arts, Trinity University, 1973

Professional Licenses

- Attorney at Law, Texas, 1976
- Board Certified, Texas Board of Legal Specialization, Family Law, Civil Trial Law, Appellate Law

Court Admissions

- United States Supreme Court
- United Stats Court of Appeals, Fifth Circuit
- United States Court of Appeals, Eleventh Circuit
- United States District Court for the Western District of Texas
- United States District Court for the Eastern District of Texas
- United States District Court for the Southern District of Texas
- United States District Court for the Northern District of Texas

Prior Professional Experiences

- Brown McCarroll, L.L.P., Partner
- Hilgers & Watkins, P.C., Shareholder Director, Vice-President/Secretary, 1980-2003
- State of Texas, Assistant Attorney General, 1976-1980

Speeches and Publications

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Legal Experience

Mr. Bailey is engaged in a civil trial and commercial practice involving complex commercial disputes and business torts. He has handled a wide range of cases in state and federal courts and in arbitration proceedings before the American Arbitration Association, JAMSEndispute, the International Chamber of Commerce, and private arbitrators. Mr. Bailey practice has included breach and enforcement of contracts, construction, criminal and civil antitrust, accounting malpractice, software implementation, franchise/distributor disputes, trademark and copyright infringement and enforcement, deceptive trade practices, false claims act, telecommunications, director and officer liability, insurance coverage, bankruptcy adversary proceedings, and product liability litigation. In addition, Mr. Bailey has represented and provided counsel to clients on matters such as unfair competition, trademark and copyright registration, commercial matters, and grand jury proceedings.

Significant Recent Engagements

- Obtained zero liability awards in commercial arbitrations matter claiming $22 million in damages for contract performance.
- Obtained zero liability award in commercial arbitration matter regarding distributor termination and intellectual property rights.
- Obtained arbitration award in excess of liquidated damages for breach of contract (enforcement action awarded attorneys' fees.
- Obtained summary judgment dismissing $25 million claim against a major accounting firm relating to software implementation consulting project.
- Obtained dismissal of claims under Racketeer Influenced and Corrupt Organization Act ("RICO").
- Obtained injunction preventing a $1.2 million demand Letter of Credit from being drawn down.
- Defense of an accountant in grand jury investigation. No indictment issued against client.
- Obtained injunctions enforcing trademark rights in an unregistered mark.
- Jury verdict acquitting client of federal criminal antitrust charges for bid rigging.
- $100 million Federal False Claims Act case settled with plaintiff paying a portion of client's attorneys' fees.
- Defense of manufacturer in grand jury investigation for price fixing. No indictment was issued against our client.

Education

- Doctor of Jurisprudence, *cum laude,* University of Notre Dame, 1986
  Managing Editor, Notre Dame Law Review
- Bachelor of Arts, University of Michigan, 1983

Professional Licenses

- Attorney at Law, Texas, 1986

Court Admissions

- United States Court of Appeals, Fifth Circuit
- United States Court of Appeals, Third Circuit
- United States District Court for the Western District of Texas
- United States District Court for the Eastern District of Texas
- United States District Court for the Northern District of Texas
- United States District Court for the Southern District of Texas
- United States District Court, Arizona
- United States Tax Court
- United States District Court, Western District of Wisconsin
- United States District Court, Southern District of New York
- United States District Court, Northern District of Ohio

Prior Professional Experience

- Law Clerk for the Honorable John R. Brown, United States Court of Appeals for the Fifth Circuit
- Jones, Day, Reavis & Pogue
- Vial, Hamilton, Koch, & Knox, L.L.P.

Speeches and Publications

- *Antitrust Issues in the B2B Economy.* Presented at the Lorman Education Seminar, *B2B and B2C E-Commerce Legal Issues,* February 2001, Article and Speech
- *An Interview With The Honorable John Robert Brown,* National Judicial Conference History Project, 1993, Article and Video Presentation
- *The Colorful Judge John Robert Brown, 7 Fifth Circuit Reporter 885,* 1990, Article
- *Court-Ordered Surgery and the Fourth Amendment. A New Analysis of Reasonableness,* 60 NOTRE DAME L. REV. 149 (1985), cited with approval in *Winston v. Lee*, 470, U.S. 753, 761 n.4, 1985

Professional Memberships and Activities

- Dallas Bar Association; Bench-Bar Committee, High School Mock Trial Competition Committee
- State Bar of Texas
- National Institute of Trial Advocacy, Faculty
- Bar Association of the Fifth Federal Circuit
- American Bar Association

Community Involvements

- Dallas Area Habitat for Humanity
- Dallas Area Hearts and Hammers
- River Forest Homeowners' Association (Past-President)

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Legal Experience

Ms. McNamara is currently working with the commercial litigation, family law and appellate practice groups. Prior to joining the firm, she clerked for Justice Patterson on the Third Court of Appeals. Ms McNamara also has 10 years' experience as a legal assistant in the area of plaintiffs' personal injury law.

