MYTHS AND LEGENDS OF FAMILY LAW

HON. SCOTT A. BEAUCHAMP, *Dallas*
Associate Judge, 255th District Court

HON. EMILY MISKEL, *McKinney*
Judge, 470th District Court

HON. DEAN RUCKER, *Midland*
Presiding Judge, Seventh Administrative
Judicial Region of Texas

HON. JUDY L. WARNE, *Houston*
Judge, 257th District Court

State Bar of Texas
43rd ANNUAL
ADVANCED FAMILY LAW COURSE
August 7-10, 2017
San Antonio

CHAPTER 4

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Associate Judge
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600 Commerce
Dallas, Texas 75202
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Education

Juris Doctorate, The George Washington University National Law Center, May 1992.
Bachelor of Science, Southern Methodist University, May 1989
Bachelor of Arts, Southern Methodist University, May 1989

Professional Organizations and Activites

Member, State Bar of Texas
Associate Judge Advisor/Liasion to the Family Law Council
Member, Dallas Bar Association Family Law Section Board of Directors, 2005 to 2007
Member, Dallas Bar Association Family Law Section Pro Bono Committee, 2005 to 2008
Associate Judge Liaison to Dallas Bar Association Family Law Section Board of Directors, 2004 and 2008 to 2011.
Fellow, State Bar College
Fellow, Texas Bar Foundation
Sustaining Life Member, Texas Family Law Foundation
Member, Board of Directors, Texas Family Law Foundation

Professional Experience

Associate Judge, 255th District Court, January 2015 to present.
Associate Judge, 301st District Court, March 2004 to December 2014
Associate Judge, 303rd District Court, August 2002 to March 2004
Private practice, September 1999 to August 2002
Office of the Attorney General, Child Support Division
Managing Attorney, July 1998 to September 1999
Assistant Attorney General, March 1996 to July 1998
West Texas Legal Services, Staff Attorney, January 1994 to March 1996

Publications/Articles

- "Trying the Complicated Temporary Order Hearing in Two Hours", co-author with Judge Susan Rankin, 2002 Advanced Family Law Course, August 2002, Dallas, Texas.
- "Ramifications of Affirmative Findings of Family Violence", co-author with Judge Susan Rankin, 2004 Family Violence Conference, Texas Center for the Judiciary, March 2004, Galveston, Texas.
- Monthly case law updates for the Dallas Bar Association Family Law Section for March 2004 through June 2004 meetings.
- Case law update regarding Child Protective Services cases, Dallas Bar Association Juvenile Justice Committee seminar "It Ain't Over Until the Fat Lady Sings: Effective Representation Parents in Child Protective Services Cases", October 2004, Dallas, Texas.
- "Helping Divorce Clients Avoid Consumer Problems: Use of Temporary Orders in Divorce Proceedings", 2005 Advanced Consumer Law Course, November 2005, Houston, Texas.
- "Effective Use of Guardian ad Litems, Attorney ad Litems, and Amicus Attorneys", Central Dallas Ministries Seminar, "Seven Things That Every Lawyer (and pro bono volunteer) Should Know About Practicing Family Law", October 27, 2006, Dallas, Texas.

- "Courtroom Presentation", 2007 Advanced Family Law Course Boot Camp, August 2007, San Antonio, Texas.
- "Family Violence in 2007: A Case Law Review", Central Dallas Ministries seminar, "Eight Things that Every Lawyer (and Pro Bono Volunteer) Should Know About Practicing Family Law", October 7, 2007, Dallas, Texas.
- "Evidence in an Electronic Age: How to Make the Old Rules Work with New Technology", University of Texas CLE, Parenting Plans-Parent-Child Relationships Conference, November 8, 2007, Austin, Texas.
- Case Law Update for 2007-2008, 2008 Dallas Bar Association Family Law Section Summer Bar Seminar, June 28, 2008, Playa Del Carmen, Mexico.
- "Using Temporary Orders in Divorce Proceedings to Ease Financial Stress", 2009 Marriage Dissolution Boot Camp Course, April 15, 2009, Fort Worth, Texas (Article adapted from prior article listed above, "Helping Clients Avoid Consumer Problems: Use of Temporary Orders in Divorce Proceedings").
- Case Law Update for 2008-2009, 2009 Dallas Bar Association Family Law Section Summer Bar Seminar, June 24, 2009, Las Vegas, Nevada.
- "Conflicting Court-Appointed Mental Health Expert Roles: How to Find Them, How to Handle Them", co-author with Angeline Bain and Dr. John Zervopolous, 2009 Advanced Family Law Seminar, August 5, 2009, Dallas, Texas.
- "Top Ten Things in the Courtroom", presented on a panel with Judge Doug Warne and Judge Larry Noll, 2009 Ultimate Trial Notebook: Family Law, December 4, 2009, San Antonio, Texas.
- "Comprehensive Guide to Evidence", co-author with Heather King, Lynn Kamin, and Emily Miskell, 2010 Advanced Family Law Course, August 10, 2010, San Antonio, Texas.
- "The Impact of Family Violence on Divorce", presented on a panel with Judge Doug Warne and Judge Judith Wells, 2011 Marriage Dissolution Institute, April 28, 2011, Austin, Texas.
- "Eight Considerations for Drug Related SAPCRs", presented on a panel with Miriam Ackels Claerhout and Jim Turnage, University of Texas CLE 11th Annual Family Law on the Frontlines Seminar, June 17, 2011, Austin, Texas.
- "Social Media Discovery and Ethics: Challenges and Responses", presented on a panel with Harold Zuflacht and Craig Ball, 2011 Advanced Family Law Seminar, August 4, 2011, San Antonio, Texas.
- Supplemental Appendix to the article "Discovery (Getting It In And Keeping It Out)", authored by Heather L. King and Jessica H. Janicek.
- "Twenty Points for the Practitioner: A View from the Bench (Second Edition)", presented on a panel with Judge Jack Marr and Associate Judge Meca Walker, 2013 Advanced Family Law Course, Family Law 101 Program, August 4, 2013, San Antonio, Texas.
- "Amicus Attorney: Protecting the Best Interest of the Child", co-author with Keith Nelson and Eileen Costello, 2013 Advanced Family Law Course, August 7, 2013, San Antonio, Texas.
- "Nonparent Standing and Substantive Relief", 2014 Advanced Family Law Course, August 6, 2014, San Antonio, Texas.
- "Nonparent Standing and Substantive Relief (Second Edition)", 17th Annual Summer School Course, Texas Bar College, July 18, 2015, Galveston, Texas.
- "Eleven Practical Points from the Bench", 2015 Advanced Family Law Course, August 5, 2014, San Antonio, Texas.
- "Discovery Workshop: A Judicial Perspective", presented on a panel with Stephen Orsinger, Christopher Wrampelmeier, and Joe Indelicato, 39th Annual Marriage Dissolution Institute, April 7, 2016, Galveston, Texas.
- "Twenty Eight Points for the Practitioner: A View from the Bench (Third Edition)", presented on a panel with Judge Scott Becker and Emily Miskel, 2016 Advanced Family Law Course Family Law 101 Program, July 31, 2016, San Antonio, Texas.
- "Nonparent Standing and Substantive Relief (Third Edition)", presented on a panel with Judge Scott Becker and Emily Miskel, 2016 Advanced Family Law Course Family Law 101 Program, July 31, 2016, San Antonio, Texas.
- "Interim Attorney's Fees: Show Me the Money!", co-author with James Mueller and Dwayne Smith, 40th Annual Marriage Dissolution Institute, April 20, 2017, Austin, Texas.

Other Presentations/Activities

- "Electronic Evidence", Panel presentation with Rick Robertson, Charles E. Hardy, Karl E. Hays, and E.X. Martin III, Marriage Dissolution Institute 2008, April 18, 2008, Galveston, Texas.
- "Making the Most of Social Studies and Psychological Evaluations", Panel presentation with Diana Friedman, Dr. Barry Coakley, and Christy Bradshaw Schmidt, University of Texas CLE 8th Annual Family Law on the Frontlines Seminar, June 19, 2008, Galveston, Texas.
- Course Director, 2008 Dallas Bar Association Family Law Section Summer Bar Seminar, June 28, 2008, Playa Del Carmen, Mexico.
- "Electronic Evidence", Panel presentation with Rick Robertson, Judge Curt Henderson, Lynn Kamin, John Wiechmann, E.X. Martin, and John Nichols, 2008 Advanced Family Law Course, August 14, 2008, San Antonio, Texas.
- Course Director, 2009 Marriage Dissolution Course Boot Camp, April 15, 2009, Fort Worth, Texas.
- Course Director, 2009 Dallas Bar Association Family Law Section Summer Bar Seminar, June 24, 2009, Las Vegas, Nevada.
- Associate Judge's Panel, co-presenter with Judge Solomon J. Casseb III, Associate Judge Richard Garcia, Associate Judge J. Andrew Hathcock, and Associate Judge Terri White, University of Texas CLE 10th Annual Family Law on the Frontlines Seminar, July 2, 2010, San Antonio, Texas.
- Associate Judge's Panel, co-presenter with Chris Nickelson, Associate Judge Diane Haddock, Associate Judge Richard Garcia, and Associate Judge Nick A. Catoe Jr., University of Texas CLE 11th Annual Family Law on the Frontlines Seminar, June 17, 2011, Austin, Texas.
- "Addressing Pro Se Litigants", panel presentation with Judge Mark Atkinson, Judge Lora Livingston, and Judge Gary Harger, CPS and Associate Judges Conference, Texas Center for the Judiciary, July 7, 2011, Austin, Texas.
- Judge's Panel, co-presenter with Judge Cheryl Shannon, Judge Lynn Cherry, Judge Andrea Plumlee, Judge William Mazur, and Associate Judge Johnese White Howard, CPS Advanced Topics Seminar, Dallas Bar Association Juvenile Justice Committee, November 18, 2011, Dallas, Texas.
- "Money Trouble: Addressing Economic Needs of Victims", Approaching the Bench: A Judicial Summit on Family Violence, Texas Council on Family Violence, May 31, 2012, Lakeway, Texas.
- "Discovery (Getting It In And Keeping It Out)", panel presentation with Heather L. King and Jessica H. Janicek, 2012 Advanced Family Law Seminar Boot Camp, August 5, 2012, Houston, Texas.
- "Divorce Cases and E-Discovery: Locating, Obtaining, Introducing, and Restricting Admission of Electronic Evidence", webinar presentation with Heather L. King and Jessica H. Janicek, Strafford Publications, Inc., February 27, 2013.
- "Electronic Discovery", 2013 State Bar of Texas Annual Meeting, June 20, 2013, Dallas, Texas.
- "Jurisdiction and Prior Orders", Dallas Bar Association Family Law Section and Dallas Volunteer Attorney Program Nuts and Bolts Training, in September 2011, 2012, and 2013, Dallas, Texas.
- Family Law Judicial Panel, Texas Lawyer CLE, November 14, 2013, Dallas, Texas.
- "Divorce Cases and E-Discovery: Locating, Obtaining, Introducing, and Restricting Admission of Electronic Evidence", webinar presentation with Jessica H. Janicek, Strafford Publications, Inc., April 9, 2014.
- "I Heard It Through the Grapevine- What You Know and What You Should Know About Custody Litigation", judicial roundtable , Innovations-Breaking Boundaries in Custody Litigation seminar, University of Texas CLE, June 12, 2014, Dallas, Texas.
- Course Director, 2014 Advanced Family Law Course Family Law 101 Program, August 3, 2014, San Antonio, Texas.
- Moderator, Dallas Bar Association Family Law Section and Dallas Volunteer Attorney Program Nuts and Bolts Training, September 16, 2014, Dallas, Texas.
- Associate Judge's Panel, Dallas Bar Association Family Law Section and Dallas Volunteer Attorney Program Nuts and Bolts Training, September 16, 2014, Dallas, Texas.
- Judge's Panel, "Domestic Violence 101- Prosecuting or Defending a Domestic Violence Case", State Bar of Texas Legal Access Division, October 3, 2014, Austin, Texas.

