

“THINGS (SOME) LAWYERS DO VERY WELL”

HON. DAVID CANALES, *San Antonio*
Judge, 73rd District Court

HON. ROY B. FERGUSON, *Alpine*
Judge, 394th District Court

HON. GRAHAM QUISENBERRY, *Weatherford*
Presiding Judge, 415th District Court

State Bar of Texas
45TH ANNUAL
ADVANCED FAMILY LAW COURSE
August 12-15, 2019
San Antonio

CHAPTER 6

JUDGE DAVID A. CANALES

73RD DISTRICT COURT

100 Dolorosa, 2nd Floor • San Antonio, Texas 78205
Court No.: (210) 335-2523 • E-Mail: dacanales@bexar.org



In November 2012, Judge David Canales was elected to serve as on the 73rd District Court in Bexar County, Texas. Originally from Corpus Christi, Judge Canales received a B.A. in Psychology with a minor in Criminal Justice from the University of Texas-Pan American. Judge Canales attended Thurgood Marshall School of Law at Texas Southern University in Houston Texas, where he earned his J.D., graduating summa cum laude of his class. Upon graduation from law school, Judge Canales started his legal career as an associate at one of the largest law firms in Chicago, Illinois, with a focus on reinsurance litigation and arbitration, and class action defense. In 2007, Judge Canales moved to San Antonio and started his own law firm, focusing his practice primarily on matters involving family law and civil litigation. Currently, Judge Canales is a member of the Texas Bar and the United State District Court for the Southern District of Texas and Northern District of Illinois. In addition to co-authoring numerous legal articles, Judge Canales has been an invited speaker at the State Bar of Texas, Texas Center for the Judiciary, National Business Institute, and University of Texas School of Law Continuing Legal Education, to name a few. He was awarded San Antonio's Best Lawyers in 2011 and 2012, and was the recipient of the American Bar Association Award in 2006. Judge Canales, who is bilingual in English and Spanish, volunteers with a variety of community organizations including his service as a Co-Chair of the Community Justice Program, the pro bono project of the San Antonio Bar Association that offers free legal assistance on uncontested civil matters to indigent and low-income individuals in the San Antonio area, and the HNBA Annual Uvaldo Herrera Moot Court. He was the first member of his family to graduate from college and to earn a professional degree. Judge Canales has been married to his wife of 20 years, Cecilia Canales, and they have three boys. In January of 2017, Judge Canales will begin his second term as Judge of the 73rd District Court, having not drawn an opponent in the General Election in November 2016.

SCHOLARSHIP/ARTICLES

SAN ANTONIO BAR ASSOCIATION

Co-Author, May 20, 2016, San Antonio, Texas

- Seminar: Bench Trials and Motions, Bexar County-Style VIII
- Article: "Default Judgments and Motions for New Trial"

SAN ANTONIO BAR ASSOCIATION

Co-Author, May 22, 2015, San Antonio, Texas

- Seminar: Bench Trials and Motions, Bexar County-Style VII
- Article: "Improving Your Summary Judgment Evidence"

SAN ANTONIO BAR ASSOCIATION

Co-Author, May 16, 2014, San Antonio, Texas

- Seminar: Bench Trials and Motions, Bexar County-Style VI
- Article: "Discovery & E-Discovery from Third Parties"

SAN ANTONIO BAR ASSOCIATION

Co-Author, May 17, 2013, San Antonio, Texas

- Seminar: Bench Trials and Motions, Bexar County-Style V
- Article: “Changes in the Pattern Jury Charges”

PRACTISING LAW INSTITUTE

Co-Author, June 11-12, 2007, New York City, New York

- Conference: Class Action Litigation 2007
- Article: “2(b) or Not 2(b): Emerging Use of 23(b)(2) Injunctive Class Actions”

SPEAKING ENGAGEMENTS

STATE BAR OF TEXAS

Speaker and Panel Member, May 20, 2016, San Antonio, Texas

- Advanced Evidence and Discovery Course
- Topic: “Objections at Trial”

SAN ANTONIO TRIAL LAWYERS ASSOCIATION

Co-Speaker, February 18, 2016, San Antonio, Texas

- Monthly Membership CLE Luncheon
- Topic: “Frank Discussion from the Bench”

SAN ANTONIO BAR ASSOCIATION

Speaker, May 22, 2015, San Antonio, Texas

- Seminar: “Bench Trials and Motions, Bexar County-Style VII”
- Topic: “Improving Your Summary Judgment Evidence”

