

COURT-ANNEXED ARBITRATION AND NEVADA'S UNIQUE PENALTY PROVISIONS: INTRODUCING AN ARBITRATOR'S FINDINGS AT A TRIAL DE NOVO

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I. INTRODUCTION

Court-annexed arbitration is a form of nonbinding mandatory alternative dispute resolution (ADR) where parties are required to submit to arbitration before seeking a trial de novo in a court of law. However, court-annexed arbitration programs often have “penalty provisions,” the purpose of which is to dissuade litigants from actually seeking a trial de novo.¹ Without penalty provisions, litigants would have little incentive to take court-annexed arbitration programs seriously.² The problem is that some penalty provisions might go too far in dissuading litigants, and therefore unconstitutionally impair the right to a jury trial.³

Legislators or judges designing the rules for court-annexed arbitration have to walk a tightrope when it comes to penalty provisions.⁴ A designer wants the penalty provision to be effective at deterring litigants from automatically appealing arbitration decisions.⁵ At the same time, the designer must make sure the penalty provision is not too effective.⁶ If the penalty provision goes too far in deterring litigants, it may make the right of a jury trial “practically unavailable” and therefore risk a court finding it unconstitutional.⁷

Nevada's court-annexed arbitration program and its unique penalty provisions arguably burden the right to a jury trial more than any other program in

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¹ Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 494-95 (1989).

² See Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 610-11 (2009).

³ *In re Smith*, 112 A.2d 625, 629 (Pa. 1955).

⁴ Schmitz, *supra* note 2, at 589-90 (recognizing balance between effectiveness of penalty provisions and the right to a jury trial).

⁵ *Id.*

⁶ *Id.*

⁷ CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER, AND JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 562 (2005) (quoting *In re Smith*, 112 A.2d at 629).

the United States. Nevertheless, litigants, attorneys, and the general public view Nevada's ADR programs, including the court-annexed arbitration program,⁸ as beneficial.⁹ Popular opinion, however, does not determine a law's constitutionality, or even make it a good idea. Because there is no clear demarcation as to how far a program can go,¹⁰ it is unresolved whether Nevada has gone too far in burdening the right to a jury trial.

This Note focuses on Nevada Revised Statute (NRS) § 38.259(2)(a), passed in 1999, which requires the written findings of an arbitrator be admitted at a trial de novo.¹¹ NRS § 38.259(2)(a) is a unique penalty provision—no other court-annexed arbitration program, as of July 2008, requires the findings of an arbitrator to be admitted at a trial de novo.¹² In *Zamora v. Price*, a litigant challenged NRS § 38.259(2)(a), arguing it violated his right to a jury trial because the jury appeared to simply adopt the arbitrator's findings.¹³ The Nevada Supreme Court held that admitting the arbitrator's written findings does not violate the right to a jury trial as guaranteed by the Nevada Constitution and the United States Constitution.¹⁴

Regardless of constitutional concerns, the question remains whether admitting the written findings of the arbitrator is a good idea. The purpose of a penalty provision is to reduce the incentive of a litigant to request a trial de novo.¹⁵ By mandating the admission of the arbitrator's written findings, the legislature undoubtedly believed that juries would rely, in a significant amount of matters, on the arbitrator's decision in making their own findings.¹⁶ This belief appears to be false in virtually all cases.¹⁷ Because admitting the arbitrator's findings is not having the effect the legislature intended, Nevada must seriously question the policy rationale of continuing the practice.

This Note analyzes NRS § 38.259(2)(a) and the Nevada Supreme's Court decision in *Zamora* to determine the constitutionality and policy implications of admitting an arbitrator's findings at a trial de novo. Part II briefly discusses court-annexed arbitration programs and penalty provisions. Part III summarizes Nevada's court-annexed arbitration program and the legislative history of NRS § 38.259(2)(a). Part IV looks at previous constitutional challenges to pen-

⁸ Telephone Interview with Chris A. Beecroft Jr., ADR Comm'r, Nev. Eighth Judicial Dist. Court (Dec. 16, 2009) [hereinafter Beecroft Interview].

⁹ SUPREME COURT OF NEV., ANNUAL REPORT OF THE NEVADA JUDICIARY 33 (2009), available at <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/2896/>; Beecroft Interview, *supra* note 8; see also Schmitz, *supra* note 2, at 608 (noting that, unlike other state programs, Nevada's Court-Annexed Arbitration program is generally seen as efficient).

¹⁰ MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 7, at 562.

¹¹ NEV. REV. STAT. § 38.259(2)(a) (2009).

¹² See Schmitz, *supra* note 2, at 618-25 (comparing court-annexed arbitration programs, or lack of thereof, for every state).

¹³ *Zamora v. Price*, 213 P.3d 490, 493 (Nev. 2009).

¹⁴ *Id.* at 494.

¹⁵ Schmitz, *supra* note 2, at 589-90.

¹⁶ Beecroft Interview, *supra* note 8; see also *Hearing on S.B. 315 Before the S. Comm. on Judiciary*, 1999 Leg., 70th Sess. 778 (Nev. 1999) [hereinafter *S.B. 315 Hearing*] (testimony of Judge Gene T. Porter stating that the purpose of bill was to "put some teeth" into the arbitration program).

¹⁷ Beecroft Interview, *supra* note 8.

alty provisions, including two cases on which the Nevada Supreme Court relied heavily in deciding *Zamora*. Part V summarizes the Nevada Supreme Court's opinion in *Zamora*. Part VI analyzes the Nevada Supreme Court's rationale in finding that admitting the arbitrator's findings at a trial de novo does not violate the right to due process or the right to a jury trial. Part VII analyzes the policy rationale behind admitting the arbitrator's findings. Part VIII summarizes the potential costs and benefits of retaining the penalty provision, and contends that its benefits do not outweigh its potential costs.

II. BACKGROUND

Mandatory court-annexed arbitration programs¹⁸ prevent some litigants from seeking a judicial trial until they have participated in an arbitration program.¹⁹ Generally, court-annexed arbitration programs either set a jurisdictional limit dependent on the amount in controversy (e.g., mandating arbitration for cases where the amount in controversy is less than \$50,000) or allow the court itself to decide whether to mandate arbitration.²⁰ Mandatory ADR programs, such as court-annexed arbitration, raise many constitutional concerns.²¹ Common constitutional challenges to mandatory ADR programs arise from rights such as due process and equal protection, as well as from principles such as separation of powers.²² It is impairment of the right to a jury trial,²³ though, that raises one of the strongest constitutional challenges to mandatory ADR programs.²⁴

Because of concerns that court-annexed arbitration programs might unduly burden the right to a jury trial, they are usually nonbinding—either party can request a trial de novo after arbitration is completed.²⁵ This “trial *de novo* escape hatch” has been criticized on policy grounds.²⁶ Some contend it creates inefficiency because parties do not take the arbitration seriously, knowing they can simply request a new trial if they are not satisfied with the arbitrator's

¹⁸ Court-annexed arbitration is also often referred to as “nonbinding mandatory arbitration” or “court-connected arbitration.”

