

Children's Commission®

**SUPREME COURT OF TEXAS PERMANENT JUDICIAL
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES**

TRIAL SKILLS TRAINING POWER POINT NOTEBOOK

DEVELOPED BY THE
CHILDREN'S COMMISSION

Fall 2025

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Burdens of Proof and Required Efforts Findings in Child Welfare Cases

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Child Protection Court of South Texas

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Managing Attorney, Region 9
Texas Department of Family & Protective Services



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Burdens of Proof

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Defining Burdens of Proof in Child Welfare Cases

Good Cause:


- A legally sufficient ground or reason, depending on the circumstances of each individual case.

Probable Cause:

- Generally means having a reasonable basis to believe the allegations are true.

Sufficient Evidence to Satisfy a Person of Ordinary Prudence and Caution:

- Ordinary Prudence and Caution is similar to the Probable Cause standard required for a search warrant.
- It requires a minimal showing of evidence, less than a preponderance but enough to persuade a person.



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Defining Burdens of Proof in Child Welfare Cases, cont.

Preponderance of the Evidence:

- Evidence that is of greater weight or more convincing than the evidence that is offered in opposition.
- This is the standard of proof generally used in civil cases.

Clear and Convincing Evidence:

- The measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.
- It is greater than a Preponderance of the Evidence but a lower burden to meet than Beyond a Reasonable Doubt.

Beyond a Reasonable Doubt:

- The trier of fact must be fully satisfied, or entirely convinced, that something occurred.



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Good Cause and Probable Cause

Good Cause applies to:

- Orders for Aid in Investigation (if child is in imminent danger of aggravated circumstances). [Tex. Fam. Code § 261.303\(b\)\(1\)](#);
- Orders for Access to Mental Health Records of a Caregiver. [Tex. Fam. Code § 261.305\(b\)](#);
- Orders for an Extension of the Adversary Hearing [Tex. Fam. Code § 262.201\(e\)](#) and [\(e-1\)](#);
- Orders for an Extension of a Court Ordered Services Hearing [Tex. Fam. Code § 264.203\(f\)](#) and [\(k\)](#).

Probable Cause applies to:

- Orders for Aid in Investigation (if necessary to protect the child from abuse or neglect, to obtain the child's medical, psychological, or psychiatric records, or obtain an order for an examination of the child). [Tex. Fam. Code § 261.303\(b\)\(2\)](#) and [\(c\)](#);
- Obtaining an ex parte hearing on a petition for orders in aid of investigation. [Tex. Fam. Code § 261.303\(f\)](#);
- Obtaining an order prohibiting the removal of a child from the state pending the completion of an investigation. [Tex. Fam. Code § 261.306](#).



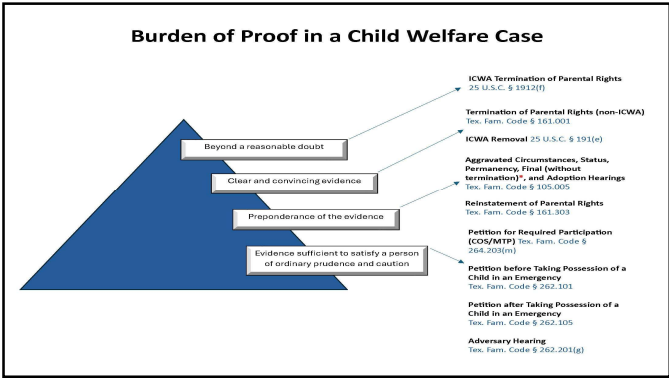
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A Note on Requests for Access to Caregiver Mental Health Records

- Pursuant to [Tex. Fam. Code § 261.305\(d\)](#), a parent or person responsible for a child's care is entitled to notice and a hearing when the DFPS seeks a court order for access to the caregiver's medical or mental health records or a court order requiring the caregiver to submit to an examination.
- If the court determines that the child's caregiver is indigent, the court shall appoint an attorney to represent them at the hearing. [Tex. Fam. Code § 261.305\(c\)](#).
- If the court finds good cause to grant the request, the court shall provide the terms and conditions under which the access to records or the examination will occur. [Tex. Fam. Code § 261.305\(b\)](#).



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SB 2052

Best Interest: Rebuttable Presumption

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Best Interest: Rebuttable Presumption

Tex. Fam. Code § 153.002 (b)

- In a suit between a parent and nonparent, it is a rebuttable presumption that a parent acts in the best interest of the parent's child; and
- It is in the best interest of a child to be in the care, custody, and control of a parent.

* SB 2052, Texas 89th Regular Legislative Session. Applies to Suits Affecting the Parent-Child Relationship (SAPCR) that are pending in trial court on or after or filed on or after September 1, 2025.

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Best Interest: Rebuttable Presumption, cont.

Tex. Fam. Code § 153.002 (c)

- In a suit between a parent and nonparent, **the nonparent may overcome the presumption** under [Tex. Fam. Code § 153.002\(b\)](#) **by proving by clear and convincing evidence** that the denial of the relief requested by the nonparent would significantly impair the child's physical health or emotional development.
- If the court renders an order in the suit granting relief to the nonparent, the court shall state in the order:
 - the specific facts that support the court's finding that denying the relief requested by the nonparents would significantly impair the child's physical health or emotional development; and
 - the extent to which the nonparent has overcome the presumption in [Tex. Fam. Code § 153.002\(b\)](#).

* SB 2052, Texas 89th Regular Legislative Session. Applies to SAPCR cases that are pending in trial court on or after or filed on or after September 1, 2025.



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Best Interest: Rebuttable Presumption, cont.

Tex. Fam. Code § 156.008

- In a suit for modification between a parent and nonparent, the nonparent, **if required to overcome the presumption** under [Tex. Fam. Code § 153.002\(b\)](#), **must overcome** the presumption **by clear and convincing evidence**; and
- May not overcome the presumption on the basis of a prior order granting relief to the nonparent if the parent agreed to the prior order.

* SB 2052, Texas 89th Regular Legislative Session. Applies to SAPCR cases that are pending in trial court on or after or filed on or after September 1, 2025.



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SB 2052

Required Affidavit for
Standing of
Nonparent

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Required Affidavit for Standing of Nonparent

Tex. Fam. Code § 102.0031

A nonparent who files or intervenes in a SAPCR in which another party to the suit is a parent of the child **shall execute and serve with the nonparent's initial pleading an affidavit** that:

- Attests, based on the nonparent's personal knowledge or representations made to the nonparent by a person with personal knowledge of the matter, that denying relief sought would significantly impair the child's physical health or emotional development and contains facts that support the allegation.
- The court shall deny the relief sought and dismiss the suit or strike the intervention, unless the court determines, based on the affidavit, that the affidavit contains facts adequate to support the allegation under [Tex. Fam. Code § 102.0031\(a\)\(1\)](#).

* SB 2052, Texas 89th Regular Legislative Session. Applies to SAPCR cases that are pending in trial court on or after or filed on or after September 1, 2025.



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Required Efforts
Findings

Reasonable Efforts

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What are “Reasonable Efforts?”

- No definition under federal law or regulation.
- Intended to be made on a case specific basis.



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What are “Reasonable Efforts?” cont.

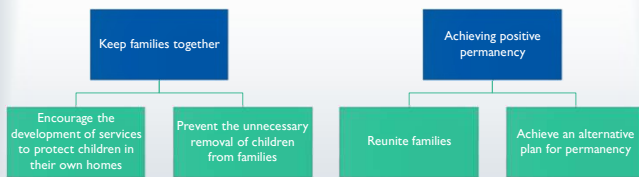
- A trial court is allowed discretion in finding what efforts are reasonable in any given case. The plain language of the provision allows some flexibility in the trial court's determination of what efforts, if any, were reasonable in the given circumstances. *In re Cochran*, 151 S.W.3d 275, 277 (Tex. App.—Texarkana 2004, orig. proceeding).
- We presume that the Texas Legislature enacted Section 161.001(f) with the knowledge of the prevailing judicial understanding of “reasonable efforts to return the child to the parent” under Section 161.001(b)(1)(N). ...As such, when addressing whether the Department proved by clear and convincing evidence that it made reasonable efforts to return [a child] to [their parents], we look to relevant judicial determinations regarding the Department's reunification efforts under Section 161.001(b)(1)(N). *In re M.N.M.* 708 S.W.3d 321, 328 (Tex. App. — Eastland 2025, pet. denied).



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Reasonable Efforts Overarching Goals



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Children's Bureau Guidelines: Factors for Making Reasonable Efforts Findings

- Would the child's health or safety have been compromised had the agency attempted to maintain the child in their home?
- Was the service plan customized to the individual needs of the family or was it a standard package of services?
- Did the agency provide services to improve factors present in the child or the parent?
- Do limitations exist with respect to service availability, including transportation issues?
- Are the State agency's activities associated with making and finalizing an alternate permanency placement consistent with the permanency goal?



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Texas Guidance: Reasonable Efforts & Child Safety

- In determining the reasonable efforts that are required to be made with respect to preventing or eliminating the need to remove a child from the child's home or to make it possible to return a child to the child's home, the child's health and safety is the paramount concern. [Tex. Fam. Code § 262.001\(b\)](#)



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Required Reasonable
Efforts Findings

Federal Law

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Federal Laws

Reasonable Efforts and Removals

- Child welfare agency must make **reasonable efforts** to maintain the family unit and prevent the unnecessary removal of a child from their home, as long as the child's safety is assured. [45 C.F.R. § 1356.21\(b\)](#)
- Federal law requires the court to find that continuation of residence in the home would be contrary to the child's welfare or that placement is in the child's best interest in order to grant a request for removal. [45 C.F.R. § 1356.21\(c\)](#)
- A judicial finding that the child welfare agency failed to make reasonable efforts to prevent removal is not part of the federal framework and does not prevent a judicial finding that a child be removed from their home.



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Federal Laws, cont.

Reasonable Efforts and Finalizing Permanency

- Child welfare agency must make **reasonable efforts** to ... reunify and make and finalize alternate permanency plans (reunification, adoption, legal guardianship, relative placement, APPLA). If the court does not make the finding, the agency will not receive IV-E funding until such a determination is made. [45 C.F.R. § 1356.21\(b\)](#)

Documentation of Reasonable Efforts

- Documentation "must be explicitly documented ... on a case-by-case basis and so stated in the court order." If reasonable efforts are not documented in the court order, a transcript of the proceedings is the only other documentation that will be accepted to verify. [45 C.F.R. § 1356.21\(d\)](#)
 - Neither affidavits nor *nunc pro tunc* orders will be accepted.
 - Court orders that reference state law are not acceptable.



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Required Reasonable
Efforts Findings

Texas Law

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Hearings that Require Reasonable Efforts Findings

Hearing Type	Court Required to Make Reasonable Efforts Finding?
Order in Aid of Investigation	NO
Required Participation (COS/MTP/OTP)	NO
Ex Parte Hearing	YES
Adversary Hearing	YES
Status Hearing	YES
Permanency Hearing Before and After Final	YES
Final Hearing without Termination	NO
Final Hearing Seeking Termination of Parental Rights	YES



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Ex Parte Hearings

Emergency Affidavits [Tex. Fam. Code §§ 262.101, 262.105](#)

- An emergency removal affidavit must describe with specificity in a separate section all **reasonable efforts**, consistent with the circumstances and providing for the safety of the child, that were made to prevent or eliminate the need for removal.

Emergency Ex Parte Orders [Tex. Fam. Code §§ 262.102, 262.107](#)

- The court order must describe with specificity in a separate section the **reasonable efforts**, consistent with the circumstances and providing for the safety of the child, that were made to prevent or eliminate the need for removal of the child.



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Adversary Hearing

[Tex. Fam. Code § 262.201\(g\)](#)

For a parent from whom the child was removed:

- **Reasonable efforts**, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; and
- **Reasonable efforts** have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.

[Tex. Fam. Code § 262.201\(g-1\)](#)

For a parent not involved in the removal:

- **Reasonable efforts** have been made to enable that person's possession, but possession by that person presents a continuing danger to the physical health and safety of the child.



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Adversary Hearing, continued

[Tex. Fam. Code § 262.201\(g-2\)](#)

Orders must describe in writing and in a separate section:

- The **reasonable efforts** made to enable the child to return home and the substantial risk of a continuing danger if the child is returned home; or
- The **reasonable efforts** to place the child with a non-custodial parent and the continuing danger to the physical health or safety of the child if the child is placed with a non-custodial parent.



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Status Hearing

Tex. Fam. Code § 263.202

- The court must find whether a service plan ensures that **reasonable efforts** are made to enable the child's parents to provide a safe environment for the child.

Tex. Fam. Code § 262.2015

- The court may waive the requirement of a service plan and the requirement to make **reasonable efforts** to return the child to a parent and may accelerate the trial schedule to result in a final order...if the court finds that the parent subjected the child to aggravated circumstances. [Tex. Fam. Code § 262.2015](#).



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Permanency Hearings Before and After Final

Tex. Fam. Code §§ 263.306 and 263.5031

- The court must determine the appropriateness of the primary and alternative permanency goals for the child developed in accordance with department rule and whether the department has made **reasonable efforts** to finalize the permanency plan, including the concurrent permanency goals.



