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Evidence in Civil Cases

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It should come as no surprise that to win *any* case, civil or criminal, one must produce evidence and get it admitted to the court record.

Trying to win without evidence is hopeless.

But what *is* evidence?

What is *not* evidence (from the standpoint of our court system).

And how does one *get* evidence admitted to the court record.

This issue of Justice® addresses those three questions.

What *is* Evidence?

Consider the word "evidence" and see it contains part of the answer.

Evidence is, or should be in a court of law, "evident", i.e., plainly and easily seen, not hidden, not in doubt.

The word comes from a Latin derivative "*videns*", to see.

We also have the word "view" that comes from the same root word, so evidence should be "visible" or, to put it another way, evidence should be something any reasonable person can see clearly with no room for doubt.

In practice, sadly, many cases are decided unjustly by allowing one side or the other to present documents, things, or testimony that falls short of being "evident", stuff that is unclear, iffy, subject to different interpretations. So, for those who need to *win* in court, the task of getting "the best evidence" is imperative. Evidence that wins in court is evidence about which there should be *no doubt*.

Evidence that *wins* must be "admissible". That means documents, things, and testimony must meet requirements of *evidence rules* that determine "admissibility". To be admissible (in either criminal or civil cases) a document, thing, or testimony must be:

- Relevant, i.e., it must tend to prove or disprove some fact that will likely affect the outcome of the case as a matter of law, such as a signed contract, blood-stained rug, DNA test results, ballistics report, etc.
- Credible, i.e., it must be believable. Documents and things must be tangible, presented in court rather than referred to by descriptions or hearsay. Witnesses must be reliable, not felons convicted of passing bad checks or other crimes involving falsifying facts.
- Not Privileged, i.e., it cannot contain anything protected by lawyer-client, patient-doctor, priest-penitent, spouse-spouse, or other relationships where communications are inviolable.
- Not Prejudicial, i.e., it cannot unduly sway the court, such as a gruesome photograph of the mangled remains of an infant victim or anything that would shock the court and unjustly amplify its probative value.

In civil cases, winners are those who present the "best" evidence.

The "greater weight of admissible evidence" decides the outcome of civil cases. (In criminal cases, to be addressed in future issues of Justice®, the admissible evidence must exclude every alternative interpretation of the documents, things, and testimony, i.e., it must be "beyond and to the exclusion of any reasonable doubt".)

What is *not* evidence?

To begin, if it isn't *admissible* it isn't "evidence". Amateurs make the mistake of thinking a document or thing is evidence because they see it as such, however unless a document or things is allowed to become part of the court's record (i.e., is admitted), it is just a document or thing that cannot (read *should* not) be allowed to influence the court's decisions.

Only *admissible evidence* is evidence.

Nothing else is.

Statements made in an old letter from Aunt Suzy (if Aunt Suzy is not present in court to testify under oath as to what she allegedly said in the letter and subject to cross-examination by the party against whom the letter is presented) is not admissible. The objection is "hearsay". The letter itself may be evidence of "when it was sent", based on a postmark on the envelope, but statements in the letter itself comprise "an out-of-court statement offered to prove the truth of what it says", i.e., it is inadmissible hearsay. Moreover, if the envelope has been opened, then the letter itself is possibly not the letter received in the envelope presented and, therefore, is not admissible because not "credible", i.e., it is unclear if the letter was included in the envelope bearing the postmark. There are several exceptions to the hearsay rule, but Aunt Suzy's letter is not one of them.

A Xerox® copy of a contract should not be admitted (if objection is made), because it is not the "best evidence". It may be "tangible", but it is not the *original* showing *original* signatures of the parties to the contract. Today's magical world of technology and computers makes it easy for a child to alter a document to make it say almost anything *and appear genuine.* Copies are copies and should not be admitted as evidence if the opposing party objects.

Testimony of a witness describing the lovely colors of a sunset at the time of some event in question is not admissible unless the colors of the sunset are a factor that directly impacts the issues on which the court must decide the case. It's not "relevant".

Similarly, a party's past bad behavior in a bar fight is not admissible in a case challenging an airline's failure to meet deadlines. Failure to meet flight schedules has nothing to do with a passenger's past behavior. The fight should be excluded if objections are made.

How Does One Get Evidence Admitted

The best way to get evidence in a civil case is to use the court rules to require the other side to provide it. This can be done in several ways, the first three being preferred and in most cases should be used before the remaining two.

Keep in mind there are only five tools to get evidence in civil cases.

Only five.

Nothing too hard for any reasonable person to master.