¹⁹ L. Christopher Rose, *Nevada's Court-Annexed Mandatory Arbitration Program: A Solution to Some of the Causes of Dissatisfaction with the Civil Justice System*, 36 IDAHO L. REV. 171, 172 n.8 (1999).

²⁰ See Schmitz, *supra* note 2, at 618-25 (comparing mandatory arbitration statutes, or lack thereof, of all fifty states and various federal districts).

²¹ See generally Golann, *supra* note 1.

²² *Id.* at 493.

²³ The United States Constitution guarantees the right to a jury trial in civil cases: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII. This right has not been extended to the states through the process of incorporation. James L. “Larry” Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 482-83 (2004). However, forty-eight states have a state constitutional provision guaranteeing the right a jury trial in civil cases. Golann, *supra* note 1, at 503.

²⁴ Golann, *supra* note 1, at 502.

²⁵ See Schmitz, *supra* note 2, at 603-04, 618-25 (comparing mandatory arbitration statutes, or lack thereof, of all fifty states and various federal districts).

²⁶ See *id.* at 606.

findings.²⁷ The availability of this option, some argue, makes court-annexed arbitration nothing more than “a superfluous but expensive dispute resolution process.”²⁸ In explaining why court-annexed arbitration might simply add more costs to the litigation process, Professor Amy J. Schmitz makes an analogy to preseason football:

Court-connected arbitration may thus resemble a bad preseason football game. The players may go through the motions knowing that the results do not “matter” in that they do not “bind” the parties on the record. Teams may then waste resources and suffer needless injuries in the game. They may also keep their best players out of the fray to save them for the “real thing” to the extent disputants may refrain from offering their best evidence in arbitration to preserve its effect for the trial *de novo* they plan to pursue after the arbitral “preseason” is over. The difference is that football teams usually *make* money entertaining the public through preseason games, whereas courts and disputants often *lose* and *waste* resources through court-annexed arbitral labyrinths.²⁹

Still, despite the fact that the “trial *de novo* escape-hatch” is the subject of much criticism,³⁰ it might actually be necessary to preserve the rights to a jury trial and due process under the law, and can provide a means to jettison “unwarranted arbitration decisions.”³¹

Legislatures, however, have sought to give teeth to court-annexed arbitration programs by enacting penalty provisions that attempt to dissuade litigants from actually seeking a trial *de novo* following arbitration.³² These penalty provisions might raise constitutional concerns if they are found to be so “onerous” that they make the right to a jury trial “practically unavailable.”³³ For example, Nevada Arbitration Rule (NAR) 20(b) creates a penalty provision that shifts attorney’s fees and costs to the party requesting a trial *de novo* if, at the new trial, the requesting party fails to improve upon the amount they were awarded at arbitration.³⁴ The state’s most controversial penalty provision might be that requiring the written findings of the arbitrator be admitted into evidence if a party requests a trial following arbitration.³⁵

III. NEVADA’S COURT-ANNEXED ARBITRATION PROGRAM

Nevada requires that cases be submitted to nonbinding arbitration when the amount in controversy “does not exceed \$50,000 per plaintiff, exclusive of attorney’s fees, interest and court costs.”³⁶ After completing arbitration, either

²⁷ *Id.* at 611.

²⁸ *Id.*

²⁹ *Id.* at 610.

³⁰ *Id.* at 606-15.

³¹ *Id.* at 606.

³² Golann, *supra* note 1, at 494-95.

³³ *In re Smith*, 112 A.2d 625, 629 (Pa. 1955).

³⁴ NEV. ARB. R. 20(B)(2)(a)-(b) (2010).

³⁵ NEV. REV. STAT. § 38.259(2)(a) (2009).

³⁶ *Id.* § 38.250(1)(a). However, cases where “the parties have agreed or are otherwise required to submit the action to an alternative method of resolving disputes established by the Supreme Court . . . including, without limitation, a settlement conference, mediation or a short trial” are exempt. *Id.*

party may exercise its right to a trial de novo³⁷ within thirty days after the arbitration award is served on the parties.³⁸ Nevada's court-annexed arbitration program has multiple penalty provisions, including cost-shifting provisions,³⁹ a requirement that litigants act in "good faith" during arbitration (or else a request for a trial de novo may be denied),⁴⁰ and, the main focus of this Note, a requirement that the written findings of the arbitrator must be admitted at a new trial.⁴¹

A. *Cost-Shifting Provisions and the Requirement of "Good Faith"*

Prior to requiring the arbitrator's written findings to be admitted at a trial de novo, Nevada's court-annexed arbitration program had two significant penalty provisions: a cost-shifting provision⁴² and a requirement that litigants act in "good faith."⁴³ NAR 20(b) shifts attorney's fees and costs to the party requesting a new trial if that party fails to improve its position by 20 percent when the arbitration award is \$20,000 or less, or by 10 percent if the arbitration award is greater than \$20,000.⁴⁴

Nevada also requires that litigants act in good faith during arbitration.⁴⁵ A party faces waiving its right to a trial de novo if the party fails "to either prosecute or defend a case in good faith during the arbitration proceedings."⁴⁶ The Nevada Supreme Court has been inconsistent in interpreting precisely what constitutes *good faith*.⁴⁷ For example, in *Chamberland v. Labarbera*, the court held that a defendant's failure to conduct any discovery and the failure of the defendant to appear at the arbitration hearing did not constitute bad faith.⁴⁸ However, the Nevada Supreme Court upheld a trial court's decision to deny a trial de novo when a defendant did not comply with the plaintiff's discovery requests.⁴⁹

³⁷ The rules of mandatory arbitration, as determined by the Nevada Supreme Court, must include "[p]rovisions for trial upon the exercise by either party of the party's right to a trial anew after the arbitration." *Id.* § 38.255(4)(d).

³⁸ "Within 30 days after the arbitration award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the commissioner a written request for trial de novo of the action. Any party requesting a trial de novo must certify that all arbitrator fees and costs for such party have been paid or shall be paid within 30 days." NEV. ARB. R. 18(A).

³⁹ NEV. ARB. R. 20(B).

⁴⁰ NEV. ARB. R. 22(A).

⁴¹ NEV. REV. STAT. § 38.259(2)(a) (2009); NEV. ARB. R. 20(A).

⁴² NEV. ARB. R. 20(B)(2)(a)-(b).

⁴³ NEV. ARB. R. 22(A). For an in-depth discussion of Nevada's good faith requirement see Rose, *supra* note 19, at 190-94.

⁴⁴ NEV. ARB. R. 20(B)(2)(a)-(b).