SAN ANTONIO BAR ASSOCIATION – FAMILY LAW SECTION

Speaker and Panel Member, February 27, 2015, San Antonio, Texas

- Seminar: Extreme Family Law Makeover XIII
- Topic: “Judicial Panel: A Hex on Both Your Houses – Dealing with Unacceptable Conduct”

TEXAS CENTER FOR THE JUDICIARY

Speaker, January 28, 2015, San Antonio, Texas

- Conference: 2015 Family Justice Conference
- Topic: “The Ins and Outs of Temporary Orders”

TEXAS BAR CLE

Speaker and Panel Member, January 16, 2015, San Antonio, Texas

- Seminar: 2015 Litigation Update Institute
- Topic: “State Judicial Panel: Dos and Don’ts in My Courtroom”

NATIONAL BUSINESS INSTITUTE

Speaker and Panel Member, November 13, 2014, San Antonio, Texas

- Seminar: NBI Judicial Forum
- Topic: “As Judges See It: Top Mistakes Lawyers Make in Civil Litigation”

SAN ANTONIO TRIAL LAWYERS ASSOCIATION

Speaker, September 26, 2014, San Antonio, Texas

- Seminar: Real World Annual CLE 2014
- Topic: “Top 5 eDiscovery Issues for Trial Lawyers”

SAN ANTONIO FAMILY LAWYERS ASSOCIATION

Speaker and Panel Member, June 3, 2014, San Antonio, Texas

- Monthly CLE Luncheon
- Topic: “But He’s Just a Baby! Crafting Possession & Access for Children 3 and Under”

SAN ANTONIO BAR ASSOCIATION

Speaker, May 16, 2014, San Antonio, Texas

- Seminar: “Bench Trials and Motions, Bexar County-Style VI”
- Topic: “Discovery & E-Discovery from Third Parties”

SAN ANTONIO BAR ASSOCIATION – FAMILY LAW SECTION

Speaker and Panel Member, February 28, 2014, San Antonio, Texas

- Seminar: Extreme Family Law Makeover XII
- Topic: “Lead On Judges’ Panel: Real Answers to Real Questions”

MEXICAN-AMERICAN BAR ASSOCIATION-SAN ANTONIO

Co-Speaker, May 14, 2013, San Antonio, Texas

- Monthly CLE Luncheon
- Topic: “Changes to the Local Rules and the Standing Order”

SAN ANTONIO BAR ASSOCIATION

Speaker, May 17, 2013, San Antonio, Texas

- Seminar: Bench Trials and Motions, Bexar County-Style V
- Topic: “Changes in the Pattern Jury Charges”

UNIVERSITY OF TEXAS SCHOOL OF LAW CONTINUING LEGAL EDUCATION

Speaker, August 18-19, 2011, Austin, Texas

- Seminar: The Car Crash Seminar: From Sign-Up to Settlement
- Topic: “The Adjuster: Dealing with and Negotiating the Claim”

SAN ANTONIO TRIAL LAWYERS’ ASSOCIATION

Speaker and Panel Member, September 16, 2010, San Antonio, Texas

- Seminar: Real World CLE 2010
- Topic: “Maximizing Your Claim Pre-Litigation”

HON. ROY B. FERGUSON - CURRICULUM VITAE

394th Judicial District Court

Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties

394th.jud.dist.court@gmail.com

Professional Affiliations, Honors, Memberships and Awards

- Judge – 394th Judicial District Court (2013-Present)
- Director – Judicial Section, State Bar of Texas (2015-Present)
- Liaison Member – Judicial Committee on Information Technology (2016-Present)
- Member – Texas Judicial Council Civil Justice Committee’s Advisory Council (2018)
- Judge Pro Tem – 8th District Court of Appeals (2015-2016)
- Life Sustaining Fellow – Texas Bar Foundation
- Member – Champions of Justice Society
- Member – College of the State Bar of Texas
- Special Service Commendation – State Bar of Texas GPSOLO Section (2014)
- Lawyer of the Year – State Bar of Texas GPSOLO Section (2012)
- Member – District 17 Grievance Committee, State Bar of Texas (2011-2012)
- General Practice Solo and Small Firm Section, State Bar of Texas
 - Councilmember (2003-2016)
 - Officer (2006-2014, including Chair (2009-2010))
- Juvenile Court Referee – Presidio County, Texas, December (2001-2003)
- Justice of the Peace Pro Tem – Presidio County, Texas (December, 1999-July, 2000)
- Licensed to practice before the United States Supreme Court
- Member – State Bar of Texas (1995-Present)

