



Southwest Region National Academy of Arbitrators Northwest Salon Training Types of Evidence Rulings November 11, 2025
 7:00 pm central via Zoom
 By: Michael Z. Green
 Texas A&M School of Law
 ©Michael Z. Green. All rights reserved.

©Michael Z. Green. Do not copy without permission.

Initial Evidentiary Objection Issues: Dealing With Fighting Advocates – Let Them Advocate But Control Proceedings

<p>RULES</p> <ul style="list-style-type: none"> • Leading • Outside Scope • Asking Arbitrator to Direct Witness to a YES/NO Answer 	<p>NON-RULES</p> <ul style="list-style-type: none"> • I Object/Not Allowed • Evidence Rules Don't Apply • Asking Arbitrator to Allow Witness to Give Narrative Supplemental Responses
--	---

©Michael Z. Green. Do not copy without permission.

Most Evidentiary Rule Objection Issues

<p>HARPO</p> <ul style="list-style-type: none"> • <u>H</u>earsay • <u>A</u>uthentication • <u>R</u>elevance • <u>P</u>rivilege • <u>O</u>riginal Writing 	<p>OPRAH</p> <ul style="list-style-type: none"> • <u>O</u>riginal Writing • <u>P</u>rivilege • <u>R</u>elevance • <u>A</u>uthentication • <u>H</u>earsay
--	--

©Michael Z. Green. Do not copy without permission.

Labor Arbitration Evidence Principles

Arbitrators have wide discretion in resolving evidentiary issues.

Misco. Bad faith or affirmative misconduct.

AAA: offer evidence that is relevant and material.

UAA: admissibility. relevant, material and weight.

Legal rules of evidence are unnecessary.

But think about reasons for such rules as going to weight. Not just I'll take it for what it is worth.

Before deciding any evidentiary issue, allow the **advocates** the opportunity to develop their arguments before proceeding to rule.

©Michael Z. Green. Do not copy without permission.

Arbitrator Evidence Guidance

Actually, the admission of proffered evidence is much less likely to render the proceedings vulnerable to court challenge than exclusion of it. Indeed, under many statutes and guides an arbitrator's refusal to hear evidence may provide a ground for a vacating the award. UAA. FAA.

The *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* in Section 5.A.1. [states] that an arbitrator "must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."

©Michael Z. Green. Do not copy without permission.

Relevance/Prejudice? Rule 402/403

Any tendency to be probative meets 402 relevance. Let advocates respond. But general orientation should be to admit not exclude for reasons stated above. In each problem, even if the questioning and the evidence are not directly related to the case, look to see if it shows other actions that would be probative in showing something is more likely than not to have occurred that has some level of importance related to the case. Maybe, what you mean is covered by Rule 403. But not just prejudice but prejudice that substantially outweighs the probative value is now your objection.

©Michael Z. Green. Do not copy without permission.

Relevance and Prejudice Hypo

The grievant, a police officer, was fired for incompetence. Union attempted to admit into evidence a national award the grievant recently received from the Mothers Against Drunk Driving for his high numbers of drunk driver arrests. Counsel for the city objected that the document was irrelevant and prejudicial. Your ruling? Sustain objection. Overrule. Poll.

©Michael Z. Green. Do not copy without permission.

Relevance as Policy Hypos

- Rule 407, Subsequent Remedial Measures, states:
- When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
 - negligence;
 - culpable conduct;
 - a defect in a product or its design; or
 - a need for a warning or instruction.
- But a court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

©Michael Z. Green. Do not copy without permission.

Relevance as Policy Hypos

- A hospital discharges a psychologist for releasing patient information, allegedly in violation of the hospital's confidentiality policy.
- At an arbitration hearing to determine whether the psychologist's discharge was for "just cause," the Union argues that the confidentiality policy was unclear and that the hospital failed to provide adequate staff training on application of the policy.

©Michael Z. Green. Do not copy without permission.

Relevance as Policy Hypos

- The Union seeks to introduce evidence that, following discharge of the psychologist, the hospital provided training programs for its staff in the application of the confidentiality policy. Is the evidence relevant?
- Your ruling if Company objects under 407 this is a subsequent remedial measure?
- Sustain/Overrule. Poll

©Michael Z. Green. Do not copy without permission.

