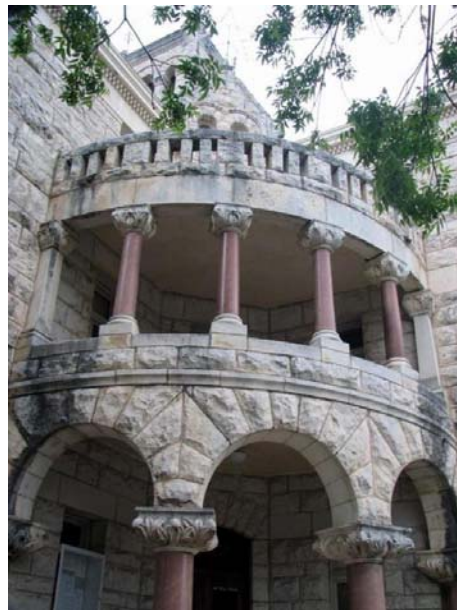


<b>SECTION 7 JURY TRIALS.....</b>	<b>2</b>
<i>JURY TRIALS.....</i>	<i>2</i>
<i>Authority .....</i>	<i>2</i>
<i>Jury Demand.....</i>	<i>2</i>
<i>Jury Shuffle .....</i>	<i>3</i>
<i>Pre-Trial .....</i>	<i>3</i>
<i>Motion in Limine.....</i>	<i>3</i>
What is a motion in limine? .....	3
Why is a motion in limine important? .....	4
When is a motion in limine filed?.....	4
How should a motion in limine be submitted? .....	5
Pre-trial .....	5
<i>Jury Instructions .....</i>	<i>5</i>
<i>Voir Dire .....</i>	<i>5</i>
Who are you looking for in voir dire? .....	6
How can you challenge a potential juror?.....	7
For Cause .....	7
Peremptory Strikes.....	8
<i>Jury Charge .....</i>	<i>8</i>
Drafting A Jury Charge.....	9
<i>After the Verdict.....</i>	<i>10</i>



## SECTION 7 JURY TRIALS

### JURY TRIALS

Both the U.S. and the Texas Constitutions guarantee the right to a jury.<sup>1</sup> With some limitations not generally applicable to suits brought by CPS, a party to a Suit Affecting the Parent-Child Relationship (SAPCR) is entitled to request a jury.<sup>2</sup> While the substantive proof is no different when a jury hears a case, there are specialized procedural requirements, as well as unique courtroom dynamics that require special trial techniques and preparation.

#### Authority

TEX. R. CIV. P. 216-236; 271-289.  
TEX. FAM. CODE §105.002.

#### Jury Demand

To invoke the right to a jury trial, a party must file a written request with the clerk of the court.<sup>3</sup> The request must be made within a reasonable time, no less than 30 days before a trial date is set.<sup>4</sup> A request must be written and be accompanied by payment of jury fees no later than the 10<sup>th</sup> day before trial is set to begin, unless a fee exemption applies (if DFPS is requesting the jury, the agency is entitled to an exemption).<sup>5</sup>

A party may appear through counsel at a jury trial and thereby avoid a waiver of the right to trial by jury.<sup>6</sup> If a party has perfected the right to a jury in accordance with Tex. R. Civ. P. 216 but proceeds to trial without a jury, the party must object on the record or indicate affirmatively that it stands on the right to a jury trial to preserve error.<sup>7</sup>

---

<sup>1</sup> U.S. CONST. Amend. VII; TEX. CONST. Art. I, § 15.

<sup>2</sup> TEX. FAM. CODE §105.002(b) (no jury trial in suit for adoption, to adjudicate issues of consent to adoption, child support, terms or conditions of possession or access or rights or duties of managing conservator, except which joint managing conservator has exclusive right to designate child's primary residence).

<sup>3</sup> TEX. R. CIV. P. 216(a).

<sup>4</sup> *Id.*

<sup>5</sup> TEX. GOV'T. CODE §51.604; TEX. R. CIV. P. 216(b); TEX. HUM. RES. CODE §40.062.

<sup>6</sup> TEX. R. CIV. P. 220; *In re M.N.V.*, 216 S.W.3d 833, 835 (Tex. App.—San Antonio 2006, no pet.).

<sup>7</sup> *In re V.R.W.*, 41 S.W.3d 185, 194 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, no pet.) (overruled on other grounds; *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002); *Stallworth v. Stallworth*, 201 S.W.3d 338 (Tex. App.—Dallas 2000, no pet.); *Trimble v. Texas Dep't of Protective and Regulatory Servs.*, 981 S.W.2d 211, 220 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, no pet.).