Education and Related Honors

- Juris Doctorate of Law, St. Mary’s University, San Antonio, Texas (1994)
- Bachelor of Science in Civil Engineering, University of Texas at Arlington (1992)
- American Jurisprudence Award recipient in administrative law
- Member, Chi Epsilon, honorary fraternity for civil engineering students
- Member, Kappa Kappa Psi, honorary fraternity for college bandsmembers
- Member, Phi Alpha Delta, honorary fraternity for law students

Public Speaking and Articles

- 2019, Adv. Family Law Conference (scheduled), Presenter, “Things Lawyers Do Well.”
- 2019, SBOT Webcast (scheduled), Presenter/Panelist, “When a Lie Isn’t a Lie: Dealing with False Testimony During Trial.”
- 2019, State Bar of Texas Annual Meeting, Presenter, “Simple Things Everyone Does Wrong.”
- 2019, Marriage Dissolution 101, Presenter/Panelist, “Gearing Up: Pleadings.”
- 2019, Marriage Dissolution, Presenter/Panelist, “When a Lie Isn’t a Lie: Dealing with False Testimony During Trial.”
- 2019, Adv. Evidence and Discovery Conference, Presenter, “Ethics in the Courtroom.”
- 2019, Presiding Judge, “State of Texas v. Kylo Ren – Mock Jury Selection.”
- 2019, Adv. Trial Skills for Family Lawyers, Presenter, “Trial on the Merits, Winning from the Beginning.”

Public Speaking and Articles (continued)

- 2018, Adv. Family Law Conference, Family Law 101, Presenter, “Discovery: A View from Both Sides of the Bench.”
- 2018, Ector County Bar Association CLE, Presenter, “Simple Things that Everyone Does Wrong.”
- 2017, NM Defense Lawyers Association and West Texas TADC Joint Seminar, Presenter, “A View from the Bench – Ethical and Effective Advocacy: What Works and What Doesn’t.”
- 2017, Texas A&M University School of Law, “Ethical and Effective Representation of Rural Communities.”
- 2017, Presiding Judge, “State of Texas v. Luke Skywalker – Mock Jury Selection.”
- 2016, Adv. Family Law Conference, Presenter, “Parental Alienation: What It Is and What It Isn’t.”
- 2016, State Bar of Texas Annual Meeting, Presenter, “Effective and Ethical Advocacy from the Judge’s Perspective.”
- 2016, Presiding Judge, State of Texas v. Harry Potter – Mock Jury Selection.”
- 2015, Adv. Family Law Conference, Presenter, “Judges’ Tech Tips.”
- 2015, Val Verde County Bar Association Annual CLE, Presenter, “Effective Use of Courtroom Technology in Family Law.”
- 2015, State Bar of Texas Annual Meeting, Presenter, “Effective Advocacy – What Does and Doesn’t Work in the Courtroom from a Judge’s Perspective.”
- 2015, American Legion District Convention, Keynote Presenter, “And Justice for All.”
- 2014, State Bar of Texas CLE, Presenter/Panelist, “What Judges Think Is (and Isn’t) Persuasive With the Use of Technology in the Courtroom.”
- 2014, State of Texas Juvenile Probation Chief’s Conference, Presenter, “Sex, Violence and Video Games.”
- 2014, Region 18 Meeting of School Administrators, Presenter, “Sex, Violence and Video Games.”
- 2014, State Bar of Texas Annual Meeting, Presenter, “Practical and Ethical Impacts of *In re Stephanie Lee*, or: Who Will Speak for the Children?”
- 2013, West of the Pecos Republican Women’s Association, Presenter, “Freedom of Speech is Under Attack!”
- 2012, American Legion Regional Meeting, Presenter, “Defending Freedom of Speech.”
- 2012, State Bar of Texas Annual Meeting, Presenter, “Legal Ethics vs. Moral Compass.”
- 2011, Texas Bar Journal, January Edition, “Referendum 2011 – How Would You Advise a Lawyer to Vote?”
- 2011, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – That’s an Impact Tremor, That’s What THAT is!”
- 2010, State Bar of Texas Annual Meeting, Moderator and Presenter, “Recent Ethical Issues for the Solo and Small Firm Practitioner.”
- 2010, General Practice Institute, Waco Texas, Moderator
- 2009, State Bar of Texas Annual Meeting, Presenter, “Hot Topics in Legal Ethics.”
- 2008, State Bar of Texas CLE, Presenter, “Ethics and the Small Law Firm.” (webcast)
- 2008, State Bar of Texas CLE, Presenter and Moderator, “Ethics and the Small Firm: Use of Technology in the Development of a Successful and Profitable Practice.”
- 2008, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – Ten Hot Tips on Avoiding Grievances.”
- 2007, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – Avoiding Grievances Through Early Detection.”
- 2006, Article, “Ethical Pitfalls for the Community Lawyer – an Outline for Discussion among General Practitioners.”
- 2006, State Bar of Texas Annual Meeting, Presenter/Moderator, “Panel Discussion on Legal Ethics.”