Education

∃ Doctor of Jurisprudence, University of Texas School of Law, 2002
Texas Law Review, Notes Editor, 2001-2002

∃ Bachelor of Arts, Duke University, 1986

Professional Licenses

- Attorney at Law, Texas, 2002

Prior Professional Experience

- Third Court of Appeals, Justice Jan Patterson, Law Clerk, 2002-2004
- Brown McCarroll, L.L.P., Summer Associate, 2001
- McGinnis, Lochridge & Kilgore, Summer Associate, 2001
- Law Offices of Dicky Grigg, Legal Assistant, 1998-1999
- Spivey Grigg, Kelly & Knisely, Legal Assistant, 1989-1997

Professional Memberships and Activities

- Texas Women Lawyers, Board Member, 2004-2007
- Robert W. Calvert American Inn of Court, Associate, 2002-2006
- Travis County Women Lawyers, Member, 2002-Present

Community Involvement

- St. David's Episcopal Church, Choir Member
- United Way Young Leaders
- LBJ Library Future Forum
- Austin Civic Chorus, Board Member, 1993-1995

EVIDENCE AND DISCOVERY IN ADR:
Issues in Mediation and Arbitration

I. OVERVIEW

Evidence and discovery issues are fundamentally different in an alternative dispute resolution context than in the traditional court framework. In many ways, it was the limitations and cost of the discovery process that spawned the development and use of various alternative dispute resolution mechanisms. So naturally, ADR formats seek to streamline the discovery process and relax the evidentiary presentation procedures in order to achieve a true alternative to the traditional courtroom path.

Mediation and arbitration are very different alternatives to the courtroom. Mediation assists parties in achieving their own agreements, whereas arbitration provides a third-party disposition outcome. The mediation-outcome approach virtually eliminates the evidence and discovery considerations that are the subject of this paper, and so emphasis here will be upon the evidence and discovery issues in the arbitration context.

II. DISCOVERY IN ARBITRATION

"[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. International/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). With this principle in mind, discovery in arbitration tends to be limited. In ascertaining the extent of discovery available in your arbitration matter, you must first determine which arbitration rules, if any, apply. We will address the general discovery rules promulgated by the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services, Inc. (JAMS), a few other entities, and what to do if you have no rules upon which to draw.

A. Rules Sources

The arbitration service and the subject matter of the dispute will often provide a set of rules governing the discovery and production aspects of the case development. Rules promulgated by private services such as the AAA and JAMS generally fill in the gaps created by statutes that aim to limit discovery in order to streamline the dispute resolution but fail to adequately address the problems created by failure to voluntarily exchange sufficient information to appropriately evaluate the issues. Examples of various rules sources are outlined here:

1. Texas General Arbitration Act

The Texas General Arbitration Act allows only limited discovery: depositions, and issuance of subpoenas. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 171.050, .051 (West Supp. 2005). The act makes no provision for interrogatories or requests for admissions. The discovery limitations, among others, make arbitration under the Act "an inexpensive, rapid alternative to

traditional litigation." *Glazer's Wholesale Distributors, Inc. v. Heineken USA, Inc.*, 95 S.W.3d 286, 295-96 (Tex. App.—Dallas 2001, pet. dism'd by agrm't) (citing *Prudential Securities, Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995) (orig. proceeding)). The absence of discovery procedures, however, limit a party's ability to compel production of broad categories of documents to search for relevant documents of their own choosing. Thus, the ability to obtain necessary documents generally depends upon the professional integrity and cooperation of the opposing counsel and party.

