

Things (Some) Lawyers Do Very Well

Judge David Canales

73rd Judicial District Court

Judge Roy Ferguson

394th Judicial District Court

Judge Graham Quisenberry

415th Judicial District Court

State Bar of Texas

Advanced Family Law Conference

August 12-15, 2019

San Antonio

General Topics of Discussion

1. Pleadings
2. Evidence
3. Ethics

Divorce Pleadings

File special exceptions to strip excess facts.

TEX.FAM.CODE ANN. § 6.402(c).

Pleadings must include enough factual detail to identify the issues, but *no more*. TEX.FAM.CODE ANN. § 6.402.

Facts should be included only to:

- establish jurisdiction
- track basic statutory elements, and
- support request for extraordinary relief.

These types of special exceptions *must* be granted by the court.

Divorce Pleadings

Active pleading must request all relief ultimately awarded.

Respondent is entitled to fair notice of the relief requested.

If the judgment includes relief not supported by the pleadings, the judgment is...

VOID!

“Default” Pleadings

Amended pleadings requesting “more onerous relief” must be served on the respondent, even if they are in “default.”

- Permanent injunction
- Sole managing
- Supervised visitation or no access
- Separate property
- Grounds for divorce.

Service by Rule 21A, not personal service and citation.

Responsive Pleadings on Modification

The best offense is a good defense!

CAUTION: A counter-motion seeking modification of a similar issue judicially admits “material and substantial change for both sides.”

“Default” Pleadings

First and foremost...

**THERE IS NO SUCH THING AS
A DEFAULT IN FAMILY LAW.**

“Default” Pleadings

If the defendant has *appeared* in the case, you must include a Certificate of Service with the Order Setting Hearing, showing compliance with Rule 21a.

APPEARANCE OR NOT?



Divorce Pleadings

Bonus Tip:

Compare birthdates with date of marriage!

If the child wasn't born during the marriage, it's not a child "of the marriage."

Include a request to establish paternity of any child born prior to the date of marriage, or seek earlier informal marriage.

Proving Best Interest and Just and Right

- Without a binding MSA, Court must make an independent determination of “best interest” and “just and right.”
- Must prove all elements, even on “default.”
- Witnesses state facts, not conclusions.
- Give the Court more than you think it should need.

Consider doing an Inventory,
or a Summary to assist the court.

Affidavits for Modification

Modifications filed less than one year after prior order/mediation.

Requests for temporary orders changing primary conservatorship.

Facts, not conclusions!