About the 394th Judicial District

The 394th Judicial District is comprised of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties. The District encompasses approx. 20,000 sq. miles (larger than nine states), and includes roughly 1/3rd of the Texas-Mexico border and 1/5th of the United States–Mexico border.

About the Champions of Justice Society

The Texas Access to Justice Commission, created by the Supreme Court of Texas in 2001, is charged with developing and implementing initiatives designed to expand access to, and enhance the quality of, justice in civil legal matters for low-income Texans. The Champions of Justice Society is comprised of those attorneys and judges who show the strongest support of access to justice.

About the Judicial Committee on Information Technology

A part of the Texas Supreme Court's Texas Commission on Judicial Efficiency, the mission of the Judicial Committee on Information Technology is to establish standards and guidelines for the systematic implementation and integration of technology in Texas' trial and appellate courts.

About the Texas Bar Foundation

Founded in 1965, the Texas Bar Foundation has maintained and pursued its mission to assist the public, improve the profession of law, and build a strong justice system for all Texans. Fellows of the Foundation are selected for their outstanding professional achievements and their demonstrated commitment to the improvement of the justice system throughout the state of Texas. Each year, only one-third of one percent of State Bar of Texas members are invited to become Fellows.

About the Texas Bar College

The Texas Bar College is an honorary society of lawyers who are among the best trained attorneys in Texas. Members are qualified attorneys who are interested in both high ethical standards and improved training for all Texas attorneys. The College recognizes and encourages lawyers, paralegals and judges who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in legal education.

About the 394th District Court Mock Jury Selection Program

When Judge Ferguson took the bench on January 1, 2013, public response to jury summonses across the 394th Judicial District was incredibly low – in some counties below 15%. Judge Ferguson implemented a multi-faceted plan to increase and improve jury turnout, with minimal fining or jailing community members in one of the poorest parts of Texas. A key facet of that plan is public education and awareness of the jury system. During Juror Appreciation Week in Texas each year, every high school senior in the District is summoned to appear before Judge Ferguson as a potential juror. Students are placed under oath, qualified, and questioned in a realistic jury selection for a fictional case. In 2016, Harry Potter was tried for the murder of Voldemort. In 2017, Luke Skywalker stood charged with 1.1 million counts of murder for blowing up the Death Star. (Charges against Mr. Potter were dismissed after the jury was empaneled and sworn, and the trial of Mr. Skywalker ended in a mistrial when the defendant leapt from his seat at counsel table and attacked the first witness for the prosecution – Darth Vader.) And in 2019, Kylo Ren was tried for the murder of his father, Han Solo. All fictional defendants are innocent until proven guilty.

Curriculum Vitae

JUDGE GRAHAM QUISENBERRY

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Weatherford, Texas 76086

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EDUCATION

Seymour High School -Diploma 1973

Texas A & M University - B.A. 1977

St. Mary's University - J.D. 1981

Diploma-Texas College for Judicial Studies-2009 (current status maintained-2013)

PROFESSIONAL INFORMATION

Associate, Quisenberry and Spurlock, Fort Worth, Texas - 1981 to 1984

Partner, Collier & Quisenberry - 1984 through 1994

Judge, County Court at Law of Parker County, Texas - 1995 to 2004

Judge, 415th Judicial District Court, Parker County, Texas - 2004 to Present

Instructor, University of Phoenix Online-2003 to present

CURRENT PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

State Bar of Texas

Sustaining Life Fellow, Texas Bar Foundation

Fellow, Texas Bar College - 1986 to present; Board of Directors 2017-2020

Board of Directors, Texas Bar College - 2017-2020

Judicial Section, State Bar of Texas

Texas District Judges Association

Family Law Section, State Bar of Texas

Licensed to practice in the U. S. District Court - Northern District of Texas

Parker County Bar Association

Chair, Parker County Judicial Council, 2008-2010, 2014 to present

Chair, Parker County Bail Bond Board

Chair, Parker County Juvenile Board

Member, Parker County Purchasing Board

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“THINGS (SOME) LAWYERS DO VERY WELL.”

Judges acquire a unique perspective on what works and what doesn't in the courtroom. Many tactics seen as “conventional wisdom” are actually ineffective or inadequate, irritate the judge, or confuse the jury. This paper identifies effective strategies, clarifies the applicable law, and recommends tactics to adopt or avoid.