- "Evidence: A Master Class", moderator of a panel with Barbara Nunnelly, Tom Vick, and Chris Nickelson, New Frontiers in Marital Property Law, October 23, 2014, Incline Village, Nevada.
- "Representing the Family Owned Business Part One: Issues at Formation and Part Two: Succession, Division, and Minority Ownership", panel presentation with Charla Bradshaw, Heather King, Judge Larry Noll, Sherry Evans, Autumn Kraus, and Ladd Hirsch, Advanced Business Law Course, November 6, 2014, Dallas, Texas.
- Judge and Presenter, 2015 Trial Institute, Texas Academy of Family Law Specialists, January 16-17, 2015, New Orleans, Louisiana.
- Judicial Panel, co-presenter with Judge Jill Willis, Judge Tena Callahan, Judge David Farr, Judge Roy Graham Quisenberry, and Judge Judith Wells, Innovations: Breaking Boundaries in Custody Litigation seminar, June 5, 2015, Fort Worth, Texas.
- Judge and co-presenter with Warren Cole and Justin Morely, SAPCR Demonstrations: Temporary Custody Hearing, 2015 Advanced Family Law Course, August 5, 2015, San Antonio, Texas.
- Judge and co-presenter with Cindy Tisdale and Steve Naylor, SAPCR Demonstrations: Direct and Cross Examination of Collateral Witnesses, 2015 Advanced Family Law Course, August 5, 2015, San Antonio, Texas.
- Judge and co-presenter with Katie Klein and Jim Monnig, SAPCR Demonstrations: Unique Child Support Issues, 2015 Advanced Family Law Course, August 5, 2015, San Antonio, Texas.
- Panel presentation with Judge Roberto Canas, Brandi Mitchell, and Amber Shemesh, Domestic Violence: Perspectives from the Bar; Dallas Association of Young Lawyers, October 30, 2015, Dallas, Texas.
- Course Director, Advanced Family Law Drafting Seminar, December 10-11, 2015, Dallas, Texas.
- Judge and Presenter, 2016 Trial Institute, Texas Academy of Family Law Specialists, January 15, 2016, Charleston, South Carolina.
- "Examine the Diagnosis", co-presenter on a panel presentation with Dr. John Zervopoulos and Charles Hodges, Texas Center for the Judiciary Family Justice Conference, January 25, 2016, Lost Pines, Texas.
- Judicial Panel, co-presenter with Judge Piper McCraw and Judge Brody Shanklin, Mock Trial: Testimony and Examination Issues with Mental Health Professionals seminar, North Texas Fit Practice Group, February 19, 2016, Plano, Texas.
- "Family Violence in Law and Practice", Family Law Ad Litem and Amicus Attorney Training, Dallas Bar Association Family Law Section Pro Bono Committee and Dallas Volunteer Attorney Program, April 21, 2016, Dallas, Texas.
- "Weekley Homes (with demo)", co-presenter with James Mueller, Greg Beane, and Grace Rubio, Family Law Technology Course, December 8, 2016, Austin, Texas.
- "Drug and Alcohol Testing", co-presenter with Jim Turnage, Use, Misuse, and Abuse: Differentiating Drug and Alcohol Issues with Family Court Clients, North Texas Fit Practice Group, February 17, 2017, Plano, Texas.
- Judicial Panel, co-presenter with Judge Brody Shanklin, Differentiating Drug and Alcohol Issues with Family Court Clients, North Texas Fit Practice Group, North Texas Fit Practice Group, February 17, 2017, Plano, Texas.
- "Weekley Homes (with demo)", co-presenter with James Mueller, Greg Beane, and Grace Rubio, Dallas Bar Association Bench Bar Conference, February 24, 2017, Dallas, Texas.

HON. EMILY A. MISKEL

Judge, 470th District Court, Collin County, Texas
emily@emilymiskel.com ▪ www.emilymiskel.com

BIOGRAPHICAL INFORMATION

EDUCATION

Harvard Law School, J.D.
Stanford University, B.S., Mechanical Engineering, with distinction

PROFESSIONAL AFFILIATIONS

State Bar of Texas, Pattern Jury Charge Oversight Committee, 2017-2020
Texas Center for the Judiciary, Finance Committee
Henderson Inn of Court, Barrister
Texas Academy of Family Law Specialists (TAFLS), Member
Harvard Club of Dallas, Vice President – Law School

PROFESSIONAL RECOGNITION

Board Certified, Family Law — Texas Board of Legal Specialization
Joseph McKnight Award for Best Article, Family Law Section of the State Bar of Texas, 2016
Exemplary Article Award, Texas Center for the Judiciary, 2016
Texas Bar Foundation Fellow
Super Lawyers Rising Star, 2012-2015
D Magazine Best Lawyers in Dallas, 2015
Best Lawyers in America, 2016

Author of the book INTERCEPTION: A PRACTICAL GUIDE TO WIRETAPPING AND INTERCEPTION LAWS FOR CIVIL AND FAMILY LAW ATTORNEYS (Amazon 2014, Barnes & Noble 2015).

RECENT PUBLICATIONS AND PRESENTATIONS

Wiretapping and Electronic Torts, Frisco Bar Association Meeting (2017).
Illegal Evidence - Wiretapping, Hacking, and Data Interception, Sex Drugs & Surveillance Course, State Bar of Texas (2017).
Social Media and the Law, guest lecturer, Southern Methodist University (2017).
Revenge Porn & Other New Causes of Action, Dallas Minority Attorney Program, Dallas Bar Association (2017).
My Rights and Responsibilities, Plano Youth Leadership Program (2017).
Revenge Porn and Other New Causes of Action for Family Law, San Antonio Bar Association Family Law Section Meeting (2017).
Digital Dirt—The Impact of Social Media on Your Case, Innovations: Breaking Boundaries in Custody Litigation Course, State Bar of Texas (2017).
Presiding Judge, 2017 Trial Institute, Texas Academy of Family Law Specialists (2017).
Advice from Judges on How to Present Your Case in Any Texas Court, Handling Your First (or Next) Divorce Case Course, State Bar of Texas (2017).
Online Impersonation, Revenge Porn, and Other New Causes of Action, Family Law & Technology Course, State Bar of Texas (2016).
Planning Committee, Sex, Drugs & Surveillance Course, State Bar of Texas (2016-2017).
Reunification Therapy and Court Orders: Best Practices to be on the Same Page, 12th Symposium on Child Custody Evaluations, Association of Family and Conciliation Courts (2016).
The Trial Lawyers Toolbox – Technology Tools for Litigation, Technology for Litigators Course, State Bar of Texas (2016).
Planning Committee, Advanced Family Law Course, State Bar of Texas (2016-2017).
Peeping Toms in the New Millennium: Digital Dos and Don'ts, New Frontiers in Marital Property Course, State Bar of Texas (2016).
Restraining Orders, Protective Orders, and Peace Bonds, Collin County Council on Family Violence (2016).
Course Director, Handling Your First (or Next) Divorce Case Course, State Bar of Texas (2016-2017).
Prepare and Present a Case for Final Trial, Family Law 101 Course, State Bar of Texas (2016).
Cloudy with a Chance of Data, Advanced Criminal Law Course, State Bar of Texas (2016).
From Private Practice to the Bench: Practice Management Tips, Law Practice Management Section, Collin County Bar Association (2016).

****Complete list available at www.emilymiskel.com****

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Presiding Judge
Seventh Administrative Judicial Region
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Judge Dean Rucker serves as the Presiding Judge of the Seventh Administrative Judicial Region of Texas. He is also the Senior Judge of the 318th Family District Court and sitting by assignment.

Judge Rucker is board certified in family law by the Texas Board of Legal Specialization. He is the 2015 recipient of the Judge Sam Emison Award given by the Texas Academy of Family Lawyers and the 2014 recipient of the Samuel Pessarra Outstanding Jurist Award given by the Texas Bar Foundation. Judge Rucker is also the 2014 recipient of the Harriett Herd Founders Award from Centers for Children and Families of Midland. In 2006, he was awarded the Chair's Award of Excellence by the Texas Center for the Judiciary. Judge Rucker was also honored as the 2005 Jurist of the Year by the Texas Chapter of the American Academy of Matrimonial Lawyers. In 1997, Texas CASA recognized Judge Rucker as the Clayton E. Evans Judge of the Year. Judge Rucker is Past Chair of the Judicial Section, State Bar of Texas and the Texas Center for the Judiciary. He was a charter Commissioner on the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families and now serves as a Jurist in Residence. Judge Rucker is the Past Chair of the Texas Children's Justice Act Task Force. He is a member of the Family Law Section, and serves on the Formbook Committee and the Legislative Committee. He served as the Judicial Advisor to the Family Law Council for many years. He is a director of the Family Law Foundation. Judge Rucker is also a member of the State Bar Pattern Jury Charge-Family/Probate Committee. He is a member of the Texas Academy of Family Law Specialists and the Midland County Bar Association.

Judge Rucker has spoken at conferences for the Texas Center for the Judiciary, the National Council of Family and Juvenile Court Judges (NCJFCJ), the State Bar of Texas, and the Texas Academy of Family Law Specialists. He earned a B.S. in Business Administration from Trinity University and a J.D. from St. Mary's University School of Law.

CURRICULUM VITAE OF JUDY LYNN WARNE

I. EDUCATIONAL BACKGROUND.

A. Undergraduate.
University of Saint Thomas, Houston, 1981
Bachelor of Arts Degree in Education and Political Science, Minor in English

B. Graduate.
University of Houston, Houston, Texas, J.D. 1983

C. State Bar of Texas and Law Related Education.
Board Certified - Family Law
(Texas Board of Legal Specialization 1989, 1994, 1999, 2004, 2009, 2014)
College of the State Bar of Texas (1991-2006)
The Pro Bono College of the State Bar of Texas (1992-2005)

II. PROFESSIONAL EMPLOYMENT.

Presiding Judge, 257th Judicial District Court, November, 2005 to present
Administrative Judge, Family Trial Division, Harris County, Texas, 2010-2011
Law Offices of Judy Warne - 1997-November, 2005
Adjunct Professor of Family Law, South Texas College of Law, 1995-1997, 1998- 2003, 2005-2011
Piro & Lilly - 1990-1997
Law Office of Burta Rhoads Raborn - 1987-1990

III. PROFESSIONAL ASSOCIATIONS.

A. State Bar of Texas
B. State of Texas, Family Law Council, Judicial Liaison 2008, 2010-2017
C. Houston Bar Association
D. Fellow, American Academy of Matrimonial Lawyers
E. Member, Texas Academy of Family Law Specialists [Current Officer]
F. Member, Gulf Coast Family Law Specialists [former Board Member]
G. State Bar of Texas - Family Law Section
H. Life Fellow, Texas Bar Foundation
I. Life Member, Texas Family Law Foundation
J. Houston Bar Association - Family Law Section [former Board member]
K. Association of Women Attorneys

IV. COURTS WHERE ADMITTED TO PRACTICE.

A. State Courts in Texas
B. United States Supreme Court

V. HONORS

A. Exemplary Judicial Faculty Award, Texas Center for the Judiciary, 2015
B. Dave Gibson Award for Excellence and Professionalism in Family Law, Gulf Coast Family Law Specialists, 2013
C. Standing Ovation Award, State Bar of Texas CLE Department, 2012
D. Jurist of the Year, American Academy of Matrimonial Lawyers, Texas Chapter, 2012
E. Adjunct Professor of the Year, South Texas College of Law, 2002-2003

VI. OTHER PROFESSIONAL ACTIVITIES.

Member, Public Policy Committee, Texas Council on Family Violence
Commissioner, Supreme Court of Texas Permanent Commission on Children and Families

VII. OTHER.

A. Course Director, 41st Annual Advanced Family Law Course, STATE BAR OF TEXAS (2015)
B. Presiding Judge, Annual Two-Day Trial Institute, TEXAS ACADEMY OF FAMILY LAW SPECIALISTS (2015)
C. Presenter, "40 Rules and Statutes You Need to Know but may have Forgotten", 38th ANNUAL MARRIAGE DISSOLUTION INSTITUTE, STATE BAR OF TEXAS, (2015)
D. Speaker, "ABC's of the UCCJEA", 2015 REGIONAL JUDICIAL EDUCATION CONFERENCE, TEXAS CENTER FOR THE JUDICIARY (2015)
E. Presenter, "Diagnose That Disorder" INNOVATIONS: BREAKING BOUNDARIES IN CUSTODY LITIGATION, STATE BAR OF TEXAS (2015)
F. Course Director, 41st ANNUAL ADVANCED FAMILY LAW COURSE, STATE BAR OF TEXAS (2015)
G. Speaker, "The New Child Custody Evaluation Statute", ANNUAL CONFERENCE, TEXAS ASSOCIATION OF DOMESTIC RELATIONS OFFICES (2015)
H. Panelist, "The Just and Right Division and the Parties' Debt" NEW FRONTIERS IN MARITAL PROPERTY, AAML and STATE BAR OF TEXAS (2015)
I. Author and Speaker, "You Want Me To Do What? Technical Issues for Judges Hearing Parent/Child Cases" FAMILY JUSTICE CONFERENCE, TEXAS CENTER FOR THE JUDICIARY (2016)
J. Speaker, "The New Child Custody Evaluation Statute", BURTA RHOADS RABORN INNS OF COURT (2016)
K. Co-Presenter, "When Bankruptcy Law and Family Law Collide", ADVANCED CONSUMER BANKRUPTCY CONFERENCE, STATE BAR OF TEXAS (2016)
L. Presiding Judge, Annual Two-Day Trial Institute, TEXAS ACADEMY OF FAMILY LAW SPECIALISTS (2015)
M. Presenter, "40 Rules and Statutes You Need to Know but may have Forgotten", 38th ANNUAL MARRIAGE DISSOLUTION INSTITUTE, STATE BAR OF TEXAS, (2015)
N. Speaker, "ABC's of the UCCJEA", 2015 REGIONAL JUDICIAL EDUCATION CONFERENCE, TEXAS CENTER FOR THE JUDICIARY (2015)
O. Presenter, "Diagnose That Disorder" BREAKING BOUNDARIES IN CUSTODY LITIGATION, STATE BAR OF TEXAS (2015)

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MYTHS AND LEGENDS OF FAMILY LAW

Written By Hon. Judy L. Warne

1. TRCP 6—

"No civil suit shall be commenced nor process issued or served on Sunday, except….." Family Law Cases are NOT part of the exception to this Rule so don't file or serve on a Sunday although publication can be made on a Sunday. This rule WAS NOT changed as part of the electronic filing process.

