BC Society of Transition Houses

Submitting Evidence

In Court

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Part 1. Evidence Law and Gathering Evidence for Court

If you have already determined the evidence that you plan on using in court, you can skip to part two of the tip-sheet which talks about presenting evidence in court.

What is evidence and what is it used for?

When you go to court for a lawsuit or legal proceeding you will have an opportunity to tell your side of the story to the court. The other party will also tell their version of the story to the court which most likely will differ. After listening to all the witnesses and seeing all the evidence, the judge must decide what the facts of the case are. Evidence is the information that you present in court to convince the judge that your version of the facts is true. The other party will also have a chance to present evidence of their own. Once both parties of a legal proceeding have presented their evidence, the judge will consider all the evidence and decide which facts in a lawsuit are true. Presenting evidence such as what you say in court or documents admitted to the court is how you tell your story. You do not have to use a specific type of evidence in court. Evidence can come in many forms; this tip sheet will go over some of those forms.

The law on evidence can often be complicated. There are rules as to when evidence can be admitted in court. Just because you want to use something as evidence does not mean that the court will allow you to do so. It is important to make sure that the evidence you plan to use in court will actually be accepted by the court. This tip sheet provides an overview of certain areas of evidence law that you may want to consider when gathering evidence for court. However, this tip sheet is not a complete guide to evidence law. It may be beneficial for you to seek legal advice or representation to help you prepare your evidence.

Once you have gathered the evidence that you intend to use in court, you should also familiarize yourself with how to present your evidence in court.

When is evidence not required to prove a fact?

Evidence is only required to prove facts that you and the other party do not agree on. It is not necessary to present evidence for facts that both parties agree are true. If you and the other party agree, a statement of agreed facts can be filed with the court. This will save you time in court since you will not have to prove these facts.

Types of Evidence

Evidence can come in many forms. You do not have to use a specific type of evidence in court. Below is a list of common types of evidence that may be used in court. Be aware that the court will keep the evidence that you submit. If you want to keep a copy of the evidence for your records, you should make a copy before your give it to the court.

Testimonial Evidence

An individual's knowledge of certain facts or events is an important source of evidence that should not be overlooked. When an individual shares their knowledge of certain facts or events by telling the court what they know, it can be used as evidence to support one's case. This type of evidence is called testimonial evidence.

> *Take, for example, a situation where you are trying to prove that Brian ran a red light. If you saw Brian run the red light, you have knowledge of this fact and can tell the court that you saw Brian run the red light. The information that you give to the court would be considered testimonial evidence.*

An individual who presents testimonial evidence in a case is called a "witness". Witnesses usually tell the court about the things they have done, seen, or heard. You can be a witness in your own case, and you can ask other people to act as witnesses in your case. This usually happens when the lawyer or parties to the case ask a witness questions about what happened, which is called oral evidence, or in a written document where you promise what is written in the document is true, which is called affidavit evidence.

Oral Evidence

Oral evidence, also known as viva voce evidence, is the information that a court hears from witnesses who are speaking in the courtroom. Oral evidence is presented to the court through a process called "direct examination" where the witness will answer questions asked of them in court. You (or your lawyer if you have one) will have to question your own witnesses. A judge will usually not question a witness for you. If you are your own witness and you do not have a lawyer who can ask you questions, you can just tell the court about what you know. At a later stage in the proceeding the other party or their lawyer will then have a chance to ask the witness questions, this is called "cross examination".

A witness is usually physically present in court to give oral evidence. However, a witness may ask permission to give their evidence by video if they have a good reason for why they are unable to make it to court (for example, if they are out of the country).

Affidavit Evidence

Affidavit evidence is information that is presented to the court as a written statement. If you are preparing an affidavit, after you have written your statement, you must find someone who has the authority to take oaths and swear to them that your statement is true. You can only swear to the truth of your statement if you yourself can personally verify that it is true. Your written statement (i.e., the affidavit) is then submitted to the court as evidence. You must also send a copy of the affidavit to all the parties of your lawsuit or legal proceeding. This guide goes over preparing affidavits for family law matters in the BC Supreme Court and the BC Provincial Court. This guide goes over preparing affidavits for civil law matters in the BC Supreme Court, but it is also helpful for civil law matters in the BC Provincial Court. Just be aware that the BC Supreme Court and the BC Provincial Court use different forms. You can find most BC court forms here.

Oral evidence and affidavit evidence are both forms of testimonial evidence. They both consist of the knowledge that a witness has regarding relevant facts or events. The main difference between oral evidence and affidavit evidence is the manner in which a witness's knowledge is presented to the court. Oral evidence involves the witness going to court and speaking in court while affidavit evidence is a written statement and does not require the witness to be in court.

Documents

Documents are records of information, facts, or events. Documents can be presented to the court as evidence to help prove your case. It would be helpful for you to locate and save any documents which might be related to your case so that they are available if you need to use them.

Paper Documents

Paper documents include any information that has been recorded on paper. Common examples of paper documents are receipts, diary pages, bank statements, and doctor's notes. When submitting a paper document to the court, it is acceptable to submit either the original paper document or a copy of the original document. However, the original is preferred.

Electronic Documents

Electronic documents include any information that is recorded digitally. Common examples of electronic documents are text messages, emails, and social media posts. You do not have to submit the original electronic document to the court. It is best to present a copy of the electronic document to the court. A simple way to copy an electronic document would be to print out a screenshot. This guide takes you through the steps of correctly taking screenshots as well as other methods of preserving electronic documents.