1. ATTACKING CONFLICTING WITNESS TESTIMONY.

These three methods for addressing faulty or incorrect witness recollection are rarely applied correctly. They are not interchangeable, and correct application of these strategies dramatically improves cross-examination.

a. Prior Inconsistent Statement.

A testifying witness may be impeached using a prior contradictory statement when the witness gives a clear statement under oath that contradicts a prior statement by the same witness on the same matter. The questioner must first tell the witness: (1) the contents of the conflicting statement; (2) the time and place of the statement; and (3) the person to whom the witness made the statement, before asking the witness whether they made the contradictory statement or not. TEX. R. EVID. 613. If the witness admits the prior inconsistent statement, the impeachment is complete and extrinsic evidence of the prior statement is not admitted. Only if the witness denies making the prior inconsistent statement may extrinsic evidence of the statement be admitted.

Although Rule 613 requires that the witness be given the opportunity to explain the contradiction, the 2015 amendment to the rule removed the requirement that the impeaching attorney give that opportunity at the time of impeachment. The impeaching attorney may forego that step, shifting the burden to redirect examination.

Practice Tip: Don't exclude the jury while confronting the witness with the contents of the statement. Read it loudly and clearly, to accentuate the witness's faulty memory and damage their overall credibility.

b. Refreshing Recollection.

When the memory of a testifying witness fails, the witness may refresh his or her memory by silently reviewing a recorded statement made or adopted when his or her memory was fresh. After reviewing the record, the witness must testify that either memory is refreshed, or is not. If memory is refreshed, the witness continues to testify from current memory and the recorded

statement is given back to the lawyer and not received into evidence. However, if the witness states that he or she still can't remember, but has identified the recorded statement and guarantees its correctness, then the record may be admitted as a past recollection recorded. See *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979).

c. Recollection Recorded.

A prior statement about a point in dispute about which a witness had first-hand knowledge, made or adopted by a witness when their memory was fresh, may be entered into evidence if the witness at the time of trial cannot recall the matter well enough to testify fully and accurately. The recorded statement is exempted from hearsay and is admissible if the witness admits to making the recording, unless the circumstances of its recording cast doubt upon its authenticity. TEX. R. EVID. 803(5). If offered by a proffering party, the statement may only be read into the record. If offered by an adverse party, the statement may be admitted as an exhibit. (This is crucial in a jury trial, as admitted exhibits can go into the jury room, while a transcript of testimony cannot.)

d. Summary Comparison.

Prior Inconsistent Statement:

- used when a witness testifies to an affirmative statement of fact, *not* when the witness doesn't recall or “doesn't know” an answer;
- prior statement is read aloud (need not be *shown* to the witness); and
- witness must admit or deny the contents of the statement.

Refreshing Recollection:

- used only when the witness does not recall a particular fact, *not* when the witness answers a question incorrectly;
- prior statement is silently shown to the witness, not read aloud, and retrieved from the witness before the next question; and
- if witness says their recollection is refreshed, the prior statement is not read aloud or put into evidence.

Recollection Recorded:

- used when a witness cannot recall a matter well enough to testify accurately, *not* when a witness answers a question incorrectly, but does not require complete absence of memory;

- has been given an opportunity to refresh recollection, yet continues to deny remembering the statement; and
- prior statement is then read aloud as testimony, or if used by an adverse party, admitted into evidence.

2. FACTUAL DIVORCE PLEADINGS.

A divorce pleading must include enough detail to identify the issues, but no more. TEX.FAM.CODE ANN. § 6.402. Divorce pleadings differ from general civil pleadings, in that facts are not appropriate except to establish jurisdiction or track statutory elements, and when seeking extraordinary relief. Special exceptions cannot be used to attack divorce pleadings because of too few facts, but can because of too many. TEX.FAM.CODE ANN. § 6.402(c). These types of special exceptions *must* be granted by the court. Courts expect the facts to come through discovery or in response to no-evidence summary judgment motions, not in the pleadings. *See In Re Marriage of Richards*, 991 S.W.2d 32 (Tex. App.—Amarillo 1999, pet. dismissed).

3. “DEFAULT” JUDGMENT.

There is no default judgment in family law. Even if the respondent fails to file an answer, the petitioner must adduce proof to support the material allegations in the petition and the requested relief at trial. *See Considine v. Considine*, 726 S.W.2d 253, 254 (Tex. App.—Austin 1987, no writ); *see also Gonzalez v. Gonzalez*, 331 S.W.3d 864, 866 (Tex. App.—Dallas 2011, no pet.)

