Chapter 1

PRELIMINARY MATTERS CONCERNING PRE-TRIAL PRACTICE IN JUVENILE PROCEEDINGS

A. RULES GOVERNING PRE-TRIAL PROCEDURE IN JUVENILE COURT

The Texas Family Code does not contain any express provision addressing pre-trial procedure. Yet, it is seems certain that some sort of pre-trial practice is contemplated by the Family Code. The Family Code, either expressly or by reference, addresses several matters for which pre-trial resolution has traditionally been viewed as appropriate. For example, Section 51.17[1] expressly provides that "[d]iscovery is [to be] governed by the Code of Criminal Procedure" which, in the context of criminal practi8 a4O earsslalwayscohe eriad5(

In criminal proceedings, the court is statutorily authorized to set a matter "for a pre-trial *hearing* before it is set for trial upon its merits" to determine certain matters.[4] However, neither the Family Code nor the rules of civil procedure, made applicable by section 51.17, contain a similar statute addressing pre-trial *hearings*. The rules of civil procedure, however, do provide a rule, that supports the notion of the appropriateness of the pre-trial resolution of certain issues.[5] Because, this rule is applicable to juvenile proceedings,[6] this rule may be viewed as statutory recognition of the court's inherent power to set such matters for a pre-trial hearing and/or resolution.

1. TEXAS RULE OF CIVIL PROCEDURE 166: PRE-TRIAL CONFERENCE

Like its criminal counterpart, Texas Rule of Civil Procedure 166 makes the setting of a matter for a pre-trial conference discretionary with the court.[7] The main difference between

See TEX. CODE CRIM. PROC. ART. 28.01 § 1, (1) (8).

[3]Chapter 38 of the Code of Criminal Procedure contains several provisions which are also viewed as traditionally appropriate for pre-trial resolution. For example, article 38.22 governs the voluntariness of statements for which pre-trial resolution is nearly always conducted. TEX. CODE CRIM. PROC. ART. 38.22. Chapter 38 also contains Texas' so-called exclusionary rule which contemplates, at least, that there will be some preliminary hearing to determine the admissibility of evidence . TEX. CODE CRIM. PROC. ART. 38.23. While some Family Code provisions overlap to a degree with some Chapter 38 provisions, there is good reason to believe that the traditional criminal preference and practice for pre-trial resolution of at least some issues is contemplated by section 51.17 of the Family Code.

[4]TEX. CODE CRIM. PROC. ART. 28.01 § 1 (*emphasis supplied*).

[5] TEX. R. CIV. PROC. 166.

[6] TEX. FAM. CODE § 51.17 (a), (b).

[7] "In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may *in its discretion* direct the attorneys for the parties and the parties…to appear before it for a conference to

the rules is that it addresses pre-trial *conferences* as opposed to pre-trial *hearings* at which evidence may be adduced.[8] However, because certain pre-trial matters that arise in juvenile proceedings are nearly meaningless without at least some opportunity to present evidence, rule 166's limitation might appear to be somewhat incongruous with strict application in the juvenile context.[9] Where appropriate, counsel should point out the issues requiring differing treatment for pre-trial resolution in the juvenile context from those involved in the usual civil proceeding when seeking a hearing.[10]

(a) Matters Appropriate for Pre-Trial Hearing and/or Resolution

The matters for which pre-trial motions/requests, hearings, and resolution are appropriate are limited only by the facts and circumstances of the particular case, the defensive strategy, and the creativity of counsel. At a minimum, however, the Family Code and the Code of Civil Procedure expressly contemplate the pre-trial addressing of the following matters:

(1) Discovery;[11]

(2) Admissibility of oral and written statements of the juvenile respondent;[12]

(3) Certain matters for which pre-trial notice may be made by motion or request;[13]

(4) Defects in pleadings;[14] and
(5) Recusal or disqualification of judges or prosecutors.[15]

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consider" various preliminary matters. TEX. R. CIV. PROC. 166 (*emphasis supplied*).

[8] *See* TEX. R. CIV. PROC. 166

[9] For example, the juvenile-respondent would bear an initial burden to invoke the court's discretion to order discovery under article 39.14, Code of Criminal Procedure. The burden might require the production of evidence or testimony. *See* discussion, infra at Chapter 3, p. 20.

[10] The mandate that preliminary matters be determined outside the presence or hearing of the jury is applicable in juvenile proceedings and further underscores the importance of pre-trial resolution to the orderly and efficient resolution of cases at trial. *See* TEX. R. EVID. 103 (c), 104 (c).

[11] TEX. FAM. CODE § 51.17 (a), (b) expressly addresses discovery in juvenile proceedings. Further, TEX. R. CIV. PROC. 166 (c) expressly refers to the setting of a discovery schedule as an appropriate matter for pre-trial consideration.

[12] TEX. FAM. CODE § 51.095. *See also* TEX. FAM. CODE § 51.17 (a), (b) (incorporating by reference article 38.22's requirements concerning the admissibility of statements and makes these requirements applicable in juvenile proceedings). However, in view of Texas Family Code section 51.095, governing the admissibility of a child's statement, much of article 38.22 is made superfluous.

[13] By reference, TEX. FAM. CODE § 51.17 makes applicable several statutory notice provisions for which pre-trial notice is expressly contemplated such as Texas Evidence Rules 404 (b) and 609 (f), as well as those found article 38.37, Texas Code of Criminal Procedure, which governs notice of extraneous offenses in certain prosecutions where the alleged victim is a child.

[14] Both the Family Code and the rules of civil procedure set forth certain minimum requirements governing the petition applicable in juvenile proceedings. *See e.g.*, TEX. FAM. CODE § 53.04; TEX. R. CIV. PROC. 90 - 94. Moreover, in some situations, civil procedure may require that the juvenile respondent raise certain matters in responsive pleadings and/or verify others. *See e.g.*, TEX. R. CIV. PROC. 93, 94.

[15] TEX. R. CIV. PROC. 16 governs disqualifications of judges in civil cases while other grounds for the disqualification or recusal of assigned judges can be found in § 74.055 of the Texas Government Code. A motion to disqualification or recuse a prosecutor may be based on any potential violation of the disciplinary rules of professional conduct. *See* TEX. DISC. R. PROF. CONDUCT 1.01, *et. seq*.

A pre-trial hearing might also be appropriate to determine the following matters specifically addressed in the Family Code:

(1) The jurisdiction of the court over the child;[16]

(2) Whether venue is prop in the county in which the prosecution is pending;[17]

(3) Whether a particular right guaranteed the juvenile respondent has been properly waived;[18] and

(4) Whether evidence has been obtained by means of an illegal detention, search or seizure.[19]

Additionally, several constitutional provisions may create rights for which pre-trial resolution may be appropriate such as—

(1) 6th Amendment right to a speedy trial;[20]

(2) due process right to disclosure of favorable and exculpatory evidence;[21]

(3) due process rights to notice and opportunity to prepare;[22]

(4) Other search and seizure issues.[23]

There may be other matters that may be proper for the filing of pre-trial motions and the seeking of a pre-trial hearing for resolution. Indeed, Texas Rule of Civil Procedure 166 contemplates a wide range of matters appropriate for a pre-trial conference. When considered along with the traditional criminal practice of resolving certain matters by pre-trial hearing, reason and the unique nature of the traditionally criminal matters that arise in juvenile proceedings provide ample support for the conducting of pre-trial hearings in juvenile proceedings.

B. TIME FOR SETTING OF PRE-TRIAL HEARING AND FILING OF PRE-TRIAL MOTIONS

Again, while civil procedure rule 166 does contemplate pre-trial conferences, it does not specifically address pre-trial *hearings*. Because the Family Code neither addresses pre-trial hearings, the practitioner does not have much statutory guidance concerning pre-trial procedure. Local rules are likely to govern the specifics of pre-trail procedure in the juvenile courts and should be consulted accordingly.

The most obvious area in which guidance would be helpful is delineating the time in which counsel would have prior to any pre-trial hearing to file pre-trial motions.[24] This is a separate and distinct issue from the time counsel is required to have to prepare for a

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[16] *See e.g.*, TEX. FAM. CODE § § 51.04, 51.041, 51.0411.

[17] TEX. FAM. CODE § 51.04.

[18] *See e.g.*, TEX. FAM. CODE § 51.09.

[19] TEX. FAM. CODE § 54.03 (e) expressly provides that evidence "illegally seized or obtained" is not admissible in an adjudication hearing. Moreover, section 51.17 makes the Texas "exclusionary rule", article 38.23, Code of Criminal Procedure, applicable in juvenile proceedings

[20] U.S. CONST. AMEND. VI; TEX. CONST. ART. I, § 10.

[21] U.S. CONST. AMEND. XIV; TEX. CONST. ART. I, § 19.

[22] *Id.*

[23] U.S. CONST. AMEND. IV; TEX. CONST. ART. I, § 9.

[24] TEX. CODE CRIM. PROC. Art. 28.01 § 2 provides that such matters are to be filed by written motion at least ten days prior to the date of the hearing. Neither the Family Code nor Civil Procedure rules provide a similar requirement. One notable exception is found in Texas Rule of Civil Procedure 18a which requires such motions to be filed at least ten days before the date the trial is set. TEX. CIV. R. PROC. 18a (a).

juvenile adjudication or transfer hearing.[25] While the 10 day preparation rule has obvious impact on the outer limits of how quickly a judge might set a pre-trial hearing (within 10 days), it does not address how long before any pre-trial *hearing* is set pre-trial motions would have to be filed to be considered timely.[26]

The most guidance provided is found in the rules of civil procedure. Rule 21 of the Rules of Civil Procedure provides that any "application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.[27] Consequently, if a matter is set for a pre-trial hearing, unless otherwise addressed by local rule, *etc.*, counsel should err on the side of compliance with rule 21 by ensuring that such matters are on file at least three days before the hearing unless otherwise specified by the court.

Finally, local rules and practice will probably govern when pre-trial motions should be filed. Local practice is expressly recognized by the rules of civil procedure and should always be consulted prior to filing of pre-trial motions.[28]

C. GENERAL REQUISITES OF PLEADINGS

Litigating pre-trial matters requires counsel to properly raise such matters in the form of a written motion. There are several minimum requirements that are found in the civil rules of procedure:

(1) Motions must be in writing;[29]

(2) Motions must state the grounds thereof, the relief or order sought;[30]

(3) Copies of all motions should be served on all other parties;[31]

(4) Motions should be certified concerning compliance with the foregoing requirements;[32] and

(5) Pleadings shall be made in good faith and not groundless.[33]

D. SETTING OF HEARINGS

Local rules should be addressed concerning the setting of, and requests/motions to set matters for a hearing.

E. EFFECT OF § 51.09's WAIVER PROVISIONS ON DUTY TO RAISE CHALLENGES

In the usual case, the failure to raise certain matters could constitute waiver or procedural default resulting in preclusion of appellate review. The usual duty to raise objections or challenges to pleadings, *etc.*, on risk of waiver, however, is greatly altered by the section 51.09 governing a juvenile-respondent's waiver of rights.[34] The courts

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[25] TEX. FAM. CODE § 51.10 (h) guarantees counsel to "10 days to prepare for any *adjudication*…hearing…"

[26] The ten day preparation rule is by its terms, limited to transfer and adjudication hearings. TEX. FAM. CODE § 51.10 (h).

[27] TEX. CIV. R. PROC. 21.

[28] Texas Rule of Civil Procedure 3a expressly provides that local rules may be adopted so long as they are satisfy each of six limitations on the adoption of local rules. Counsel should request a copy of the local rules and ensure that they do not violate rule 3a.

[29] TEX. CIV. R. PROC. 21.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See* TEX. FAM. CODE §51.09.

have given that section a strict reading such that its provisions require an "affirmative" waiver of rights; waiver by inaction is simply insufficient to forfeit a juvenile-respondent's rights in some situations.[35] Thus, to the extent that pre-trial practice seeks to assert certain of the juvenile-respondent's rights, the purpose of preserving complaints for appellate review may be less important than in the context of adult proceedings.

F. CONCLUSION

While counsel need not become an expert on the workings of the rules of civil procedure, the practice of juvenile defense requires a working understanding of some of the basic rules of pleading and procedure.[36]

Once a basic facility with the rules of civil procedure in the context of juvenile pre-trial practice is achieved, counsel may litigate pre-trial matters according to the facts and circumstances of the particular case limited only by her judgment and creativity.

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[35] *See e.g., D.A.W. v. State*, 535 S.W.2d 21, 23 (Tex. Civ. App.—Houston [14th Dist.] 1976, *writ ref'd.*).

[36] The discussion is not intended to be a definitive description of the applicability of the civil rules application in juvenile proceedings. Rather, it is intended to set forth the basic pleading requirements and procedural framework found in those rules. Counsel is encouraged to read and research the rules of civil procedure in all cases in which an issue arises.

Chapter 2

CHALLENGES TO THE PLEADINGS: SPECIAL EXCEPTIONS TO THE PETITION AND RELATED MATTERS

Pleading practice in juvenile court should be considered a critical component of pre-trial practice notwithstanding that fact that unlike criminal procedure, there is no requirement that matters even be raised prior to trial on the risk of waiver.[37] Indeed, it appears that challenges to the pleadings may be made at any time, even at and *during* the trial with the sole limitation that such matters must be raised prior to the close of evidence at the adjudication phase of trial.[38] Nonetheless, pleading practice should be considered a cornerstone of juvenile pre-trial practice. This section will discuss pre-trial challenges to the pleadings.

Pleading practice is discussed first not only because logically it should form the basis for any pre-trial practice. However, unlike in the context of adult criminal proceedings, the raise defects in pleadings may not result in the waiver of those defects for purposes of appellate review.[39]

A. SOURCES OF LAW GOVERNING PRE-TRIAL CHALLENGES TO THE PLEADINGS

The procedure governing pre-trial challenges to the pleadings in juvenile proceedings is governed by the rules of civil procedure.[40] The specific formal and substantive requirements of the petition—the primary State pleading—however, are found in statutory requirements set forth, for the most part, in the Family Code. The many criminal rules found in the Code of Criminal Procedure and case decisions are not applicable despite that fact that the substantive basis of juvenile pleading is derived from criminal jurisprudence.[41]

However, criminal pleading practice is not irrelevant to pleading practice in juvenile court. Indeed, the juvenile practitioner should consult and seek guidance from criminal pleading jurisprudence in identifying and drafting challenges to the state's petition.

The main focus of defensive pre-trial pleading practice is limited to challenging the sufficiency of the petition in terms of form and substance. However, the practitioner should not only be aware of what the petition must contain but also how such matters are raised in the context of juvenile proceedings which is very different than the manner of

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[37] In the adult, criminal context, Art. 1.14 (b) provides that all defects in the charging instrument in criminal actions not raised prior to the day of trial are waived. TEX. CODE CRIM. PROC. ART. 1.14 (b). The Family Code does not contain a similar provision.

[38] The Rules of Civil Procedure provide that defects in the pleadings must be raised prior to the charge being given to the jury in jury cases and prior to the judgment in non-jury cases. *See* TEX. R. CIV. PROC. 90.

[39] *See* section "B", *infra* at 7.

[40] *See* TEX. R. CIV. PROC. 45, *et. seq.* The Family Code provision addressing practice and procedure does not include pleading practice as one of the areas to which criminal procedure is applicable. *See* TEX. FAM. CODE § 51.17.

[41] *See e.g.,* TEX. CODE CRIM. PROC. ART. 21.01. *et. seq.*

raising such challenges in the criminal context. Understanding juvenile pleading practice will require a basic facility with the rules that govern pre-trial pleading practice in juvenile proceedings.

In order of hierarchical application,[42] the sources of law governing pre-trial practice may be identified as those addressing that which **must** be included in the petition—*substantive and formal requirements*, and those addressing how defects in pleadings may be raised—*procedure*. The substantive and formal requirements of petitions are found in three main sources: those sources addressing (1) specific requirements concerning the substance and form of the petition found in the Family Code,[43] (2) the general pleading requirements found in the Code of Civil Procedure,[44] and (3) the requirements of form and substance that may be required by constitutional provisions.[45]

B. PROCEDURE FOR CHALLENGING PLEADINGS IN JUVENILE COURT

The most important facet of juvenile pleading practice is the application of the civil rules to pleading practice.[46] ***Unlike with discovery and evidence, criminal procedure governing the challenges to the sufficiency of indictments and informations is not applicable in juvenile proceedings***.

Juvenile proceedings, being civil in nature, are commenced by petition.[47] The civil nature of the proceeding determines the procedure for raising defects of form and substance in the petition. One of the most notable features of juvenile pleading practice occasioned by the application of the civil rules of procedure is, again, the absence of any requirement that such matters be raised prior to trial at the risk of waiver.[48] Also notable is the lack of the various and detailed statutory rules setting forth the requirements of the pleadings as found in the Code of Criminal Procedure.[49] Finally, the application of civil procedure to juvenile proceedings means that the pleading requirements are far less strict in terms of the certainty required in the allegations of the conduct in the state's petition for which the prosecution is sought.[50]

Again, remember, that defects in pleadings should but, apparently, need not be raised before the charge is given to the jury in jury cases and before judgment signed in non-jury cases.[51] While the provisions of the family code and the civil rules of procedure do impose certain requirements in terms of the order of filing of responsive pleadings and

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[42] *See* TEX. FAM. CODE § 51.17.