2. NOTICE ISSUES:

a. TRCP 21a--The electronic service rule [21a] only allows email service "if the email address of the party is on file with the electronic file manager" and in instances where the document is filed electronically, the rule says IT MUST BE SERVED ELECTRONICALLY if the email address is on file as stated. Furthermore, service under this rule is only allowed if another method of service is not "otherwise expressly provided in these rules…."
b. The Certificate of Service MUST CONTAIN the recipient's address and email address, a statement that the document was served on opposing counsel or the opposing party, if the party is pro se, by a certain method on a certain date, and the signature of the attorney of record, or party, if pro se. See O'Connor's Commentaries to the TRCP and also Dunn v. Menassen, 913 S.W.2d 621 (Tex.App.—Corpus Christi 1995, writ denied) which states that the certificate of service ON IT'S FACE must indicate full compliance with the rule.
c. Three days notice actually means "not less than three days" before the time specified for the hearing" TRCP 21b. If service is by mail, add an additional three days [TRCP 21a (c). If notice is by fax received after 5 p.m., it is considered given the following day.
d. Electronic notice is considered complete upon transmission but you better have the confirmation from the electronic file manager proving you have three days notice.
e. If the document is something for which there is a time deadline to respond, Saturday, Sunday and legal holidays count in that time deadline unless the last day of the period lands on a Saturday, Sunday or legal holiday, in which case the deadline is extended to the first business day following. TRCP 4
f. Don't count the day of the act, event or default in your time deadlines, so if you file on Tuesday, start counting on Wednesday. Arguably, this means that the Monday after the expiration of 20 days on answer time, means you can't take a default until Tuesday. TRCP 4.
g. For any notice period of less than 5 days, Saturdays, Sundays and legal holidays don't count unless they are part of the three day extension for fax service. TRCP 4
h. Electronic filings due on a date certain are considered timely if received by the service before midnight [as opposed to the filing-in-person rule of receipt before 5 p.m.], but Saturdays, Sundays and legal holidays don't count. TRCP 21 (f)(5)(A)

3. CONTEMPT NOTICE ISSUES:

a. Respondents in contempts are entitled to 10 days notice of the hearing. The Court cannot waive the 10 days notice, although the parties may agree to do so. TFC 157.062
b. If a capias is issued that results in the Respondent being arrested, the court must conduct a release hearing on or before the THIRD working day after the arrest. TFC 157.105.
c. If the Respondent is not released at that release hearing but rather held over for a full trial on the contempt, the trial on the contempt must be held no later than the 7th day after the date of arrest [NOT SEVEN DAYS AFTER THE DENIAL OF RELEASE] TFC 157.105.

4. TRCP 107—

If your process server is certified under the Supreme Court Order, the return MUST CONTAIN HIS OR HER IDENTIFICATION NUMBER AND THE EXPIRATION DATE OF HIS/HER CERTIFICATION.

5. TRCP 680—

"Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance……No more than one extension may be granted unless subsequent extensions are unopposed…..On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

6. PUBLICATION ISSUES:

a. TFC 6.409—Citation by Publication MUST include the NAMES of the parties and a statement of the relief sought. This has recently been interpreted by the El Paso Court of Appeals to mean that if a SAPCR is included, the citation must say that. [Curley v. Curley, 2014 WL 3867798, (Tex.App.—El Paso 2014) TFC 102.010 has the same language for SAPCRs.
b. TFC 6.409 (d) Citation by publication in a SAPCR CANNOT BE BY POSTING at the courthouse door
c. TFC 6.409 (e) Appointment of an Attorney Ad Litem for the missing party may only be waived if the petitioner or the petitioner's attorney MAKES AN OATH that no child presently under 18 years of age was born or adopted by the spouses AND that no appreciable amount of property was accumulated by the parties.
d. TFC 6.409 (e) A statement of evidence, approved and signed by the Judge is REQUIRED in any case in which citation was by publication. This is not limited to those ending in a default judgment.

7. TFC 6.410

The Petitioner in a divorce case shall file a report with the court "At the time a petition for divorce or annulment is filed" that contains the information required by the Health and Safety Code, section 194.002. [Glad you asked what that is—it means that ALL information required for completion of a BVS form, including parties' full names and residences.

8. TFC 102.008

SAPCR pleadings [does not include adoptions] REQUIRE the NAME of the child.

9. TFC 152.209

requires a UCCJEA affidavit in EVERY SAPCR [yes that includes a SAPCR joined in a divorce] "…unless each party resides in this state…" or "…a party alleges IN AN AFFIDAVIT OR PLEADING under oath that the health, safety, or liberty or a party or child would be jeopardized by disclosure of the identifying information" in which case you still have to file it—you just ask the court to seal it.

10. PARENTAGE CASES

a. TFC 160.524 Temporary Orders in a parentage case cannot order an alleged parent to pay child support until he has declined genetic testing.
b. TFC 160.637 The child is not bound by a parentage finding unless the child was a party to the suit or was represented in the proceeding that determined parentage by an attorney ad litem. This does not apply to AOPs or adjudications that are consistent with genetic testing.
c. Filing a SAPCR does not get you a parentage finding. If you are trying to establish parentage you have to plead for it.

MYTHS AND LEGENDS OF FAMILY LAW

Written By Hon. Dean Rucker

1. SERVICE OF AMENDED PETITION SEEKING MORE ONEROUS RELIEF AGAINST A DEFAULTING PARTY

Until 2009, it was well-established law that new citation is necessary for a party who has not appeared or answered in response to an original pleading when the plaintiff, by amended pleading, seeks more onerous relief than prayed for in the original pleading. See *Weaver v. Hartford Accident and Indemnity Co.*, 570 S.W.2d 367, 370 (Tex. 1978).

In the case of *In re E.A.*, 287 S.W.3d 1 (Tex.2009), Emilio and Norma Avitia were appointed joint managing conservators of their children in a final decree of divorce. Emilio later filed a petition to modify the parent-child relationship, seeking the exclusive right to designate the children's primary residence. Norma was served with citation but did not file an answer or otherwise appear. Approximately three months later, Emilio filed an amended petition seeking to be named as the children's sole managing conservator. Although the amended petition did not contain a certificate of service, Emilio alleged that sent Norma the amended petition via certified mail, return receipt requested. The trial court rendered a default judgment granting the relief requested by Emilio. Norma moved to set aside the default judgment and for new trial, arguing that the default judgment was improper because Norma was not served with the amended petition. The trial court denied both motions. The Court of Appeals affirmed.

Before the Texas Supreme Court, Norma argued that service of a new citation was required, while Emilio contended that service under Texas Rule of Procedure Rule 21a was sufficient. The Court stated that in 1990, after Weaver was decided, the Court amended Rule 21a to provide that several methods of delivery, including certified or registered mail, are appropriate for every pleading, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in the Texas Rules of Civil Procedure. The Court found that nothing in the Texas Rules of Civil Procedure requires a plaintiff to serve a non-answering defendant with a new citation for a more onerous amended petition. Finding that a non-answering defendant must be served with a more onerous amended petition in order for a default judgment to stand, the Court held that Rule 21a service satisfies that requirement and that to the extent Weaver conflicts with Rule 21a, the rule prevails. See *In re E.A.* 287 S.W.3d. at 7-8.

It is interesting to note that in 2013, four years after the *E.A.* decision, the Supreme Court amended Rule 21a as to methods of service for notice, pleadings and requests. Specifically, service by first class mail suffices, and no longer needs to be made by certified mail, return receipt requested. In addition, other methods of service are available under revised Rule 21a, including fax or email. See T.R.C.P. 21(a)(2).

2. STANDING TO FILE A MODIFICATION.

When Title 5 of the Texas Family Code was recodified in 1995, it was touted as a non-substantive recodification. However, there were some substantive changes made in its adoption. Case in point was Section 156.002(b) which delineates who has standing to file a modification.

For years, bench and bar alike had operated under the knowledge that only the parties affected by the order the subject of the suit for modification had standing to file a modification. In the "non-substantive" recodification, a new group of persons was added to the list of those who had standing to file a modification. Section 156.002(b) allows a person who, at the time of filing a modification, has standing to sue under Chapter 102 of the Code, to file a modification.

Section 102.003(a), Texas Family Code provides a laundry list of those who have standing to file an original suit affecting the parent-child relationship. Section 102.004(a) gives standing to a grandparent or another relative of the child related within the third degree of consanguinity, to file an original suit for managing conservatorship under certain specified circumstances. Section 102.0045 grants standing to siblings to file suits requesting access to a child.

Although the recodification has been in effect for some 22 years, this aspect of modification still seems to come a surprise to the bench and bar alike.

3. CERTIFICATE OF CONFERENCE

A myth has proliferated throughout the legal community that the failure to include a certificate of conference on discovery motions and other pleadings will prevent the court from conducting a hearing on the motion until there is compliance with any applicable rule governing a certificate of conference.

All discovery motions or requests for hearings related to discovery are required to contain a certificate by the party filing the document stating that a reasonable effort was made to resolve the dispute without the need for court intervention and that the effort failed. T.R.C.P. 191.2*; United Servs. Auto Ass'n v. Thomas*, 893 S.W.2d 628, 629 (Tex. App. – Corpus Christi 1994, writ denied); see O'Connor's Texas Rules, Civil Trials, ch. 6-A, §4.2(1), p. 480. By local rule, courts in several counties, including Harris, Dallas and Tarrant, require a certificate of conference on a variety of matters and require a more detailed certificate.

The myth that the failure to include a certificate of conference will prevent the court from taking up the

motion or pleading until there is compliance with any applicable rule requiring a certificate of conference was dispelled *in Groves v. Gabriel*, 874 S.W.2d 660 (Tex. 1994). In a footnote, the Texas Supreme Court stated as follows:

> "Groves complains that Owens' motion to compel discovery did not contain the certificate of conference required under Texas Rules of Civil Procedure 166b(7). Because this rule is for the benefit of the trial court, see *International Surplus Lines Ins. Co. v. Wallace*, 843 S.W.2d 773, 776 (Tex. App. – Texarkana 1992, orig. proceeding), the court's failure to require a certificate of conference does not justify mandamus relief." *Groves*, 874 S.W.2d at 661.

The purpose of former Rule 166b(7) was to ensure that court time will not be taken to resolve discovery disputes unless the parties cannot resolve them without court intervention. Because this rule was for the benefit of the trial court, a trial court had discretion in a given instance to forego the benefit and not enforce the rule. See *International Surplus Lines Ins. Co.*, 843 S.W.2d at 776. When the discovery rules were revised and renumbered, this comment was removed; however, it is the author's contention that the purpose of requiring a certificate of conference remains as the benefit of the court.

A contrary result was reached in the United Services case. In that case, a motion for sanctions did not contain a certificate of conference. At the hearing, counsel for the expert admitted that she failed to confer with counsel for the insurance company prior to filing the motion. The trial court then asked the insurance company to explain why it did not contact counsel for the expert as soon as the motion was received and attempt to resolve the discovery dispute without the necessity of court intervention. The Court of Appeals held that the trial court placed the burden on the wrong party and abused its discretion by granting the motion for sanctions without the required certificate of conference. See *United Servs.*, 893 S.W.2d at 629-630.

All that said, counsel should be warned that courts expect the parties to confer in advance of hearings on discovery motions and other types of motions. While many judges will, for the sake of judicial efficiency and prompt dispatch of the court's business, forego enforcement of any rule requiring a certificate of conference, other judges may, in their discretion, postpone the hearing on the motion until the parties have attempted to resolve the dispute and have filed the required certificate of conference. Know the practices of the judge of the court in which you are appearing!

4. WARRANT TO TAKE PHYSICAL CUSTODY OF A CHILD

Many of us are aware that in criminal cases, law enforcement can obtain a warrant to enter the premises of an accused provided certain constitutional safeguards are met. Perhaps we have seen movies where law enforcement breaks down the door to a residence and enters on the premises to make an arrest or to search the premises. If one were to ask most civil and family lawyers if such a remedy existed in civil or family law, the answer would most likely be that such a remedy does not exist. Such a remedy does not exist for the enforcement of orders by Texas courts in family law cases. Surprisingly, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), provides that very remedy in a proceeding to enforce a child custody determination of another state.

Section 152.311, Texas Family Code permits the issuance of a warrant to take physical custody of a child upon a verified application that the child is imminently likely to suffer serious physical harm or be removed from Texas. TEX, FAM. CODE ANN.

In serving the warrant, the statute further provides a remedy unique to family law. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour. TEX. FAM. CODE ANN. §152.311(e).

5. RULE 305, TEXAS RULES OF CIVIL PROCEDURE

Any party may prepare and submit a proposed judgment to the court for signature. Each party who submits a proposed judgment for signature shall serve the proposed judgment on all other parties to the suit who have appeared and remain in the case, in accordance with Rule 21a. T.R.C.P. 305.

The attorney who prepares the judgment must take great care to ensure that all other parties to the suit receive notice of the submission of the proposed judgment. The failure to provide notice under Rule 21a of the submission of a proposed judgment to the court for signature may result in violation of due process. See *In re State of Texas, ex rel. Jennifer A. Tharp*, 2017 WL 562704 *1 (Tex. App. – Austin February 9, 2017) (orig. proceeding) (the State failed to serve the parent with the final order presented to the referring district court for signing after a trial before an associate judge, and the parents had no notice of the district court's signing of the order with an adequate time to pursue a direct appeal or a restricted appeal through no fault or negligence of their own).

6. PROTECTIVE ORDERS UNDER CHAPTER 7A, TEXAS CODE OF CRIMINAL PROCEDURE

For most family lawyers, the only protective orders they are used to seeing in a family law case are those filed under Title 4 of the Family Code and the magistrate's order for emergency protection under Article 17.292, Texas Code of Criminal Procedure.

Yet, there exists another remedy for persons who may need relief from other conduct by a perpetrator and/or wish to seek a lifetime protective order. No better description of this protective order exists than that given by the El Paso Court of Appeals in its opinion in the case of *R.M. v. Swearingen*, 510 S,W,3d 630, Tex. App. – El Paso 2016), as follows:

> "The Code of Criminal Procedure allows victims of the crimes of continuous sexual abuse of a young child, indecency with a child, sexual assault, aggravated sexual assault, stalking, trafficking of persons, continuous trafficking of persons, or compelling prostitution to obtain protective orders under a separate procedure. See TEX. CODE CRIM. PROC. ANN. art. 7A.01(a)(1)-(2)(listing eligibility requirements and predicate crimes). No prior relationship between an assailant and victim is required to obtain a protective order under the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 7A.01(a). If, after the close of the protective order hearing, the court finds that "there are reasonable grounds to believe that the applicant is the victim of sexual assault or abuse, stalking, or trafficking[,]" then "the court shall issue a protective order that includes a statement of the required findings." TEX. CODE CRIM. PROC. ANN. art. 7A.03(a)-(b)(West 2015). No additional showings beyond status as a crime victim are required to obtain the order. A protective order issued under this article may last "for the duration of the lives of the offender and victim or for any shorter period stated in the order." TEX. CODE CRIM. PROC. ANN. art. 7A.07(a)(West 2015).