⁴⁵ NEV. ARB. R. 22(A).

⁴⁶ *Id.*

⁴⁷ *Hearing on S.B. 195 Before the S. Comm. on Judiciary*, 1999 Leg., 70th Sess. 778 (Nev. 1999) [hereinafter *S.B. 195 Hearing*].

⁴⁸ *Chamberland v. Labarbera*, 877 P.2d 523, 525 (Nev. 1994).

⁴⁹ *Casino Properties, Inc. v. Andrews*, 911 P.2d 1181, 1183 (Nev. 1996).

B. Introduction of Arbitrator's Written Findings at a New Trial

NRS § 38.259(2)(a) grew out of concerns that the cost-shifting penalty and good faith requirement were not effective deterrents to parties wastefully requesting trials de novo.⁵⁰ Thus, the Nevada legislature began to consider mandating the introduction of the arbitrator's written findings at trial.⁵¹ Although the concept of introducing the results of an ADR proceeding at trial is not unique,⁵² Nevada is the only state that does so with a court-annexed arbitration program.⁵³ If a party requests a new trial following mandatory arbitration, Nevada law requires the written findings of the arbitrator, or panel of arbitrators, to be admitted as evidence at trial.⁵⁴

While the Nevada legislature debated the provision, supporters contended that litigants would have to take arbitration seriously if they knew that the arbitrator's written findings would be introduced at trial.⁵⁵ However, opponents of the provision argued that introducing the arbitrator's findings would "jeopardize and prejudice" the jury.⁵⁶

1. Legislative History

In 1999, Nevada State Senator Dina Titus introduced and Judge Mark W. Gibbons requested introduction of two separate bills⁵⁷ into the Nevada Senate in order to "[r]equire . . . certain information concerning arbitration to be presented at trial de novo before [the] jury."⁵⁸ Those who testified in favor of admitting the arbitrator's written findings expressed two main concerns about the nonbinding arbitration program: (1) litigants were not taking arbitration seriously,⁵⁹ and (2) some insurance firms were requesting new trials excessively, some even doing so "for no apparent reason, including the smallest of cases."⁶⁰

Regarding the first concern, Judge Mark W. Gibbons from the Eighth Judicial District testified before the Nevada Senate Committee on Judiciary (Committee on Judiciary), expressing concerns similar to those in Professor Schmitz's preseason football analogy.⁶¹ "[O]ver the years," he testified, "many people have not taken the arbitration process seriously, and have the intent to participate minimally, knowing they can request a trial de novo and start over

⁵⁰ See *S.B. 315 Hearing*, *supra* note 16, at 776.

⁵¹ S.B. 315, 1999 Leg., 70th Sess. (Nev. 1999); S.B. 195, 1999 Leg., 70th Sess. (Nev. 1999).

⁵² See Golann, *supra* note 1, at 513-15.

⁵³ See Schmitz, *supra* note 2, at 618-25 (comparing mandatory arbitration statutes, or lack thereof, of all fifty states and various federal districts).

⁵⁴ NEV. REV. STAT. § 38.259(2)(a) (2009).

⁵⁵ *S.B. 195 Hearing*, *supra* note 47, at 778.

⁵⁶ *Id.* at 783-84.

⁵⁷ The two bills were designated S.B. 195 and S.B. 315. *S. B. 315 Hearing*, at 776, 777. Both bills were virtually identical. *Id.* at 777. The Nevada Senate eventually passed legislation under S.B. 315.

⁵⁸ *S.B. 315 Hearing*, *supra* note 16, at 776.

⁵⁹ *Id.*

⁶⁰ *S.B. 195 Hearing*, *supra* note 47, at 780.

⁶¹ *S.B. 315 Hearing*, *supra* note 16, at 776; Schmitz, *supra* note 2, at 610.

again at the time of trial.”⁶² Accordingly, proponents of the bill argued that allowing the arbitrator’s written findings to be admitted at trial would be “a mechanism to ‘put some teeth’ into the arbitration system.”⁶³

George Bochanis, a Las Vegas personal injury attorney, testified he was concerned that insurance companies request new trials indiscriminately.⁶⁴ Steve Burris, representing the Nevada Trial Lawyers’ Association, hypothesized that insurance companies are incentivized to request new trials because it extends the length of the litigation.⁶⁵ The insurance companies, having the resources to withstand a lengthy litigation process, request new trials following arbitration and wait, hoping the plaintiff, often needing the money immediately, will eventually be willing to settle for less than the arbitration award.⁶⁶

Opponents to the bill countered that admitting the arbitrator’s written findings at trial would “prejudice” the jury,⁶⁷ and also would make the arbitration process more costly.⁶⁸ Some lobbyists argued that admitting the arbitrator’s written findings directly conflicted with the definition of a trial de novo and the findings would unfairly bias the jury.⁶⁹ Interestingly, the First, Second, and Ninth Nevada Judicial District Courts were opposed to the legislation because of concerns that litigants would take arbitration too seriously, which would drive up the costs of arbitration.⁷⁰ The Arbitration Commissioner of the Second Judicial District⁷¹ testified his Judicial District was not experiencing the same problems as the Eighth Judicial District—less than 1 percent of arbitration cases in the Second Judicial District resulted in a trial de novo.⁷² He also noted that arbitration reduces costs by eliminating discovery and motion practice.⁷³ The commissioner testified, “[A]s the importance of [an] arbitration decision is increased, the time, effort, energy, and money that both sides pour into the arbitration will increase as well.”⁷⁴

2. Statutory Scheme

To understand how the introduction of the arbitrator’s award might affect the decision of the jury, it is important to understand the process by which the award is presented. Pursuant to NRS § 38.259, an arbitrator must make written findings after the conclusion of mandatory nonbinding arbitration in the following form:

Based upon the evidence presented at the arbitration hearing concerning the cause of action for, the arbitrator finds in favor of(name of the

⁶² *S.B. 315 Hearing, supra* note 16, at 776.

⁶³ *S.B. 195 Hearing, supra* note 47, at 778.

⁶⁴ *Id.* at 782.

⁶⁵ *Id.* at 780, 782.

⁶⁶ *Id.*

⁶⁷ *Id.* at 776, 784.

⁶⁸ *Id.* at 786.

⁶⁹ *Id.* at 783-84, 789-90.

⁷⁰ *Id.* at 784-86.

⁷¹ The Second Judicial District Arbitration Commissioner also represented the Arbitration Commissioners of the First and Ninth Judicial Districts. *Id.* at 784.

⁷² *Id.* at 784-85.