[43] *See* TEX. FAM. CODE § 53.04.

[44] *See generally* TEX. R. CIV. PROC. 45 – 77.

[45] Counsel should always be mindful of constitutional requirements such as the due process clause which address and make specific demands on pleading practice apart from and separate to those required by the statutory provisions. The classic Supreme Court treatment of notice in the context of juvenile proceedings was set forth in *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, and should be consulted. It can always be argued that the due process clause requires greater specificity and certainty in pleading than do the various statutes.

[46] Texas Family Code section 51.17 specifically makes applicable the rules of civil procedure in juvenile proceedings in all pre-trial matters with the exception of matters of discovery and those addressed in Chapter 38, Code of Criminal Procedure.

[47] TEX. FAM. CODE 53.04; TEX. R. CIV. PROC. 22, 77, 78, - 80.

[48] TEX. R. CIV. PROC. 90.

[49] *See e.g.*, TEX. CODE CRIM. PROC. Arts. 21.01, *et. seq*.

[50] *See e.g., In the Matter of Edwards*, 644 S.W.2d 815, 821 (Tex. App.—Corpus Cristi 1982, *writ ref'd. n.r.e.*).

[51] TEX. R. CIV. PROC. 90.

the basis of defects in the pleadings, **failure to follow such order or raise such matters do not appear to amount to a waiver or procedural default of such complaints**.[52]

1. Order of Filings Important: Special Exceptions Raised First!

Because the civil rules of procedure are applicable, challenges to the pleadings are made not by a *motion to quash the petition* but, rather, by means of special motions peculiar to civil procedure--*special exceptions to the petition*. Additionally, matters not directly related to the petition such as challenges to the jurisdiction, must be raised by means of a special pleading known as the *special appearance*. To complicate matters, civil procedure rules require that these matters be raised in a certain order in order to be operative; the failure to follow this filing order in the usual civil context could result in a waiver of the particular challenge. As discussed earlier, however, in juvenile proceedings, failure to follow this order is likely not to constitute waiver by inaction due to the requirement of an affirmative waiver of rights pursuant to section 51.09. Thus, while it is good practice to know the usual operation of the civil pleading rules, in view of section 51.09, many of these rules appear to be purely advisory of good practice procedure.[53]

With the prohibition on waiver by inaction in mind, counsel without a background in civil procedure should be aware of several, well-settled, formal rules of civil pleading that determine whether counsel can even challenge potential defects in a petition or even the jurisdiction of the juvenile court. These rules primarily relate to *the order in which a respondent's pleadings must be filed* in order to be considered. The following represents the order in which a respondent's pleadings must be filed in juvenile proceedings:

(1) The Special appearance;[54]

(2) Motions to transfer venue;

(3) Special exceptions to the state's pleadings; and

(4) An Answer, general or specific, to the state's pleading containing matters required to be plead and/or verified.

The order of filing should always be followed; the failure to do so in the usual civil case could render an otherwise legitimate exception to the petition or challenge to the jurisdiction being "waived" or procedurally defaulted. It is not likely that failure to follow this filing order will result in a similar waiver in juvenile proceedings.[55] Thus, counsel should first review the petition and the statutes setting forth the requisites of the form and substance of the petition and, if any challenges exist, raise them in the order in

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[52] *Id.* The strict waiver provisions of the Family Code render much of the rules of civil procedure governing defensive pleading practice superfluous at best. Thus, rule of civil procedure 90 requiring that defects be pointed out to the trial court on risk of waiver are simply inapplicable in the context of juvenile proceedings due to the strict waiver provisions contained in section 51.09 of the Family Code. *See e.g., In the Matter of W.H.C.*, 580 S.W.2d 606 (Tex. Civ. App.---Amarillo 1979) (substantive defect in petition was not waived due to failure to object at trial because the strict requirements governing waiver set forth in section 51.09, Family Code, were not met). In short, waiver by inaction is virtually inapplicable due in juvenile proceedings. Thus, much of the discussion here must be viewed as purely advisory of good practice habits.

[53] *See supra* n. 50.

[54] Order of filing of other responsive pleadings immaterial except with respect to special appearances. TEX. R. CIV. PROC. 120.

[55] *See supra* at n. 50.

which they should be raised. Again, the most important point is that **motions raising defects in the state's petition, if any may potentially exist, must be filed before all other motions.**

C. THE SPECIAL APPEARANCE

In the criminal context, any challenge to the jurisdiction may be made at any time and need not be made in any particular order or form. However, challenges to the jurisdiction in civil proceedings, such as juvenile proceedings, must be made **first and prior to any other pleadings.** Such a challenge is made by means of the *special appearance*.

The special appearance should be filed before any other pleadings if grounds exist for their filing.[56]

> "A special appearance under rule 120a is a very narrow one. The ***only*** basis for objection to the jurisdiction is that the person…of the defendant is not amenable to process issued by the courts of Texas. Any other basis included in the motion, such an objection to citation or service converts the appearance to a general one, and even if the complaint is sustained, the defendant has made a constructive appearance…"[57]

The Family Code sets forth three basic requirements that can be considered jurisdictional for the purposes of filing a special appearance. These requirements relate to (1) the conduct forming the basis of the prosecution, (2) the juvenile-respondent's status as a "child" within the meaning of the Family Code, and (3) its exclusive jurisdiction as designated by the county's juvenile board.[58] Any other jurisdictional matters should raised in the special appearance.

Finally, as a matter of drafting procedure, other responsive pleadings, motions, the answer, *etc.*, ***may*** be included in the same document as the special appearance but they must follow the special appearance in the pleading.[59]

D. MOTIONS TO TRANSFER VENUE

Motions to transfer venue must be raised prior to any other motions except for the special appearance.[60] Texas Rule of Civil Procedure 85 sets forth the procedures governing the filing and litigating of the motion to transfer venue and should be consulted should such a motion be filed.[61] Likewise, the Family Code sets forth the venue requirements governing juvenile proceedings and should be consulted to determine if such a motion should be filed.[62] Again, it should be remembered that the answer and other motions may be filed in the same document as the motion to transfer venue but they must follow the motion to transfer venue.[63]

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[56] TEX. R. CIV. PROC. 85, 91, 120 (a).

[57] 2 FRANK W. ELLIOTT, WEST'S TEXAS FORMS § 5 (West's 2001).

[58] See TEX. FAM. CODE § 51.04 (d). The Family Code specifically addresses objections to the age of the respondent and provides that they are waived if not raised at the adjudication hearing. TEX. FAM. CODE § 51.042. The is consistent with the general approach of the Family Code. However, to the extent that such a matter is jurisdictional, the more specific provisions of the Family Code would seem to suggest that this matter need not be raised in the special exception but rather, as the rule states, at any time prior to the end of the adjudication hearing.

[59] *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 322-23 (Tex. 1998).

[60] TEX. R. CIV. PROC. 84.

[61] TEX. R. CIV. PROC. 84.

[62] TEX. FAM. CODE § 51.06.

[63] *See Dawson-Austin v. Austin*, 968 S.W.2d at 322-23.

E. DRAFTING THE SPECIAL EXCEPTION

The special exception to the petition should be viewed as the civil corollary to the motion to quash the indictment or information.

There are several civil rules that govern the procedure by which challenges to the petition should be raised. First, "defects, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing" is waived.[64] Second, again, these defects need not be pointed out prior to trial but must be raised prior to the conclusion of the adjudication hearing.[65] Third, while the civil rules require only that pleadings state the relief sought and the grounds for such relief,[66] the rules of appellate procedure require that all complaints be stated with "sufficient specificity".[67] These rules govern the framework in which special exceptions should be raised.

(1) Time for Filing Challenges to Pleadings or Jurisdiction

The only statutory requirement governing the time when pre-trial challenges to the pleadings or the jurisdiction, *etc.*, are to be filed appear to be those found in Texas Rule of Civil Procedure 90 which requires that such matters be raised before the adjudication hearing.[68] The only remaining limitation is determined by the service requirement that all pleadings, unless local rule requires otherwise, be served on the state at least three (3) days before any hearings are held.[69] Again, local rules are likely to govern the time for filing such motions as the special appearance and should be consulted.

(2) Good Faith Pleading Requirement

Although not likely to arise in the context of pre-trial pleading practice, counsel should be aware of the "good faith" filing requirements applicable to all pleadings the violation of which is punishable by sanction.[70]

(F) GROUNDS FOR SPECIAL EXCEPTIONS: REQUISITES OF FORM AND SUBSTANCE

Both the Family Code and the rules of civil procedure do set forth minimum formal and substantive requirements of the petition. However, some of the civil procedure requirements are duplicitous of and of require less than the Family Code's more specific requirements. Good practice would be to cite both the general requirements found in the rules of civil procedure as well as the more specific requirements found in the family code.

Conceptually, it is helpful to view special exception practice in three separate categories: first, in terms of the sufficiency of the pleading, secondly, to set up dilatory matters not apparent on the face of the pleadings, and, finally, the form of the pleadings. In the context of juvenile proceedings, we need be concerned here only with the challenges to the sufficiency and the form of the pleadings.[71]

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[64] TEX. R. CIV. PROC. 90.

[65] *Id.*

[66] TEX. R. CIV. PROC. 21.

[67] TEX. R. APP. PROC. 33.1 (a) (1) (A).

[68] TEX. R. CIV. PROC. 90.

[69] TEX. R. CIV. PROC. 21.

[70] TEX. R. CIV. PROC. 13.

[71] "Dilatory" pleas are those which do not seek to defeat the action on the merits but, rather, seek to delay or defeat the action. Two basic dilatory pleas are the special appearance, already discussed, and a plea of privilege not likely to arise in the context of juvenile proceedings. *See* TEX. R. CIV. PROC. 93.

(1) Statutory Requirements of Form and Substance

The rules of civil procedure set forth only four requirements of the petition: it should contain (1) a short statement of the cause of action sufficient to give fair notice,[72] (2) a concise statement in plain language of the cause of action and any other matter required by law or rule to be pled,[73] (3) a demand for a jury and all other relief to be sought,[74] (3) state each separate claim, if any, in separate, numbered paragraphs,[75] and (4) a signature by the parties.[76]

(a) Family Code Requirements Related to the Filing of the Petition. The Family Code imposes filing requirements on the prosecutor in terms of the time in which a petition must be filed.[77] However, non-compliance with these provisions do not affect a defect "in the pleading" as appears to be contemplated by rule 91 of the rules of civil procedure. Rather, non-compliance with the filing requirements is remedied by release of the juvenile-respondent from detention.[78] Thus, non-compliance is probably not proper for challenge by means of a special exception or other challenge to the petition.

[72] TEX. R. CIV. PROC. 47 (a).

[73] TEX. R. CIV. PROC. 45 (b), (c).

[74] TEX. R. CIV. PROC. 47 (c). As will be discussed at "G", *infra* at 18, in the context of juvenile proceedings, the state need not request all relief that the court may grant.

[75] TEX. R. CIV. PROC. 47 (c), 51 (a).

[76] TEX. R. CIV. PROC. 57.

[77] *See* TEX. FAM. CODE § 53.04 (a) requiring prosecutors to "promptly review" referrals for "legal sufficiency and [the] advisability of prosecution" for the filing of a petition. Along with the times within which a petition must be returned as set forth in section 54.01, these statutes set forth the general times within which a proceeding must be commenced. Moreover, the petition must be approved by the prosecutor. TEX. FAM. CODE § 53.012.

[78] TEX. FAM. CODE § 54.01 (p).

(b) Statutory Requirements Related to Form of the Petition. The Family Code sets forth very minimal requirements regarding the form of the petition. Section 53.04 (c) requires only that the petition be on the "information and belief" of the prosecuting attorney and be styled "*In the Matter of…*"[79]

Counsel with a background in criminal practice must be aware that the requirements traditionally required for charging instruments in the criminal context are simply not applicable in juvenile proceedings.[80] Consequently, it will be the rare instance in which a defect of form will form the basis for a special exception. Nonetheless, counsel should raise any such defects not later than the close of evidence at the adjudication hearing.[81]

(c) Statutory Requirements Affecting the Substance of the Petition: Charging the Conduct. Unlike the form requirements, the Family Code imposes several substantive requirements on the petition.[82] These are best viewed as statutory enactment of the apparent demands of the due process clause's notice requirements in the context of juvenile proceedings.[83]

The Family Code's substantive requirements generally relate to the conduct charged, the identity of the child, and the provision of law on which the prosecution is based. First, the Family Code requires that the petition "state…with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts…"[84] The

[79] TEX. FAM. CODE § 53.04 (c).

[80] *In that Matter of V.R.S.*, 512 S.W.2d 350, 355 (Tex. Civ. App.—Amarillo 1974).

[81] TEX. R. CIV. PROC. 90.

[82] *See* TEX. FAM. CODE 53.04 (d).

[83] *See In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428.

[84] TEX. FAM. CODE 53.04 (d) (1).

reasonable particularity requirement means that all of the elements of the offense must be alleged.[85] It should be remembered that due process is held to not require the same level of particularity in allegations in juvenile proceedings.[86] Because the rules of criminal pleading are not applicable, the same particularity required for indictments and informations is simply not applicable in the juvenile context.[87] In this regard, it has been held that these requirements may be met by simply citing the Penal Code section by name and number.[88]

However, the "reasonable particularity" requirement does demand the some specificity in the petition's allegations. One such requirement is that the "place" of the alleged violation be stated in the petition; failure to do so may render the petition fatally defective.[89] At a minimum this would require an allegation of the county. There do not appear to be any cases addressing whether there is a requirement that a venue allegation be contained in the petition. However, the "reasonable particularity" requirement of alleging the place where the conduct forming the basis of the prosecution occurred should suffice to satisfy any venue allegation.

The "reasonable particularity" requirement also requires some allegation concerning the time at which the alleged conduct was engaged. However, there is not much guidance given to the "time" component of the "reasonable particularity" requirement. The usual petition will use the traditional criminal "on or about" language. There are no cases addressing the sufficiency of this language in the context of juvenile proceedings. It is likely that the "on or about" language which satisfies the stricter pleading requirements in the criminal context are likely to satisfy the less strict pleading requirements in juvenile proceedings. However, counsel should consider urging that this language does not comport with either the Family Code or Rules of Civil Procedure's pleading requirements.[90]

Section 53.04 (d) also requires that the petition state the name, age, and residence address…of the child who is the subject of the petition…"[91] Any failure or defect in the "identity" allegation should be raised by means of the special appearance although it would not hurt to also allege the deficiency by means of a special exception. Challenge by means of the special appearance might be justified because the "age" allegation is considered necessary to show the jurisdiction of the court.[92]

Also, section 53.04 (d) (3) of the Family Code requires that the parents or guardians of the child be alleged in the petition. Although section 53.04 (d) (3) appears to *require* that the petition state the names of the "parent, guardian, or custodian of the child and of the child's spouse…",[93] this provision has been

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85 *See In Re W.H.C.*, *III*, 580 S.W.2d 606, 608 (Tex. Civ. App.--Amarillo 1979).

86 *See In the Matter of Edwards*, 644 S.W.2d 815, 820-21 (Tex. App.—Corpus Cristi 1982).

87 *In the Matter of V.R.S.,* 512 S.W.2d at 355. However, pleadings sufficient to satisfy traditional criminal rules are most likely to satisfy juvenile pleading requirements. *See e.g., In the Matter of T.R.S.*, 663 S.W.2d 920, 921 (Tex. App.—Fort Worth 1984).

88 *In the Matter of C.F.*, 897 S.W.2d 464, 470-72 (Tex. App.—El Paso 1995).

89 *See In the Matter of H.S., Jr.*, 564 S.W.2d 446, 447-48 (Tex. Civ. App.—Amarillo 1978).

90 Texas Rule of Civil Procedure 47 requires that any pleading which sets for the claim for relief contain " a short statement of the cause of action sufficient to give fair notice of the claim involved."

91 TEX. FAM. CODE § 53.04 (d).

92 TEX. FAM. CODE § 51.04.

93 "Parent" is defined in section 51.02 (9) of the Family Code.

held not to be mandatory.[94] In either event, such a failure or deficiency should be raised by means of a special exception pursuant to rule 91 of the rules of civil procedure.

Finally, counsel should be mindful of the effect that the strict waiver procedures applicable in juvenile proceedings preclude waiver by failure to point out defects in the petition.[95] Thus, it is good practice to point out such defects timely, but given the strict waiver requirements, it is not likely that failure to raise such defects will amount to waiver.