Once a final order is issued, the circumstances under which the order may be rescinded differ under the Family Code and the Code of Criminal Procedure. The Family Code allows either the original applicant or the person subject to the protective order to move the issuing court to reconsider the continuing need for a protective order after one year. TEX. FAM. CODE ANN. § 85.025(b)(West Supp. 2015). By contrast, when a protective order is issued under the Code of Criminal Procedure in response to a sexual assault, the trial court may only rescind the order upon the victim's request, which may be made at any time. TEX. CODE CRIM. PROC. ANN. art. 7A.07(b).

Although the protective order mechanisms in the Family Code and the Code of Criminal Procedure should be read in harmony with one another, TEX. CODE CRIM. PROC. ANN. art. 7A.04 (West 2015)(tying Family Code Title 4 to Criminal Procedure Code Article 7A), a subsection of Article 7A specifically states that to the extent the order rescindment provisions of the Family Code and the Code of Criminal Procedures conflict, the Code of Criminal Procedure takes precedence. TEX. CODE CRIM. PROC. ANN. art. 7A.07(d)."

Id. at 633-634.

MYTHS AND LEGENDS OF FAMILY LAW

Written By Hon. Emily Miskel

I. "OBJECTION! THEY'RE TRYING TO GO BEHIND THE LAST ORDER!"

We've all heard the objection. However, in order to successfully keep the complained-of evidence out, it is important to understand the legal basis for this objection. Essentially, this objection is a complaint that the issue has already been litigated and therefore should not form the basis of new litigation – a defense of claim preclusion or issue preclusion.

A. Res Judicata and Collateral Estoppel – TRCP 94

In Latin, the phrase res judicata means "a matter already judged." The plain English equivalent term is claim preclusion. Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action.[1] It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.[2] Res judicata bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in the prior suit.[3]

The doctrine of collateral estoppel, or issue preclusion, requires that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.[4] Collateral estoppel is narrower than res judicata. It is frequently characterized as issue preclusion because it bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.[5]

Claim preclusion—res judicata precludes litigation of a *cause of action* or defense that was previously litigated or *could have been* previously litigated in a prior action.

Issue preclusion—collateral estoppel bars the re-litigation of any *issue* that was *actually* litigated in a prior case and was essential to the prior judgment.

The public policies behind these doctrines include promoting judicial efficiency, protecting parties from multiple lawsuits, and preventing inconsistent judgments.[6]

Res judicata and collateral estoppel are not evidentiary objections; they are affirmative defenses that, under Rule 94, must be pleaded. One commentator recommends that attorneys regularly plead these affirmative defenses in modifications. *See below*.

B. Material and Substantial Change – Tex. R. Evid. 402

In order to modify an order affecting the parent-child relationship, a party must show a material and substantial change in circumstances since the date the last order was rendered.[7] To prove that a material change in circumstances has occurred, the petitioner must demonstrate what conditions existed at the time of the entry of the prior order as compared to the circumstances existing at the time of the hearing on the motion to modify.[8]

Tex. R. Evid. 402 provides that "irrelevant evidence is not admissible." Attempting to prove specific incidents that occurred prior to the rendition of the last order would not be relevant to a material and substantial change in circumstances occurring after the last order. Therefore, an objection to "going behind the prior order" may be more precisely restated as a relevance objection.

C. Exception – Pattern of Conduct

A long-recognized exception to the defenses of res judicata and collateral estoppel exists where prior acts of misconduct are offered in evidence to corroborate similar acts in a subsequent proceeding.[9] Tex. R. Evid. 406 also provides that habit evidence is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit.

D. Exception – Context

Without trying to relitigate specific fact issues that pre-date the last order, evidence about past occurrences

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[1] *Barr v. Resolution Trust Corp*., 837 S.W.2d 627, 628 (Tex.1992).

[2] *Amstadt v. US Brass Corp*., 919 S.W.2d 644, 653 (Tex.1996).

[3] *Russell v. Moeling*, 526 S.W.2d 533, 536 (Tex.1975).

[4] *Id*.

[5] *Wilhite v. Adams*, 640 S.W.2d 875, 876 (Tex.1982); *Benson v. Wanda Petroleum Company*, 468 S.W.2d 361, 362 (Tex.1971).

[6] *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex.1994).

[7] Tex. Fam. Code § 156.101(a)(1).

[8] *Agraz v. Carnley*, 143 S.W.3d 547, 552 (Tex.App.—Dallas 2004, no pet.); *Considine v. Considine*, 726 S.W.2d 253, 255 (Tex.App.—Austin 1987, no writ).

[9] *Wilson v. Elliott*, 96 Tex. 472, 73 S.W. 946 (1903); *Pennington v. Pennington*, 195 S.W.3d 677, 678 (Tex.Civ.App.—Texarkana 1946, writ ref'd n.r.e.).

may be relevant to give context to other admissible evidence. Unlike habit evidence, evidence of specific past acts is not admissible to prove the character of a person in order to show action in conformity therewith. Tex. R. Evid. 404(b). However, evidence of past acts may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. *Id*. Similarly, evidence of conduct prior to the last order may be relevant to whether or not there was a material and substantial change in circumstances or whether the requested modification is in the best interest of a child.

E. Exception – Impeachment

Depending on a party's testimony at trial, statements preceding the last order may be relevant and permissible for impeachment purposes. A witness's prior statements may be used to impeach the witness's credibility. *See* Tex. R. Evid. 613.

For a more thorough discussion of res judicata in family law cases, please see Chad Baruch's excellent article "'*It Ain't Legal and Worse than That by God, It Ain't Right!' Why Almost Everything Family Law Attorneys Think They Know About Res Judicata is Wrong*," Chapter 11, Advanced Family Law Course (2008).

II. "OBJECTION! THEY'RE TRYING TO GET INTO SETTLEMENT DISCUSSIONS!"

Tex. R. Evid. 408 makes settlement offers, conduct, or statements made during negotiation inadmissible to prove liability or the amount of a disputed claim. However, the rule itself expressly lists several permissible uses, including but not limited to bias, prejudice, interest, delay, or obstruction. Further, the rule does not shield evidence simply because it was presented to the adversary during compromise negotiations.

A. Permissible Uses of Settlement Negotiations

Settlement offers, agreements, and negotiations are admissible to show the bias, prejudice, or interest of a witness or a party. For example, a settlement agreement may properly be used to show that a witness (who used to be a party but settled before trial) is interested or unreliable.[10]

A settlement offer sent along with relevant documents may be admissible to prove that notice regarding a claim was provided, or that there was no undue delay.[11]

B. Award of Attorney's Fees

Many attorneys refer to *Lawrence v. Boles*[12] as a basis for contending that settlement offers may be considered for the purposes of awarding attorney's fees. In that case, evidence of settlement negotiations was admissible for the purpose of showing that the attorney's fees incurred to bring the lawsuit were *not* necessary. Many have argued that the logic should extend to the admissibility of settlement offers to show when attorney's fees *are* necessary, but there is no family law case on that principle.

TRCP 167 contains a procedure to award litigation costs against a party who rejects a reasonable settlement offer, but it explicitly excludes actions brought under the Family Code.[13] That said, if you have civil claims in connection with a family law case, the procedure may apply to the tort claims, for example.

Since TRCP 167 took effect in 2011. Since it contains specific procedures for using settlement offers as a factor in determining attorney's fees, it may have overruled previous common law cases that differ from its explicit provisions. Therefore, if an opposing party is attempting to use settlement evidence to influence the award of attorney's fees, it may be worth arguing that the addition of TRCP 167 explicitly removed that remedy for family cases. There are no decisions on this issue.

For a more thorough discussion of Rule 408 in family law cases, please see the excellent article "Texas Rule of Evidence 408: So You Think Settlement Offers are Inadmissible in Family Cases," by Hon. Jonathan Bailey and Aubry Talkington, Chapter 42, Advanced Family Law Course (2014).

III. "OBJECTION! OPTIONAL COMPLETENESS!"

A. Tex. R. Evid. 106 – Remainder of or related writings or recorded statements

The rule of optional completeness is that if one party introduces part of a statement or document, the opposing party may contemporaneously introduce as much of the balance as is necessary to explain the first part.[14] The rule is based on two considerations: (1) the danger that material may be made misleading by being taken out of context, and (2) the inadequacy of a delayed repair.[15]

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[10] *Via Metro. Transit Auth. v. Barraza*, No. 04-13-00035-CV (Tex. App.—San Antonio Dec. 4, 2013, pet. denied) (mem. op.).

[11] *Certain Underwriters at Lloyd's, London v. Chicago Bridge & Iron Co.*, 406 S.W.3d 326, 339 (Tex.App.-Beaumont 2013, pet. denied).

[12] *Lawrence v. Boles*, 631 S.W.2d 764, 766-67 (Tex.App.—Tyler 1981, no writ).

[13] TRCP 167.1(d).

[14] *Travelers Ins. v. Creyke*, 446 S.W.2d 954, 957 (Tex.Civ.App.—Houston [14th Dist.] 1969, no writ).

[15] *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex.App.—Texarkana 1991, writ denied).

Rule 106 has been described as merely a rule of timing applying only to writings and recorded statements. [16] Rule 106 is an acceleration provision that applies to a subset of the evidence that is accorded admissibility under the broader "door-opening" doctrine codified in Rule 107.[17]

Under Rule 106, a party whose opponent introduces part of a writing or recorded statement may *at that time* introduce any other part.[18] Not only may the adverse party immediately offer the remainder, she may interrupt her opponent's case to do so.[19] However, the rule is optional and does not require the adverse party who seeks to introduce the remainder to present it during her opponent's case; she can rely instead on Rule 107.[20]

B. Tex. R. Evid. 107 – Rule of optional completeness

The rationale behind the rule serves to permit an opponent of the alleged incomplete writing to introduce the remainder of the writing to correct any false or misleading impressions left by the incomplete writing.[21] It allows the admission of otherwise inadmissible evidence to fully and fairly explain a matter broached by the adverse party.[22] Nevertheless, the omitted portion of the statement must be on the same subject and must be necessary to make the admitted portion fully understood.[23]

In *Walters*,[24] the Court of Criminal Appeals discusses the rule:

> Hearsay statements are generally not admissible unless the statement falls within a recognized exception to the hearsay rule. Rule 107, the rule of optional completeness, is one such rule. This rule is one of admissibility and permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the adverse party. It is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing. Rule 107 does not permit the introduction of other similar, but inadmissible, evidence unless it is necessary to explain properly admitted evidence. Further, the rule is not invoked by the mere reference to a document, statement, or act. And it is limited by Rule 403, which permits a trial judge to exclude otherwise relevant evidence if its unfair prejudicial effect or its likelihood of confusing the issues substantially outweighs its probative value.

Rule 107 is merely a rule of admissibility and does not affect when the party may introduce the remainder.[25] The rule does not allow the opponent to immediately introduce the remainder; rather, the opponent must wait until her turn to introduce the additional portions.

C. Optional Completeness Does Not Exclude Evidence

Rules 106 and 107 are not rules of exclusion, but rather rules of admissibility.[26] Rule 106 is not enforced by excluding a partial recording or document, but by allowing the opposing party to contemporaneously introduce any other part of the statement that should be considered with the portion introduced by the proponent.[27] An opponent has no right to prevent the use of edited evidence on the sole ground that it is out of order or incomplete; the remedy is to introduce the unedited version or their own edited version in response to the offer.[28]

For more discussion of the rule of optional completeness, please see the excellent blog post on the topic by Hon. Bonnie Sudderth, available at judgebonniesudderth.wordpress.com/2011/06/09/the-rule-of-optional-completeness/

IV. "STATE OF MIND"

Frequently, an attorney will be trying to elicit hearsay statements allegedly made by a child. Upon objection, the attorney will simply respond "state of mind!" This appears to be the most misunderstood of the hearsay exceptions in Rule 803.

803(3) Then-Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling,

[16] *Ziolkowski v. State*, 223 S.W.3d 640, 649 n.8 (Tex.App.—Texarkana 2007, pet. ref'd).
[17] *Id*.
[18] *Reece v. State*, 772 S.W.2d 198, 203 (Tex.App.—Houston [14th Dist.] 1989, no pet.).
[19] *Id*.
[20] *Id*.
[21] *Walters v. State*, 247 S.W.3d 204, 217-18 (Tex.Crim.App.2007).
[22] *Id*.
[23] *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex.Crim.App.2004).
[24] *Walters v. State*, 247 S.W.3d 204, 217-218 (Tex.Crim.App.2007).
[25] *Reece v. State*, 772 S.W.2d 198, 203 (Tex.App.—Houston [14th Dist.] 1989, no pet.).
[26] *Lomax v. State*, 16 S.W.3d 448, 450 (Tex.App. —Waco 2000, no pet.); *see also In re C.S. et al*, No. 11-12-00294-CV (Tex.App.—Eastland, March 6, 2014).
[27] *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex.App.—Texarkana 1991, writ denied).
[28] *Id*.

pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed….