Relevance as Policy Hypos

- Rule 408 of the Federal Rules of Evidence makes offers of compromise or the willingness to accept an offer of compromise inadmissible to prove liability for or invalidity of the claim or its amount.
- Conduct or statements made in settlement negotiations are also inadmissible under the Rule.
- Assume that at an earlier step in the grievance procedure an employer offered to reinstate the employee without back pay, but the union refused to accept the offer.
- At arbitration, the Union seeks to introduce evidence of the offer to show the employee continues to be an acceptable worker. Ruling? Poll to Admit or Deny.

©Michael Z. Green. Do not copy without permission.

Relevance as Policy Hypos

- At Step 3 of parties' grievance procedure, a meeting was held between the grievant, the union business agent and the employer's hr manager to discuss the grievant's discharge and seek to settle grievance.
- In the course of the meeting, the grievant explained what he had done.
- At the arbitration hearing, employer sought to question the manager of human resources about what the grievant had said at the Step 3 meeting.
- Union objects it was offer of settlement? Ruling. Poll. Admit or Deny.

©Michael Z. Green. Do not copy without permission.

Relevance as Policy Hypos

- In arbitration of employee’s discharge, employer contends arbitrator should consider previous materials in which administrative law judge concluded employee had been discharged for misconduct and was ineligible for unemployment compensation including:
 - (a) the transcript from the unemployment compensation hearing should be admitted “for what it’s worth,” and
 - (b) finding of employee’s misconduct precludes the arbitrator from concluding the employee’s discharge lacked just cause. Your ruling to union objection? Poll

©Michael Z. Green. Do not copy without permission.

Article VIII. Hearsay as Defined Under Rule 801.

Simply put: Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.

Key elements: 1. Out of court. 2. A Statement. 3. Offered to Prove. 4 Truth of the Matter Asserted (TOMA).

©Michael Z. Green. Do not copy without permission.

Hearsay: Labor Arbitrators Should Admit it Anyway, Right?

There are good reasons for accepting hearsay evidence in a labor arbitration proceeding. Arbitration is generally **informal** and the participants are frequently nonlawyers, who can **not be expected** to handle cases on the basis of legal technicalities, including the Rules of Evidence. Facts are determined, not by a jury, but by an arbitrator, who is expected to have the expertise to evaluate evidence and to accord the appropriate weight to hearsay.


©Michael Z. Green. Do not copy without permission.

Hearsay: Labor Arbitrators Should Admit it Anyway, Right?

Frequently, hearsay is the only evidence available in the workplace, and the automatic exclusion of it could result in an incomplete record and a failure to accomplish a just result. Problems and Challenges for not admitting more likely to exist than for admitting. So many exceptions maybe even swallow the rule. Still arbitrators must and should consider underlying trustworthiness and reliability issues when clearly hearsay in deciding the weight if deciding to admit the hearsay.

©Michael Z. Green. Do not copy without permission.

Hearsay
Exceptions



©Michael Z. Green. Do not copy without permission.

Hearsay Hypo:

- Grievant fired for patient care abuse at nursing home.
- Employer wants to introduce statements from the patient saying Grievant got mad at him when he struggled to get back in bed and just threw him in the bed and he fell out and hurt his back.
- The grievant says the patient was quite large and while putting him back in the bed, he rolled over and fell off the other side and hurt his back.
- The patient is not there to testify. The Union objects that the statements offered by the patient are hearsay. How do you rule? Exclude as Hearsay/Overrule. Poll

©Michael Z. Green. Do not copy without permission.

Hearsay: Outside Complaints

- Grievant was discharged for allegedly threatening to poison the office buffet.
- Discharge was based on the oral and written reports from a subsequently discharged co-worker who was not called to testify.
- Union objects to statements as hearsay. Admit/Poll
- In actual case, hearsay statements of the co-worker were themselves inconsistent as well as inconsistent with recollections of others present at the same time yet did not hear the alleged threat.
- Can rely on hearsay in arbitration but it must still be trustworthy and it was not in this case.

©Michael Z. Green. Do not copy without permission.

Hearsay: Third Party


- Union argues that employer subcontracted maintenance work in violation of CBA.
- Company witness offers to testify that outside business it used to supplement maintenance services had threatened to not serve Company anymore unless it used more maintenance workers to serve its facility at a major outage scheduled at the end of the month.
- The Union objects that this testimony is hearsay.
- Sustain or Overrule/Poll.

©Michael Z. Green. Do not copy without permission.

Privileges

©Michael Z. Green. Do not copy without permission.

Privileges put information beyond the subpoena power of a court ...But



©Michael Z. Green. Do not copy without permission.

