

ADMISSION OF KEY EVIDENCE: THE ROAD TO A SUCCESSFUL RESULT

BY

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The author defines key evidence as evidence in domestic relations case which will make an impact or influence the ultimate decision of the trial judge or arbitrator.

How should the key evidence presented? Before the day of trial, request for admission can be utilized. MCR 2.312 request for admission provides:

“(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.301(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including genuineness of documents described in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested must be stated separately.”

Before the actual trial begins, stipulations as to the admissibility of key evidence such as exhibits should be utilized. The List of Exhibits and actual exhibits should be placed in a three ringed notebook with separators indicating the actual number of each exhibit to be offered into evidence. The List of Exhibits to be offered should contain the key evidence to be presented.

In trial some examples of key evidence to be presented are:

The admissibility of an expert's written evaluation report in a contested child custody case has caused a problem for family law trial lawyers.

Over the years, some trial judges would not allow into evidence an expert's written evaluation report containing hits for her opinion on the question of custody. The rationale of the ruling

was that the expert's report violated the hearsay rule and that the statements made in the report were made outside of the proceeding and offered in evidence to prove the truth of the matter asserted. Formerly, the business records exception to the hearsay rule, MRE 803(1), provided an exception to the hearsay rule and allowed the admissibility of records relating to "acts, transactions, occurrences or events." In 1991, this evidence rule was amended, adding "conditions, opinions or diagnoses" to the list of regularly conducted activities that were admissible as an exception to the hearsay rule.

An expert's written evaluation report in a contested child custody case should be admitted into evidence when these, foundational requirements are met:

- The record is a memorandum, report, record, or data compilation.
- The report describes acts, transactions, occurrences, events, conditions, opinions, or diagnoses.
- The report was made at or near the time of the occurrence.
- The report was made by a person with knowledge or from information transmitted by a person with knowledge.
- The report was kept in the regular course of business.
- It was a regular practice to keep the document.

MRE 803(6)."

Rule 2.312 Request for Admission states:

“(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested must be stated separately.

(B) Answer; Objection.

(1) Each matter as to which a request is made is deemed admitted unless, within 23 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. Unless the court orders a shorter time a defendant may serve an answer or objection within 42 days after being served with the summons and complaint.

(2) The answer must specifically deny the matter or state in detail the reasons why the answering party cannot truthfully admit or deny it. A denial must fairly meet the substance of the request, and when good faith requires that a party qualify an answer or deny only part of the matter of which an admission is requested, the party must specify the parts that are admitted and denied.

(3) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable is insufficient to enable the party to admit or deny.

(4) If an objection is made, the reasons must be stated. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. The party may, subject to the provisions of MCR 2.313(C), deny the matter or state reasons why he or she cannot admit or deny it.

(C) Motion Regarding Answer or Objection. The party who has requested the admission may move to determine the sufficiency of the answer or objection. The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of the rule, it may order either that the matter is admitted, or that an amended answer be served. The court may, in lieu of one of these orders, determine that final disposition of the request be made at a trial. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

D) Effect of Admission.

(1) A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission. The court may condition amendment or withdrawal of the admission on terms that are just.

(2) An admission made by a party under this rule is for the purpose of the pending action only and is not an admission for another purpose, nor may it be used against the party in another proceeding.

(E) Public Records.

(1) A party intending to use as evidence

(a) a record that a public official is required by federal, state, or municipal authority to receive for filing, or recording or is given custody of by law, or

(b) a memorial of a public official,

may prepare a copy, synopsis, or abstract of the record, insofar as it is to be used, and serve it on the adverse party sufficiently in advance of trial to allow the adverse party a reasonable opportunity to determine its accuracy.

(2) The copy, synopsis, or abstract is then admissible in evidence as admitted facts in the action, if otherwise admissible, except insofar as its inaccuracy is pointed out by the adverse party in an affidavit filed and served within a reasonable time before trial.