For example, a statement that a person was afraid would fall within this hearsay exception, but a statement offered to prove the reason for the fear is inadmissible hearsay.[29]

Admitting statements of memory or belief would virtually destroy the hearsay rule by allowing a state of mind, provable by hearsay statements, to serve as the basis for inferring the happening of an event which produced the state of mind.[30]

Examples:

- "The child told me he was sad" -- ✓ qualifies for the "state of mind" hearsay exception
- "The child told me he was sad because he doesn't want to live with his mom anymore." -- **X** an out-of-court statement of belief, offered to prove the reason behind the state of mind

V. PROOF OF SERVICE ON FILE 10 DAYS BEFORE DEFAULT

Often, an attorney will appear with a client to prove up a default judgment, and the attorney will bring with them a return of service or waiver of citation. Under the rules, the default cannot proceed until the return or waiver has been on file for over 10 days:

TRCP 107(h) Return of Service

No default judgment shall be granted in any cause until proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filling and the day of judgment.

This rule applies to default judgments and so the ten-day requirement should not apply to agreed judgments.

The rule does not explicitly state that the ten-day requirement applies to waivers of service. However, the rule regarding waivers says they are treated the same as a citation:

TRCP 119 Acceptance of Service

The defendant may accept service of process, or waive the issuance or service thereof by a written memorandum signed by him, or by his duly authorized agent or attorney, **after suit is brought**, sworn to before a proper officer other than an attorney in the case, and filed among the papers of the cause, and such waiver or acceptance **shall have the same force and effect as if the citation had been issued and served as provided by law**. The party signing such memorandum shall be delivered a copy of plaintiff's petition, and the receipt of the same shall be acknowledged in such memorandum. In every divorce action such memorandum shall also include the defendant's mailing address.

If a waiver of service is treated the same as a citation, then under the rules, the waiver must also be on file with the court 10 days prior to proving up a final order (unless the order is agreed).

Another common mistake, especially with agreed terminations, is that the parent will sign the affidavit of relinquishment, containing a waiver of service, prior to the date the suit is filed. Under the rules, a waiver may only be signed after the suit is actually filed.

The rules regarding the issuance, service, and return of process are mandatory, and failure to affirmatively show a strict compliance with those rules will render the attempted service of process invalid.[31]

VI. REQUIREMENTS OF TRCP 10 FOR ATTORNEY WITHDRAWAL

A trial court **abuses its discretion** when it grants a motion to withdraw that does not comply with the **mandatory** requirements of TRCP 10:[32]

An attorney may withdraw from representing a party only upon written motion for good cause shown.

If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only.

If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines.

If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may

[29] *Barnum v. State*, 7 S.W.3d 782, 790 (Tex. App.-Amarillo 1999, pet. ref'd).

[30] *Vann v. State*, 853 S.W.2d 243, 249 (Tex. App.—Corpus Christi 1993, pet. ref'd).

[31] *Travieso v. Travieso*, 649 S.W.2d 818, 820 (Tex.App.—San Antonio 1983, no writ).

[32] *In re A.T. et al*, No. 05-16-00539-CV (Tex.App.—Dallas, May 31, 2017); *Gillie v. Goulas*, 65 S.W.3d 219, 221 (Tex. App.—Dallas 2001, pet. denied); *see also Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex.1990).

impose further conditions upon granting leave to withdraw.

Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail.

If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

Rule 10 requires that an attorney provide her client notice of a motion to withdraw by **both** certified and regular mail. I am frequently seeing attorneys trying to withdraw after providing notice to their clients via email. This is not permitted under the rules. If the court were to grant such a motion, it would be an abuse of discretion. Rule 10 may be burdensome, but you must comply with its mandatory requirements.

Further, Rule 10 is very specific about what the motion is required to state. Do not try to withdraw from a case without reading Rule 10. For convenience, I have attached Appendix A, a checklist I prepared for my court, to help attorneys comply with Rule 10 and our Collin County local rules.

VII. WHERE DOES THE PROVE UP COME FROM?

In some counties, courts require at least one client to appear with an attorney to "prove up" an agreed divorce decree. Some courts require all original cases to be proved up, including divorces, suits affecting the parent-child relationship, paternity suits, etc. Other courts only require divorces to be proved up, allowing parties to submit agreed orders in other original suits without prove ups. I have been searching for a basis for this costly, yet essentially scripted and formulaic process.

A. Default Judgments

Ordinarily, a defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition.[33] However, Tex. Fam. Code § 6.701 states that, in a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer. Further, pursuant to Tex. Fam. Code § 6.402, it is not proper to include facts in a divorce petition.

Therefore, in taking a default judgment in a divorce case, a client would have to appear with counsel to put on testimony to support the requested relief. A default judgment of divorce is subject to an evidentiary attack on motion for new trial and appeal.[34] Vague, conclusory statements are not sufficient to support a default judgment. The best practice for proving up a default divorce judgment is to treat it like a trial and put all the testimony and evidence into the record.[35]

An older case also extended this requirement to custody modifications.[36] However, Title V of the Family Code does not contain provisions similar to Chapter 6, and under my informal polling, judges are not making people appear to prove up agreed modifications.

B. Agreed Decrees and Orders

It appears that the divorce prove up requirement sprang from the increased evidentiary requirements for default judgments. However, there does not appear to be any statutory or case law basis requiring a prove up of an agreed order. In my informal survey of specialized and general jurisdiction judges, judges are not making parties appear in person and prove up agreed final orders in civil cases, for example.

There are real costs for clients associated with paying lawyers to travel to the courthouse to appear for prove ups. If there is no purpose to this requirement, I propose that courts consider reevaluating whether to require prove ups for agreed orders and decrees, or to just accept and sign them like in other civil cases.

If you believe there is a statutory or other legal requirement for prove ups of agreed judgments, please e-mail me: emily@emilymiskel.com

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[33] *Stoner v. Thompson*, 578 S.W.2d 679 (Tex.1979).

[34] *Considine v. Considine*, 726 S.W.2d 253, 254 (Tex.App.—Austin 1987, no writ).

[35] *See, e.g., Gonzalez v. Gonzalez*, 331 S.W.3d 864, 866 (Tex.App.—Dallas 2011, no pet) (appellate court reversed and remanded divorce case where conclusory prove up testimony did not provide legally sufficient evidence to support the default judgment).

[36] *Id.*

VIII. APPENDIX A – CHECKLIST FOR TRCP 10 AND COLLIN COUNTY LOCAL RULE 4.3

Attorneys – Are You Trying to Withdraw?

Complete this Checklist Before Presenting Your Order

❑ My client signed off on my motion or order

1. Did you follow TRCP 10?

- ❑ I filed a written motion
- ❑ I made sure that the motion contains all the items listed in TRCP 10
- ❑ I delivered the motion to my client in person **or**
- ❑ I mailed the motion to my client's last known address by BOTH certified and regular first class mail

2A. Hearing

- ❑ I gave my client proper notice of the withdrawal hearing under TRCP 21 and 21a
- ❑ I am ready to hand my proof of notice to the court reporter

2B. No Hearing - Did you follow Collin County Local Rule 4.3?

- ❑ I sent my client a letter notifying him/her of the right to object to my withdrawal within ten days of mailing
- ❑ I sent the letter with my motion by both certified and regular mail
- ❑ My letter is on file with the court
- ❑ No objection has been filed

Also initial the following:

_____ I am aware that if my motion to withdraw is granted, I must send the client by regular mail:

- o a copy of the court's order
- o a letter that lists all settings and pending deadlines and,
- o if another lawyer is not being substituted, advises the client to obtain other counsel

_____ I must file this letter with the clerk and serve opposing counsel

MYTHS AND LEGENDS OF FAMILY LAW

Written By Hon. Scott A. Beauchamp

I. PLEADING STANDING

An attorney representing a nonparent in a Suit Affecting Parent-Child Relationship should always anticipate a challenge to the client's standing to bring the suit. Pleading is essential in these matters, as the court has no subject matter jurisdiction to make orders regarding a child without sufficient pleadings regarding standing for the nonparent. The question facing attorneys representing nonparents is: what is necessary in terms of pleading for a nonparent to maintain a Suit Affecting the Parent-Child Relationship?

The court's analysis of whether a party has standing always begins with the live pleadings of Petitioner. *Jasek v. Texas Department of Family and Protective Services*, 348 S.W.3d 523, 527(Tex.App.Austin 2011). The Petitioner should always plead sufficient facts for the court to ascertain whether the Petitioner has standing to file the suit. The trial court is to look at the pleadings and determine, assuming all facts in favor of the Petitioner, whether the pleadings establish standing under the applicable statute. *Heckman v. Williamson County*, 369 S.W.3d 137(Tex.2012). One Court has held that the specific statutory basis for standing need not be included in the pleadings as long as the facts permit the court to discern a statutory basis for standing. *In the Interest of DA*, No. 02-14-00265-CV, 2015 TEX.APP.LEXIS 1150(Tex.App.Fort Worth February 5, 2015); see also *Jasek*, 348 S.W.3d at 531(Standing upheld where Petitioners pleaded Texas Family Code section 102.003(a)(9) as a basis for standing without reciting the text of the section but also included facts that met the requirements of the section) .

The burden is on the Petitioner to plead facts which, if true, would demonstrate standing. Pleadings are to be construed liberally; however, unsubstantiated legal conclusions are not sufficient. *Medrano v. Zapata*, No. 03-12-00131-CV, 2013 TEX.APP.LEXIS 15452(Tex.App.Austin December 31, 2013); *In the Interest of YB, KB, and TB*, 300 S.W.3d 1(Tex.App.San Antonio 2009), petition for review denied. The petition should give fair notice of the Petitioner's legal basis for bringing the suit. *In the Interest of RER*, No. 13-14-00489-CV, 2016 TEX.APP.LEXIS 9235(Tex.App.Corpus Christi-Edinburg August 25, 2016). If the pleadings are insufficient, the Petitioner should be allowed to amend. *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217(Tex.2004). Petitioner must show that standing existed as of the filing of the suit. *In the Interest of SMD*, 329 S.W.3d 8(Tex.App.San Antonio 2010), petition for review dismissed. The basis for standing must be pleaded in the petition, not merely subsequently filed motions. Pleading a new basis for standing in a Motion for New Trial or Motion to Reinstate after dismissal of the case for want of jurisdiction does not support a finding of standing. *In the Interest of YHT, AMT, and RST*, no. 10-14-00189-CV, 2015 TEX.APP.LEXIS 2180(Tex.App.Waco March 5, 2015).

Pleading for standing tends to run against pleading practice generally in family law cases. Most pleadings in divorce and SAPCR cases do not contain facts relevant to the case in the body of the pleadings. However, the authority regarding standing suggests that pleadings should contain at least a minimal recitation of facts necessary for the court to determine that it has standing, and therefore subject matter jurisdiction, to hear the case and make orders.

Although pleading facts may be the best practice, it may be possible to plead for standing by merely reciting the statutory grounds in the petition. See, *In the Interest of CDM*, no. 11-15-00319-CV, 2016 TEX.APP.LEXIS 10944(Tex.App.Eastland October 6, 2016). The *Jase*k and *CDM* Courts held that pleadings are sufficient if they give fair notice of the basis for Petitioner's standing. *Jasek*, 348 S.W.3d at 531; CDM, 2016 TEX.APP.LEXIS 10944 at *6. The Respondents can file special exceptions to complain of any dearth of facts in the pleadings that support standing, and failure to do so waives any complaint regarding the pleading. *Jasek*, 248 S.W.3d at 531. However, the best practice is to include facts in support of standing in order to avoid delays and additional hearings that may be caused if special exceptions are sustained to the insufficiency of the pleadings.

Of course, the Respondent in a case may still challenge standing and the facts stated in pleadings to support standing by filing a Plea to the Jurisdiction. In such a situation, the trial court is not limited to the pleadings in determining standing but may also consider evidence and must do so when it is necessary to resolve the jurisdictional issues raised. *Bland ISD v. Blue*, 34 S.W.3d 547(Tex. 2000). See also, *Texas Association of Business v. Texas Air Control Board*, 832 S.W.2d 440(Tex. 1993). The court can consider the record from the trial on the merits, temporary order hearings, motions, and post trial proceedings in determining standing. *Medrano v. Zapata*, no. 03-12-00131-CV, 2013 TEX.APP.LEXIS 15452(Tex.App.Austin December 31, 2013).

II. ABUSE OF DISCOVERY?

Texas Rule of Civil Procedure 215 articulates standards and punishments for abuse of the discovery process. Of course, this discussion mostly bears on the ability of the court to impose sanctions, usually attorney's fees. Courts and attorneys struggle with the

following questions on a case by case basis in discovery disputes:

- What conduct constitutes an abuse of the discovery process?
- What conduct does not constitute an abuse of the discovery process?
- What sanctions are appropriate if there has been an abuse of the discovery process?

A. What is an abuse of discovery?

The following list includes examples of conduct that may constitute discovery abuse and therefore be cause for sanctions:

- Frivolous, evasive, or incomplete responses.
- Failure to respond to a Request for Disclosure, Interrogatories, or a Request for Production.
- Failure to produce documents for inspection in response to a valid Request for Production or a failure to answer Interrogatories without a good faith objection or assertion of privilege.
- Misrepresentations as to information or the existence of document.
- Asserting numerous unfounded objections, especially in a uniform manner across all discovery requests made.
- Objections to requests for documents that are clearly discoverable. (e.g., tax returns and paycheck stubs where child support is an issue in the case).
- Objections made where there are no documents to produce.
- Discovery responses that state a party will supplement without any indication why the supplementation is necessary instead of immediate production.
- Propounding discovery requests where the party would not have access to a document or information sought. (e.g., a request for a party to produce a third party's bank statements).
- Voluminous Requests for Production that request documents having little bearing on the case or are difficult or impossible to answer.
- Failure to appear at a deposition after being duly served with a subpoena.
- Improper objections or obstruction in a deposition.
- Abusive questioning at a deposition.
- Failure to abide by court orders regarding discovery, especially after a previous Motion to Compel.
- Spoliation, or destruction of evidence.
- Failing to produce a document responsive to a request where the party had the ability to attain the document from a third party that holds the document but did not do so.