⁷³ *Id.*

⁷⁴ *Id.* at 785.

party) and("awards damages in the amount of \$....." or "does not award any damages on that cause of action").⁷⁵

These written findings must be admitted at trial if either party seeks a trial de novo.⁷⁶

As noted above, the legislature was aware of the potential constitutional challenges based on the right to jury a trial.⁷⁷ Likely for the purpose of balancing these constitutional concerns, the Nevada legislature enacted a mandatory jury instruction,⁷⁸ barred the arbitrator from testifying or being deposed, and barred any other evidence concerning the arbitration.⁷⁹ The jury instruction explains to the jury how to weigh the arbitrator's written findings as evidence.⁸⁰ The jury instruction takes the following form:

During the course of this trial, certain evidence was admitted concerning the findings of an arbitrator. On the cause of action for, the arbitrator found in favor of(name of the party) and("awarded damages in the amount of \$....." or "did not award any damages on that cause of action"). The findings of the arbitrator may be given the same weight as other evidence or may be disregarded. However, you must not give those findings undue weight because they were made by an arbitrator, and you must not use the findings of the arbitrator as a substitute for your independent judgment. You must weigh all the evidence that was presented at trial and arrive at a conclusion based upon your own determination of the cause of action.⁸¹

IV. CONSTITUTIONALITY OF "PENALTY PROVISIONS"

The introduction of the arbitrator's written findings creates constitutional concerns because the likely purpose of admitting the findings is to deter litigants from seeking trials de novo.⁸² However, juxtaposed with the need for giving court-annexed arbitration some teeth is the constitutional right to a jury trial. The concern is that by admitting the findings of the arbitrator, the jury will simply reaffirm the result of the arbitration, and thus take away the fact-finding duty of the jury. Litigants have challenged penalty provisions of non-binding mandatory arbitration programs primarily because they violate the constitutional rights to a jury trial, equal protection, and due process.⁸³ However, most constitutional attacks on nonbinding mandatory arbitration have failed.⁸⁴ This Note focuses on the right to a jury trial.

⁷⁵ NEV. REV. STAT. § 38.259(1) (2009).

⁷⁶ *Id.* § 38.259(2)(a).

⁷⁷ *See S.B. 195 Hearing, supra* note 47, at 782-83.

⁷⁸ NEV. REV. STAT. § 38.259(2)(b) (2009).

⁷⁹ *Id.* § 38.259(2)(a).

⁸⁰ *Id.* § 38.259(2)(b).

⁸¹ *Id.*

⁸² Beecroft Interview, *supra* note 8; *see also S.B. 195 Hearing, supra* note 47, at 778 (testimony of Judge Gene T. Porter stating that the purpose of bill was to "put some teeth" into the arbitration program).

⁸³ MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 7, at 562.

⁸⁴ *Id.*

A. *Right to a Civil Jury Trial*

Historically, American society has placed great importance on the right to a jury trial in civil cases.⁸⁵ The rationale is based on the idea that it represents a “great safeguard against state power . . . ‘[I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.’”⁸⁶ The United States Constitution preserves the right to a jury trial in civil trials,⁸⁷ but the right has not been applied to the states through the process of selective incorporation.⁸⁸ However, forty-eight of the fifty states, including Nevada, guarantee the right to a jury trial in their state constitutions.⁸⁹ Nevada’s constitution reads that “[t]he right of trial by Jury shall be secured to all and remain inviolate forever.”⁹⁰

The trial de novo escape hatch has been interpreted as necessary for a court-annexed arbitration to survive constitutional muster because litigants must have some “sufficiently unfettered access to a trial de novo.”⁹¹ Constitutional analysis, though, does not begin and end with the mere right to a jury trial.

A penalty provision, or a combination of multiple penalty provisions, may overly burden the right to obtain a trial de novo and thus violate the right to a civil jury trial. It is not certain, however, to what degree a penalty provision or combination of multiple penalty provisions can burden the right to a jury trial before it will make it practically unavailable.⁹² Commentators have noted there is simply no clear line of demarcation.⁹³ In fact, most constitutional challenges to court-annexed arbitration based upon the right to a jury trial have failed.⁹⁴

In attempts to determine the limits, commentators⁹⁵ and the Nevada Supreme Court⁹⁶ have looked to particular language from *In re Smith*, a Pennsylvania case.⁹⁷ There, the court held that a mandatory arbitration program did not compromise the right to a jury trial where litigants were required to pay a \$25 fee and the cost of the arbitrator, before either litigant could seek a trial de novo.⁹⁸ In reaching this conclusion, the court first held that nonbinding arbitration does not directly interfere with the right to a jury trial because such programs are not a final determination of the parties’ rights.⁹⁹ However, the court

⁸⁵ See Wright & Williams, *supra* note 23, at 496-99.

⁸⁶ *Id.* at 499 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (1765)).

⁸⁷ U.S. CONST. amend. VII.

⁸⁸ Wright & Williams, *supra* note 23, at 482-83.

⁸⁹ Golann, *supra* note 1, at 503.

⁹⁰ NEV. CONST. art. 1, § 3.

⁹¹ MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 7, at 562 (emphasis added).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Barrett v. Baird*, 908 P.2d 689, 694 (Nev. 1995).

⁹⁷ *In re Smith*, 112 A.2d 625 (Pa. 1955).

⁹⁸ *Id.* at 628, 631.

⁹⁹ *Id.* at 629.

recognized that penalty provisions could significantly interfere with a party's right to a jury trial.¹⁰⁰ The court held that "the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right *practically unavailable*."¹⁰¹ Still, determining whether the right of appeal is burdened so much that it is *practically unavailable* is a problem "of degree rather than of kind."¹⁰²

The *Smith* court rationalized that in certain situations a fee could overly burden the right of appeal.¹⁰³ For example, suppose a court-annexed arbitration program required litigants to pay an arbitrator \$250 to conduct the arbitration as a prerequisite to a trial de novo. In case X, the amount in controversy is \$50,000. In case Y, the amount in controversy is \$1,000. In case X, the \$250 fee is relatively meager, less than 1 percent of the amount in controversy. It is unlikely that a litigant in case X would be significantly deterred from seeking a trial de novo because of the \$250 fee. However, in case Y the fee is relatively substantial. It is 25 percent of the total amount in controversy. In case Y, it is likely that a party would not exercise the right to a jury trial because the amount of the fee would seriously undercut any improvement the party might gain at a trial de novo.

Acknowledging this issue, the *Smith* court reasoned that courts would likely have to waive or lower the arbitrator's fee in case Y, or else the fee would unconstitutionally burden the right to a jury trial.¹⁰⁴ Because a court must analyze the burden on the right to a jury trial in the context of other circumstances, making a bright-line rule is virtually impossible.