2. American Arbitration Association (AAA)

Under the AAA Commercial Arbitration Rules and Mediation Procedures (AAA Rules), the parties and arbitrators determine at a preliminary hearing the extent to which discovery should be conducted. AAA Rule L-3, *available at* http://www.adr.org. AAA Rule L-4 governs the parties' conduct when engaging in discovery, which includes the following:

* * * *

> (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.
>
> (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.
>
> (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

3. Judicial Arbitration and Mediation Services, Inc. (JAMS)

Rule 17 of the JAMS Comprehensive Arbitration Rules and Procedures (JAMS Rules) governs discovery procedures in a matter arbitrated using this group of neutrals. You may access the complete rules at the JAMS website, http://www.jamsadr.com/rules/comprehensive.asp, last revised February 19, 2005. If the parties hold a preliminary conference, they may at that point address exchange of information in accordance with Rule 17 and the schedule for the exchange. *See* JAMS Rule 16. Rule 17 sets forth the rules concerning the exchange of information, as follows:

> (a) The Parties shall cooperate in good faith in the voluntary, prompt and informal exchange of all non-privileged documents and other information

relevant to the dispute or claim immediately after commencement of the Arbitration.

(b) The Parties shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals whom they may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report that may be introduced at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(c) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition, and if the Parties do not agree these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(d) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that have not been previously exchanged, or witnesses and experts not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(e) The Parties shall promptly notify JAMS when an unresolved dispute exists regarding discovery issues. JAMS shall arrange a conference with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

4. International Bar Association (IBA)

Article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration states, in part:

> Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another Party.
> [A]ny Party may submit to the Arbitral Tribunal a Request to Produce.

IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), *available at* http://www.ibanet.org.

5. National Association of Securities Dealers (NASD)

In an effort to reduce discovery disputes, the NASD has developed two procedures: early appointment of arbitrators to conduct an initial prehearing conference and standardized document production lists. National Association of Securities Dealers, The Discovery Guide, available at http://www.nasd.com. At the initial prehearing conference, the arbitrator and the parties set discovery cut-off dates, among other issues. *Id.* Parties may request documents in addition to those listed on the Document Production Lists, with the standard response time being thirty days. *Id.* The NASD strongly discourages depositions in arbitration except in limited circumstances. *Id.* Should a party not comply with discovery requests, the arbitration panel has "wide discretion to address noncompliance," including issuance of sanctions. *Id.*

6. Make up Your Own

Should no discovery rules apply, you may craft the scope of discovery at the outset in an arbitration clause. For a sample arbitration clause addressing discovery issues, see Dawn Estes, *Arbitration Strategy & Impact in High-Tech Cases* 17, State Bar of Texas Advanced High-Tech Litigation (2000). If the arbitration clause does not address discovery, and your selected arbitration provider does not have specific rules, discovery will need to be done by agreement between the parties to exchange relevant, non-privileged information or by convincing your arbitrator at the inception of the case to permit certain discovery. Because arbitration is a procedure created by agreement, the applicable rules are also created by agreement. Be sure to include in your agreement a scheduling order for exchanging requests and documents.

B. Obtaining Discovery

As the rules discussed above illustrate, arbitrators encourage voluntary disclosure of information before arbitration. Written discovery requests are often allowed, but add additional costs to a process designed to be a cost-saving method of dispute resolution. Because discovery is less extensive and less formalized, so too is the ability to compel discovery from parties and third-parties. In such an unstructured context, it is often necessary to invoke some authority to compel production of information necessary for the appropriate development of the case. Fortunately, there is some authority which may help.

1. Compelling Production through Subpoena Issued by Arbitrator

Arbitrators are often granted formal subpoena power through their organizational rules, the Federal Arbitration Act, or the applicable state arbitration act. While providing the arbitrator with authority to issue a subpoena, the arbitrator only has jurisdiction over those who agree to be submit their dispute to the arbitrator. The arbitrator has no jurisdiction over those third parties who choose not to recognize the formality of the arbitration subpoena and who have not agreed to the arbitrators jurisdiction. To obtain enforcement of the arbitrator's order/subpoena against a third party who has not agreed to be bound by his/her authority, it may be necessary to obtain an order from a Court of general jurisdiction to enforce the subpoena. Again, this procedure will add additional costs and delay to a proceeding designed for cost and time efficiency. For an in-depth discussion of an arbitrator's power to compel production through a subpoena, see Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 Am. Rev. Int'l Arb. 197 (2003).

Federal Arbitration Act: The Federal Arbitration Act (FAA), which applies to commercial arbitrations in the United States and in certain foreign countries, is the primary source of authority to compel discovery from third parties during an arbitration. The act applies to any arbitration involving a transaction in interstate commerce.