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Termination of Parental Rights Cases Filed on or after Sept. 1, 2023



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Termination of Parental Rights

Tex. Fam. Code § 161.001(f)

- The court may not order termination of parental rights in a suit by DFPS unless the court finds by clear and convincing evidence that DFPS made **reasonable efforts** to return the child to the parent before commencement of a trial on the merits, and despite those reasonable efforts, a continuing danger remains in the home that prevents the return of the child to the parent.
- The court does not have to make a finding regarding **reasonable efforts** if a service plan for the parent was waived due to aggravated circumstances under [Tex. Fam. Code § 262.2015](#).



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Termination of Parental Rights, cont.

Tex. Fam. Code § 161.001(g)

- The court must include in a separate section of its order written findings describing with specificity the **reasonable efforts** DFPS made to return the child to the child's home.



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Reasonable Efforts Considerations

- Safety planning/Parental Child Safety Placement (PCSP)
- Creation of a Family Plan of Service (FPOS), monitoring of the services, and paying for the services
- Exploring other legal options to keep the children safe without filing for removal
 - Kick out order or protective order
 - Offering Family Based Safety Services (FBSS)/exploring suitability for Texas Family First Services Pilot (TFF), where available
 - Filing a Petition for an Order to Participate in Services (MTP/COS/OTP)



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Reasonable Efforts Considerations, cont.

- Make timely referrals and provide alternate forms of services (Zoom, parenting packets, out of state referrals)
- Provide financial and/or transportation (bus, gas, etc.) assistance
- Provide visitation to strengthen parent-child bond
- Attempt to engage and/or locate absent parent
- Explore relative/fictive kin placements
- Maintain caseworker contact
- Provide translation services, if needed



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As an attorney,
how can you
address
reasonable
efforts?

- Review the reasonable efforts section of affidavits and court reports.
- Consider whether services are narrowly tailored to address the needs of the child and family.
- Prep your client for direct and cross examination of questions related to reasonable efforts.

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Special Issue

Elimination of “O”
Ground
(as we know it)

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H.B. 116

- Eliminated [Tex. Fam. Code §161.001\(b\)\(1\)\(O\)](#): *“failure to comply with a court order that established the necessary actions for a parent to obtain the return of the child who has been in the permanency or temporary conservatorship of the Department for not less than nine months.”*
 - Typically, this is referred to as “failure to comply with the family plan of service.”
- All other grounds after the “O” ground have been re-lettered.

* HB 116, Texas 89th Regular Legislative Session. Applies to SAPCR cases that are pending in trial court on or after or filed on or after September 1, 2025.



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Other Uses for the Family Plan of Service (FPOS)

- Best interest: programs available to assist in seeking custody
- Endangerment: failure to address the reasons that the children came into care
- Reasonable efforts



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Special Issue

Indian Child Welfare Act
(ICWA)

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Indian Child Welfare Act (ICWA)

Does any parent have Native American Heritage? If so, get the information on the record.

- Must serve the tribe and notify of hearings
- Elevates the burden of proof
- Requires Active Efforts
- Additional hearing requirements

This inquiry is an ongoing inquiry throughout the life of the case.



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Questions?

Hon. Robert Falkenberg

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The first part of the paper discusses the importance of understanding the cultural context of the research. It highlights the need for researchers to be sensitive to the values and beliefs of the communities they are studying. This is particularly important in the field of health research, where cultural differences can significantly impact the effectiveness of interventions.

The second part of the paper reviews the literature on cultural competence in healthcare. It examines the various models and frameworks that have been developed to help healthcare providers deliver culturally appropriate care. The review also identifies the challenges and barriers to achieving cultural competence in practice.

The third part of the paper presents the findings of a study that explored the cultural beliefs and practices of a specific community. The study used a qualitative approach, involving in-depth interviews with community members. The findings reveal a range of cultural beliefs and practices that influence health behaviors and perceptions.

The fourth part of the paper discusses the implications of the study findings for healthcare practice. It suggests that healthcare providers should take a more holistic approach to patient care, one that recognizes and respects the cultural beliefs and practices of their patients. This may involve adapting communication styles, using interpreters, and incorporating traditional healing practices into the treatment plan.


The fifth part of the paper concludes with a summary of the key points and a call to action. It emphasizes the need for ongoing research and education to improve cultural competence in healthcare and ensure that all patients receive high-quality, culturally appropriate care.

Preparing for the Initial Contested Hearing

REQUESTS FOR COURT ORDERED PARTICIPATION
IN SERVICES AND ADVERSARY HEARINGS

Tiffany Reedy
Managing Counsel, Child Protective
Services and Elder Law Division
Harris County Attorney's Office


Belinda Roberts, TBLS
Mental Health Public Defender
Assisted Outpatient Treatment Program
Travis County Probate Court No. 2



1

Initial Contested Hearings in Child Welfare Cases

- Required Participation, [Tex. Fam. Code § 264.203](#)
- Full Adversary Hearing, [Tex. Fam. Code § 262.201](#)



2

You've Been Appointed, Now What?

- Know your role
- Know the burdens of proof and required findings
- Know the court file
- Know your client
- Know your witnesses
- Know case strengths and weaknesses



3

Know Your Role

- Powers and Duties of Guardian ad Litem for Child [Tex. Fam. Code § 107.002](#)
- Powers and Duties of Attorney ad Litem for Child [Tex. Fam. Code §§ 107.003, 107.004, 107.008, and 264.203\(g\)](#)
- Powers and Duties of Attorney ad Litem for Parent [Tex. Fam. Code §§ 107.0131 and 264.203\(h\)](#)



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Know Your Role, cont.

- Powers and Duties of Attorney ad Litem for an Alleged Father [Tex. Fam. Code § 107.0132](#)
- Powers and Duties of Attorney ad Litem for Unknown Parent [Tex. Fam. Code § 107.014](#)
- Temporary Appointment of Attorney ad Litem for Parent [Tex. Fam. Code § 107.0141](#)



5

Know Your Role, cont.

County Attorney's Office, District Attorney's Office, and/or DFPS Regional Attorneys may represent DFPS in your county. See [Tex. Fam. Code § 264.009](#)

- Know your office rules related to representation of DFPS.
- Know the scope of representation for DFPS and their agents (ex. Single Source Continuum Contractor/SSCC).
- Review the DFPS handbooks and Texas Administrative Code so that you can make the correct assessments, give the correct guidance, and provide the best representation under the Tex. Fam. Code.
- Know the protocol for conflicts of interest.



6

Know the Burdens of Proof and Required Findings: Order for Required Participation

At the conclusion of the hearing, the court shall deny the petition unless the court finds **sufficient evidence to satisfy a person of ordinary prudence and caution** that:

- Abuse or neglect occurred or there is a substantial risk of abuse or neglect or continuing danger to the physical health or safety of the child caused by an act or failure to act of the parent, managing conservator, guardian, or other member of the child's household; **and**
- Services are necessary to ensure the physical health or safety of the child. [Tex. Fam. Code §264.203\(m\)](#).



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Know the Burdens of Proof and Required Findings: Order for Required Participation, cont.

If the court finds that a parent, managing conservator, guardian, or other member of the child's household did not cause the continuing danger to the physical health or safety of the child or the substantial risk of abuse or neglect, or was not the perpetrator of the abuse or neglect alleged, the court may not require that person to participate in services ordered under [Tex. Fam. Code §264.203\(n\)](#).



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Know the Burdens of Proof and Required Findings: Adversary Hearing

At the conclusion of the hearing, the court shall order the return of the child to a person entitled to possession from whom the child is removed unless the court finds **sufficient evidence to satisfy a person of ordinary prudence and caution** that:

- there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;
- the urgent need for protection required immediate removal and reasonable efforts, consistent with the circumstances and providing for the safety of the child were made to eliminate or prevent the removal; and
- reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home. [Tex. Fam. Code §262.201\(e\)](#).



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Know the Burdens of Proof and Required Findings: Adversary Hearing, cont.

If the court does not order the return of the child to the person from whom the child was removed, and finds that another person entitled to possession did not cause the immediate danger..., the court shall order possession of the child by that person unless the court finds **sufficient evidence to satisfy a person of ordinary prudence and caution** that:

- The person cannot be located after the exercise of due diligence by DFPS, or the person is unable or unwilling to take possession of the child; or
- Reasonable efforts have been made to enable the person's possession of the child, but possession by that person presents a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person. [Tex. Fam. Code §262.201\(g-1\)](#).



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Know Your Court File

- Retrieve and review all pleadings, affidavits, and orders.
 - What are the allegations?
 - What type of relief is being requested?
 - Who might you expect to testify?
 - Has your client been served? Do you have their contact information?
 - What additional information do you need?



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Conduct Your Own Investigation

Aside from reviewing the affidavit and any other documents provided to you by DFPS:

- Meet with your client
- Talk to the CPI caseworker/supervisor
- Reach out to any listed collaterals (family members, law enforcement, doctors, teachers, etc.)



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Conduct Your Own Investigation, cont.

Consider requesting:

- Copies of Safety plan(s)
- Copies of Parental Child Safety Placements (PCSP)
- Copies of Completed Notification of Rights Form
- Authorization Agreements

* File a Request for Certain Disclosures (prior to Adversary)*



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Disclosure of Certain Evidence Tex. Fam. Code § 262.014

On request of an attorney for a parent or the attorney ad litem for the parent's child, DFPS must provide the following before the full adversary hearing:

- Name of any non-DFPS employee that DFPS will call as a witness;
- Copies of any offense reports related to the allegations that will be used in court to refresh a witness' memory; and
- Copies of any photos, videos, or recordings that will be presented as evidence.



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Know Your Client

Attorneys Representing DFPS:

- Who will act as the Department representative at the hearing?
- Is that same person your lead witness?
- Will that person testify as to the contents of the entire DFPS case file as the custodian of record?
- How experienced is your client? (Take the time to meet with and prepare your client for the hearing)



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Know Your Client, cont.

Parent Attorneys and AALs:

- Pay attention to the narrative describing the interaction with your client and review the DFPS and criminal histories listed in the affidavit.
- What is missing from the story being told?
- Are there any indicators that there may be mental health or other issues that need to be addressed?
- Are there any current or prior psychological, medical, or school assessments related to your client that may be of use to you?



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Tips for Parent Attorneys

Meet your client "where they are:"

- Remember that you are meeting your client at a low point in their life, and they may be experiencing a mix of emotions and/or dealing with issues such as domestic violence, mental health, or addiction.
- Listen! Give your client the opportunity to tell you what happened from their perspective.
- Explain things in a manner that your client understands.



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Tips for AALs

- Depending on the age of the client(s), bring an activity. Coloring books, activity sheets, 20-minute crafts, fidget toys to keep hands busy.
- Don't assume you know what your child client's position is before meeting. Talk about their desires in terms of preferences and help them order their preferences.
- Come to court with solutions and options and do the homework necessary to support the options.



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Tips for Attorneys Representing DFPS

- Take the time to learn how to pronounce your client(s) name(s). Do not take for granted that using their title will suffice.
- Get to know the decision makers on your case. Do not staff/prepare for a hearing without the core participants.
 - Caseworker, Supervisor, Program Director (PD), etc.
- Determine if the DFPS is amenable to alternative solutions.
- Be prepared for objections commonly used by opposing counsel.



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Know Your Witnesses

Create witness list that includes all persons you intend to call during the hearing:

- Case worker(s)/Supervisor(s)
- Mother and Father(s)
- Relatives/Friends
- Law Enforcement
- Medical Professional(s)
- Potential Placement witnesses



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Know Your Case Strengths and Weaknesses

- Where is your client most vulnerable?
- Are there solutions to present?
- Does the Exclusionary Rule Apply?
 - Did the CPI caseworker inform the parent of their rights and provide a written copy of those rights to the parent?
- Can the parties come to a full or partial agreement?
 - After speaking with your client is an agreement feasible?
 - Should there be an agreement?
 - If so, what does an agreement look like?



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Exclusionary Rule Tex. Fam. Code § 261.307(e)

If a person who is the subject of an investigation does not receive the verbal notification and written summary required by Tex. Fam. Code § 261.307, any information obtained from the person, and any other information that would not have been discovered without that information, is not admissible for use against the person in any civil proceeding.



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Discussing Potential Outcomes with Your Client

- How do you secure your client's interest while centering the best interest of the child who is the subject of the case?
- How do you advise a parent that something other than what they want is in the best interest of their child?
- What do you do if your child client wants to return to an unstable environment that is not in their best interest?
- As the agency attorney, how do you advise DFPS if there is a deficiency with their case, but the child may still be in danger if returned home or if no services are put in place?



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Discussing Potential Outcomes with Your Client, cont.

- How do you manage your client's expectations for the hearing?
- Discuss the evidence likely to be presented and the likelihood of the court siding with your client.
- Have your client come up with one to two alternative outcomes that they willing to accept that you can present to the court.
- Discuss whether your client is willing to consider a full or partial agreement.



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Discussing Potential Outcomes with Your Client, cont.

