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JUSTICE®

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Justice On Trial

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At the core of every court case is a battle for *evidence.*

Whether it's a criminal case threatening an accused with prison and possibly a death sentence or a civil case threatening property loss or injury to one's family or self, the outcome of the case will always turn on the *evidence.*

Evidence is the stuff legal decisions are made of.

Evidence determines what law will apply to decide the outcome.

Evidence may be documents, sworn testimony, video or audio recordings, phone or bank records, or even things like a broken ladder or the wreckage of an automobile.

The winner will have evidence in his or her favor.

The loser will not.

And the battle runs hot and heavy to see who has the best evidence and, too often, who can succeed in *hiding the evidence!*

This issue of Justice® is dedicated to unveiling the hidden practices of unscrupulous lawyers who *hide evidence!*

We also explore the reasons why lawyers hide evidence, how they hide it, and what can be done to put a stop to it.

First let's take a look at what evidence is.

What is Evidence?

To begin, everything that "seems" to be evidence is not evidence.

We often hear people proudly proclaim, "I have all the evidence I need to win this case!" when, in fact, much if not all of what they have cannot qualify under the evidence rules to be *admitted.*

The first rule is that *only admissible evidence is evidence!*

A box full of old phone records will not be admitted over a timely objection if it cannot be corroborated by live testimony.

A photograph of the crash scene in a auto accident case will not be admitted over a timely objection if it cannot be authenticated by some independent means.

And, in most cases, even a sworn affidavit bearing the blue ink signature of the person giving the affidavit *is not admissible as evidence under the rules.*

Just because something "seems" to the amateur lawyer's eyes as evidence doesn't make an anthill of difference in court. If it isn't admitted to the court record as *admissible evidence* it is just stuff.

Stuff is not evidence.

Unless it can be gotten into the court record as *admissible evidence.*

What is and is not admissible depends on the Rules of Evidence that control the court where one's case is being heard. It never depends on what one thinks or hopes.

To be admitted as *admissible evidence* a document or thing or live testimony must be:

- Relevant
- Reliable
- Not Privileged
- Not Likely to Cause Prejudice to Either Side

Evidence is relevant when it will tend to prove or disprove some fact or facts material to the outcome of the case. For example, if the driver of a schoolbus involved in an accident is an accomplished accordion player, that fact cannot tend to prove or disprove anything material to the cause of the accident and therefore is not relevant and thus not admissible.

Evidence is reliable when its source is unquestionably trustworthy. For example, if a witness called to the stand has been convicted of perjury or has been adjudicated mentally incompetent, testimony of that witness should not be admitted, since there is no assurance that the testimony will be true.

Evidence should be excluded if privileged. Examples may include (in most jurisdictions) testimony of one spouse against another about communications between them intended to be privileged, prayers of a penitent given to a priest in confession, statements made by a patient in consultation with a psychiatrist. There are others listed in the rules of your court. These three are common everywhere. If the testimony (or letter, memo, email, etc.) is privileged, evidence rules should exclude it from being admitted.

Finally, evidence that is likely to prejudice one side or the other may be excluded from the record when its admission would act in an unfair way to cause the trier of fact to be unduly persuaded contrary to other evidence. An extreme example is a photograph or video recording of a horribly mangled child at an accident scene. It is not likely to convince the court who caused the accident, but it will certainly cause the court to have intense feelings that likely will affect the court's willingness to be impartial.

Burden of Proof

The "burden of proof" decides how much evidence one needs to win his or her case in court.

In criminal cases, the burden in most jurisdictions is "beyond and to the exclusion of any reasonable doubt". The astute criminal defense lawyer will go on the *offensive* to find evidence that provides some alternative set of facts that create "reasonable doubt". If evidence can be obtained on the record tending to prove an alternative that does not paint the accused as guilty, the court *should* acquit on the grounds that reasonable doubt exists, even if the evidence strongly supports conviction. The burden is not a "balancing act". The rule is clear that "any reasonable doubt" requires acquittal.

In a civil case, however, opposing parties sit on a see-saw. Each is scrambling to obtain the "greater weight of admissible evidence". This may mean *more* evidence or *more credible* evidence or *more reasonable theories based on the evidence.* The winner needs only to present sufficient admissible evidence to convince the court that his or her story is "more likely" to be what *really happened.* This is how civil cases are won … or lost. The scramble for more evidence is usually a bitter battle or, as one lawyer observes, an "axe fight"!

Getting Evidence

In criminal cases, the prosecutor is supposed to reveal all evidence to the accused if the prosecutor intends to rely on it as evidence to convict. Aspirational "Criminal Justice Standards" of the American Bar Association state, "Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information [that is] known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order." Failure to do so [if evidence proving failure can be found] should provide a solid basis for reversing a conviction on appeal. Sadly, too often a prosecutor's zeal for obtaining convictions to bolster reputation and the likelihood of professional advancement result in evidence being hidden or "lost". Fortunately for most persons accused of a crime, prosecutors are constrained by criminal defense lawyers to obey the rules and provide all evidence for or against the accused.

In civil cases the process of getting evidence is not so easy, since lawyers in civil cases frequently have a financial motive to hide evidence (a motive that rarely exists with prosecutors). Thus in civil

cases evidence becomes a "jump ball" with both sides trying to get the "greater weight" admitted to the record.