Under the FAA, "[t]he arbitrators selected . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7. Federal courts are split on the scope of this provision, depending on whether they interpret the provision narrowly or broadly. In *COMSAT Corp. v. National Science Foundation*, the court held that the provision gave arbitrators subpoena power to compel a non-party to testify at a hearing, but not to compel pre-hearing discovery. 190 F.3d 269, 275-76 (4th Cir. 1999). *See also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004) (citing *COMSAT* with favor). On the other hand, several courts have permitted pre-hearing discovery from a non-party. *See, e.g., In the Matter of Arbitration between Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988). In *Security Life Insurance*, the court held that "implicit in an arbitration panel's power to subpoena relevant documents at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." 228 F.3d at 870-71.

IBA Rules: Article 3.8 of the IBA Rules gives an arbitrator discretion in determining the method for compelling discovery:

> If a Party wishes to obtain the production of documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents. The Party shall identify the documents in sufficient detail and state why such documents are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take necessary

steps if in its discretion it determines that the documents would be relevant and material.

2. Compelling Production through Subpoena Issued by Court

According to the Fourth Circuit, "a federal court may not compel a third party to comply with an arbitrator's subpoena for pre-hearing discovery, absent a showing of special need or hardship." *COMSAT Corp.*, 190 F.3d at 278. *See also Deiulemar v. Compagnia di Navigazione S.P.A.*, 198 F.3d 473 (4th Cir. 2000). The Texas Civil Practice and Remedies Code, however, expressly provides for enforcement of the arbitrators subpoena through the Court. Tex. Civ. Pract. & Rem Code §171.

3. Extraterritorial Jurisdiction

Courts that have addressed this issue have held that an arbitrator is bound by the territorial limits of Federal Rule of Civil Procedure 45. *See, e.g., Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362-63 (S.D.N.Y. 1957). Rule 45 sets forth a 100-mile subpoena limit, unless the party requesting the subpoena "shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated." Fed. R. Civ. P. 45(b)(2), (c)(3)(B)(iii).

C. Resolving Discovery Disputes

Obviously, the paucity of authority authorizing compulsory discovery procedures will severely limit the ability of counsel to enforce an effort to obtain discovery. The limited scope of enforcement opportunities is illustrated by the generality of the rules authorizing resolution of discovery disputes.

1. Addressed in the Arbitration Agreement

With some luck, the agreement to arbitrate the matter will address the discovery process. "The best place to resolve discovery issues is in the arbitration agreement itself. The parties can build discovery procedures into the arbitration agreement and may even adopt the Federal Rules of Civil Procedure if they so desire." Teresa Snider, *Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 Tort & Ins. L.J. 101 (1998). In practice however, a large number of disputes are submitted to arbitration on the strength of only a general – although enforceable – agreement to arbitrate that has no reference to controlling rules or discovery procedures..

2. Arbitrator's Authority

The AAA and JAMS rules address the arbitrator's authority to resolve discovery disputes. AAA Rule L-4(g) gives the arbitrator the authority to resolve "any disputes concerning the exchange of information." JAMS Rule 17(e) states:

The Parties shall promptly notify JAMS when an unresolved dispute exists regarding discovery issues. JAMS shall arrange a conference with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

3. Court's Split on whether Monetary Sanctions are available

Not Available: In an arbitration conducted in Massachusetts under AAA rules, one party failed to respond to discovery, even after the arbitrator issued an order directing the party to comply or face a fine of $1,000 per day of noncompliance. *Superadio Ltd. P'Ship v. Walt "Baby" Love Productions, Inc.*, 818 N.E.2d 589, 590 (Mass. App. Ct. 2004). When the arbitration panel entered its award, it imposed $271,000 in sanctions, which was upheld by the trial court. *Id.* at 591. On review, the court of appeals found that neither the AAA rules nor the Uniform Arbitration Act (adopted by Massachusetts) authorize arbitrators to impose monetary discovery sanctions. *Id.* at 592-93. Thus, the court held that monetary sanctions imposed by an arbitrator are available only if the parties agree to them. *Id.* at 594.