- What about after the hearing?
 - As soon as practicable, go over the court orders with your client.
 - Discuss any potential remedies that may be sought.
 - Discuss the consequences of not following a court order.
 - Make sure your client understands the case timeline.
 - Develop a plan together on how to get to your client's desired outcome in the quickest and safest way possible.



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Is There Still a Need for Participation in Services?

Since the filing of the Petition:

- Are court-ordered services still necessary to ensure the physical health and safety of the child?
- Has the family initiated in services on their own?
- Has the situation corrected itself or has the family self-corrected without the assistance of DFPS' legal intervention?
 - Yes? Seek to dismiss.
 - No? DFPS may wish to proceed. Parent Attorneys may still wish to seek to dismiss and provide a list of resources that your client is able to access without court intervention.



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Is There Still a Need for Temporary Managing Conservatorship?

Since the Initial Removal:

- Has the issue that led to the removal dissipated prior to the adversary?
- Has DFPS made reasonable efforts to eliminate the need for continued removal?
- Are there less invasive measures that can be put in place that will keep the child safe and eliminate the continued need for removal?
 - Yes? Consider a Nonsuit.
 - Somewhat? Discuss whether Temporary Managing Conservatorship (TMC) is needed or if voluntary or court-ordered FBSS services is a better fit.
 - No? Proceed.



27

Special Issue: Indian Child Welfare Act (ICWA)

Does any parent have Native American Heritage? If so, get the information on the record.

- Must serve the tribe and notify of hearings
- Elevates the burden of proof
- Requires Active Efforts
- Additional hearing requirements

This inquiry is an ongoing inquiry throughout the life of the case.



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Questions?

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29

The first part of the paper discusses the importance of understanding the cultural context of the research. It highlights the need for researchers to be sensitive to the values and beliefs of the communities they are studying. This is particularly important in the field of education, where cultural differences can significantly impact learning outcomes.

The second part of the paper focuses on the methodology used in the study. It describes the process of selecting participants and the data collection methods employed. The researchers used a combination of qualitative and quantitative approaches to gather comprehensive data on the topic.

The third part of the paper presents the findings of the study. It discusses the results of the data analysis and how they relate to the research objectives. The findings suggest that there are significant differences in educational outcomes between different cultural groups, and these differences can be attributed to a variety of factors, including socioeconomic status and access to resources.


The final part of the paper discusses the implications of the findings for future research and practice. It suggests that educators and policymakers should take into account the cultural context of their students when designing educational programs. This could involve providing additional support and resources for students from disadvantaged backgrounds and ensuring that the curriculum is culturally relevant.

Identifying, Designating, Preparing, and Presenting Your Witnesses

HOW TO GET YOU AND YOUR WITNESS READY FOR TRIAL

Mauro Valdez, TBLS
DFPS Division Chief
Bexar County District Attorney's Office


Rob Galvin, TBLS
Attorney at Law
Rob Galvin, PC



1


Why is it Important to Identify Potential Witnesses?

- Case/Hearing Preparation
- Discovery Requirements



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Discovery Rules Related to Witnesses



3

Disclosure of Certain Evidence Witnesses Tex. Fam. Code § 262.014(1)

On the request of the attorney for a parent who is a party in a suit affecting the parent-child relationship filed under this chapter, or the attorney ad litem for the parent's child, DFPS shall, **before the full adversary hearing**, provide the name of any person, excluding a department employee, whom the department will call as a witness to any of the allegations contained in the petition filed by the department.



4

Responding to Written Discovery

- Not later than the 30th day before the last day of any applicable discovery period, a party may obtain disclosure from another party of the information or material described by [Tex. Fam. Code § 301.052](#) by serving the other party with a request for disclosure. [Tex. Fam. Code § 301.051](#)
- A party who fails to make, amend, or supplement a discovery response, including a required disclosure, in a timely manner may not introduce in evidence the material or information or offer the testimony of a witness (other than a named party) unless the court finds that there was good cause for the failure or that the failure of the party to do so will not unfairly surprise or unfairly prejudice the other parties. [Tex. R. Civ. P. 193.6\(a\)](#)



5

Required Disclosures Tex. R. Civ. P. 194a

- No later than 30 days before the end of any applicable discovery period, a party may obtain disclosure from another party of the information or material described in [Tex. R. Civ. P. 194a.2](#) by serving the other party a request. [Tex. R. Civ. P. 194a.1](#)
- Child welfare actions are also subject to court orders for certain disclosures and disclosure timelines set by the court.
- Unless subject to an exception, the responding party must serve a written response on the requesting party within 30 days after service of the request. [Tex. R. Civ. P. 194a.3](#)
- Unless otherwise ordered by the court, pretrial disclosures must be made at least 30 days before trial. [Tex. R. Civ. P. 194.4\(b\)](#)



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Discovery Regarding Testifying Expert Witness Tex. R. Civ. P. 195a

- A party may request another party to designate and disclose information concerning a testifying expert witness only through a disclosure request served under [Tex. R. Civ. P. 194a.1](#) or a deposition or report permitted by [Tex. R. Civ. P. 195a](#). [Tex. R. Civ. P. 195a.1](#)
- Unless otherwise ordered by the court, ***a responding party seeking affirmative relief must provide the information requested under [Tex. R. Civ. P. 194a.2\(f\)](#) 90 days before the end of the discovery period.*** [Tex. R. Civ. P. 195a.2](#)



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Identifying Witnesses



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Identifying Witnesses

You should be able to identify potential lay and expert witnesses in your child welfare case from the following:

- Your client
- Reviewing the Affidavit and Statutory Court Reports
- Service Plans
- FTM, FGCs, PCs
- De-ID file
 - **Practice Tip:** Make a discovery request early on in the case for a copy of DFPS' De-Identified file. Follow up on supplementation of discovery.
 - **Practice Tip:** The De-ID file can be a treasure trove of information. Mine it thoroughly.



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Identifying Lay Witnesses

- Relatives
- DFPS Caseworkers/Employees
- Employers
- Neighbors
- Teachers and Counselors
- Foster Parents/Kinship Placement
- CASA
- Coaches/Extracurricular Sponsors
- Mentor (Big Brothers, Big Sisters)
- Clergy
- Community Supports
- Substance Abuse Counselor/Sponsor



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Making Contact with Lay Witnesses

- All attorneys in a child welfare case should be familiar with the CVS (or SSCC) caseworker assigned to the case.
 - Attorneys representing DFPS should be meeting with the caseworker on a regular basis and prep them to testify.
 - Other attorneys should reach out to the caseworker if they intend to call them as a witness in support of their position.



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Tips on Establishing a Relationship with Other Lay Witnesses

- If a relative or friend of your client, consider asking your client to introduce you or to let them know you will be calling before reaching out.
- If a professional such as a teacher, law enforcement officer, etc. provide a brief synopsis of who you are and why you are reaching out to them. Let them know that their testimony is important to the outcome of the case.
- Meet them in their own environment.
- Explain their importance in helping to tell your client's story
 - There is more to the parent than the DFPS' allegations
 - Child's needs
 - Witness can testify to changes over time (good and bad)
 - Your client needs an ally



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Identifying Expert Witnesses

- General types of Experts:
 - The Academic (the Professor)
 - The Experienced (the Beekeeper)
- And Either Type Can Be Further Classified as:
 - The Non-Retained (the Treating Doctor)
 - The Retained/Contracted (the Hired Gun)



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Types of Experts Most Commonly Utilized in Child Welfare Cases

- Treating doctors
- Psychiatrists/Psychologists
- Therapists
- Caseworkers (?)



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Finding Experts for the Defense

Where do defense attorneys find their own expert?

- Academia
- Practitioners
- Service Providers; referrals
- Expert search services and directories
 - www.tasanet.com
 - www.ims-expertservices.com
 - www.forensicgroup.com
 - www.roundtablegroup.com
 - www.medquestltd.com
 - www.jurispro.com
 - www.amfs.com
 - www.expert4law.org



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Designating Expert Witnesses



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Does the Witness Need to be Recognized as an Expert for the Purpose of their Testimony?

- Tex. R. Evid. (TRE) 701: Testimony by a Lay Witness
- If the witness is not testifying in their capacity as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are:
 - (a) Rationally based on the witness' perception and
 - (b) Helpful to clearly understanding the witness' testimony or to determine a fact in issue.

Practice Reminder: An expert witness does not have carte blanche to repeat hearsay.



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Qualifying Expert Witnesses

- Steps to take
- Timing
- Practice Tips
 - What if the other side objects?
 - What if you are unsuccessful in getting your expert qualified?
- Back-up Plan



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Preparing and Presenting Witnesses



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Preparing and Presenting Your Witnesses

- Engage them early
- Interview them ahead of time
- Check past history, references, background, etc.
- Inquire about expert fees and file any motions need for payment
- **Practice Tip for Defense Attorneys:** No later than 6 months into the case, file a motion requesting that the court authorize the release of funds to retain your own expert.



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Preparing Your Lay Witnesses to Testify

- General Tips...
- Preparing your client:
 - Attorneys representing DFPS, make sure to prep the INV and CVS/SSCC caseworkers. If an HST or other caseworker covered an important event you need testimony on, make sure to call that person and have them prepped.
 - If your client is the parent, DFPS will probably call them to the stand as their first witness. Make sure to prep them for this!
 - If your client is the child, and they wish to testify, make sure fully discuss this with them and prepare them for the stand. If applicable, consider filing a motion to allow for alternatives such as closed-circuit testimony, etc.
- Tips on preparing your client...



21

Making Contact with Expert Witnesses

- They will likely be difficult to schedule. Get on the calendar and make sure you don't have any potential conflicts.
- Review the report and write out your questions.
- Practice Tip: At your first meeting, let them speak about the case uninterrupted.
 - Be ready to jot down notes quickly.
 - Ask any follow up questions.



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Preparing Your Expert Witnesses to Testify

- Explain the trial process to your expert.
- Remember that your expert's language is not the same as your child welfare language (have them explain in laymen's terms for the record—and especially if you have a jury!)
 - It is okay for experts to use big terms and acronyms, but remind them to explain these terms
 - Be prepared to make them do so on both direct and cross



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Preparing Your Witnesses to Testify

- Experts come from their specialized world and are used to being at the top of the ladder there—try to make them comfortable in the legal world (even though they will not be in charge).
- Experts and Lay Witnesses: a lot of their behavioral/emotional response is from their anxiety.
 - Practice Tips for attorneys in case your witness gets nervous or reactive on the stand...



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Preparing Your Witnesses to Testify, cont.

- Ease your witness' anxiety
 - Meet with them prior to testifying!
 - Try to do this in the courtroom, if possible, to get them familiarized/comfortable.
 - Otherwise, meet wherever the witness is comfortable.
- Explain some basics of legal procedure: When the witness is not on the stand, where will they be, when the witness can/cannot respond to a question, who will be questioning them, what direct, cross, and redirect are.
 - Most of your lay witnesses (even law enforcement or caseworkers) will have little to no experience taking the stand.
 - Don't assume experts have experience or an understanding of the trial process.



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Preparing to Present Your Witness at Trial

- Discuss your theory of the case with the witness and how their testimony fits into that theory.
- Review the expert's opinion and the expert's basis for that opinion.
 - Educate the expert to limit discussion to only a FEW pieces of evidence-based literature.
 - Remind expert to explain things in simple terms (for example, in non-medical language).



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Preparing to Present Your Expert at Trial

- Ensure that the expert is aware of facts/positions of the opposing side—experts hate surprises as much as you do!
 - Discuss competing theories or possible competing opinions by other experts. Provide any written reports/diagnosis provided by opposing experts.
 - Prepare expert to debunk alternative theories of the case:
 - Is the opposing literature not evidence-based? Is it not appropriately peer-reviewed?
 - Consider addressing during direct examination.



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27

Questions?

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Motion Practice in Child Welfare Cases

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469th Judicial District Court
Collin County, TX

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Family Justice Director
Williamson County Attorney's Office

Amanda Lockhart, TBLS
Attorney at Law
Palmos, Russ, McCullough, & Russ, LLP


Tiffany Reedy
Managing Counsel, CPS and Elder Law Division
Harris County Attorney's Office



1

Why is Motion Practice Important?


- To obtain relief/action for your client.
- To positively build attorney-client relationship/trust.
- To cut through bureaucracy and red tape.
- To keep the Judge informed.



2

When is it Necessary to File a Motion?

- When the court requires it of you.
- When there is not agreement among all the parties.
- When you believe that the Court will not adopt the agreement of the parties (not the subject of an MSA).
- When you want a return or placement change.
- When you want a discovery response (Motion to Compel, Motion to Enforce, Motion for Sanctions).



3

When is it Necessary to File a Motion, cont.

- When you want to conduct a deposition or request interrogatories (if required by the local Discovery Control Plan).
- When an order has been ignored or violated (Motion for Enforcement/Motion for Contempt).
- In order to preserve error.



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The Procedural Foundation for a Motion Tex. R. Civ. P. 21(a)

Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, must be filed with the clerk of the court in writing, must **state the grounds** therefore, must **set forth the relief or order sought**, and at the same time a true copy must be served on all other parties, and must be noted on the docket.



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The Basics of Drafting a Motion: Planning

- Legal Research
 - Procedural Rules
 - Substantive Law
 - Policy
- Facts
 - What Facts are Necessary under the law?
 - How must you/will you provide those facts/evidence?