(d) Disqualification of Prosecuting Attorney Due to Conflict of Interest. The Family Code provides that the prosecuting attorney has the responsibility of filing the petition to commence juvenile proceedings.[96] There may be instances in which a prosecuting attorney may be subject to disqualification due to a potential violation of the disciplinary rules of professional conduct.[97] For example, the Rules of Professional Conduct prohibit a party from representing a party in a matter adverse to a former client.[98] The issue may arise when an attorney, formerly in private practice, represented the juvenile and is now employed in the prosecutor's office prosecuting the juvenile. The courts have split on whether an entire prosecuting attorney's office may be disqualified due to a conflict of interest arising from the representation of the juvenile in a prior case.[99] In either event, should such a situation present itself, counsel may seek to disqualify the prosecuting attorney. If she seeks to do so, she should raise such challenge by means of a special exception. However, be mindful that the rules of civil procedure suggest that such a plea is required to be verified.[100]

(d) Grand Jury Matters. The Family Code permits a prosecuting attorney to seek the advice of the grand jury in the filing of a petition.[101] If such advice is sought, the prosecutor will have full access to the powers of the grand jury as would be available in the criminal context.[102]

The statute granting this authority is fairly recently enacted and there is not much Family Code authority addressing the procedure that is to govern. However, by giving the grand jury the "same jurisdiction and powers to investigate the facts and circumstances...as it has to investigate other criminal activity…" it is likely that criminal procedural rules may be applicable or at least provide persuasive guidance.[103] In either event, the fact that the grand jury remains a quasi-judicial body acting as an appendage of the district court would seem to indicate that it is subject to the grand jury procedural rules set forth in the Code of

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94 *In the Matter of M.E. v. State*, 616 S.W.2d 690, 692 (Tex. Civ. App.—Waco 1981).

95 *See In the Matter of W.H.C.*, 580 S.W.2d at 608.

96 *See generally* TEX. FAM. CODE §§ 53.012, 53.04.

97 *See generally* TEX. DISC. R. PROF. CONDUCT 1.06 – 1.09.

98 TEX. DISC. R. PROF. CONDUCT 1.09.

99 *See In Matter of S.C.*, 790 S.W.2d 766, 776-77 (Tex. App.—Austin 1990) (entire prosecutor's office cannot be disqualified without meeting all of the requirements for recusal); *compare State Ex. Rel. Sherrod v. Carey*, 790 S.W.2d 705, 709 (Tex. App.—Amarillo 1990) (not error for court to disqualify entire prosecutor's office). The Court of Criminal Appeals has found that the office should not be disqualified unless all of the grounds for removal from office are met. *See State Ex. Rel. Eidson v. Edwards*, 793 S.W.2d 1, 5-6 (Tex. Crim. App. 1990). The Texas Supreme Court, which has appellate jurisdiction in civil cases, has not yet ruled on the issue.

100 TEX. R. CIV. PROC. 93 requires a pleading which alleges that there is a defect of parties might be applicable to such a challenge. Whether a conflict of interest is considered a "defect of parties" is a matter for which case authority should be consulted.

101 TEX. FAM. CODE § 53.045.

102 *Id.*

103 TEX. FAM. CODE § 54.03 (b).

Criminal Procedure.[104] Consequently, it would appear that the full panoply of grand jury practice procedures available to the criminal practitioner is available to the counsel representing the juvenile respondent should the prosecutor seek such assistance.

In practical terms, rarely will juvenile-respondents be aware of the grand jury investigation unless the juvenile-respondent, a parent or guardian, family member, or an acquaintance are summoned or subpoenaed to appear before the grand jury. In that case, the full panoply of grand jury practice procedures should be available and utilized. However, in the context of the juvenile pre-trial proceeding, it seems unlikely that one will be able to determine that the petition was returned with the advice of the grand jury.[105]

Assuming that counsel is aware of such grand jury participation, there are several pre-trial motions that counsel should file and litigate if appropriate. These might include motions that seek to limit grand jury testimony to particular matters, motions seeking grants of immunity from prosecution, motions to produce grand jury testimony, motions for production of grand jury testimony,[106] and other motions that are the mainstay of state grand jury practice.[107]

Finally, if counsel has the assistance of an investigator,[108] she might petition the court permit the identities of the grand jurors to be disclosed for the limited purpose of determining whether the grand jurors were qualified to serve.[109] If the grand jurors were not so qualified, the "advice" forming the basis of the prosecutor's decision to file a petition may be challenged as the product of an illegally constituted grand jury.

(e) Enhancement Paragraphs

Prior adjudications alleged for purposes of enhancement should be alleged in separate, numbered paragraphs.[110] A defect in a pleading alleging prior adjudications forming the basis of habitual felony conduct will not render the petition defective as long as the remaining counts are sufficient.[111] Consequently, counsel should carefully review any such enhancement allegations and through proper pre-trial investigation, determine if any such defects may form the basis of a defect in proof at trial.

However, based on rules of criminal jurisprudence, an allegation of a prior mayl000 5.5451(0.3502

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[104] *See generally*, TEX. CODE CRIM. PROC. Chs. 19, 20.

[105] Section 54.03 provides that the prosecutor may seek the advice of the grand jury. However, should such advice be sought it appears that the prosecutor may be stuck with the advice of the grand jury. Moreover, should a petition not be returned during that term of the grand jury, they may do so only during the term of the succeeding grand jury.

[106] Discussed herein, *infra*, at "G", p. 28.

[107] An excellent discussion of grand jury procedure is found in Professors Dawson and Dix's treatise on Texas criminal procedure. *See* 41 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: TEX. CRIM. PRACTICE AND PROC., § 18 (West's 2001). Motions concerning specific procedures

Like criminal practice, a petition may join several offenses in a single charging instrument.[113] However, rules of civil procedure apply and not the more familiar joinder rules found in Chapter 3 of the Penal Code.

Under civil rules of procedure, a party may set forth alternative claims for relief and such claims shall be made in numbered paragraphs.[114] Each claim founded upon a separate transaction or occurrence in a separate count."[115] Further, in a petition, a party may join as many claims as she may have against an opposing party.[116]

Unlike criminal practice, however, the rules of joinder and severance are far more liberal and do not provide a right to severance; the juvenile-respondent simply does not have an absolute right to severance as do criminal defendants.[117] Rather, the court has discretionary inherent authority to sever counts or paragraphs in a petition.[118]

Thus, there is little basis for challenging a petition on grounds of misjoinder of offenses in a single petition other than a claim that the joined offenses were not stated in separate counts—a matter of form[119] or that the trial of the joined offenses would prejudice the juvenile-respondent such that trial of the joined causes would amount to a due process violation. In the event that such a matter is apparent from the pleadings, the means of raising such an issue is by means of the special exception.

F. THE JUVENILE-RESPONDENT'S ANSWER

Under the usual civil rules of procedure, a defendant must file an answer. Failure to answer, after proper service of process, can result in the granting of a default judgment. In the answer, the defendant may set up any defenses,[120] counter or cross-claims, or any other matter desired.[121] There are a number of defenses and affirmative defenses that must be set up in the answer if they are to be asserted as well as pleas that must be verified.[122] If a matter is specifically denied, however, the general rule for specific denials is that only those matters specifically denied need be proven at trial.[123] Alternatively, the defendant may simply file a "general denial" which puts every matter in the plaintiff's petition at issue. This is the general approach and is usually advisable unless there are matters which must be set up in the answer such as affirmative defenses.[124]

However, unlike usual civil procedure, **the juvenile code does not require an answer**.[125] A party *may*, but need not, file an answer but it may be oral or in writing.[126] If the juvenile-respondent does not file an answer, a general denial will be assumed.[127] Unless an affirmative defense must be set up or a plea required to be verified, a general

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113 *See* TEX. R. CIV. PROC. 47 – 50.

114 TEX. R. CIV. PROC. 50.

115 TEX. R. CIV. PROC. 51 (a).

116 TEX. R. CIV. PROC. 51 (a).

117 TEX. PEN. CODE § 3.04.

118 *See Moore v. State*, 713 S.W.2d 776, 770 (Tex. App.-Hou. [14th Dist.] 1986)

119 TEX. R. CIV. PROC. 50.

120 TEX. R. CIV. PROC. 50.

121 TEX. R. CIV. PROC. 84, 85.

122 TEX. R. CIV. PROC. 92 provides that any matter required by statute to be raised and plead under oath should be stated in the answer.

123 TEX. R. CIV. PROC. 54.

124 TEX. R. CIV. PROC. .

125 TEX. FAM. CODE 53.04 (e).

126 *Id.*

127 *Id.*

denial or none at all will suffice in the usual case.

1. Verified Pleas

Texas Rule of Civil Procedure 93 sets forth certain pleas that must be verified if alleged in a pleading. Many of these matters,

G. PRAYER REQUIREMENTS

The juvenile practitioner should always carefully read the prayer in the petition. There is not much pre-trial practice procedure concerning issues set forth in the prayer but it is good practice to be familiar with its contents. In the event that particular relief is requested which cannot be had in a particular case, counsel may seek to challenge such relief sought by means of a special exception or simply wait until the disposition phase of the hearing to challenge the granting of the relief sought.

The main relief for which there may be a requirement that a specific request be made in the prayer is that for restitution.[137] The Family Code permits restitution to be sought…[138] The cases are not clear and split as to whether restitution must be plead in the petition.[139] In either event, this appears to be a matter of trial practice rather than pre-trial practice.

Finally, the petition should contain "a demand for judgment for all the other relief to which th party deems himself entitled."[140] In the context of juvenile proceedings there are a number of findings that the prosecutor may or may not request the Court to find[141] These matters need not be requested because they are merely findings and do not constitute specific relief sought. However, all relief sought need not be alleged—a request in the prayer for removal of the child from the home[142] need not be alleged in the petition.

option of challenging a prosecution on the basis of statute of limitations as a pre-trial challenge to the charging instrument, or at trial as a matter which the state must prove beyond a reasonable doubt, or both. Here, this is a matter of counsel's defensive strategy.

137 TEX. R. CIV. PROC. 301.

138 TEX. FAM. CODE § 54.04 (i).

139 *See In re A.F.D.*, 628 S.W.2d 87 (Tex. Civ. App.—Beaumont 1981) (holding that disqualification of the prosecutor's office is appropriate); *compare In the Matter of M.H.*, 662 S.W.2d 764 (Tex. App.—Corpus Cristi 1983) (holding that disqualification of the prosecutor's office is not required).

140 TEX. R. CIV. PROC. 47 (c).

141 See e.g., TEX. FAM. CODE 54.04 (i).

142 TEX. FAM. CODE 54.04 (i).

Chapter 3

STATUTORY DISCOVERY AND DISCLOSURE OF EVIDENCE

In addition to, but not instead of, informal discovery and investigation, formal pre-trial discovery practice[143] is one of the most important aspects of a comprehensive pre-trial practice. In addition to a formal pre-trial discovery practice, counsel is encouraged to utilize other, less formal and formal alternative means of learning the facts of their case such as the Open Records Act,[144] the Freedom of Information Act, and other means of informal investigation. The Family Code expressly provides that "[d]iscovery in a [juvenile proceeding] is governed by the Code of Criminal Procedure and by case decisions in criminal cases."[145] This statute, enacted in 1995, changed the long-standing applicability of the civil rules of discovery to juvenile proceedings with their much more expansive and liberal discovery procedures. The change made applicable to juvenile proceedings the more greatly circumscribed discovery available to criminal defendants.

Nonetheless, discovery remains a significant and critical aspect of juvenile practice and should not be neglected. Indeed, a comprehensive and thoughtful approach to discovery can greatly assist in the defense of juvenile prosecutions. Familiarity with the breadth, scope, and procedural requisites of Texas Code of Criminal Procedure Article 39.14 is essential to pre-trial practice in the juvenile courts.

Finally, it should be noted that there are several instances in which discovery may be permitted by article 39.14 and other procedural or evidentiary rules. In such cases, it is advisable to seek discovery under each provision as a separate and independent ground for disclosure.[146]

A. Overview of Discretionary Statutory Discovery

Reviewing the cases governing statutory discovery discloses several key points that are useful to be considered in all discovery matters. First, with two limited exceptions,[147] there is really no "right" to discovery. Consequently, emphasis should be on presenting and demonstrating a good basis for the court's exercising of its discretion to order such discovery and reliance upon informal and other traditional tools of independent investigation. Second, many of the cases defining the parameters of the court's authority to order discovery are determined by those cases in which the trial court has abused its discretion in ordering discovery. The fact that some of these cases have reached the appellate courts by means of a state's writ of mandamus, makes it quite unlikely that trial courts will be willing to push or even explore the limits of permissible

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143 Article 39.14 contemplates a motion for discovery being made before or during the trial *See* TEX. CODE CRIM. PROC. ART. 39.14 (a).

144 TEX. GOV'T. CODE § § 551.001, *et. seq.*

145 TEX. FAM. CODE § 51.17 (b).

146 For example, article 39.14 specifically requires that written statements of the defendant are subject to discovery as well as Article 39.23 that provides in part "…"

147 Generally speaking, an accused can speak of two "rights" to disclosure of evidence: favorable and exculpatory evidence for which disclosure is required as a matter of constitutional law and evidence indispensable to the state's case for which disclosure is required as a matter of statutory law.

discovery.[148] Third, even when counsel has made the requisite showings set forth in the statute, she is not yet entitled to discovery as a matter of right but rather has made the showing only to invoke the trial court's authority. Thus, it is important to view discovery in the context of a two stage process: (1) invoking the trial court's discretion, and (2) once it has legal discretion to act, convincing the court that discovery is proper under the terms of the statute such that it will exercise its discretion to order discovery. It is more likely that those matters considered traditionally available and for which there is no local prosecutorial adversity to disclosure will define the limits of what is available through discovery. In sum these points make it incumbent upon counsel to be creative and engage in a comprehensive and zealous pre-trial discovery practice. The case law sets the standards under which such a showing can be planned and presented.

B. Legal Bases Governing Discovery

With one notable exception[149] there is no general constitutional right to discovery. Indeed, even courts that had opined some inherent authority for a court to order discovery have viewed the statutory enactment as depriving it of any such inherent authority.[150] Nonetheless, there is general widespread agreement that there is no general right to discovery. Thus, the court's authority to order discovery is generally viewed as a purely limited, statutory authority to grant discovery.[151] From the perspective of counsel, it is a right only to seek to invoke the limited discretion to order discovery the denial of which is rarely seen as a denial of a substantial right.[152] Thus stated, the question should be approached from the perspective of "how can I invoke the court's discretion in such a way that it should be moved to exercise its discretion in a way that is sound in view of the purposes of the statute?"

C. Invoking the Trial Court's Authority: Requisites of the Motion for Discovery, Inspection, and Production

Article 39.14 defines the burden and standard for invoking the court's authority to order discovery. These burdens, in turn, form the basis for the essential allegations to be set forth in the motion for discovery as well as serve as the framework for litigation of the motion.

In short those showings are as follows:

(1) A properly filed *motion* moving court to enter order for state to produce for

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[148] One court has noted that, unlike in the context of civil cases, criminal cases are likely to be reversed for failure to order discovery. *See e.g. Herring v. State*, 752 S.W.2d 169, 172 (Tex. App.—Hou. [1st Dist.] 1988). It is likely that trial courts are aware of this appellate reluctance, if it exists, and may or may not factor in discovery decisions.

[149] The due process clause requires that favorable and exculpatory evidence be disclosed to the defendant if known to the state, even absent a request or motion.

[150] *See generally* 41 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: TEX. CRIM. PRACTICE AND PROC., § 18 (West's 2001).

[151] At least one court has noted that there might be some situations in which a trial court has inherent authority to order discovery beyond that permitted by article 39.14. *See State Ex. Rel. Holmes v. Lanford*, 764 S.W.2d 593, 594 (Tex. App.—Hou. [14th Dist.] 1989). Beyond this observation in *dicta* the court does not say more.

[152] As has been emphasized throughout this discussion, creative counsel should always assert that the trial court has inherent authority and, even if not, that there is a constitutional right to discovery under the due process clause. The view is based on the view that today's losing arguments are tomorrow's seminal cases and the basis ethical obligation to marshal all good faith arguments for extensions in existing law. *See Comment* to TEX. DISC. R. PROF. CONDUCT 3.01 which expressly provides that a lawyer is not prohibited from making a good faith argument "for an extension, modification or reversal of existing law."

inspection and, possibly copying, a *tangible thing*;

(2) *Notice* was properly given to all parties;

(3) Tangible thing for which production sought:

i. constitutes or contains *evidence;*

ii. that is in the *possession* or custody of the state or any of its agencies;

iii. is *not work product or otherwise privileged*; and

iv. there is *"good cause"* for the ordering such production.

These allegations should be made in the motion and any proof or support should be made with these burdens in mind. As importantly is the fact that the simple fact that the allegations have been made do not justify invoking the court's discretion. If any of these matters are not supported, in the face of a refusal by the State to turn over such items, the trial court's failure to order such production will not be error on appeal.[153]

(1) Specific Request for Items for Which Disclosure Requested

In addition to these preliminary allegations, the motion should, (as specifically as counsel's knowledge of the facts of the case permit and consistent with not revealing defensive strategy and otherwise privileged work product) make as specific a request as possible of the evidence to be produced.[154]

Finally, there should always be an allegation that the matters requested are within a specific category of evidence for which discovery permitted under the statute[155] and that they contain or constitute evidence not privileged.[156]

(2) Notice and Timeliness

Article 39.14 requires only that notice be given to all parties, presumably the state, and the statute does not address the "timeliness" factor at all. However, while the Code of Criminal Procedure's article 28.01 requirement does not apply in the context of juvenile proceedings, Texas Civil Procedure Rule 21a's requirement of three days service prior to all hearings does apply.[157]

(3) Prayer

Any motion for production and discovery should, at least, request the following:

(1) A hearing in the event that any matter for which disclosure requested is denied in whole or in part and an opportunity to make an appropriate record or offer of proof as to the allegations in the motion;

(2) An offer to make an in camera proffer in support of the "good cause" burden and request to seal the same from public or State viewing without court approval and after notice to and a hearing with the defendant;

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153 *See Kinnamon v. State*, 791 S.W.2d 84, 92 (Tex. Crim. App. 1990).