B. What is not an abuse of discovery?

Common themes of nonsanctionable conduct include diligence used to comply with discovery requests, compliance with the discovery rules to the greatest extent possible, and transparency to the court and the opposing party in propounding and responding to discovery. The following are examples of conduct that are likely not an abuse of discovery:

- Asserting objections to discovery requests that have a good faith basis in fact and law.
- Refusing to produce documents or answer interrogatories where a privilege is asserted until the court rules on the applicability of the privilege.
- Inadvertently failing to produce a small quantity of documents, where the discovery request was voluminous and the party substantially responded to the request.
- Failing to produce documents in a timely manner, where research or a request from a third party was necessary to procure the document.
- Filing a Motion to Compel regarding objections made by the responding party, even if it is represented that the responding party produced all responsive documents.

C. Sanctions

Courts are empowered to impose a wide range of sanctions in the discovery context against parties that engage in abuse of discovery. Appellate courts give trial courts a wide berth in imposing these sanctions, reviewing the decision of a trial court to impose a sanction for abuse of discretion. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238(Tex. 1985). However, this power of the trial court is not without limits, as the large body of case law regarding discovery sanctions indicates. The Courts of Appeals review sanction awards to determine whether the trial court acted without reference to any guiding rules and principles. *Id.* The purposes of sanctions are to assure compliance with the discovery process and deter further abuses of discovery. *Id.*

Texas Rule of Civil Procedure 215 catalogs many different types of sanctions for different types of misconduct. Failure of a deponent to appear for a deposition may be punished by contempt of court. TEX.R.CIV.PRO. 215.2(a). That sanction is also available against a nonparty that fails to comply with an order for entry onto property pursuant to Texas Rule of Civil Procedure 196.7 or fails to comply with a discovery subpoena for documents and tangible things without deposition under Texas Rule of Civil Procedure 205.3. TEX.R.CIV.PRO. 215.2(c). A party that makes an evasive or incomplete answer to a Request for Admission may be sanctioned by having the answer deemed by the court as admitted or by the court

requiring an answer that complies with Texas Rule of Civil Procedure 198. TEX.R.CIV.PRO. 215.4(a).

If a party denies any matter requested to be admitted and the requesting party can prove that the matter of the Request for Admission was true, the requesting party may be awarded the expenses necessary to prove the matter true, including reasonable attorney's fees. TEX.R.CIV.PRO.215.4(b). There are four defenses to the sanction for denying a matter requested to be admitted that is proven true. First, there can be no sanction if the admission was held objectionable by the court. Second, there can be no sanction if the court finds that the admission was of no substantial importance. Third, it is not sanctonable if the party failing to admit the matter had a reasonable ground that he or she would prevail in not admitting the matter. Fourth, there can be no sanctions if there is other good cause for failing to admit the matter. *Id*.

There are also sanctions for parties that set up depositions that do not proceed. If a party fails to appear or proceed at a deposition that he or she noticed and the other party appeared for the deposition, then the court may order the noticing party to pay reasonable expenses incurred by the other party in attending the deposition, including reasonable attorney's fees. TEX.R.CIV.PRO. 215.5(a). If a party noticing a deposition fails to procure the attendance of a witness that is subject of the deposition and is at fault in that failure, the court can award another attending party reasonable expenses incurred in attending the deposition, including reasonable attorney's fees, against the noticing party. TEX.R.CIV.PRO.215.5(b).

The most familiar sanctions are those that can be assessed against a party for failing to comply with a discovery request or order. These sanctions include:

1. An order disallowing further discovery.
2. An order taxing costs of discovery against the disobedient party or attorney.
3. Deeming as established certain facts for the purposes of the matter pending before the court.
4. An order preventing a party from supporting or opposing designated claims or defenses or prohibiting the party from introducing designated matters into evidence.
5. Striking of all or parts of pleadings, staying a proceeding until discovery orders are obeyed, dismissing the action before the court with or without prejudice, or rendering a default judgment against the disobedient party.
6. Contempt of court for failure to obey any discovery order except an order to submit to a physical or mental examination.
7. Sanctions one through five listed above for failing to attend a physical or mental examination as ordered or for failing to bring a person as ordered for a physical or mental examination unless inability to bring the person for the examination is proven.
8. Reasonable expenses, including attorney's fees. incurred by the failure to comply with discovery requests or orders unless the failure is found to be substantially justified or other circumstances exist that make the award of expenses unjust.

TEX.R.CIV.PRO. 215.2(b)(1-8).

In addition to sanctions, the trial court must award reasonable expenses, including attorney's fees, incurred in obtaining an order compelling production against the party or attorney whose conduct necessitated the motion. TEX.R.CIV.PRO. 215.1(d). This type of award is not referred to as a sanction in the rule; rather, it is a rule of reimbursement. *Clark et al. v. Clark*, no. 08-15-00293, 2017 TEX.APP. LEXIS 2664(Tex.App.El Paso March 29, 2017). The right to reimbursement under this rule is also not to be construed as a penalty. *Hanley v. Hanley*, 813 S.W.2d 511, 522(Tex.App.Dallas 1991); *Blake v. Dorado*, 211 S.W.3d 429(Tex.App.El Paso 2006). The right to reasonable expenses under Rule 215.1(d) is not absolute. If the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust, the court may decline to award reasonable expenses. *Id.*

An example of a case where the Court found that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust occurred in *Kings Park Apartments v. National Union Fire Insurance Company*, 101 S.W.3d 525, 541(Tex.App.Houston 1st 2003), petition for review denied. In the case, the First Court upheld the trial court's ruling that denied an award of attorney's fees, finding that such an award to the movant was unjust. The trial court found that the moving party had expended attorney's fees in discovery for information to use in other cases and that it had otherwise considered the offensive conduct in discovery and crafted a discovery order that punished that conduct. *Id.*

An example of a situation where the appellate court found that the imposition of reasonable expenses against a party responding to a Motion to Compel was justified occurred in the Clark matter. There, the trial court had previously issued a letter that admonished the parties to "carefully review and reconsider their position" regarding the discovery dispute and warned of the court's ability to award reasonable expenses. However, the responding party continued to assert his objections even after the Court's admonition. The responding party was later ordered to pay attorney's fees in connection with the discovery dispute. These facts were sufficient to defeat the responding party's claim that the award of attorney's fees was unjust, as the letter of the

trial court had given notice to the responding party that at least a portion of the objections lodged were on "shaky footing." See, *Clark*, 2017 TEX.APP.LEXIS 2664 at *17.

Rule 215.1(d) does work conversely. The Court may award reasonable expenses against the moving party or attorney and in favor of a party opposing the motion if the motion is denied. TEX.R.EVID. 215.1(d). The court may not award reasonable expenses against an unsuccessful moving party or attorney if the court finds that the party was substantially justified in bringing the motion or that other circumstances make the award of expenses unjust. *Id.*

The court may make partial award of reasonable expenses in a just manner in circumstances where a Motion to Compel is granted in part and denied in part. *Id*. The court's award must be reasonable in relation to the amount of work necessary to bring the Motion to Compel or to oppose the motion. *Id.*

In granting reasonable expenses under Rule 215.1(d), the trial court must find that the party, attorney, or both are responsible for the conduct leading to the discovery dispute. *Clark*, 2017 TEX.APP.LEXIS 2664 at *18. The trial court cannot grant expenses against an innocent party under this rule, though the level of culpability required for an award of expenses differs and is likely less than that of a true sanction. *Id.*

If attorney's fees are sought, the party seeking the sanction must put evidence into the record of the attorney's fees that were incurred and how those fees resulted from or were cause by the sanctionable conduct of the opposing party. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528(Tex. 2016). The Supreme Court in *Christus Health Gulf Coast* cited that the evidence was insufficient to support a sanctions award of attorney's fees where the record contained no evidence of fee bills, no evidence of the hourly rate charged, no evidence of time billed, and no evidence of a dollar amount that would have compensated for the time involved in the discovery motion. *Id.*, at *29. Pleadings, motions, and the factual allegations therein are not evidence upon which a court can grant a sanction of attorney's fees. *Id.*

A party seeking, making, or resisting the discovery process may also be sanctioned for abusing the discovery process or propounding any interrogatory or request for production or inspection that is unreasonably frivolous, oppressive or harassing. TEX.R.CIV.PRO. 215.3. Also, a party that makes a response or answer to discovery requests that are unreasonably frivolous or for purpose of delay may be sanctioned. *Id.* Sanctions under Rule 215.3 are limited to those sanctions listed above in items (1), (2), (3), (4), (5), and (8). *Id.*

Discovery sanctions issued by a trial court must comply with two part test. First, a direct relationship must exist between the offensive conduct and the sanction imposed. *Transamerican Natural Gas Corporation v. Powell*, 811 S.W.2d 913, 917(Tex. 1991). The sanction must be imposed for the purpose of remedying the prejudice suffered by the innocent party due to the misconduct of the offending party. Id. Further, the sanction must be levied only against the offending person. *Id.; American Flood Research v. Jones*, 192 S.W.3d 581(Tex.2006); Spohn Hospital v. Mayer, 104 S.W.3d 878(Tex. 2003). Counsel cannot be sanctioned for the sole misconduct of the client, and the client cannot be sanctioned for the discovery abuses attributable only to his or her attorney.

The second test is that the sanctions may not be excessive. *Transamerican Natural Gas Corporation v. Powell*, 811 S.W.2d 913, 917(Tex. 1991). Discovery sanctions should not be any more severe than necessary to remedy the prejudice to the innocent party. *Id.* The court must always consider on the record less stringent sanctions. *Id*., at 918. Normally, the court must implement and test lesser sanctions before proceeding to more extreme sanctions; however, this is not necessary where egregious conduct and blatant disregard for the discovery process exists. *Cire v. Adams*, 134 S.W.3d 835, 842(Tex.2004). Sanctions may be assessed against a party even if a party eventually complies with a discovery request. *Horizon Health Corp. v. Acadia Healthcare Co*., no.15-0819, 2017 TEX. LEXIS 480 at *75(Tex. May 26, 2017).

The most extreme sanctions, commonly known as "death penalty sanctions", are outcome determinative of the case. This includes the striking of pleadings, rendering of a default judgment, exclusion of evidence, or deeming any critical facts to the case against the sanctioned party. These types of sanctions have constitutional due process implications. *Transamerican Natural Gas Corporation v. Powell*, 811 S.W.2d 913, 917(Tex. 1991). As such, the analysis of the court in imposing the sanctions is different than other sanctions. If a discovery sanction has the effect of adjudicating the merits of a party's claims or defenses (or preventing the adjudication of the merits of a claim or defense), the sanction should not be imposed without a finding of a party's flagrant bad faith or counsel's conscious disregard for the responsibilities of discovery under the rules. *Id.*, at 918. Bad faith is not simply bad judgment or negligence, but the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose. *Time Warner, Inc. v. Gonzalez*, 441 S.W.3d 661, 666(Tex.App.San Antonio 2014), petition for review denied, quoting *Armstrong v. Collin County Bail Bond Board*, 233 S.W.3d 57, 63(Tex.App.Dallas 2007). Essentially, such a sanction is warranted in these circumstances because the party's or attorney's discovery abuses justify a presumption that the claims or defenses of the party are without merit. *Transamerican Natural Gas*, 811 S.W.2d at p. 918. See, e.g., *Cire v. Adams*, 134 S.W.3d 835(Tex.2004)(Court struck Petitioner's pleadings where Petitioner destroyed

audio tapes critical to the outcome of the case after being ordered to produce them. The suit involved a legal malpractice claim by a client against her attorney. Seventy to one hundred audio tapes were made by the client of conversations between the client and her attorney regarding settlement of the underlying case. Court concluded no other sanction would be effective on the record); see also, *JNS Enterprise Inc. v. Dixie Demolition LLC*, 430 S.W.3d 444(Tex.App.Austin 2013)(Suit dismissed where Plaintiff fabricated evidence and lied about the evidence at a deposition; Court held that typical discovery orders would be ineffective in addressing or punishing such discovery abuse); *Imagine Automotive Group v. Boardwalk Motor Cars Ltd.*, 430 S.W.3d 620(Tex.App.Dallas 2014), petition for review denied (Trial court upheld in striking pleadings and defenses based on party's repeated failure to comply with discovery orders to produce documents during two year pendency of case, then producing documents within thirty days of trial); *Caron v. Smaby*, no.-01-15-00528-CV, 2017 TEX.APP.LEXIS 5244(Tex.App.Houston 1st June 8, 2017)(Death penalty sanctions upheld where Respondents refused to abide by three prior orders compelling discovery and pay previously ordered monetary sanctions related to discovery).

In considering death penalty sanctions, the trial court must consider whether lesser sanctions or other alternatives to death penalty sanctions would be effective; however, a trial court is not required to test all available lesser sanctions before imposing more serious sanctions. *Alma Investments v. Bahia Co-Owners Association*, 497 S.W.3d 137, 143(Tex.App.Corpus Christi-Edinburg 2016), petition for review denied.

One case has held that where a party's efforts to comply with discovery requests were "sometimes sloppy, sometimes inaccurate and sometimes incomplete" but the efforts to comply were substantial, no death penalty sanctions could be ordered. *Hernandez v. Polley*, No. 03-15-00384, 2016 TEX.APP.LEXIS 11116(Tex.App.Austin October 13, 2016). The trial court could neither find that the party engaged in conduct involving flagrant bad faith nor that the attorney's conduct indicated callous disregard for the responsibilities of discovery under the rules in this case. *Id*. Trial by sanctions is not appropriate unless either the party engaged in conduct involving flagrant bad faith or the attorney's conduct indicated callous disregard for the responsibilities of discovery under the rules. *Alma Investments v. Bahia Co-Owners Association*, 497 S.W.3d 137, 142(Tex.App.Corpus Christi-Edinburg 2016), petition for review denied.