4. PLEADINGS ON “DEFAULT.”

Even when the respondent fails to answer or appear, the relief in the judgment must be supported by the pleadings. *See In re Marriage of Day*, 497 S.W.3d 87, 90 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). If final judgment includes relief not requested in the pleadings, even on default, it is *void*. *Id.* Trial amendments and trial by consent are also not available in a default scenario because the respondent is entitled to fair notice of the additional claims. *See id.*; *Maswoswe v. Nelson*, 327 S.W.3d 889, 895-96 (Tex. App.—Beaumont 2010, no pet.)

5. NOTICE OF AMENDED PLEADINGS.

If an amended petition raising a new claim or subjecting the respondent to “more onerous relief” is filed after service of the original petition, the pleading party must serve the amended petition on the defaulting respondent in accordance with TEX.R.CIV.PRO. 21A; *see In re Marriage of Day*, 497 S.W.3d 87, 90 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (“More onerous” is anything that exposes the defendant to additional liability.”); *see also Cox v. Cox*, 298 S.W.3d 726, 733 (Tex. App.—Austin, 2009, no pet.) (reversing default judgment because wife failed to give husband

fair notice that her amended petition sought permanent rather than temporary relief). Service may be by any method in Rule 21A; it need not be by personal service of citation.

6. ESTABLISHMENT OF PATERNITY.

Always check the pleadings to compare the dates of birth of your client’s children to the alleged date of marriage. If a child’s date of birth predates the alleged date of formal marriage, you must either include a request to establish the paternity of the child or a claim of informal marriage that predates the birth of the child. Do *not* submit an agreed decree stating, “The parties agree that Baby A is a child of the marriage,” if Baby A was born prior to the marriage date proved-up. The correct language should be, “The Court finds that Husband is the biological and legal parent of Baby A.”

7. TEMPORARY ORDERS SEEKING MODIFICATION OF PRIMARY CONSERVATORSHIP.

When a party files a motion to modify conservatorship, a court may not enter a temporary order changing the exclusive right to designate the primary residence of the child, or imposing or changing a geographic restriction, unless the movant attaches to the motion an affidavit containing facts supporting the allegation that “the child’s present circumstances would significantly impair the child’s physical health or emotional development.” TEX.FAM.CODE ANN. § 156.006(b-1). The movant is not even entitled to a hearing on the temporary orders unless the court finds that the affidavit supports the allegation. However, the court often does not even see the motion or affidavit until after the hearing is scheduled. In order to streamline the process, best practice is for the respondent to quickly file a motion asking the court to summarily deny the request for temporary orders when the affidavit does not meet the statute’s strict requirements on the “person’s personal knowledge or the person’s belief based on representations made to the person by a person with personal knowledge.”

8. DISCOVERY GAMES.

The rules of procedure require that the parties exchange requested information. Many attorneys treat the discovery process as a game, rather than a means to an end. Not only is this guaranteed to displease the judge, but it also violates the Texas Disciplinary Rules of Professional Conduct. Rule 3.04(a) states, “A lawyer shall not unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.”

9. CERTIFICATE OF CONFERENCE.

All discovery motions and requests for hearings must include a certificate of conference stating a “reasonable effort” was made to resolve the matter with opposing counsel before seeking the trial court’s assistance. TEX.R.CIV.P. 191.2. The fundamental purpose of the certificate “is to ensure that parties cooperate ... and make reasonable efforts to resolve ... disputes without the necessity of court intervention.” See *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 146 (Tex. App.—Dallas 2011, no pet.) Best practice is to make the certificate meaningful by describing in some detail the attempts made to resolve the disputes. (A blanket statement of, “We tried to confer and were unsuccessful,” will not protect you from an angry judge if at the hearing it becomes clear that no meaningful conversations actually took place.)

10. RESPONSIVE PLEADINGS IN MODIFICATION SUITS.

Suits seeking modification of prior SAPCR orders must allege a “material and substantial change in circumstances.” TEX.FAM.CODE ANN. § 156.101. Attorneys representing respondents should carefully consider whether to file a countermotion, or merely a general denial. A countermotion’s allegation of changed circumstances with respect to an issue constitutes a judicial admission of the common element of changed circumstances in the other party’s similar pleading, thus lifting from the movant the burden of offering evidence to prove the change occurred. See *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex.App.—Fort Worth 2013, no pet.); *In re L.C.L.*, 396 S.W.3d 712, 718 (Tex.App.—Dallas 2013, no pet.). By filing only a general denial, the respondent can attack the threshold element of “material and substantial change.”