Videos/Photos

Videos and photos are fairly self-explanatory. Photos and videos of information or events that are related to your case may be useful as evidence. Thus, it may be appropriate to document certain events using photos or videos. However, you should be aware that a court may not accept secretly recorded videos as evidence. In some situations, trying to use a secret recording in court may even result in the judge having an unfavourable impression of you. This is a common occurrence in family law matters, especially in matters involving children. If you feel like you must make a recording in order to prove your case, make sure that you are not purposely trying to make the opposing party look bad for the sake of the recording.

Audio Recordings

Audio recordings are also quite self-explanatory. Audio recordings of information or events that are related to your case may be useful as evidence. Commonly made audio recordings include recordings of voicemails and phone conversations. As is the case with video recordings, you should be aware that a court may not accept secret audio recordings as evidence.

Improperly Obtained Evidence

Improperly obtained evidence can include:

- Videos or audio recordings made secretly
- Stolen documents
- Hacked phones messages or emails

If your evidence has been improperly obtained, there is a good chance that a court will not accept the evidence because they do not want to encourage bad behaviour. Usually when improperly obtained evidence is accepted it is because the evidence has a lot of value and is important to the case. Do not try to submit improperly obtained evidence that has barely any relevance to the case. Even if you think a piece of improperly obtained evidence is central to your case, be prepared for the possibility that the judge will not accept it.

Relevance

The most basic rule of evidence is that evidence must be relevant.

> *Relevant evidence is information that makes a material fact more probable.*[1]

First, what is a material fact? A material fact is a fact that will affect the outcome of your case, such as one that helps prove a legal aspect of your case. You can also think of a material fact as a fact that will help you win your case. In order to be relevant, evidence must help establish the material facts of your case. There must be a connection between the evidence that you present and the material fact that you are trying to prove. Irrelevant evidence is evidence that has no connection to the material facts of your case. Evidence that is irrelevant will not be accepted by the court.

Preparing Your Evidence with Relevance in Mind

As mentioned above, only relevant evidence is accepted in court. When preparing for court, it is important to make sure you have not overlooked relevant evidence that could help your case. It is also important to avoid getting sidetracked by irrelevant evidence. Irrelevant evidence can often distract you and the judge from the real issues of your case, making the case more complicated and time consuming than it needs to be.

Below are some things to consider when determining the relevant evidence in your case.

1. What are the material facts of your case?
    - To figure out the material facts you must first understand the law that applies to your case. The law will require you to prove basic elements of your case in order to win. The elements that you must prove will depend on what your case is about.
        - For example, if you wish to obtain a protection order against a family member, the law requires you to prove that you are a family member who is at risk of family violence. Thus, the basic element of your case that you must prove is that you are a family member at risk of family violence.
            - A more in-depth tip sheet on relevant evidence in protection order applications can be found here.
        - For family law cases, Legal Aid BC has useful resources that help outline the basic elements that must be proved for various types of cases. It may also be helpful

[1] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014)

for you to seek legal advice from a lawyer or legal advocate who can explain what needs to be proven.

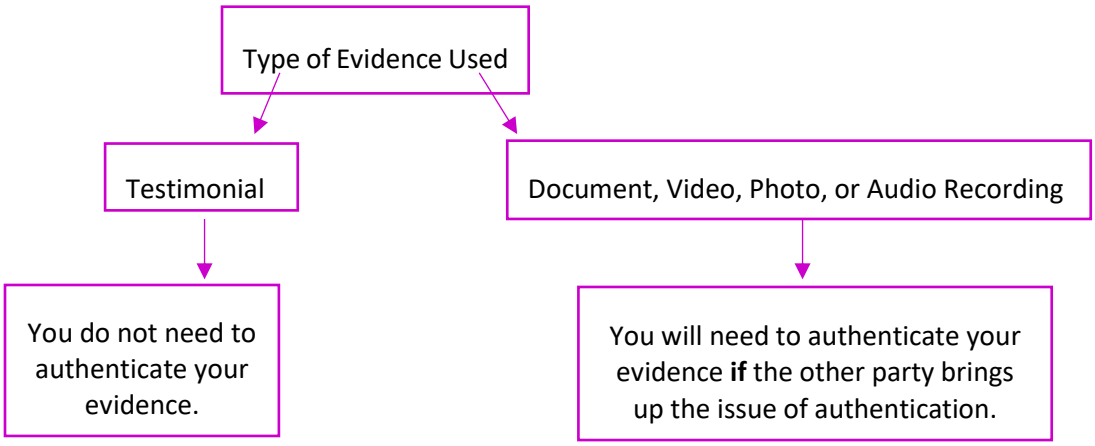
- Once you have determined the basic elements that must be proved, you can start identifying the material facts of your case. Material facts are facts that will help you prove the basic elements of your case.
    - As mentioned in the previous example, to obtain a protection order, the basic element that must be proved is the risk of family violence. The material facts in a case like this are facts that help prove the risk of family violence. For instance, if you have been threatened by the person you want a protection order against, this would be a material fact that helps prove the risk of family violence. Showing a copy of a text message where that person has threatened you would help prove a material fact. A fact that doesn't help prove the risk of family violence would not be a material fact. For example, text messages where that person was rude to you would not prove a material fact in this case.

2. After figuring out the material facts of your case, what evidence are you going to use to establish the material facts?
    - Think about the information that is available that could help prove the material facts.
    - Think about other people who may have information regarding material facts and whether they could act as a witness for your case.
    - Remember that all material facts must be established through evidence. You cannot claim that a material fact has occurred without some evidence to back up that claim.
        - There are many different types of evidence that you can use in court, including your own testimony.
    - Evidence that you think will help establish the material facts of your case is relevant evidence that should be presented to the court.
        - However, be aware that even though you believe that a piece of evidence is relevant the court may not always agree with you that it is relevant.
3. Finally, you should try to limit the amount of irrelevant evidence that you present in court.
    - As previously mentioned, evidence that does not help establish a material fact is irrelevant and will not be accepted by the court.
    - As you prepare your evidence for court, keep in mind that you should not be bringing up everything the other party has ever done wrong. All you need to do is bring up evidence that establishes the material facts of your case.

