

Evidence Without Witnesses

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Methods

- Affidavits
- Deposition testimony
- Admissions
- Agreed Statements and Stipulations
- Judicial Notice
- Rule 18.001 Affidavits

Using Affidavits

- Summary Judgment proceedings
 - Tex. R. Civ. P. 166a(c) prohibits oral testimony
 - Burden to produce sufficient evidence to prevail on “traditional” motions and defeat “no-evidence” motions

Affidavits

- Tex. R. Civ. P. 166a(f)
 - Three requirements
 - Based on personal knowledge
 - Facts admissible in evidence
 - Affiant competent to testify about the matters asserted

Affidavits

- Personal knowledge
 - Governed by TRE 602
 - Their own testimony that they do may be enough
 - Does witness know enough about the subject to testify governed by TRE 104(b)

Affidavits

- Personal knowledge
 - Avoid qualifying statements
 - Avoid “its my understanding” or “I learned as the result of an investigation”
 - Statements must be direct an unequivocal
 - Only statutes authorize affidavits on “knowledge or belief” i.e. expert’s affidavits, motions to recuse

Affidavit

- Admissible evidence
 - Prove up any hearsay exceptions
 - Demonstrate authenticity of attachments

Affidavit

- Competent to testify
 - Ability to be a witness
 - Over 18
 - Sound mind
 - Able to accurately perceive and recount event

Affidavit

- Timely filed
 - For party seeking MSJ, at least 21 days before hearing
 - For party responding, at least 7 days before hearing
 - 166a(f) allows courts discretion if not timely filed
 - Trigger hearing date if submitted without request for hearing

Affidavits

- Formal Objections
 - If you fail to object, you waive right to complain on appeal
 - Object in writing
 - If objection is raised, opposing party has right to try to cure objection

Affidavits

- Formal defects
 - Lack of competence
 - Lack of personal knowledge
 - hearsay evidence

Affidavits

- Substance objections
 - No objection necessary to preserve error
 - May be raised for first time on appeal

Raised when affidavit is based on missing evidence or does not set out a proper basis for testimony

Affidavits

- Substance problems
 - Unsupported conclusions, legal and factual
 - Conflicting evidence
 - Unsupported expert opinion

Affidavits

- Practice tip
 - While written objections not always required, best to make formal objections to preserve issue for all affidavit defects

Depositions

- Avoid submitted too much
 - Submitting entire deposition not considered
 - Draw attention to specific section
 - Kitchen sink response not effective

Admissions

- Only used against party making them
- Rarely effective to prove factual disputes

Agreed Statements

- Tex. R. Civ. P. 263
- Allows parties to submit disputes to court on Agreed Statement of Facts
- Must be in writing
- Similar to motion for summary judgment
- Both parties should agree in writing to matters submitted

Judicial Notice

- TRE 201
- Only for adjudicative facts
- Fact not subject to reasonable dispute
 - Generally known
 - Capable of accurate determination

Judicial Notice

- At court's discretion
- Can be taken at any stage in the proceeding
- Court instructs jury to accept as conclusive any fact judicially noticed

Interrogatories

- TRCP 197
- Allows use only against answering party
- Present to court before trying to use in front of jury
- Once admitted, not subject to hearsay objections
- Generally cannot use supplemented answers, although the supremes may change that

18.001 Affidavits

- Civ. Prac. & Rem. 18.001
 - Allows affidavit to prove up reasonable and necessity of medical expenses
 - Defeats hearsay objections
 - Can exclude contrary evidence

18.001 Affidavit

- Form must follow statute
- Counter affidavits
 - Must be filed not later than 30 days after receipt of affidavit
 - At least 14 days before date evidence first presented at trial
 - With leave of court at any time before commencement of trial evidence

18.001 Affidavit

- Counter-affidavit
 - Must give reasonable notice of basis of objection
 - Must be made by someone qualified to raise objection
 - Must identify areas objected to