

Laying Your Evidentiary Foundation

Offering Exhibits Commonly Used In Child Welfare Cases

SUPREME COURT OF TEXAS CHILDREN'S COMMISSION

NOVEMBER 17, 2023



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CERTIFIED COPIES

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

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

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PHOTOGRAPHS

Foundation for Admitting Photographs

Elements:

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



Tips for Admitting Photographs

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



Example: Entering Photos from Doctor

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

Example: Entering Photos from Doctor, cont.

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

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

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

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

Example: Entering Photos from Doctor, cont.

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



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EMAIL AND TEXT MESSAGES

Foundation for Email or Text Message

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

Example: Entering Email

Q Ms. Caseworker, I'm showing you Petitioner's Exhibit 2. Do you recognize it?

Q What is it?

Q Is Petitioner's Exhibit 2 an exact duplicate of the contents of the email you received on your computer/phone?

Q Do you recognize the email address of the sender? How?

Q Do you recognize the name at the end of the message?

Q Do the contents of the email refer to any previous communication you had with this person?

Q Is the information in the contents known to this person?

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SOCIAL MEDIA POSTS

Foundation for Social Media Post

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

Example: Entering Facebook Post

Q Mom, I'm handing you what's been marked Petitioner's Exhibit 3; do you know recognize it?

A Yes.

Q What is it?

A It's a copy of my Instagram, Facebook, Tik Tok page.

Q How do you know it's your social media?

A It has my profile picture/screen name and there are photos of me on the printout.

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AUDIO CLIPS

Laying the Foundation for Audio Clips

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

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



Steps for Laying the Foundation for Audio Clips

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

Example: Foundation for Audio Clips

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

* Practice Tip: have the original recording available also.



Example: Foundation for Audio Clips

Q. Can you identify the voice on the recording as Respondent Mother?

Q. Is Petitioner's Exhibit 4 the taped recording you made of that voicemail message?

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



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VIDEO CLIPS

Laying the Foundation for Video Clips

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

Steps for Laying the Foundation for Video Clips

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

Example: Foundation for Video Clip

Q. Have you provided the original video or an unaltered copy of the original video for us today?

Q. Is the copy you provided a digital copy of the video for admission as an exhibit in court?

Q. On what day and time was this video recording made?

* Practice Tip: have the original recording available also.



Example: Foundation for Video Clip

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

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

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RECORDS

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

The Rules:

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

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



3 R's

Exhibits should follow the 3 R's:

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

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



Authentication: Texas Rule of Evidence (TRE) 901

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



Records of Regularly Conducted Business

What “records” are covered?: TRE 803(6)

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

Records of Regularly Conducted Activity

Methods for authentication: TRE 803(6)

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

Laying Foundation Through a Witness

Request permission to approach the witness.

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

Show exhibit to opposing counsel.

Show exhibit to the witness and ask:

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



Laying Foundation Through a Witness, cont.

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

Laying Foundation Through a Witness, cont.

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



Laying Foundation Through a Witness, cont.

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

Laying Foundation Through a Witness, cont.

OR

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



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

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



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

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

Challenges to Foundation:

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



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HEARSAY STATEMENT OF CHILD
ABUSE VICTIM

Foundation for Hearsay Statement of Child Abuse Victim

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

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

Texas Family Code § 104.006



Foundation for Hearsay Statement of Child Abuse Victim, cont.

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



Foundation for Hearsay Statement of Child Abuse Victim, cont.

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

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DRUG TEST RESULTS

Drug Test Results

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

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



Drug Test Results, cont.

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

Drug Test Results, cont.

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

Drug Test Results, cont.

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

Drug Test Results, cont.

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

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

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

Drug Test Results, cont.

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

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

Objections To Drug Test Results

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

Objections To Drug Test Results, cont.

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



Thresholds

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



Thoughts on Remote Hearings

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



Questions?

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