- It can be tempting to show the court evidence of all the ways the other party has wronged you. However, unless this evidence also helps prove the material facts of your case, it is likely not relevant.

Authentication

Depending on the type of evidence you use, you may have to authenticate your evidence when you present it in court.



If the other party does not question the authenticity of your evidence, you do not have to prove authentication.

How to Authenticate Evidence

To authenticate evidence you must prove that the evidence is what it purports to be.[2]

What this means is that you will have to prove to the court that the evidence you are using is what you say it is.

[2] *R v Hamdan*, 2017 BCSC 676

The process of authenticating evidence is quite simple:

1. Tell the court exactly what your evidence is.
2. Examples:

   "This is a photocopy of my receipt for a purchase from Walmart on X date."

   "This is a printout of the messages I received from my ex-husband over Instagram."
3. You will say this to the court through either oral testimony or an affidavit.
4. If the evidence is unusual in any way, then include this in your description of the evidence.
5. This includes if the evidence has been edited. For instance, if text messages have been deleted from a conversation that you are showing the court, you should say so.
6. If you are presenting digital evidence, you should be able to explain how the program or application worked. For example, if you want to submit a Snap Chat video, you should be able to tell the court how that app works. This is especially important if it is an app or program that is less well known.
7. You should also tell the court how the evidence has been processed.
8. Is the evidence a copy of an original document or video?
9. Have you used other applications to process the evidence? For instance, sometimes it may be easier to use a 3rd party application when you want to save large volumes of text messages. You should be able to explain to the court how any 3rd party application you use works.
10. If the evidence was created by another person, you should try and get that person to explain to the court what the evidence is.
11. For instance, if you use a video that was taken by someone else, it is best to ask the person who took the video to tell the court how they filmed it.
12. Finally, it is important you do not misrepresent your evidence. Do not say that your evidence is something that it's not. If you do not know the answer or information, it is better to just say that. Do not state anything that you do not know.
13. Tell the court how you know that the evidence accurately represents what you say it represents.
14. Examples:

    "This is a photocopy of my receipt for a purchase from Walmart on X date. I made the photocopy from the receipt I received after completing my purchase. I checked the photocopy against the original and the copy accurately reflects the original receipt."

    "This is a printout of the messages I received from my ex-husband over Instagram. I took a screenshot of the messages I received on my phone and then I printed out the screenshot. I

checked the printout against the original messages I received, and the printout accurately reflects the messages I received."

15. Again, if the evidence was created by another person, you should try and get that person to tell the court about the evidence.

Authentication of evidence is usually not a complicated process; however, if you want a more in-depth explanation, this tip sheet goes into more detail on the authentication of digital evidence. Although the tip sheet focusses on authenticating digital evidence, the concepts still apply to the authentication of all evidence.

Hearsay

Hearsay is a complicated subject. While this section is not a complete guide to hearsay, it aims to shed some light on what hearsay is and how it may affect your case in court.

What is Hearsay?

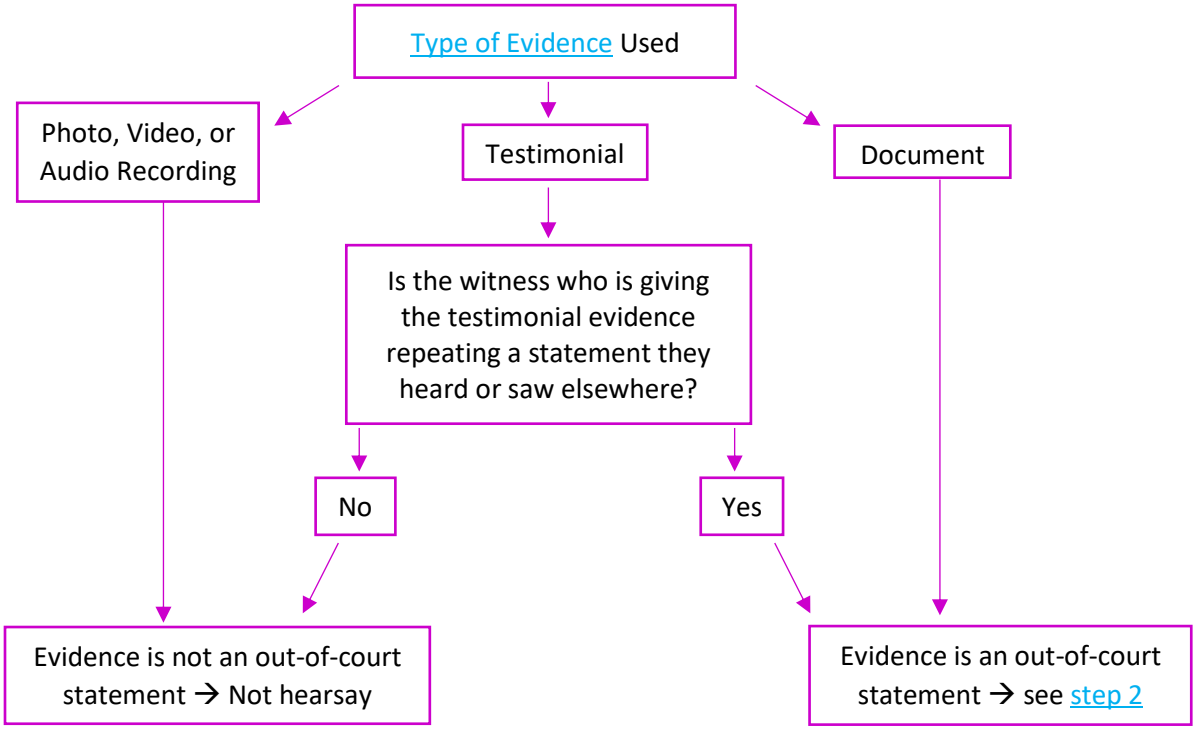
Hearsay is usually defined in two parts. Hearsay is (1) an out-of-court statement; and (2) that is being offered for the truth of its contents.[3] If your evidence is hearsay, the general rule is that it will not be accepted by the court. However, there are many exceptions to this rule. **One important exception is that hearsay is allowed if you are making an interim application.** You will likely not have to worry about hearsay if you are going to court for an interim application.