11. SELF-REPRESENTED LITIGANTS.

Be respectful to self-represented litigants. While it is true that SLR’s don’t know how to object or respond to objections, your making frivolous objections or harassing motions, or offering evidence you know to be objectionable may violate the Texas Disciplinary Rules of Professional Conduct. Habitual violation of rules of procedure or evidence violates Rule 3.04(c). For example, bringing up derogatory matters about the other party that you do not reasonably believe are relevant to the proceeding or that will not be supported by admissible evidence, just because you know the SLR won’t assert an objection, is unethical. Doing so risks invoking the ire of the judge.

12. ATTORNEYS’ FEES EVIDENCE.

Three recent cases decided by the Texas Supreme Court, including one in June of 2019, clarified what evidence is necessary to support awards of attorneys’ fees. Simply put, mere testimony and supporting

affidavits are generally insufficient to support an award of attorneys’ fees. See *Rohrmoos Venture et al. v. UTSW DVA Healthcare LLP* ___ S.W.3d ___, 2019 Tex.LEXIS 389 (Tex.2019), and *Daniel S. Barnett et al. v. Richard B. Schiro*, ___ S.W.3d ___, Tex.LEXIS 386 (Tex.2019). Detailed billing records reflecting hours worked and tasks performed are required. The same rules apply whether the award is a final judgment or as a discovery sanction. *Nath v. Texas Children’s Hospital*, ___ S.W.3d ___, 2019 Tex.LEXIS 636 (Tex.2019).

13. SUMMARIES.

Summaries greatly assist the finder of fact in understanding your case and increase the likelihood that your relief will be granted. The best use of summaries differs depending on whether the hearing is to judge or jury. A Rule 1006 summary is used for convenience, while demonstrative summaries are used to persuade.

- a. Rule 1006 Summaries. A 1006 summary of voluminous evidence is admissible as evidence, and may be sent in with the jury for deliberations. The summary is a substitute for evidence, and is thus itself evidence. “The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.” TEX. R. EVID. 1006.
- b. Demonstrative Summaries. A demonstrative summary of evidence or requested relief introduces no new evidence, but only attempts to more effectively explain evidence previously admitted. It has no probative force beyond the credibility of the underlying evidence previously admitted. The summary can also contain a chart of requested relief, to minimize the risk that the Court will unintentionally omit an element of your requested relief.

14. DEMONSTRATIVE EVIDENCE.

While most people quickly forget two-thirds of what they hear, several studies conclude that people learn better, retain more, and are more likely to grant a request if they are exposed to visual as well as oral evidence. Demonstrative evidence helps the jury remember your evidence, understand your argument, and recall your requested relief. Use demonstrative evidence in every trial – from witness summaries to requested relief. In jury trials, use demonstrative exhibits to accentuate your story; in a bench trial, use

them to save time and clarify your requested relief. However, barring agreement of counsel, demonstrative exhibits will likely not go to the jury room during deliberations.

15. MOTIONS FOR SUMMARY JUDGMENT.

No-evidence or traditional motions for summary judgment are rarely used in the divorce context, but can be extremely effective in resolving contested issues prior to trial or mediation. TEX.R.CIV.PRO. 166a. For example, fault grounds, characterization, and reimbursement claims can be established or eliminated through well-crafted motions for summary judgment.

16. HEARSAY IN GENERAL.

Hearsay may be the most misunderstood concept and misused objection in the Rules of Evidence. TEX. R. EVID. 602, and 801 *et. seq.* The mere fact that a question calls for an out-of-court statement does not make it objectionable. The mere fact that an answer includes recitation an out-of-court statement does not make it inadmissible. In fact, most out-of-court statements are admissible for some limited purpose. TEX. R. EVID. 803. Many are not hearsay at all. "Based on hearsay" is not a good objection, as practically all we know as humans is based upon what we read, heard, or saw. Further, out-of-court statements are not hearsay unless offered at trial. "Calls for hearsay" is a premature objection, as the rule prohibits inadmissible answers, not poorly worded questions. Remember, we often cannot rule upon the objection until we hear the answer.

17. HEARSAY OF CHILDREN.

There is no special rule that permits out-of-court statements by children or excludes them from the strictures of Rule 801 and 802. The most common exceptions applicable to hearsay statements of children are present-sense impression, excited utterance, and then-existing mental, emotional or physical condition. TEX. R. EVID. 803(1), (2), and (3). Remember that the first two may recite the child’s rendition of the event itself, while the third must only describe the child’s mental, emotional or physical condition caused by the event, but not the event itself. (However, you can often get the hearsay statement in following the description of the condition for the limited purpose of explaining why the child felt that way. “It doesn’t matter whether the child’s explanation was true, only that hearing/seeing it caused the child to react in that manner.”)