## Jury Shuffle

Any party can request a jury shuffle once without explanation as to why it is necessary.<sup>8</sup> The demand must be made by any party or attorney in the case prior to voir dire examination.<sup>9</sup> There shall be only one shuffle by the trial judge in each case.<sup>10</sup>

## Pre-Trial

When a jury is hearing a case, and depending upon the discovery control plan, the trial court may require the attorneys to submit all exhibit and witness lists at the pre-trial conference. All witnesses must correspond to both fact and expert witnesses listed in responses to requests for disclosure and interrogatories. If possible, stipulate to evidentiary exhibits in advance of the pre-trial hearing. Also, ensure that discovery is fully supplemented in a timely manner to avoid the possible exclusion of witnesses or evidence.

### **TIP:**

An expert's curriculum vitae must be provided in a response to a request for disclosure. Remember that if you stipulate to an expert's credentials, you will forfeit the chance to educate the jury about your expert's unique background and value as a witness. It's also a good idea not to offer an expert's resume or curriculum vitae until *after* the witness has testified to his or her credentials. Otherwise, the expert's testimony may be barred because it duplicates the written document already admitted.

## Motion in Limine

### What is a motion in limine?

A motion in limine is a procedural device that permits a party to identify, before trial, certain evidentiary rulings that the trial court may be asked to make.<sup>11</sup> A motion in limine is a written motion made before a jury trial to request a protective order prohibiting discussion of specific questions or statements in front of the jury. The purpose of this procedure is to prevent the jury from being exposed to potentially prejudicial information before a ruling on admissibility can be obtained.<sup>12</sup> A motion in limine is designed to avoid the injection of irrelevant, inadmissible, or prejudicial information into a trial.<sup>13</sup> See, Practice Guide, SECTION 11, TOOLS, Jury, Motion in Limine.

---

<sup>8</sup> TEX. R. CIV. P. 223.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Greenberg Traurig, P.C. v. Moody*, 161 S.W.3d 56 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.).

<sup>12</sup> *Hartford Acc. and Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963).

<sup>13</sup> *Wilkins v. Royal Indem. Co.*, 592 S.W.2d 64 (Tex. App.—Tyler 1979, no writ).

The trial court's ruling on a motion in limine is not a ruling that excludes or admits evidence.<sup>14</sup> It is merely a tentative ruling that prohibits a party from asking certain questions or offering certain evidence in front of the jury without first approaching the bench for a ruling.<sup>15</sup> A limine order may prevent parties from referring to matters during voir dire or the opening statement without first approaching the bench for a ruling.<sup>16</sup>

**TIP:**

To maximize the impact of a motion in limine, request that the prohibitions extend to all parties, witnesses, and counsel, and that opposing counsel is ordered to instruct witnesses and clients accordingly. In drafting the motion, consider whether your own client or witnesses may have difficulty avoiding any prohibitions in the order. If this happens, a court may conclude that CPS opened the door on a specific issue and as a result the prohibition is lifted. If this is a risk, consider narrowing the terms of the motion in limine.

### **Why is a motion in limine important?**

- The ruling on a motion in limine sets the ground rules for evidence in the case;
- An objection to improper evidence or limiting instruction after the fact is often required, and is better than nothing, but will not necessarily remove the impression that prejudicial evidence can have on jurors. Once a jury has heard highly prejudicial or inflammatory testimony, it is almost impossible to “unring the bell,” or “get the skunk out of the jury box;” and
- A well-crafted motion in limine anticipates potential problems and avoids exposing the jury to potentially misleading or confusing evidence.

### **When is a motion in limine filed?**

Preferably, the motion in limine should be filed prior to the pre-trial conference, so the trial court can rule on the motion in limine at the pre-trial conference. Once the trial court has made its rulings regarding material issues and admissible evidence, the parties can better fashion their voir dire questions and opening statements.

A motion in limine does not preserve error. If the evidence is offered at trial, the party that wants to exclude it must object when the evidence is offered.<sup>17</sup> When a motion in limine is granted, the party that wants to introduce the evidence must (1) approach the bench and ask for a ruling; (2) formally offer the evidence; and (3) obtain a ruling on the offer.<sup>18</sup> A party seeking to object to a violation of a motion in limine must do so immediately or risk waiv-

---

<sup>14</sup> *Fort Worth Hotel L.P. v. Enserch Corp.*, 977 S.W.2d 746 (Tex. App.—Fort Worth 1998, no pet.).