V. ZAMORA V. PRICE

In *Zamora v. Price*, the Nevada Supreme Court held the admission of the arbitrator's written findings at a trial de novo, pursuant to NRS § 38.259, does not violate the constitutional right to jury trial.¹⁰⁵ The court reasoned that the arbitrator's written findings were "mere evidence" the jury could accept or reject.¹⁰⁶ The court placed great weight on the statutory jury instruction, NRS § 38.259(2)(b), finding the instruction sufficiently addresses any concern that introducing the arbitrator's written findings interferes with the right to a jury trial.¹⁰⁷

In 2004, Tyshae Price filed a complaint in Nevada's Eighth Judicial District Court against Steve Zamora asserting tort claims resulting from an automobile accident.¹⁰⁸ The court submitted the case to mandatory non-binding

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.* at 630.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Zamora v. Price*, 213 P.3d 490, 494 (Nev. 2009).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 491.

arbitration because the amount in controversy was less than \$40,000.¹⁰⁹ After conducting a hearing, the arbitrator awarded Price \$18,000 in damages.¹¹⁰

Zamora requested a trial de novo, resulting in a jury trial.¹¹¹ In accordance with Nevada law, the arbitrator's findings were admitted into trial as evidence.¹¹² The jury awarded Price \$18,000, the same amount she received via arbitration.¹¹³ Zamora appealed the verdict to the Nevada Supreme Court on the grounds that his constitutional right to a jury trial and his right to equal protection of the law had been violated by the introduction of the arbitrator's written findings into evidence.¹¹⁴ The Nevada Supreme Court found the admission of the arbitrator's findings did not violate Zamora's right to a jury trial because the findings are "mere evidence" for the jury to weigh.¹¹⁵ The court also rejected Zamora's equal protection claims, finding a rational basis for only applying nonbinding mandatory arbitration where the amount in controversy is less than a certain amount.¹¹⁶ This Note focuses only on Zamora's claim that his right to a jury trial was violated.

A. *Right to a Jury Trial*

Zamora based his argument on the idea that admission of the arbitrator's written findings violated his constitutional right to a jury trial "because it effectively removed the jury as the fact-finder . . . and improperly turned the jury into an appellate body reviewing the reasonableness of the arbitration award."¹¹⁷ Zamora also argued that the entire purpose of admitting the written findings is to prejudice the party requesting a trial de novo, "which defeats the very purpose of having a new trial."¹¹⁸ To prove his point, Zamora pointed to the fact that the jury awarded Price the exact amount that the arbitrator awarded.¹¹⁹

The Nevada Supreme Court rejected Zamora's argument.¹²⁰ In analyzing Zamora's right to a jury trial claim, the court relied heavily on its decision in *Barrett v. Baird*,¹²¹ where the court held that the admission of a medical-legal screening panel's findings at trial did not violate the right to a jury trial.¹²²

In *Barrett*, the Nevada Supreme Court held that the admission of the written findings of a medical-legal screening panel did not burden the litigant's

¹⁰⁹ The complaint was filed on January 15, 2004, at which time it was required all civil actions where the amount in controversy did not exceed \$40,000 to be submitted to nonbinding arbitration. *Id.* at n.1. In 2005, the amount in controversy was increased to \$50,000. NEV. REV. STAT. § 38.250(1)(a) (2009).

¹¹⁰ *Zamora*, 213 P.3d at 491.

¹¹¹ *Id.* at 491-92.

¹¹² *Id.* at 493.

¹¹³ *Id.* at 492.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 494.

¹¹⁶ *Id.* at 495-96.

¹¹⁷ *Id.* at 493.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 494.

¹²¹ *Barrett v. Baird*, 908 P.2d 689 (Nev. 1995).

¹²² *Zamora*, 213 P.3d at 493-95.

right to a jury trial to such a degree that it was practically unavailable.¹²³ Nevada law required plaintiffs to submit a petition alleging medical malpractice to a medical-legal screening panel prior to filing a complaint in district court.¹²⁴ The medical-legal screening panel found no negligence on the part of the defendant.¹²⁵ The plaintiff proceeded with a complaint and the panel's findings were admitted at trial.¹²⁶ At trial, the jury found no negligence on the part of the defendant, and the plaintiff received no damages.¹²⁷

Barrett argued that the screening panel statute denied her right to a jury trial because jurors were predisposed to "overvalue the weight of the panel's decision without knowing that the panel's decision relies on evidence that would be inadmissible at trial."¹²⁸ The court ruled that the admission of the panel's findings was mere evidence that the jury, according to the mandatory jury instruction, is to weigh as "'an expert opinion which is to be evaluated by the jury in the same manner as it would evaluate any other expert opinion.'"¹²⁹ In deciding the sufficiency of the jury instruction the *Barrett* court looked to a Ninth Circuit case, *Wray v. Gregory*.¹³⁰

In *Wray*, the Ninth Circuit found that the written findings of a medical-legal screening panel (the same panel procedure analyzed in *Barrett*) were improperly admitted at trial because of a statutory technicality.¹³¹ In dicta, the Ninth Circuit expressed skepticism that the jury instruction, as it was written at the time, constitutionally ensured the right to a jury trial.¹³² At the time, the jury instruction merely stated that the jury must treat the screening panel's findings as it would treat "any other evidence."¹³³ The Ninth Circuit held the screening panel's findings were not like "any other evidence" because the findings purported to be a final determination of the central issue (i.e., whether there was medical malpractice), by experts that were not subject to cross-examination.¹³⁴

The Ninth Circuit also suggested that Nevada judges should bolster the jury instruction so the jury does not give undue weight to the panel's findings.¹³⁵ Specifically, they advised judges to inform juries that "because the screening panel inquiry constitutes only 'a summary process' and because Nevada law precludes the jury from inquiring into that process, the jurors

¹²³ *Barrett*, 908 P.2d at 694.

¹²⁴ *See id.* at 692.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 694.

¹²⁹ *Id.* (quoting *Comiskey v. Arlen*, 390 N.Y.S.2d 122, 126 (N.Y. App. Div. 1976)). In *Barrett*, the court also instructed the jury that the panel's finding "is a summary process to screen those frivolous and marginal cases. It is not a full trial and is not to be considered by you as a substitute for a full trial." *Id.* at n.5. This additional instruction appears to follow the suggestion of the Ninth Circuit. *Wray v. Gregory*, 61 F.3d 1414, 1419 (9th Cir. 1995).

¹³⁰ *Wray*, 61 F.3d at 1414.

¹³¹ *Id.* at 1420.

