

How to Testify in a Custody Case

Most people are nervous when they testify in court. Answer questions completely, be honest and try to remain calm.

Steps:

- 1. Talk with your attorney before the court date and find out what questions he will be asking as well as what you can expect from the other attorney.**
- 2. Rehearse your testimony with your lawyer, but do not memorize lines or plan a performance.**
- 3. Dress appropriately for court.**
- 4. Sit on the witness stand when you are called. Swear the oath the judge asks you.**
- 5. Refer to the judge as Your Honor, the attorneys as Mr. or Ms., and do not speak to the other parent directly.**
- 6. Keep your hands in your lap and try not to fidget. Request a glass of water if your mouth is dry.**
- 7. Look at the person who is questioning you and listen carefully to the question.**
- 8. Be quiet if there is an objection to a question being asked of you or if the judge speaks. Ask to have a question rephrased if you do not understand it.**
- 9. Do not treat the opposing attorney as an enemy. She is just doing a job. If you are treated unfairly, the judge or your attorney will intervene.**
- 10. Avoid evasions. The judge can tell if you are avoiding answering a question. This does not mean you have to offer information that is**

not requested. If the other attorney asks you if you went to a bar last night, you should answer truthfully, but you do not need to add that you had three gin and tonics.

11. Try not to become angry, upset or loud. You need to get your testimony out for the court to consider. Becoming angry or upset prevents your story from being heard. Ask for a recess if you become overly emotional, begin to cry and can't stop, need to go to the bathroom or need some air.

12. Speak loudly and clearly. Do not use obscenities unless you are quoting what you heard someone say.

13. Remain quiet while others are testifying. If you need to tell your attorney something, write it down or whisper it.

Tips:

If your attorney forgot to ask you about something important or you think of something you would like the court to know, ask if you can speak privately with your attorney.

Judges appreciate witnesses who are cooperative, calm and rational. They become annoyed with those that raise their voices, refuse to follow directions and make things difficult.

Children Testifying in Court

Testifying in court, while difficult and trying for many adults, can be a highly traumatic experience for a child victim of abduction or sexual exploitation. Repeated questioning, lengthy delays, testifying in front of the accused, and other legal requirements may be intimidating and can increase the child's anxiety and sense of helplessness. While we want victimized children to work through their trauma and put bad memories behind them, the legal system demands that they recount their victimization and hold the memory of the event fresh in their minds, at least through the trial phase of the case— which may, unfortunately, be filled with delays. Not all children suffer such trauma, however, and many children and families have benefited from new procedures that enhance their participation in the legal process. Many child witnesses derive great satisfaction and a sense of vindication from helping bring the facts of the case to light and taking part in a process that attempts to ensure “justice is done.”

This information is designed to help parents and guardians prepare their children to testify in court. Included are an explanation of the courtroom process, a discussion of current reforms to help child witnesses testify, advice about preparing children to testify, considerations in working with legal professionals, and suggestions for aftercare following the trial.

The Courtroom Process

To testify in court means to answer questions under oath. Explain to your child that an oath is simply a promise to tell the truth. There are a number of situations in which your child may be asked to testify in court. Your child may have been exploited, neglected, or involved in a custody or visitation dispute if you are going through a separation or divorce. Your child may have been a victim of a crime such as robbery. He or she may have been injured and is involved in a civil suit for damages. Or your child may have been the victim of a family or nonfamily abduction. A child may also have to testify in court if he or she was simply a witness to a crime or accident.

Depending on the kind of offense and laws in your state, your child could testify in criminal court, civil court, or family court. Matters of child sexual exploitation and abuse are most often handled in criminal court. Common names for family court include juvenile court and domestic relations court. Divorce and custody cases are generally heard in domestic relations court.

When criminal charges are filed and the person accused of the crime, known as the defendant, does not plead guilty, a criminal trial is held. The case will be heard either by a judge alone or by a judge and jury, the group of people appointed to hear the case. In a jury trial the jurors will listen to the evidence and decide the outcome. Also present in the courtroom will be the bailiff, who is a kind of law-enforcement officer for the court; a court reporter to record what is said; and a court clerk to administer the oath. Furthermore the judge may allow spectators and newspaper, radio, and/or television reporters, but usually not other witnesses, in the courtroom while your child testifies. In certain cases the judge may ban spectators and reporters from the courtroom if your child is testifying on a sensitive or embarrassing subject or to uphold state law regarding the protection of juvenile witnesses or victims.

Each side will have its own attorney present to ask questions of witnesses and argue the case. In some cases more than one attorney may be present for each side or there may even be a prosecution/defense team consisting of several attorneys. The prosecutor or district attorney will try to prove beyond a reasonable doubt that the person accused of the crime broke the law. The defense attorney acts on behalf of the defendant. They will both question your child. The defense attorney will attempt to show your child's version is not true or your child is not a reliable witness. Your child may have to tell the same story in detail to each attorney and should expect to be questioned closely.

The judge can play an important role in helping your child testify. For example the judge can provide alternative seating, shorten the length of time your child is required to testify, and control the defense attorney's use of cross-examination to prevent harassment. The judge's role may also include directly questioning the child.

The family court process differs from the criminal court process in several important ways. While a criminal trial generally involves a jury, the family court trial does not. Family court generally has a more relaxed and private atmosphere. Testimony in family court may be presented in the judge's office or chambers. There are only a few people present during testimony in family court including the child witness, support persons, the judge, the court reporter, and the attorneys for each side.

Many states appoint a special attorney or advocate, called a guardian ad litem, to help ensure proper protection of the child in family court. The guardian ad litem represents only the child and serves in addition to the attorneys representing each side. The family court may use a specially trained volunteer who is not an attorney, often called a court-appointed, special advocate (CASA), as well as a guardian ad litem.

Reforms to Help Child Witnesses Testify

The rules of evidence and procedure in the legal system within the United States are designed to help ensure a fair trial for all accused persons. The most important consideration is the right of an individual to due process—notice and an opportunity to be heard—under law. Some legal procedures, however, may intimidate a child and inhibit credible testimony. For example an accused person has a right to confront the witnesses against him or her. The parent or guardian concerned with a child's well-being may find such a requirement unfair and unreasonable.

Efforts have been made to pass laws or change procedures in order to accommodate the special concerns of the child witness. Certain procedures have been adopted in most states that make it easier for children to testify such as allowing the presence of a support person, using child-sized chairs, letting the child sit on the parent or guardian's lap, or permitting testimony in the judge's chambers. Some states have even adopted procedures in which a child may be able to testify via closed-circuit television or videotaped depositions. Ask the lawyer or guardian ad litem to make use of any available or permissible ways of making it easier for your child to testify.

Preparing Your Child to Testify

Remember that you will have a better case against an offender if your child is a reliable witness— that is, tells the truth in a clear, thorough, and comprehensible manner. If the child victim cannot testify, and there is no other evidence available, defense attorneys know that the case usually cannot be proved. Although some people believe young children are not competent to testify in court, in fact a child as young as 3 or 4 is usually as reliable a witness as an adult. In order to “qualify” your child to testify, the judge may ask your child questions to determine if he or she understands the difference between telling a lie and telling the truth. Below is a list of suggestions that will help you prepare your child to testify.

Do not go over your child’s testimony before the courtroom appearance. The defense attorney may ask your child, “Did someone tell you to say that?” Thus, if you have “gone over” your child’s testimony with him or her before the trial, you may be thought to have coached your child and influenced the testimony. It is perfectly acceptable, however, for the prosecutor to review the testimony with your child before the trial. Try not to discuss the facts of the case with or in front of your child. If the attorney for the defense seeks to question your child before trial, you should consult with the prosecutor, guardian ad litem, a victim/witness advocate, and/or your own attorney.

Any anxiety your child exhibits about testifying in court will be lessened if he or she knows what to expect from the courtroom process. The prosecutor, victim/witness advocate, or a counselor will be familiar with local practices and should provide you with accurate information. A visit to the courtroom when it is not in session can demystify the experience for your child. The victim/witness advocate or guardian ad litem can explain courtroom dynamics to your child, show your child where he or she will be seated, point out where the defendant will be seated, and indicate where the judge presides. Your child can be taught strategies to reduce anxiety before or while testifying. These can include relaxation exercises, mentally rehearsing the testimony, or simply playing with a favorite toy. Again, a therapist or victim/witness advocate can help with ideas.

If your child is a victim of sexual exploitation or abuse, he or she may be especially afraid or embarrassed about telling the story in court. Reassure your child that disclosing the victimization was the right action to take.

Remind your child that you know he or she is telling the truth and you believe him or her no matter what the defense attorney or the defendant says. Make sure your child knows no matter what happens in the legal process, your feelings toward him or her will not change.

Advise your child that the most important thing to do in court is to tell the truth.

Tell your child that if he or she is confused or does not know the answer, feel free to say so. No one expects your child to remember all the details or know all the answers. Be sure to let your child know that not remembering all of the details or knowing all of the answers doesn't mean he or she has done something wrong.

Working with Legal Professionals

In addition to providing comfort and support to your child during the legal process, monitor the legal professional's handling of the case to ensure your child's needs are met. Below are guidelines for parents and guardians in working with legal professionals.

If the attorney does not have experience in working with child witnesses, ask if he or she will consult with one who has this experience. Most state attorney's or district attorney's offices now have a crimes-against-children unit, with specially trained attorneys, to handle these cases.

In your meeting with the lawyers before the court appearance, talk with the attorneys about the best time of day for your child to testify—that is, try to schedule the testimony so as not to interfere with naps or mealtimes. If your child is very young, attempt to have the testimony scheduled early in the day, before your child becomes tired. The lawyers should know of planned events that might interfere with testimony such as a school field trip, vacation, or birthday. If

your child has any special ways of showing fear or distress, tell the lawyer.

Discuss with the attorneys any special measures that may be taken to alleviate your child's anxiety on the witness stand. The attorney may speak to the judge to request permission for your child to testify in the judge's chambers, obtain a smaller witness chair, or allow the use of dolls or drawings to demonstrate what happened. It may also be possible to "isolate" your child from the defendant outside of the courtroom as well. Many courts now have special waiting areas for children away from the proceedings.

Meet with any victim/witness counselor who may be assigned to your case. When assigned, this person should follow the case all the way to resolution. In addition the district attorney's office or law enforcement may have a victim/witness program. This program may also be listed in the telephone book under the county department of social services. A local nonprofit organization serving missing and exploited children and their families may also help guide you and your child through the legal system.

Your Child's Appearance in Court

Before your child appears in court, find out whether you will be able to be present in court with him or her. If you are also a witness in the case, you may not be able to be present when your child testifies. In that case you should ask if a support person, such as a victim/witness advocate, relative, or friend, may be in court when your child testifies.

On the day of your child's courtroom appearance, you and your child should have a good breakfast and try to relax as much as possible. You and your child should dress neatly and comfortably. Since there may be long periods of waiting and unforeseen delays, bring snack food and some quiet toys to amuse your child such as crayons, a book, or a doll. You and your child should not discuss the case with each other or anyone else. Ask your child to think carefully about the details of the testimony he or she will give.

After the Courtroom Testimony

After the testimony is over, reassure your child he or she testified well and you are proud. You may not know the outcome of the trial or be disappointed with the outcome, but know telling what happened was the right action to take.