154 *See Sanderip v. State*, 418 S.W.2d 807, 808 (Tex. Crim. App. 1967).

155 Included by specific reference as within the purview of article 39.14, Code of Criminal Procedure, are documents, papers, written statements of the defendant, books, accounts, letters, photographs, objects or tangible things.

156 TEX. CODE CRIM. PROC. ART.. 39.14 (a).

157 *See* TEX. R. CIV. PROC. 21 made applicable to juvenile proceedings by section 51.17 of the Family Code.

(3) A statement of the less burdensome and less formal means utilized to obtain discovery of the requested matters to buttress the "good cause" showing. This statement should include any refusals by the prosecutor or any other person to provide the attorney with access to the requested information.

(4) A statement of indigence if it will be necessary to request funds to cover the costs of conducting inspection, photographing, inspection, etc., of the matters for which discovery sought.[158]

(5) A general request for appropriate sanctions[159] for failure to abide by terms of order of discovery tailored to the particular case;[160]

(6) A request that the State be ordered to ascertain the existence and possession of the matters from its agents;[161]

(7) That the trial court set forth the "manner" in which discovery should be conducted such as whether to be accomplished by inspection, copying, photographing, *etc.*, and, for example, in the case where the juvenile-respondent has expert assistance, the terms and conditions under which a defense expert may inspect or test the evidence or matter disclosed.

D. AT THE HEARING: SHOWINGS FOR WHICH PROOF SHOULD BE MADE AND STANDARD FOR TRIAL COURT'S INVOCATION OF DISCRETION

The case law gives some guidance as to the evidentiary burden on the accused in invoking the trial court's authority to order discovery. There are some ground rules that should govern the strategy and proof to be made in support of any discovery order should such a hearing be required.[162]

First, the matters sought must be seen as "material" to the preparation of the case. "Materiality" in this context is different than that used by appellate courts in reviewing claims of error for trial court's refusing to grant discovery although this distinction is often blurred.[163] Materiality here means not solely exculpatory evidence but inculpatory evidence as well. In this regard, article 39.14 is more expansive than the constitutional right to

[158] *See State v. Simmons*, 799 S.W.2d 426, 431-32 (Tex. App.—El Paso 1990) (trial court has authority to order that costs of complying with discovery order be paid at no cost to indigent defendant).

[159] The sanctions referred to here do not refer to sanctions in the context of monetary or otherwise punitive sanctions. Rather, "sanctions" here refers to those responses by the court to the state's failure to comply with the court's discovery order. These sanctions will generally concern either the granting of recesses or continuances or the excluding from the state's use at trial, of evidence with which court discovery orders were not complied. See Dix and Dawson.

[160] There are a number of sanctions available for discovery violations limited only by the court's discretion. *See e.g., Lindley v. State*, 635 S.W.2d 541, 543 (Tex. Crim. App. 1982) (however, sanctions for discovery violations are beyond the scope of this discussion).

[161] *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. 1998).

[162] Rarely will such hearings be required given the traditional customs that generally govern discovery. That is, in the usual case, the court will order such discovery or the State will provide it without the need for formal court action. Nonetheless, the possibility of a hearing should be discussed because the statute clearly contemplates invoking the trial court's authority. While custom may suffice, the regularly practicing attorney should be familiar with her options in the event that custom and tradition do not yield satisfactory results.

[163] *See e.g., Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980)("materiality" refers to exculpatory evidence).

disclosure of exculpatory evidence. Indeed, "material" evidence within the meaning of Article 39.14 refers to evidence that may be offered a trial[164] or that is logically relevant to some element of the crime of prosecution.[165] This would include not only evidence that is admissible or will be actually offered at trial but also that which may not be offered at trial.[166] For example, "materiality" would cover evidence that could be used to impeach or cross-examine a witness.[167]

Counsel must also show that the state or one of its agents has possession or custody of the matter sought.[168] Matters possessed by a witness that has testimony favorable to the State is not in the possession of the state for purposes of article 39.14.[169]

Counsel will also be required to show "good cause" why the court's discretion should be exercised. Logically, this suggests that at this stage of the analysis that the defendant has invoked the court's authority. There is little case law to settle the suggestion. There is likewise little guidance as to the standard of showing required under "good cause". The leading commentator suggests that the "good cause" showing that is applicable in invoking the trial court's discretion to order depositions under article 39 is appropriate for invoking the trial court's discretion to order discovery.[170] Under that standard, there is "good cause" when it is shown that the information sought is not available by other less formal or burdensome means.[171] A similar showing would be appropriate in context in the case of article 39.14 discovery.

E. Means of Proof

Counsel may adduce evidence in support of the allegations by sponsoring live testimony of a number of sources and is limited only by his or her creativity and the particular facts of the case. At first blush, testimony from the arresting and investigating officers, a private investigator, etc., could be sponsored to show the existence and possession of certain items by the state.[172] The remaining burdens relating to "materiality" and "good cause" will be left to common sense, argument, and possibly *in camera* proffers of the defensive strategy.

F. Requisites of The Court's Order

Once counsel has invoked the court's discretion and an order for discovery is entered, counsel is still obligated to ensure that the order is sufficient to preserve error on appeal.[173] Specifically, the court will not err in failing to order discovery where defense counsel has not requested, under the terms of the statute, that the court schedule "the time, place and manner

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164 *Hollowell v. State*, 571 S.W.2d 179 (Tex. Crim. App. 1978).

165 *See McBride v. State*, 838 S.W.2d 248, 250 (Tex. Crim. App. 1992).

166 *Smith v. State*, 721 S.W.2d 844 (Tex. Crim. App. 1986).

167 *See* 41 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: TEX. CRIM. PRACTICE AND PROC., § 22.26 (West's 2001).

168 *See Hollowell v. State*, 571 S.W.2d 179.

169 *Reeves v. State*, 566 S.W.2d 630, 632-33 (Tex. Crim. App. 1978).

170 *See* 41 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: TEX. CRIM. PRACTICE AND PROC., § 22.105 (West's 2001.

171 *Id.*

172 In the context of adult criminal proceedings, it is clear that a court may decide the merits of a pre-trial motion on the allegations in the motion itself and/or any supporting affidavits. *See* TEX. CODE CRIM. PROC. ART. 28.01. In the adult context, this procedural rule governing means of proof in support of discovery motions is applicable to motions for discovery by express reference in article 28.01. It is unclear whether such proof can suffice in the juvenile context.

173 Failure of trial court to specify time, place and manner of discovery is not error unless record shows that counsel requested the court enter an order setting forth those matters. *See Kinnamon v. State*, 791 S.W.2d 84. 92 (Tex. Crim. App. 1990).

of making the inspection and taking the copies and photographs of" the matters for which discovery is ordered.[174]

If the juvenile respondent is indigent, his or her testimony may be necessary to establish a particular matter. Counsel should be aware that the rules of evidence permit the accused to testify to a limited purpose in support of a pre-trial matter.[175] One specific example might be to establish indigence for the purposes of entitling counsel to the costs of conducting discovery should the court have not made a finding of indigence or has not taken judicial notice of the fact.

G. What if the State Asserts the Matters are Privileged?

The State may avoid disclosure of a matter even where the defendant has made the requisite showings stated above because the statute is simply inapplicable to privileged matters.[176] The state may assert a privilege or seek to disprove a claim by defense counsel that such privilege was waived or waived only partially.[177] Counsel should be aware of this option at all times when seeking disclosure. Creative and careful counsel will be diligent in looking for any basis upon which a claim that the privilege has been waived by full or partial disclosure.[178] In this context, there is an interesting question of whether matters contained in the file of a prosecutor provided pursuant to an open file policy constitutes waiver.

[174] *See Detmerig v. State*, 481 S.W.2d 863, 864 (Tex. App. 1978).

[175] *See* TEX. EVID. R. 104 (d).

[176] TEX. CODE CRIM. PROC. ART. 39.14.

[177] *See e.g., State Ex. Rel. Holmes v. Lanford*, 799 S.W.2d at 431.]

[178] *See* TEX. EVID. R. 511 governing waiver of privilege by voluntary disclosure.

H. Limitations on Court Ordered Statutory Discretionary Discovery

There are several major limitations on court ordered discovery some of which are implicit in the statute. First, matters not in the possession of the state cannot be ordered disclosed. Moreover, matters not in existence at the time the order is entered cannot be ordered to be created.[179] For example, a court cannot order that a witness or complainant submit to psychological or psychiatric examination.[180]

Finally, the statute specifically excepts from disclosure statements of witnesses, privileged matters, or other matters that do not constitute or contain evidence. Here also, the court's framework regarding "logical relevance" could also serve as the limitation on those matters for which discovery can be ordered.

G. Overview of Matters for Which Discovery May be Ordered

(1) Specific Matters Mentioned in Statute— The following matters to the extent that they contain or constitute evidence not privileged:

(a) Written statement of the defendant;[181]

[179] *See Turpin v. State*, 606 S.W.2d 907, 915 (Tex. Crim. App. 1980); *DeLeon v. State*, 758 S.W.2d 621 (Tex. App.—Hou. [14th Dist.] 1988).

[180] *State Ex Rel. Holmes v. Lanford*, 769 S.W.2d 593.

[181] It is important to ensure that the discovery request specifically requests all statements of the juvenile respondent both written and printed. The not only ensures that a comprehensive request is made but may be pertinent in view of the applicability of article 38.25 in juvenile proceedings which provides that "[w]hen an instrument is partly written and partly printed, the written shall control the printed portion when the two are inconsistent." TEX. CODE CRIM. PROC. ART. 38.25 applicable to juvenile proceedings pursuant to TEX. FAM. CODE § 51.17.

(b) Books and accounts;

(c) Letters;

(d) Photographs;

(e) Objects or tangible items.[182]

(2) Other Miscellaneous Matters Not Specifically Listed in Statute

(a) Criminal records of victims and witnesses;[183]

(b) Scientific reports of disinterested witnesses;[184]

(c) Right to own independent analysis of chemical substances, *etc*.;[185]

(d) List of witnesses to be used at any stage of the trial;[186]

(e) Grand Jury Testimony.[187]

(3) Matters Generally Not Discoverable

(a) Written statements of witnesses;[188]

(a) Offense, incident, and investigative reports;[189]

(b) Victim impact statements;[190]

(c) Crime Stoppers information;[191] and

(d) Scientific reports or tests and results of chemical analysis.[192]

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[182] In lieu of production of actual stolen property in a theft case, a photograph of the same may suffice. *See* TEX. CODE CRIM. PROC. ART. 38.34.

[183] May be discoverable under article 39.14. Nonetheless, this is a category for which there are independent grounds for discovery such as Texas Evidence Rule 609 (f) as well as *See Thomas v. State*, 482 S.W.2d 218 (Tex. Crim. App. 1977).

[184] *Shippy v. State*, 556 S.W.2d 246 (Tex. 1977).

[185] *Terrell v. State*, 521 S.W.2d 618, 619 (Tex. Crim. App. 1975). The should be distinguished form the ability to view the results of tests ran by state's interested witness.

[186] *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977). Excepting reputation witnesses. Also, in the case of a grand jury indictment, the witnesses upon whose testimony the indictment was returned must be listed. *See* TEX. CODE CRIM. PROC. ART. 21.21.

[187] No general right. *Johnson v. State*, 503 S.W.2d 280, 283 (Tex. Crim. App.1973). Separate statutory authority on showing of "particularized need". *See* TEX. CODE CRIM. PROC. ART. 20.20. Inquiry in determining whether "particularized need" shown is based on consideration of a totality of circumstances. Bynum v. State, 767 S.W.2d 769, 787 (Tex. Crim. App. 1989) Usually a showing that necessary to impeach witness.

[188] *Brady* will permit the discovery of witness statements if they are "favorable" within the meaning of *Brady v. Maryland* and its progeny. Otherwise, witness statements are not discoverable until the time of trial pursuant to Texas Evidence Rule 614. After testifying witness statements discoverable, *Crawford v. State*, 892 S.W.2d 1 (Tex. Crim. App. 1994).

[189] Same rules as above apply. *See Brem v. State*, 571 S.W.2d 314, 322 (Tex. Crim. App. 1978).

[190] Not discoverable until witness testifies unless exculpatory. *Harper v. State*, 753 S.W.2d 516, 519 (Tex. App.—Texarkana 1988).

[191] Same as above apply,. May have right to *in camera* inspection. *Thomas v. State*, 837 S.W.2d 106, 113 (Tex. Crim. App. 1992); specifically excluded by article 56.03, Texas Code of Criminal Procedure.

[192] Generally not discoverable. *See Alba v. State*, 492 S.W.2d 555 (Tex. Crim. App. 1973); however, this appears to be in conflict with the spirit and purpose of article 39.14's logical relevance standard. Moreover, this evidence would seem to be "indispensable to the state's case." See

Also, by statute the chemical results of breath test analysis for purposes of driving while intoxicated prosecutions is expressly made discoverable pursuant to Texas Transportation Code 724.018.

H. DISCOVERY OF IDENTITY OF EXPERT WITNESSES

Article 39.14 (b) provides that, upon motion and notice to the State, the Court may order the disclosure of "the name and address of each person the other party may use at trial to present [expert] evidence…"[193] Such notice must be provided not later than 20 days before the date of the trial.[194]

The motion should request such disclosure as specifically as possible and the rules above regarding the request for the setting of the time and manner of disclosure. Although the statute mandates at least 20 day notice, counsel may request earlier notice but should tailor the allegations to support the motion for earlier compliance.

This motion need not be filed as a separate motion but may be advisable to do so.

I. INDEPENDENT STATUTORY BASIS FOR DISCOVERY OF EVIDENCE WHICH MUST BE DISCLOSED: EVIDENCE "INDISPENSABLE" TO STATE'S CASE

With all of the discussion that has been had with respect to the greatly discretionary nature of statutory discovery, it is clear that there are some situations in which a judge must order that the state disclose evidence; **there is no discretion to deny the motion.**[195] Evidence meeting this criterion is deemed evidence "indispensable" to the state's case.

What constitutes evidence "indispensable" to the state's case is sometimes easily discernable while in some cases it is not. For example, in a possession of a controlled substances case, discovery and inspection of the contraband forming the basis of the prosecution would be considered "indispensable."[196] However, recordings of a defendant's admissions after commission of a crime might not be "indispensable".[197]

In either event, counsel should always seek to catalog those items for which discovery is sought that arguably constitute evidence "indispensable" to the prosecution and seek discovery on this basis independently of the discretionary basis of Texas Code of Criminal. Procedure Article 39.14 (a).

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193 TEX. CODE CRIM. PROC. ART. 39.14 (b).

194 *Id.*

195 *See McBride v. State*, 838 S.W.2d 248, 250 (Tex. Crim. App. 1980).

196 *Id.*

197 *See Quinones v. State,* 592 S.W.2d 933 (Tex. Crim. App. 1980).

Chapter 4

CONSTITUTIONALLY-REQUIRED DISCOVERY AND DISCLOSURE OF FAVORABLE EVIDENCE

There are fewer more clear duties owed to a criminal accused than the duty of the prosecutor to disclose favorable and exculpatory evidence as a matter of constitutional due process. Not only is the duty of constitutional dimension,[198] its spirit is embodied in both state statutory law[199] as well as the ethical rules governing attorney conduct.[200] Indeed, the duty to disclose favorable and exculpatory evidence is one of the bedrocks our criminal justice system. Because the duty to disclose favorable and exculpatory evidence is required as a matter of due process, it is as an integral component of pre-trial practice in juvenile proceedings as it is in adult criminal proceedings.

One of the hallmarks of the constitutional right to disclosure of favorable evidence lies in the fact that it is a duty imposed on the prosecutor without any requirement of a request, motion, or any action at all on the part of the accused. However, notwithstanding the self-executing nature of this right to disclosure of favorable and exculpatory evidence, this does not mean that defense counsel need not take any action in seeking disclosure of favorable and exculpatory evidence. Indeed, a positive and active approach to seeking disclosure of favorable and exculpatory evidence can not only increase the opportunities for disclosure of such evidence but even heighten the already-imposed prosecutor's duty to seek out and disclose such evidence. In sum, a comprehensive and well-planned *Brady*[201] pre-trial practice is a critical component of any pre-trial practice.

A. NATURE OF THE RIGHT TO DISCLOSURE OF FABVORABLE EVIDDNECE

In, *Brady v. Maryland*, the Supreme Court found due process is denied when the state suppresses evidence favorable to the accused.[202] In positive terms, due process requires the state to disclose to the accused any favorable evidence in its possession.

B. WHAT IS "FAVORABLE" EVIDENCE?

It is not always clear what constitutes "favorable" evidence for which disclosure is constitutionally required.[203] Indeed, whether a particular piece of evidence or information is "favorable" does not appear to be the more difficult question for analysis. Rather, whether the particular evidence or information is "material" within the meaning of *Brady v. Maryland* and its progeny, as it will be seen, is

198 *See generally Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).