¹³² *Id.* at 1419.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

should not give *undue weight* to the panel's findings."¹³⁶ The Ninth Circuit stated that a jury instruction needed to ensure that the introduction of the panel's findings do not "interpose [an] obstacle to a full contestation of all the issues, and take [a] question of fact from . . . the jury."¹³⁷ The Ninth Circuit's concern was that a jury would take the panel screenings and adopt them as their own.¹³⁸

The *Barrett* court looked at the dicta in *Wray* to support its conclusion that the admission of a medical-legal screening panel at trial violates neither the United States constitutional right to due process nor the Nevada constitutional right to a jury trial.¹³⁹ Essentially, the jury instructions had been amended in accordance with the Ninth Circuit's suggestions in *Wray*.¹⁴⁰ The *Zamora* court analogized the admission of an arbitrator's written findings to the admission of a medical screening panel analyzed in *Barrett*.¹⁴¹

The *Zamora* court held that the award, like the panel's findings in *Barrett*, "is mere evidence, which the jury is free to accept or reject."¹⁴² The court also reasoned that a party could attack the arbitrator's findings;¹⁴³ if a party is not satisfied with the arbitration result, the party has the opportunity to present evidence and argue that the arbitrator decided the case incorrectly.¹⁴⁴ Because the arbitrator's findings are mere evidence, it is the party's job to present evidence and convince the jury that the arbitrator's decision was wrong.¹⁴⁵

Zamora argued that admission of the arbitrator's written findings was different from the admission of the screening panel's determination of negligence in *Barrett* because the arbitrator's findings are not similar to expert testimony.¹⁴⁶ The court rejected this argument, reasoning that "[r]egardless of whether the award is or is not considered expert testimony, the award is nonetheless evidence that the Legislature, by enacting the substantive rule of evidence . . . has authorized for admission at the trial de novo."¹⁴⁷ The court also reasoned that the mandatory jury instruction addressed concerns that the admission of the findings would impair the jury's "fact-finding role."¹⁴⁸

VI. INTRODUCING THE ARBITRATOR'S FINDINGS AT A TRIAL DE NOVO DOES NOT VIOLATE THE RIGHT TO A JURY TRIAL

In *Zamora*, the court held that the introduction of an arbitrator's written findings in a trial de novo does not unconstitutionally burden the right to a jury

¹³⁶ *Id.* (emphasis added) (quoting *Jain v. McFarland*, 851 P.2d 450, 455 (Nev. 1993)).

¹³⁷ *Id.* at 1419 (alteration in original) (quoting *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430 (1915)).

¹³⁸ *See id.*

¹³⁹ *Barrett v. Baird*, 908 P.2d 689, 695 (Nev. 1995).

¹⁴⁰ *Id.*

¹⁴¹ *Zamora v. Price*, 213 P.3d 490, 494 (Nev. 2009).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

trial nor does it violate a litigant's right to equal protection of the law.¹⁴⁹ The court's dismissal of Zamora's equal protection claim appears to be supported by all authorities on the subject. However, the court's decision as it relates to the right to a jury trial is worthy of in-depth analysis.

Although other ADR programs have had similar penalty provisions allowing the admittance of the findings of the ADR program at a trial de novo,¹⁵⁰ Nevada is only the state with a court-annexed mandatory arbitration program that allows arbitrators' findings to be admitted at a trial de novo.¹⁵¹ Despite the apparent validity of the belief that the jury will not give undue weight to the arbitrator's findings,¹⁵² there are some issues worthy of consideration. First, Zamora's argument that there is a difference between a medical-legal screening panel and an arbitrator's findings could have more merit if argued differently. Second, when the moderator of an ADR program (such as arbitration) is not available for cross-examination, as is the case with Nevada's court-annexed arbitration program,¹⁵³ it might violate the right to a jury trial.¹⁵⁴ Finally, the belief that the jury instruction is adequate to protect against overreliance on the arbitrator's findings might be flawed.

A. *Differences Between a Medical-Legal Screening Panel and an Arbitrator's Findings*

One of Zamora's arguments—which the court dismissed as unpersuasive—is that an arbitrator, unlike a medical-legal screening panel, is not an expert.¹⁵⁵ Although it might be immaterial whether an arbitrator is an expert, the fact remains that an arbitrator *is* different from a medical-legal screening panel. The goal of the screening panel is to look at cases of medical malpractice and decide whether they have merit.¹⁵⁶ Regardless of the panel's decision, a litigant is allowed to move forward with a malpractice lawsuit.¹⁵⁷ An arbitrator, however, examines evidence, decides fault, and awards damages accordingly. Unlike the screening panel, arbitration is not a “summary process.”¹⁵⁸

Part of the reasoning of the Nevada Supreme Court in *Barrett*¹⁵⁹ and the Ninth Circuit in *Wray*¹⁶⁰ was that the jury would be able to determine that the panel's decision was merely a “summary process” to which they should not give “undue weight.” One could argue that if the jury knew that the arbitrator, who is often a lawyer,¹⁶¹ functioned as the fact-finder, they would give more

¹⁴⁹ *Id.* at 494, 496.

¹⁵⁰ See Golann, *supra* note 1, at 513-15.

¹⁵¹ See Schmitz, *supra* note 2, at 618-25 (comparing mandatory arbitration statutes, or lack thereof, of all fifty states and various federal districts).

¹⁵² Beecroft Interview, *supra* note 8.

¹⁵³ NEV. REV. STAT. § 38.259(2)(a) (2009).

¹⁵⁴ *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 360-61 (Alaska 1988) (Burke, J., dissenting).

¹⁵⁵ *Zamora v. Price*, 213 P.3d 490, 494 (Nev. 2009).

¹⁵⁶ See *Barrett v. Baird*, 908 P.2d 689, 692 (Nev. 1995).

¹⁵⁷ *Id.* at 695.

¹⁵⁸ See *id.* (describing the Medical-Legal Screening Panel as a “summary process”).

¹⁵⁹ *Id.*

¹⁶⁰ *Wray v. Gregory*, 61 F.3d 1414, 1419 (9th Cir. 1995).

¹⁶¹ Beecroft Interview, *supra* note 8.

weight to an arbitrator than they would a screening panel. In fact, it appears that attorneys who represent clients in Nevada's court-annexed arbitration program believe this to be true. When an attorney represents a client in court-annexed arbitration and wins, and the other party requests a trial de novo, the winning attorney often tries to introduce evidence as to how the arbitration process works.¹⁶² However, they are almost always unsuccessful in actually getting such evidence admitted.¹⁶³ Knowing this, why would an attorney nevertheless try to introduce this evidence? The answer is likely because if the jury knew how arbitration worked, it would give the arbitrator's findings much more weight in its own decision.¹⁶⁴

Also, a jury member could already know how arbitration works or could infer its nature from the written findings alone. Although it is unlikely that a jury member would know of Nevada's court-annexed arbitration program specifically, it is possible a jury member will know of the process of arbitration in general. A jury member could also infer that arbitration was similar to a trial based upon the arbitrator's award. The written findings state they are "based upon the evidence presented."¹⁶⁵ The findings then declare whether or not fault is found, and the amount of damages awarded, if any.¹⁶⁶ It is unlikely a jury member would conclude that the arbitration process is some sort of summary process; the only evidence the jury is given about the arbitration process looks like a court order proclaiming to be based on evidence by the litigants, similar to a trial order.