Your child may have some stress-related sleep problems, worries, or feelings of insecurity for a day or two. You should consider professional counseling for your child to help him or her deal with any long-lasting trauma of the victimization as well as the entire judicial process. Don't be afraid to talk to your child about the experience and listen carefully to any of his or her thoughts, fears, or concerns. Answer questions as truthfully and honestly as possible.

The Role of the Parent or Guardian

Your child will testify more effectively and with less trauma if you control your own anxiety, perhaps by talking to relatives, friends, or a therapist. Do not neglect any needs you may have to receive help in addressing and dealing with your own feelings of guilt and anger over what has happened to your child.

Ask others how you can most effectively help your child in court, and make sure the appropriate legal personnel are handling the case properly. Make use of advocates, and be proactive in ensuring what is best for your child.

Do not try to investigate or handle the case yourself. This is not your role and can harm the case. If you do learn information that may be helpful, be sure to notify the proper authorities.

Remember you already know what the truth is, and the legal decision—however it may turn out—does not change that.

Your most important role is to provide comfort, support, reassurance, and love to your child during this potentially difficult and trying time. This will go a long way in helping your child through the healing process.

CROSS-EXAMINATION

In this article you will find an excellent discussion of cross-examination tactics and techniques. This article, written for attorneys, gives you an inside look at how an attorney can and will handle you on the stand and in depositions. **Knowing what the opposing counsel will likely do puts you a step ahead of them.**

Several other subjects related to cross-examination are also covered, including a section on psychological tests. Though long, this document is well worth the read. We also suggest that you print this article out and give it to your attorney.

I. INTRODUCTION

Cross-examination can make or break your case. For that reason, it is often referred to as the most dangerous double-edged sword in the litigator's arsenal. Therefore, this weapon should be maintained properly, practiced thoroughly and handled with care. In order to conduct a solid cross-examination, the lawyer must know the rules of the game, the best strategy and the art of war.

This article provides a general overview of the applicable rules of cross-examination, tips and strategies to consider in any cross-examination, and specific ideas related to particular witnesses that might be encountered at trial. It is important to note that all of the information contained in this article is merely suggestive in nature. In order to develop a smooth and thorough presentation, the lawyer must develop his or her own unique style of cross-examination. Combined with your own flare, this tool can truly be a work of art at trial if the lawyer is armed with knowledge about the witness, the opposing counsel and the audience.

II. THE RULES OF THE GAME

A. Wide Open Cross-Examination

Under Texas evidence law as well as the law of evidence in most other states, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." TEX. R. CIV. EVID. 611(b).

In other words, the scope of cross-examination is wide open and not limited to the scope of direct examination and credibility.

The cross-examination of an expert, however, may be limited to the scope of direct examination, credibility, and to areas designated during discovery as being within the scope of the direct examination. The subject matter of the expert's testimony must be disclosed after a proper discovery request at least 30 days prior to the beginning of trial, unless the party affirmatively establishes good cause for the failure to supplement his or her discovery responses. TEX. R. CIV. P. 215(5). In one case, a witness was designated as an expert by both sides. The court of appeals held that it was proper for the trial court to allow cross-examination that went beyond the scope of the cross-examiner's designation because it fell within the scope of the direct-examiner's designation. The court of appeals rejected the argument, holding that the better rule is to require a showing of good cause only when the scope of the cross-examination exceeds the designation of testimony by either party. The court reasoned that this rule preserved the parties' right under Civil Evidence Rule 611(b) to cross-examine "on any matter relevant to any issue in the case". Kreymer v. North Texas Mun. Water Dist., 842 S.W.2d 750, 752-53 (Tex. App.- Dallas 1992, no writ).

As a general rule, leading questions are permitted and advisable when a witness is being cross-examined. TEX. R. CIV. EVID. 611(c). However, leading questions may be denied when opposing counsel calls an adverse party witness. If the party is "friendly" to the examiner, use of leading questions is generally inappropriate. See GAB Business Services, Inc. v. Moore, 829 S.W.2d 345, 351 (Tex. App.- Texarkana 1992, no writ) (no error by trial court in limiting use of leading questions in cross-examining friendly witness). By the same token, when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions as in the case of cross-examination. TEX. R. CIV. EVID. 611(c).

The extent of cross-examination is within the trial court's discretion, and the court's ruling will not be disturbed on appeal unless an abuse of that discretion is shown. Palmer v. Miller Brewing Co., 852 S.W.2d 57, 63 (Tex. App.- Fort Worth 1993, writ denied).

B. Purpose of Cross-Examination

There are two primary purposes of cross-examination. One is to overcome, qualify, or explain testimony given on direct examination. The other is to attack the credibility, knowledge, and recollection of the witness by exposing inaccuracies in the direct examination or by exposing the witness' bias or prejudice toward the other side.

The right to cross-examine adverse witnesses is a "valuable right to the litigant, and a denial or abridgment thereof upon a material matter is reversible error." *Rich v. Park*, 177 S.W. 185, 189 (Tex. Civ. App.-Austin 1915), rev'd on other grounds, 212 S.W. 947 (Tex. Civ. App. 1919, opinion adopted). The tool of cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed.2d 489 (1970) (quoting 5 Wigmore, Evidence § 1367).

C. Kinds of Cross-Examination

A cross-examiner may question a witness on any matter relevant to the witness' credibility, except to the extent that evidence is made inadmissible for impeachment purposes. See, e.g., TEX. R. CIV. EVID. ANN. 404 and 608. Matters relating to the credibility of a witness may include the witness' (1) ability to recall or communicate events; (2) lack of personal knowledge about the event; (3) bias, prejudice, partisanship, corruption, or interest; and (4) inconsistent statements.

1. COMPETENCE

The ability of a witness to perceive, recall, and communicate relevant events is a question of competence. TEX. R. CIV. EVID. 601. Initially, this is a question of law for the judge, but if the witness satisfies this test, the problem becomes one of credibility, which is a fact question for the jury. To be competent, the witness must have the ability to understand the nature and significance of the oath and be able to conform his or her conduct to it. See TEX. R. CIV. EVID. 601 (competency and incompetency of witnesses) and 602 (personal knowledge). In family law cases, this issue often arises with "child" witnesses. In this case, it must be shown that the child understands

the difference between right and wrong in order to be competent to testify. The issue can also arise if an allegedly "insane" witness is called to testify.

If the witness passes muster with the judge in the area of competency, it is left to the lawyer to show that the witness cannot possibly perceive, recall and communicate the relevant event effectively. In the case of a child witness that you do not want to testify, the cross-examiner has several options. One is to let the direct examiner embark on a complex line of questions to the child, then ask no questions at all. This will show the judge or jury that your side of the case is sympathetic and cognizant of the fact that children have no place in the courtroom. You are not going to risk emotional injury to innocent children in order to win a case. On the other hand, if you have to cross-examine, be as delicate and brief as possible. Be sure to inquire whether the child knew she would testify in court, how she knew, and who prepared her for the big day. Oftentimes, you will find that the child was in opposing counsel's office the day before. This will severely injure the credibility of the opposing party, opposing counsel, as well as the innocent child witness. This is an intriguing and complex topic which is discussed more thoroughly later in the paper.

2. LACK OF PERSONAL KNOWLEDGE

The witness must also satisfy the personal knowledge requirement. In this regard, it must be shown that this witness has knowledge as a result of personally seeing, feeling, hearing or experiencing the event in question. See TEX. R. CIV. EVID. 602. This information should be investigated by the lawyer at the discovery phase. At trial, the witness can be precluded from testifying about those matters of which she has no personal knowledge. This is also an excellent way to attack the witness' credibility for attempting to relay information about events that are outside their personal knowledge. In this regard, the lawyer should attempt to ascertain where the witness was when the alleged event occurred. Delve into the mental state of the witness at the time the event was perceived. Were they at a party? Were they intoxicated? What time of day or night was it? Is this something they personally witnessed or did someone tell them about it? It is not uncommon for a witness to mistakenly believe they have personal knowledge of an

event because they simply do not know what that term means. Therefore, you must take a very simplistic approach to the inquiry and determine that their information did not come from Aunt Vera who has never told a lie!

3. BIAS, PREJUDICE, INTEREST, OR PARTISANSHIP

Credibility can also be attacked by exposing a witness' bias, prejudice, partisanship, or outright corruption. Bias is an improper predisposition in favor of one side of a controversy, while prejudice has been defined as an improper predisposition against another. *Traders & General Ins. Co. v. Diebel*, 188 S.W.2d 411, 414 (Tex. Civ. App. - Dallas 1945, writ ref'd for want of merit). Partisanship amounts to favoritism toward one side for whatever reason. Corruption is more heinous, involving such things as bribery or false testimony. *Texas & Pac. Ry. Co. v. Brown*, 98 Tex. 397, 14 S.W. 1034, 1035 (1890); *Rutledge v. Rambler Automobile Co.*, 95 S.W. 749, 750 (Tex. Civ. App. 1906, no writ).

Demonstrating bias is often an effective technique when cross-examining expert witnesses. Such witnesses, are often professional witnesses for one side and may have an obvious institutional bias and interest. Exposing bias and prejudice in the lay witness often involves exposing an employment relationship that makes the witness incapable of being impartial and objective. In family law cases, this will always apply to a relative of the party eliciting the testimony. Regardless of the particular area, the approach is the same. Your cross-examination must carefully suggest the witness' impartiality, then stop. A subtle cross-examination that allows the jury to reach their own conclusion is often more effective than an overly zealous cross-examination that runs the risk of offending the jury.

A witness may also lack credibility because he or she has a stake in the outcome. For example, a witness is interested if the witness or one of his relatives will receive money if the case is won. *Rothermel v. Duncan*, 365 S.W.2d 398, 403-04 (Tex. Civ. App. -Beaumont), rev'd on other grounds, 369 S.W.2d 917 (Tex. 1963). In family law, this might occur if the nanny will receive an extremely large Christmas bonus for testifying on behalf of mom at trial. Of course, the actual evidence of one's financial interest will be very subtle in most cases, so it must be investigated thoroughly. For example, has the nanny ever gotten a

Christmas bonus before? She may truly be under the delusion that mom has finally decided to reward her for her good works! This is probably far from the case and must be used as a form of attacking credibility. On a more typical level, an expert witness who is being paid for his testimony or who testifies often for one attorney or side may be subject to attack on the ground of interest. Therefore, be sure to ask a multitude of questions about the expert's prior testimony and compensation before trial. If possible, locate other deposition transcripts from other cases. This can provide excellent cross-examination information, especially if the expert will take the reverse position depending upon whose paying.

The examination of a witness concerning a bias or interest is comparable to the procedure for impeachment on a prior inconsistent statement. To show bias or interest, the witness must first be confronted with the information that shows he is biased or prejudiced. The witness must be given an opportunity to explain or to deny the circumstances or statements. TEX. R. CIV. EVID. 613(b). If the statement is in writing, the writing need not be shown to the witness, but on request it must be shown to opposing counsel. TEX. R. CIV. EVID. 613(b). If the witness unequivocally admits such bias or interest, extrinsic evidence of it is not admissible.

III. PRACTICAL TIPS & STRATEGIES

Any approach to cross-examination must be considered in light of our own personality. Learn from the masters and their years of experience, but we should not try to be someone we are not, or do something unnatural to our own personality. Watching a great trial lawyer cross-examine a difficult witness is an educational experience unavailable from any article or seminar. Remember, the strategy and technique is unique to that lawyer, that case, and that witness. In the final analysis, we must be ourselves.

