

Making and Responding to Objections

SUPREME COURT OF TEXAS CHILDREN'S COMMISSION

MARCH 12, 2024



Making and Responding to Objections

MAKING OBJECTIONS

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\(a\)](#).



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.

Making and Responding to Objections

OBJECTING TO WITNESS TESTIMONY

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](#)

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](#)

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



Objections Not Used Enough

- Leading
- Narrative
- Irrelevant
- Argumentative

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



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.



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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OBJECTING TO EXHIBITS

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](#)



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](#)



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.



Making and Responding to Objections

PRACTICE TIPS

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.



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.**



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.

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.

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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RESPONDING TO OBJECTIONS

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\(6\)](#)



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)**



Overcoming Hearsay Objections: Declarant Unavailable

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



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\(d\)\(2\)](#)



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

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.).

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.

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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PRACTICE TIPS

Responding to Objections: Practice Tips

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



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.



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.



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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PREPARING FOR YOUR HEARING

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.

Preparation Before Your Hearing, cont.

(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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PRESERVING THE RECORD
FOR APPEAL

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.



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.



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.

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.

Bill of Exception Procedure

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

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

Questions?

Rob Galvin

Rob Galvin, P.C.

Email: rob@galvinlaw.com

William “Drake” Mikeska

Managing Attorney, Region 8

Texas Department of Family and Protective Services

Email: william.mikeska@dfps.texas.gov