[3] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014)

Is Your Evidence Hearsay?

There are two parts to determining whether your evidence is hearsay.

1. Is your evidence an out-of-court statement?



2. What are you trying to prove by using an out-of-court statement as evidence? An out-of-court statement is considered hearsay if you try to use it to prove the truth of its contents.
3. Example:

   Your witness testifies in court saying, "*Brian talked to me on Friday and told me that he stole a thousand dollars*". Your witness is repeating an out-of-court statement made by Brian.
4. If you try to use this evidence to prove that Brian stole a thousand dollars, you are using an out-of-court statement to prove the truth of its contents. The evidence would be considered hearsay.
5. If you try to use this evidence to prove that Brian talked to your witness on Friday, you are not using an out-of-court statement to prove the truth of its contents. The evidence would not be considered hearsay
6. Example:

You show the court a copy of *Brian's text messages to you where he says that he's outside your house watching you every day.* The text messages are out-of-court statements made by Brian.

7. If you try to use this evidence to prove that Brian watches you daily by being outside of your house, you are using an out-of-court statement to prove the truth of its contents. The evidence would be considered hearsay
8. If you try to use this evidence to prove that Brian is violating a no contact order by sending texts, you are not using an out-of-court statement to prove the truth of its contents. The evidence would not be considered hearsay.

If your evidence is hearsay, the general rule is that it will not be accepted by the court. It may seem like the hearsay rule prevents you from using a lot of evidence, but there are many exceptions to the hearsay rule and they are discussed below.

Exceptions to the Hearsay Rule

There are many exceptions to the rule against using hearsay as evidence. Listed below are common exceptions that may be helpful for you to know when preparing your evidence for court.

Admissions

1. If the opposing party has made any statements related to your case outside of court, these statements are usually not subject to the hearsay rule.
2. The admissions exception does **not** just include oral statements, written statements such as text messages and emails sent by the opposing party are included.

Business Records

1. Documents created for the operation of a business may fall under the business records exception.
2. Examples of business records include telephone records, hospital records such as doctor's notes, and receipts.
3. A "business" under this exception does not have to be a for-profit business. Most services or professional operations would be considered a "business".
4. Be aware that there are limitations to the business records exception. Just because a business creates a record does not automatically mean that the record falls under the business record exception.

Refreshing a witness's memory

1. Sometimes when a witness is presenting evidence to the court, they may forget the details of an event that they witnessed.
2. Documents that are hearsay may be used to help a witness remember. The document must have been created by the witness when their memory was still fresh. Or, if the document was not

created by the witness, the witness must have reviewed and agreed to the accuracy of the document when their memory was still fresh.

3. For example, if your witness saw Brian hit you with his car and then wrote down a note about what happened, that note could be used to help her remember how the accident occurred.
4. You should bring documents to court even if they are hearsay. You will not be able to use the documents as evidence, but they might be useful if you need refresh a witness's memory in court.

Hearsay in Family Law Cases

For family law cases, there is a possibility that the court will accept hearsay as evidence even if it does not fall under an exception. However, once hearsay evidence is admitted, the judge may decide to give the evidence little to no weight because hearsay is usually unreliable evidence. This means that hearsay will probably not be very persuasive evidence even if it is admitted.

Avoiding Hearsay Evidence

If none of the exceptions for hearsay apply to your evidence, it may still be possible to avoid the hearsay rule. Hearsay, by definition, must be an out-of-court statement. If you do not use an out-of-court statement, then the hearsay rule does not apply. You can avoid using an out-of-court statement by asking the person who made the out-of-court statement to testify as a witness for you.

> *For example, your witness says in court, "Adam told me that he saw Brian steal my car", the witness is repeating an out-of-court statement made by Adam. You can avoid using the out-of-court statement by simply asking Adam to be a witness for you. As a witness, Adam can tell the court that he saw Brian steal your car.*

If an individual does not wish to be a witness in your case, you can consider issuing a subpoena to make them testify as a witness. This guide to family law trials in the BC Supreme Court has a section on how to issue a subpoena, as does this guide to family law trials in the BC Provincial Court. The same concepts apply to civil lawsuits, however, be aware that you must fill out different forms. You can find most BC court forms here.

Opinion Evidence

When you or your witnesses give testimonial evidence to the court, the evidence is supposed to be about the facts of the case. When witnesses start to talk about their own opinions, it is considered opinion evidence. Opinion evidence will not be accepted by the court.

This does not mean that a witness is never allowed to speak about their opinions in court. People regularly talk about their opinions without even noticing it. Witnesses are allowed to talk about their "lay opinions". Lay opinion generally means an opinion that an ordinary person would naturally incorporate into their story. *For example, it would likely be acceptable for a witness to say, "Brian was*

slurring his words, stumbling a lot, and drinking from a large bottle of vodka, he seemed drunk". The witness does not actually know that Brian was drunk, thus it is still their opinion that Brian seemed drunk. However, a reasonable person observing Brian would likely come to the same conclusion and incorporate it into their testimony. This would be an example of "lay opinion" that is usually allowed in court.

