

HARDY'S ADR SERVICES
MCLE
Course Outline

Participants are required to review the following approved course outline together with the referenced code sections; and, should be prepared to meet and deal with any objections to the proposed testimony and/or exhibits to be offered into evidence.

I. **On-Line Claim Introduction-Arbitration Brief with Exhibits

- A. Procedural introduction-Parties/Pleadings
- B. Claims introduction-Statement of the Case
- C. Statement of Facts w Introduction of Exhibits
 - 1. Contracts; Repair Estimates; Bids; Invoices; Business Records; Medical Records; Police/Crime Reports; Citations; etc...
 - 2. Photographs; digital/video recordings; audio/electronic recordings; e-mails; notes and memoranda; etc...
 - 3. Live vs recorded testimony
 - 4. Reports; diagrams; maps; models; PowerPoint; websites; etc...

(**Note: Electronic submittals are required and must present the necessary foundational requirements.)
Preparation by counsel-no MCLE credit.

II. Conditions for Admitting Evidence

- A. Logical relevance-must be more **probative** than not; must have any tendency in reason to make the existence or non-existence of any material fact more or less probable. (*See: relevance-Black's Law Dictionary*)
Self-study 1.0 hrs MCLE credits
EC § 350
- B. Legal relevance-must be more probative than **prejudicial** All evidence is prejudicial and will be admitted only if the probative value outweighs the prejudicial effect. Will be excluded if the prejudice is too great or if the evidence otherwise confuses issues, misleads juries, or causes undue delay, waste of time, or needless presentation of cumulative evidence.
EC § 352
- C. Foundational Prerequisites
 - 1. Testimonial Evidence-lay witness

- a. Under oath. **EC § 403**
- b. Must be based on personal knowledge
- c. Must state facts. Opinions ok only if rationally based on own perceptions; will help with a fact finder; and, are not based on scientific, techno, or specialized expertise.
- d. The witness must be competent i.e. US Citizen; non-felon; can distinguish between a truth and a lie.

D. Authentication-the item is readily or uniquely identifiable; or can be identified by the witness through the chain of custody. **EC § 1400-1401**

In essence, authentication is sufficient if the offer supports a finding that the object or illustration in question is what the proponent claims it to be.

- 1. Real Evidence –must show that the object is indeed the same object that was involved in the circumstances.
- 2. Demonstrative evidence must show that the object fairly represents or illustrates what it is claimed to represent.
- 3. Authentication of Writings and Recordings **EC § 250**
EC § 1410-1421
 - a. Who is the author? Identified by the person who made the writing/recording through his/her signature.
 - b. By direct testimony; or,
 - c. By distinctive characteristics of the document or by the circumstances surrounding it i.e. logos; verify production through discovery; or, through similar by comparison to similar, other authenticated writings. **EC § 1520-1523**
- 4. Authentication of Phone Conversations/Recordings
 - a. By establishing the parties' phone conversation recordings or e-mail chain.
 - b. Outgoing calls by the number assigned or by the surrounding circumstances i.e. self identification; caller id; or business related to items discussed.
 - c. Incoming calls-where the sponsoring witness is the recipient, self-authentication by the caller is insufficient. Additional evidence is required to show that the caller says who he says he was.

5. Self-Authentication
 - a. By notary; by certified copies of public records; or, by official publications, newspapers, labels, signs, etc....
6. Authentication if not necessary if documents are admitted by request for admissions; or by stipulation.
7. The Best Evidence Rule concerns only recorded communications i.e. recordings, photographs, notes, memoranda, contracts, etc.... Does not apply to evidence generally, but only to “writings”.
EC § 1520, et seq.

- a. To prove the material terms of a writing, the original must be produced unless it is shown to be unavailable for some reason other than by the serious fault of the proponent

- B. Applies only to the terms within the context to be proven.
- C. Does not apply if the original is unavailable.
- D. Modern statutes allow certified photocopies, business, and public records.

III. Judicial Notice-the court may accept that a fact is true even though no evidence has been offered.

- A. Adjudicative facts-relate to particular event and must be generally known and capable of immediate and accurate verification.
EC § 452 (may) 453 (must)

- B. Legislative facts are generalized facts that do not concern the immediate parties.
EC § 451 (mandatory)

- C. Laws/Statutes

- D. Sources: Advice, opinions, treatises-virtually any source may be acceptable.

EC § 454

IV. Habit and Custom-Generally allowed to show that the person followed his habit on a given particular occasion.
EC § 1100, et seq.

- A.. Must be specific.

- B. Must be regular-as in a ratio of reaction to similar situations-by percentage.

C. Must be unreflective or semi-automatic i.e. routine general business practices.

1. Character and reputation generally inadmissible.

2. Habit and custom generally admissible.

EC § 1100

V. **Character Evidence** is generally not allowed unless “character” is in issue i.e. negligent entrustment; defamation; or, criminal entrapment; etc...**EC § 786**

A. Prior bad acts are inadmissible unless admitted for other purposes such as proof of motive, intent, preparations, plans, knowledge, identity, or absent mistake or accident. **EC § 787**

Prior felony convictions generally are admissible. **EC § 788**

B. But, whatever proof of character that is allowed may be shown by reputation or by testimony.

C. Evidence of good character is generally inadmissible unless bad character *** is tendered to evidence. **EC § 790**

VI. **Excluded by extrinsic policy**

A. Liability Insurance is never admissible.

B. Settlements and Plea Bargains; offers to pay medical expenses; mediations/settlement conferences **EC § 1115-1119; EC § 1152**

C. Subsequent remedial measures to prove negligence. **EC § 1151**

VII. **Witness Examination**

A. **Order of Examination**

1. direct; **EC § 760**

2. cross; **EC § 761**

3. redirect; and, **EC § 762**

4. re-cross. **EC § 763**

B. Subsequent examination must stay within the scope of the prior examination i.e. cross-examination only allowed on points covered in direct. **EC § 772, 773**

C. Leading questions not allowed on direct examination.

1. Leading questions are those that suggest, to the witness, the answer to the questioner desires.

EC § 764-767

2. Leading questions are allowed on direct examination if the witness is considered “hostile” i.e. biased against the calling side.
3. Leading questions are also allowed on cross-examination. A witness's credibility may always be attacked on cross.