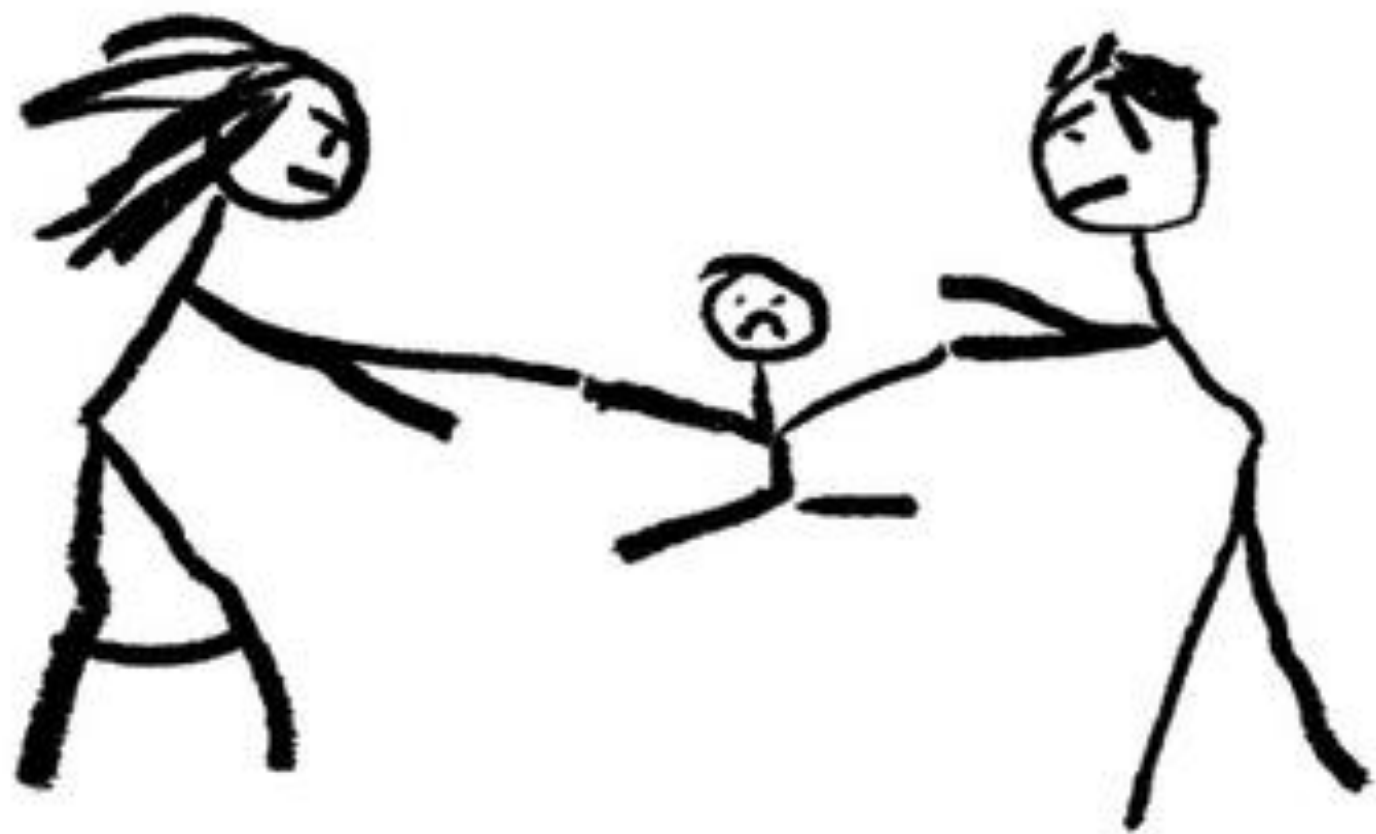
Summaries of Evidence

Texas Rule of Evidence 1006 Summary

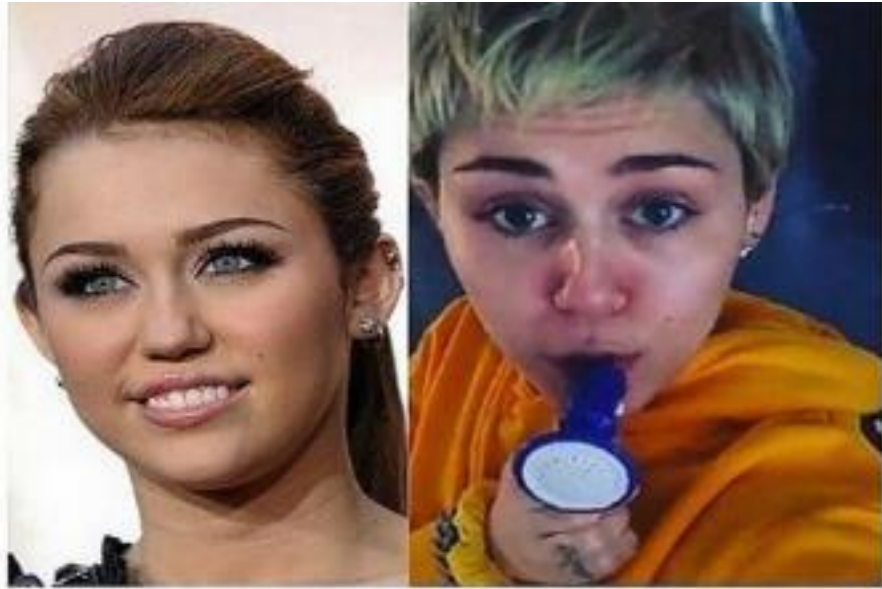
- Replaces voluminous admissible evidence.
- Underlying records need not be admitted.
- The summary is itself evidence – is offered and admitted.
- Goes to the jury.

Demonstrative Summaries

- Introduces no evidence.
- Summarizes records already admitted.
- Is not admitted as evidence.
- Does not go to the jury.



NO!



before drugs and after





Attorneys' Fees Evidence

“Expert” Testimony of Attorney? **Not enough**

Affidavits tracking experience and opinion? **Not enough**

Must submit detailed billing records outlining time worked and tasks performed.

Applies to ALL requests for fees, including sanctions.

Rohrmoos Venture et al. v. UTSW DVA Healthcare LLP, ___ S.W.3d ___, 2019 Tex.LEXIS 389 (Tex.2019); *Daniel S. Barnett et al. v. Richard B. Schiro*, ___ S.W.3d ___, Tex.LEXIS 386 (Tex.2019). *Nath v. Texas Children’s Hospital*, ___ S.W.3d ___, 2019 Tex.LEXIS 636 (Tex.2019).