Available: On the other hand, the NASD Discovery Guide, which serves as a guideline only, states that "the arbitration panel should issue sanctions if any party fails to produce documents or information required by a written order, unless the panel finds that there is "substantial justification" for the failure to produce the documents or information. The panel has "wide discretion to address noncompliance with discovery orders." In response to increasing discovery abuse, the NASD in November 2003 issued a notice to members reminding them of their duty to cooperate in the arbitration discovery process and that arbitration panels are increasingly imposing monetary sanctions for discovery abuse. NASD Notice to Members 03-70 (Nov. 6, 2003). In June 2004, the NASD submitted to the SEC a proposed amendment to the NASD Code of Arbitration Procedure, allowing arbitrators to impose discovery sanctions. Securities and Exchange Commission, Form 19b-4, Proposed Rule Change by NASD, File No. SR-NASD-2004-088, pp. 2-3. This proposed amendment is still under review.

4. Substantive Sanctions

Substantive sanctions by the arbitrator may be available. In an instance of egregious discovery abuse, in which plaintiffs contacted a defendant's clients after discovery had concluded, an arbitration panel dismissed the plaintiffs' case with prejudice. *First Preservation Capital v. Smith Barney, Harris Upham & Co.*, 939 F. Supp. 1559, 1561-62 (S.D. Fla. 1996). The district court upheld the dismissal, in traditional deference to arbitrators' rulings and in keeping with Federal Rule of Civil Procedure 37, which allows a court to dismiss a complaint with prejudice as a sanction against a party who has violated discovery. *Id.* at 1566 (citing Fed. R. Civ. P., 37 (b)(2)(C)).

Additionally, certain arbitration rules may allow substantive sanctions. For example, under the NASD rules, discussed above, an arbitrator has "wide discretion" to sanction failure to produce information. JAMS Rule 29 also gives an arbitrator broad authority, stating: "The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations

under any of these Rules. These sanctions may include, but are not limited to, assessment of costs, exclusion of certain evidence, or in extreme cases ruling on an issue submitted to Arbitration adversely to the Party who has failed to comply." There is also real value in bringing a discovery dispute to the arbitrators attention to either gain their assistance in obtaining key information needed or demonstrate the failure of the opposing party to participate in arbitration in good faith. It is probably even more important in arbitration than in a trial court to ensure that the dispute is not only a legitimate and serious violation or the opposing party's obligations, but that it is a key element needed to fairly present the case. Bringing costly and contentious litigation tactics to arbitration will backfire on you by demonstrating your failure to comply with the purpose for which arbitration was created.

5. Enforcement by the Courts

Not available for Party to the Case: As to parties involved in arbitration, courts are loathe to interfere with arbitrators' decisions concerning discovery. For example, when a party sought a court order compelling arbitrators to issue subpoenas or in the alternative for the court to issue subpoenas, the court held that under the FAA it did not have authority to grant the relief requested. Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 Tort & Ins. L.J. 101 (1998) (citing *Thompson v. Zavin*, 607 F. Supp. 780, 782-83 (C.D. Cal. 1984)). The *Thompson* court noted that after it stayed the judicial proceeding, its only authority under the FAA was to enforce the arbitrator's subpoena or confirm, vacate, or modify the arbitrators' award. *Id.* (citing *Thompson*, 607 F. Supp. at 782). Similarly, courts will not permit a party to bypass the arbitrators and seek a discovery ruling directly from the court. *Id.* (citing *In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994)). A court may order discovery only if "extraordinary circumstances" exist, such as a need to preserve evidence. *Id.* (citing admiralty cases in which ships and their crews were about to leave port).

May be Available for Third Party: "[A] federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship." *COMSAT Corp.*., 190 F.3d at 278.

III. EVIDENCE RULES IN ARBITRATION

Depending on the rules under which you are arbitrating, the rules of evidence either do not apply or are only loosly applied. Fortunately, regardless of the applicable evidentiary rules, your arbitrator is usually a lawyer who will not completely ignore his or her training in the rules of evidence and the underlying purpose of the rules to aid in the gathering of reliable evidence.