Although there is no real substitute for the courtroom, knowledge of the fundamentals of cross-examination can prevent common pitfalls. The key to any cross-examination is control.

A. Younger's Ten Commandments

The late Irving Younger's ten commandments are without question the most quoted authority on cross-examination. We need to know them and use them by rote.

All of the commandments do not work in every case, and one must depart from some of them in unique circumstances. However, one should follow them until you feel comfortable departing from them.

1. BE BRIEF

Confine cross to our strongest points to avoid diluting their impact.

2. SHORT QUESTIONS, PLAIN WORDS

Simplicity is the mark of the effective cross-examiner. Short questions paint a comprehensible picture for the judge or jury. Fancy words and elaborate syntax have no place in cross-examination.

3. ASK ONLY LEADING QUESTIONS

Every question on cross-examination should put words in the adversary's mouth. All the adversary does is reply, in strict rhythm: "Yes", "No", or "I don't know." The leading question is the spoon to put the castor oil of unpleasant facts into the adversary's mouth.

4. NEVER ASK A QUESTION TO WHICH YOU DO NOT ALREADY KNOW THE ANSWER

Cross-examination is not the time for discovering what the case is about. If we don't know the answer, we shouldn't ask the question.

5. LISTEN TO THE ANSWER

Our adversary will oftentimes say something contradicted by other testimony, contradicted by his prior testimony, contrary to human experience, or completely inconsistent with the way the universe is organized. We cannot allow ourselves to be so absorbed in our script that we fail to hear what the adversary is saying.

6. DO NOT QUARREL WITH THE WITNESS

Resist the temptation. Simply expose absurd or patently false testimony to the judge or jury. Save argument for closing.

7. DO NOT PERMIT THE WITNESS TO EXPLAIN

The effective cross-examiner controls the witness with leading questions. Permitting explanations is indicative of a loss of control.

8. DO NOT ASK THE WITNESS TO REPEAT THE TESTIMONY HE GAVE ON DIRECT EXAMINATION

When we ask our adversary on cross-examination to repeat his direct testimony, it simply serves to elevate his credibility. Even if potentially damaging, we have invited our adversary to explain it away: "Oh, yes, but what I really meant to say was..."

9. AVOID ONE QUESTION TOO MANY

If we have made our point, resist the temptation to ask the ultimate question. We should save our punch line for closing argument. Only Perry Mason wins the entire case during cross-examination.

10. SAVE THE EXPLANATION FOR SUMMATION

Resist the urge to draw out the cross-examination so the judge or jury comprehend at once the nature of our questioning, and the brilliance of the cross-examiner. Pull it together during summation.

B. Types of Cross-Examination

There are two types of cross-examination: corroborative and destructive. Corroborative cross seeks to have the adversary agree with the facts which support our client's position. During this phase, get the witness to agree with every good admission previously made about your client. This should include any admissions on positive parenting skills of your client values that are important to your burden

of proof, fault grounds and the like. If our adversary starts contradicting his deposition testimony, that is when we use his deposition for impeachment.

Destructive cross discredits our adversary and his direct testimony. This type of cross-examination is more difficult to execute. It is on destructive cross that we pull our knife out and start jabbing the witness. During the cross-examination on fault issues, discuss the adversary's cruel treatment of your client, his illicit affairs, and all the other bad facts which have been discovered. The witness must be controlled by the examiner at all times. Do not let him waiver from his deposition testimony. Each time the witness attempts to deviate from his prior testimony, impeach, impeach, impeach.

Corroborative cross must be attempted before destructive cross. At the beginning of a cross-examination, our adversary will be less hostile and more trusting than he will be later in the cross-examination.

There is a two-fold purpose to this method: (1) oftentimes the witness can be "worn down" to the point of answering questions in the manner he believes we want him to answer because he assumes the deposition testimony is going to be "thrown in his face", and (2) the judge or jury are hearing every contradictory answer and will, hopefully, decide that if the witness cannot tell the truth about unimportant issues, he probably will not tell the truth about issues that will effect his future.

C. Cross-Examination at Trial

After the discovery phase, counsel should have a thoroughly prepared and organized trial notebook complete with full examinations for each potential witness to be cross-examined. As experience and confidence is gained in the courtroom, the trial notebook questions may be limited to an outline of important points to be covered with each witness. Regardless of your experience level, there is no way we can anticipate every question to be asked on cross-examination. Be prepared to be spontaneous and react to unplanned testimony that has been brought out on direct examination by the opposing party.

Virtually the entire cross-examination should be prepared by going through prior deposition testimony and picking out the most damaging points to the adversary as well as the most helpful points to your case. From these points prepare an outline of points to cover on cross-examination; either in question or "statement" format, depending on your experience and comfort level. Each statement or question should be keyed by line and page number to the deposition. For example, if the opposing party admits in deposition that our client is an excellent mother, the trial notebook would merely say, "Excellent mother -- 23 + 45". There is no reason to write out a question, "Your wife is an excellent mother, isn't she?" If every question is written out and merely read out loud, our cross-examination will end to sound "canned" and our examination will lose much of its effectiveness.

The question should always be leading, requiring the witness to answer "yes" or "no". By framing the questions in a leading manner, you are better able to present your side of the story to the judge or jury.

IV. THE ART OF WAR

A. Impeachment

Impeachment is the most dramatic trial technique in the lawyer's arsenal. Selectively used and effectively employed, it can have a devastating effect at trial. Jurors appreciate effective impeachment. An effective impeachment is rarely successful if attempted at the examiner's whim at trial, but is usually the result of intense research and preparation at the pretrial discovery level.

1. PRIOR INCONSISTENT STATEMENTS

One of the most common ways of discrediting a witness' testimony is to show that the witness has previously made statements that are inconsistent with his or her testimony at trial. A prior inconsistent statement of a witness is admissible to attack his or her credibility. See TEX. R. CIV. EVID. 613(a). A prior inconsistent statement of a party or witness is also admissible to prove the truth of the matter

asserted when the declarant testifies at the trial or hearing, is subject to cross-examination, and the inconsistent statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. TEX. R. CIV. EVID. 801(e)(1)(A).

Raising prior and inconsistent statements is the most frequently used impeachment method at trial. More than any other impeachment method, however, impeaching with prior inconsistent statements requires a precise technique to be effective before the jury. Rule 613 of the Texas Rules of Civil Evidence expressly requires that the witness have an opportunity to admit, deny, or explain making the inconsistent statement. If the prior inconsistent statement was made in a deposition, the following litany should be followed with any impeachment of a witness with deposition testimony. First, the examiner should establish that the deposition was taken and have the witness testify about the general area of inquiry. Secondly, the examiner should establish that the witness understood the nature of the deposition and treated it as an important, serious matter. Third, if the witness read and corrected the deposition transcript, delve into the fact that the witness even had a second opportunity to review and correct their testimony prior to trial. Fourth, identify trial testimony that is inconsistent with deposition testimony and commit the witness to it. Fifth, confront the witness with the prior inconsistent deposition testimony.

2. CONTRADICTIONARY FACTS

A cross-examiner may wish to show that certain facts are different from what the witness claims. This is usually called impeachment by contradiction. How the fact is asserted on cross-examination determines whether you are under an obligation to prove up the actual fact.

3. PRIOR BAD ACTS

Prior bad acts are admissible under Rule 608(b) of the Texas Rules of Civil Evidence if the acts are probative of truthfulness. TEX. R. CIV. EVID. 608(b). Bad acts that are probative of truthfulness, include submitting false loan applications or inaccurate employment applications.

4. PRIOR CONVICTIONS

Prior convictions are governed by Rule 609 of the Texas Rules of Civil Evidence. Any felony conviction, and any misdemeanor conviction involving dishonesty or false statements, can be used to impeach the credibility of any witness who has testified. However, the conviction or release from confinement must not be more than 10 years old (or the release from the confinement must not have been more than 10 years before the date of use). TEX. R. CIV. EVID. 609(b).

Prior convictions must be raised on cross, unless the witness has already volunteered such evidence on direct examination. This situation frequently occurs when the opposing counsel is trying to lessen the impact of the prior conviction coming out on cross-examination. If a witness denies or equivocates about the prior conviction, you must be prepared to prove it up with extrinsic evidence, since prior convictions are almost always considered non-collateral.

B. Preparation and Planning for Cross-Examination

1. PLAN OF ATTACK

The following basic principles should be observed in developing a plan for cross-examination of witnesses.

a. The cross-examination should be planned to meet its intended purposes. b. Plan to begin and end with your strongest points. People tend to remember what they hear first and last, with some casual day-dreaming in the middle. Do not let your brilliant cross-examination fizzle out with a boring or irrelevant question.

c. Have a preconceived plan about how, when and why the witness' credibility will be attacked. Otherwise, the jury will sympathize with the witness, who it will see as being bullied by the lawyer.

d. Cross-examination, like other parts of the trial, is not just substantive; it's a matter of impression management. Don't just

expose the opposition's weaknesses, be prepared to tell a sequential and creative story that clearly exposes why your client should win.

e. Your story is obviously different from the opposition, so tell it that way. Do not fall into the trap of attacking the witness based on the way in which the story was told on direct. This could cause the jury to believe "that's the way it really happened". Your side of the story should be distinct from the opposition, so create your own version of what happened through cross-examination. Reduce the basic facts to memory and be sure that they are brought out appropriately with each witness' testimony.

f. The cross-examination should be aimed at probabilities. By using experience and logic to think through what probably happened (including the minor details), the cross-examiner can interrogate the witness to bring out the "probable" facts that favor the cross-examiner's case or that tend to cast doubt on the witness' story, conclusions, or interpretations. Stretch the other side's bad facts as far as you can on cross-examination and patch them up with logical conclusions during final argument.

g. Many commentators believe that a cross-examiner should never ask a question of an opposing witness unless the answer is known beforehand. This simple principle provides safety from misfortune, but it may not be appropriate in all circumstances. One such instance is when an opposing witness simply must be raked over the coals in order to minimize the harm that his testimony has already caused. If the examination will delve into an area in which the examiner doesn't know how the witness will answer, a backup point should be saved for use after the answer. For example, with an expert witness, the cross-examiner should save the points that the witness is being paid a big fee and has testified numerous times for the opposing counsel until the end of the examination unless some other sizzling question is being saved until the end. There is nothing worse for the case on cross-examination than getting "killed" with an answer and having no further points to make.

2. JURY V. NON-JURY

Before beginning any "presentation", it is important to know your audience. Therefore, prior to preparing your cross-examination outline, think about whether your questions will be observed by a judge or jury. If your audience consists of a jury, it will be impossible to tailor your style of presentation around any particular model. On any given day, the panel members can be completely different. Therefore, with a jury panel, it is even more important to know your witness. As shown in this article, some witnesses need to be handled with care in front of a jury, even if they are damaging to your case. Examples include children, preachers, teachers and older persons. Jurors can be very protective of these sorts of witnesses, regardless of whether they hurt your case. Unless you can really make points on cross-examination, the best option may be to ask no cross questions.