B. *The Unavailability of the Arbitrator to be Cross-Examined*

One also could argue that not allowing cross-examination of the arbitrator violates a litigant's right to a jury trial because there is a danger the jury will give too much weight to the findings without any opportunity for rebuttal.¹⁶⁷ The Nevada Supreme Court did not address this issue in *Zamora*, but the Alaska Supreme Court rejected a similar argument.¹⁶⁸ In *Keyes v. Humana Hospital Alaska, Inc.*, the Alaska Supreme Court analyzed the constitutionality of admitting medical malpractice screening panel opinions at trial and rejected the plaintiff's argument that not allowing him to cross-examine the panel members violated his right to a jury trial.¹⁶⁹ The *Keyes* court relied on the fact that the plaintiff had access to the records and statements made to the panel, which either party could use to buttress or impeach the panel's opinion.¹⁷⁰

Cross-examination is very important to how a jury perceives the credibility of a witness.¹⁷¹ For example, if *Zamora* had the opportunity to cross-

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ NEV. REV. STAT. § 38.259(1) (2009).

¹⁶⁶ *Id.*

¹⁶⁷ *Keyes v. Humana Hosp. Alaska Inc.*, 750 P.2d 343, 360-61 (Alaska 1988) (Burke, J., dissenting).

¹⁶⁸ *Id.* at 349 (majority opinion).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See id.*

examine the arbitrator, he might have been able to show the arbitrator made his or her decision based on faulty principles of law, personal bias, or shaky reasoning. Because the issue has not been settled, a party could challenge NRS § 38.259(2)(b) on the ground that not allowing litigants to cross-examine the arbitrator violates their right to a jury trial.¹⁷²

C. *Analysis of the Jury Instruction*

The *Zamora* court believed the jury instruction strongly safeguarded against concerns that the jury would rely too heavily on the arbitrator's findings.¹⁷³ Indeed, the holding that an arbitrator's written findings are "mere evidence that the jury can accept or reject"¹⁷⁴ has statistical support: juries rarely give the findings any deference at all.¹⁷⁵

The problem with the court's analysis of the jury instruction, however, is that it did not take into account any statistical evidence. If evidence showed that juries gave significant deference to the arbitrator's findings in the majority of cases, the right to a jury trial would be significantly impaired, regardless of the jury instruction. Suppose that in eighty percent of cases, the jury simply adopted the arbitrator's findings, or something relatively close. If a litigant had only a twenty percent chance to alter the outcome of the arbitration, there would be very little incentive to appeal. Arguably, the right of appeal would be "practically unavailable" in such a scenario.

The ADR Commissioner for Nevada's Eighth Judicial District Court believes that jury members generally take their fact-finding role seriously.¹⁷⁶ Polling conducted by the Eighth Judicial District Court found that jury members do not substitute their own judgment with that of the arbitrators.¹⁷⁷ One could also contend that the jury simply would not care about the written findings of the arbitrator even if there were not a limiting instruction. Perhaps the jury trusts no judgment but its own, and the trial format provides jurors with more than enough information to come to a conclusion.

In summary, it appears that introducing the arbitrator's written findings at a trial *de novo* does not violate the right to a jury trial.¹⁷⁸ Although there are many arguments that could be levied against the introduction of the findings, juries appear take their role as fact-finders seriously.¹⁷⁹ The evidence shows that the introduction of the arbitrator's findings does not have a significant impact on juries.¹⁸⁰ Ironically, the fact that juries do not give much weight to the introduction of the arbitrator's written findings helps bolster the constitu-

¹⁷² See *id.* at 360-61; *cf.* *McLaughlin v. Superior Court*, 189 Cal. Rptr. 479, 483 (Cal. Ct. App. 1983) (finding admittance of mediator's recommendations at trial violated right to due process where party was not allowed to cross-examine mediator).

¹⁷³ *Zamora v. Price*, 213 P.3d 490, 494 (Nev. 2009).

¹⁷⁴ *Id.*

¹⁷⁵ Beecroft Interview, *supra* note 8. Beecroft estimated that 98 to 99 percent of juries do not adopt the arbitrator's findings. *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

tionality of the practice and at the same time damages the policy rationale behind it.

VII. WHY KEEP A PENALTY PROVISION THAT CREATES NO PENALTY?

Even if admitting the written findings of the arbitrator is constitutional, is it a good idea? The Nevada legislature believed that mandating the admission of the arbitrator's written findings would "put some teeth" into Nevada's court-annexed arbitration program.¹⁸¹ The legislature likely believed litigants would be less likely to request a trial de novo because they thought juries would be strongly influenced by the arbitrator's written findings.¹⁸² The reality, however, is that juries very rarely give the arbitrator's findings much weight at all;¹⁸³ the identical award in *Zamora* is a statistical anomaly.¹⁸⁴ But this discrepancy between the intended penalty and the actual outcome warrants serious consideration of the potential benefits and drawbacks of continuing the practice. Ultimately, the drawbacks appear to outweigh the benefits.

A. *Potential Benefits of Introducing the Arbitrator's Findings*

One cannot say admitting the arbitrator's findings is a bad policy simply because the jury rarely adopts the same award as the arbitrator. There are some arguments that the findings should be admitted notwithstanding the effects on juries. One is that litigants might believe that introducing the arbitrator's written findings has at least some effect on the jury. Another is that introduction of the arbitrator's written findings at a trial de novo could be used as a bargaining chip in settlement talks.

1. *Litigants Might Believe the Findings Influence the Jury*

Litigants might believe that a negative result at arbitration can only hurt their cases in the view of the jury. If that is the case, the litigant has an incentive to take the arbitration seriously. Even though juries do not follow the arbitrator's award most of the time, a litigant could still see it as a loss that could hurt them later at trial. Thus, there is potential that admitting the arbitrator's findings at trial will give a negative reinforcement for litigants to arbitrate seriously.

Conversely, litigants might also believe a positive result at arbitration can only help their cases. They may believe that winning an arbitration is simply another brick in the wall of evidence supporting their cases at trial, and thus take the arbitration seriously. Even if the jury does not adopt the findings of the arbitrator, it is possible the jury is still influenced by the arbitration award in some manner. The effect might be slight, but constructing a case is often like constructing a building. One usually constructs a case using little bricks of

¹⁸¹ *S.B. 195 Hearing*, *supra* note 47, at 778.

¹⁸² Beecroft Interview, *supra* note 8; *see also S.B. 315 Hearing*, *supra* note 16, at 776 (testimony of Judge Gene T. Porter stating that the purpose of bill was to "put some teeth" into the arbitration program).

¹⁸³ Beecroft Interview, *supra* note 8.

¹⁸⁴ *Id.*

evidence supporting one another, not one giant rock. A positive result at arbitration can be seen as a little brick helping to build the litigant's case.