6

The Basics of Drafting a Motion: Format

- Super Brief Summary (facts, law, relief)
- Background Facts
- Grounds for Relief
- The Relief Sought



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The Basics of Drafting a Motion: Next Steps

- Confer with parties – include a certificate of conference in the motion
- Remember a Certificate of Service
- E-file and serve
- Get a hearing!
 - Virtual vs. In Person?
- Prepare your ideal order



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Answers and Counterpetitions

- Parents' Attorneys
 - Avoid Default
 - BUT – was client served?
- Children's Attorneys
 - [Tex. Fam. Code 107.003\(a\)\(1\)\(F\)](#)
- Frames the issues for trial – relief that can be granted



9

9

Requests for Certain Disclosures Tex. Fam. Code § 262.014

On request of the attorney for a parent who is a party in a suit affecting the parent-child relationship, or the attorney ad litem for the parent's child, DFPS shall, before the full adversary hearing provide:

- The name of any person, excluding a department employee, whom the Department will call as a witness;
- A copy of any offense report relating to the allegations contained in the petition that will be used in court to refresh a witness' memory; and
- A copy of any photograph, video, or recording that will be presented as evidence.



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Motions to Consider Filing Throughout the Life of a Child Welfare Case

- Change in placement
- Changes to visitation
- Additional/change to services for child or parent
- Requests for money for experts/Request for second opinion
- Request for Monitored Return
- Request for Extension



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Motions to Consider Filing Throughout the Life of a Child Welfare Case, cont.

- Request for No Reasonable Efforts Finding
- Petition for Intervention/Mtn to Strike
- Motion for De Novo Review/Mandamus Petition
- Request for Mediation
- Motion to Confer with Child
- Motion for Substituted Service/Citation by Publication



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Pre-Trial Motions to Consider Filing

- Motion in Limine
- Motion to Exclude
 - Evidence
 - Experts
- Motion to Equalize Strikes/Time
- Motion to Use Forensic Interview in Lieu of Child's Testimony



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Practice Tips



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Practice Tips for Everyone

- Know whether your motion requires solely legal argument only or if it will need to be supported by testimony.
- Make the court aware if you have an agreed motion.
- Don't be afraid to create a motion that doesn't exist.
- Don't over analyze your motion.



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Tips for Attorneys Representing Parents

- Be a Lawyer! BE, BE A LAWYER!!!
- You will never get your client to follow your advice if they do not trust you or see you advocating for them – crafting a written motion and seeing it be argued can help cure this.
- You do not have to be the only advocate for your client's position, work on finding common ground with other parties.



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Tips for Attorneys Representing Children

- You are a lawyer with a client; act like one
- Are your client's needs being met? If not, do something about it!
- Consider your client's trauma in the context of anything you are told about behavior.
- Check with multiple sources on issues/compare stories
- Trust your client even while considering stage of development/trauma
- Normalcy is important too



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Tips for Attorneys Representing DFPS

- Even though DFPS is the managing conservator, DFPS is still a litigant.
- Staff the case with the client; be familiar with the case and the court file.
- Ensure the necessary evidence and witnesses are available before the hearing.
- Ensure motions are filed timely.
- Amend pleadings, as necessary.



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Tips from the Bench

- With some exceptions, it is preferable that you file a written motion and get a setting for it.
- Confer with the other parties on the case before filing your motion.
- Circulate case law you plan to argue ahead of time.



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Questions?

- | | |
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Conducting a Successful Direct Examination

The Honorable Elizabeth Watkins, TBLS
Associate Judge
Child Protection Court of the Concho Valley



1

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Key to Direct

- PREP.
- PREP again.
- Then prep again.
- You MUST know more than your witness.
- You need to talk often with court coordinator and reporter:
 - How do they want evidence introduced?
 - What can be agreed upon by the parties ahead of time?
 - In a digital world, a pre-trial hearing is a must.



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What's the Point?

- Avoid testimony that doesn't seem to go anywhere.
- Testimony should have a beginning, middle, and end.
 - Think about the testimony you want to offer through each witness.
 - Do not call a witness if they do not have something to add.
- Make a list of all witnesses, in the order you plan to offer them, and the evidence you plan to introduce through them.
- Keep your list close while asking questions, refer to it, mark off as you go, and review before passing.
 - Don't count on other attorneys asking questions. Get everything you need covered with your initial questions.



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LISTEN

- Even if you have prepped with your witness, if you don't listen to your witness while they testify, you may lose valuable bonus points.
- Follow the flow of the story, even if interrupted. Always circle back to your point.
- WATCH – have another attorney/assistant with you to watch the witness and Judge/Jury – are they paying attention?
- ASK questions – DO NOT let the witness do the opposite of leading – narrative (The Expert Special).




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To Lead or Not to Lead...

Issues with direct:

- Your witness won't say what you want/expected them to. 
- You know what you want to draw out of them because you've prepped them. Don't lose your point. Try to pull them back to what they told you in prep.
- Your witness gets cut off by an objection.
 - **Know which of your questions may draw an objection** and have your response ready (and ask judge to respond). If the objection is sustained, be ready to rephrase or ask additional questions to illicit the testimony you need. Next Level Lawyering – Have a brief ready on the point...ex.: Witness pleading the 5th
- If the objection is overruled, restate your question to your witness.



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Do Not Avoid the Bad Stuff

- Know ahead of time what potential problems exist with the witness.
 - e.g. parent tested positive; claims of caseworker not returning calls; therapist seems one-sided; foster parents just after a kid
- What is your spin?
- Say it first, then it's not the worst.



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Your Direct...Their Cross

Prepping your witness for direct includes prepping your witness for cross examination.

- "Loaded Questions"
 - Would you agree with me that...
 - Isn't it true that...
- Teach them to be comfortable with silence – if the answer is a simple "No," it's ok to say that and wait, a rambling witness is NEVER good.
- As a parent's attorney consider recalling your clients in direct, don't leave them hanging.
- If you know you have a good fact, but want to introduce it on direct, make sure you let court/jury know:
 - If your client just got killed on stand, ask some benign question, then end with a statement like "Your Honor, I would like to reserve my questions for the Respondent's case in chief."



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Start Big, End Big

- Having supremely prepped your case, you know the big points: Make them and get out. Save the best points for closing!
- DO NOT be afraid to ask for a minute to review your notes before you release your witness.
- Prepare for cross, LISTEN, watch, and be ready to re-direct your client.
- DO NOT let the witness go down in flames.



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Questions?

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Conducting a Successful Cross-Examination in a Child Welfare Case

Amanda Lockhart, TBLS
Attorney at Law
Palmos, Russ, McCullough, & Russ, LLP

Hon. Charles Griffin, TBLS
Associate Judge
Child Protection Court of the Gulf Coast



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What is Cross Examination?

- It **is** the engine for getting to the truth.
- It **is** an art form.
- It is neither **cross**.
- Nor an **examination**.



2

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Do You Really Want to Cross Examine this Witness?

Option 1: "I have no questions, Your Honor."

- What???
- Why would you NOT conduct a cross examination of a witness?
 - Did the direct examination hurt your case?
 - Did the witness make obvious misstatements or even lie?
 - Was the witness sympathetic or charming?
 - Who is the witness? Elderly, very young, cognitively delayed, a grandma, or a nun?



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Other Considerations

- How important is the witness to your case or the opposing party's case?
- Will the judge, jury, or client think you are conceding the point?
- Did you invoke The Rule?
- Can you control the witness?
- Can you impeach the witness?
- Do you want to give the witness the chance to repeat testimony or improve upon it?



4

Do You Really Want to Cross Examine this Witness, cont.

Option 2: Take the Witness on Cross



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Forms of Cross Examination

There are two basic forms:

1. Destructive Cross: Reducing the credibility of the witness or the persuasive value of the opposition evidence.
2. Supportive Cross: Bolstering the questioner's theory.



6

How to Conduct a Cross-Examination

- You should ask MOSTLY leading questions.
- Voice inflection can turn a statement into a leading question.
- Avoid using “tag lines” with every question. “correct?,” “isn’t that a fact?,” “wasn’t he...,” or “weren’t they...?”
- You should ALMOST NEVER ask: “who, what, when, where, or why,” or the worst: “please explain.”
- Listen to the answer.
- STOP TALKING.



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Don’t Polish the Diamond and Don’t Guild the Lily

- Jurors may not be as impressed by inconsistencies as you are. They may be willing to let things go. We may be thinking “ah-ha!” and they may be thinking, “Aah, poor thing.”
- Save a few questions or the “big” question for the very end and end on a high note.
- Don’t become a victim of asking one question too many.



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Keep Calm and Stay in Control

Tips for dealing with a hostile witness:

- Control your tone and emotions.
- Summarize the answer.
- Ask the SAME question AGAIN.
- Help the witness walk off the cliff.
- Expose bias.
- Consider looking to the Court for help.
- Do not sweat the small stuff.
- STOP TALKING.



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Cross Examining Experts

General Points:

- **PREPARE !!!!**
 - You **MUST** talk to the “other expert” ahead of time.
- Recognize that you probably **WILL NOT** have the Tom Cruise-Jack Nicholson moment (“A Few Good Men”).
- Don’t cross examine without an objective. Supportive v. Destructive.
- Don’t play on the expert’s field.



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10

Questions?

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Hon. Charles Griffin

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The first part of the paper discusses the importance of understanding the cultural context of the research. It highlights the need for researchers to be sensitive to the values and beliefs of the communities they are studying. This is particularly important in the field of health research, where cultural differences can significantly impact the effectiveness of interventions.

The second part of the paper focuses on the methodology used in the study. It describes the process of selecting participants and the methods used to collect data. The authors emphasize the importance of using a mixed-methods approach, which allows for a more comprehensive understanding of the research topic.

The third part of the paper presents the results of the study. It discusses the findings related to the cultural beliefs and practices of the study population. The authors note that there are significant differences in health beliefs and practices between different cultural groups, which has implications for the design and implementation of health interventions.

The final part of the paper discusses the implications of the findings for future research and practice. It suggests that researchers should take into account the cultural context of their research and work to develop interventions that are culturally appropriate and effective.

Preparing for Impeachment of a Witness

USING PRIOR INCONSISTENT STATEMENTS
TO YOUR ADVANTAGE

Diane Sumoski, TBLS
Clinical Professor of Law
SMU Dedman School of Law



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1

What is Impeachment of a Witness?

“To call into question the veracity of a witness, by means of evidence adduced for such purpose, or adducing of proof that a witness is unworthy of belief.” Black’s Law Dictionary



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It’s about Credibility – Who Do You Believe?



3

3

How to Impeach – Sort Of!



4

Five Methods of Impeachment

- Prior inconsistent statement; [Tex. R. Evid. 613\(a\)](#)
- Biased against a party or has pecuniary interest in the case; [Tex. R. Evid. 613\(b\)](#)
- Attack the character of the witness by proving generally unworthy of belief (prior convictions or through character witnesses); [Tex. R. Evid. 404\(a\)\(4\)](#); [Tex. R. Evid 607-609](#)
- Attack ability to perceive, remember, or recount accurately; and
- Specific contradiction (bring another witness)



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Our Focus: Impeachment Through Two Types of Inconsistencies

PRIOR INCONSISTENT STATEMENT

Today, you said: "The sky was blue on January 1"

On January 1, you said: "The sky is an odd shade of red today."

IMPEACHMENT BY OMISSION IN PRIOR STATEMENT

Oops...well I might have forgotten – it has been a while.



6

But First Things First: Should You Impeach?



- [Tex. R. Evid. 611\(b\)](#): “A witness may be cross-examined on any relevant matter, including credibility.”
- Rule appears to allow free reign in attacking credibility without the [Tex. R. Evid 401](#) constraints that may otherwise apply.
- But... should you?



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Considerations

- Do you have a good faith basis?
- How significant is the inconsistency? Is it really a “material” impeachment matter?
- How will it look to the jury or judge? How will it impact your courtroom presence?



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Impeachment by Prior Statements

So, you’ve thought about it (usually in the heat of the moment at trial) and you want to impeach on a point. Let’s get down to the details!



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BASIC PREMISE: It has to be the Prior Statement of the Witness, Not Someone Else.



- Don't forget your hearsay rules though!
- Some statements, even if repeated "by someone or somewhere else" are not hearsay or fall within hearsay exceptions.