A. Contexts in Which Rules of Evidence do not Apply

1. FAA Rules

Under the FAA, arbitrators are given considerable liberty in conducting an arbitration hearing. *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992). Their proceedings are not

constrained by formal rules of procedure or evidence. *Id.* "[T]he basic policy of conducting arbitration is to offer a means of deciding disputes expeditiously and at lower costs. Thus, the Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues." *Id.*

Nevertheless, "generally speaking, the law governing arbitral procedures, including the admission of evidence, is the law of the place where arbitration occurs." Bruce A. McAlister & Amy Bloom, *Use of Evidence in Admiralty Proceedings: Evidence in Arbitration*, 34 J. Mar. L. & Com. 35, 35 (2003). Under the FAA, an award may be vacated when an arbitrator refuses to hear evidence "pertinent and material to the controversy." 9 U.S.C. § 10(c). *Id.* at 36. Thus, an arbitrator may reject irrelevant and immaterial evidence. *Id.* "Arbitrators are not bound to hear all the evidence tendered by the parties; they need only afford each party the opportunity to present their arguments and evidence." *Terk Techs. Corp. v. Dockery*, 86 F. Supp. 2d 706, 709 (E.D. Mich. 2000).

2. Texas Rules of Evidence

Rules of evidence apply only in court proceedings. *Castleman v. AFC Enters., Inc.*, 995 F. Supp. 649, 653-54 (N.D. Tex. 1997) (holding that arbitration proceedings not governed by formal rules of evidence) (citing Tex. R. Evid, 101(b)). Nevertheless, "the arbitrator is the judge of relevance and admissibility of evidence introduced in an arbitration proceeding." *Id.*

3. AAA

"Conformity to legal rules of evidence shall not be necessary." AAA Rule R-33. This rule gives arbitrators discretion in the admission of evidence:

> (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.

4. Texas Civil Practice and Remedies Code

In the arbitration of international commercial disputes, the "power of the arbitration tribunal . . . includes the power to determine the admissibility, relevance, materiality, and weight of any evidence." Tex. Civ. Prac. & Rem. Code Ann. § 172.104 (West Supp. 2005).

B. Contexts in which Evidence Rules Exist

1. JAMS

JAMS Rule 22(d), concerning the admission of evidence in the arbitration hearing, states:

> Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

2. IBA

Article 9 of the IBA rules defines the arbitrator's role in the admissibility of evidence:

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:

   (a) lack of sufficient relevance or materiality;
   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

   (c) unreasonable burden to produce the requested evidence;

   (d) loss or destruction of the document that has been reasonably shown to have occurred;

   (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

   (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a

public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be considered subject to suitable confidentiality protection.

C. Make up your own

Absent formal rules, you can always come to an agreement with opposing counsel and the arbitrator(s) concerning the evidentiary standards and procedures in your arbitration. In many cases, the arbitrator will impose a discovery control order setting out the procedures for exchanging and identifying evidence as well as raising and resolving authenticity and admissibility disputes.

III. HOW TO PRESENT/OPPOSE EVIDENCE IN ARBITRATION

Consistent with the nature of arbitration, presenting evidence in arbitration lacks the formality and technical procedural requirements of trial. In addition, very rarely is evidence formally excluded, since exclusion of material evidence is one of the only basis to overturn an award. 9 U.S.C. § 10(c). As a result, many mistakenly approach evidentiary issues without much thought or preparation, knowing it is all coming in anyway. This approach is a mistake. State and Federal Rules of Evidence were created for good reason, to ensure evidence that is reliable is considered and that which is not reliable is excluded. Most Arbitrators are lawyers or former judges and will know when evidence is being presented which is not admissible in Court. While the evidence may be "admitted," its weight will be affected by whether you demonstrate that it is credible evidence.

A. Pre-Hearing Procedure

Most arbitrators will require that the parties exchange exhibits prior to the arbitration hearing (if they don't you should propose it). Presenting a joint group of exhibits will ease everyone's burden in determining whose exhibit is being relied upon. Exhibits should be presented in a binder, a different color for each party (it is much easier to refer to the exhibits by color notebook since there is no Court reporter to keep exhibits straight). Prepare separate copies of the exhibit notebooks for each arbitrator, a witness copy, one for opposing counsel, and one for yourself. There is nothing worse than having to have witnesses and arbitrators search through a stack of loose exhibits until they eventually turn to your opponent's better organized set. Having the exhibits a few weeks before the arbitration hearing commences will also give you time to eliminate duplicate exhibits and memorize the exhibit numbers. Determine before the hearing whether there are any exhibits that are truly worth objecting to, knowing that the exhibit is likely going to be admitted.