Case determinative sanctions may be imposed in an initial sanctions order only in exceptional cases when they are clearly justified, and it is fully apparent that no lesser sanctions would promote compliance with the rules. *GTE Communications v. Tanner*, 856 S.W.2d 725, 729(Tex. 1993). If the court will assess case determinative sanctions against a party, it must explain on the record why lesser sanctions are not appropriate. Id. One Court has held that death penalty sanctions were not appropriate against the clients where the only evidence of discovery abuse was that of their attorney. *Zheng v. Bridgestone Firestone North American Tire*, 284 S.W.3d 890(Tex.App.Eastland 2009). Another Court has held that a trial court cannot assess merit preclusive sanctions against a party where the record did not establish that the client was responsible for the offending conduct. *Lott v. McCain*, no. 12-15-00244-CV,2016 TEX.APP.LEXIS 3796(Tex.App.Tyler April 13, 2016).

A recent opinion upheld the assessment of sanction striking the father's pleadings in a Suit Affecting Parent Child Relationship where the father failed to comply with the trial court's order to participate in a child custody evaluation. There was a nexus between the sanction and father's behavior, as he alone was the person responsible for refusing to attend evaluation sessions and pay for the evaluation. *Young v. Young*, no. 03-14-00720-CV, 2016 TEX.APP.LEXIS 13254(Tex.App.Austin December 15, 2016). The sanction was not excessive in that prior sanctions, including an oral warning and a sanction striking his evidence (overturned in the same opinion), were not effective in gaining father's compliance. *Id*. The Court found that father's misconduct warranted a presumption that his claims or defenses lacked merit, since the trial court had previously stressed to father the importance of the evaluation for the resolution of the case and gave him numerous opportunities to comply. *Id*. The failure of lesser sanctions also justified a presumption that father's claims and defenses were without merit. *Id.* Finally, father had engaged in a long list of offensive and egregious behaviors during the case. *Id*.

Young also involved sanctions for father's insufficient and "clearly offensive" discovery responses. *Id*. Two of those sanctions were overturned. An order striking father's jury demand was reversed, as there was no showing of how such a sanction would remedy his misconduct. *Id.* An order striking father's evidence at trial was reversed for several reasons. First, such a sanction punishes father alone, there was no indication in the record that the trial court established whether father or his attorney were at fault for the insufficient responses to discovery requests. *Id*. Second, the trial court struck father's evidence on the first Motion to Compel hearing regarding discovery responses without testing lesser sanctions. *Id*. Finally, the Court noted the difficulty in justifying exclusion of evidence in a Suit Affecting Parent-Child Relationship, where evidence is critical in determining a child's best interest. *Id.*

If there are separate phases of the case and the discovery abuse prejudices the opposing party from

proving or defending a claim in only one particular phase of the case, the court should not issue a sanction that affects the offending party's ability to participate in the unaffected phase of the case. See, *Paradigm Oil v. Retamco Operating*, 372 S.W.3d 177(Tex. 2012)(Sanction striking answer and granting default judgment was upheld as to liability where discovery abuse was related to liability facts; preventing defendant from participating in the damages portion of the trial reversed, as discovery abuse did not relate to facts as to damages).

There is some authority that would seem to limit a court's ability to grant death penalty sanctions in Suits Affecting the Parent-Child Relationship for discovery abuse. In *Van Heerden v. Van Heerden*, 321 S.W.3d 869(Tex.App.Houston 14th 2010), the trial court excluded the mother's fact witnesses as a discovery sanction. The Court noted that the exclusion of witnesses is properly characterized as a death penalty sanction when it means that a parent has no testimony other than her own to defend her parental rights. *Id*. at 878, citing *In Re NRC*, 94 S.W.3d 799, 810(Tex.App.Houston 14th 2002) petition for review denied. The Court concluded that sanctions to this extent were not consistent with the determination of the best interest of the child, which was the primary consideration of the Court as mandated by the legislature. *Id*.; see also *Young*, 2016 TEX.APP.LEXIS 13254 at * 14-15.

It should be noted that an exclusion of evidence at trial due to failure to produce such evidence in compliance to a discovery request under Texas Rule of Civil Procedure 193.6 is not regarded as a discovery sanction. *In the Interest of TKD-H*, 439 S.W.3d 473(Tex.App.San Antonio 2014). Therefore, the legal analysis regarding sanctions is not applicable to the propriety of excluding evidence under Rule 193.6.

There are other sanctions made available by case law in addition to those in Rule 215. The Texas Supreme Court has stated that forced production of work product privileged documents may be utilized as a sanction unless the work product protected document contains an attorney's thought processes. *Occidental Chemical Corporation v. Banales*, 907 S.W.2d 488(Tex. 1995). This sort of forced production would fall into the category of outcome determinative sanctions, which require a higher showing of discovery abuse in order to be imposed. *Id.*

Some sanctions are not permissible. A court may not exclude an attorney from a case as a discovery sanction. *In Re Vossdale Townhouse Association*, 302 S.W.3d 890(Tex.App.Houston 14th 2009). A court also may not assess attorney's fees against a party or attorney as a discovery sanction without evidence in the record support the award. *Stromberger v. Turley Law Firm*, 251 S.W.3d 225(Tex.App.Dallas 2008). Without evidence in the record support an attorney fee award, the sanction is an impermissible arbitrary fine. *Id*.

A particular type of sanctions analysis applies when spoliation of evidence, or destruction of evidence, is present. There are two elements of spoliation. First, there must be a duty to preserve the evidence. *Wal-mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721(Tex. 2003). This duty arises when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim. *Id.*, at 722. The second element of spoliation occurs when a person with such a duty deliberately destroys relevant evidence or fails to produce relevant evidence and does not explain its nonproduction. *Id.*

If the destroyed evidence was critical to the outcome of the case, a court may impose death penalty sanctions as the court did in *Cire v. Adams*, 134 S.W.3d 835(Tex. 2004). Another type of spoliation sanction is an instruction to the jury. An example of such an instruction would require the jury to presume that the missing evidence would have harmed the case of a party if the jury found that the party destroyed the evidence after that party knew or should have known that the evidence destroyed would be evidence in the case. See, *Wal-Mart Stores, Inc*., 106 S.W.3d at 721. To impose this sanction, the court must find that the spoliating party acted with intent to conceal discoverable evidence or the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense. *Petroleum Solutions LLC v. Head*, 454 S.W.3d 482, 489(Tex. 2014), citing *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9(Tex. 2014). In determining whether to impose the sanction of a jury instruction, the trial court must weigh the spoliating party's culpability and the prejudice to the nonspoliating party. Id. This involves reviewing whether the evidence was relevant to the key issues in the case, whether the evidence would have harmed the spoliating party's case or been helpful to the nonspoliating party's case, and whether other evidence existed that was cumulative to the spoliated evidence. *Id.* See also, *Knoderer v. State Farm Lloyds*, no. 06-16-00009-CV, 2017 TEX.APP.LEXIS 298(Tex.App.Texarkana January 13, 2017), petition for review filed (Use of spoliation instruction reversed where Respondent was not prevented from establishing a defense by spoliation of evidence; Respondent was able to establish the same defense through different evidence.). Negligent spoliation will not support a finding that the evidence destroyed was relevant and harmful unless there is some proof of what the destroyed evidence would show. *In Re Advanced Powder Solutions Inc.*, 496 S.W.3d 838, 855(Tex.App.Houston 1st 2016), citing *Brookshire Brothers*, 438 S.W.3d at 22, quoting *Trevino v. Ortega*, 956 S.W.2d 950, 958(Tex. 1998).

Sanctions may be considered even if the case is nonsuited or dismissed. The trial court retains the ability to consider sanctions against a party as long as it retains plenary power over the case. *Johnson v. Chesnutt*, 225 S.W.3d 737(Tex.App. Dallas 2007), petition for review denied, citing *Scott & White Memorial Hospital v. Schexnider*, 940 S.W.2d 594(Tex. 1996).

III. CONCLUSORY STATEMENTS

Conclusory statements for the purpose of this section can best be defined as those statements that reach a conclusion, including a legal conclusion, without providing the underlying facts that lead the witness to make the conclusion.

Testimony involving conclusory statements is common in family courts. Some examples include:

- Testimony that an individual committed "family violence" against another, without any details of the events that actually happened.
- Testimony that property is community or separate in character, without any further specific factual evidence to support the claim.
- Testimony that there has been a material and substantial change in circumstances regarding the parties or the child, without evidence of the circumstances that were in existence at the time that the prior order was rendered and specific facts that demonstrate how there had been a material and substantial change in circumstances.
- Testimony that requested relief is in the "best interest of the child", without any specific factual evidence demonstrating that this statement is correct.
- Testimony that records held by an organization or person are "business records" of that organization or person, without specific factual evidence of the predicate set forth under Texas Rule of Evidence 803(6).

Bare conclusions are incompetent evidence and represent no evidence at all even if there is no objection to the statement. *Dallas Railway Terminal Company v. Gossett*, 294 S.W.2d 377, 380(Tex.1956); *Casualty Underwriters v. Rhone*, 132 S.W.2d 97, 99(Tex.1939). Statements that are no more than a legal conclusion are also not competent evidence that will support a judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112(Tex. 1984)(Testimony that contract had been modified without explanation of factually how the modification occurred was no more than a legal conclusion). Conclusory statements have been held to be not probative and therefore insufficient for purposes of establishing a prima facie case. *Serafine v. Blunt,* 466 S.W.3d 352, 358(Tex.App.Austin 2015). Likewise, a witness' agreement to an attorney's question regarding the existence of the legal causation standard at issue in the suit before the court is also not evidence of that causation that can be considered by the court. *HMC Hotel Properties II Limited Partnership and Host Hotels & Resorts v. Keystone-Texas Property Holding Corporation*, 439 S.W.3d 910, 917(Tex. 2014).

Courts of Appeals analyze testimony as to whether it is conclusory only on the basis of the face of the record. *Coastal Transport Company v. Crown Central Petroleum Corp*., 136 S.W.3d 227, 233(Tex. 2004).

The consequences for relying on conclusory statements in an evidentiary hearing can be severe. If a party requesting relief relies solely on conclusory statements in a hearing, a directed verdict is appropriate once that party rests. See, *Brownlee*, 665 S.W.2d at 112. If a prove up on a default consists of questions and answers that amount to no more than conclusory statements, then the resulting judgment will be susceptible to reversal on appeal or restricted appeal, as there is no competent evidence supporting the judgment. See, *O'Neal v. O'Neal*, 69 S.W.3d 347, 350(Tex.App.Eastland 2002); see also, *Beam v. Beam*, no. 07-15-00250-CV, 2017 TEX.APP.LEXIS 4261(Tex.App.Amarillo May 10, 2017).

Some further examples of conclusory statements in case law:

- An owner's testimony regarding the value of his or her property without a factual basis for the owner's determination of that value. *Natural Gas Pipeline v. Justiss et al.*, 397 S.W.3d 150(Tex. 2012).
- In a suit involving a determination of whether a lienholder had renewed and extended a deed of trust lien, a summary judgment affidavit was conclusory and therefore insufficient where the bank president stated that the lien was "renewed and extended" without explanation of any facts showing how the lien was renewed and extended. *Mercer v. Daoran Corporation*, 676 S.W.2d 580, 583(Tex. 1984).
- In a suit to collect on a defaulted note, Respondent alleged failure of consideration. A summary judgment affidavit was conclusory and therefore insufficient where Surety Savings vice president stated that "valuable consideration" was paid for the note by Surety Savings without explanation of any facts showing what constituted "valuable consideration" or other details of the transaction of how Surety Savings acquired the note. *Hidalgo v. Surety Savings and Loan Association*, 487 S.W.2d 702, 703(Tex. 1972).
- Testimony was held insufficient and the default judgment was set aside where it was based on Petitioner's conclusory testimony that the division of assets and debts in the decree was "fair and equitable" and that the child support amount in the decree was "fair and equitable and in the best

> interest of the child." There was no evidence of the value of any property of the parties or any improvements to such property. There was no evidence that real estate claimed by Petitioner to be his separate property was in fact his separate property. Finally, there was no evidence of father's income or his financial ability to pay child support. *O'Neal v. O'Neal*, 69 S.W.3d 347, 350(Tex.App.Eastland 2002).

Lay opinion testimony can also fall under the category of a conclusory statement. Texas Rule of Evidence 701 allows lay witnesses to testify as to opinions. However, this ability is not unlimited. The witness must establish that the opinion is rationally based on the witness' perception. TEX.R.EVID. 701(a); see, *Dallas Railway Terminal Company*, 284 S.W.2d at 381. The witness must therefore supply the specific facts which the witness has perceived that support the opinion. Without testimony as to the specific facts on which the opinion is based, the opinion is merely a conclusory statement without evidentiary support, and it is therefore incompetent evidence that will not support a judgment. *Id*.