On the other hand, if cross-examination questions are required, be sure to cover potentially sensitive areas in the voir dire examination. Let the jury know that the opposing counsel will call certain witnesses that you will have to cross-examine. Let the jury know that you are only doing your job and not trying to abuse anyone. Also, remember to discuss credibility issues with the jury at the very outset. During the voir dire examination, ask the jurors to identify various reasons that a person would lack credibility. Make sure the panel members identify the issues of credibility concerning friends and relatives of an opposing party. Do not forget to talk to them about credibility issues in relation to experts and their fees. As a result, if you simply cannot chip away at the substantive portion of the witness' testimony, ask a few questions related to bias and prejudice, then move on. Remind the jury about the credibility problems in closing argument.

If you are trying the case before a judge, there should be some familiarity with the judge's personality, demeanor, bias' and prejudices. If you know nothing about these issues -- find out. Many judges prefer that the lawyer get right to the point, without abusive questioning, grandstanding and belaboring the point. Of course, there are those "technical" sorts who love to dabble in the minutia. Find out about your judge's house rules and tailor your cross-examination around those preferences. Be prepared for every contingency and be ready to adapt to it. In fact, be ready for the judge to take over your cross-examination entirely. One lawyer was so devastated by the judge's actions that he actually stood up and said, "Judge, I don't

mind you cross-examining my witness, but please try not to lose the case for me!" This sort of statement is probably not recommended with most courts. As a result, it is important to be "flexible" anytime you are dealing with a judge rather than a jury. Judge's are human too, and they may prefer to speed up your case on any given day. Be ready to accommodate the judge in any way possible so long as it does not harm your case.

3. TEMPORARY V. FINAL TRIAL

The issue of cross-examination at the temporary hearing stage is often overlooked. Of course, the tips provided in this article can be used either at the temporary hearing or the final trial. In family law, the temporary hearing often sets the stage for the final outcome of the case. Therefore, it is imperative that the lawyer be immensely prepared during this phase of the case. The temporary hearing should be prepared as though it is a final trial, designed to place the parties in a certain position for all time. If the lawyer approaches the temporary hearing in this fashion, the chance of success increases dramatically. The wonderful thing about a temporary hearing is the concept of "trial by ambush". At this level, the lawyer can usually call whomever he wants without warning the other side. As a result, it is important to begin the discovery process with an extensive interview of your client. Give the client homework, wherein they will relay all of the positives and negatives about themselves, their spouse and the case. This should include a required listing of all favorable and adverse witnesses who might be called to testify in the case. For each adverse witness provided, immediately begin to prepare a "facts" file for future cross-examination. Inquire about the witness' relationship to each party and any skeletons in their closet. A more extensive interview sheet should be included for each of the parties.

Be prepared for the other side to call expert witnesses at the temporary hearing, especially if you are dealing with a custody matter. On cross, determine whether the witness was recently hired for purposes of the litigation. If the opposing party does not have an established relationship with the expert, his opinions can be attacked.

Finally, be prepared to deal with the master's schedule in an appropriate manner. If possible, obtain a special setting so that you

are not surprised by the short amount of time the master has allotted for her docket. If there is no time to obtain a special setting, be sure to get right to the point on cross-examination. Masters generally have a very heavy docket and are unable to hear any contested matter that lasts over thirty minutes absent a special setting. The most important factor in preparing for cross-examination at the temporary hearing stage is to be flexible. On final, you should know the time constraints and plan accordingly.

C. Techniques of Cross-Examination

The main thrust of cross-examination will normally be to bring out all details that tend to show that the facts stated on direct examination are not probable or credible. If a witness is completely honest, he will have to answer some questions in a way that appears unfavorable to his side of the case. Most witnesses, however, will try to answer all questions favorably to themselves, and will therefore be inconsistent in some ways. The cross-examiner should look for the weak points in the witness' version of the story and focus the cross-examination on those areas.

1. PROBABILITIES

As stated above, the witness should be asked and committed to a multitude of small details surrounding an event or crucial point. By doing so, the cross-examiner can build up an arsenal of small details pointing to the probability of the conclusions desired. These should seem inconsequential enough that the witness would look horribly biased if the question was not answered favorably. The lawyer should be prepared to tie together all of these probabilities into a logical conclusion during closing argument.

2. POSSIBILITIES

An unfavorable witness, particularly an expert witness, should be cross-examined about the possibilities favoring the cross-examiner's side, even though he or she may have testified that the probabilities are otherwise. Particularly to a jury, the "possibility" that something may or may not be true can carry more weight than it really should. Discredit an expert's testimony by forcing him to admit to a multitude

of possibilities that could disprove a theory or change a final outcome. This should dilute the overall impact of the expert's conclusions which seemed air tight on direct examination.

3. THE "FLANK" ATTACK

If there is nothing with which to impeach the witness, the cross-examiner should not take the witness over the subject of the direct examination. Instead, the cross-examination should attack only the weak points of the witness' story and ask for details in areas where the witness may not be prepared. Each time there is an inconsistency, the witness should be confronted with that fact until the jury finally senses that he or she is inventing answers. The jury will begin to see the contradictions and discount the witness' story.

4. THE "PLANK" ATTACK

Before the cross-examiner impeaches a witness with a prior inconsistent statement, he or she must set up the witness for impeachment by pinning the witness down on all the surrounding details and make the witness give a full account of the present version of the facts. Then, the witness can be impeached with the statement giving the previous version or story. In other words, the cross-examination should walk the witness down the plank then kick him off.

5. MAGNIFY MISTAKES

The cross-examiner should always keep a finger on the opposing side's weaknesses. If a witness makes a statement that damages him or her, it should be used as the predicate for some questions thereafter. However, the cross-examiner should take care not to overuse the statement. A few questions immediately after the fact is brought out should be sufficient; then the matter should be dropped for a time. However, the cross-examiner should come back to it occasionally and use it as the predicate for one or two questions. If it is overused, the jury may become comfortable with the fact and not hold it against the witness to the extent that they otherwise would. The fact must be emphasized so that the jury remembers it, but left somewhat mysterious and unusual. For example, reference to the

prior damaging statement can be built into a question like, "After you drank those couple of beers, then what did you do?"

6. DOCUMENTS

A cross-examiner may take written material sentence by sentence and line by line and ask the witness about each such sentence. One tactic involves the examiner's going through each sentence separately and fully with all of the questions about that area before going to the next sentence. Often a witness can be set up in this way by giving explanations for certain sentences only to be impeached with the next sentence of the document. If possible, the examiner should not show the witness the document while going through it. Instead, the examiner should simply read it, taking one sentence at a time, asking several questions about it, and then reading the next sentence and repeating this procedure.

7. PAST DETAILS

If the witness says that he or she remembers a small detail that occurred long ago, the examiner can point out how minute it is, how long ago it was, and compare it to the more significant information that has conveniently been forgotten. By doing so, the implication is that the witness cannot really remember in such detail. For example, if a doctor testifies that he or she remembers certain things in an examination of a patient three years ago but has no office notes to refresh recollection, the cross-examiner can ask the doctor how many patients he or she sees per week, per month, per year, and then ask how long it has been since this examination. An inquiry can also be made about when the particular examination took place, what was the time of day, how many other patients were scheduled on that day, etc. It is unlikely that the witness will recall these sorts of details. The examiner should stop at that point and not allow the doctor to explain why he or she remembers the allegedly significant detail. On summation, the lawyer should discount the witness' recall of the harmful detail by the fact that the witness cannot recall basic everyday information surrounding the same issue.

8. NO CROSS-EXAMINATION

When the time for cross-examination comes and counsel has nothing to ask the witness, one of two courses of action are suggested. Counsel should either refrain from any cross-examination or ask a few innocuous questions to give the jury time to forget the direct examination.

V. DIFFERENT STROKES FOR DIFFERENT FOLKS

A. Grunt and Groaners

Grunt and groaners include that laundry list of witnesses that seem to come out of the woodwork on the day of trial, each witness is all dolled up and ready to say the exact same thing as the person that just left the stand. Usually these people are friends and loved ones of the opposing client. Therefore, bias and prejudice are easily attacked on cross-examination. If the opposing side proceeds to march a parade of these grunt and groaners to the stand, consider whether any of them have something new or special to offer. If not, this may be the time for a strategic decision to establish a link to the opposition and move on. If there are a number of these folks, the jury will get the hint that they will say whatever is required by the home team. The jury will appreciate your refusal to engage in this obnoxious exercise.

On the other hand, the opposition may call a grunt and groaner that knows some interesting tidbits about your client. In that case, the witness should be thoroughly investigated and his testimony taken very seriously.

For all the grunt and groaners, maintain a "witness file" in which you keep any key documents authored by or relating to the witness, or any prior sworn statements or testimony. As you prepare the case, make notes anytime you have an idea about potential cross-examination questions for the witness. Be sure and add these to the witness file. Develop ideas for cross-examination prior to taking the witness' deposition. It is important to have some idea how you will cross the witness as you prepare for the deposition. Use the deposition not only to develop facts but to develop the cross-examination you plan to use at trial. However, be prepared to change course, new facts always develop. As you prepare for trial, review the

"witness file" and develop all potential areas for cross-examination, then cut the list in half. Stick to the highlights. Write out your proposed cross-examination, look for areas where the witness can potentially "escape", and close any loopholes you find. If you plan to use direct questions from the depositions make sure your trial questions track the deposition questions exactly. Incorporate all of the exhibits, deposition passages, or other material you will use in the cross-examination in your outline. There is nothing worse than fumbling for something when questioning a witness. If there are key exhibits you plan to use consider an overhead projector and transparency or blowup of the exhibit. The jury is more likely to remember the exhibit if they have seen and read it themselves.

B. Preachers, Teachers and Geezers

Some of the most credible witnesses at trial are the preachers, teachers and geezers. These are some of the folks that automatically appear credible at trial. As a result, these are also some of the most difficult witnesses you will ever face on cross-examination, especially if these folks are armed with damaging information about your client. Juries are especially protective of and aligned with a preacher, teacher or geezer. Therefore, the most important aspect of any cross-examination is a well thought out game plan. The importance of this sort of testimony cannot be overemphasized.

Prior to trial, you should have a discovery response from the opposition which includes the names, address and telephone numbers of each witness. Hopefully, you have asked the "nature of the facts known by each such witness" and gotten that information by any means possible. Armed with this list you should consider interviewing and/or deposing each preacher, teacher or geezer on the opposition's list. Initially, these folks should be handled with the utmost care and respect. In a friendly manner, find out whether the witness even knows they were listed on the opposition's discovery, as they are often unaware of this information. If the witness is surprised by this, determine what, if anything, they know about the facts of the case. Use this time to promote your client's "good points" whenever possible.

If the witness is strongly against your client, start with the bias issues, hit any pertinent facts regarding the particular witness and conclude the questioning. There is no need to abuse a preacher, teacher or geezer that is squarely in the opposition's corner.

Of course, there are cases where an apparently "reputable" witness can lose all credibility with a little investigation. For example, if there is any evidence that the preacher dips into the offering or has had affairs with members of the congregation, a jury would quickly discount the witness' credibility. Likewise, if a teacher uses unaccepted disciplinary practices or teaching methods a jury may not look at her so favorably. Although a preacher, teacher, geezer or other credible witness should be approached in a guarded and respectable fashion, there is always room to chip away at their stature. A little creativity and lots of homework is a must before cross-examining any of these witnesses at trial.

C. Children

The cross-examination of a child witness is a delicate and difficult task which requires skill and ingenuity by the examiner. Invariably, the judge or jury will sympathize with the child during cross-examination; therefore, the importance of a thoughtful cross-examination cannot be over emphasized.