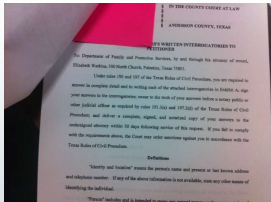
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Where to Find Impeachment Material

DISCOVERY

THE CASE FILE



Texas Department of
Family and Protective Services



EMPOWER
CHILD, FAMILY, COMMUNITY



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Sources of Impeachment Material

PREVIOUS COURT HEARING

THE INTERNET

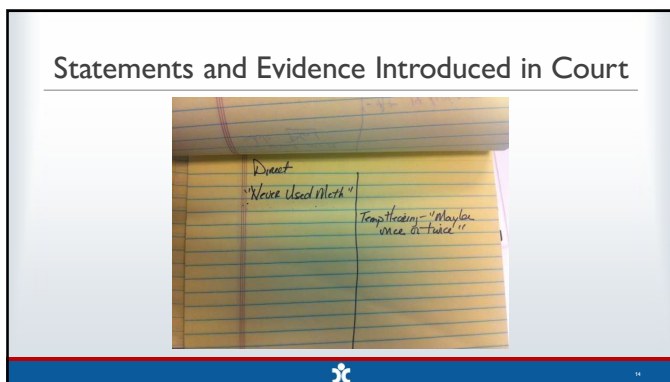


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Tex. R. Evid. 613 (a) – Prior Inconsistent Statements

1. Foundation Requirement: Tell the witness the content of the statement, time and place and person to whom it was made.
2. If written, do not need to show it to the witness at the time (but show to opposing counsel upon request).
3. Give the witness the opportunity to explain or deny (but, remember, redirect can be just such an opportunity).
4. If witness unequivocally admits the statement, no extrinsic evidence allowed (does not apply to admissions of a party opponent).

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Only Ask Leading Questions

A leading question is one that suggests the answer to the question in the question.



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The Three Cs of Impeachment

- Commit
- Credit
- Confront



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Let's Apply All of That: You are at Trial!



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Commit/Confirm the Witness to the In-Court Statement

“Your testimony **today** during direct examination was that you **didn’t use** methamphetamine during your pregnancy, is that true?”



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Credit the Prior Inconsistent Statement

- “Let’s go back to June 14; you were at a temporary hearing before this court, right?”
- “You remember that the judge swore you in?”
- “Ms. Watkins asked you if you used methamphetamine during your pregnancy, right?”
- “You know the court was relying on you being truthful, isn’t that right?”



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Confront the Witness with the Prior Statement

Sworn testimony at deposition or prior judicial proceeding:

“When Ms. Smith asked you during the hearing on June 14, if you had used methamphetamine during your pregnancy, you said “once or twice at a party?”



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Explain or Deny

- You must give the witness an opportunity to explain or deny the prior statement. [Texas Rules of Evidence 613\(a\)](#)
- But see the Comment to the Rule: "...this requirement is not imposed on the examining attorney. A witness may have to wait until redirect examination to explain a prior inconsistent statement. . . . But the impeaching attorney still is not permitted to introduce extrinsic evidence of the witness's prior inconsistent statement or bias unless the witness has first been examined about the statement or bias and has failed to unequivocally admit it."



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If the Witness Admits the Impeaching Statement, You are Done

Lawyer: "When Ms. Smith asked you during the hearing on June 14, if you had used methamphetamine during your pregnancy, you said "once or twice at a party?"

Witness: "Yes, I did."

Lawyer: "Thank you."



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But if the Witness Denies Making the Statement, Extrinsic Evidence of it is Permitted

Lawyer: "Let's look together at page 26, line 17 of the transcript from that hearing. I'll read the question and you read the answer."

Lawyer (Question): "Did you use methamphetamine during your pregnancy?"

Witness (Reading Answer): "Maybe once or twice at a party."



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Impeachment by Omission

Same steps:

- **Commit/confirm** the witness's in-court omission.
- **Credit the omission** in the prior testimony or statement.
- **Confront** the witness with the omission.



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Impeachment by Omission, cont.

Commit/Confirm

- "Your testimony today, Mr. CPS investigator, is that Tommy, the oldest child, had a large bruise on his forehead on June 12th when you interviewed Tommy, agreed?"

Credit

- "On June 13th, you wrote a narrative report about the interview, right?"
- "That was just one day after the interview?"
- "And you knew that your report was very important in determining what could happen to this family?"



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Impeachment by Omission, cont.

Confront

- "Yet, you didn't say anything about seeing a bruise on Tommy in your June 13th narrative report, right?"



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What to Do if You Know Your Witness Will be Faced with Impeachment

- Prepare your witness **beforehand** for possible impeachment by opposing counsel.
- Air your own **dirty laundry** on direct.
- Assure your witness that you will help on re-direct.
- Tell your witness **not to get hostile**.



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The More Likely Scenario: Rehabilitation of Witness After Surprise Impeachment

- “That day you gave the statement, how were you feeling?”
- “Did you understand the question?”
- “Were you represented by an attorney?”
- “Was your deposition/prior testimony accurate?”
- If the impeachment wasn’t to a critical fact, ignore it.



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Questions?

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Laying Your Evidentiary Foundation

Offering Exhibits Commonly Used In Child Welfare Cases

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Laying Your Evidentiary Foundation

CERTIFIED COPIES

2

Public Records or Reports: Texas Rules of Evidence 901(a)(7) Certified Copies

- Evidence that a writing is from the public office where items of this nature are kept.
- These records are self-authenticating; they do not require a sponsoring witness or business record affidavit.
- Usually entered into evidence as certified copies of public records: Texas Rules of Evidence (TRE) 902(4).
- Examples: criminal indictments/judgments/sentences, pen packets, child support records, orders/Court of Continuing, Exclusive Jurisdiction (CCEJ)/Paternity Registry/Family Plan of Service (FPOS), etc. from your child welfare case.

3

Laying Your Evidentiary Foundation

PHOTOGRAPHS

4

Foundation for Admitting Photographs

Elements:

- Photograph must be relevant.
- Witness is familiar with the scene or item in the photograph.
- Witness is familiar with the scene or item when the photograph was taken.
- Photograph is a "fair and accurate" depiction of the scene or item as it appeared on the date the photograph was taken.



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Tips for Admitting Photographs

- Testimony from witness PRIOR to requesting admission of photograph is CRUCIAL.
- Must tailor questions to witness, keeping in mind the photograph you are trying to admit.
- Admission of the photograph does NOT have to be through the person who took the photograph.



6

Example: Entering Photos from Doctor

- Doctor just finished describing the bruises she observed on the child's abdomen during the examination of the child. Testimony included a date and time of doctor's exam.
- Common issues encountered when attempting to admit photos:
 - Showing the photograph to the jury before it is admitted;
 - Asking the witness to describe items in the photograph PRIOR to admission;
 - Thinking the witness must have taken the photograph; or
 - When attempting to admit photos of injuries, photographs often don't show the person's face. You must obtain testimony from witness to establish that the photographs are of that specific person and of that person's injuries.



7

Example: Entering Photos from Doctor, cont.

- Step 1. Show the exhibit to opposing counsel.
- Step 2. Ask permission to approach witness.
- Step 3. Show exhibit to witness.
- Step 4. Key Words – fair and accurate depiction.

Q. Dr. Jones, I'm showing you Petitioner's Exhibit 1.

Q. Are you familiar with the scene depicted in Exhibit 1?

Q. Is this photograph a fair and accurate depiction of the scene you observed during your examination?



8

Example: Entering Photos from Doctor, cont.

- Step 5. Offer Exhibit into evidence.
- Step 6. Opposing counsel may object to admission.
- Step 7. Respond to any objection made by opposing counsel.
- Step 8. Judge will rule on objection and either sustain or overrule the objection. If the objection is sustained, the Exhibit will not be admitted so make an offer of proof (addressed in the presentation on objections).
- Step 9. If objection is overruled, the Judge will state that the Exhibit is admitted.
- Step 10. In a bench trial, hand the exhibit to the Judge. In a jury trial, ask permission to publish the exhibit to the jury and hand to the jury after the Judge gives permission to do so.



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Laying Your Evidentiary Foundation

EMAIL AND TEXT MESSAGES

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Foundation for Email or Text Message

- Emails and text messages are authenticated by the sender's email address or phone number and by internal characteristics within the context of the message.
- The authentication may also include information external to the contents such as it was found on the person's computer.
- The best practice for admitting messages is to break them down into a series of messages and discuss the reasons why the witness thinks the particular person sent the message.
 - "I believe Mom sent me this email because she was upset about her cancelled visitation."



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Example: Entering Email

- Q. Ms. Caseworker, I'm showing you Petitioner's Exhibit 2. Do you recognize it?*
- Q. What is it?*
- Q. Is Petitioner's Exhibit 2 an exact duplicate of the contents of the email you received on your computer/phone?*
- Q. Do you recognize the email address of the sender? How?*
- Q. Do you recognize the name at the end of the message?*
- Q. Do the contents of the email refer to any previous communication you had with this person?*
- Q. Is the information in the contents known to this person?*



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Laying Your Evidentiary Foundation

SOCIAL MEDIA POSTS

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Foundation for Social Media Post

- Foundation is similar to that of an email or text message.
- Identify the person has an account/page on the social media platform (ex. Facebook, "X," etc.)
 - Profile picture is one way to do so.
- The witness authenticating the exhibit may testify to the picture or post if they have information about the contents of the post that are known to them.



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Example: Entering Facebook Post

- Q. Mom, I'm handing you what's been marked Petitioner's Exhibit 3; do you know recognize it?
- A. Yes.
- Q. What is it?
- A. It's a copy of my Instagram, Facebook, TikTok page.
- Q. How do you know it's your social media?
- A. It has my profile picture/screen name and there are photos of me on the printout.



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Laying Your Evidentiary Foundation

AUDIO CLIPS

16

Laying the Foundation for Audio Clips

Texas Rules of Evidence (TRE) 901: Requirement of Authentication or Identification

(a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

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Steps for Laying the Foundation for Audio Clips

- Q. Did Respondent Mother leave you a voicemail message?*
- Q. On what date and time did Respondent Mother leave you that message?*
- Q. Have you listened to the voicemail recording?*
- Q. Was this recording left on a device capable of making an accurate recording?*
- Q. Is that message saved on your phone as a digital recording?*

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Example: Foundation for Audio Clips

- Q. Do you have your phone and the original voicemail message with you?
- Q. Have you provided a digital copy for admission as an exhibit in court?
- Q. Are you competent to operate the recording device that you used?
- Q. Is the recording an accurate representation of the voicemail message that Respondent Mother left you?
- Q. Is this an unaltered and unedited recording?

* Practice Tip: have the original recording available also.



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Example: Foundation for Audio Clips

- Q. Can you identify the voice on the recording as Respondent Mother?
- Q. Is Petitioner's Exhibit 4 the taped recording you made of that voicemail message?

At this time, offer the Exhibit and ask to play the message.



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Laying Your
Evidentiary Foundation

VIDEO CLIPS

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Laying the Foundation for Video Clips

- Very similar to audio clips and photographs.
- TRE 901 applies.
- Generally, the proponent needs to be able to identify the scene depicted, the voices recorded, and that the video is an original or a copy with no deletions or additions.
- Most importantly, it must be an accurate depiction of the scene and any conversation recorded.



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Steps for Laying the Foundation for Video Clips

- Q. Did Respondent Mother have supervised visits with her child at your office?*
- Q. Were those visits recorded on video?*
- Q. Is it a standard practice to video supervised visits?*
- Q. Are you competent to operate the video recording device that you used?*
- Q. Was this video recording made on a device capable of making an accurate recording?*



23

Example: Foundation for Video Clip

- Q. Have you provided the original video or an unaltered copy of the original video for us today?*
- Q. Is the copy you provided a digital copy of the video for admission as an exhibit in court?*
- Q. On what day and time was this video recording made?*

* Practice Tip: have the original recording available also.



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Example: Foundation for Video Clip

- Q. Can you identify the voices heard and people seen on the video?
- Q. Is the video recording an accurate depiction of the visit which Respondent Mother had with her child that you supervised?
- Q. Is Petitioner's Exhibit 5 the video recording you made of Respondent Mother's visit with her child?

At this time, offer the Exhibit and ask to play the message.



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Laying Your Evidentiary Foundation

RECORDS

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Records of Regularly Conducted Activity: The Texas Rules of Evidence (TRE) & Their Purpose

The Rules:

- TRE 803(6);
- TRE 803(7);
- TRE 806(8);
- TRE 806 (10); and
- TRE 902(10).

Purpose: These rules are authentication provisions, meant to establish the trustworthiness of the record.



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3 R's

Exhibits should follow the 3 R's:

- **Relevant** (TRE 401) - does it prove or disprove something in issue
- **Reliable** - business and public records
- **Right** (TRE 403)

* Probative value is not outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury.



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Authentication: Texas Rule of Evidence (TRE) 901

- Identification
- A condition precedent to admissibility
- Satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be



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Records of Regularly Conducted Business

What "records" are covered?: TRE 803(6)

- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses.



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Records of Regularly Conducted Activity

Methods for authentication: TRE 803(6)

- Custodian of records for the business.
- Affidavit.
- "Other qualified witness" is any person who can credibly testify that the records satisfy the requirements of this exception.



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Laying Foundation Through a Witness

Request permission to approach the witness.

Have exhibit marked by court reporter if not already pre-marked.

Show exhibit to opposing counsel.

Show exhibit to the witness and ask:

- *I am showing you what has been marked as Petitioner's Exhibit 6.*
- *Do you recognize it?*
- *What is it?*
- *How do you know what it is?*



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Laying Foundation Through a Witness, cont.

- *Are you the custodian of records/employee/owner of _____ (business/hospital)?*
- *Are you familiar with the manner in which its records are created and maintained?*



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Laying Foundation Through a Witness, cont.

- Are these the original records or exact duplicates of the original records?
- Is it the regular practice of the business activity to make the record (is it a routine record)?