199 *See* TEX. CODE CRIM. PROC. ART. 2.01 ("It shall be the primary duty of al prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.").

200 *See* TEX. CODE OF PROF. RESP. 3.09.

201 The term is used euphemistically because this area of the law has been referred to as *Brady* practice based on the seminal Supreme Court case of *Brady v. Maryland* which really developed the law in this area.

202 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).

203 A more detailed analysis can be found in treatises specific to criminal procedure. *See e.g.*, 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 24.3 (b) (West's 2000 and 2001 Supplement).

the more difficult inquiry. However, there are several broad categories of evidence or information which, in the usual case, have been considered "favorable" for purposes of constitutionally required disclosure.

It is clear that witnesses having testimony or information helpful to the defendant's version of the events or contrary to the state's theory of the prosecution are considered "favorable" witnesses.[204] Moreover, impeachment evidence is "favorable" if it would be admissible under the rules of evidence.[205] "Impeachment" is viewed as evidence of information that can affect the credibility of the particular witnesses. In this regard, evidence of any understanding or agreement concerning a future prosecution of a key state witness is considered to affect credibility.[206] Along the same lines, evidence of the criminal records of a witness constitute favorable evidence and should be turned over because of their impeachment value.[207] Prior statements of witnesses can be favorable if they contain discrepancies in the description of the perpetrator.[208] Finally, there is some suggestion that evidence or information that casts doubt on the sufficiency of the investigation conducted by the law enforcement agency is "favorable".[209]

It should be remembered that "favorable" is viewed in terms of all phases of the trial-whether guilt/innocence or punishment.[210] Also, it should be noted the duty to disclose evidence includes that which would otherwise be exempted from disclosure due to rules of privilege or confidentiality.[211] However, disclosure is not required unless the evidence is clearly favorable within the meaning given that term in the case law.[212]

C. DRAFTING THE REQUEST OR MOTION

There is little direct guidance provided by the appellate courts concerning the drafting of requests or motions for disclosure of favorable evidence. However, some guidance can be gleaned from discussions by appellate courts in determining whether there has been error in the failure to disclose evidence at trial. The following are an exemplary listing of allegations that should be made in the motion or request for disclosure of favorable evidence and should serve as a framework and starting point for counsel litigating requests for disclosure of favorable evidence.[213]

(1) Make as Specific A Request as Counsel's Knowledge of the Case and Defensive Strategy Permit. One issue that has been addressed by appellate courts reviewing claims of denial of the right to disclosure is whether there was a *specific*

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[204] *See e.g., White v. State*, 517 S.W.2d 543, 546-48 (Tex. Crim. App. 1974).

[205] *See U.S. Johnson*, 872 F.2d 612, 620 (5th Cir. 1989).

[206] *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763 (1972).

[207] *See Reed v. State*, 644 S.W.2d 494, 498-99 (Tex.App.—Corpus Christi 1982, pet. ref'd.).

[208] *See Crutcher v. State*, 481 S.W.2d 113, 114-117 (Tex. Crim. App. 1972).

[209] *See generally Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555 (1995).

[210] *See U.S. v. Agurs*, 427 U.S. 97, 107-14, 96 S. Ct. 2392 (1976).

[211] *See Cruther v. State*, 481 S.W.2d 113, 114-117 (Tex. Crim. App. 1972) (police offense reports); *see also Florio v. State*, 532 S.W.2d 614, 616 (Tex. Crim. App. 1976 (scientific tests).

[212] *See e.g., Boles v. State*, 598 S.W.2d 274, 280 (Tex. App.—Houston [14th Dist.] 1984), *aff'd.* 687 S.W.2d 359 (Tex. Crim. App. 1985) (where report stated that no conclusion could be formulated that the slugs came from the defendant's pistol).

[213] Here as in other contexts, counsel must use caution and prudence when making specific allegations in motions. Counsel should ensure that defensive strategies and work product are not revealed unless there is a conscious effort to do so.

request made for the withheld evidence.[214] While the distinctions drawn in the case law are sometimes of questionable validity, those cases are instructive to counsel in the drafting of pretrial motions.[215] While the prosecutor has an obligation to disclose exculpatory evidence even without such a request,[216] the standard for reversible error in cases where there has been no request at all or only a general one is whether the undisclosed evidence was sufficient to create a reasonable doubt as to the defendant's guilt that did not otherwise exist without it.[217] However, the import of defense counsel's making of a specific request lies in the fact that the failure to respond to a specific a specific request is hardly ever excusable. In this regard, the presence of a specific request will undoubtedly serve as putting the state on notice of the specific evidence to disclose. This is especially important when considered in conjunction with the prosecutor's duty to determine the existence of favorable evidence in the possession of other state agencies. Specifically requesting evidence also serves to defeat or lessen the probative value of any state's claim of negligence or inadvertence in the failure to provide such evidence on appeal since such claims will defeat a claim of intentional withholding of favorable evidence.[218]

Finally, the more specific the request, the better the argument counsel can make the state's nondisclosure, after a specific request, had an adverse impact on counsel's ability to prepare for trial and the devise trial strategy. The underlying assumption is that by specifically requesting the information, the more reasonable the assumption that such evidence did not exist. Appellate courts may consider this circumstance in determining the prejudicial effect non-disclosure had on counsel's preparation for trial.[219] Thus, counsel should allege that disclosure is also required to render effective assistance of counsel and prepare for trial.

(2) Allege Facts That Demonstrate the Favorable Character of the Evidence. Allege the specific favorable character of the evidence in the context of the prosecution. For example, such an allegation might state whether the specifically requested evidence or information constitutes impeachment evidence, *etc.*, such as prior convictions, evidence that indicates bias, evidence of a prior misidentification of the perpetrator, *etc.*[220] The level of specificity here is limited only by counsel's defensive strategy and the extent to which such strategy may be revealed by more specific description.

(3) Allege Facts that Demonstrate the "Materiality" of the Evidence. Again, utilizing the appellate standard for determining whether a violation has occurred, counsel should allege those facts which render

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214 *See e.g. Butler v. State*, 736 S.W.2d 668, 670 (Tex.Crim. App. 1987).

215 It should be borne in mind that the rule regarding the standard to be used on appeal in determining whether error was caused by the failure to disclose evidence was viewed as depending upon whether there was a specific request or a general or no request at all. *See U.S. v. Agurs*, 427 U.S. at 106—112. However, subsequent authority suggests that the test for materiality is the same irrespective of the absence or presence of a specific request. *See U.S. v. Bagley*, 473 U.S. 667, 682 (1982); *see also O'Rarden v. State*, 777 S.W.2d 455, 458 n. 2 (Tex. App.—Dallas 1989, *pet. ref'd.*).

216 *See U.S. v. Agurs,* 427 U.S. at 112. (even in the absence of a specific request, error occurs where the prosecution fails to produce evidence that "creates a reasonable doubt that id not otherwise exist.").

217 *See Butler v. State*, 736 S.W.2d at 670.

218 *See O'Rarden v. State*, 777 S.W.2d at 458; *see also Holloway v. State*, 525 S.W.2d 165, 169 (Tex. Crim. App. 1975).

219 *See Derden v. McNeel*, 938 F.2d 605, 617 (5th Cir. 1992).

220 *See e.g., Ex Parte Adams*, 768 S.W.2d 281, 290-91 (Tex. Crim. App. 1989).

the evidence "material" to the defense. In this context, again, "materiality" has been held to mean that evidence which, if it had been disclosed to the defense, there would have been a "reasonable probability" would have changed the result of the proceeding. A "reasonable probability" is that sufficient to undermine the confidence in the outcome.[221] Hence, the operative language to be used in the request or motion is the term "reasonable probability" in conjunction with the phrase "undermine the confidence in the outcome of the case". All such allegations should be phrased with this standard in mind.

The case law gives some guidance as to what allegations might serve to establish "materiality". For example, materiality can depend upon the value of the evidence relative to other evidence offered at trial.[222] Thus, where the State relies on a single witness, the "materiality" of impeachment witness would be heightened.[223] Or, where the undisclosed evidence will confirm the testimony of a defense witness may heighten its materiality.[224] Thus, counsel should concentrate on how important the evidence is in relation to the other available evidence.

D. ENFORCING THE RIGHT AT PRE-TRIAL

The accused's due process right requires the prosecution to respond to any specific request made for favorable information in the possession of the state or any of its agents if such evidence is "material". However, it is important to remember that the prosecutor's duty to disclose favorable evidence is a *continuing* duty.[225] Thus, counsel should always reurge any pre-trial requests or motions for disclosure of favorable evidence.

If a hearing is necessary, defense counsel must attempt to show the existence of the evidence or information sought in order to show error on appeal.

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221 *See U.S. v. Bagley*, 473 U.S. at 682.

222 *See e.g., Garcia v. State*, 794 S.W.2d 495, 497-98 (Tex. App.—Corpus Christi 1986, *no pet.*).

223 *See O'Rarden v. State*, 777 S.W.2d at 458-59.

224 *See Ham v. State*, 760 S.W.2d 55, 58 (Tex. App.—Amarillo, *no pet.*).

225 *See Granviel v. State*, 552 S.W.2d 107, 119 (Tex. Crim. App. 1976).

Chapter 5

STATUTORY NOTICE: REQUESTS AND MOTIONS

Notice practice supplements and complements formal discovery practice and should be viewed as a necessary component of an overall comprehensive discovery practice. Several matters not discoverable under the statutory or constitutionally-required discovery may be subject to disclosure under the various statutory notice provisions. Thus, a working understanding of the various notice provisions, how they are invoked procedurally, and remedies for their violation once invoked is important. Moreover, it should be remembered that notice, unlike discovery,[226] is sometimes a two-way street requiring the juvenile respondent provide pre-trial notice to the state of her intent to offer certain types of evidence at trial.

The various notice provisions are scattered throughout the Code of Criminal Procedure, the Family Code and the Rules of Evidence. It is useful to catalog the various provisions and incorporate their provisions within a greater pre-trial discovery practice. Further, all of the notice provisions do not operate the same way procedurally. There are those that are self-executing, that is, without any requirement of a request by defense counsel. Then, there are others for which execution is dependent upon court order after motion of the defendant. To complicate matters, there are some provisions which may be self-executing or require court action depending upon the *form in which defense counsel seeks to obtain notice from the state.*

Specifically, notice may be sought by means of a self-executing request made directly to the prosecutor or by written motion seeking court order. Whether the notice provisions are effected by means of a motion or a request is a matter left to preference and defensive strategy and will discussed below. However, for reasons discussed herein, notice requests or motions should be grouped together and apart from other general discovery motions. While the specific notice requests or motions need not be set forth in separate requests or motions, they should be kept separate from other discovery requests and motions. The same is true whether notice is sought by means of motion or a direct request.[227]

Finally, notice practice, like formal discovery practice, should be utilized in addition to, but not instead of, informal discovery and investigation, and formal pre-trial discovery practice.[228] Each notice provision will be discussed separately herein.

A. TEXAS FAMILY CODE NOTICE PROVISIONS

The Family Code contains two notice provisions that will be discussed here. Neither of the two provisions require any request or motion by the juvenile respondent but rather are mandatory in their terms and application. To get the full benefit of the notice provisions, however, counsel must be aware of the specifics of each of the notice requirements.

[226] Discussed *supra* at Chapter 3, p. 19.

[227] The rule of thumb is that any item entitled "motion" will be read as requiring court action to be effective while an item entitled a "request", for purposes of the various notice provisions, will invoke the notice requirements without any court order or action.

[228] Article 39.14 of the Texas Code of Criminal Procedure does not specify a time for discovery and, indeed, there is support for the view that discovery pursuant to Article 39.14 can be made at trial.

(1) Notice of Written Matters to Be Considered in the Disposition Phase: Tex. Fam. Code § 54.04 (b)

Unlike the Code of Criminal Procedure, the Family Code does not contain a statute requiring that, upon request, notice be provided to the juvenile-respondent of the evidence to be used by the state at the disposition stage of the proceedings.[229] The Code of Criminal Procedure's rule requiring such notice be provided in the context of adult criminal proceedings is simply inapplicable to juvenile proceedings.[230] However, counsel for the juvenile respondent may seek the functional equivalent of such notice by means of section 54.04 (b) which provides that "[p]rior to the disposition hearing, the court shall provide the attorney for the child with access to all written matter to be considered in disposition."[231] While this does not nearly approach the notice provided the adult accused of the evidence that will be offered at the punishment phase of trial, in practical terms, any such evidence may very well be inclu the-97(uE "cess to a)-5"1(d)-0.4.3ent crimnushase 8be

statutes and their particular notice requirements to get the full benefit of a comprehensive pre-trial discovery practice.

B. TEXAS RULES OF EVIDENCE NOTICE PROVISIONS

(1) Notice of Extraneous Offenses to Be Used at Trial

Texas Evidence Rule 404 (b) provides that the juvenile-respondent is entitled to notice of the State's intent to offer evidence of trial of "other" crimes, wrongs, or acts.[235] While on its face this language appears sweeping, it is important to understand the scope and limitations what constitutes "evidence" for which notice must be given pursuant to rule 404 (b). First, "evidence" may or may not cover a particular subject. Defense counsel should not assume that the rule covers any matters other than that pertaining to the allegations in the petition.[236] Second, notice need only be provided for that evidence that the State will offer in its case in chief; it does not apply to rebuttal evidence.[237] Third, and importantly, notice need not be provided for evidence "other than that arising out of the same transaction."[238] Such evidence need not be disclosed because it is considered "same transaction contextual evidence"[239] and is said to be that which is necessary to the jury's understanding of the charged offense.[240]

Bearing in mind these limitations, defense counsel should always seek notice of extraneous offenses by either motion or request at the earliest practicable time.[241]

(a) *Should Notice Be Sought Pursuant to a Motion or a "Request"?*

Rule 404(b)'s language speaks of a "timely *request*" by the juvenile-respondent of notice. However, the Court of Criminal Appeals has made it clear that notice may be sought by means of a *request* or a *motion*. Again, this distinction is important. A request is self-executing and needs not court action to trigger rule 404 (b)'s notice requirements. Consequently, such a "request" need only meet the requisites that it be in writing and served on the State.[242] However, if counsel seeks notice in the form of a motion, or otherwise contained within another document seeking court action, the self-executing nature of the rule is considered to have been forgone in preference of a court order. In short, the styling of the document in which notice is sought will determine what is required to make operative rule 404 (b)'s notice provisions.[243] Stated conversely, if notice is sought by means of a motion, rule 404 (b) imposes no duty on the part of the State to provide the notice without court approval.

Once it is recognized that rule 404 (b) lends itself to both means of seeking its operation, defense counsel is in a position to determine which may be best suited for the particular circumstances of a case. There are instances where a self-executing request may be the best means of invoking the various notice provisions while there may be other instances in

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235 TEX. EVID. R. 404 (b).

236 *See e.g., Evans v. State*, 945 S.W.2d 259, 261 (Tex. App.—Houston [1st Dist.] 1997, *pet. ref'd.*).

237 *Herring v. State*, 752 S.W.2d 169, 172 (Tex. App.—Houston [1st Dist.] 1988, *remanded on other grounds* 753 S.W.2d 283 (Tex. Crim. App. 1988).

238 TEX. EVID. R. 404 (b).

239 *Buchannan v. State*, 911 S.W.2d 11, 15 (Tex. Crim. App. 1995).

240 *See Rogers v. State*, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993).

241 The rule is written in such a way that counsel may request notice at any time. *See* TEX. EVID. R. 404 (b).

242 *Espinosa v. State*, 853 S.W.2d 36, 38 (Tex. Crim. App. 1993).

243 *Id.*

which a motion seeking court action may be preferable.

A good example of the benefits of seeking notice by means of a motion would be when counsel seeks specific orders relating to the provision for notice. For example, unlike some statues,[244] rule 404 (b) does not provide for a specific time within which notice must be provided to the juvenile respondent. Neither does it provide any requirements concerning how descriptive the notice of the extraneous offenses should be. Counsel might prefer to seek a court order so that she may ask the trial court to order that notice be provided by a specific means, within a specific time, and with certain specific details concerning the extraneous offenses for which notice is provided. A motion would be the appropriate means of seeking notice in such a situation.

In the event that counsel seeks notice by means of a "request", there are certain basic matters to be considered. First, the document in which notice is sought should be clearly referenced as a "Request for Notice of Intent to Offer Extraneous Offenses at Trial" or some similarly worded specific reference.[245] The request should also state the specific legal basis upon which notice requested. This document should be filed with the Office of the Prosecuting Attorney and the certificate of service should specifically state the means of service on the prosecutor. Defense counsel should request the clerk filemark both of the copies of the original request left with the prosecutor's office. One of these should be filed in the court's file and the other copy should be kept in defense counsel's file. In the event that there arises a question of whether the State had been properly served, the copy of the document in the court's file bearing the prosecuting attorney's date and time stamp, preferably citing "Received" along with the date and time of its receipt, should suffice to establish service.[246] It is important to keep a copy of this request in your file.

(b) What Constitutes Providing Notice: Adequacy of Notice

There are several matters to be considered concerning the adequacy of the state's response. These are discussed herein.

i. How Is Notice "Provided"?