The tools for obtaining evidence in civil cases are provided by the Rules of Civil Procedure and the Evidence Rules. They include:

1. Requests for Admissions
2. Requests for Production
3. Interrogatories (written questions answered under oath)
4. Depositions (spoken questions and answers under oath)
5. Subpoenas and Special Court Orders

The problem is that "financial motive" too many civil lawyers allow to persuade them against obeying the rules and responding in good faith to the foregoing methods by which opponents seek to obtain evidence. In short, too many civil lawyers "hide the ball" and even lie to judges so they can win dishonestly.

The consequence is more money for the lawyers on both sides!

Some Examples

#1 – The Inanimate Agreement

Some years ago I served opposing counsel in a multi-million dollar case with a simple request for admissions. One of them requested my opponent to admit that a certain agreement "contemplated" that his client would be paid several million dollars by one of my client's competitors if he could get my client's customer records into the hands of that competitor.

The term "contemplated" is commonly applied to describe what a contract or agreement is written to achieve. For example, if one enters a contract to have his house painted blue, the contract may say the painter will use blue paint. In that case one may correctly say the contract "contemplates" the house be painted blue. This term is used again and again in legal jargon. It is not in the slightest a word that could be misunderstood by any lawyer graduating from an accredited law school.

Further, if my opponent "admitted" this *as the rules require*, this case would have ended then and there! That admission would have been all I needed to prove the conspiracy that cost my client money and loss of a lucrative business in South Florida.

Instead the lawyer replied saying, "Objection. The agreement is an inanimate object and cannot contemplate."

We won, but only after more delays and unjust costs.

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#2 – In another case I served opposing counsel with a request for production seeking "all documents or things in any way evidencing the presence of objectionable substances in plaintiff's premises."

Here the term "evidence" is in verb form, again extremely common in legal parlance. For example, dark clouds *evidence* an approaching storm. Documents and things *evidencing* presence of objectionable substances in plaintiff's premises would include damaged clothing, contaminated food, and medical bills reflecting a physicians's opinion that the plaintiff suffered some illness as a direct result of such objectionable substances in plaintiff's premises.

Nothing was produced. Instead, my opponent replied, "Objection. The request is vague. Plaintiff does not understand 'evidencing'."

More unjust costly delays to pad lawyers' pockets.

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#3 – In another case where an elderly mother and father sued their child (my client), the mother refused to respond to *any* discovery requests, so I scheduled her for a deposition where she would be required to answer my questions under oath at a court reporter's office. Her lawyer filed a motion for protective order claiming her advanced age and health forbid her being exposed to the stress.

So, I arranged with her physician for the deposition to be taken at her doctor's office where she could be monitored. Her lawyer filed another motion for protective order. This time I pressed the matter at a hearing, and the judge granted the protective order over my objections. So, I appealed.

Five days later the appellate court granted my appeal and ordered the trial judge to reverse his order and allow me to take the lady's deposition or to require the lady to withdraw her complaint against my client. All costing more time and more of my client's money.

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Why?

Lawyers have been the butt of jokes critical of the profession for a very long time. In recent years, however, jokes are more deserved. Increasingly they are not funny!

Lawyers too often cheat to win for their clients.

Some lawyers even cheat their own clients so they can drag a case out over months or years when the case could have been settled within a few weeks *if both lawyers followed the rules and allowed evidence into the record without bad faith objections!*

In generations past, law schools inculcated a sense of responsibility in fledgling lawyers seeking a degree. At one time graduates were required to apprentice to experienced lawyers for a few years, and in that period were taught the value of honesty, putting justice as a higher goal than the "winning at any cost" we see too often today.

Today money opposes justice.

Too many lawyers abuse the system so they can make more money by hiding evidence, requiring their opponent to fight tooth-and-nail to get what should have been produced upon first request.

Sadly, the lawyer seeking evidence is also motivated by money, so he or she joins the fun, filing motions, setting hearings, and in every way possible causing the time-clock to keep ticking dollars into both lawyers' pockets.

If judges put a stop to evidence discovery abuses, most civil cases would end quickly, instead of taking years to resolve. Undoubtedly you, dear reader, have heard horror stories from acquaintances who have been raped by this all-too-common practice that has of late become a war on justice and a blight on society.

What Can Be Done?

Since the "Bar" is a closed society operating behind closed doors, it is unlikely lawyers will police themselves to end the practices listed in this issue of Justice®. And, since nearly every judge in the nation is required to be a member of the "Bar", it is unlikely our judges will take an initiative to mount a campaign to police lawyers who abuse the evidence discovery rules.

However, you and others do have a voice if you will make it heard.

Few people (other than those required by circumstance) ever visit a courtroom to witness the smoke-and-mirrors high-jinks that are commonplace within the hallowed walls paid for by our taxes. Few stop to consider that a fair administration of justice in our courts is essential to preserve of our way of life. One cannot enjoy Liberty if the pathway to Justice is blocked by corrupt legal practices!

American Justice Foundation® seeks to educate the American Public to a greater understanding of what *really* takes place in court. What you see on TV or at movies depicting courtroom battles are, for the most part, nonsense and rarely reveal the work that goes on behind the scenes to obtain evidence *prior* to trial.

When evidence is hidden, justice is perverted.

When the People are kept in darkness, scoundrel lawyers prosper at the expense of us all by abusing the Rules of Court to delay just decisions so they can make more money from their illegal "game".

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