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Laying Foundation Through a Witness, cont.

- Were the records made at or near the time of the event/condition/opinion/or diagnosis set forth? OR Is it the regular practice of _____ to make this type of record at or near the time of each act/ event/ condition/ opinion/or diagnosis set forth in the record?
- Were the records made by, or from information transmitted by, persons with knowledge of the matters set forth...



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Laying Foundation Through a Witness, cont.

OR

- Is it the regular practice of _____ for this type of record to be made by, or from information transmitted by, persons with knowledge of the matters set forth in them?
- Did the person with knowledge act in the regular course of business or have a business duty to report?
- I offer into evidence Petitioner's Exhibit 6.



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Laying Foundation By Affidavit: Texas Rules of Evidence 803(6)(7)

Any record or set of records or photographically reproduced copies of such records, which would be admissible under TRE 803(6) or (7) are admissible in evidence upon the affidavit of the person who would otherwise provide the prerequisites of TRE 803(6) or (7).



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Laying Foundation By Affidavit: Texas Rules of Evidence 902(10)

- The record and accompanying affidavit must be served on each other party to the case at least 14 days before trial by any method permitted by Texas Rule of Civil Procedure 21(a).
- The affidavit must conform to the substance of the model affidavit in TRE 902(10)(b).



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Challenges to Foundation:

- Hearsay: TRE 801(a)-(d)
- Authenticity: TRE 901
- Relevance: TRE 401
- Personal Knowledge: TRE 602
- Prejudice: TRE 403
- Original: TRE 1002



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Laying Your Evidentiary Foundation

HEARSAY STATEMENT OF CHILD ABUSE VICTIM

40

Foundation for Hearsay Statement of Child Abuse Victim

In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:

- 1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
- 2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.

Texas Family Code § 104.006



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Foundation for Hearsay Statement of Child Abuse Victim, cont.

What matters is the child's age at which the statement is made, not the child's age at trial. *In re K.L.*, 91 S.W.3d 1, 15 (Tex. App.—Fort Worth 2002, no pet.).



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Foundation for Hearsay Statement of Child Abuse Victim, cont.

A trial judge's "common sense" that making an eight-year-old confront in open court the man who abused her is insufficient to support the finding that the statement in lieu of the child's testimony is necessary to protect her welfare. *In re S.P.*, 168 S.W.3d 197, 208 (Tex. App.—Dallas 2005, no pet.).



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Laying Your Evidentiary Foundation

DRUG TEST RESULTS

44

Drug Test Results

Ideally you would have 3 experts to get drug test results admitted:

- A chain of custody witness;
- An expert to establish the theory's validity (reliability) and proper technique to implement the theory (test protocol); and
- An expert to testify to the test results (usually the technician who tested the sample).



45

Drug Test Results, cont.

- However, if you have the Supervisor/Director of the lab, you will only need two witnesses.
- Supervisor/Director can testify from business records (litigation packet) as to conduct and results of the test and that the test performed was standard and accepted for that substance.
- The person who administered the test is not enough to prove up the drug test result without the expert.



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Drug Test Results, cont.

- Drug test may not be admissible if the source of information or method/circumstances of preparation indicates a lack of trustworthiness.
- Error will be found unless:
 - The person conducting the test is qualified, and
 - Type of test is standard and accepted for the substance tested.



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Drug Test Results, cont.

- Drug test results are not necessarily reversible if there is other evidence of the parents' drug use such as their admissions. *K.C.P.*, 142 S.W.3d 574, (Tex. App. – Texarkana 2004).
 - *K.C.P.* also discusses that laying this foundation is pertinent in termination because of the higher burden of clear and convincing evidence.
 - It appears that it might not be the same in Adversary Hearings because of the low burden of proof.
- See *A.T.*, No. 02-04-00355-CV, 2006 WL 563565 (Tex. App. – Ft. Worth Mar. 9, 2006) as to hospital records.



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Drug Test Results, cont.

E.B., No. 11-19-00001-CV, 2019 WL 3955974 (Tex. App. – Eastland August 22, 2019) upheld admission of drug screen with proper affidavit by custodian of record that set out the chain of custody, testing procedures, and qualifications of the analysts. The affidavit satisfied TRE 803(6) and 902(10). Furthermore, the court did not read *K.C.P.* to require live testimony.

***There are a couple of cases out there where the courts have held that there is no requirement for expert testimony about drug test results in termination cases. ***

See *In re C.M.-L.G.*, No. 14-16-00921-CV, 2017 WL 1719133 (Tex. App. – Houston [14th Dist.] May 2, 2017, pet. denied); *In re L.G.R.*, 498 S.W.3d 195 (Tex. App. – Houston [14th Dist.] 2016, pet. denied); *In re M.R.D.W.*, No. 14-17-00506-CV, 2017 WL 6045575 (Tex. App. – Houston [14th Dist.] Dec. 7, 2017, no pet.); *In re C.W.*, No. 02-14-00274-CV, 2014 WL 7139645, (Tex. App. – Fort Worth, December 12, 2014, no pet.).



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Drug Test Results, cont.

ITIO K.R.K.-L.H., 671 S.W. 3d 761 (Tex. App. – Beaumont 2023), pet. denied, upheld admission of drug test results based on the business records kept by the custodian of record at the specimen collection facility. The affidavit satisfied TRE 803(6) and 902(10).

- Lab results were from a DHHS certified lab (Department of Health and Human Services), which involved entities and individuals engaged in interstate commerce subject to federal law.
- Business records included reports signed by a certified medical review officer—licensed physician with training in collection procedures—interpreting the results of the testing on the specimens.
- Once the Department established that records were authentic, burden of proof shifted to the parent to prove the source of information, method the records were prepared, or the circumstances behind them “indicate[d] a lack of trustworthiness.” [TRE 803(6)(A-D)]



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Objections To Drug Test Results

- Chain of custody (authentication)
- Hearsay
 - Is the hair strand or urinalysis drug test result a record of regular business activity of the entity that provided the affidavit of business record?



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Objections To Drug Test Results, cont.

- Lack of Proper Foundation
 - Who tested the specimen? Were they properly trained in administering the test? Did they properly administer the test?
 - Were the tests administered standard tests for the particular substance?
 - What test devices were used and were they properly supervised or maintained?
- Possible Prejudice Outweighs Probative Value



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Thresholds

- Thresholds are minimum levels of detection values that are established to minimize the potential for testing positive due to incidental exposure that can accurately be measured by laboratory equipment.
- Drug tests completed through DFPS use threshold values established by SAMHSA and these values are used by most government agencies.



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Thoughts on Remote Hearings

- Become familiar with your judge's rules on submitting exhibits.
- Know how you will object or interrupt when needed.
- Prepare early and often to ensure that the virtual hearing occurs as seamlessly as possible.



13

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Questions?

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The first part of the paper discusses the importance of understanding the local context in which a project is implemented. This involves a thorough analysis of the social, cultural, and economic factors that may influence the success or failure of the intervention. It is essential to engage with the community from the outset, ensuring that their voices are heard and their needs are addressed. This participatory approach not only fosters a sense of ownership and commitment among the community members but also allows for the identification of potential challenges and the development of strategies to mitigate them.

In addition, the paper highlights the need for a clear and realistic assessment of the resources available, both human and financial. This includes a detailed budgeting process that takes into account the costs of materials, personnel, and other logistical requirements. It is also important to establish a timeline for the project, with regular monitoring and evaluation to ensure that the project is progressing as planned and that any deviations are promptly addressed.


The second part of the paper focuses on the implementation of the project, emphasizing the importance of maintaining open communication and collaboration throughout the process. Regular meetings and reports should be provided to the community, as well as to the relevant stakeholders, to keep them informed of the project's progress and to solicit their feedback. This transparency is crucial for building trust and ensuring that the project remains aligned with the community's needs and expectations.

Finally, the paper concludes by discussing the importance of sustainability and the need to develop a plan for the long-term maintenance and support of the project. This may involve training local personnel in the skills and knowledge required to manage the project, as well as establishing a system for the ongoing collection and analysis of data to inform future improvements. By adopting a holistic and sustainable approach, the project has the potential to make a lasting positive impact on the community.

Making and Responding to Objections

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1


Making and Responding to Objections

MAKING OBJECTIONS

2

Why Object?

- An objection is a formal protest that evidence, testimony, or a question from an opposing party should not be considered by the factfinder.
- Effectively objecting in court protects your client's rights and interests, manages the scope of the evidence considered, and assists with building a stronger case for trial.
- Objecting, when properly done, protects your record and enables you to raise the issue on appeal. [Texas Rules of Evidence \(TRE\) 103\(a\)](#); [Texas Rules of Appellate Procedure \(TRAP\) 33.1\(a\)](#).



3

Know How to Properly Object

- Objections can be written or oral and may be raised to written motions, discovery requests, deposition questions, at fact-finding hearings, and during trial.
- Know the rule, know your objections!
- Bring a cheat sheet to your court hearings.
- Plan for evidentiary issues.



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Making and Responding to Objections

OBJECTING TO WITNESS TESTIMONY

5

Common Objections in Child Welfare Cases

- Hearsay: TRE 801(d); 802
- Suggestive/Leading: TRE 403; 611(c)
- Narrative: TRE 403; 611(a)
- Nonresponsive: TRE 611
- Irrelevant: TRE 401; 402
- Witness lacks personal knowledge: TRE 602
- Speculation: TRE 403; 611(a)
 - Except Experts: TRE 703



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Common Objections in Child Welfare Cases, cont.

- Calls for a legal conclusion: TRE 701; 702; 704
- Asked and answered: TRE 403; 611
- Beyond the scope: TRE 611
- Assumes facts not in evidence: TRE 403; 611



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What To Listen For

Recognize objectionable "Buzz Words:"

- "Is it possible?" – speculation
- "Isn't it conceivable?" – speculation
- "What did he say?" – hearsay
- "What did you learn from him?" – hearsay
- "Did he agree with you?" – hearsay
- "What did he conclude?" – hearsay



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Objections Not Used Enough

- Leading
- Narrative
- Irrelevant
- Argumentative

* Make opposing counsel get the testimony in through the proper witness.



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Objecting to Hearsay Testimony and Statements in Affidavits

- **Object to hearsay specifically.**

Be specific about the statement to which you object. If your objection is sustained, then what comes into evidence is more limited.

- Be familiar with and be persistent with **running objections.**

Volkswagen v. Ramirez, 159 S.W.3d 897 (Tex. 2004).

- Object to testimony or a statement in the affidavit **by a person other than the affiant.** The affiant should be in court. Otherwise, you may have multiple hearsay objections to make.



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Object to Leading

OBJECT TO LEADING!

Judges may grant some leeway, but objecting to leading questions makes DFPS have to prove its case through its witnesses.

Three instances where leading is permissible during direct (see [TRE 611](#)):

- 1) Witness lacks capacity to convey meaningful information to non-leading questions;
- 2) Preliminary or undisputed matters; or
- 3) Witness is adverse or aligned with adverse party.



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Making and Responding
to Objections

OBJECTING TO EXHIBITS

12

Common Objections to Exhibits

- Rule of optional completeness: [TRE 107](#)
- Lacks proper foundation: [TRE 901](#)
- Not properly authenticated: [TRE 901](#)
- Irrelevant: [TRE 402](#)
- Contains hearsay/double hearsay; [TRE 802](#)
 - But see [TRE 805](#): Hearsay Within Hearsay
- Prejudice outweighs its probative value: [TRE 403](#)



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Common Objections to Exhibits, cont.

- Contains inadmissible matter. [TRE 802](#)
 - It mentions prior convictions, drug test results, etc.
 - But see, [TRE 609](#); *Taylor v. Texas Dept. of Protective and Regulatory Services*, 160 S.W.3d 641 (Tex.App.—Austin 2005, pet. denied).
- Violates best evidence rule. [TRE 1002](#)
 - A copy is generally admissible unless there is a dispute over the writing's authenticity. [TRE 1003](#)



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Objecting to the DFPS File

- Admissibility of documents in the DFPS file depends on the nature of the specific documents.
- An item is not automatically admissible just because it is contained in the DFPS file.
- Redaction of certain items contained in the documents is likely, so be prepared to identify items that need to be redacted and to argue why.
- Object to the court taking judicial notice of the facts from the file or findings in temporary orders.



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Making and Responding to Objections

PRACTICE TIPS

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Making Objections: Practice Tips

- Objections must be **timely**. TRE 103(a)(1)(A)
- Improper question – must object **before** an answer is given.
- Improper answer – must object as soon as that fact becomes apparent.
 - Although it is proper to object to a completed answer (and necessary in order to protect the record) this is not the most desirable solution.
 - If your objection is sustained, ask that the answer be struck and that the jury be instructed to disregard it.



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Making Objections: Practice Tips, cont.

- **Stand** when objecting.
- **Address the judge**, not opposing counsel.
- **State the legal basis** without excessive argument.
- **Avoid** arguing the objection before the jury.
- **Insist on a ruling**, or you risk waiving error on appeal.
- Remember: To preserve the record on appeal, **you must ask to have the answer struck and ask for the jury to be instructed to disregard the answer.**



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Practice Tip: Making Objections Before Trial

Pretrial Motion to Exclude Evidence: request for ruling to exclude evidence before trial commences.

