

# Evidence for Family Law Practitioners

EPCBA Trial Advocacy School  
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## **I. How is Family Court different?**

1. Bench trial, not jury. On closer evidence calls, Judge can generally decide for himself/herself what is relevant, reliable, etc. It often takes more time to argue an objection than to simply hear the evidence.
2. Usually no reason for motions in limine to keep evidence out.
3. Rarely Constitutional implications in a domestic relations evidentiary ruling. If inadmissible evidence comes in, court can disregard.
4. Limited time to try a case. Sometimes, judges put attorneys on a “clock”. If opponent spends precious time on side issues, that's less time to focus on what's important.
5. I object when: (1) colorable objection, (2) evidence could affect outcome against my client, and (3) other party is unlikely to be able to overcome objection (e.g. if a simple question to correct a foundational deficiency would overcome it, the objection is probably a waste of time).

## **II. Relevance. Colo. R. Evid. 401-403.**

1. **No-Fault State.** Introducing evidence of fault to “smear” opponent will backfire with judge.
2. **Adultery.** Almost never relevant. If have evidence of dissipation of assets (trips/gifts to significant other, then admissible for that purpose). If parenting at issue, it may be relevant if children exposed to “revolving door” of multiple boyfriends/girlfriends, but would have to be pretty severe.
3. **Criminal Offenses.** Potentially relevant if expended marital funds to defend against criminal charges, especially if spouse was victim of underlying offenses.
4. **Drugs/Alcohol/Domestic Violence.** Only relevant if parenting is at issue.
5. **Bad parent?** Not relevant for child support.

## **III. Character Evidence. Colo. R. Evid. 404, 405, 608.**

1. **Not common,** And not helpful. Move on to real facts and real issues, not layperson opinions.

2. **If parenting at issue**, certain aspects, such as violent character, alcoholism, etc. may be relevant.

3. **Felony Conviction.** C.R.S. 13-980-101. Admissible in DR case if within past 5 years.

#### **IV. Compromise/Offers.** Colo. R. Evid. 408

1. **Inadmissible to show agreement.**

2. **Agreement must be in writing.** C.R.S. 14-10-112(1).

3. **Mediation has separate confidentiality rules.** If reach agreement, sign MOU, or else pointless.

4. **Verbal statements between spouses**, w/o evidence, not often persuasive (e.g. mother says father agreed she would be majority parent, father denies, and asks for equal).

5. **Gray areas.** Agree to use certain valuation date for accounts. Or divide physical property and both sides say they're happy with division.

#### **V. Interrogation at Trial.** Colo. R. Evid. 611

1. **Leading Questions.** Your mileage may vary. Gets to point quicker, and judges recognize difference between agreeing with attorney recitation, and actual testimony. Many judges allow more leading to save time.

2. **Direct/Cross/Redirect.**

3. **Harassment & Undue Embarrassment.** 611(a)

4. **Cumulative Questions** 611(a)

5. **Experts.** Often go out of order, so both experts hear each other and testify after one-another. May testify as to ultimate issue, Colo. R. Evid. 704, and frequently do (parenting, appraisals, etc).

#### **VI. Privileges.** C.R.S. 14-13-310(4).

1. **Husband/Wife.** N/A to litigation against each other.

2. **Attorney.**

3. **Clergy**

4. **Physician/nurse**

5. **Therapist/counselor/social worker**

## **VI. Hearsay.** Colo. R. Evid. 801-807.

- 1. Admission of Party Opponent.** Not hearsay, per Colo. R. Evid. 801(d)(2). Questionable veracity if denied and statement was to your own client.
- 2. Child Statements.** Courts may interview child in chambers, per C.R.S. 14-10-126. But rarely done.
- 3. Child Statements to Parents?** Depends upon the judge, but take with grain of salt since self-serving. May be admissible as excited utterances or then-existing mental/emotional/physical condition admissible under Colo. R. Evid. 803(2) or (3).
- 4. Experts.** CFI, PRE frequently testify as to what child and others told them, and submit reports in advance. Colo. R. Evid. 703 says opinion itself is admissible, even if based upon hearsay, but otherwise inadmissible data/facts only admissible after test of probative vs. prejudice.
- 5. Therapists.** Statements made for purposes of medical treatment. Colo. R. Evid. 803(4).
- 6. Teachers, Neutral Third Parties.** Perhaps use residual hearsay if indication of reliability. Colo. R. Evid. 807.

## **VII. Making Objections.**

1. See Attachment.
2. Common objections: Relevance, argumentative, calls for speculation, hearsay, cumulative.
3. If questioning does not hurt, don't bother objecting, despite being objectionable. E.g. if opposing counsel browbeating witness, but witness is holding up fine. Or if calls for hearsay, but it's reliable, and not harmful.
4. To object, stand up, say e.g. "Objection, Hearsay", etc.
5. No "Singing Objections". There is no jury – often the judge will sustain/overrule the objection w/o hearing anything further.
6. If judge wants to hear more (e.g. after the other side argues), the judge will look at you for additional argument.
7. Objecting during closing – generally just for misstating law or facts.