18. ETHICS OF AGGRESSION (ZEALOUS ≠ ETHICAL).

Texas Disciplinary Rule of Professional Conduct 3.01 states, “A lawyer shall not bring or defend a proceeding, or *assert or controvert an issue* therein, unless the lawyer reasonably believes that there is a

basis for doing so that is not frivolous.” (emphasis added.) Agree where you can, and fight where you must.

19. PERSONAL OPINIONS.

Don’t share your personal opinions of the litigants or the issues. TEX. DISC. R. PROF. CONDUCT 3.04(c)(improper to “state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused[.]”) Instead, stick to arguing the facts and the law.

20. TELL THE TRUTH.

The Texas Rules of Disciplinary Conduct prohibit lawyers from making false statements of law or fact to the court or to opposing counsel, or allowing their clients to do so. TEX. DISC. R. PROF. CONDUCT 3.03(a)(1) and 4.01. Rule 3.03 requires attorneys to volunteer the truth, even to the detriment of their client. “In an ex parte proceeding, a lawyer shall not fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision,” (TEX. DISC. R. PROF. CONDUCT 3.03(a)(3)), and “a lawyer shall not fail to disclose to the tribunal authority (1) in the controlling jurisdiction (2) known to the lawyer to be (3) directly adverse to the position of the client and (4) not disclosed by opposing counsel.” TEX. DISC. R. PROF. CONDUCT 3.03(a)(4).

21. DON’T TOLERATE LIES.

The Disciplinary Rules require that an attorney who learns that a client or their witness lied under oath on direct examination must take steps to remedy the situation. TEX. DISC. R. PROF. CONDUCT 3.03(b). The lawyer must first attempt to persuade the witness to correct or withdraw the false statement. If the witness refuses to do so, the lawyer *must* take remedial action, up to and including informing the court of the falsehood and disclosing the true facts. This obligations lasts for so long as remedial measures are reasonably possible – up to four years after final judgment in divorce matters, and until emancipation of the child in SAPCR matters.

Your obligations are different if false statements are elicited by opposing counsel on cross-examination. Rules 3.03(b) and 3.04(b) don’t apply because you didn’t “offer or use” the false statement (so long as you don’t repeat it or mention it during closing argument), and Comment 13 to the Rule expressly excludes that scenario from mandated correction or disclosure. However, the Rules *permit* you to disclose the falsehood, should you choose to do so.

Practice Tip: When your client lies during cross-examination, interrupt and ask to confer privately with the client, and encourage them to correct the false statement. If they refuse, either inform the court, or move to withdraw under Rule 1.15(b)(4) without

disclosing details. In this situation, you can withdraw even though it would have a materially adverse effect on the client.

22. QUICK HITTERS.

- a. Don't talk yourself out of a win.
- b. In the absence of a binding mediated settlement agreement, the Court is not bound by the agreement of the parties, and must make an independent determination that the proposed division is just and right. TEX.FAM.CODE ANN. §§ 6, 7. Give the court sufficient facts to reach that conclusion, not a mere recitation of a conclusion of law from the witness. Consider providing an inventory at the prove-up.
- c. Similarly, in the absence of an MSA, the Court must make an independent determination that the agreement is in the best interest of the child. Be prepared to present some evidence to prove-up best interest (beyond the unsupported declaration of the parties). TEX.FAM.CODE ANN. §§ 153, 162, and 262.
- d. Conclusory statements by witnesses carry little evidentiary weight. Prayers are for lawyers, not witnesses. The stated facts in a pleading must be established through competent evidence, while the requested relief in a pleading is the legal or equitable remedy arising from the evidence, thus needing no evidentiary support. TEX.R.CIV.P. 45-47.
- e. Motions for enforcement, especially those seeking contempt, should include precise detail regarding the alleged violations. TEX.FAM.CODE ANN. § 157. What, when, and where the violation occurred should be stated with absolute particularity. Failure to do makes the motion susceptible to a motion for directed verdict at the close of the applicant's case-in-chief, or at the very least, could foreclose the possibility of contempt.

FINAL THOUGHTS.

Knowing the rules is important, but knowing your judge is equally so. For example, some judges always want evidence to make an independent determination of “best interest” and “just and right,” while others accept agreed decrees without even requiring prove-up hearings. The foregoing recommendations are suggested “best practices” to simplify your presentations, increase persuasiveness, and maximize your odds of success, no matter the setting.