Witnesses do not need to worry about accidently including their opinions. The line between opinion and fact can often be blurry. The purpose of this section is to remind you that evidence is about facts, not opinions. Do not start talking about why you should win your case when giving evidence. You will have an opportunity to do this during the closing arguments after all your evidence has been presented.

Settlement Privilege

When you and an opposing party have a legal dispute, sometimes the two of you may try to settle your disagreement outside of court. Settlement privilege is the right to keep any communications regarding a settlement private. This means that if you end up going to court, you cannot use settlement communications from the opposing party as evidence. At the same time, the opposing party cannot use settlement communications from you as evidence either. Settlement communications are not limited to oral communications. Written communications such as emails and text messages are also included.

There are a few exceptions to settlement privilege including:

- When the communication is a threat or involves something illegal.
- When you and the opposing party disagree on whether or not a settlement was reached.

Settlement communications can be used in court as evidence under these circumstances.

Weight

After all the evidence has been admitted, the judge will determine how much weight to give each piece of evidence. The judge will determine the reliability and trustworthiness of the evidence. Evidence that is given more weight will have a greater impact on the outcome of your case. Evidence that is given little to no weight will not affect the outcome of your case very much.

The credibility of your witnesses (i.e., how believable your witness is) will always affect how much weight the judge gives your evidence.

Factors that affect the credibility of a witness include:

- The ability of the witness to remember events accurately.
    - Was the witness intoxicated when they witnessed the event in question?
    - Since the event, did something occur that impacted the witness's memory of the event?
- Biases that the witness may have for one party.
    - For instance, if your mother acts as a witness in your case, it is possible that her testimony is perceived as biased.
- Whether the witness's testimony contrasts with other pieces of evidence.
    - For instance, if the witness tells the court that they have never been to Hawaii but the other party shows the court Facebook photos of the witness vacationing in Hawaii, their credibility will suffer.

To increase credibility, a witness should always tell the truth in court. If a witness does not know the answer to a question, they can tell the court that they do not now rather than guess. If a witness does not understand a question, they can ask for the question to be repeated or re-phrased. A witness will want to make sure that they are properly answering the question asked. This includes being clear and direct when speaking, avoiding contradictions, and acting courteously towards the other party.

Part 2. Presenting Evidence in Court

Giving Testimonial Evidence

Testimonial evidence can be either oral evidence or affidavit evidence. The Provincial Court of BC and the Supreme Court of BC have different rules on which form of testimonial evidence must be used. In the Provincial Court of BC, oral evidence is usually used in both applications and trials. In the Supreme Court of BC, affidavit evidence is used when you make an application while oral evidence is used in trials.

Giving Oral Evidence in Court

Oral evidence is given by witnesses in court. A witness who is giving evidence will tell the court about the things that they have done or witnessed. If someone has information that could help your case, you should consider asking them to be a witness in your case. You can also act as a witness in your own case.

Giving Evidence as a Witness in Your Own Case

The process of acting as a witness in your own case involves you speaking in court. If you have a lawyer, your lawyer will ask you questions regarding your case. You will give evidence by answering their questions. If you do not have a lawyer, you can just tell the court about the things that you have done or witnessed in relation to your case. Just make sure that you are aware of the different rules that may apply to your evidence. An overview of some of these rules can be found in part one of this tip-sheet.

When speaking in court, make sure that your story is easy to follow and that you are not sidetracked by irrelevant evidence. You should also try to be as detailed as possible when giving evidence. Always clearly state the date and time of when each event occurred so that you can present a clear timeline. When giving your evidence, it usually makes the most sense to talk about the events in a chronological order. This means that you should start with the earliest events and end with the most recent events. You will not be allowed to read from a script in court. It is a good idea to outline your testimony so that you do not forget any important points.

When you talk about events that you and the other party disagree on, you do not need to explain to the judge why the other side's version of the story is wrong. If you and the other party disagree on how an event occurred, you only need to give a detailed description of your version of the events. Consider an example where you and the other party (Brian) disagree about a conversation that occurred between the two of you. You remember asking Brian to stop following you home from work, but Brian claims that you actually asked him to walk you home. You only need to focus on telling the court about the conversation between the two of you as you remember it. After you have finished explaining your recollection of the conversation, move onto the next event in your case. Do not argue that your version of the conversation with Brian is the correct one. There will be a chance for you to make a summary of the evidence and an argument after all the evidence has been presented during closing arguments.

Questioning Witnesses in Court

After you have given your own evidence to the court, your other witnesses will have a chance to give evidence. If you have a lawyer, your lawyer will ask each witness questions. The witness will give evidence by answering the questions. If you do not have a lawyer, you will have to ask the questions yourself. The process of questioning a witness is called a "direct examination" or an "examination-in-chief".

It is a good idea to start by asking your witness simple direct questions. These are questions about things that are facts. This will help the witness get used to answering questions in front of the judge. Examples of questions to start with could include:

- Do you live at X address with the applicant/plaintiff?
- Do you work at X with the respondent/defendant?
- How many years have known the applicant/plaintiff?

Once you finish the context questions, you can ask questions about the events that are important to your case. These questions will relate to the issues that are being contested. The answers that your witness give will act as evidence for your case. Usually, it is a good idea to ask about the events in a chronological order.