Hearsay

Not every repeated statement is inadmissible hearsay.

“Based on hearsay” is not a good objection.

“Calls for hearsay” is usually not a good objection.

Most out of court statements are admissible for some limited reason.

Hearsay Statements of Children

Exception - Statement by Child Describing Abuse:

In a SAPCR,
Child is 12 years old or younger,
The child was the victim of the abuse, and
the statement describes the abuse, AND

Court finds sufficient indications of reliability,
Child is available to testify, or
Using the statement instead of testimony is necessary to protect
the welfare of the child.

Tex.Fam.Code 104.006

Hearsay Statements of Children

Most Common Other Exceptions for Children:

“Present sense impression.”

describing or explaining the event

while perceiving or immediately after the event

without time to consider or change the story

“Excited utterance.”

a spontaneous statement

made while witness is still under the stress of the event.

relating to the startling event that caused the excitement

“Then-existing mental, emotional or physical condition.”

a spontaneous statement by the speaker

about the speaker’s state of mind, feelings or body

that *cannot* be about what caused the condition

Motions for Summary Judgment

For information gathering.

To streamline the case before trial:

- Fault Grounds
- Characterization
- Enforceability of Marital Agreements
- Reimbursement Claims
- Informal Marriage
- Material and Substantial Change

Conflicting Witness Testimony

Prior Inconsistent Statement

Refreshing Recollection

Recollection Recorded

Conflicting Witness Testimony

Prior Inconsistent Statement

1. Impeachment – attacking credibility
2. witness makes an affirmative statement of fact, (not “doesn’t recall” or “doesn’t know”)
3. prior statement is read aloud
4. witness must admit or deny the contents of the statement.

Conflicting Witness Testimony

Refreshing Recollection

1. when witness can't answer (not when given answer is incorrect)
2. prior statement is silently shown to the witness, not read aloud, and retrieved from the witness before the next question
3. if witness says their recollection is refreshed, the prior statement is not read aloud or put into evidence

Conflicting Witness Testimony

Refreshing Recollection

Rule 612.

When a witness reads “a writing” to refresh their recollection before testifying, the other party can demand it, read it, cross-examine about it, and offer relevant portions into evidence.

Conflicting Witness Testimony

Recollection Recorded

1. when witness can't remember well enough to answer accurately (not when given answer is incorrect)
2. prior statement made or adopted by witness when memory was fresh
3. If witness admits to making the statement, the statement itself may be either read or offered into evidence (if offered by adverse party).

Personal Opinion

TRDPC 3.04(c)

(2) ... assert **personal knowledge** of facts in issue except when testifying as a witness[.]

(3) 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[.]

Telling the Truth

TRDPC 3.03 and 4.01

Truthfulness in Statements to Tribunals, and to Others

In the course of representing a client a lawyer shall not knowingly:

- (a)(1) **make a false statement of material fact or law** to a third person or tribunal;

Telling the Truth

TRDPC 3.03 and 4.01

Truthfulness in Statements to Tribunals, and to Others

In the course of representing a client a lawyer shall not knowingly:

(a)(2) **fail to disclose a material fact** to a third person when disclosure is necessary to avoid making the lawyer a party to a **criminal act** or knowingly assisting a **fraudulent act** perpetrated by a client.

(a)(5) **offer or use** evidence that the lawyer knows to be false

Telling the Truth

TRDPC 3.03, Comment 15:

A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false.

That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client.

Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value.

A lawyer's obligations [to disclose] are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

Correcting Lies

TRDPC 3.03

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties ... continue until remedial legal measures are no longer reasonably possible.

Correcting Lies

TRDPC 3.03

Comment 13. A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination, but who offered false testimony or other evidence **during examination by another party**. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client's case, however, would violate paragraph (a)(5).

Correcting Lies

TRDPC 3.04(d)

A lawyer shall not knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience

Comment 6: "Paragraph (d) prohibits the practice of a lawyer not disclosing a client's actual or intended noncompliance with a standing rule or particular ruling of an adjudicatory body or official to other concerned entities. It provides instead that a lawyer must openly acknowledge the client's noncompliance."

Self-Represented Litigants

Let them have their day in court.

- Don't beat them down.
- Don't intentionally anger them with process.
- Don't abuse the Rules.
- TRDPC 3.04(c) – intentional habitual violations of rules (of procedure and evidence)
- TRDPC 3.01 – don't fight over frivolous issues

Thank you and enjoy the conference!

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