B. Introducing Exhibits

Although pre-admitted, it is still worth laying at least a portion of the predicate for the first few exhibits you rely upon and for the key exhibits to your case. This serves two purposes, first, to demonstrate to the legally trained arbitrator that you know what you are doing, and second to demonstrate that the exhibit is legally proper and reliable evidence that should be accorded more weight. Although pre-admitted, the arbitrator is not going to understand which exhibits are significant or most reliable without testimony to demonstrate such factors. Summary and demonstrative exhibits are more heavily relied upon and more easily presented in arbitration proceedings than in trial. Arbitrators are not only accepting of summary exhibits, they are also often grateful for them. Summary exhibits can be used effectively not just for data, but demonstrative timelines will often be introduced as evidence and relied upon heavily. This is one area where the relaxed rules of evidence can be used to your advantage in presenting evidence and testimony in an arbitration which you may not be able to present as succinctly in court.

C. Objecting to Evidence

Objections in arbitration take a much different form from trial, and vary greatly by your arbitrator. Like trial, you must read your decision maker and adapt your style accordingly. Some arbitrators run the proceeding very much like a courtroom and want more formality. Many are so procedurally relaxed they believe there is no place for objections. You are still both entitled and obligated to protect the proceeding from unreliable evidence, or at least notify the arbitrator when evidence is flawed.

Given the procedural informality of most arbitrations, foundation objections are almost never worth making. Objections designed to protect substantive reliability of the evidence relied upon, however, are a different story. This is particularly true with objections to testimony. Hearsay, especially if it is critical and unreliable, should be pointed out in a manner that demonstrates you understand evidentiary rules and procedures are relaxed in arbitration, but that the reliability of the testimony is so objectionable, it should not be allowed. Objections to excessive leading questions and repetitious testimony are also appropriate, and often appreciated.

The American Arbitration Association Rules expressly permit introduction of testimony by affidavit, but the rule then states that it will be accorded "appropriate weight." In the few occasions we have seen affidavits introduced, the arbitrators have pointed out the "appropriate weight" provision and appeared to interpret that to mean no weight.

D. Use of Experts

Experts are equally important in arbitration as they are in Court. However, prepare your expert for cross examination from the arbitrators as well as the opposing party. The amount of questioning you will receive from the arbitrators is unique and generally unknown to you since you do not have as great of an opportunity to observe or investigate their style. Some will be very active in questioning witnesses; others will be quiet. The expert witness, however, is more likely to be examined by the arbitrator than any other witness.

E. Expert Arbitrators

Depending on the selection of your arbitrator, you may find that the arbitrator is an expert, one which you do not get to prepare or cross examine. In these instances, you may be unaware of the factors being brought to bear on the evidence you have presented. If you choose an industry expert as your arbitrator, you should also find a deferential way to examine the arbitrator's analysis so you can rebut or reinforce how the evidence is being weighed or analyzed.

F. Interim Summaries

The relaxed procedural rules and informality of arbitration provide unique opportunities for attorneys to provide interim case summaries and to check on the fact finder's understanding of the evidence. Discussion with the arbitrator between or even during a witness's testimony can be used to determine if a point is clear or needs further explanation. Most arbitrators will permit such discussions, provided they are helpful to presentation and understanding of a case and not improper advocacy.

IV. EVIDENCE AND DISCOVERY IN MEDIATION

Unlike arbitration, few if any rules govern discovery in mediation. Whether to conduct discovery before mediation is a strategic decision, taking into account, among other factors, the complexity of the case, budgeting concerns, your client's needs, and the needs of the opposing party and lawyer.

With discovery being a major expense in any case, you may want to conduct only limited discovery before mediation. Talk with the opposing party to see if you can enter into an agreement. For example, you could agree to limited depositions with the right to reexamine the witnesses if mediation is not successful. You could also agree to a voluntary exchange of documents, including position papers. The general practice is to submit a detailed position paper to the mediator, but to maintain the confidentiality of that paper from the opposing side. Quite often, the mediator spends half a day trying to sort out the confidential positions and the opposing parties attempt to discern what is the strengths and weaknesses of their case through the mediator. Exchanging position papers, that are still inadmissible under mediation rules may, in the right case, provide the parties a better opportunity to evaluate the settlement value of the case, and to present the key factors in the dispute to the mediator so they can spend less time investigating and more time mediating. Whatever the extent of the discovery or exchange of information, the key to a successful mediation is to conduct a sufficient amount of discovery for each party to be able to accurately evaluate their respective positions and be willing participants ready to engage in meaningful negotiations at mediation.