<sup>15</sup> *Id.*

<sup>16</sup> *Babcock v. Northwest Mem'l Hosp.*, 767 S.W.2d 705 (Tex. 1989).

<sup>17</sup> *Hartford Acc. and Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963).

<sup>18</sup> *Johnson v. Garza*, 884 S.W.2d 831 (Tex. App.—Austin 1994, writ denied).

ing the error.<sup>19</sup> The cumulative effect of repeated violations of a motion in limine may be grounds for reversal.<sup>20</sup>

## **How should a motion in limine be submitted?**

### **Pre-trial**

- Before requesting a motion in limine, find out if opposing counsel will agree to specific issues and in doing so narrow the scope of issues for the court to decide;
- Any motion in limine that is complex or lengthy should be filed well before the pre-trial conference with copies of the supporting case law;
- Number each limine request, cite the supporting authority, and insert provisions for the court to indicate GRANTED or DENIED for each individual request;
- Schedule sufficient time for a hearing on contested issues; and
- Prepare a written ruling in advance of the hearing on a motion in limine and get the ruling signed and filed with the court before trial begins. Making a record is essential to preserve any issue for appellate review.

## **Jury Instructions**

After the jury is sworn in and before the voir dire examination begins, the court must give the jury panel instructions as prescribed by the Supreme Court.<sup>21</sup> Approved instructions to the jury panel and to the jury are set out following rule 226a.<sup>22</sup>

## **Voir Dire**

Voir dire literally means “to speak the truth,” an apt phrase for the process used to examine potential jurors for bias or prejudice that might prevent a fair trial. Voir dire is the *only* time an attorney gets to directly interact with prospective jurors. It is the first opportunity an attorney has to get to know a jury and the first opportunity the attorney has to educate the jury panel about the case. It is the only time the jury panel will be able to tell an attorney what they think about issues relevant to the case prior to the verdict. An attorney’s most important goal in voir dire is to get the panel talking. If a member of the jury panel voices criticism of CPS or social workers, this may be an opportunity to find

---

<sup>19</sup> *Weidner v. Sanchez*, 14 S.W.3d 353 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2000, no pet.).

<sup>20</sup> *Id.* at 363.

<sup>21</sup> TEX. R. CIV. P. 226a.

<sup>22</sup> *Id.*

out who among the potential jurors has strong negative opinions about termination of parental rights, the agency, or other relevant issues. If a potential juror has a strong bias, that person may be subject to being stricken for cause (see discussion of challenges, below). Potential juror's comments, followed up properly, can also be used as a springboard to educate the entire panel about the case in a way that might cause one or more jurors to reconsider a specific position.

Voir dire is also an opportunity to educate potential jurors about the process of a CPS case, including how CPS's main goal is family reunification. In addition, voir dire can be used to explain to prospective jurors that CPS offers many services to struggling parents, such as counseling, parenting classes, anger management training, and other relevant services to assist in family preservation and reunification.

Each judge may require the litigants to conduct voir dire in accordance with the judge's specific direction. While voir dire in each case must be tailored to the facts, a sample voir dire for CPS cases is designed to prompt consideration of common relevant issues.<sup>23</sup> Once you have gathered basic information from members of the panel, it is helpful to ask open-ended questions and then to get other panel members to reflect on those answers.

***EXAMPLE:***

Ms. Garcia, "Do you agree with Ms. Jones' contention that a parent's rights should be terminated only upon a showing of physical abuse?"

"If not, why not?"

"Mr. Smith, Ms. Garcia has stated that a child who has witnessed physical abuse of a sibling can suffer from fear and anxiety, and she considered that endangering conduct. Can you think of other ways in which a child might suffer mental or emotional abuse?"

"Ms. Jackson, do you agree with Ms. Garcia and Mr. Smith's belief that there are some instances in which mental or emotional abuse can be as bad or even worse than physical abuse? Can you think of other examples?"

**Who are you looking for in voir dire?**

The potential jurors you want to identify and attempt to eliminate from the jury pool include those who, for whatever reason, will never vote to terminate parental rights, no matter what evidence is presented. Some general characteristics that may be cause for concern in a potential juror in a CPS case include people:

- Who have strong beliefs about the State's intrusion into a family's private life;
- Who have little or no contact or experience with children;
- Who think that CPS (the police, the DA, etc.) frequently find child abuse where none exists;

<sup>23</sup> See Practice Guide, SECTION 11 TOOLS, Jury, Voir Dire.