(F) Filing With Court. Requests and responses under this rule must be filed with the court either before service or within a reasonable time thereafter.

In *Molloy v Molloy*, 247 Mich App 348, 637 NW2d 803 (2001), a special panel resolved the conflict between the prior *Molloy* opinion, 243 Mich App 595, 628 NW2d 587 (2000), and *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998), by deciding that the purpose and questioning of an in camera interview is limited to determining the child's preference. The

panel also mandated that all in camera interviews with children in custody cases be recorded and sealed for appellate review. If the information provided in the in camera setting exceeds the scope of preference to the extent that it affects the custody decision, the trial court must permit the parties access to the record and the opportunity to be heard. *Id.* In an order dated April 29, 2002, 2002 Mich LEXIS 610 (2002), the Michigan Supreme Court affirmed the decision of the court of appeals, with the exception of the recording requirement. The court was unable to determine whether the constitution mandated such a requirement. Therefore, the court opened an administrative file to examine the extent to which, and the procedures by which, in camera testimony may be taken in custody cases.

In this section of the main text, there is a quote from *Burghdoff v Burghdoff*, 66 Mich App 608, 239 NW2d 679 (1976), that cites to MCL 600.2163 and states that the statute did not apply to the case. MCL 600.2163 has been repealed.

In a case involving alleged criminal sexual conduct, videotaping of the testimony of the child was allowed under MCL 660.2163a(13)-(14). *People v Pesquera*, 244 Mich App 315, 625 NW2d 407 (2001).

If a Friend of the Court recommendation has been made, how will it be handled? Even though the Friend of the Court report and recommendation may not be admissible in evidence, the trial judge can read the report. *Jacobs v Jacobs*, 118 Mich App 16, 324 NW2d 519 (1982). Any unfavorable facts or evidence in the Friend of the Court report about a client and his or her position should be analyzed and addressed during the trial.

The Michigan Rules of Evidence which govern admissibility of evidence:

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the

State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.
“

MRE 103 Rulings on Evidence provides:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

MRE 104 “Preliminary Questions” provides:

(a) **Questions of Admissibility Generally**. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision

(b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact**. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

MRE 106 Remainder of or Related Writings or Recorded Statements states:

“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

MRE 201 Judicial Notice of Adjudicative Facts:

“(a) **Scope of Rule**. This rule governs only judicial notice adjunctive facts, and does not preclude judicial notice of legislative facts.

(B) **Kinds of Facts**. A Judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not, and may require a party to supply necessary information.

(d) **Opportunity to Be Heard.** A party is not entitled upon timely request to an opportunity to be heard as to the property of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.”

MRE 202 Judicial Notice of Law states:

“When Discretionary. A court may take judicial notice without request by a party of (1) the common law, constitutions, and public statute in force every state, territory, and jurisdiction of the United States; (2) private acts and resolutions of the Congress of the United States and of the Legislature of Michigan , and ordinances and regulations of governmental subdivisions or agencies of Michigan; and (3) the laws of foreign countries.

(b) **When Conditionally Mandatory.** A court shall take judicial notice of each matter specified in paragraph (a) of this rule if a party requests it and (1) furnishes the court sufficient information to enable it properly to comply with the request and (2) has given each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request.”

MRE 401 Definition of “Relevant Evidence” states:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

MRE 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

states:

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.”

MRE 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste

of Time states:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

MRE 611 Mode and Order of Interrogation and Presentation states:

“(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”

MRE 803 Hearsay Exceptions; Availability of Declarant Immaterial states:

“(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form of acts, transactions, occurrences, events, conditions, opinion, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

MRE 1006 Summaries states:

“The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The

originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.”

An example of key evidence utilized to achieve a successful result, settlement during trial, is a chart used in *Perpich v Perpich*, a Wayne County Divorce Case. This chart presented to the trial Judge, Judge Lita Popke a summary of exhibits which demonstrated a 2.9 million dissipation of marital assets.

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Respectfully submitted,

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