The Court of Criminal Appeals has indicated that rule 404 (b) means what is says—that the state must provide notice of intent to offer extraneous offense. In this regard, "provide" appears to mean that the state should *communicate* its intent to use such evidence, either expressly or, surprisingly, implicitly. This notion is best illustrated by reference to two cases construing whether notice had been "provided". First, the Court of Criminal Appeals has found that simply providing a defendant access to its files, in which was contained references to extraneous offenses, by means of an "open file policy" will not suffice to indicate such intent.[247] However, the Court of Criminal Appeals has also made it equally clear that the form in which the notice provided is not controlling: as long as what is provided to counsel can be reasonably assumed to be in response to the defendant's request, rule 404 (b)'s notice requirements are satisfied.[248]

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[244] *See e.g.*, TEX. CODE CRIM. PROC. ART. 39.14 which requires court action to be effective.

[245] *Id.* at 38, n.3.

[246] *Id.* at 38.

[247] *Buchannan v. State*, 911 S.W.2d 11, 14 (Tex. Crim. App. 1995).

[248] In a recent case, defense counsel requested notice of extraneous offenses and the state provided him with witness statements. Although, the response was not in the form of "notice of extraneous offenses" specifically, the Court of Criminal Appeals found that in the context in which the statements were given, it was a reasonable assumption that they were

ii. Has the Notice Been Timely Provided?

The statute is silent as to the time, before the trial, in which notice is to be provided after a timely request or order by the court. In very general terms, notice is likely to be deemed timely as long as it is given in advance of trial. There does not appear to be any *per se* rule regarding when notice is unreasonable and recent appellate courts have answered the question providing the greatest amount of benefit to the state construing the purpose of the statute as seeking to prevent surprise.[249] Although bright line rules cannot be provided, it appears that the longer the request is on file or the court's order has been in effect prior to trial, the better case the accused has in showing an unreasonable provision of notice. Again, the watchword is to seek notice early.

iii. What Facts Must Be Provided in the Notice?

Again, the rule does not provide any guidance regarding how descriptive the notice must be of the extraneous offense for which notice is given. As stated earlier, this is a good reason to seek notice in the form of a motion so that defense counsel can craft and seek the court to order the specific manner in which notice is to be provided and the degree of description with which notice should be provided.

The case decisions suggest that the watchword is that the notice should be sufficient enough to communicate to the defendant not only the intent to offer the evidence but sufficiently identify the particular offense so that the defendant will not be surprised of its introduction at trial. Appellate courts split on what this ultimately requires.[250]

iv. Allegations in the Motion

Again, it is important to make sure that any motion for notice be specifically styled as a "motion" for notice of intent to offer extraneous offenses. The motion should also cite rule 404 (b) as the primary legal basis. Additionally, it is useful to cite due process and due course of law as a legal basis for the motion. Finally, counsel should cite the state's continuing duty to provide and supplement any notice provided until and through trial.[251]

Counsel should also give consideration to the drafting of the prayer. Defense counsel should request that an order be entered directing that notice be provided, the manner by which notice should be provided, the time before the commencement of trial by which notice should be provided, and any specific description desired for the extraneous offenses for which notice is sought. Finally, counsel should consider requesting additional relief in the event that the court's order is not complied with such as that for a delay or continuance at trial should notice not be provided according to the terms of the order. Additionally, proposed relief could include a request to preclude the use of any extraneous offenses for

responding to the defendant's request and any extraneous matters referred to in the statements satisfied notice. The opinion did not discuss the other traditional requisites of the adequacy of notice discussed in section of this paper.

[249] *See e.g., Shalt v. State*, 28, S.W.3d 819 (Tex. App.—Corpus Christi 2000) (finding that notice given the Friday before the Monday morning trial was reasonable given the facts of the case).

[250] In *Hayden v. State*, 13 S.W.3d 9 (Tex. App—Texarkana 2000, *reversed* 11/14/01 in No. 610-00 (Tex. Crim. App. 2001), the Court of Appeals held that simply identifying a person as a witness and providing that person with a copy of the statement was sufficient notice. *Sebalt v. State*, 28 S.W.3d at 822, found that providing the county and cause numbers of prosecutions sufficed. In short, it appears that if facts are provided upon which a reasonable investigation could apprise defense counsel with the underlying facts of the extraneous offenses will suffice to satisfy the rule.

[251] *See Washington v. State*, 943 S.W.2d 501, 504 (Tex. App.—Fort Worth, 1997, *pet. ref'd.*).

which notice was not provided according to the terms of the court's order.

(2) Notice of Impeachment Evidence

As with extraneous offenses, the State is required to give notice of its intention to use evidence of a witness' prior convictions to impeach that witness pursuant to Texas Evidence Rules 608 and 609.[252]

Again, counsel should take the time to craft as specific a request or motion as her knowledge of the case will permit. The motion should not only cite Texas Evidence Rule 609 (f), but the due process and due course of law provisions given the constitutional implications of the value of impeachment evidence to an accused.[253]

The importance of this rule is that its terms apply to any and all witnesses. From the perspective of defense counsel, unless there is a reason to keep the identity of some witness a secret until trial, each defense witness should be listed because failure to provide the notice may form the basis for a motion for the witness to testify free from impeachment.[254] This could be of obvious import in the presentation of a defense case. On the other hand, because the rules of evidence permit impeachment by either party,[255] there is no reason not to include each and every potential state's witness, as discovered through defense counsel's investigation, informal and formal discovery, and as provided in the state's written witness lists. Again, the only matter that should be considered is that, in some circumstances, the listing of witnesses has the potential of revealing defensive trial strategy. If defensive strategy will be revealed, counsel should think carefully about listing all witnesses in her request or motion.

To be sufficient, the request must be in writing and specify the witness or witnesses of the requesting party as to whom the request is being made. The discussions above concerning the advisibility of seeking notice of impeachment evidence by means of a request or a motion apply with equal force here.

C. TEXAS CODE OF CRIMINAL PROCEDURE NOTICE PROVISIONS

There are two other notice provisions found in the Code of Criminal Procedure that are applicable in juvenile proceedings by incorporation under section of the Family Code.[256] Generally speaking, chapter 38 of the Code of Criminal Procedure contains special evidentiary rules applicable in adult criminal trials. Within these rules there are two main notice provisions. They are set forth below:

(1) Notice of Intent to Offer Evidence of Pre-Petition Oral Recording of Child Victim.

Under the terms of a very confusingly written statute, the State is entitled to introduce in evidence "the recording of an oral statement of[a] child made before a complaint has been filed or an indictment returned" subject to certain conditions in certain prosecutions in which a child younger than 13 years of age is determined to be "unavailable" as that term is defined in the statute.[257] By analogy, this statute must be read to mean a pre-petition recording.

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252 TEX. EVID. R. 609 (f).

253 The matter is expressly considered "favorable" under *Brady v. Maryland* and its progeny and should be sought under both legal bases. *See* discussion *supra,* Ch. 4, p. 24.

254 Rule 609 (f) speaks in mandatory terms and states that if the proper notice is not given the evidence of a conviction is not admissible. *See Bryant v. State*, 997 S.W.2d 673, 677 (Tex. App.—Texarkana 1999).

255 *See* TEX. EVID. R. 607.

256 TEX. FAM.. CODE § 51.17.

257 TEX. CODE CRIM. PROC. ART. 38.071 § 1, 5.

One of the statute's requisites for introduction of such a recording is that "immediately after a compliant was filed or an indictment returned, the attorney representing the state notified the court the defendant, and the attorney representing the defendant of the existence of the recording[.]"[258] Consequently, this article is also self-executing and counsel should be mindful of the obligations of the State to provide notice in the event that a trial is had.

(2) Notice of Intent to Introduce in Evidence a Child Abuse Victim's Hearsay Statement

This statute[259] is covered by Texas Family Code Section 51.031 and has been previously discussed above. Its provisions contain a nearly identical requirement of notice to be provided without the necessity of a defense request.[260]

(3) Notice of Oral or Sign Language Statement of An Accused.

Unlike written statements,[261] the Code of Criminal Procedure's article 38.22 expressly provides that before evidence of an oral or sign language statement of an accused may be admitted in evidence, "not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings…"[262]

Likewise, section 51.095 (a) (5) (d), Texas Family Code, also requires that "a complete and accurate recording" of the child's statement be provided to counsel not later than 20 days before trial.

(4) Evidence of Extraneous Offenses in Certain Prosecutions Involving Minor Children

In certain enumerated prosecutions, notwithstanding Texas Evidence Rule 404 (b), the State may introduce evidence of extraneous offense alleged to have been committed by the juvenile respondent against the alleged victim for certain limited purposes.[263]

However, that section also provides that "on timely request by the defendant, the state shall give the defendant notice of the state's intent to introduce in the case in chief" such evidence "in the same manner as the state is required to give notice under Rule 404 (b)…" The comments pertaining to 404 (b) notice apply equally here.

D. JUVENILE-RESPONDENT'S DUTY TO GIVE NOTICE OF INTENT TO INTRODUCE CERTAIN EVIDENCE

Counsel should be mindful of at least two situations in which she is required to give notice to the state at the risk of being precluded from use of the evidence at trial[264].

(1) Evidence of Previous Sexual Conduct

258 TEX. CODE CRIM. PROC. ART. 38.071 § 5 (7).

259 TEX. CODE CRIM. PROC. ART. 38.072.

260 Under the hierarchical governance of rules of procedure in juvenile court, because the matter is addressed in the Family Code, strictly speaking article 38.072 does not apply. Nonetheless, it is included in the discussion because familiarity with the corresponding adult provisions may be important in construing cases under the adult statute in the context of juvenile proceedings.

261 An accused's written statements are discoverable under the rules of formal discovery. *See* TEX. CODE CRIM. PROC. 39.14 (a).

262 TEX. CODE CRIM. PROC. ART. 38.071 § 5 (7).

263 TEX. CODE CRIM. PROC. § 5 (7).

264 In at least one notable instance, the Code of Criminal Procedure requires that an accused give notice to the state of her intent to rely on the insanity defense. TEX. CODE CRIM. PROC. ART. 46.03. No such requirement is applicable to juvenile proceedings.

In sexual assault prosecutions, "evidence of specific instances of an alleged victim's past sexual behavior is…not admissible" may be admissible by offering documentary evidence or direct or cross examination with the requirement that the defendant "Inform the court out of the hearing of the jury prior to introducing such evidence or asking any such question."[265] case involving , counsel must give notice to the state of an intent to introduce evidence

(1) Notice of Intent to Offer Evidence of Self-Authenticating Business Records Affidavit.

In matters of evidence, in the event that proof of a document will be made pursuant to a self-authenticating business records affidavit, such evidence is not admissible unless at least fourteen business days prior to the commencement of the trial, the defendant filed such evidence with the court and gave notice of such filing to the state.[266] While no pre-trial notice need be given the State, it is important for counsel to be mindful of the requirement that he notify the court.

E. Conclusion

With the foregoing in mind, counsel should conduct discovery in conjunction with formal discovery motions as well as seeking all available notice provided for in the Code of Criminal Procedure, Rules of Evidence, and Family Code.

[265] TEX. EVID. R. 412 (c).

[266] TEX. EVID. R. 902 (10).

Chapter 6

SUPPRESSION AND EXCLUSION OF EVIDENCE ON CONSTITUTIONAL GROUNDS

In many cases, the most significant aspect of pre-trial practice will concern defense challenges to the admissibility of evidence based on the manner in which the evidence was obtained.[267] Such challenges may be based on potential violations of either, or both, federal and state constitutional provisions.[268] Additionally, such challenges may be based on statutory provisions that govern the manner in which evidence may be obtained. Generally, the substantive rights forming the basis of such challenges are the right to be free from unreasonable searches and seizures,[269] the privilege against self-incrimination,[270] right to counsel,[271] and the right to due process of law.[272] To some degree, some of these constitutional provisions will be overlapped by corresponding statutory provisions.[273] To the extent that the constitutional and statutory provisions overlap, both provisions should be urged as a basis for suppression.

Because the goal of pre-trial practice is the suppression of evidence to preclude its use at trial,[274] identifying and litigating pre-trial suppression issues is a critical component of a comprehensive pre-trial practice.

A. STATE AND FEDERAL EXCLUSIONARY REMEDIES FOR VIOLATIONS

The violations of any of the constitutional and statutory provisions discussed here may be subject to remedy by means of the so-called "exclusionary" rule. The

[267] The distinction is important because it addresses the admissibility of evidence on constitutional grounds as opposed to state statutory requirements which may impose requirements additional to those required by federal or state constitutional provision. For example, Family Code Section 51.095 imposes procedural requirements governing the admissibility of a child's oral and written statements that are beyond those required by constitutional provisions.

[268] U.S. CONST. AMENDS. IV, V, VI, XIV; TEX. CONST. ART. I, §§ 9, 10, 19.

[269] U.S. CONST. AMEND. IV; ART. I, § 9; *see also* TEX. FAM. CODE §54.03 (e).

[270] U.S. CONST. AMEND. VI; TEX. CONST. ART. I, § 10.

[271] U.S. CONST. AMEND. V; TEX. CONST. ART. I, § 10.

[272] U.S. CONST. AMEND. XIV; TEX. CONST. ART. I, § 19.

[273] For example, the constitutional requirement that all statements be voluntary is also found in §51.095 (a) (1) (B) (ii), and art. 38.21, Texas Code of Criminal Procedure, made applicable to juvenile proceedings by § 51.17, Texas Family Code. Also, the requirement that the warnings designed to safeguard the privilege against self-incrimination be given and voluntarily waived can be found in § 51.05 (a) (1) (B) (ii), (5) (A). Finally, section 54.03 (e), Texas Family provides that "[a]n extrajudicial statement which was obtained without fulfilling the requirements of [the Family Code] or the constitution of this state or the United States, may not be used in an adjudication hearing…" and "[e]vidence illegally seized or obtained is inadmissible in an adjudication hearing."

[273] U.S. CONST. AMENDS. IV, V, VI, XIV; TEX. CONST. ART. I, §§ 9, 10, 19. Exclusion of evidence for violations of state statutory provisions is discussed *infra* Ch. 4, at p. 19.

§ 54.03 (e).

[274] The discussion will not include exclusion of evidence of juvenile's statement for violations unrelated to those constitutionally required

"exclusionary" rule requires that evidence obtained in violation of a constitutional (or, in the case of Texas' exclusionary rule) or statutory provision be suppressed and excluded from the state's use at trial.[275] It is important for counsel to be familiar with both the federal and state exclusionary rule and the means by which they are invoked as a remedy.

The federal statutory rule is the familiar rule announced in *Mapp v. Ohio*.[276] However, Texas' exclusionary rule, expressly made applicable to juvenile proceedings,[277] is found in article 38.23, Texas Code of Criminal Procedure. It provides, in part:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any cause.[278]

The Family Code also provides for a more limited exclusionary sanction for such violations.[279]

The following is general listing of the constitutional rights and possible bases for the exclusion of evidence in juvenile proceedings.

(1) Evidence obtained in a manner that violates the essentials of due process, fair treatment, and dignity;[280]

(2) Evidence obtained in violation of the Fourth Amendment, U.S. Constitution's prohibition on unreasonable searches and seizures;[281]

(2) Statements and evidence obtained in violation of the Fifth Amendment, U.S. Constitution's privilege against self-incrimination and right to counsel;[282]

(3) Evidence obtained in violation of the Sixth Amendment right to counsel;[283]

Should counsel believe a particular constitutional provision provides a basis for

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[275] *See Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1961).

[276] 367 U.S. 643, 81 S.Ct. 1684.

[277] TEX. FAM. CODE § 51.17 (c).

[278] TEX. CODE CRIM. PROC. ART. 38.23 (a).

[279] Finally, section 54.03 (e) provides that "[a]n extrajudicial statement which was obtained without fulfilling the requirements of [the Family Code] or the constitution of this state or the United States, may not be used in an adjudication hearing…" and "[e]vidence illegally seized or obtained is inadmissible in an adjudication hearing." TEX. FAM. CODE § 54.03 (e).

[280] *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428; *R.A.M. v. State*, 599 S.W.2d 841. In the context of suppression of evidence, due process challenges would be directed primarily at the means by which evidence has been obtained. The classic example would be the use of procedures to obtain evidence that so "shock the conscience" as to violate due process. Another example might be a prosecutor's use of evidence learned during the existence of a prior attorney-client relationship with the childe. *See e.g., State Ex. Rel. Sherrod. v. Carey*, 790 S.W. 2d 705 (Tex. App. 1990).

[281] U.S. CONST. AMEND. IV; TEX. CONST. ART. I. § 9; *see Lanes v. State*, 767 S.W.2d 789, 800-01 (Tex. Crim. App. 1989) (the probable cause requirement of both the United States and Texas constitutions are applicable in juvenile proceedings); *see also* Texas Family Code Section 52.01 (b) which expressly provides that the taking of a juvenile into custody is an arrest "for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States.

[282] U.S. CONST. AMEND. IV; TEX. CONST. ART. I. § 9.

[283] U.S. CONST. AMEND. VI; TEX. CONST. ART. I. § 10; *see In Re Gault,* 387 U.S. at 36, 87 S.Ct. 1428; *see also* TEX. FAM. CODE §51.10 (statutory right to counsel).

the possible exclusion of evidence, she should consult the case decisions interpreting each provision prior to litigating the challenge.

