

Evidence 101: Everything You Have Forgotten Since Law School

WHERE DO I STAND AND WHAT DO I DO?

I. DISCOVERY: suggested mindset: expect to litigate every case

If litigated, what documents do you need?

First, tell your client to bring in the basic documents

- Tax returns—3 years
- House or county appraisal
- Mortgage statement with current balance
- Stock accounts
- Retirement accounts
- 6 months of bank statements
- Credit card statements
- Credit report (some clients have no idea what they owe)
- Utility bills
- Pay stub, YTD
- Day care bill
- Evidence of debt

Second, make informal request for discovery, by asking the other side for documents

If informal requests don't work, Requests for Admissions (K.S.A. 60-236) and Requests for Production of Documents (K.S.A. 60-234) are CHEAP discovery. Get them on file.

The discovery documents will help you and your client fill out the Domestic Relations Affidavit required by Supreme Court Rule 164. See 2010 Kansas Child Support Guidelines, Appx. III for the DRA form.

II. Temporary Orders (K.S.A. 60-1607)

Try for more truth in motions for temporary orders. At a hearing, some motions and affidavits look pretty close to perjury. Don't think a person has a free pass to exaggerate or that you have no duty and can rely upon a verified statement. We all make lists of people who lie or stretch the truth beyond justification.

Certainly, these temporary orders are even more troubling when they touch on custody; saying the kid is always with you, when the kid isn't. These are volatile issues, and truth is important. Remember, your client is under oath and you are subject to sanctions under K.S.A. 60-211. Also, in an ex parte request for temporary orders, the attorney has a higher burden to make sure that all relevant facts are before the court. Supreme Court Rule 226.

As a judge, I sign most things that come to me, because I figure the other party will come in for a hearing. However, if the other side enters an appearance, or files an action simultaneously in the race to the courthouse, then no ex parte temporary orders. There are some exceptions to this rule.

Tell your clients custody and visitation is a very low bar. Dad is probably going to have visitation and joint custody, unless current drug abuse, incarcerated or mentally ill. See In re Marriage of Kimbrell, 34 Kan. App. 2d 413 (2005) (upholding a parent's statutory right to parenting time under K.S.A. 60-1616(a) when spending time with the parent would not seriously endanger the child's physical, mental, moral, or emotional health).

III. PRE-TRIAL DISCLOSURE STATEMENT

The point of pre-trial is to exchange relevant documents, witnesses, and to narrow issues.

If not on the pre-trial order, then not admissible.

It is helpful to propose a division of property that your client wants and that you can defend as just and equitable.

IV. TRIAL

What evidence do you need to prove?

What witnesses do you need?

How are you going to get your documents in? If no stipulation, then need to lay foundation.

A document may be hearsay as to your client, so whom do you need to subpoena or get to court? K.S.A. 60-460 defines hearsay and lists exceptions for admitting it (e.g. business entries, records of documents affecting an interest in property, statements concerning family history, etc.).

Admission of documents:

- Pre-mark you documents – if you do this, make a chart naming the exhibits and the number for the court reporter
- Exchange documents at the pretrial conference
- At trial: mark for identification, show it to opposing counsel then to witness
- Ask the witness to identify it, lay a foundation, then ask for admission

Objections: Long narratives are unprofessional and may not properly preserve the record for appeal. In order to preserve the record for appeal, an objection must be timely, and the grounds for the objection must be clear. K.S.A. 60-404 (aka Contemporaneous Objection Rule); see, e.g., State v. McCaslin, 291 Kan. 697 (2011) (finding that the objection of “stating facts not in evidence” was an insufficient objection to preserve a hearsay or confrontation clause claim for appeal).

Proper objections help to avoid the use of tainted evidence at trial and can limit seemingly unending litigation. State v. King, 288 Kan. 333, 342 (2009). Common objections include:

Asked and answered – accuse opponent of asking the same question repeatedly to coerce a desired response

Assumes facts not in evidence – when questioner imparts important information in the question, should be supported by proof already submitted.

Argumentative – questioner tries to contradict witness or wants more to confront witness with disbelief than to get a response.

Compound – question apparently seeks more than one answer or suggests alternative responses while being framed in a way that invites yes/no response (Did you do A or B after you saw the defendant? Simple yes or no implies you did one or the other, but answer is ambiguous)

Leading the witness – telling witness what to say (counsel testifying)

Misleading – question misstates evidence

Speculation or conjecture – witness should only testify to what he knows (at least reasonably believes), not to what he would guess/suppose/expect

Ambiguous, uncertain, and unintelligible – expose flaws in questions that can’t be understood or whose meaning depends on inflection in questioners voice

Nonresponsive to the question – witness answers more than was asked for in the question. This objection is made by the person asking the question.

General objection – irrelevant, incompetent, and immaterial. If overruled, this objection is not preserved for review. If sustained, it may be preserved for review if there are any grounds on which it may be supported. This is risky, though, so be clear as to grounds.

In response to the objection, the offering party should provide a reason to overrule the objection.

Exhibits: It is a good idea to have a trial notebook of exhibits. You look prepared, and it is easier to find a tabbed exhibit 32, then to paw through a stack of papers looking for Ex. 32.

REDACT personal information

Social Security Numbers (all but last four digits)

Date of birth

Financial account numbers (all but last four digits)

In a case with children: need child support worksheet. See 2010 Kansas Child Support Guidelines, Appx. I for the CS worksheet form.

Documents to support income line: current tax return

current W-2

YTD pay stub (REDACT SS#).

letter from HR verifying health insurance

Real Estate:

- Appraisals:
 - Don't wait until the last moment and move for continuance to get one
 - To admit at trial, need stipulation as to admissibility or
 - Need to subpoena appraiser, cannot be admitted over hearsay objection
 - County appraisal—will take judicial notice

Don't be afraid to fire a client. Have a serious meeting early about what the goals of this representation are. If you have a client who is refusing to hand over discovery, which anyone would want and which is court-ordered, then fire him or her. If you have a client who is hiding assets or dissipating assets in violation of the routine restraining orders, then fire him or her. If you have a client who insists on one frivolous motion after another, then fire him or her.

Linda Elrod's Kansas Family Law Handbook is a great resource for attorneys practicing in this area. It is available on Westlaw, Lexis, and through the KBA.