

CAN I GET A WITNESS?

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I. Introduction

The value of witness affidavits at a temporary hearing cannot be overstated. The most important witness at a temporary hearing is typically your client; however witness affidavits, if prepared and presented properly, can provide critical information to the judge that can have a far-reaching effect on the outcome of the temporary hearing and, consequentially, on the entire case.

II. Basic Law

Uniform Superior Court Rule 24.5 allows only one witness, in addition to your client, to give testimony at a temporary hearing. Often, especially in custody cases, more than one witness has crucial information for the judge to consider. Additional witnesses must testify by affidavit or deposition, unless otherwise ordered by the Court. U.S.C.R. 24.5(A).

All affidavits which you intend to use must be served upon opposing counsel at least twenty-four (24) hours prior to the hearing. U.S.C.R. 24.5 (A). This rule is strictly enforced, and failing to serve the affidavit 24 hours in advance of the hearing will prevent you from being able to use it. If you have a hearing scheduled in the morning, you may want to serve your affidavits by the end of business two evenings before the hearing. At a minimum, you should arrange for a courier to hand-deliver them in advance of the 24 hour period so there is no question they will arrive on time. Faxing them does not technically constitute service. You should hand-deliver them to

make sure you abide by the statute. Do not rely solely on your secretary, paralegal, or new associate to perfect service. You should always play a role in ensuring the affidavits are served because the consequences of not serving them in time could make a difference between winning and losing your temporary hearing.

III. Who Should Provide Affidavits?

The best witnesses for affidavits are witnesses that can provide unbiased, factual information about the parties and each child in a case. For example, doctors, teachers, extra-curricular instructors, and nannies or other caretakers provide excellent affidavits.

Doctors can provide information about how often each parent is at each child's appointments. If a child has special needs, the child's speech therapist or occupational therapist could provide particularly useful information to find out which parent has been more involved in the child's treatment.

Teachers or other educators can provide information about which parent has been more involved in the child's education and which parent has been the contact for school related issues. For example, who has attended the school conferences, school events, and volunteered at school can be very useful information to a court. An extra-curricular instructor such as a coach or dance teacher can provide information about which parent has attended each child's activities.

Nannies or other caretakers can provide the most crucial information because they have spent the most time with a child and sometimes have been in the marital home during a significant portion of the day. Caretakers can provide information such as which parent picks up a child or drops off a child and when (or which parent leaves

home in the morning first and comes home from work last). Caretakers are usually in contact with a parent during the day and one parent may be more instrumental in planning the caregiver's activities with each child. You may consider who interviewed the caretaker, who communicates with the caretaker, and who organizes the caretaker's schedule to show the court who is more involved. Further, the caretaker may know information about how bonded each child is with each parent.

Friends and family members may also provide useful information. However, friends and family member affidavits are likely to be viewed as biased. The parent of each child's friends may provide affidavits if they spend a lot of time with one or both parties and each child such as at play dates or extra-curricular activities.

Family members usually have spent a great deal of time with both parents, and if they stick to the facts, they may provide useful information for the judge. Family members tend to provide lengthy and biased affidavits, so it is best if you can keep their affidavits narrowly focused on the issues at hand. Sometimes family members are the only witnesses that have information about a specific event or incident. In these instances, family members' affidavits could be helpful. However, the typical family member affidavit that says his or her relative is a great parent will get little attention from the court.

IV. Focus on Quality Instead of Quantity

There is no limit to the number of affidavits you may submit. However, producing more affidavits is not necessarily better for your case. Judges typically do not have time to read pages and pages of affidavits, especially if they are going to rule from the bench at a temporary hearing.

The judge may only have time during the hearing or a short break to look at the affidavits before making his or her decision. Rather than focusing on the quantity of the affidavits you present, instead focus on the quality, presenting the most important affidavits. The affidavits should not be redundant. For example, it is not convincing to provide the judge with ten (10) affidavits from various friends and family members that say the same generic language such as “Mr. Smith is a great father.” Instead, consider providing fewer affidavits from a variety of witnesses that know different specific facts about the case.

The affidavits do not need to be several pages. Try to limit the affidavits to only the most important facts. Affidavits that are seemingly endless may lose the judge’s attention. They may have some great information imbedded in them, but the judge may never read your important points if they are hidden in long paragraphs with irrelevant information. There is no required length for an affidavit. You can draft an affidavit with a few sentences if the witness has only one important point to make. For example, an affidavit from the child’s pediatrician that states, “Mr. Smith has taken the child to every doctor appointment. Ms. Smith has never been to a doctor appointment” may be all the judge needs to determine which parent has been involved in the child(ren)’s medical care.

V. How to Prepare Affidavits

Affidavits can be prepared by the affiants themselves or by the attorney after speaking with the affiant. There are positives and negatives to both. If cost is an issue, it is much more cost effective to have the witnesses prepare his or her own statements. Additionally, the affidavits look more credible and less coached when

they are in the affiant's own words. However, if you can interview the witness ahead of time and prepare the affidavit for them based on the interview, you have far more control over the affidavit. If you interview the witness, you can ask the questions that lead to the specific facts you would like to include in the affidavit. Before deciding who to interview, you can ask your client to make you a list of all of the witnesses and what each would say. This will help narrow the list of witnesses you end up calling.

On balance, if cost is not an issue, it is preferable to interview the witnesses and draft the affidavits for the witnesses. At a minimum, you should have the witness send you his or her statement prior to signing the affidavit so you can edit the affidavit as necessary.