B. EXCLUSION OF EVIDENCE: CHALLENGING THE USE OF EVIDENCE BASED ON UNREASONABLENESS OF SEARCHES AND SEIZURES

(1) Introduction

As with adults, the juvenile-respondent is guaranteed the protection of the Fourth Amendment's prohibition on unreasonable searches and seizures.[284] While there are some special rules regarding search and seizure in the context of juveniles not applicable in the adult context, a working understanding of federal and state constitutional (and state statutory) search and seizure law will suffice to form the basis of any pre-trial suppression effort.

This section addresses the most familiar aspect of pre-trial suppression practice: the suppression of evidence based on *how* the evidence was obtained. More specifically, this section will address the general grounds upon which a pre-trial motion to suppress evidence may be based. As will be discussed below, the sources of the bases for seeking suppression of such evidence may be constitutional or statutory.

(2) Possible Bases of Motions to Suppress Evidence Based on Searches and Seizures: Constitutional Bases

The following is an exemplary, but not exhaustive, listing of the possible constitutional bases for challenging the admission of evidence based on the manner in which it was obtained. Again, counsel should consult the case decisions for specifics of litigating each possible challenge:

A. Search or seizure conducted without a warrants[285] and not pursuant to any permissible exception to the general warrant requirement.[286]

B. Search or seizure so extraordinarily intrusive that unreasonable;[287]

C. Matters seized without warrant not in plain view or with probable cause;[288]

D. Container searched without warrant or probable cause;[289]

E. Detention not based upon reasonable suspicion;[290]

F. "Community Caretaking Stop";[291]

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[284] U.S. CONST. AMEND. IV*; See Russell v. State*, 739 S.W.2d 923 (Tex. App. 1987).

[285] It should be remembered that unlike with adults, in Texas, there is no warrant requirement applicable to juveniles. *See Vasquez v. State*, 739 S.W.2d 37 (Tex. Crim. App. 1987). Counsel should be mindful that the taking of a juvenile into custody is an "arrest" for purposes of determining the validity of the detention or any corresponding searches. TEX. FAM. CODE § 52.01 (b).

[286] Establishing that the arrest was made without a warrant may require that the state produce evidence that the arrest comes within a valid exception to the general warrant requirement. In this regard, this is a burden of proof borne by the state. Discussion of the burdens is beyond the scope of this paper. Counsel should consult the case decisions to determine the placement of burdens in litigating search and seizure challenges.

[287] *See e.g., Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611 (1985) (surgical procedure so intrusive that it violated Fourth Amendment's prohibition on unreasonable searches).

[288] *See e.g., DeLao v. State*, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977).

[289] *See e.g., United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476 (1977).

[290] *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968).

[291] *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998) (officer has the power to make an investigatory stop based on a reasonable belief that the person's well being is at risk even

G. Search conducted incident to arrest was not made pursuant to a "custodial" arrest,[292] or exceeded the scope of permissible searches incident to arrest;[293]

H. "Pat-down" frisk for weapons not based on reasonable fear for officer's safety or exceeded the scope of any permissible "pat down" weapons search;[294]

I. Evidence obtained without valid consent, or exceeded the scope of the consent provided; and

J. Evidence obtained without valid waiver of juvenile-respondent's constitutional rights.[295]

As has been emphasized, this is only an exemplary listing. Should counsel believe that any of the above challenges potentially available in a given case, the case decisions construing the requirements of each should be consulted.

(3) Possible Basis of Motions to Suppress Evidence Based on Searches and Seizures: Statutory Bases

In addition to constitutional grounds, motions to suppress evidence may be based on statutory grounds. In many respects, search and seizure law in Texas is a matter that, in addition to constitutional provisions, is also heavily regulated by statute. Counsel should therefore be familiar with the statutory framework governing much of search and seizure practice in Texas.[296]

Texas statutes not only address the substantive limitations on law enforcement conduct in conducting detentions of juveniles and adult arrests but, as has been previously discussed, also the remedy for their violation. Indeed, it is safe to say that nearly all areas of constitutional search and seizure law can be addressed by means of state statutory reference. Nonetheless, it is always the better practice to allege violations of the separate and independent constitutional provisions as the primary basis of establishing both the violation and the right to relief. These matters are discussed in greater detail below.

As with adult criminal proceedings, the Family Code sets forth both the bases upon which a child may be taken into "custody" "[297] as well as the remedy for violation of these requirements.

Texas Family Code § 52.01 expressly sets forth five situations in which a child may be taken into custody. Four are specific to juvenile proceedings:

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without sufficient information to indicate that criminal activity might be afoot).

[292] *See Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969).

[293] *See e.g., Illinois v. Lafayette*, 462 S.W.2d 640, 103 S.Ct. 205 (1966).

[294] *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968).

[295] The basis would overlap with the statutory provisions go9verning the waiver of rights found in the Family Code. *See* TEX. FAM. CODE §51.09.

[296] It was long held that the United States Constitution set the floor of constitutional protections at which State constitutional provisions could, but need not, provide greater protections. See e.g., . However, in the Court of Criminal Appeals surprisingly held that this was not the case; the Texas Constitution could provide less protection than the United States Constitution because they are separate and independent constitutions and not necessarily based on the other at the time of adoption. Thus, the need to allege both state and federal constitutional bases as independent grounds for relief is heightened.

[297] "Custody", in juvenile proceedings, is the functional equivalent of an "arrest" for purposes of "determining the validity of taking him into custody or the validity of a search under the laws and the constitution of this state or of the United States." TEX. FAM. CODE §52.01 (b).

(1) pursuant to an order of the juvenile court as provided in the Family Code;

(2) by a law enforcement officer if there is probable cause to believe that the child has engaged in conduct violating a political subdivision or delinquent conduct, or conduct indicating a need for supervision;

(3) by a probation officer if there is probable cause to believe that the child has violated a condition of probation; and

(4) pursuant to a directive to apprehend as provided in the Family Code.[298]

The fifth basis upon which a child may be taken into custody is "pursuant to the laws of arrest[.]"[299] This provision incorporates the laws of arrest as they relate to adults in criminal proceedings into juvenile proceedings. Thus, some of the provisions relating to arrests without warrants in the Code of Criminal Procedure may be pertinent determining what constitutes a permissible "custody" in a juvenile proceeding.[300] It should be borne in mind, however, that a particular detention might be upheld as permissible under the Family Code but not satisfying the stricter requirements of the Code of Criminal Procedure.[301] As with the juvenile provisions setting forth the situations in which a juvenile may be taken into custody, the practitioner should research the requirements of these provisions to determine whether grounds for challenging the admission of evidence exist.[302]

Finally, and importantly, with respect to juvenile detentions:

"There is no requirement of an arrest warrant or other court order to arrest on probable cause. There is also no requirement of an emergency that makes it impracticable to obtain a warrant or court order."[303]

C. THE BASIS FOR EXCLUDING THE EVIDENCE

The federal exclusionary rule requires the exclusion of evidence offered by the state when that evidence was obtained in violation of certain of the accused's Fourth,[304] Fifth,[305] and Sixth[306] amendment rights. Exclusion is

298 The substantive requirements of each and, accordiny, the legality of the custody, will be determined by the case decisions construing each provision and should be consulted when drafting any motions to suppress evidence.

299 TEX. FAM. CODE § 52.01 (a) (5).

300 TEX. CODE CRIM. PROC. ARTS. 14.01, *et. seq*

301 *See e.g. Vasquez v. State*, 739 S.W.2d 37.

302 The main import of Chapter 14 of the Code of Criminal Procedure is that it provides for a wide range of circumstances in which warrantless arrests may be made. While some of the Code of Criminal Procedure's provisions are made inapplicable due to the absence of a warrant requirement on the on hand and section 52.01's independent authority for taking a child into "custody", the Code of Criminal Procedure provisions remain an important aspect of pre-trial suppression practice in juvenile proceedings.

303 ROBERT O. DAWSON, TEXAS JUVENILE LAW 5th Ed., p. 308 (Tex. Juv. Prob. Comm. 2000).

304 *Mapp v. Ohio*, 367 U.S. 64, 81 S.Ct. 1684 (1961).

305 *Miranda v. Arizona*, 384 U.S. 436, 479, 8 S.Ct. 1602 (1966).

306 *Brewer v. Williams*, 430 U.S. 387, 405-06, 97 S.Ct. 1232.

required as a matter of federal constitutional law.[307]

On the other hand, while Texas has its own exclusionary rule, the Texas exclusionary rule does not appear to be constitutionally based.[308] However, it is clear that Texas imposes what the leading commentator notes as "probably the broadest state law exclusionary requirement of any American jurisdiction."[309] Understanding both exclusionary rules is a necessary component of pre-trial suppression practice.

(a) Specific Reliance on State Exclusionary Rule.

Although counsel should specifically invoke reliance upon the Fourth Amendment and Article I, § 19 as separate and independent grounds,[310] counsel should, but need not, specifically indicate her reliance upon Article 38.23 as the basis for exclusion.[311]

(b) Procedural Requirements Invoking Exclusionary Remedy

There are several procedural burdens that the juvenile-respondent will have, in addition to establishing that evidence was illegally obtained, in order to invoke the exclusionary remedy:

(1) Showing that evidence obtained in violation of a "law" of the United States or Texas;[312]

(2) Establishing that the juvenile respondent has standing to challenge the alleged violation of the "law";[313]

(3) Establishing "harm" or "prejudice" from the alleged violation of the "law";[314] and

(4) Showing of a "causal connection" between the alleged violation and the obtaining of the evidence.[315]

Each of these required showings should be borne in mind by counsel in drafting and litigating any motion for the exclusion of evidence.

D. OTHER CONSTITUTIONAL GROUNDS FOR SUPPRESSION OF EVIDENCE: VOLUNTARINESS OF CHILD'S STATEMENT

Because a child has the same rights to due process and due course of law as do adults,[316] if a question is raised concerning the

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307 *See generally, Mapp v. Ohio*, 367 U.S. 64, 81 S.Ct. 1684

308 *See e.g., Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998*) citing Welcheck v. State*, 247 S.W. 524, 528 (Tex. 1924) (Article I, § 9 does not require exclusion of evidence obtained in violation of its provisions).

309 40 GEORGE DIX & ROBERT O. DAWSON &, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4.15.

310 *See White v. State*, 543 S.W.2d 36, 369-70 (Tex. Crim. App. 1976).

311 Because the exclusionary rule is a mandatory once an accused has shown a violation of her rights, there is no need for her to specifically its reliance. *See Polk v. State*, 738 S.W.2d 274, 276 (Tex. Crim. App. 1987).

312 Determining what constitutes a "law" is not as simple as it appears; counsel should consult the case decisions for further guidance. *See* 40 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4.44.

313 *See Craft v. State*, 295 S.W. 617 (1927).

314 *See generally See* 40 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4.45.

315 *See generally* 40 *See* 40 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4.58.

316 *In re D.B.*, 594 S.W.2d 207 (Tex. Civ. App. 1980).

voluntariness of a child's statement, the trial court is required to conduct a hearing outside the presence and hearing of the jury and make an independent finding whether the statement was made voluntarily.[317]

In addition to the constitutional grounds requiring statements be made voluntarily, state statutes requiring that statements be voluntary are applicable to juvenile proceedings.[318]

E. EXCLUSION OF EVIDENCE: CHALLENGING THE USE OF EVIDENCE BASED ON VIOLATIONS OF PRIVILEGE

The child in a juvenile proceeding enjoys all of the privileges guaranteed by the rules of evidence.[319] In the event that evidence is obtained, either directly or derivatively, in violation of one of the enumerated privileges, absent a valid waiver, such evidence should not be admissible.

Any challenge to the admissibility of evidence based upon a possible violation of privilege should also allege non-compliance with Texas Family Code § 51.09's waiver of rights procedures. Finally, the use of evidence obtained in violation of a privilege provision may also form the basis for a due process violation.[320]

[317] *See Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964).

[318] TEX. CODE CRIM. PROC. ART. 38.22 requires all statements be voluntary as a prerequisite to admissibility and is made applicable to juvenile proceedings pursuant to section 51.17 of the Family Code. Much of section 51.095 of the Family Code is intended to ensure that a child's statement is voluntarily made. *See* TEX. FAM. CODE 51.095 (a) (1), (5).

[319] *See* TEX. EVID. R. 101, *et. seq*., made applicable to juvenile proceedings by Texas Family Code § 51.17 (c).

[320] *See State Ex. Rel. Sherrod. v. Carey*, 790 S.W. 2d 705.

F. DRAFTING THE MOTION TO SUPPRESS EVIDENCE

(1) Raising and Preserving Issues Regarding Exclusion of Evidence

Because a motion to suppress seeks first to have the trial court suppress specified evidence, at a minimum it should allege that evidence has been obtained in violation of the juvenile-respondent's constitutional or statutory rights. However, because the motion to suppress also seeks to serve as the basis for a properly preserved point of error should the motion be denied, the motion should also meet the requisites for preserving error. A motion to suppress, then, at a minimum, should memorialize the evidence objected to, the legal basis for the objection (constitutional or statutory provision violated), the factual basis for the violation, and the legal basis for exclusion.[321]

The preservation requirements that address the sufficiency of objections to evidence are found in Rule 103, Texas Rules of Evidence, and Rule 33.1, Texas Rule of Appellate Procedure. Read together these rules provide the general framework for preserving and, consequently, raising challenges to the admission of evidence.

Rule 103 (a) (1) provides that objections should "stat[e] the specific ground of objection…" otherwise there can be no error in the admission of evidence. Likewise, Texas Rule of Appellate Procedure 33 requires, as a prerequisite to appellate review, that a timely objection have been made "with sufficiently

[321] For the courts' view of the specific requirements of motions to suppress, *see Mayfield v. State*, 800 S.W.2d 932, 935 (Tex. App.—San Antonio 1990); *see also Livingston v. State*, 731 S.W.32d 744, 747 (Tex. App.—Beaumont, *pet. ref'd*.).

specificity…unless the specific grounds were apparent from the context."[322]

Finally, the specific requirements of the substantive constitutional or statutory provision which is alleged to have been violated will also determine any additional requirements of specificity or substance of the objection. Only research of the pertinent case authority will provide these requirements. Thus, adequate research of the grounds for the motion to suppress is critical to the proper drafting of motions to suppress evidence.

(2) Other Matters for Inclusion In the Motion

The motion to suppress should always request that a hearing be held on the motion so that the counsel may produce evidence, if necessary in order to meet any evidentiary burdens in establishing either the illegality of the detention or search and/or the exclusionary rule's applicability.[323]

If necessary, counsel might attach affidavits of persons with knowledge of facts pertinent to the resolution of the motion to suppress. Attachment of such affidavits may increase the likelihood that the trial court will set the matter for a pre-trial hearing.

Finally, counsel should always request that, after a hearing is held, the trial court make findings of fact and conclusions of law.[324]

(3) Timeliness of the Motion to Suppress

As discussed earlier,[325] there is no statutory requirement applicable to juvenile proceedings such as Article 28.01, Code of Criminal Procedure, which addresses pre-trial *hearings* and the requirement that matters be raised by motion prior to the hearing.[326] Again, while the rules of civil procedure address the scheduling of pre-trial *conferences* to resolve certain pre-trial matters, there is no express statutory recognition of pre-trial hearings in juvenile proceedings. Thus, counsel must look to local rules for the scheduling of pre-trial hearings and the time before which formal, written motions will need to be filed. At a minimum, however, the rules of civil procedure require such motions to be served on the state not later than three (3) days before such hearing.[327]

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[322] TEX. R. APP. PROC. 33.1. It is unclear how the statutory prohibition on "waiver" of rights without counsel and the juvenile-respondent's express assent, *see* TEX. FAM. CODE § 51.09, alters the preservation requirements of the rules of evidence or Family Code. At least in the context of defects in pleadings, the failure to object does not amount to a waiver because of the provisions of Texas Family Code Section 51.09. Nonetheless, counsel should always object and identify the particular basis of the objection and remedy sought.

[323] For example, for some search and seizure issues, case authority may impose burdens of persuasion or proof on the accused in litigating the issue. *See* 42 GEORGE DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE §§ 29.91, *et. seq.*

[324] While the rules of civil procedure provide for findings of fact and conclusions of law, it appears that the rule is limited to judgments after trial. *See* TEX. R. CIV. PROC. 296 - 299a. Nonetheless, counsel may always request such findings and conclusions and, indeed, such a request may be appropriate in some cases. For example, with regard to determining the voluntariness of a statement under article 38.22, Tex. Code of Crim. Proc., findings and conclusions must be made by the trial judge. *See* TEX. CODE CRIM. PROC. ART. 38.22 § 6.

[325] *See* discussion *supra* at p. 1.

[326] See TEX. CODE CRIM. PROC. ART. 28.01 § 2.

[327] TEX. R. CIV. PROC. 21.