- Requests for Admissions
- Requests for Production
- Interrogatories
- Depositions
- Subpoenas and Court Orders

Each can be *compelled* by the court if a party against whom they are directed fails or refuses to respond according to the rules. In a future issue of Justice® we will explain how to force evidence from recalcitrant parties in civil cases, even to the extreme of obtaining an order from the court directing the sheriff to take the party into custody, locking him or her behind bars, and keeping the iron doors securely shut until good faith responses are obtained.

The first three in the list can be done *in writing* and cost no more than postage to mail. No hearing or other court appearance is required unless the party against whom they are served fails or refuses to respond according to the rules, whereupon the party serving them must file a Motion to Compel, set it for hearing, and appear before the court to explain why the information sought is relevant or, at least, "reasonably calculated to lead to admissible evidence".

Remember that with all these discovery tools, information sought need not be admissible so long as it is "reasonably calculated to lead to the discovery of admissible evidence".

The rules may set a limit on the number of those first three a party may use to get evidence from his or her opponent, so they must be used sparingly and strategically. They are like hand-grenades. If you only have a limited number, use them sparingly and strategically!

Requests for Admissions

Requests for admissions are simply statements of law or fact that the party on the receiving end must admit or deny. They can be as simple as, "Admit you were in Chicago on March 19 of 2019." If that party's presence in Chicago is likely to lead to admissible evidence, the request must be admitted.

A copy of a contested document can be attached to a request to admit the copy accurately states the content of an invoice or the identities of parties to a contract. The party served with this must admit the accuracy of the copy in good faith or the request may be deemed admitted for all future purposes upon further motion and entry of a court order granting the motion.

Requests for admission are powerful. They are "leading questions" submitted in writing, the *most* powerful tool for getting evidence.

Requests for Production

Requests for production give the requesting party power to force his or her opponent to produce documents or things that may lead to discovery of admissible evidence … or go to jail!

Suppose a bank or lender attempts to foreclose on a mortgage, claiming a promissory note is in default. The foreclosing party should be required to prove it has the original mortgage (or written evidence of its right to sue on the mortgage) and records showing the promissory note is in default, triggering its right to foreclose. Without such proof, foreclosure should be denied.

Documents, not witness testimony alone, should be required to prove the foreclosing party has a legal right to proceed. This is just common sense. Some courts today have backed away from this common sense view, however the burden of proof is always on the party asserting its claim. That burden can only be met by admissible evidence. Requests for production are powerful tools in such cases.

If a ladder fails, causing plaintiff's injury, the injured party should be allowed to demand that faulty ladder be produced for inspection. A written request for production achieves this goal. If a manufacturer destroys the ladder, it may be liable for damages on the assumption the ladder was destroyed to conceal the defects. Such "spoliation of evidence" may alone suffice to win such a case, even without the defective ladder as proof. Equity demands good faith.

The rules of evidence favor the "good guy" every time (if they are enforced by court orders when good faith responses are not given.

Interrogatories

That fancy name is simply a written list of questions that must be answered in writing under oath by the person to whom they are directed. The responding party's lawyer cannot answer. The party to whom they are directed must be duly sworn by a notary or other judicial officer when affixing his or her signature to the responses.

Interrogatories can be used for many purposes. They are frequently used to get the names of persons who are not parties to the action but may have information that will lead to admissible evidence. In many cases they are used to require an opposing party to identify witnesses it intends to call at trial.

There is no limit to what questions may be asked and answered under oath, so long as the questions and the information sought is reasonably calculated to lead to discovery of admissible evidence.

Depositions

Depositions are simply interrogations of a witness under oath. They are typically done at a court reporter's office but may be conducted by phone or even in the witness' office. The party deposing may ask any question reasonably calculated, etc. The opposing party may also ask questions of the witness. The questions and answers are taken down in writing by the reporter, and the transcription may be used at trial to get admissible evidence into the record.

Depositions are best taken just before trial (if trial is necessary), and only after good faith responses to admissions, production, and interrogatories are in hand so the information obtained in writing can be used while deposing the witness … instead of going on what lawyers call a "fishing expedition" blind to what the case is about. Except in rare cases where a witness is dying or will be otherwise unavailable for trial, taking depositions *before* getting responses to the first three *written* discovery tools is unwise.

Subpoenas and Court Orders

Subpoenas and other court orders are sometimes necessary to get information from non-parties. These are extremely powerful and dare not be ignored upon threat of jail time!

Hopefully we've provided some powerful information about what is and what is not evidence and how to get it in civil cases.

Go to www.AmericanJusticeFoundation.com to learn more, and tell everyone you meet that we are fighting for *you* and *your* children.