VI. What Should the Affidavits Say?

Facts not Conclusions

Affidavits should strictly state facts and not opinions or conclusions. Well-intended as they may be, statements such as "I believe Mr. Smith should have custody of the children" or "I believe Mr. Smith is a caring, loving father" do little to convince the court of your side of the case. By contrast, statements such as, "I have observed Mr. Smith at all of Bobby's soccer games. I have never seen Ms. Smith at a soccer game. Mr. Smith encourages Bobby by standing on the sidelines and cheering him on at every game" show the judge that Mr. Smith is more involved in Bobby's activities without the affiant making that conclusion in the affidavit.

No Hearsay

The rules of evidence apply to affidavits. One of the main rules of evidence that is typically violated in affidavits is including hearsay. The affidavits should only contain information of which the witness has first-hand knowledge. More specifically, the affidavits should not contain information that the witness learns from one of the parties. For example, “Ms. Smith told me Mr. Smith drinks too much.” If the witness does not have first hand knowledge about that issue, it should not be included in the affidavit. A witness is much more credible if they stick to the facts that they know, rather than inserting information they heard from someone else. Affidavits could be excluded if they contain hearsay. The judge may decide not to consider an affidavit that contains hearsay, and an important witness affidavit may be ignored because it contains improper information.

Theme

Affidavits should support the theme of your case. For example, if one of your themes is that your client should have primary physical custody because the other parent travels excessively for work and is not available for the child(ren) during the week, you should get affidavits from people who have first-hand knowledge about his or travel schedule such as a nanny or co-worker. If you focus your affidavits to support the theme of your case then they will make your theme clearer for the judge and you will be more likely to get your important points across to the judge.

VII. Now that You Drafted the Affidavits, How Do You Use Them?

Affidavits should be presented to the judge in your opening statement. Many lawyers file their affidavits prior to the hearing. However, filing the affidavit prior to the hearing could be problematic because this does not give the other side an

opportunity to object to the affidavits prior to the judge potentially viewing them. Once they are admitted into evidence, you may refer to the affidavits throughout the hearing. You should reference the important points of your affidavit in your opening statement. Additionally, during your direct examination you may read any portion of the affidavit to the judge as if they were in court as a live witness. You may want to ask your client about the affidavits when he or she is on direct examination to emphasize important points in the affidavits. You can also cross examine the opposing party about the affidavits. For example, “you have never been to a doctor appointment as Dr. Smith testified in his affidavit?”

Further, you may want to ask the opposing party in his or her deposition to confirm the credibility of a witness before you use his or her affidavit. For example, “do you believe Dr. Smith is a good speech therapist? Is he an honest person?” If the opposing party admits a witness is truthful and credible during a deposition then in court you can emphasize that even the opposing party believes the witness tells the truth, so the affidavit is credible. If you acquired good affidavits, you should reference them during your hearing to emphasize the most important facts.

VIII. Other Uses of Affidavits

Affidavits for Defensive Strategy

An affidavit from the other party’s witness may be discredited if you can provide an affidavit from the same witness. This can offset the damage of the other party’s affidavits. For example, if you know a teacher that is providing an affidavit about how Mom is very involved in school, you may obtain an affidavit from the same teacher talking about the events and conferences that Dad attended at school. Even if

Dad was not as involved, if you have an affidavit from the same teacher talking about his involvement it will lessen the impact and convey Dad is involved in school somewhat, rather than Dad is not involved at all. If all that is presented to the court is Mom's affidavit, the court may get the impression that Mom is the only involved parent.

Affidavits are an effective way to provide the court with testimony from a witness that may otherwise refuse to testify in court or may be a horrible witness on cross examination. Some witnesses feel much more comfortable giving an affidavit rather than testifying at a hearing. You can usually get witnesses to be more honest and open in an affidavit since they are less nervous and not under the pressure of the courtroom. Moreover, some witnesses that you know would crumble under cross examination can provide solid affidavits that sound much better in writing than his or her live testimony. For example, if you have a chatty nanny that says too much when asked her opinion, she may provide an excellent affidavit but be a horrible witness on the stand. The great thing about affidavits is they provide the statements you want the witnesses to say, and not the statements you fear they would say in court.

Guardian ad Litem

The affidavits could be useful to provide to the Guardian ad Litem in your case. Even if they are not used in a hearing, the Guardian ad Litem can consider them as part of his or her investigation.

Settlement

Additionally, the affidavits could be useful to bring the parties closer to settlement. You may decide to exchange affidavits earlier than 24 hours in advance

so you and your client can learn the weaknesses in the case and explore settlement. Once each party sees the other party's affidavits, they may want to settle.

X. Effective Ways to Discredit Affidavits

To effectively discredit affidavits, you should object to them if possible prior to them being presented at the hearing. For example, if they contain hearsay, improper conclusions, or privileged information, you can make an objection and ask the judge to keep them out of the evidence.

If the judge allows the affidavits into evidence, you can try to discredit them during your cross examination of the other party. You can cross examine the party about the preparation of the affidavits if you believe the other party or other lawyer prepared them instead of the affiant. You can also point out the affiant did not have personal knowledge about the items in the affidavit and that the information in the affidavit was information that was provided to them by the party – and not information they have independent knowledge about.

You can also discredit the affiant by pointing out in court that the affiant does not know your client and only the other party in the case.

It is a mistake to ignore the other party's affidavits. By attacking the affidavits, you may discredit them entirely.

XII. Conclusion

The proper drafting and use of witness affidavits is a critical skill that takes practice. The more often you use witness affidavits, the more comfortable you will feel using them at a temporary hearing. Providing solid witness affidavits could make

the difference at your temporary hearing, and could have a significant effect on the entire case.