1. TO CROSS OR NOT TO CROSS

Cross-examination is always risky; however, when the witness is a child it is particularly so. As adults, jurors feel protective of the youngster and one wrong question, or one question too many can ruin your case. If the jury thinks that the attorney is taking advantage of the child, they will likely react negatively.

The initial question is whether the child's direct testimony has done any harm to your case. When a child chooses the other party as managing conservator, that child's testimony is damaging and cross-examination may be inevitable. In rare cases, the child's testimony may not do any harm, and counsel may be able to simply smile gracefully after the direct examination and say "no questions". In the vast majority of cases, one must listen to direct, determine his or her

objectives for cross-examination, and then decide how best to achieve them.

2. CONSIDER YOUR OBJECTIVE

First, one must determine what he or she expects to achieve in cross-examination. In general, the following are possibilities:

- (a) To elicit favorable testimony to the cross-examiner's theory of the case.**
- (b) To show that the child witness is lying.**
- (c) To show that the child witness was coached.**
- (d) To show that the child witness' testimony is improbable.**
- (e) To supplement the witness' direct testimony.**
- (f) To impeach with prior and consistent statements.**
- (g) To cast a doubt on credibility.**

The specific goals of cross-examination vary from child to child. Some specific objectives that appear in most cross-examinations of children follows:

- (a) Counsel may commit the child to a specific version of the facts so that the child can be impeached by prior inconsistent statements and contradicted by extrinsic evidence.**
- (b) Inconsistencies may indicate that the testimony is mistaken or deliberately falsified, or the child is confused, uncertain, highly suggestible, or lacking in personal knowledge of the facts.**
- (c) The examiner may hope to show that the child was coached, or the direct testimony was memorized.**

Whatever the objectives, it is important to clearly identify them and plan how to achieve them well in advance of taking the child on cross-examination.

3. DISCOVERY

A successful cross-examination depends on thorough preparation. Preparation for a child witness and an adult witness both require thorough discovery. The Texas Rules of Civil Procedure permit a child's deposition to be taken. This provides the attorney with the opportunity to elicit the child's story, as well as the opportunity to establish a rapport with the child. If a deposition is not feasible, you may consider meeting the child in appropriate circumstances. In any event, you do not want to be the attorney who is perceived as "coaching" the child.

Texas Rule of Civil Procedure 167(a) authorizes a physical or psychiatric examination of a child whose physical or mental condition is at issue. TEX. R. CIV. P. 167(a). If the child is receiving psychotherapy, the therapist's notes may be valuable. Access to interviewers' notes and audio or video tapes could disclose prior inconsistent statements, possible coaching, defects in capacity, or other valuable information. Education records may also be useful in detecting disciplinary problems at school, the child's dishonesty, emotional problems, and family conflicts which are causing behavior problems at school. The education records may also indicate that the child requires special programs for psychological problems which may be particularly important in determining conservatorship.

4. SUGGESTIBILITY

Much has been written about how children of tender years will sometimes lie to please or protect people, but generally will not lie about sexual abuse. By the time a child reaches the age of 12, he or she is capable of abstract reasoning and understands the reasons for and against bending the truth in court. The differences between children and adults begins to diminish at adolescence and some 12 year olds may be as cognitively mature as the average adult witness. Do not rely on cross-examination to convince the jury that a child witness is lying. This could only serve to anger and/or alienate the

jury. Instead be ready to have a professional expert testify about the credibility problems with a child's testimony and the psychological dynamics that might effect a child's ability or inability to tell the truth under varying circumstances.

In some cases, the cross-examiner's pretrial investigation may reveal highly suggestive interviews of the child which may have distorted or even obliterated the truth. In these cases the cross-examiner should elicit information from the child about the number of interviews and what occurred each time. The cross-examiner may follow up with calling those adults as witnesses and eliciting evidence of the improper use of suggestive questioning.

5. PUT THE WITNESS AT EASE

A witness has the most credibility immediately after direct examination. Therefore, the first questions after establishing rapport should be those which elicit favorable facts for your theory of the case. In some cases, cross-examination ends at this point. Negative cross-examination may not be necessary when the additional favorable facts flush out the whole story. This situation allows the cross-examiner to avoid the risk of a negative reaction to a more typical cross-examination.

No single correct technique exists to establishing rapport with a witness. In general, the attorney should treat the young adult respectfully and try to make her feel comfortable in the questioning. Some attorneys begin their cross-examination with a smile and a string of innocuous questions designed to put the child at ease. Other times it is appropriate to empathize with a child by saying, "I know that you have been through a lot and this is not easy for you. I will be asking you some questions and then when we are finished you can go home." By setting out the plan, the child may be put at ease and be more receptive to your questioning. Begin with the good facts and demonstrate approval and pleasure with the answers, reinforcing the child's likelihood of agreeing with future questions. Once the child feels comfortable, counsel may then move to questions which are designed to elicit favorable information. It is important that the

attorney continue to speak in the same friendly, upbeat tone of voice, and provide the same nods of approval following favorable answers. When this technique works, the child may agree to a version of the facts that is favorable to the cross-examiner or that is inconsistent with the direct testimony.

This technique of cross-examination may also be used to elicit information about coaching. The attorney may present a series of questions to the child asking about the persons with which he or she has discussed the case. Be sure to elicit testimony that the opposing counsel "helped" them get ready for their day in court.

This technique can also be employed to get a child to agree that another version of the facts is possible. For example, after establishing a positive rapport and asking a series of appropriate questions, counsel can begin asking questions such as: "Maybe that is how you thought it happened, but it could of happened a little different, couldn't it?"

An important aspect of suggestibility concerns the possibility that the child witness was subjected to improper suggestion prior to trial. When counsel learns that improper suggestion has occurred, it becomes possible to attack the opposition without attacking a child. After all, it is not the child's fault that adults misused their authority to alter the child's recollection of events. When counsel can establish that an adult improperly implanted ideas in a child's mind, the jury is unlikely to be sympathetic with the adult and counsel has more freedom for vigorous cross-examination. By attacking the interviewer, the cross-examiner convinces the jury that the child and the examiner's client had been treated unfairly.

6. INCONSISTENT PRIOR BEHAVIOR

When a child testifies to conduct which is inconsistent with his or her behavior, the cross-examiner can focus on that inconsistency. Adults generally try to explain away such inconsistencies, whereas children are often more forthright. The cross-examiner may then be able to

have the child acknowledge that Dad was a scout leader even though on direct he said he was never around.

7. COACHED TESTIMONY

Preparation of a child witness is necessary and entirely proper as previously discussed. The proponent of the child witness may, however, overstep the boundary from preparation to coaching and it is the duty of the cross-examiner to respond.

The phenomenon of coaching is prevalent in sexual abuse allegations although it occurs in other contexts as well. While law enforcement officials attempt to guard against improper influence; the desire to win, which drives the adversary system, sometimes tempts conscientious individuals to cross the line. Cross-examiners can raise the possibility of coaching by asking a child to describe each interview that has taken place. This will educate the judge or jury that more than one adult has "helped" the child to prepare his or her testimony.

Coaching is sometimes uncovered by asking the child to describe the details of what happened. The cross-examiner should watch the child to see if he or she looks to an adult for encouragement or answers. The cross-examiner should point out to the court or jury if an adult is assisting with gestures or head nods. Even if the adult is not actually gesturing to the child, counsel may ask "do you need Mr. Smith's help to answer my question, you seem to be looking at him a lot."

8. MEMORIZED TESTIMONY

The cross-examiner may sometimes get the impression that a child's direct testimony is memorized rather than spontaneous. The following is a popular cross-examination technique for dealing with memorized testimony:

While not a common phenomenon, sometimes a witness on direct examination will give clues that his testimony, at least in critical parts, is memorized, or is so similar in certain respects to another witness' testimony that it suggests they got together and planned identical stories. The clues may be words or phrases that are not natural for the

witness. They may be that the witness has testified to details that normally would not be remembered, or has omitted facts that would ordinarily be recalled. A clue may be in the deliberateness of the testimony or some other unusual discovery. Whatever the clue, the approach is the same. These witnesses can be asked to violate one of the cardinal rules of cross-examination: never repeat the direct examination. Witnesses who have memorized parts of their testimony, particularly children who have been coached, will usually repeat the testimony essentially verbatim, using the same words, phrases, and details as before. These witnesses will often claim to remember facts that they normally would not remember. They will sometimes use a vocabulary that is not natural for them. The jury will usually pick up on the striking similarity between the two narrations, or the peculiar recall of the witnesses, or an odd word choice. Once this has been demonstrated, you should inquire whom the witness talked to before testifying, to uncover the origins of the memorization.

T. Mauet, Fundamentals of Trial Techniques Section 6.8, at 285-86 (1980).

Establishing that all or portions of the child's testimony have been memorized raises the possibility that the child has no present recollection of the facts or that the child was improperly coached.

9. TRICKERY

Many child witnesses are cautioned to beware of the cross-examiner as he or she may try to "trick" them with deceptive questions. Under these circumstances the child will answer questions opposite of what the child thinks the attorney wants to hear. The cross-examiner can take advantage of the situation by asking questions which are designed to make the child think the attorney wants a particular answer when in fact the attorney wants precisely the opposite answer.

10. INCONSISTENCIES

Eliciting inconsistent statements can be accomplished by getting the child to agree to leading questions that inject subtle alteration to the details of the story. The odds for success are increased when counsel alters the sequence of events. A child who has been coached may not

be able to remember the correct answers when the questions are asked out of order. Keeping more than one line of questioning going at the same time will keep the child off balance, increasing the likelihood of inconsistent statements.

D. Foreign Witnesses

Professor Deborah Tannen of Georgetown University in her various books (e.g., *You Don't Understand*) contends that you cannot automatically determine a person's state of mind, intent, candor or emotional condition merely from what they say or how they say it. This is especially true when dealing with a foreign witness. In such cases the lawyer must take into account that person's cultural background, class, gender, race or region of origin.

When preparing for cross-examination, the lawyers's questions usually contain subtleties which are designed to elicit a given response. However, subtleties can register a totally unexpected response from a witness, even if he normally has a good command of the English language. One humorous example of this mistake was President Carter's visit to Warsaw where he stated, "I like the Polish people." To those of Polish descent, this statement actually meant, "I sexually desire the Polish people." That "subtlety" was not taken well by the Polish listeners, except by those who may have been turned on by Jimmie.

The form of construction of English sentences often does not conform with the sequencing of words and phrases in a foreign language. This can lead to an interpretation by the foreign-speaking witness contrary to the intent of the question, thus producing an erroneous answer by the witness. In German and Korean, for example, the verb tends to be at the end of a sentence.

Some English phraseology can in other respects be unintentionally offensive and provocative (especially amongst Japanese, Chinese, Koreans and Vietnamese) because a phrase may only be appropriate for speaking to persons of a lower station in life, or puzzling because it is appropriate only for old persons or high ranking government or business officials or royalty. For example, the exact same sentence in Japanese can be constructed in at least twelve different

combinations, depending on the dyad of the social status and ages of the person speaking and the being spoken to.