- Who think children are unreliable witnesses;
- Who think children often lie about sexual abuse;
- Who think termination of parental rights is morally wrong;
- Who know someone who was falsely accused of child abuse;
- Who are professionals (therapist, psychologist, advocate, etc.) whose experience has led them to be sympathetic to sexual perpetrators, child abusers, substance abusers, perpetrators of domestic violence, or other relevant populations;
- Who have had a negative experience with CPS, either personally or through a friend or family member; or
- Who believe that CPS's primary mission is to "snatch" children.

***TIP:***

An example of an issue that may require careful education of the jury is the fact that there are often no medical findings in a sexual abuse case. By laying a foundation on this issue during voir dire and introducing expert evidence at trial to explain why this occurs, this issue can be removed as an obstacle for the jury in a sexual abuse case. This is a prime example of an issue that may require some special attention because it pertains to information that is not common knowledge.<sup>24</sup>

**How can you challenge a potential juror?**

**For Cause**

A potential juror is subject to disqualification if he or she expresses opinions that reveal an unwillingness or inability to follow the law or show bias for or against one side that would unduly prejudice the other side.<sup>25</sup> Strikes for cause are unlimited, and as such, whenever possible, an attorney should attempt to have a potential juror struck for cause and avoid using peremptory strikes. The trial court has great latitude in controlling voir dire and may restrict trial counsel from attempting to gauge the weight a potential juror may give to evidence, as opposed to discovering a potential juror's attitude or bias.<sup>26</sup>

***TIP:*** Do not let a panel member with extreme views contaminate the jury. Ask to approach the bench and question the panel member outside the hearing of the other panel members. If a potential juror shows bias, use a challenge for cause.

<sup>24</sup> See *Investigating & Prosecuting Child Sexual Abuse*, T. Buess and M. Trent (Texas District and County Attorneys Association) p. 191, citing recent research showing medical evidence is found in less than six percent of known sexual abuse cases.

<sup>25</sup> TEX. R. CIV. P. 228.

<sup>26</sup> *Hyundai Motor Co. v. Vasquez*, 189 S.W. 3d 743 (Tex. 2006) (proposed question inappropriately sought to test the weight jurors would place on evidence).

## Peremptory Strikes

Peremptory strikes allow a party to remove a member of the panel without stating a reason. This allows removal of a person who can't be shown to be biased but who has opinions or attitudes that may be at odds with the agency's position in the case. Each side is allocated six peremptory strikes.<sup>27</sup> It is not unusual for CPS to share strikes with similarly aligned parties, including the attorney ad litem or a relative if the parties' positions are substantially the same.<sup>28</sup> If these parties are not aligned, it is important to advise the court, and request that the agency not share strikes with any party that is not aligned.

If a party's use of peremptory strikes reveals a pattern of striking all persons of one race, ethnicity, or gender, a *Batson* challenge may be brought.<sup>29</sup> If a *Batson* challenge occurs, the party who exercised the strikes must be prepared to articulate a racially neutral reason for the strikes.

### **TIP:**

Always have at least one other person watching the panel during voir dire. The observations of reliable persons as to how the panel reacts to comments and questions can be an invaluable tool in evaluating a jury panel and assessing how to most effectively use strikes.

## Jury Charge

The jury charge is the collection of questions, definitions, and instructions the court gives to the jury to help them in resolving the factual disputes in the case. The jury charge instructs the jury on the law applicable to the case. Many judges require that the jury charge be submitted to the court on a writable CD. The trial court must read the charge to the jury prior to final argument.<sup>30</sup>

In preparing a jury charge, trial counsel should:

- Prepare the proposed charge as part of trial preparation;
- Expose the jury to terms, instructions and questions during voir dire;

---

<sup>27</sup> TEX. R. CIV. P. 233.

<sup>28</sup> *In re M.N.G.*, 147 S.W.3d 521, 532 (Tex. App.—Fort Worth 2004, pet. denied) (error for trial court to afford extra strikes where attorney ad litem admitted coordinating with DFPS to avoid double strikes).

<sup>29</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986); *In re A.D.E.*, 880 S.W.2d 241, 243 (Tex. App.—Corpus Christi 1994, no writ) (*Batson* applied to termination case; however, *Batson* challenge rejected where party striking potential jurors provided racially neutral explanation for peremptory strikes).