One important rule to remember when questioning a witness is that you are not allowed to ask your witness leading questions. Leading questions are questions that suggest an answer. An example of a leading question would be, "didn't you hear Brian yelling threats?" This question suggests to the witness that Brian did yell threats. If you ask a leading question, the other party can object to the question and if the judge agrees with the objection, your witness will not be allowed to answer the question. However, sometimes the other party will not object to the question. If the other party does not object and the judge does not say anything, then your witness is free to answer the question. This does not mean that you should be ask as many leading questions as possible. It is best to ask non-leading questions and let the witness testify in their own words. A non-leading question is usually an open-ended question that does not suggest the answer. An example of a non-leading question would be, "What did you hear Brian say?"

To illustrate leading questions, consider an example where you are trying to get your witness to tell the court that they saw the respondent (Brian) following the applicant (you) home.

1. A series of leading questions would be:

   Q1: On October 3rd, did you walk home from work on X Street at 2PM?
   A1: Yes.
   Q2: While you were walking home, did you see the applicant walking on the same street?
   A2: Yes.
   Q3: Was Brian following the applicant in his car?
   A3: Yes.
   Q4: Did the applicant ask the respondent to stop following her?
   A4: Yes.

2. A series of non-leading questions would be:

   Q1: On October 3rd, when did you leave work?
   A1: 2PM.
   Q2: What street did you take?
   A2: I took X Street.
   Q3: What did you see on that street?
   A3: I saw the applicant walking while Brian was following her in his car.
   Q4: What did the applicant do?
   A4: She told Brian to stop following her two times.

It can be hard to predict the answer to open-ended questions. Consider the different answers that you could get from Q3: What did you see on that street?

- I saw the applicant walking on the street.
- I saw the applicant and respondent together.
- There was a traffic jam and there was a band playing on the sidewalk.

None of these answers mentions that the respondent (Brian) was following the applicant (you). You would have to ask more questions to get the witness to tell the court that she saw Brian following the applicant.

Because non-leading questions are so open-ended, it is a good idea to prepare your witnesses for what to expect in court and what questions you will ask. When preparing a witness, you cannot ask the witness to say things that they do not remember seeing or doing. Saying to a witness, “you should tell the court that you saw Brian following me home” is inappropriate. However, in order to prepare your case, asking a witness if they “did you see Brian following the applicant home that day?” is appropriate. If the witness does remember seeing Brian following you home, then you can ask them to testify about it. If they do not remember seeing this, then their testimony may not be relevant to your case.

Refreshing a Witness' Memory

Even if you spend time preparing a witness for court, it is possible that when the witness gives evidence in court, they suddenly forget to mention details that are important to your case.

For example, your witness heard Brian yelling threats at you while he followed you home from work. You ask your witness what they saw and heard but they do not mention that Brian threatened you. You are not allowed to ask a leading question such as "didn't you hear Brian yell threats?" So how do you get your witness to tell the judge that they heard Brian yell threats? If your witness made a document about the incident, then that document can be used to refresh their memory. The document could be almost anything. Text messages, written notes, and sketches are all examples of documents that can be used. However, the document must have been created by the witness while their memory of the event was still fresh. Alternatively, if someone who is not the witness made the document, the witness must be able to confirm the accuracy of the document while their memory was still fresh.

The steps to refreshing a witness' memory are quite simple:

1. "Exhaust" the witness's memory. Ask your witness if they can remember anything else from the event in question.
2. If they say no, ask the judge if you could refresh your witness's memory with a document.
3. Pass the document to your witness
4. Ask the witness if they recognize the document and how the document was created. For example, "are these text messages that you sent to me after you saw Brian following me on October 3rd?"
5. Confirm that the document was made when your witness' memory was still fresh. You could ask, "did you text me these messages right after you saw Brian following me?"

   Or

   Confirm that your witness reviewed the accuracy of the document if someone else created the document.
6. Ask your witness to review and read the document to themselves. If the document is long, you can point out the section that is relevant to their testimony and they can read that section.
7. Then ask your witness, "having read that document or section of that document, did it refresh your memory as to what happened that day?"
8. Hopefully, they will say yes, and you can repeat the earlier question and your witness can testify to all the things they witnessed that day.

Objections

During the questioning of your witness, the other party can object if they think that you have asked an improper question. The other party will say "objection" and then explain why they are objecting. You then have a chance to respond to the objection. The judge will decide if the objection is justified or not. If the objection is justified, then the witness cannot answer your question and you will have to ask another question.

Below are some common types of objections that the other party may make:

1. The question has no relevance to the issues of the case.

   If your question has no relevance to the issues of your case, it will not be allowed. If you believe that the question is relevant and will help your case, you should explain why when it is your chance to respond to the objection.

2. The question is a leading question.

   If your question is a leading question that suggests an answer, it will not be allowed. You can restate your question so that it is no longer a leading question.

   For example, the other party may object if you ask your witness, "didn't you hear Brian yelling threats?" You can restate the question and ask, "what was Brian doing?"

3. The question asks the witness to provide expert opinion.

   Witnesses are generally not allowed to give their opinion in court.

4. Opinions are usually only given by expert witnesses.

   There is a process for getting the court to recognize expert witnesses to testify. More common is the use of lay opinions, which are often allowed as evidence. A lay opinion is an opinion that an ordinary person would naturally incorporate into a story. For example, if a witness saw someone consuming multiple alcoholic drinks, it would be natural for the witness to assume that the person was under the influence. It would be appropriate for you to ask a witness, "how many drinks did Brian have?" followed by, "did Brian seem intoxicated?"

5. The question asks the witness to provide hearsay.

   If your question asks the witness to provide hearsay evidence, it is usually not allowed.

   However, there are circumstances where hearsay evidence is allowed. Part one of this tip-sheet covers some of those circumstances. For instance, a statement that would normally be hearsay is not considered hearsay if it is not being used for the truth of its contents. Hearsay evidence that is an admission made by the other party is also allowed.