A foreign person's hand gestures, facial features, and body language can have different, even dramatically opposite, significance than they have in our culture. This can distort the true demeanor and credibility of the witness in an American court room. Therefore, it is important to investigate these aspects about the witness prior to calling him as an adverse witness at trial. Knowing in advance that the witness will not make eye contact, appears to have a bad temper, or instantly uses offensive hand gestures can be capitalized on at trial.

Similarly, the physical expressions of a cross-examiner can convey the wrong signal to a foreign witness, and even be highly provocative. One example is our common gesture of pointing the second finger to either make a point or identify an object. This can infuriate someone from Italian society, particularly from southern Italy. Another example is the strong negative reaction of a Middle Eastern Arab if another person exposes the soles of his shoes. There are several books on the market detailing the various contrary meanings of gestures and body language in different cultures. If this is an important witness for you, do the homework on the particular customs involved.

In different cultures, the physical space between two persons conversing with each other can diverge greatly. For example, Middle-Eastern Arab males talk practically nose-to-nose and are offended if the space between them widens. Americans feel uncomfortable if the space is less than 1 1/2 feet. Thus, how the space between the cross-examiner and the witness is utilized can elicit different attitudes, and thereby, the context of the response.

Recognizing these cultural differences, the lawyer should capitalize on them for purposes of cross-examination. In preparation of your cross-examination of a foreign witness, review books which explain a foreign person's use of language, gestures and body movement.

If the testimony is critical to the case, speak to a sophisticated, knowledgeable "expert" from that culture, who is also highly fluent in English, to discuss your concerns and how best to deal with them at trial. If possible, have the "expert" with you in the courtroom for

advice during the examination of the witness. If necessary, explain to the court that the expert's presence is imperative for later testimony concerning the witness' demeanor, gesture, and the like.

Additionally, it may be helpful to speak to a foreign-raised person on a casual, informal basis, before a deposition or a trial, to determine how that person speaks and moves when not being formally questioned. Finally, videotape the deposition of a critical foreign witness so that her mannerisms and gestures can be carefully studied in a formal setting by you and the expert prior to trial.

E. Experts

In theory, expert testimony is admissible because experts possess knowledge, training, and experience which allows them to form opinions on matters that jurors are not equipped to form. Expert opinions aid jurors in understanding topics and deciding issues which are beyond their common experience or knowledge. Expert testimony can allow a jury to reach its own conclusions by enabling it to comprehend specialized factual matters. Expert testimony can also be used to present facts and conclusions in the form of the expert's opinion, leaving the jury to either accept or reject the expert's conclusion. Experts serve two basic functions at trial: (1) to present factual subject matter not ordinarily understood in a manner that will enable the judge or jury to decide issues in the case; and (2) to present opinions, rationale, arguments, theories, and reasons based on expert skill or knowledge that the jury is free to accept or reject, and thereby decide the issues in the case.

1. APPLICABLE RULES

a. Rule 702: Testimony by Experts. Article VII of the Texas Rules of Civil Evidence is dedicated solely to the rules applicable to expert testimony. Rule 702 states that, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." TEX. R. CIV. EVID. 702.

Based on this rule, the expert must be qualified to testify as a person who has specialized knowledge on the subject matter of the testimony. *Housing Authority of City of Galveston v. Henderson*, 267 S.W.2d 843, 845 (Tex. Civ. App. - Galveston 1954, no writ). The court exercises discretion in permitting evidence from an expert, and should do so only after being satisfied that the witness has specific qualifications not possessed by the jury which can aid them in determining the issue at hand. *Trick v. Trick*, 587 S.W.2d 771, 773 (Tex. Civ. App. - El Paso 1979, writ dismissed). Therefore, be cognizant of the fact that opposing counsel's expert may have a ten page vitae outlining an area of expertise that has nothing to do with the issue before the court. Use this to keep the expert off the stand altogether or to discredit his opinions and conclusions.

b. Rule 703: Bases of Opinion Testimony. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Tex. R. Civ. Evid. 703.

First-hand knowledge of the subject matter in issue will qualify any person to give testimony on that topic. In particular cases involving value of realty or personal property, personal knowledge of market values of similar property in the locality is a requirement. *Mobile Housing, Inc. v. Tague*, 488 S.W.2d 582, 584 (Tex. Civ. App. - Dallas 1972, no writ); *Arkansas Louisiana Gas Co. v. Allison*, 620 S.W.2d 207, 210 (Tex. Civ. App. - Tyler), modified on other grounds, 624 S.W.2d 566 (Tex. 1981).

Before the adoption of Rule 703, the rule in Texas was that an expert could rely on hearsay only when the testimony was also predicated on personal knowledge. See, e.g., *Parr v. Tagco Industries*, 620 S.W.2d 200, 206 (Tex. Civ. App. - Amarillo 1981, no writ) (expert testified to cost of repairs to determine damages in DTPA case). In *Parr*, the expert testified that he used the services of an estimator to verify and confirm his personal opinion on the cost of needed repairs, and the court applied the long established rule that an expert's testimony predicated upon personal knowledge and hearsay was admissible evidence. Since the adoption of Rule 703, an expert may

base his opinion testimony on hearsay evidence alone, if it is reasonably relied upon by experts in the field of expertise. *Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc.*, 740 S.W.2d 873, 876 (Tex. App. - Beaumont 1987, no writ). The test for admissibility now centers on the reasonable reliability of the hearsay evidence and whether experts in the field rely upon it. The trial court makes the initial determination of admissibility.

c. Rule 704: Opinion on Ultimate Issue. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." TEX. R. CIV. EVID. 704.

The general rule is that no witness may give opinion testimony on a question of domestic law or on matters that involve questions of law. The key is to stay away from legal definitions, since evidence of mental capacity based on observations or other admissible evidence is acceptable and need not include opinions based on legal definitions or conclusions. Additionally, Rule 704 has been interpreted by the Texas Supreme Court to allow expert testimony on mixed questions of law and fact as long as it is relevant and based on proper legal concepts.

d. Rule 705: Disclosure of Facts or Data Underlying Expert Testimony. "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data." TEX. R. CIV. EVID. 705.

The clear intent of Rule 705 is to eliminate the hypothetical question which has always been criticized as time-consuming, cumbersome, and awkward. Yet, what the rule may actually accomplish is the refinement of the use of the hypothetical as an effective tool in presenting expert opinions.

2. EFFECTIVE CROSS-EXAMINATION OF EXPERT WITNESS

As noted by leading civil trial litigant Frank Branson, "The primary purpose of cross-examination is to lead the opposing expert to the

truth, since he obviously missed it on direct!" A second objective is to discredit the expert's opinions by showing he is biased, prejudiced, unqualified, or inadequately prepared. The two approaches are not necessarily harmonious, so select the one that is best suited to the particular case and the specific expert.

There is no right way or wrong way to prepare to cross-examine an expert witness. But remember that the expert is armed with a vast amount of knowledge on the subject matter of his testimony, so do your homework thoroughly. There are some suggested steps that will be part of any successful preparation.

A. Do Your Homework.

The expert's credentials should be closely examined well in advance of trial. You can engage sophisticated computer networks or you can make phone calls. Get copies of every article the expert has ever written and study each one carefully. Compare the expert's articles to others in the field, noting each and every difference. The same applies to every transcription of the expert's testimony in every trial. If the expert is a "hired gun", it is likely that he has expressed an opinion on the same issue in the past. If the expert has reached a different conclusion on the same issue, this is a lawyer's dream. Use this to the maximum extent possible on cross-examination to show that the expert's opinion is not worth more than his hourly rate. You may find that the expert always testifies for the same side. This can be a jewel as well. If the expert only recommends dads for custody, capitalize on this. It will severely damage such a recommendation. At a minimum, ask other lawyers about the expert, especially if they have cross-examined him. Get insight into the expert's knowledge, but also delve into his court-room demeanor and personality. The expert may be a "brainchild" on paper and a bumbling idiot before a judge or jury. Of course, the opposite could be true. Therefore, the examiner must be prepared to focus on the expert's weak points, whatever they may be, prior to facing this important witness at trial.

If you are going to challenge the witnesses' qualifications in his field do it outside the presence of the jury. Do not ask the Judge to rule in the presence of the jury unless you are positive that he is going to tell the jury that this person is not qualified as an expert. If the Judge

overrules you then the jury may have the false impression that this person is a solid, credible expert.

You may find that your expert is generally qualified in the area but not specifically qualified in the exact area involved in your case. If this is the case (again, outside the presence of the jury) direct your objection to his lack of qualifications in this specific instance and not his general qualifications.

B. Enlist Your Expert's Assistance.

It is almost always necessary to have a session with your own expert which is exclusively devoted to preparation for cross-examination of the adverse expert. Prepare a notebook for your expert which contains everything you have found about the adversary and have her study the information well in advance of trial. Once your expert has reviewed the adverse expert's deposition testimony, reports, transcripts, and publications, plan a "jam" session wherein the expert will teach you about the subject matter, as well as educate you about any flaws or weaknesses in the expert's theories. It may also be helpful to enlist the assistance of your expert in conducting his own investigation. Just like in the legal arena, accountants, appraisers, and psychologists have their own "gossip" pool. Tap into this source whenever possible. You never know what sorts of gems you will discover about the opposition.

C. Be Concise.

A well prepared cross-examination should be brief, concise, and narrow in scope. Preparation eliminates shotgunning, and shotgunning is what turns your cross into a rehash of the direct. Trim your cross-examination to a short list of necessary areas that must be covered. Depending on the subject matter, this can take five minutes or five hours. But remember to adhere to the rule of quality over quantity.

D. Use Leading Questions.

When possible use leading questions with the expert witness to keep him on the subject of interrogation. Only ask open-ended questions when you do not care what the expert says and when you are certain that nothing he says will hurt you.

E. Maintain a Poker Face.

Don't bleed on the floor when the expert witness cuts you. When he scores, move on without showing it.

F. Know Thyself.

Know when to take risks and explore uncharted ground, and when not to. Know the difference between a calculated risk and shotgunning.

G. Listen.

If you are not listening to the answers, you will never know when to be bold and daring. If you have a hard time really listening to the answers, then the expert is dictating the pace of your cross.

H. Be Kind, Gentle, and Polite.

Jurors are conditioned by television, books, movies, and cocktail conversation to sympathize with the witness on cross. They are more sympathetic when the witness is a non-litigant. Therefore, treat the expert as politely as possible unless the nature of the case and the witness calls for different tactics. This is especially true in the discovery phase. It will do absolutely no good to practice your hard hitting cross-examination during depositions. Treating the expert with respect and courtesy is the way to get the most valuable information.

I. To Break or Not to Break.

If given a choice, go right into cross-examination at the end of direct. Remember that opposing counsel ended strong on direct, or tried. It's important for you to start and end very strong. If you need a break to get your act together and you ask for one, you have lost the chance to start strong, and you have given the jury additional time to mull over the opposing counsel's strong points as they drink coffee. If you need a break for a really good reason, or if you sense that the jury needs a break for the same good reason, graciously ask the court its preference. The Court will likely need one, and you will get your recess.

J. You Can Lead 'Em to Water but You Can't Make 'Em Drink.

If you have ascertained (either in pre-trial preparation or in listening to the witness on direct examination) that it is not possible to undermine the qualifications of the expert successfully, then you should not attack the witness unnecessarily. To better explain, "Never try to teach a pig to sing - it wastes your time and it annoys the pig". Likewise, consider very carefully whether or not you really want to cross-examine this expert witness. Typically the more qualified the expert, the less you will gain by cross-examination. Do not do it unless you really think you can accomplish something.