2. *Admittance of Findings Might Influence Settlement Negotiations*

Many court-annexed arbitration cases are appealed to a trial de novo, but 80 to 85 percent of the cases settle before a new trial occurs.¹⁸⁵ Litigants must weigh the effect of admission of the arbitrator's findings during post-arbitration settlement negotiations. A litigant who received a positive result at arbitration could utilize the fact that the findings will be admitted at trial to increase his or her bargaining position. On the contrary, the losing litigant might fear that the jury will follow the arbitrator's findings, thus reducing that party's chances for success at a trial de novo. Misconceived or not, such assumptions about who has the upper hand could inspire both parties to end the case quickly rather than face the additional time, costs, and risk of a trial de novo.

However, it is more likely that attorneys already know that juries rarely follow the arbitrator's written findings.¹⁸⁶ Accordingly, it is unlikely attorneys conducting negotiations for their clients could use a victory in arbitration to gain a better negotiating position.

B. *Potential Drawbacks to Introducing the Arbitrators Findings*

One of the big drawbacks to admitting the arbitrator's findings is that losing parties might have an incentive to appeal to a trial de novo because juries rarely match the arbitrator's award. Another drawback is that if courts view admitting the arbitrator's findings as a penalty provision, regardless of its effectiveness as a deterrent, it might move a court-annexed arbitration program one step closer to violating the constitutional right to a jury trial. This is of great significance when the penalty provision is not effective at deterring parties from seeking a trial de novo.

1. *Admission of Arbitrator's Findings Might Incentivize Requests for Trials De Novo*

Because juries most often do not follow the arbitrator's outcome, it arguably gives an incentive for losing litigants to appeal to a trial de novo. Suppose a plaintiff is awarded \$50,000 at arbitration. Also, suppose the defendant, for whatever reason, strongly believes the jury will not award more than \$50,000. Recall that the defendant will have to pay the plaintiff's attorney fees and costs if the defendant fails to improve its position by 10 percent.¹⁸⁷ In this case, the defendant will be responsible for the plaintiff's attorney fees unless the jury reduces the award to \$45,000 or less. If the defendant, armed with the knowledge that juries rarely award the same amount as the arbitrator, strongly believes that the jury will award less, the defendant will have a greater incentive to appeal the decision. Although knowing that the jury rarely awards the same amount as the arbitrator acts as an incentive in this scenario, where the

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ NEV. ARB. R. 20(B)(2)(a)-(b).

defendant has a strong belief the jury will award less, in virtually all cases there is no logical reason for such a strong belief.

2. *One More Step toward "Practically Unavailable"*

There is no bright-line rule to determine when penalty provisions go too far and unconstitutionally restrict the right to a jury trial.¹⁸⁸ One can view penalty provisions as obstacles and the right to a jury trial as a path. Every penalty provision a litigant faces in appealing an adverse arbitration finding places an obstacle in the path to a trial de novo. The more penalty provisions there are, the more obstacles there are in the path.

However, one needs to take into account the strength of the penalty provisions, as well. In theory, one strong penalty provision could be more severe than many weak ones. At some point, if there are too many obstacles in the path, or if there are a few obstacles that are too severe, a court may invalidate a court-annexed arbitration program as onerously burdening the right to a jury trial to the degree that it is practically unavailable. Every obstacle added moves a court-annexed arbitration program closer to crossing the line of making the right to a jury trial "practically unavailable."¹⁸⁹

If a penalty provision does not have the desired consequence intended, it should be seriously questioned. It should be questioned if, for no other reason, to provide more room for penalty provisions that actually work. Penalty provisions that are not effective simply increase the risk a court might find a court-annexed arbitration program unconstitutional without adding any significant benefits. A penalty provision that does not work could be replaced with one that does. Or, a penalty provision that does not work could be removed and existing penalty provisions that do work could be strengthened.

C. *The Potential Drawbacks Outweigh the Benefits*

The potential drawbacks of continuing to admit the arbitrator's written findings at a trial de novo outweigh the potential advantages. Although litigants could theoretically use the admission of the findings to increase their bargaining position in settlement talks, such use is not likely. In reality, the admittance of the findings could actually incentivize litigants to request trials de novo, despite the fact that the arbitrators' findings are of little consequence to juries. Instead of having a nonworking penalty provision count as a strike against a successful court-annexed arbitration program's constitutionality, other deterrents could be implemented or existing deterrents bolstered.

When the Nevada legislature mandated that arbitrators' written findings be admitted at trials de novo, it likely believed that juries would often give deference to the findings.¹⁹⁰ They do not. Although it is possible that admitting the arbitrator's findings deters litigants from seeking a trial de novo for other reasons, it is very unlikely. Attorneys have likely caught on that juries are not simply copying the arbitrator's findings. Thus, courts might view admitting the

¹⁸⁸ MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 7, at 562.

¹⁸⁹ *Id.*

¹⁹⁰ *S.B. 195 Hearing*, *supra* note 47, at 778 (testimony of Judge Gene T. Porter stating that the purpose of bill was to "put some teeth" into the arbitration program).

arbitrator's findings as an obstacle in a constitutionality analysis, but, in reality, litigants are likely undeterred by it. Under such circumstances, the rationale for continuing to admit the arbitrator's findings must be seriously re-examined.

Accordingly, the Nevada legislature should repeal NRS § 38.359, and then either add another penalty provision or bolster its current penalty provisions, as part of an exchange whereby they take one obstacle off the path and add or bolster another. For example, the legislature could remove NRS § 38.259 and strengthen either the good-faith requirement or increase the percentage a litigant must improve by at trial (lest face paying the opposing party's attorney's fees and costs).

VIII. CONCLUSION

Nevada's court-annexed arbitration program appears successful regardless of the effect that arbitrators' written findings have on juries at trials de novo.¹⁹¹ Nevada's practice of admitting the arbitrator's findings at a trial de novo does not violate the right to a jury trial, but the policy rationale for doing so should be seriously questioned. A successful court-annexed arbitration program, like Nevada's program, is rare,¹⁹² but the program could be even better through more effective penalty provisions. Instead of expending efforts on a penalty provision that does not work, the Nevada legislature should repeal NRS § 38.259, which allows the arbitrator's written findings to be admitted at a trial de novo, and should either create a new penalty provision or strengthen existing penalty provisions.

¹⁹¹ Beecroft Interview, *supra* note 8; *see also* Schmitz, *supra* note 2, at 608 (noting that, unlike other state programs, Nevada's Court-Annexed Arbitration program is generally seen as efficient).

¹⁹² Beecroft Interview, *supra* note 8; *see also* Schmitz, *supra* note 2, at 606-08 (noting that the "trial *de novo* escape hatch" makes nearly all court-annexed arbitration programs inefficient, but excepting Nevada and North Carolina's programs).