Expert testimony is also subject to the rule that conclusory statements are not probative evidence. *Anderson v. Snider*, 808 S.W.3d 54, 55(Tex. 1991); *Waldewitz v. City of Waco*, 951 S.W.3d 464, 466-467(Tex. 1997). Expert testimony has no value simply based on the qualifications of the expert and his or her bare opinion. *Burrow v. Arce*, 997 S.W.2d 229, 235(Tex. 1999); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 819(Tex. 2009). The probative value of expert testimony is derived from its basis and not just the fact that an expert has given the opinion. *Houston Unlimited Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 829(Tex. 2014). In giving expert opinion testimony, the expert must show his or her work and how the opinion was reached. This involves the expert testifying to the methodology and the factual data used in reaching the opinion. *City of San Antonio*, 284 S.W.3d at 818. If the expert does not explain the opinion and provide the factual bases for the opinion, the opinion constitutes no evidence even if no objection is raised. *Burrow*, 997 S.W.2d at 236; City of San Antonio, 284 S.W.3d at 818. The rendering of an opinion without full explanation of its factual and scientific bases can reveal an "analytical gap" in the expert's methodology, which could render the testimony inadmissible. *Elizondo v. Krist*, 415 S.W.3d 259, 264(Tex. 2013). If the facts that are the basis of the expert's opinion support several different conclusions, the expert testimony must also explain why the opinion sponsored by the expert is superior to the alternatives. *Jelinek v. Columbia Rio Grande Health Care LP*, 328 S.W.3d 526, 536(Tex. 2010).

A quote from a recent Texas Supreme Court case is instructive regarding conclusory testimony and experts: "In order to be competent summary judgment evidence, an expert's opinion must have a 'demonstrable and reasoned basis on which to evaluate his opinion'…(citation omitted)…This basis must come in the form of 'Why': Why did the expert reach that particular opinion?" *Rogers v. Zanetti*, no. 15-0557, 2017 TEX. LEXIS 405 at *20(Tex.April 28, 2017).

The best practice, whether a witness is an expert or not, is to focus on the facts that actually occurred and avoid overarching opinions until the factual foundation is solidly established. In essence, by the time that the question is reached about the witness' opinion, there should be no question about how the witness arrived at the conclusion or even what that conclusion is. With regard to legal conclusions, those are best avoided in testimony entirely. Generally, it is the province of the court to make those determinations. However, legal conclusions are fertile ground for closing arguments, where counsel can tie together the facts elicited at the hearing and present them to the court as proof that, in fact, the legal conclusion sought is warranted.

To use a football analogy, conclusions are the evidentiary end zone. The underlying facts are the plays. One cannot expect to reach the end zone without running any plays.

IV. JUDICIAL NOTICE

Frequently attorneys will request the Court to take judicial notice of materials that are in the case file. This can include affidavits of witnesses or parties, business records affidavits, drug test reports, and other documents. The question addressed here is how far can a trial court go in taking judicial notice of a fact?

Judicial notice is governed by Article II of the Texas Rules of Evidence. The Court can take judicial notice general of certain facts as set out by Texas Rule of Civil Procedure 201, laws of other states and countries, municipal and county ordinances, contents of the Texas Register, and published agency rules. This section addresses only judicial notice of adjudicative facts and not judicial notice of laws of other states and countries, municipal and county ordinances, contents of the Texas Register, and published agency rules.

Adjudicative facts have been defined as follows: "…adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." *In Re Graves*, 217 S.W.3d 744, 750(Tex.App.Waco 2007), quoting 1 STEVEN GOODE ET AL., GUIDE TO THE TEXAS RULES OF EVIDENCE section 201.2 (3rd ed. 2002)(quoting 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE section 15.03(1st ed. 1958).

Texas Rule of Evidence 201 governs judicial notice of adjudicative facts. Subpart (b) allows a Court to take judicial notice of a fact that is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction or it can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. Subpart (c) allows a court to take judicial notice on its own motion. This subpart also requires the court to take judicial notice if requested by a party and the court is supplied with the necessary information to make the determination. Subpart (c) provides for judicial notice to be taken at any point in the proceeding. A party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. TEX.R.EVID. 201(e). A party still is entitled to be heard regarding whether judicial notice should be taken of a fact if the party did not receive notification before the Court takes judicial notice. Id. In a civil jury trial, the trial court must instruct the jury to accept judicially noticed facts as conclusive. TEX.R.EVID. 201(f).

Proper judicial notice is an exception to the normal requirements of proof. *Garza v. State*, 996 S.W.2d 276, 279(Tex.App.Dallas 1999). However, improper judicial notice of evidence amounts to no evidence. *Guyton v. Monteau*, 332 S.W.3d 687, 693(Tex.App.Houston 14th 2011). Judicial notice normally requires a "high degree of indisputability." Graves, 217 S.W.3d at 750, citing GOODE at section 201.2. To be appropriate for judicial notice, adjudicative facts must be relevant to the case and not be the subject any controversy. *Kubosh v. State*, 241 S.W.3d 60, 63(Tex.Crim.App. 2007).

Here is a listing of various types of evidence of which judicial notice is inappropriate:

- Affidavits and other documents on file with the clerk in the case before the court. The trial court can take judicial notice that documents are on file with the court, the date that the documents were filed, and the fact that the documents were before the court on the date of the trial or hearing. *In the Matter of CS*, 208 S.W.3d 77, 81(Tex.App.Fort Worth 2006), petition for review denied. However, the court cannot take judicial notice of the truth of facts stated in documents on file with the clerk. *Barnard v. Barnard*, 133 S.W.3d 782, 789(Tex.App.Fort Worth 2004), petition for review denied; *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508(Tex.App.Austin 1994), petition for review refused; *Guyton*, 332 S.W.3d at 693. This includes documents such as drug test reports, affidavits, business records accompanied by an affidavit under Texas Rule of Evidence 902(10), letters from counselors, reports from experts, and any other document that avers any facts. Documents such as these must be offered and introduced into evidence at trial or at a hearing, or else their content cannot be considered by the court. As an example, the Fort Worth Court of Appeals in one case upheld the trial court's denial of a Motion for New Trial; the supporting affidavit that was attached to the Motion was not offered into evidence, and the affidavit was not appropriate for judicial notice. *Jackson v. State*, 139 S.W.3d 7(Tex.App.Fort Worth 2004), petition for review refused.
- Prior testimony in the same proceeding. A court cannot take judicial notice of testimony in the retrial of the same case. *Guyton*, 332 S.W.3d at 693. Testimony from a previous trial or hearing in the same case must be admitted into evidence in order to be considered by the court. Id. This is especially critical in family law cases, where there may be several prior proceedings before the court in the same case involving testimony that is relevant at final trial as well. A trial court cannot take judicial notice of testimony given in the same proceeding at a temporary orders hearing. *May v. May*, 829 S.W.2d 373, 376(Tex.App.Corpus Christi 1992).
- The judge's memory of prior testimony in the same proceeding. A fact is not capable of accurate and ready confirmation simply because a trial judge remembers how a witness testified at trial. *Garza*, 996 S.W.2d at 280. It would make little sense if the court could not take judicial notice of previous testimony that is certified by a court reporter, yet he/she could take judicial notice of his or her memory with all of the failings of personal recollection. Moreover, the Dallas Court of Appeals noted that prior testimony is not the type of fact subject to judicial notice in any case; testimony can be subject to different interpretations and is regularly disputed. Id. As such, prior testimony, especially based on memory alone, does not fall in the category of facts set forth in Texas Rule of Evidence 201 that can be judicially noticed.
- Prior testimony in a different proceeding.
- The judge's general personal knowledge of facts outside the record. Personal knowledge is not judicial knowledge, and a judge may personally know a fact of which he or she cannot take judicial notice. *Eagle Trucking Company v. Texas Bithulithic Company*, 612 S.W.2d 503, 506(Tex.1981), citing 1 Ray, Law of Evidence, Judicial Notice section 211 (1980) at 286. As an example, it has been held that a trial court cannot rely on his/her personal knowledge about flight prices and flight times in determining the travel expenses necessary for a parent to visit his children out of state. *In the Interest of ACS and GES*, 157 S.W.3d 9(Tex.App.Waco 2004).

- Sworn inventories. Inventories have been analogized to pleadings. *Tschirhart*, 876 S.W.2d at 509. Another case compared inventories to answers to interrogatories. *Poulter v. Poulter*, 565 S.W.2d 107, 110(Tex.App.Tyler 1978). Both of these cases held that as such, inventories could not be considered by the court unless admitted into evidence. *Tschirhart*, 876 S.W.2d at 509; *Poulter*, 565 S.W.2d at 110; see also *Bokhoven v. Bokhoven*, 559 S.W.2d 142(Tex.App.Tyler 1977); *Barnard v. Barnard*, 133 S.W.3d 782, 789(Tex.App.Fort Worth 2004). These cases are consistent with the concept that while a trial court can take judicial notice of the existence of documents in its file, it cannot take judicial notice of the truth of the contents of those documents. *Id*. One case has held that mere filing of a sworn inventory allows the court to take judicial notice of the content of that document. However, this appears to be a minority opinion. See, *Vannerson v. Vannerson*, 857 S.W.2d 659(Tex.App.Houston 1st 1993).
- Findings in prior temporary orders in the same case. See, *In Re Shifflet*, 462 S.W.3d 528, 539(Tex.App.Houston 1st 2015).

The trial court can take judicial notice of some factors in determining whether to award attorney's fees. These include knowledge of the complexity of the case, the amount in controversy in the case, and the expertise of counsel in arriving at a reasonable amount of attorney's fees. *Smith v. Smith*, 757 S.W.2d 422, 427 (Tex.App.Dallas 1988).

A trial court can take judicial notice of its records in a case involving the same subject matter between the same parties on its own initiative. *Gardner v. Martin*, 345 S.W.2d 274, 276(Tex. 1961). Appellate Courts will generally presume that trial courts have taken judicial notice of the record without a request being made or an announcement of doing so by the trial court. *Marble Slab Creamery v. Wesic*, 823 S.W.2d 436, 439(Tex.App.Houston 14th 1992). A party opposing judicial notice of an adjudicative fact must make a timely objection or challenge, or else the complaint will be procedurally defaulted. *Kubosh v. State*, 241 S.W.3d 60, 67(Tex.Crim.App. 2007). This is especially critical where the trial court has taken judicial notice sua sponte. Trial courts should give notice of the taking of judicial notice sua sponte at some point. *In the Interest of CL and IL*, 304 S.W.3d 512, 516(Tex.App.Waco 2009). Appellate courts can find that, even without an announcement of the taking of judicial notice by the trial court, notice was given to the parties of judicial notice by inferences that can be drawn from the written judgments of the court. *Id.*, at 66. Therefore, the obligation to object or challenge judicial notice may be triggered without a formal announcement of the trial court. However, the appellate court may find there has been no judicial notice taken by the trial court where there has been no request by either side, no announcement by the trial court, and judicial notice cannot be inferred from the trial court's written orders or judgments. See, *CL and IL*, 304 S.W.3d at 516. It is critical, therefore, for any practitioner to clarify with the trial court exactly what has been the subject of judicial notice during the course of any trial.

V. PRODUCTION DOES NOT EQUAL ADMISSIBILITY

Frequently, attorneys argue that documents should be admissible against an opposing party because the documents were produced by that party. A review of Texas Rule of Civil Procedure 193.7 reveals that production of a document may make it easier to admit the document against a party producing the document, but this does not insure that the document will come into evidence.

Rule 193.7 allows self-authentication of a document against the party that produced the document in trial or any pretrial proceeding. TEX.R.CIV.PRO. 193.7. The implicit limits in this rule are as follows:

- The document is authenticated only as to the party producing the record. If there are other parties in the proceeding that did not produce the record, the document must be separately authenticated as to the nonproducing parties.
- Authentication of a document does not automatically result in the admission of the document. Many other objections may be raised to the admissibility of such a document. The document may still be excluded from evidence as not relevant to the proceedings. See, *Farrell v. Regent Care Center of the Woodlands*, no. 09-15-00230-CV, 2016 TEX.APP.LEXIS 13794 (Tex.App.Beaumont December 29, 2016). As documents are generally hearsay, authentication also does not bypass the need to establish a hearsay exception for produced documents if such an objection is raised. If a produced document is a duplicate of an original, it may be excluded if a question is raised about the original's authenticity or the circumstances would make it unfair to admit the duplicate. TEX.R.EVID. 1003. The document may also be excluded if its probative value is substantially outweighed by unfair prejudice to the opposing side, confusion of the issues, the extent to which it misleads of the jury, undue delay, or its cumulative nature. TEX.R.EVID. 403.

The rule allows self-authentication of documents against a party that produced them. The rule does not permit self-authentication of a document for the party that produced the document merely by virtue of that party's production. See, *Blanche v. Nationwide*

Mortgage Corporation, 74 S.W.3d 444, 451-452(Tex.App.Dallas 2002).

The party offering the document must be able to prove that the document was produced by the opposing side. This can be critical in cases where there are voluminous documents that have been produced in discovery. It is a difficult and distracting situation in a trial to have to search through binders of documents in an attempt to prove that the other side produced the document. Therefore, it is important to Bates stamp or catalog documents received from the opposing side as they are obtained. It also may be helpful to send a cover letter summarizing to the opposing side the documents received in discovery immediately after their receipt, requesting a response if the letter is not accurate. See, *Kucera v. Humble Independent School District*, no. 14-03-01200-CV, 2004 TEX.APP.LEXIS 8583(Tex.App.Houston 14th September 28, 2004)(Court excluded documents as unauthenticated where opposing party denied producing the document and the offering party had no proof, such as a Bates stamp, that the opposing party had produced the document).

There is also a procedure that must be used in order to self-authenticate documents under Texas Rule of Civil Procedure 193.7. The producing party must be given ten days actual notice of the opposing party's intent to use the document at a pretrial proceeding or trial, unless the court shortens or lengthens the notice period. TEX.R.CIV.PRO. 193.7. The party that produced the document may then object to the authenticity of the document within the ten day time period, stating the specific basis for the objection. *Id.* If the objection is to the authenticity of a portion of a document, then the remainder of the document to which there will was not an objection will be self-authenticating. *Id.* The party offering the document must still be given a reasonable opportunity to establish the authenticity of the document in the event of an objection. *Id.*