3. MENTAL HEALTH PROFESSIONALS

The general rules and strategies previously discussed should be utilized with all experts, including the mental health professional. Additionally, keep in mind that the mental health professional has a two-fold task unlike most pure experts. He must deal with the case on an objective and subjective level. In that regard, the mental health expert is not faced merely with raw data in order to form his opinion. Of course, if that is all the expert has done in the case, he is dead in the water. Most experts will engage in a thorough investigation of the parties, children, extended families, teachers and psychologists. Therefore, this should be your first area of investigation for cross-examination purposes. This line of questioning should inquire into failure to see crucial parties, failure to communicate with other witnesses, failure to review other available evidence or to follow up on other avenues of information. Most will admit that more information is

always helpful in arriving at accurate findings, but few will admit that their opinion will change.

a. Know the Lingo. No attorney should attempt to examine or cross-examine a mental health professional without knowing the expert's lingo. An excellent source of information is the DSM-IV. The Diagnostic and Statistical Manual provides information on the most recent classification of mental disorders. If the opposing party alleges any sort of mental disorder, or your client thinks one exists, research the manual thoroughly on that particular topic. The DSM-IV provides a list of criteria that make up any recognized disorder. It will also include a listing of symptoms which could warrant a finding that a particular disorder exists. The examiner can put this list into a question format during the discovery phase to get the witness committed to each identifying criteria. Your own expert can then review the deposition and advise about possible cross-examination questions concerning any potential diagnosis, or lack thereof, that may be favorable to your position. The DSM-IV is also helpful to educate the attorney about possible disorders that might exist in any fact scenario. Being able to talk intelligently with the mental health professional on cross-examination will boost your own credibility and break the expert's confidence in making sweeping or generalized opinions that could hurt your case.

If your client has been diagnosed by the opposing expert as having a mental disorder, use of the criteria set out in DSM-IV is mandatory to effectively test the reliability of the diagnosis. If the diagnosing expert has not done a complete DSM-IV diagnosis, the attorney can chip away at the credibility of the expert. Questions as to each and every criteria which forms the basis of the diagnosis should be closely examined. The examiner should also cross-examine the opposing expert regarding criteria which may exist regarding the opposing party as to the possibility of his or her suffering from a mental disorder.

b. Questioning Psychological Tests and Testing. Ensure that you are fully aware of the scope of the expert's testimony. Determine whether the scope of his testimony was dictated by the judge or opposing counsel. If the expert is court-appointed, ensure that everyone is aware of the extent of his or her involvement. As the trial progresses,

follow up on whether the expert is doing his job. If the expert is appointed solely to test the parties then report the results, a thorough knowledge of the test itself, as well as its validity and reliability, is imperative. The following is a general overview of psychological tests and their purpose. If any of these tests are used in your case, an in depth study of the particular test should be thoroughly reviewed.

(1) Norms Should be Standardized. Standardized tests compare the test-taker's answers with those of other persons. The expert should be questioned about the population from which the norms were established. Inquiry about the mean and standard deviation of test results should be included.

(2) Widely Used in Profession. The second requirement is acceptability in the profession. The attorney must rely on the advice of his expert to establish this fact.

(3) Test Should Be Validated for the Purpose Used. Even though particular psychological tests may be standardized, if they do not tell about the population used to set the norm, they cannot be properly applied. For example, if the test is not normal for an adolescent population, they cannot be applied to adolescents.

(4) Cognitive, Objective and Projective Tests

(a) Cognitive Tests. Measure language and levels of academic achievement.

1) Weschsler Intelligence Test (WIT). This test is designed to measure knowledge, reasoning, judgment, vocabulary, visual alertness, perception and eye-hand coordination, and a full scale I.Q. It is designed for different age groups. There are often discrepancies between the subtest scores. The attorney should be aware as to whether the discrepancies have been validated for the conclusions being drawn by the expert.

2) Wide Range Achievement Test (WRAT). This test measures one's level of academic achievement. This test is commonly used to determine whether gaps exist between a person's ability and his/her achievement level.

(b) Objective Tests

1) Generally. These types of test results require little or no interpretation by the examiner. Interpretation is usually done automatically.

2) Minnesota Multiphasic Personality Inventory (MMPI). This is by far the most commonly encountered test in child custody cases. The results suggest personality traits and certain types of mental disorders. The patient/client answers 500 plus questions. In its simplest form, if the person tested answers certain questions the way a paranoid patient did (based on the standardized results from other mental patients), the person is considered to be paranoid. Total reliance on the MMPI for formulation of the expert's opinion is fertile ground for cross-examination.

(c) Projective Tests. These types are relatively unstructured and the results require the subjective judgment of the mental health expert. Projective tests, because of their subjective interpretation, are topics for intense cross-examination. If projective tests are the only tests administered, the opposing expert should be exposed to the jury as not having sufficient data upon which to base his conclusions.

1) Rorschach Test (Ink Blot). Consists of 10 ink blots and the person tested responds by telling the examiner what the blot represents to them. Can be administered to children and adults.

2) Thematic Apperception Test (TAT). This test is typically used in conjunction with the Rorschach. If the Rorschach reveals innerconflict within the individual, the TAT is used to uncover the source of the innerconflict. The person tested is shown ambiguous images and asked to respond as to what they represent.

3) Children's Apperception Test (CAT). This test should only be administered to children ages 3-10. It is similar to the TAT, except the child is shown pictures of animals. Instead of responses to specific questions, the child is encouraged to discuss his\her meaning in relation to the child's family.

Note: The TAT/CAT may be less reliable when given to creative persons or children. Unusual responses may be a function of their creativity rather than personality traits or emotional disturbances.

4) Bender-Gestalt Test. This test consists of 9 black geometric designs printed on cards. It is primarily used to measure the person's ability to concentrate. It is also very useful in determining whether or not the subject suffers from organic brain syndrome.

5) Sentence Completion Test. This test is given orally to very young children and in written form to children 12 years or older. The examiner leads with a phrase and the person tested is asked to complete the sentence.

6) Projective Drawing Test. The person tested is asked to draw a tree, a house, a family, etc. The content and proportions are then interpreted by the expert.

7) Play Test - Therapy. This procedure is usually done with very small children. Observations are made by the expert as to various aspects of the child's behavior and interaction. For example, the particular toys chosen by the child are used to measure aggression, concentration, etc.

8) Administering and Interpreting Psychological Tests. Even if the tests relied on by the expert are accepted, standardized and validated, the cross-examiner needs to be sure that the normal detailed instructions for administering the tests were followed. If not administered and interpreted according to the "book", the test itself and the opinion based on those test results should not be afforded the same weight as one properly conducted and scored.

c. Turn Their Expert Into Yours. In some instances, it is not advisable to dispute the credibility of the opposing expert. Based on his prior testimony, book or treatise, the expert may be forced to make certain admissions. The cross-examiner should attempt to elicit that he:

-Admits that a series of examinations were better than one examination;

- Changes or revises his opinion on subsequent examination;**
- Certain tests resulted in negative findings for opposing party;**
- Admits your expert's theory represents legitimate scientific knowledge;**
- Could have been mistaken;**
- Can never be wrong.**

D. The Cross-Examination

As in all litigation, the best cross-examination is one involving the maximum of preparation. This can be done with confidence if the examiner has advance knowledge of the appraisal report, qualifications of the expert, methodology used, data and mental impressions of the expert. Thoroughly delve into the methodology used by the expert. Why was one valuing process used rather than another? Why were certain comparisons accepted and others rejected? Was the property viewed and were the comparisons inspected?

The amount of effort put into an appraisal will reflect directly upon its effectiveness. The more the expert can do to confirm his opinions (i.e., inspect the property and the comparisons; view the area, obtain relevant sales and listing information, etc.), the more his opinions will appear to be valid and based upon an intelligent inquiry. As with any other witness, preparation and thorough investigations are the keys to a successful cross-examination.

VI. CONCLUSION

Some have analogized the trial process to the blank canvas used by an artist. In this regard, the law is analogous to the size of a canvas; it merely sets the outer limits of what we can and cannot accomplish. Within those boundaries we are free to try each case with dignity,

humanity, style and creativity. Hopefully, your cross-examination practice can become both a work of art and a weapon for the adversary to fear at your next battle.

Common Custody Traps For Parents

When a legal action is initiated which involves a child, and if a parent is not residing in the same home as the child, he or she will presumptively be considered as the non-custodial parent. The only way to avoid this trap is to not leave the home, or allow your child to be taken out of it.

At the filing of a legal action involving a child, if a temporary injunction is issued to maintain the status quo (keep the child under the care of one parent), the excluded parent will presumptively be considered as non-custodial. Any pre-trial orders which impede your ability to parent your child can be immediately appealed. If you wait for trial, you will waive your right to later raise these issues.

Pre-trial if a parent consents to pay child support, the judge and both attorneys will take this as a signal that he or she agrees to be the non-custodial parent. Any consent order a parent agrees to (even if it comes after a contested hearing) cannot be appealed. You do not have to "consent" to anything, even if your attorney says otherwise. Remember, attorneys are officers of the court, and quite possibly friends with the judge and opposing attorney. They are required to zealously represent you, and to uphold the constitution. Expect neither.

Normally an investigation of the parents will be done. This can be anything from a college volunteer working for CASA, an attorney called a Guardian Ad Litem, a private investigator, up to a pediatric psychologist. The job of all these folks is to invade the privacy of your relationship with your child, and transfer as much wealth as possible to themselves. Also you will either be encouraged or mandated to attend counseling, to achieve the same goals. Using the above constitutional citations you can object to any invasion of your privacy and your child's. If you fail to object, you waive your rights.

At trial your attorney can have a pre-trial brief prepared which carefully identifies the applicable laws and how your case applies to those laws (including of course constitutional law). Very few attorneys will do this. Most will present your case with no reference to any laws whatsoever, and simply allow the judge to rule as he or she wishes.

Also at trial both parents are considered to be voluntarily submitting the question of child custody to the court. Your attorney can assert that you do not want custody of your child decided by the state. If you don't do this, it will be considered waived for appeal purposes, as will any applicable state and constitutional laws not raised by your attorney in his or her oral arguments.

If you ask that the law be followed in your case, expect intimidation tactics such as your attorney threatening to resign, or being told visitation with your child will be reduced. If any of this happens, request a brochure or other method whereby you can file a complaint with your state board of responsibility.

If you receive an unfavorable decision at trial, your attorney can file a motion to reconsider, or a notice of appeal. If you are appealing there are strict time limits on this, which if not followed will cause your case to be thrown out. If you consent to anything at trial, it will not be appealable.

Appeals are usually taken to a state appellate court, then if needed an application is filed to your state supreme court (they may be called another name).

The state supreme court has discretion whether to take your case or not, and they probably won't take it. If your state supreme court does not give you a favorable ruling, you can appeal properly preserved constitutional questions to the United State Supreme Court, which virtually never takes a family law case. Wherever your case finally stops, it will be considered final.

Tips for Parents Seeking Custody

Generally speaking, there are some concrete things you can do when seeking custody of your kids that will better your chances. Note that doing these things has to become a "way of life" and must be sincere. By that, I mean you cannot merely approach them as a huge strategy that you execute only in an effort to get custody and forget about later on.

