Arbitrators Can Write Their Own Rules

By Frank Garfield
Los Angeles Daily Journal
September 8, 1994

The rules of evidence do not apply in arbitration proceedings. Section 1282.2(d) the California Code of Civil Procedure provides that "rules of evidence and rules of judicial procedure need not be observed in arbitration proceedings." Rule 28(d) of the Rules for the Arbitration of Fee Disputes of the Los Angeles County Bar Association is identical. This is typical of the rules that govern the conduct of private arbitration proceedings. Rule 31 of the Commercial Arbitration Rules of the American Arbitration Association is to the same effect.

Given that the rules of evidence will not be applied in an arbitration proceeding, it is incumbent upon parties and counsel selecting a forum to assess whether their case would be helped or harmed if the rules of evidence were strictly applied. There are any number of instances in which the rules of evidence can be successfully invoked to keep evidence out in a court of law. But not in arbitration proceedings. After arbitration has been elected — on the theory that it is a comparatively efficient and economical means of dispute resolution — it is too late. This evaluation must be made before a forum has been selected.

Virtually all laypersons — and many lawyers — consider the rules of evidence a needless bother. They do not understand or appreciate the reasons behind the rules; they may grasp the mischief the rules are intended to prevent only dimly, and even then perhaps only in the most egregious cases. There are several reasons for this. The rules of evidence may be regarded as legal mumbo jumbo. They may be viewed as impeding the fact-finding process. In extreme cases, they may even be seen as precluding the introduction of relevant evidence. If the goal is an informal resolution of a controversy, something is surely gained when the rules of evidence are not applied. But something may be lost as well.

While there is a tradition of great confidence in the jury system — the notion that a group of ordinary citizens can sift through the facts and apply the law to reach the correct conclusion — the facts that a jury may consider are rigidly circumscribed by the rules of evidence in both criminal and civil proceedings. If relevance was the only standard for admissibility, a jury would be able to consider all kinds of evidence that is now excluded. What jury, for example, would not consider a defendant's prior criminal record relevant to whether he committed the crime for which he is on trial? Ask any prosecutor or defense attorney what would happen to a defendant's chances of conviction if his rap sheet were admissible and the jury was entitled to weigh his prior criminal record in assessing guilt or innocence. Because of the dramatic impact of such evidence on a jury's deliberations, the rules of evidence exclude it except under circumstances in which the defendant has opened the door by, say, putting his character in issue.

In the civil context, most juries would be interested in learning about settlement offers. After all, what the defendant is willing to pay in order to resolve the matter is obviously relevant, but the rules of evidence expressly preclude consideration of settlement offers by the trier of fact. Once again, this is

because the evidence, even though relevant, is more prejudicial than probative.

Indeed, even though evidence of a criminal defendant's prior record and a civil defendant's settlement offer are excluded by specific sections of the Evidence Code, the policy behind the exclusion of prejudicial evidence is so pervasive that Section 352 of the California Evidence Code gives a judge blanket authorization to exclude evidence that, in his or her opinion, is more prejudicial than probative. This discretion is a powerful tool for ensuring the integrity of the fact-finding process. As one of the leading commentators puts it in Moore's Federal Practice:

> Basic to the law of evidence is relevancy. And while irrelevant evidence is not admissible for logical reasons, the law of evidence for various policy reasons has developed a considerable number of exclusionary principles that apply to relevant, evidentiary materials. . . . In brief, the nature and application of judicial proof is a circumspect one – too much at times some may think. Yet when one considers that life, liberty, fortune, reputation, or some other matter of great moment may ride on the outcome of a judicial proceeding circumspection is a virtue. To strike a reasonable balance must be the goal. If the edifice of legal evidence is properly structured, it should, in the great bulk of cases, materially aid the just determination of legal proceedings.

In most respects, lay arbitrators are identical to jurors in their attitudes. As a general matter, lay arbitrators want to "hear it all." Since they view the effect of applying the rules of evidence as exclusive, they tend to be adamantly opposed. It is almost as if lay arbitrators are afraid that unless they hear everything, they might miss something.

In practice, lay arbitrators can be bored to tears just like everyone else and may wonder why they have to listen to "evidence" that is of dubious probative value. But they suffer in silence. If the choice is between admitting evidence that may be interesting or excluding evidence that is irrelevant (or even prejudicial), lay arbitrators will vote to admit it every time.

This tendency is pronounced even among sophisticated laypersons and lawyers who are not litigators. This class of arbitrators may not dismiss the rules of evidence out of hand. They may even understand the purpose of the rules of evidence and believe that they have a place in our legal system. However, they will almost invariably conclude that they do not have a place in arbitration proceedings.

The most that can be said is that they are more open to the possibility that judicious application of the rules of evidence might be salutary and, indeed, further the purposes of the arbitration. But they are often dissuaded from applying the rules of evidence, even to a limited extent, by other institutional policies. For example, in California, one of the few bases for reversal of an otherwise binding arbitration award is the failure of the arbitrators to consider evidence material to the resolution of the controversy. Under this standard of appellate review, even a relatively sophisticated arbitrator would think twice before excluding evidence on any theory.

Arbitrators who are litigators tend to recognize the salutary purposes served by applying the rules of evidence, at least to an extent. For them, the task is to apply the rules to achieve those purposes without running afoul of the standard for appellate review.

This is a virtually impossible task. The reason is simple. Whatever their deficiencies, the rules of evidence provide a comprehensive set of principles for the conduct of evidentiary hearings. Take them away and arbitrators are either left with nothing to take their place or they have to make up their own rules as they go along. Since the latter is unworkable as a practical matter, the let-it-all-in school of thought tends to win by default.

Compounding this problem is that counsel test the envelope of relevance in the presentation of their cases. Trial lawyers work hard to get in as much evidence as possible. The theory seems to be that one never knows what the trier of fact (judge, jury or arbitrator) will seize on to rationalize the desired result. Therefore, it's better to provide as much evidence to choose from as possible. Besides, lawyers have clients. They may be criticized by those clients if they don't introduce certain evidence and the case is lost; if that evidence is offered but excluded, they cannot be blamed. It is the rare attorney who appreciates that relevance is not the only test of whether the evidence should be offered in the first place.

In the courtroom, what evidence the jury may consider is regulated by the judge. In exercising his or her discretion, the judge is bound by the rules of evidence. When a judge is the trier of fact, the rules of evidence may be relaxed somewhat, but they are not ignored. They are perceived to ensure the integrity of the factfinding process. In contrast, in arbitration proceedings, the arbitrators are judge and jury. Virtually all evidence offered by the parties is admitted and given whatever weight the arbitrators deem appropriate in their unfettered discretion. Before electing arbitration to resolve a legal dispute, counsel must understand the pressures militating against the exclusion of any relevant evidence.

Franklin R. Garfield, a lawyer in Century City, was the chair of the Los Angeles County Bar Association arbitration panel that decided a $28 million fee dispute between the Marciano brothers, owners of Guess Jeans, and Alschuler, Grossman & Pines.