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## **The Use of Evidence in Commercial Collection Litigation**

Questions often arise as to what rules that the courts follow in admitting into evidence, testimony and documents relating to the trial and litigation of a commercial collection account. This article will provide an explanation of the general rules followed by most state and federal courts when they consider what testimony and documents may be allowed and presented. Pertinent questions relative to this issue should be considered, discussed and determined between the creditor and its attorney prior to trial to avoid the dreaded "objection sustained" when a fact or document is offered into evidence, upon the objection of debtor's counsel.

The general rule is that ***all evidence that is relevant is admissible***. Relevant evidence is defined by the courts as that testimony or documentation tending to establish the existence of any fact, and which fact is of consequent to the termination of the issues, and which issues are more or less probable than they would be without the evidence. However, in practice, there are exceptions. These exceptions are found in the many and varied statutes, procedural codes and case law which tend to govern the legal procedures in state and federal courts.

The courts require that ***only the "best evidence" be presented***. Under the "Best Evidence Rule", secondary evidence is inadmissible. An example of the "best evidence" is the original credit application. A copy of the credit application would be considered secondary evidence. Courts will allow secondary evidence (such as copies of records or documents) if the original document has been lost, destroyed or is otherwise unavailable. The creditor should take care to ensure that safeguards are in place to maintain the safety of original documents. Courts are suspicious and guarded as to claims that original documents have been destroyed, lost or misplaced. Questions arise as to the validity, content or alteration of secondary evidence presented in place of "original" or "best" evidence.

*"The rules of evidence can be both "devil" and "angel" in the presentation of evidence"*

### **Inadmissible Evidence**

**Parol (oral) evidence is not admissible** to alter or vary the terms of a written instrument. Generally, this rule will exclude oral evidence as proof in contested issues relating to establishment of the contents of a written instrument produced during trial. The law presumes that the written document contains all the terms of the parties and speaks for itself. No other evidence of the contents to vary the written document can be offered or produced.

**Hearsay evidence is not admissible** even if it is relevant. Hearsay evidence consists of out-of-court statements made by someone other than the one testifying. Hearsay evidence is not

admissible since the courts presume that it is unreliable. However, a series of exceptions have been carved out by the law. The court may hold the hearsay to be reliable because of the circumstances under which the statement was made or if it was written by a person other than the testifying witness. Some of these exceptions which are relevant in the commercial collection case include work product and statements of individuals who are not in court. Other representatives of the creditor who appear as witnesses in court may testify as to the validity of the account of the business records of the debtor as kept in the ordinary course of business. In such exception, the one that prepared such records need not appear at the trial, so long as someone familiar with the business records is authorized to testify as a witness.

Other exceptions exist and must be carefully considered during the presentation of evidence during trial. One of these is highly important when proof must be presented in the form of computer printouts resulting from the input of data from other sources. Debtor's counsel may voice an objection to the introduction of these printouts on the basis that they are not the "best evidence" or are hearsay. The basis of either objection is that these documents are merely a summary or a compilation of information. Care should be taken that these records are qualified under the business record exception to the hearsay rule to ensure the court will allow them. In addition, all available backup documents should be readily accessible for better proof if the objection is sustained.

#### **Court the "Angel" to Beat the "Devil"**

The rules of evidence can be both "devil" and "angel" in the presentation of evidence to a court. In the trial of a matter, there is no substitute for thorough preparation of witness testimony and production of documents. This can assure the creditor that all relevant evidence to prove the account will be admitted and that an angel (not the Devil) is sitting on the creditor's shoulder.

Common exceptions to this general rule are allowed where the validity of the document is the fact in dispute, or where the writing is ambiguous. To protect the enforcement of the general rule, it is good practice for the creditor to include a clause in all written agreements providing that all of the terms of and conditions between the parties are fully included in the document and that any changes or modifications to the agreement must be in writing.

Updated from the original version published in [Creditor's Edge](#).

#### **About Kohner, Mann & Kailas, S.C.**

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the normal course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.

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