- Preferred method.
- File motion and set it for a hearing as soon as practical.
- Allows party to plan accordingly.



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Practice Tip: Making Objections Before Trial, cont.

Motion in Limine: identifies evidentiary rulings that the court may be asked to make during trial.

- Not possible to address all evidentiary matters in pretrial.
- Can be made before trial or during trial.
- Allows the Judge to rule outside the presence of the jury.



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Important Difference

MOTION TO EXCLUDE

- Excludes evidence from being presented.
- Preserves error on appeal.

MOTION IN LIMINE

- Requires offering party to approach and request a ruling prior to the introduction of evidence.
- Does not preserve error on appeal.
- Must object.

* Remember: the title of a motion is not dispositive



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Making and Responding to Objections

RESPONDING TO OBJECTIONS

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Overcoming Hearsay Objections: Availability of Declarant Immaterial

- Present Sense Impressions: [TRE 803\(1\)](#)
- Excited Utterance: [TRE 803\(2\)](#)
- Then-Existing Mental, Emotional, or Physical Condition: [TRE 803\(3\)](#)
- Statement Made for Medical Diagnosis or Treatment: [TRE 803\(4\)](#)
- Records of a Regularly Conducted Activity: [TRE 803\(6\)](#)

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Overcoming Hearsay Objections: Availability of Declarant Immaterial, cont.

- Statements in Learned Treatises, Periodicals, or Pamphlets: [TRE 803\(18\)](#)
- Reputation Concerning Character: [TRE 803\(21\)](#)
- Judgment of a Previous Conviction: [TRE 803\(22\)](#)
- Statement Against Interest: [TRE 803\(24\)](#)

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Overcoming Hearsay Objections: Declarant Unavailable

- Former Testimony: [TRE 804\(b\)\(1\)](#)
- Dying Declaration: [TRE 804\(b\)\(2\)](#)



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Overcoming Hearsay Objections: Statements that are Not Hearsay

- Prior Statement by Witness: [TRE 801\(e\)\(1\)](#)
- Admission by a Party Opponent: [TRE 801\(e\)\(2\)](#)
- Deposition taken in same proceeding: [TRE 801\(e\)\(3\)](#)
- Business Records Exception: [TRE 803\(6\)](#)
- Not offered for truth of the matter asserted: [TRE 801\(d\)\(2\)](#)



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Exceptions to Hearsay for Children's Statements: Texas Family Code Chapter 104

- [Tex. Fam. Code § 104.002](#): Prerecorded Statement of Child
- [Tex. Fam. Code § 104.003](#): Prerecorded Videotaped Testimony of Child
- [Tex. Fam. Code § 104.004](#): Remote Televised Broadcast of Testimony of Child
- [Tex. Fam. Code § 104.005](#): Substitution for In-Court Testimony of Child



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Exceptions to Hearsay for Children's Statements: Texas Family Code Chapter 104, cont.

- **Tex. Fam. Code § 104.006:** Hearsay Statement of Child Abuse Victim ("Outcry Statements")
 - Statements made by a child 12 or younger regarding abuse;
 - Hearing held outside presence of jury to determine if the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability; and
 - Child testifies or is available to testify at the proceeding or in any other manner provided by law; or
 - Court determines that the use of the statement in lieu of testimony is necessary to protect the welfare of the child.
- See *In re M.R.*, 243 S.W.3d 807 (Tex. App.—Ft. Worth 2007, no pet.).



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Responding to Hearsay Objections to Statements in DFPS Affidavits and File

- Statements contained in the affidavit made by individuals other than the parties, such as law enforcement or medical professionals, are not admissible under hearsay rules, unless an exception applies.
 - Example: Statement made for medical diagnosis or treatment.
- Review exhibits you plan to enter such as court reports, provider notes, or court orders and anticipate hearsay objections related to the documents.



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Answering an Objection to Leading

Don't be quick to rephrase your question.

Asking a "yes or no" question is not *always* leading if the question does not suggest the answer.



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Making and Responding to Objections

PRACTICE TIPS

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Responding to Objections: Practice Tips

- Don't fold to an objection.
- Respond to the objections.
- Know your rules.
- Have case law ready.



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Responding to Objections: Practice Tips, cont.

- Stand and state your response to the objection.
- Address the judge, not opposing counsel.
- Ask to approach the bench if you need to make a lengthy argument.
- Wait for the ruling.
- If no ruling given, ask for ruling to preserve your record.
- If the objection is overruled, the attorney asking questions of the witness should restate the question.

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Responding to Objections: Practice Tips, cont.

If the objection is sustained, think about how you can overcome the objection:

- Offer the evidence for a limited purpose, where appropriate.
- Make a conditional offer of the evidence, where appropriate.
- Rephrase if the objection is to the form of the question.
- Make an offer of proof if evidence is excluded.



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Practice Tips for Trial

- Request a pretrial hearing to identify the actual grounds that are being tried. Consider filing a motion for partial summary judgment to remove unsupported grounds.
- Be careful to not try an unpled matter by consent.
- If jury hears inadmissible evidence the objecting party must pursue an adverse ruling.
 - 1) Make a proper and specific objection.
 - 2) Request an instruction to disregard the evidence.
 - 3) Motion to strike may or may not be necessary, be safe and make it.
 - 4) Motion for mistrial.



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Making and Responding
to Objections

PREPARING FOR YOUR HEARING

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Preparation Before Your Hearing

- Know your case facts and exhibits.
- Anticipate objections to your evidence and prepare your responses.
- Attach a note to remind you of your responses to possible objections.
- Prepare your witness.



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Preparation Before the Your Hearing

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child

Fact	Document	Witness	Objection	Response



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Making and Responding
to Objections

PRESERVING THE RECORD
FOR APPEAL

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Offer of Proof: TRE 103(a)(2)

What is an Offer of Proof and why use it?

- Informs appellate court of the substance of the evidence that was excluded, so that the appellate court will be able to determine if the exclusion was improper; and if so, if it was reversible error by the trial court to have done so.
- May make the trial court judge reverse ruling.
- Must be made before the jury is charged or before any error excluding evidence is waived.



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Making an Offer of Proof, cont.

- Tell the judge you would like to make an Offer of Proof.
- Make your Offer of Proof outside the presence of the jury, or at a minimum through a sidebar conference.



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Two Ways to Make Offer of Proof

- Witness can be called and questioned in order to make a record of the excluded testimony.
- Attorney can tell the judge what the excluded evidence would have been.



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Bill of Exception: [TRAP 33.2](#)

What is a Bill of Exception and why use it?

- Informs appellate court of something that occurred at trial but isn't reflected in the record – i.e. that the judge made a ruling during trial that wasn't included in the court reporter's record.
- Must be filed no later than 30 days after notice of appeal is filed.
- Found in the clerk's record rather than in the reporter's record.



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Bill of Exception Procedure

- This is highly technical, giving opposing counsel and judge the opportunity to weigh in.
- Read [TRAP 33.2](#) carefully.



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Helpful Resources

- The Family Law's Essential Tool Kit by Family Law Section of the State Bar of Texas
- Courtroom Handbook on Texas Evidence published by Goode and Wellborn, published by Thompson West
- Trial Techniques by Thomas A. Mauet
- Children's Commission Tool Kit for Attorneys Representing Parents and Children in Child Welfare Cases
- Children's Commission Tool Kit for Attorneys Representing DFPS in Child Welfare Cases



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Questions?

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Expert Witnesses: How to Qualify and Disqualify Experts

GETTING PAST THE GATEKEEPER

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When is it Appropriate for an Expert to Testify?

Texas Rules of Evidence (TRE) 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.



2

Getting Past the Gatekeeper

For expert testimony to be admissible, the court must be satisfied that three conditions are met:

1. The witness qualifies as an expert;
2. The subject matter of the testimony is an appropriate one for the expert's testimony; and
3. Admitting the expert testimony will assist the fact-finder in deciding the case.



3

Reliability & Relevance

Even if the expert is qualified and the topic is a proper one for expert testimony, the proposed testimony must be reliable and relevant.

E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995).



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Robinson Reliability Factors

1. The extent to which the theory has been or can be tested;
2. The extent to which the technique relies upon the subjective interpretation of the expert;
3. Whether the theory has been subjected to peer review and/or publication;
4. The technique's potential rate of error;



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Robinson Reliability Factors, cont.

5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. The non-judicial uses which have been made of the theory or technique.

These factors are not exclusive, and the trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence.

E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995).



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"Soft science" factors

1. Whether the field of expertise is a legitimate one;
2. Whether the subject matter of the expert's testimony is within the scope of that field; and
3. Whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field.

In re G.B., No. 07-01-0210-CV, 2003 WL 22327191, at *2 (Tex. App.—Amarillo Oct. 10, 2003, no pet.).



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Important Case

In the Interest of A.A.T., No. 04-16-00344-CV, 2016 WL 7448370 (App.—San Antonio Dec. 28, 2016).

- State challenged a parent's expert on Temporary Brittle Bone Disease/metabolic bone disease.
- Court excluded the expert testimony.
- On appeal, the Fourth Court of Appeals held the trial court did not err in excluding the testimony. The opinion addresses TRE 702, Robinson, and Gammill (analytical gap between the data and the opinion proffered).



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Gatekeeping Process

The Court must determine that:

1. the expert's field of expertise employs sound principles and methods;
2. the expert's opinion is based on sufficient facts or data; and
3. the expert has applied the principles and methods in a reliable manner.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993); *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).



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Methodology Reliability

- In most cases, the scientific methodology underlying the tests is well established.
- The question is whether the tests were correctly conducted, followed proper procedures, and used reliable equipment.

Mauet, "Trial Techniques," Chap. VIII, p. 316.



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Basis of Expert's Opinion

TRE 703 sets forth three permissible bases upon which an expert's opinion be based:

1. Facts within the expert's personal knowledge;
2. Facts presented to the expert at trial, which may be posed in the form of a hypothetical question. Any facts comprising a hypothetical question must be admitted into evidence, at least by the close of the case; or
3. Facts presented to the expert outside of court, but not perceived by the expert personally.



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Basis of Expert's Opinion, cont.

If the expert seeks to base an opinion on facts not personally perceived or introduced into evidence, the court must determine based on Rule 104(a) that the facts relied upon by the expert are of a type relied upon by experts in the particular field and that such reliance is reasonable, regardless of admissibility. **TRE 703.**

Souris v. Robinson, **725 S.W.2d 339**, 341-342 (Tex. App.—Houston [14th Dist.] 1987, no writ)



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Proper Forms of Expert Testimony

- Opinion or opinion to a reasonable degree of certainty (“in my opinion...”)
- Conclusion: (“the injury is permanent and will never improve”)
- Ultimate issue: If the testimony is helpful to the jury. (“the defendant, a paranoid schizophrenic with organic brain damage, is a danger to herself and the community”)

Mauet, “Trial Techniques,” Chap. VIII, p. 318



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Discovery of Opposing Counsel's Expert's Credentials and Opinions

- Disclosure Requests – [Texas Rules of Civil Procedure \(TRCP\) Rule 194a.2](#); [Tex. Fam. Code § 301.052](#)
- Not Automatic unless Court requires in Discovery Control Plan



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Disclosure Requests

for any *testifying* expert:

- (1) the expert's name, address, and telephone number;
- (2) the subject matter on which the expert will testify;
- (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting that information; and



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Disclosure Requests, cont.

(4) if the expert is *retained by, employed by, or otherwise subject to the control of the responding party*:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and biography;



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Depositions of Experts Tex. R. Civ. P. 195a.4

In addition to a disclosure request served under [TRCP 194a.1](#), a party may obtain discovery by oral deposition and a report prepared in accordance with [TRCP 195a.5](#) of:

- (a) the subject matter on which a testifying expert is expected to testify;
- (b) the expert's mental impressions and opinions;
- (c) the facts known to the expert, regardless of when the factual information is acquired, that relate to or form the basis of the expert's mental impressions and opinions; and
- (d) other discoverable items, including documents not produced in response to a disclosure request.



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Procedures to Challenge Expert Testimony

Challenges to expert testimony may be raised before or during trial:

- Pre-trial challenges may be raised via *Daubert* motions, motions to suppress, in limine, or to exclude or strike.
- Challenges during trial: the court must conduct the proceedings to the extent practicable so as to prevent inadmissible evidence from being suggested to the jury by any means. [TRE 103\(c\)](#).



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Challenging the Underlying Facts or Data Tex. R. Evid 705

(a) Unless the court orders otherwise, an expert may state an opinion -and give the reasons for it- without first testifying to the underlying facts or data. **But the expert may be required to disclose those facts or data on cross-examination.**

(b) Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may-or in a criminal case must-be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.



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Tex. R. Evid. 705, cont.

(c) An expert's opinion is **inadmissible** if the underlying facts or data do not provide a sufficient basis for the opinion.



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When to Stipulate to an Expert

Proponent of Expert: This is your opportunity to “bolster” your witness. You are not required to accept the opponent’s offer to stipulate to the expert’s qualifications.

PRACTICE TIP: State that the jury has a right to hear the qualifications so that it can better assess the expert’s opinion.