<sup>30</sup> TEX. R. CIV. P. 275; See Practice Guide, SECTION 11 TOOLS, Jury Charge.



- Know the local rules regarding the timeframe for filing a jury charge;<sup>31</sup>
- Be prepared to discuss and address legal issues raised by the charge instruments at both informal and formal charge conferences;
- Adjust the jury charge as needed to reflect the evidence that is actually admitted at trial;
- Submit timely written requests for proposed questions, definitions, and instructions to be given to the jury in the jury charge;<sup>32</sup>
- Make timely and specific objections to the charge, although objections also may be written or dictated to the court reporter in the presence of the court and opposing counsel;<sup>33</sup>
- Get a ruling on objections and requests for charge before the case is submitted to jury;<sup>34</sup> and
- Use the jury charge in closing argument to tell the jury unequivocally how to answer question by question, citing the specific evidence that supports each answer.

### **Drafting A Jury Charge**

Drafting a jury charge requires careful attention to the facts and law. Pattern jury charges offer a useful resource, as long as care is used to tailor the charges to the particular case circumstances.<sup>35</sup> A jury charge must be carefully crafted and reviewed to ensure:

- Each issue is supported by both pleadings and evidence;<sup>36</sup>
- The charge accurately states the law;
- There is no comment on the weight of evidence or the effect of the jury’s answer;
- Whenever feasible “broad-form questions” are used (basically a general conclusion as opposed to a series of single issue questions); and<sup>37</sup>
- Admonitory instructions are included.<sup>38</sup>

Salient guideposts on the issue of broad-form or special-issue jury submissions may be helpful: (1) the purpose of broad-form submissions is to reduce conflicting jury answers and simplify the jury charge;<sup>39</sup> and (2) a special issue format may be more appropriate if the trial court is unsure if the bases considered by the jury are invalid or without legally

---

<sup>31</sup> The TEX. R. CIV. P. does not require that the charge be filed pretrial but practitioners should be aware of local rules regarding charges. To find local rules, consult Texas Judicial Online at [www.courts.state.tx.us](http://www.courts.state.tx.us).

<sup>32</sup> TEX. R. CIV. P. 273.

<sup>33</sup> TEX. R. CIV. P. 272, 274.

<sup>34</sup> TEX. R. CIV. P. 276 (trial judge’s endorsement of refused or modified instructions, questions, or definitions preserves objection).

<sup>35</sup> Texas Pattern Jury Charges—Family (2006); See Practice Guide, SECTION 11 TOOLS, Jury Charge.

<sup>36</sup> TEX. R. CIV. P. 278.

<sup>37</sup> TEX. R. CIV. P. 277.

<sup>38</sup> TEX. R. CIV. P. 226a.

<sup>39</sup> *Texas Dep’t of Human Servs. v. E.B.*, 802 S.W. 2d 647 (Tex. 1990).

sufficient evidence.<sup>40</sup> Requests for questions, definitions, and instructions to the jury must be separate and apart from a party's objections to the court's charge.<sup>41</sup>

The jury charge must be supported by the pleadings. In a termination of parental rights case, this requires that counsel for CPS ensure that the agency's pleadings address:

- The statutory ground for termination;
- That termination is in the child's best interest;
- The names of the parties and children; and
- Appointment of DFPS as permanent managing conservator.

Include in every termination order the language in Texas Family Code section 153.131 that appointment of a parent as conservator would significantly impair the physical health or emotional development of a child.<sup>42</sup>

## **After the Verdict**

Once the jury verdict is returned and accepted by the court, counsel for CPS must:

- Prepare the judgment, making sure to track the language of the jury charge;
- Circulate the judgment for signatures from opposing counsel, CASA, and any other parties;
- File a Motion to Enter Judgment if a party fails or refuses to sign the judgment;
- Schedule a section 263.405 hearing not later than 30 days after the judgment is signed by the trial judge;<sup>43</sup> and
- Schedule a Placement Review Hearing.

---

<sup>40</sup> *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000); *Harris County v. Smith*, 96 S.W. 3d 230 (Tex. 2002).

<sup>41</sup> TEX. R. CIV. P 273.

<sup>42</sup> *In re J.A.J.*, 243 S.W. 3d 611 (Tex. 2007).

<sup>43</sup> For more information about the hearing conducted under TEX. FAM. CODE §263.405, See Practice Guide, SECTION 8 DE NOVO HEARINGS & POST TRIAL STRATEGIES.