D. Refreshing recollection.

E. Examination of adverse party-may be examined as if under cross-examination.

EC § 776

1. Foundation-the examiner must first show that the witness's memory is either hazy or needs refreshment. Then, pictures, documents, weapons, etc...may be shown to refresh their recollection (present recollection refreshed). But, the document/items are not introduced as evidence. **EC § 771**
2. Cross-examiner may examine the document/item and use any part during cross. Also, the examiner may introduce into evidence any parts of the document that relate to the witness's testimony.

VIII. Argumentative and Misleading Questions

1. An argumentative question is one that tries to get the witness to agree with examiners' interpretation.
2. A misleading question is one that assumes that its' true effect is not in evidence.

IX. Impeachment

1. May impeach-by showing prior inconsistent statements;
2. -By showing bias;
3. -By showing sensory or mental defect;
4. -By other evidence that contradicts the witness's testimony;
5. -By prior criminal convictions i.e. any felony or, by misdemeanor that involves a propensity toward dishonesty or false statements;
6. -By showing the witness's bad reputation for truthfulness; and,

EC § 769, 770

X. Hearsay-A statement or assertive conduct which was made or occurred out of court and is offered in court to prove the truth of the matter asserted.

EC § 1200, et seq.

- A. Out of court statement: Any written statement by someone other than the witness at trial.
- B. Prior statement by the witness: At trial where the statement was not made in the present trial before the trier of facts.
- C. Statements include: Assertive conduct; or, silence in the face of an accusation.
- D. Truth to the matter asserted: Typically not hearsay if offered to show “verbal acts”; the effect on the hearer or the reader; the state of mind; statements about reputation; or if used to impeach.
- E. Exceptions include:
 - 1. Admissions-may be implied by surrounding conduct or by silence;
EC § 1220-1223
 - 2. Spontaneous, excited, or contemporaneous utterances;
EC § 1240
 - 3. Statements about physical or mental condition;
EC § 1250-1253
 - 4. Past recollections recorded;
EC § 1237
 - 5. Business Records;
EC § 1270-1272
 - 6. Public records and reports-first hand knowledge;
EC § 1280

- * G. Exceptions that require unavailability
 - 1. Former testimony-must have been given at hearing or earlier action or in deposition in which the examining party was present; and, where a witness was given the opportunity to cross-examine.
EC § 1290-1294
 - 2. Dying declarations;
EC § 1242
 - 3. Declarations against interests-pecuniary or proprietary interest;
 - 4. Statements concerning personal or family history i.e. pedigree; and,
EC § 1230
 - 5. Forfeiture-if the witness is unavailable by wrong doing.

***(The underlying premise is whether the exception carries an indicia of reliability.)**

- XI. **Privileges-generally belong to persons whose interest or relationship is intended to be fostered by the privilege; and, under circumstances in which the type of communication is one that public policy seeks to promote.**
EC § 900, et seq.

1. Attorney-Client –belongs to client in a professional relationship where communication is intended to be **confidential**. Will not protect lawyer to conceal physical evidence; inapplicable where confidences relate to future fraud; **EC § 950-956**
2. Physician-Patient – requires **confidential** communication, made to physician for purposes of obtaining treatment; **EC § 990-996**
3. Priest-Penitent – actual communications made to clergy and/or to professional in his or her capacity as a spiritual advisor; **EC § 1030-1034**
4. Journalist-Source/Shield Laws – provides limited protection to journalists from disclosing the identity of sources; some protect against forced disclosure of notes and records; **EC § 1070**
5. 5th Amendment – privilege against self-incrimination-must be claimed by the individual who had the communication; must be testimonial in nature; must be sought to be compelled; and, may potentially incriminate the witness; **EC § 940**
4. Spousal Immunity – gives spouse complete protection from adverse testimony by the other spouse; to protect **confidential** communications made by one to the other; applies only if the parties are still married at the time of trial; does not apply to statements made before the marriage. **EC § 970-972**
5. Marital Privilege-applies to **confidential** communications made during marriage; applies even if the parties are no longer married at the time of trial. **EC § 980-987**

XII. Expert opinion

1. Scientific, technical, or other specialized knowledge - must assist the trier of fact to understand the evidence to determine a fact in issue; **EC § 720-721**
2. Witness must be qualified - as an expert by knowledge, skill, experience, training, or education; **EC § 800-801**
3. Testimony must be based upon sufficient facts or data;
4. Testimony must be the product of reliable principles and methods;
5. Witness must have applied these principles and methods reliably to the facts of the case.

XIII. On-line Exam – 80% passage required.

<u>MCLE credits</u>	<u>.05</u>
Total	1.5

XIV. Case Specific Issues-In Limine Motions