6. The question asks for speculation.

You will not be allowed to ask your witness to speculate about how an event occurred. For example, if you ask your witness "How do you think Brian got home?" you are asking your witness to speculate or guess about how Brian got home. You could re-state your question and ask, "Did you see how Brian got home?" This way you are asking your witness to make a statement of fact instead of asking them to guess.

You are also allowed to make these objections and others when the opposing party is questioning their witnesses. For instance, if you think the other party is asking their witness a question that has no relevance to the case, you can make an objection. The steps to making an objection are:

7. Stand up after the other party has asked their question and before their witness has started answering the question.
8. Address the judge and state what your objection is.

What Happens After a Witness Gives Evidence?

Every time a witness finishes giving evidence in court, the other party will get an opportunity to ask them questions. This process is called "cross-examination". The other party will ask your witness about the evidence that they have given. If you have given evidence, the other party will also get a chance to ask you questions.

If you have a lawyer, your lawyer will conduct the cross-examination for you and ask the other party's witnesses questions. If you do not have a lawyer, you will have to conduct the cross-examination yourself.

This guide to cross examination may help you prepare for a cross-examination.

Providing Evidence Through an Affidavit

Affidavits are commonly used when making an application to the Supreme Court of BC. An affidavit is a written statement of facts regarding the issues of your case. You generally do not use oral evidence for applications to the Supreme Court of BC. This means that there will not be any witnesses to give evidence in court when you make an application. Instead, you must ask each of your witnesses to help you prepare an affidavit. These affidavits will be used as evidence in court. If you are a witness for your case, you will also have to prepare an affidavit. The rules of evidence discussed in part one of this tip-sheet all apply when a witness writes their affidavit statement.

In the Provincial Court of BC, oral evidence is usually used for both applications and trials. However, in some cases, affidavit evidence can be used as well.

There are certain forms that you must fill out when you prepare an affidavit and there are other procedural requirements as well. For example, each witness must find someone who has the authority to take an oath and then swear that their affidavit is true. This guide to affidavits has a section on how

to fill out the different forms required. The guide also explains how witnesses can swear to their affidavit.

Presenting Documents and Photos

Before you go to court, you should organize all the documents and photos you intend to present to the court. If you have a large number of documents, it may be a good idea to organize all the documents in a binder. You can use numerical divider tabs to separate each document. You should also number the pages of each document. Afterwards, make three copies of the binder so that you can provide the judge, the other party, and your witness with a document from the binder if necessary. This way you can easily show the court the document or photo by asking them to go to a tab and page number in your binder. Then everyone can easily look at the same thing.

The process of presenting documents and photos to the court is called "entering an exhibit" or "introducing an exhibit". A witness must "introduce" the document to the court before it can be accepted by the court as evidence. Once a document is accepted as evidence, it becomes an exhibit.

When are documents introduced? If a witness is giving oral evidence in court, then documents must be introduced orally by the witness during this time. If evidence is being provided through an affidavit, then documents are introduced in the affidavit. Remember that in the Provincial Court of BC, oral evidence is usually used in both applications and trials. In the Supreme Court of BC, oral evidence is used in trials while affidavit evidence is used in applications.

Introducing Documents and Photos through a Witness in Court

You first need to determine who your witnesses will be. A witness who introduces a document should be someone who can authenticate the document. Generally, authentication requires a witness who can confirm that the document is what it purports to be. If you are able to confirm that the document is what it purports to be, then you can act as a witness and introduce the document yourself. If you cannot confirm that the document is what it purports to be, then you are not a suitable witness for introducing the document.

Take these steps if you are the witness introducing a document:

1. Begin by giving the court oral evidence on the events of your case.
2. When you reach the point in your testimony where the document comes up, you can hand over a copy of the document to the judge and the other party. If you organized all of your documents in a binder, just identify which tab to turn to in the binder.
3. Tell the court what the document is. For instance, "this is a printout of a text message conversation".
4. Give the court more details about the document. These details may include:

5. **When?** When was the photo taken? When were the text messages sent? When did you receive the letter?
6. **Who?** Who took the photo? Who sent you the messages? Who took the screenshots? Who sent you the letter? Who is in the photos?
7. **Accurate?** Were there any changes made to the evidence? For instance, have messages been deleted from the conversation? Have you cropped the photo? What programs did you use to alter the document? Do the changes to the document make the document less relevant?
8. **Reliable?** Is the evidence reliable? Is the photo a realistic depiction of what happened? Did printing out the photo cause the photo to become too blurry?
9. **Relevant?** How is the document relevant? Sometimes it is obvious that the document is relevant, so you do not have to explain. For instance, if your case is about obtaining a protection order against your ex-husband, copied threatening text messages be relevant.
10. Although authentication is usually not an issue unless the other party brings it up, there is no harm in authenticating the document. You can follow the section on authentication in part one of this tip-sheet to authenticate the document.
11. Next, ask the judge, "may I mark this document/photo as the next exhibit?" If the judge agrees then the document is marked as an exhibit. This means that the document has been accepted by the court.
12. Once the document has been marked as an exhibit, you should point out things about the document that stand out. For instance, if the document submitted is a text message conversation where your ex-husband threatened you over 20 times in a week, you may want to point out that number to the court. Or, if your ex-husband continuously texted threatening messages to you while you were at work. You could point out to the judge the timing of these messages lines up with when you were working. You could then tell the court that the messages prevented you from properly doing your job.
13. Once you finish going over the document, you can continue giving the rest of your oral evidence if you still have more evidence to present.
14. The marked exhibit can be used when you make your closing argument as to why you have proven your case with facts and that the judge should decide in your favour. You can refer back to the document as evidence to prove your case.