1. Educate yourself about the custody factors and process within your state. Nearly every state has a list of criteria in the state law that is used to determine custody. Find that list and research each item point by point. Factors might include:

A.) The child's adjustment to his or her home, school, and community.

B.) The love and affection and other emotional ties existing between the child and each parent.

2. Take the criteria you've identified above and see where you now stand and how you can impact it. This means looking at each point and honestly evaluating your strengths and weaknesses as they relate to that point. Your goal must be to build upon your strengths and eliminate your weaknesses.

3. You must document where you are and where you are going! This is critical and means you must write down notes about each point in the criteria. It wouldn't be uncommon to have several pages of notes about each point when you are done. The notes should include your thoughts on the specific criteria. Let's say it's from point "A" in number one above: "The child's adjustment to his or her home, school, and community. Your notes would elaborate on each of the three points within that item—notes on adjustment to home, notes on adjustment to school, and notes on adjustment to the community.

4. Evaluate your positives and seek factual information to back up your position. Take the strengths you have listed and seek ways to verify those strengths. If a strength for you is your involvement in your child's school, for example, then come up with ways to illustrate that to others. The goal is to be factual and objective. Below are sources of information, some factual and objective, and comments on their usefulness.

a. Concrete Evidence.

This would include items you can touch that show your strengths in a given area. Using the school example above you must think of concrete things that could show your involvement. It might be evidence of being on the school board or a school committee (like meeting minutes). It might be photos of you coaching a school sport. It might be a thank you note from a teacher for helping out with a class party or field trip. The list of concrete items that illustrate your involvement in your child's school could be many things. The example we are using is your involvement in your kids school, but this principle of concrete evidence can be applied to any of the criteria. Concrete Evidence is one of the strongest items you can present to influence the custody decision.

b. Independent Third Party Testimony.

Don't be taken aback by the word "testimony." This is really nothing more than getting other people to describe how you rate on a given criteria from the list. The key is that they are "independent third party" people. These are people who have no real vested interest in the outcome of your custody situation. They can be teachers, doctors, childcare providers, neighbors, school counselors, community groups, coaches, and others. The goal is to get these individuals to provide information they know about you - ideally, in writing and sometimes via verbal court testimony.

Again, using the example of school involvement this might be asking a teacher to write a note about how you have never missed one of your child's conferences, or seeing if the school counselor would give verbal court testimony about your efforts to see that your kids emotional needs were being met. The examples are limited only by your unique situation and should be applied to the entire spectrum of the criteria to determine custody.

The value of Independent Third Party Testimony is very high. These individuals provide great insights into you as a parent and can also be questioned regarding their opinion on the prospects of future successful single parenting on your part. Sometimes the toughest part can be approaching the individual doctor, teacher, counselor, etc and having a discussion requesting them to get involved. Don't skip this step, however, as it's invaluable.

c. Friends and Family.

The best way to use friends and family are for emotional support and to have them help you with ideas on the previous two points. Too often, parents rely only on friends and family to provide their testimony on how you interact with your kids and then have them rate you on the criteria. It just doesn't pack much punch to have this input. Having a brother or parent who testifies you enjoy going into your child's school and reading to the class one day a month doesn't have the impact of having the kindergarten teacher make the same statement. Judges and caseworkers expect family and close friends to say great things about you and that's why the things family and friends say doesn't carry great weight. On the other hand—and this next idea is not as rare as it may sound—if you can get a family member or close friend of your soon-to-be ex to provide testimony to your strengths, then this is a great thing! Think about it—It's very compelling to have verbal testimony or written comments from your soon-to-be ex's parents about how much time you dedicate to coaching your kids sports or helping your child get their homework done. In summary, family is invaluable in the overall process of divorce or a custody dispute—especially from the emotional angle. Just don't give their willingness to testify too much weight.

d. Your input.

This begins with the notes of your strengths and weaknesses completed earlier. With both the strengths and weaknesses you should be able to elaborate on various items listed. You should have thought through (and even written down in many cases) how you would respond to a weakness that you recognize or might be a perceived weakness brought up by the other party. So, in our example, maybe you've never been to your child's classroom. That is likely to be a weakness you recognize or might be brought up by the ex. What will your response be? It's important to have thought this through and to be ready to respond. Not being prepared might make you respond with a "Yes, I haven't been in my child's classroom." Being prepared might allow you to say "Yes, I haven't been in my child's classroom as my employer is pretty strict about time off during the day. I have generally called the teacher, Mrs. Johnson, during my lunch break once a week to touch base with her on my daughter's progress and I usually spend one night a week working on my daughter's school scrapbook as I go through papers she brings home from school." It's your input that insures you have accurately and thoroughly addressed each of the custody criteria in your state law. As you can see from reading this far, addressing each of the state custody criteria points with

just your words and thoughts is not going to be enough! You must focus on concrete evidence, the input of independent third parties, and friends and family.

5. Act upon your weaknesses. Every action item up to this point focused on how to frame your strengths for greatest impact. At least as important as that is how you handle your weaknesses. If you had no weaknesses or areas needing improvement in relation to the criteria, then you likely haven't done an honest assessment of your situation.

Review your weaknesses to see where you can make an impact. Again, it must be a sincere desire to do what's best for your kids that drives you to action. Don't allow spite, revenge, anger, competition, or other unhealthy motives to cause you to attempt to be someone you really don't want to be. By this, I mean you may have weaknesses that you are aware of and have no intent of changing—either because you don't value the particular issue or because the changes that would be necessary run counter to whom you really are as an individual. For example some state law custody criteria can touch on religion. If you haven't been a particularly religious individual you could list this as a weakness for that criteria and work to build it into a strength. If you are adamantly set against religion you might list it as a weakness and also recognize it's not an issue you can act upon—meaning it remains a weakness with your knowledge.

So, how do you act upon weaknesses? Essentially you take the weakness—and for our purposes we'll now say "involvement in your child's school" is a weakness—and you examine steps you can take to make it a strength. Calling and arranging a meeting with your child's teacher, principal, school counselor, or other staff might be a starting point. Find out from them how you can be more involved in your child's education. Writing a thank you note to each one you met with and keeping a copy will begin to provide concrete evidence as was mentioned above.

Responses you get from teachers will add to that concrete evidence. Over time, as you demonstrate you are working to be more involved in the school environment you may find a teacher is willing to provide a letter, or even verbal testimony about your efforts. Now you've taken a known weakness and have turned it into a strength. And something as simple as school involvement can actually go from a weakness to a strength in just a few months if you really apply yourself.

Generally speaking then the goal is to determine action on weaknesses by looking at the desired end result. One end result is to make it a strength, of course. The two other major end results are to generate concrete evidence and independent

third party verification of your efforts. Below is a short example of what this means.

The weakness: You are not very involved in your child's healthcare.

If the other parent has been the only one to bring your young child to the doctor for sickness, you need to take action.

One action: Keep a closer eye on your child's health care. Let's say there is a case of diaper rash or diarrhea/dehydration—pretty common with young kids and often treated with items you can buy at the store. I'd suggest you take the child to the doctor instead.

One result: You have something concrete—doctor's instructions or receipt—of the visit and of your concern for your child's well-being from an independent third party.

Second action: Check to see if your child needs immunizations and be the one to bring him/her for them.

Second result: Immunizations are often overlooked by parents and seeing that your child is current on shots provides that concrete record, the immunization card, that you were involved in meeting this need. It shows you are responsible and plan for your kids needs. And the list of things regarding health care can go on and on from vision screenings to dental cleanings, etc. Think of the items that apply to healthcare and then make a plan to address them with a goal of your child's well-being, concrete evidence, and independent third party testimonies.

6. Communicate!

Doing the previous five steps in a vacuum will not help you. Using solid legal counsel and a good therapist/counselor you need to communicate with them about the self-evaluation you have made and the actions you are working on. Your lawyer needs the information to build your case. Your mental health professional needs the information to gauge your progress on coping with your emotions and helping to hold you accountable when times get tough.

7. Educate/Reach Out.

You've educated yourself about your state's criteria for custody and made a plan. Don't stop there. You'll need to learn about much more than custody alone as you travel the road of an ended relationship. You need to learn about courts, attorneys, state agencies, counseling services, and more. Finding an organization, like Responsible Single Fathers, that holds local educational meetings could likely prove very helpful. You achieve all of this by reaching out within your local community—saying you could use help in this area or that area and asking for help in locating services that can make a difference during this new stage of your life.

How to Negotiate Child Custody Without Going to Court

Custody can be negotiated if both parents sit down and talk rationally about what kind of arrangement will work best for both of them and the child. Everyone's schedule and lifestyle need to be considered to make a plan that will work.

Steps:

- 1. Try to discuss custody with the other parent. Schedule a time when you can talk without any interruptions. Take turns talking, agree not to fight, and try to discuss what will work best for both of you as well as your child. When you talk, remember that you're making plans for the future, not rehashing what has happened in the past.**
- 2. Think about which parent has more time to spend with the child. This should be an important factor in your decision about custody.**
- 3. Talk about which home should be the child's residence. This decision should be made by considering where the child lives now, where the child goes to school, which person is more equipped to parent most of the time, as well as what feels right to both of you. Once you know where the child will live, it will be easy to decide who should have custody.**
- 4. Realize that "custody" and "visitation" are just words. You're both parents, you're both going to continue to be parents, and the label that's used is not important. What is important is making sure your child is happy, healthy and loved by parents who are committed to sharing time in a reasonable way.**
- 5. Be flexible. Neither one of you is going to have your child every hour of every day. None of the options facing you is perfect. Accept this and make a plan that will let your child have adequate time with both parents.**

- 6. Agree to work together as parents even though you may no longer be a couple. Your child needs two parents who function together.**
- 7. Sit down with a big calendar. Write down all the obligations that you, the other parent and your child have. Then determine the best way to divide up the time while accommodating everyone's schedules. Nothing you decide will be etched in stone. Schedule changes will come up, and you'll deal with them when they occur.**
- 8. Avoid bouncing your child back and forth between parents too often. This can be confusing for children. Most kids need stable stretches of time with both parents at reasonable intervals.**
- 9. Consider seeking professional help. You may wish to each see an attorney so that you each have an idea about the law concerning custody in your state. If you're having trouble negotiating in a calm and reasonable manner, work with a mediator who can help you work out a parenting plan. You could also see a couples therapist for assistance in learning to co-parent effectively.**
- 10. Write down anything you agree to. This prevents any future confusion. In order for your agreement to be legally binding, you'll need to see a lawyer or go to court to have it formalized.**

Tips:

Discuss any decisions you have made with your child. The decisions you make heavily impact his or her life. Be sure to explain everything clearly and answer any questions.

One of the most common parenting schedules used is: residence with Parent A, visitation with Parent B alternate weekends and every Wednesday evening; holidays alternated between the parents. Create a schedule that works for your situation.

Warnings:

If you and the other parent are unable to agree, you need to see an attorney. It's possible that the attorneys could negotiate an agreement without going to court. If not, you can have a trial and the judge will make a fair determination based on the evidence.

If the other parent is physically abusive to you or your child, don't attempt to reach any kind of agreement unless you have an attorney acting on your behalf. Get yourselves to a safe place and then worry about custody. Safety must come first.

If either you or your child is severely depressed, see a counselor or therapist.

If the other parent has a drug or alcohol problem, think very carefully about what kind of arrangement will keep your child safe. Consult an attorney about your options.