Texas Evidentiary Foundations, Ch 9, § 9.03 Expert Opinion Testimony (2011)



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Qualifying Your Expert: Educational/Clinical Background on Direct

The expert probably has an extensive educational background and experience – hit the high points!

- Renowned medical school? Any other post-graduate degrees?
- Don't forget the academic accolades—i.e., summa cum laude, AOA, etc.
- Make sure to cover specialized training/experience.
- Make sure to go overboard/specialty certifications—this is what makes the expert memorable.
- Be systematic and chronological (it's easier for everyone to follow).



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Disqualifying An Expert on Cross

The extent to which the theory has been or can be tested:

"The theories you based your opinion on have not been tested, right?"

The extent to which the technique relies upon the subjective interpretation of the expert:

"The opinions or techniques you used in reaching your opinions were entirely subjective, right?"



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Disqualifying An Expert on Cross, cont.

Whether the theory has been subjected to peer review and/or publication:

"Your theory has not been subjected to peer review and/or publication, right?"

The technique's potential rate of error:

"Isn't it true that you refuse to disclose the potential rate of error for the technique you used?"



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Disqualifying An Expert on Cross, cont.

The witness qualifies as an expert:

"Isn't it true that you don't have any experience, training, or education in this subject matter?" **or**

"Your experience and training in this area are limited, correct? In fact, isn't it true that you haven't worked on a case like this before?"

The subject matter of the testimony is an appropriate one for the expert's testimony:

"This subject matter is way outside of your area of expertise, isn't it?"



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Rehabilitating Your Expert after Cross

Identify 2 or 3 key points that are central to your theory of the case that require rehabilitation.

- Don't nitpick each and every point.
- When picking those points to "rehabilitate" on cross, allow the expert to explain the basis for his/her "yes/no" answer on cross.



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Rehabilitating Your Expert after Cross, cont.

Example: Doctor, on cross examination, opposing counsel asked you a question about this case report. You were about to say something, but you didn't get a chance to finish. Can you explain what you were about to say?



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A Note on HIPAA

- HIPAA does not prevent covered entities from reporting child abuse or neglect to public health authorities or other government agencies.
- Medical professionals, like attorneys, are mandatory reporters and are subject to criminal penalties if they fail to report child abuse or neglect. [Tex. Fam. Code § 261.101](#)
- A person, including a medical facility, that makes a report as required under [Tex. Fam. Code § 261.103](#) is required to release to DFPS records that directly relate to the suspected abuse or neglect without requiring parental consent or a court order. If a child is transferred from a reporting medical facility to another medical facility to treat the injury or condition that formed the basis for the original report, the transferee medical facility is also required to release records relating to the injury or condition to DFPS, upon request, without requiring parental consent or a court order. [Tex. Fam. Code § 261.303](#)



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A Note on Forensic Assessment Center Network (FACN) Doctors

- DFPS utilizes the FACN in most medical abuse and/or medical neglect cases.
- The FACN allows for consultations with physicians who are board certified in a relevant field or specialty, including radiologists, geneticists, orthopedists, and endocrinologists.
- Physicians must also have experience in certain specific conditions such as rickets, Ehlers-Danlos Syndrome, and other medical conditions that mimic child maltreatment or increase the risk of misdiagnosis of child maltreatment. [Tex. Fam. Code § 261.3017\(b\)](#)



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A Note on Forensic Assessment Center Network (FACN) Doctors, cont.

- A health care provider who makes a report of suspected abuse or neglect of a child or was involved in reviewing the case, including as a member of a review team under [Tex. Fam. Code § 261.312](#) or a multidisciplinary team under [Tex. Fam. Code Ch. 264, Subchapter E](#) may not provide forensic assessment services in connection with an investigation from the report. [Tex. Fam. Code § 261.30175\(b\)](#)
- The exigent removal of a child may not be based solely on the opinion of a medical professional under contract with DFPS who did not conduct a physical examination of the child. However, if the physician who conducted the physical examination and the FACN physician both agree that abuse and neglect occurred, both opinions may be used for an emergency removal. [DFPS CPS Policy Handbook § 2233.5](#)



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Questions?

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Bench Trials

Preparing for a Final Contested Hearing in a Child Welfare Case

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Associate Judge
Child Protection Court of the Concho Valley

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Managing Attorney
DFPS Region 8



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Bad Habits Observed in Bench Trials

- Treating the final hearing with less formality than a jury trial.
- Arriving late.
- Not knowing what you must prove.
- Not confirming that all the required documents have been filed with the court prior to the hearing (Paternity Registry Search, Service Receipts, Orders of Transfer and Consolidation, Business Records Affidavits, Certified Copies of documents, etc.).
- Not prepping your case or using notes/"Winging it."



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Bad Habits Observed in Bench Trials, cont.

- Failing to call the right witnesses/Failing to prep your witnesses.
- Failing to keep track of what evidence you have put on in support of your case.
- Not anticipating/preparing for a contested final hearing.
- Asking the court to take judicial notice of the court's file.
- Failing to include the relief sought in your pleadings.
- Failing to object to inclusion of relief not plead.



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Where to Begin



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Plan Ahead: Adversary and Status Hearings

- Review the removal affidavit!
 - Identify potential witnesses and/or evidence to present.
- The plans of service set the tone for the case.
- Parent attorneys- object to “cookie cutter” services and remember that your client has a right to choose their providers.
- AALs- advocate for services that are needed to ensure your client is getting the therapeutic, educational, or medical assistance that they need.



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Plan Ahead: Permanency Hearings

Review DFPS' court reports before each permanency hearing.

- Watch for changes in goals.
- Has DFPS made reasonable efforts to achieve permanency for the child?
- Consider whether it is appropriate to file a motion for a finding of no reasonable efforts.
- Are there additional services or orders to request at the hearing?
- Is mediation appropriate?



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Plan Ahead: Identifying Witnesses

Listen for witnesses at each hearing.

- Has there been any involvement with law enforcement? Has the caseworker provided information that has been reported from another source?
- Who are the service providers? Have any of them changed?
- Will these individuals be needed for a final trial?
- Can they appear in person, or does a motion to have them appear via video need to be filed?
- Do you need to request additional resources from the Court: co-counsel, investigators, experts?



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Bench Warrants and Subpoenas

- Timely request bench warrants.
- Know who is responsible for requesting the bench warrant and how to do so.
- Know what kind of subpoena you need to issue.
- Be sure to get permission from the court for witnesses to appear virtually, if needed.
- AALs and Parent Attorneys, do not rely on DFPS' witness list.



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Final Trial



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Know What Final Relief is being Sought

- Final Order without Termination
- Termination of Parental Rights
 - Both parents?
 - Termination as to only one parent?
- Dismissal



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Final Order without Termination (Non-ICWA case)

- Burden of Proof: Preponderance of the Evidence. [Tex. Fam. Code § 105.005](#)*
- Best Interest. *Holley Factors*, *Holley v. Adams*, 544 S.W. 2d. 367 (Tex. 1976); [Tex. Fam. Code §§ 153.002](#) and [263.307](#)
- Note: Do not ask for no access/no contact with a parent when you are not seeking termination.

* But see [Tex. Fam. Code § 153.001\(b\)](#), Best Interest Rebuttable Presumption, SB 2052, 89th Regular Legislative Session.



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Termination Order (Non-ICWA case)

- Burden of Proof: Clear and Convincing Evidence. [Tex. Fam. Code § 161.001](#)
- Ground. [Tex. Fam. Code § 161.001\(b\)\(1\)](#)
- Reasonable Efforts to return child to the parent. [Tex. Fam. Code § 161.001\(f\)](#)
- Best Interest. *Holley Factors*; [Tex. Fam. Code §§ 153.002](#) and [263.307](#)



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Dismissal

- Burden of Proof: Preponderance of the Evidence. [Tex. Fam. Code § 105.005](#)
- Best Interest. *Holley Factors*, *Holley v. Adams*, 544 S.W. 2d. 367 (Tex. 1976); [Tex. Fam. Code §§ 153.002 and 263.307](#)
- A suit to terminate may not be dismissed nor may a nonsuit be taken unless the dismissal or nonsuit is approved by the court. [Tex. Fam. Code § 161.203](#)



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Know Your Case

- What is your case theme and theory?
- What evidence do you have to support your request?
- Who are your witnesses?
- What exhibits do you plan on introducing?
- What evidence do you plan on objecting to?



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Trial Preparation

- Review your pleadings! Amend as necessary.
- Stay on top of discovery deadlines and supplement your discovery responses on a regular basis.
- All attorneys should be mindful of any Pretrial Scheduling Orders.
- Prepare with your client in advance.
- Practice Direct and Cross Examinations with your client and witnesses.



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Trial Preparation, cont.

Parent Attorneys, if you have no direction from your client, you still need to be prepared to ask questions of the Department's witnesses.

All attorneys should:

- Request and review Investigation reports and FBSS logs;
- Learn how to pull vital information from DFPS records; and
- Reach out to removing workers and other potential witnesses well in advance.
- Draft your proposed final order.



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Practice Using Trial Notebooks

- Use Trial Notebooks for complex or lengthy trials.
- Develop a running witness list.
- Develop an exhibit list for every case.
- Start gathering these items early on.



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Communication

While written communication (via motions) can preserve record; make sure to talk to all sides about procedure.

- The more you know about what they intend to do, the more you can prepare the timing of your case.
- Gone are the days of trial by surprise.



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Communication, cont.

- Talk to your Client
 - What are their expectations?
- Find the caseworkers (INV, each CVS caseworker assigned, the admin tech, etc.), family, therapists, and doctors and reach out to them for interviews.



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Communication, cont.

The attorney for DFPS should:

- Communicate their position to the AAL and opposing counsel at least 14 days from trial.
- Reach out in a timely manner and try to resolve some or all of the issues informally.
- If the parties are unable to resolve all the issues, get a good time announcement for the court.



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Practice Tips



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Practice Tip: Two Witness Rule

- It is never good practice to put on an entire case with one witness.
- Two witnesses are a must, but three witnesses are better.
- Single witness terminations are frowned upon by the appellate courts and ripe for reversal.
- Develop a list of common witnesses for trial and direct examination questions for each type.



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Practice Tip: Necessary Filings

The Petitioner should make sure that the following items have been filed prior to the final hearing:

- Proof of Service
- Service Plan/Amended Service Plan
- CCJ Letter
- Paternity Registry Verification (BVS)/Genetic Testing Results and/or Order Adjudicating Parentage
- Order for Transfer and/or Consolidation



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Practice Tip: Prepare as if the Case will be Appealed

Develop a Trial Checklist for Termination Hearings (fact issues).

- Use your checklist to prepare before each hearing;
- Do not wait until trial to start preparing for trial;
- At the end of each hearing, review your checklist with your client;
- Be proactive in problem solving;
- As a general rule, **do not** request judicial notice; and
- TRACK YOUR DISMISSAL DEADLINES!



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Practice Tip:
Prepare as if the Case will be Appealed, cont.

Minimize your appellate issues before trial (legal issues).

- Always double-check your dismissal deadlines;
- If you miss a dismissal deadline, be forthright with everyone;
- Consolidate fact issues into one trial; and
- Avoid piecemeal trials or severed parties.



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Tips from the Bench



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Tips from the Bench

- Be prompt and get yourself set up prior to the hearing.
- Be familiar with the court's rules, the Rules of Evidence, the Rules of Civil Procedure, etc.
- If the hearing is contested and has more than 2 witnesses, try to find a trial partner.
- No matter how many times you have been before the court on the case, **the final stands alone**.
 - Every element of your case must be in the record of the final.



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Tips from the Bench, cont.

- Bench briefs and case law – if you know there will be an issue about something (ex. Pleading the 5th) - anticipate and prep.
- Exchange exhibits ahead of time and come to an agreement on which exhibits, if any, can be preadmitted.
- Timely notify parties of your intent to admit records via business records affidavits and provide them with copies.
- Find the witnesses to avoid hearsay objections.
- Know your affirmative defenses.



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Tips from the Bench, cont.

- You have a duty to represent your client even if they don't appear.
- Present your case as if you are telling this story to a total stranger who has never heard this case before.
- Avoid using terms of art and acronyms. If you do, make sure you have your witness explain or spell out what they are talking about.
- Taking "Judicial Notice" does not mean what you think it means.



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Tips from the Bench, cont.

Parent Attorneys:

- Prep your client for how trial will be different from the rest of their hearings.
 - Explain that they are likely to be called to the stand.
 - Explain the process of direct and cross examination.
 - Explain how their right to assert the 5th is different than from a criminal proceeding.



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Tips from the Bench: Reasonable Efforts

- Use notes.
- Say the words.
- Your Reasonable Efforts argument is not the same as your Best Interest argument.
- If DFPS had issues with obtaining services, explore it.
- If a parent had legitimate reasons for not getting to services, say it.



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Resources



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Texas Children's Commission Resources

- Attorney Tool Kits
- Texas Child Welfare Law Bench Book
- On-Demand Training and MCLE webpage
- Children's Commission Conversations Podcast
- Legal Training Support
- Scholarship Opportunities

<https://www.texaschildrenscommission.gov>



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Questions?

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