Rule 612. Writing Used to Refresh a Witness' s Memory

(a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that justice requires the party to have those options.

b) **Adverse Party' s Options; Deleting Unrelated Matter.** Unless prohibited...in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness' s testimony.

©Michael Z. Green. Do not copy without permission.

Refresh a Witness' s Memory Hypo

Union witness is testifying but keeps looking at his phone while testifying.

Company objects and requests that it receive a copy of what the witness is looking at on his phone before questioning continues.

Witness says it is just notes he took after prepping for the hearing with the Union's attorney that are helping to jog his memory.

Union responds that the notes are attorney client privileged and involve protected work product.

Your ruling? Response/Poll.

©Michael Z. Green. Do not copy without permission.

Privilege Hypos: 5th Amendment


- Employer suspended employee/grievant indicted for shooting his wife.
- The local newspaper reported the attack, the grievant's subsequent arrest, and other information.
- The grievant declined to testify at the arbitration hearing because of the pending criminal charges. Asserts 5th Amendment Privilege.
- He chose to remain silent at arbitration about Dallas Morning News article and say nothing about pending indictments.

©Michael Z. Green. Do not copy without permission.

Privilege Hypos: 5th Amendment

- Grievant's silence leaves the arbitrator with only the media account and Dallas County criminal records to consider.
- Company asks Arbitrator to take a negative inference from the Grievant's silence and the Union asserts that this would diminish the Grievant's 5th Amendment privilege.
- Your ruling? Poll

©Michael Z. Green. Do not copy without permission.



Foundational Evidence, Authentication


©Michael Z. Green. Do not copy without permission.

Authentication Hypo

- During a hearing the Union is offering a document into admission that shows overtime charges.
- The document is an official Company document.
- On one side of the document are markings and notes adding information about employee seniority status that was not on the generated document.
- The Company objects and says the document is not authentic. They don't know who made those notes and even if they did, there is no one here to validate the information. How do you rule? Admit/Exclude. Poll.

©Michael Z. Green. Do not copy without permission.

Best Evidence Doctrine: Really the Original Writing Rule



©Michael Z. Green. Do not copy without permission.

Original Writing Question

Security company providing security at mall. A customer was assaulted at mall and security guard grievant terminated for allegedly failing to intervene to protect customer. At arbitration hearing, Union witness testifies that “our Company contract with the mall prohibits us from using any physical force in connection with our duties”


Admit or not admit? Poll.

©Michael Z. Green. Do not copy without permission.

Original Writing Question

In an arbitration, a witness testifies that he noticed a car parked near the scene (which turned out to be Grievant’s car) because it had three parking tickets on the windshield. Union objects that this testimony is improper because the Company did not produce the tickets.

Admit or not admit? Poll.



©Michael Z. Green. Do not copy without permission.

Original Writing Hypo

- A grievant offers to show that when he turned in his timesheets, he wrote a note on the timesheets stating that he clocked in at 8.
- But he did not start working until 9 because he felt sick and was in the bathroom for an hour.
- He is being terminated for falsely reporting at 8 when he did not start working until 9.
- The supervisor is testifying about the fact that the shift starts at 8 and he could not find the grievant until 9 despite his time clock check-in saying he worked the full shift starting at 8.

©Michael Z. Green. Do not copy without permission.

Original Writing Hypo

- Supervisor terminated the grievant for falsely clocking in at 8 but not working till 9.
- Union advocate objects and says strike testimony because the best evidence of whether he falsified anything is the actual timesheet.
- How do you rule? Strike/Admit. Poll.
- Isn't the best evidence of falsifying the time his timesheets, the actual timesheets?
- Some excuse? Destroyed at no fault of employer.
- Duplicate intended to represent original?
- Not controlling. Clocked in and clocked out is violation not what the sheets or writing says.

©Michael Z. Green. Do not copy without permission.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part— or any other writing or recorded statement— that in fairness ought to be considered at the same time.



©Michael Z. Green. Do not copy without permission.

Completeness Writing Hypo

- Grievant terminated for alleged hostile environment sexual harassment.
- Company offers a note that the Grievant wrote stating: "I am so sorry that you heard me talking to a female employee and heard me say a term that was sexually offensive to you and vulgar."
- Union objects that the Company only offered part of the note and under doctrine of completeness should offer entire note which included: "The conversation was in the break room with a friend who asked me to discuss what happened on the Seinfeld show last night." Admit or Exclude? Poll.

©Michael Z. Green. Do not copy without permission.