If you are not the witness introducing the document but another witness is doing so. Here are steps to take,

1. The witness will be sitting at the witness stand. Unless you have a lawyer, you will have to ask the witness questions about the document.
2. Begin the direct examination of your witness.

3. When you reach the point in your witness's testimony where the document comes up, you can hand over the document to the witness. You should also give the judge and the other party a copy of the document. If you organized all of your documents in a binder, just identify which tab to turn to in the binder.
4. Ask the witness what the document is.
5. Ask more questions regarding the details of the document. These details may include:

   When? When was the photo taken? When were the text messages sent? When did you receive the letter?

   Who? Who took the photo? Who sent you the messages? Who took the screenshots? Who sent you the letter? Who is in the photos?

   Accurate? Were there any changes made to the evidence? For instance, have messages been deleted from the conversation? Have you cropped the photo? What programs did you use to alter the document? Do the changes to the document make the document misleading?

   Reliable? Is the evidence reliable? Is the photo a realistic depiction of what happened? Did printing out the photo cause the photo to become too blurry?

   Relevant? How is the evidence relevant? Sometimes it is obvious if the document is relevant, so you do not have to explain. For instance, if your case is about obtaining a protection order against your ex-husband, threatening text messages would be relevant.

   Although authentication is usually not an issue unless the other party brings it up, there is no harm in authenticating the document. Part one of this tip-sheet explains how documents can be authenticated. Because you are not authenticating the document yourself, you will have to ask the witness questions that will establish that the document is what it purports to be. Many of the questions that you should ask a witness when establishing authenticity are listed in step #5.

   Next, ask the judge, "may I mark this document/photo as the next exhibit?" If the judge agrees then the document is marked as an exhibit. This means that the document has been accepted by the court.
6. Once the document has been marked as an exhibit, you can ask the witness about the document. For instance, your mother is the witness and the document that she introduced is a text message conversation where your ex-husband threatened her over 20 times in a week. You may want to point out that number to the court. You could do this by asking the witness: "how many text messages do you usually receive from X in a week" and "what is the nature of these text messages?"
7. Once you finish going over the document, you can continue the direct examination of your witness if you still have more questions to ask them.

8. The marked exhibit can be used when you summarize your argument. During the closing argument, you can summarize the testimony and argue that you have proven our case,

Introducing Documents and Photos through a Witness' Affidavit

The process of introducing documents and photos through a witness' affidavit follows the same process as when you introduce a document in court. The main difference is that you are writing everything out instead of saying it aloud in court. Steps #4-6 of the previous section goes over what you or your witness should write about when introducing documents in an affidavit. After you introduce your documents in your affidavit, you have to attach the documents to the affidavit. This guide on affidavits has a section on how to attach exhibits to affidavits.

Objections

The other party may object to the documents and photos you try to introduce. Some common objections include:

1. Relevance. If your documents are not relevant, they will not be admitted no matter how damaging it looks for the other party.
2. Authenticity. The other party may argue that your documents are not authentic. Generally, it is not too difficult to show that your documents are authentic. The section on authentication in part one of this tip-sheet reviews authenticity.
3. Hearsay. The other party may argue that your documents are hearsay and cannot be accepted. This objection does not apply to photos. There are many circumstances where hearsay evidence is allowed. Part one of this tip-sheet covers some of those circumstances. For instance, a document is not considered hearsay if it is not being used for the truth of its contents. Admissions made by the other party is another type of hearsay that is always allowed. This means that text messages, emails, and essentially any sort of document created by the other party is allowed.

Presenting Video and Audio Recordings

The process of presenting video and audio recordings in court is similar to the process of introducing documents or photos. However, there are some important differences.

If you plan to use a recording in court as evidence, make sure that you provide the other party with a copy of the recording as far in advance as possible. The easiest way to do this would be to make a copy of your recording onto a USB and give it to the other party.

Make sure that the courtroom will have the proper equipment for you to play your recordings. If you want to introduce a video recording in court, you should request a monitor and speakers from the courthouse ahead of time. Contact the courthouse well in advance to confirm that you will be able to play your recordings. Often, you can bring your own laptop and connect it to the monitor. However, do not play your video file directly from your laptop. Create a copy of the video and put it onto a USB. You can then play your video file on the USB in court. The USB will be taken by court after your trial.

When are video and audio recordings introduced? Generally, recordings are used in trials and not in applications. In both the Provincial Court of BC and the Supreme Court of BC, recordings are introduced by the witness when the witness gives oral evidence.

Introducing Audio and Video Recordings through a Witnesses in Court

First, you need to identify your witnesses. A witness who introduces a document should be someone who can authenticate the document. Generally, authentication requires a witness who can confirm that the document is what it purports to be. If you are able to confirm that the document is what it purports to be, then you can act as a witness and introduce the document yourself. If you cannot confirm that the document is what it purports to be, then you are not a suitable witness for introducing the document.

If you are the witness introducing a video or audio recording, follow these steps.

If another witness is introducing the video or audio recording for you, follow these steps.

These two sets of instructions above are instructions for the introduction of documents and photos. However, the process of introducing documents is quite similar to the introduction of recordings so the instructions should still be helpful. Here are some tips:

1. When you introduce a document, you give the judge and opposing party their own copies of your document so that they can view the document for themselves. When you introduce a video, the judge and opposing party do not get their own copies of the video to watch separately. The recording will play on the monitor or screen for the entire court.
2. You may find it helpful to produce a transcript of the most important segments of an audio recording, especially if the audio recording is very long. It could also be helpful to take and print out screenshots of important points in a video recording. For instance, if the video recording only shows someone's face for a second, a screenshot of that moment might be useful. The process of

introducing transcripts or screenshots is identical to the process of introducing documents and photos.

Technology Safety Project

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