Chapter 7

SPECIAL DUTIES OF THE COURT APPOINTED ATTORNEY: OBTAINING EXPERT ASSISTANCE OF INVESTIGATOR

The attorney appointed by the Juvenile Court has special duties and obligations to the indigent juvenile-respondent. These duties and responsibilities arise from the general constitutional requirements that an indigent accused should have access to expert assistance when such assistance will be a significant factor at her trial. Further, this "access" should not be determined simply based on the wealth of the accused.[328] Thus, as a matter of due process, there are circumstances in which the trial court is required to provide funds to assist the indigent accused. This notion has found voice not only in our constitutional jurisprudence but also statutes affecting indigent defense and providing for the means by which assistance to the indigent will be funded at no cost to the accused. These statutes are applicable to both adult[329] and juvenile proceedings.[330] The juvenile practitioner should be familiar with the procedures required for utilization of the juvenile statute concerning indigent defense.

Generally, there are four main areas requiring attention of the court appointed attorney: (1) obtaining the finding of indigence, (2) obtaining expert investigative assistance if necessary, (3) obtaining specialized expert assistance, and (4) obtaining approval for covering of necessary expenses in defending the accusation. These issues will be addressed below.

A. Family Code's Statutory Requirement of Provision for Indigent Defense and Guidance from Code of Criminal Procedure

While the Family Code has long recognized the need to provide for compensation of counsel for indigent defense,[331] unlike the Code of Criminal Procedure,[332] it did not address the need for compensation of expert and other expenses incurred by counsel representing the indigent juvenile-respondent. The Code of Criminal Procedure has long provided for payment of expenses incurred during the course of representing an indigent accused and a small body of case decisions interpreting the provision has developed. No such provision was made in the context of juvenile proceedings.

However, the last legislature added to section 51.10 (i) that attorneys representing indigent juvenile-respondents were to be paid according to the schedule in "…Article 26.05 of the Texas Code of Criminal Procedure…" By specifically incorporating the fee schedules set forth in Article 26.05, Code of Criminal Procedure, the express rules providing for reimbursement of "reasonable and necessary expenses" brought indigent defense in juvenile proceedings on par with adult juvenile defense.[333] Consequently, those procedures for

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328 *See generally Ake v. Oklohoma* 470 U.S. 68, 105 S.Ct. 1087 (1985).

329 *See* TEX. CODE CRIM. PROC. Art. 26.05.

330 *See* TEX. FAM CODE § 51.10 (i).

331 *See* TEX. FAM CODE § 51.10.

332 *See* TEX. CODE CRIM. PROC. Art. 26.05.

333 In view of the sweeping changes to indigent defense made by the 2001 legislature's passing of the Fair Defense Act, Senate Bill 7, and the amendments to the existing indigent assistance statute--Article 26.05, Code of Criminal Procedure, there is good reason to believe that the liberal spirit

reimbursement of counsel for expenses incurred obtaining expert or investigative assistance should be applicable in juvenile proceedings.

Because section 51.10 (i) expressly incorporates the indigence assistance statute found in the Code of Criminal Procedure,[334] it is important to discuss the procedures governing indigent defense as they have developed in the context of criminal procedure.

(1) Seeking Court Approval of Expenses for Investigative Assistance

The assistance of a licensed professional private investigator is essential in a significant number of cases for a myriad of reasons and for a great many purposes. Counsel who is aware of the limits of his or her expertise is in the position of better representing his or her client The attorney is best suited to represent the interests of an accused when he or she is familiar with the law and the facts, which *in the usual case, cannot be relied upon for full disclosure within the files and reports contained in the prosecutor's report.* He or she is usually not better qualified to ferret out those facts as is a private investigator. The importance of an investigator to the practicing attorney is buttressed by the full-time positions in nearly every prosecutor's office of such an investigator. Defense attorneys should recognize the importance of the investigator to the fulfilling of their professional obligations and, in any case in which it is necessary, seek court approval of funds to reimburse investigative assistance early and vigorously.

The representing attorney should seek court approval of reimbursement for investigative expenses early. Indeed, as soon as the attorney-client relationship is consummated and informal discovery of the prosecutor's case (review of offense report, witness statements, *etc.*) has revealed sufficient information to draft a list of tasks for an investigator, counsel should seek investigative assistance.[335]

(a) Legal Basis For Court Approval of Expert Assistance: Family Code Statutory Authority

Now that there is direct statutory authority for professional assistance to the court appointed attorney,[336] the Family Code makes direct statutory authorization for the obtaining of expert and investigative assistance to court appointed counsel.[337] The Family Code provides that court appointed counsel is entitled to be reimbursed from the general funds of the county according to the schedule adopted pursuant to Article 26.05, Tex. Code Crim. Proc.

Article 26.05 expressly authorizes a court's approval to reimburse for expenditure of funds to obtain investigative assistance. This article was amended in 2001 as part of that legislature's comprehensive attempts to address a variety of deficiencies in indigent defense. Given the fact that due process is applicable to juvenile defense, the significant similarities in criminal and juvenile defense, the frequency of indigent

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of that act governs the practice of indigent defense of juveniles.

334 *See* TEX. CODE CRIM. PROC. Art. 26.05, *et. seq.*, which governs various issues related to the defense of indigent accuseds including in non-capital cases.

335 In order to best utilize the assistance of a private investigator and minimize the expenditure of unnecessary investigative time, counsel should always have as thorough an understanding of the prosecutor's case as zealous investigation and informal/formal discovery will permit consistent with the admonition to seek investigative assistance early. *See* I TEXAS CRIMINAL PRACTICE GUIDE § 60.03 [3][a] (Mathew Bender 2001).

336 As a separate and independent basis for investigative assistance, counsel should urge such assistance as a matter of due process under *Ake v. Oklohoma* and its progeny. *Ake v. Oklohoma*, 470 U.S.. 68, 105 S.Ct. 1087; *see also Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995).

337 By its terms, the statute excludes attorneys employed with a public defender's office. TEX FAM. CODE § 52.10.

status of juvenile respondents, and the legislative addressing of similar matters in the juvenile context, the seeking of expert assistance in the juvenile context may be provided significant guidance from Article 26.05.

(b) What the Statute Authorizes

Article 26.05 governs the procedure for seeking investigative and expert assistance in the context of juvenile proceedings by direct statutory reference.[338]

Article 26.05 provides that "[c]ounsel…shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts."[339] That statute was significantly amended by the 77th legislature during which the issue of indigent defense figured heavily. Many of the changes made to that statute made obtaining expert and investigative assistance to the court appointed attorney much simpler and easier. The juvenile defender must be aware of the statute and its changes.

The most significant change made to the statute authorizes reimbursement for all "reasonable and necessary expenses" while the former statute only authorized reimbursement for those expenses incurred with prior court approval. *See* TEX. CODE CRIM. PROC. Art. 26.05 (a) (West's 2000). Under both articles, however, the court is authorized to make such reimbursement payable directly to the private investigator. TEX. CODE CRIM. PROC. Art. 26.05 (h).

The change to the statute is noteworthy because it allows the court appointed attorney to incur expenses to cover investigative and expert assistance *without* first obtaining court approval. That is, he or she may work assured that, upon a proper showing, such expenses will be reimbursed. However, it is important to note the limitations of the statute. First, while the statute provides that counsel can incur such expenses without prior court approval, such expenses will be reimbursed only if, and to the extent that, such expenses are fond by the court to be "reasonable and necessary". Thus, the attorney seeking to utilize the new language of the statute risks some or part of the expenses incurred to be denied. Because the expenses will have already been incurred, it places the attorney in the conundrum of advancing the funds and costs of the investigation from his or her own funds and with the risk that they may or may not be reimbursed. This dilemma may be of questionable constitutionality.[340] Thus, counsel should be aware of the risks attendant with the statute's otherwise seemingly sweeping language that such expenses "shall be" reimbursed.

Second, the statute permits only "reimbursement" of expenses associated with expert or investigative assistance.[341] It does not provide for the *advancement* of funds to hire such assistance. This is a critical distinction. In practical terms, it underscores the admonition stated herein that counsel should ask early, often, thoroughly, and zealously for the approval of reimbursement of funds if that is the route he or she will take to obtain assistance.

In practical terms, these two points have significant import to the appointed attorney seeking expert and investigative assistance. First, seeking prior court approval is the least risky option in ensuring that expense incurred will not be completely reimbursed. Second, appointed counsel should develop a relationship with experts and investigators that are aware of the mechanics of how they will be paid. If an expert requires payment up front to retain his or her services, because the statute does not

[338] TEX. FAM. CODE § 51.10 (i).

[339] TEX. CODE CRIM. PROC. ART. 26.05 (a).

[340] *See Johnson v. State*, 746 S.W.2d 791, 794-95 (Tex. App.—Corpus Christi 1987, *no pet.*).

[341] TEX. CODE CRIM. PROC. ART. 26.05 (d).

authorize the advancement of funds, appointed counsel will have to hire the expert out of his or her own funds and hope that the court will reimburse those funds at a later date. This is clearly one of the deficiencies of the statute and places appointed counsel in a dilemma of . Finally, because the court may approve only reimbursement, counsel should never be in the position of seeking advancement of funds because the denial of such a motion does not appear to be error based on the plain language of the statute.

(c) Filing Procedure: Filling the kinene-5.(d S-6. b)-5(e: Fan Inveove onsti

(3) "Reasonable" Allegation.

Counsel should ensure that the motion contains a thorough statement as to the reasonableness of the funds requested. This will require counsel to familiarize his or herself with the going rates of private investigators in the community. This can be achieved by speaking with private investigators and attorneys that have used them. With some judges, more detail will require a schedule of the rates quoted to support the rate quoted and for which reimbursement will be requested. Additionally, if a rate is requested higher than the court is accustomed to paying, counsel may demonstrate that a higher rate may be appropriate given the complexity of the case or the skill of the private investigator. Affidavits from the private investigator or attorneys that have hired the private investigator may be of assistance. Again, counsel must be mindful of revealing defensive strategy, work product or other privileged information since it is not clear that such filings will be sealed. After this is done, there should be a sufficient statement that sets forth what the "commonly accepted rate" for payment of such expenses are.

(4) Statement or Allegation of Harm and Duties of Counsel Without Expert Assistance.

It never hurts defense counsel to include in either the prayer or shortly before the prayer that the expert assistance is needed to further the overall constitutional right of effective assistance of counsel, compulsory process, confrontation, etc., of counsel. In this regard, it does not help to assert that the denial of such expenses will deny or undermine counsel to fulfill his constitutional and ethical obligations to his client.

(5) Statement As to Specific Amount Requested and Right to Return to Request More.

Always ask for what you want. If you do not get it all, ask again.[346] It is important to make such a request in your prayer. The allegations should state that such funds have been expended, how they were expended, and how additional funds are necessary based on the status of the investigation, etc., at that point. The need for showing materiality are equally applicable here and the caution with revealing privileged information and defensives strategy apply equally here.

(6) Request Court to Grant Hearing.

If you are unable to obtain reimbursement of what you truly believe to be a reasonable and necessary expense, request an ex parte hearing at which you can adduce testimony or provide an offer of proof of the need for the expenses in order to ensure that the appellate has a record on which to evaluate your claim.[347]

(7) Miscellaneous

Investigative assistance should be sought as soon as its need becomes apparent irrespective of whether prior court approval will be sought or whether investigative expenses will be incurred with post incurred approval is sought. In this regard, counsel should be mindful that given the Family Code's authorization for grand jury review of filing a petition, there may be instances in which court appointed counsel may seek a pre-petition assistance of a private investigator should there ever arise an occasion in which court appointed counsel is involved in that early a stage in the proceedings.[348]

Finally, the admonition in seeking investigative assistance is to give due

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[346] *See Castillo v. State*, 739 S.W.2d 280, 294 (Tex. Crim. App. 2987).

[347] *See Ventura v. State*, 801 S.W.2d 225, 227 (Tex. App.—San Antonio 1990) (failure to show prejudice will preclude harm showing).

[348] *See* Att'y. Gen. Op. No. G-65 (1990).

consideration after the initial investigation and discovery has taken place as to whether the assistance of an investigator is necessary in assisting the attorney in the zealous representation of the juvenile-respondent. If it can be said in good conscience and faith that such assistance is necessary, the watchwords are—ask early, ask specifically for what you need, ask again, and, if necessary, spend your own money to secure the assistance. In short, take the risk.[349] Defense attorneys should recognize the importance of the investigator to the fulfilling of their professional obligations and, in any case in which it is necessary, seek court approval of funds to reimburse investigative assistance early and vigorously.

Counsel should always be aware of the greater role that his or her efforts play in the development of the practice of juvenile defense for subsequent issues that may arise in the instant case, his or her future cases, and the general practice in the juvenile court. In this regard, the more often that das seek investigative assistance in cases where such assistance is necessary to the performance of his or her duties in a professional, zealous, and competent manner, the greater that he or she educates the judges as to the need for such assistance.

B. SEEKING THE APPOINTMENT OF A GUADIAN AD LITEM

The role of the parent in a juvenile proceeding cannot be gainsaid. Indeed, the Supreme Court, in its seminal case construing the constitutional requirements of due process applicable in the context of juvenile proceedings, the Court found that the right to counsel was both the juvenile respondent's *and his mother's*.[350] The statement may have been dicta and overly broad, the notion underlying the statement is simple: in the context of juvenile proceedings, the participation and presence of the parent is fundamental. The Family Code requires the presence of a parent, where possible, at every stage of proceedings.[351] In either event, children are not to appear before the juvenile court without a parent or guardian. Section 51.11 imposes upon the juvenile court the obligation of appointing a guardian ad litem to "Protect the interests of the child" if "a child appears before [it] without a guardian or parent." That section provides for appointment of a guardian ad litem in two situations: (1) where there is no parent or guardian or (2) where there is a parent or guardian but who is "incapable or unwilling" to protect the interests of the child. The unique characteristics of the juvenile proceedings place additional ethical duties on the defense attorney not normally present in the adult context. It should be noted that the juvenile court can appoint the attorney to be the ad litem.[352]

There are two situations in which appointed counsel might move the Court to appoint a guardian ad litem. The simple case is the one in which appointed counsel is aware that there is no guardian or parent. The more complicated case arises where there is a parent

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349 "The juvenile needs the assistance of counsel to cope with the problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *In Re Gault* 387 U.S. at 3, 87 S.Ct. at 1448 *quoting Powell v. Aabama*, 287 U.S. 45, 53 S.Ct. 55 (1932).

350 "Mrs. Gault testified that she knew she could have appeared with counsel and the juvenile hearing. The knowledge is not a waiver of the right to counsel which she and her juvenile son had,…They had a right to expressly be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did nor did not choose to waive the right. IF they were unable to afford to employ counsel, they were entitled in vied of the seriousness of the charge and the potential commitment, to appointed counsel, unless they hose waiver. " *In Re Gault*, 387 U.S. at 41-42, 87 S.Ct. at 1451.

351 TEX. FAM. CODE § 51.115 (a).

352 TEX. FAM. CODE § 51.11(c).

or guardian but there is an inability or unwillingness to protect such interests. In either case, appointed counsel should move the court to appoint an ad litem.

Finally, the more complicated case arises where the attorney is appointed to be the ad litem. It is my belief that there are situations where the attorney cannot perform the duties and obligations of an *ad litem* consistent with the duties and obligations of the counsel.[353] In this situation, the attorney's duties as counsel should predominate where there is a conflict of interest because of the constitutional nature and primary responsibility as counsel. Appointed counsel should move the Court to appoint another guardian ad litem based on the conflict of interest and offer to make an in camera showing of the specific conflict. An example in which this might occur is the case where counsel may be able to successfully challenge a prosecution pre-trial or at trial but where the consequences of the juveniles release might be contrary to protection of the interests of the child. Appointed counsel should never even have such concerns be in his mind and should be mindful of even the semblance of such a conflict. At the minute it arises, move the court to appoint an *ad litem* based on conflict of interests that hamper the constitutional right to effective assistance of counsel and conflict free representation.

[353] *See generally* TEX. R. PROF. RESP. 1.01, *et. seq.*

Chapter 8

SPECIAL DUTIES OF THE COURT APPOINTED ATTORNEY: OBTAINING OTHER PROFESSIONAL EXPERT

In addition to the need and the basis for obtaining the reimbursement for investigative assistance, there may also be the need for the assistance of an expert if such assistance addresses a matter that will be a "significant factor" at trial. Here, in addition to the statutory basis provided in the Family Code,[354] the there are constitutional requirements that overlap and, perhaps, at time supercede the statutory entitlement. Counsel should always seek assistance pursuant to both the statutory and constitutional bases. This section discusses the constitutional right to expert assistance.

There are fewer things more important for the defense lawyer to recognize is when he or she needs professional assistance beyond that which he or she possesses. Once this can be recognized, the question arises of how one pays for such assistance. If counsel is retained and there are funds available to cover the costs of expert assistance there is not an issue. However, the court appointed attorney may have significantly difficulty raising funds to secure the assistance of an expert although both his ethical and professional obligations indicate and the particular facts of the case otherwise warrant such assistance. This section focuses on the constitutional right to expert assistance for indigent defendants. Faced with the untenable situation where only the wealthy would be able to obtain such assistance, much of the case law elucidating the constitutional right to expert assistance at no cost to the indigent has sought to ensure that wealth does not determine access to expert assistance. Much of the case law that has developed has sought to ensure that that indigent defendant's access to expert assistance is commensurate with that of the non-indigent defendant.

Counsel representing the indigent juvenile-respondent must have a working understanding of the law governing obtaining expert assistance, the procedures for obtaining such assistance, and the procedures governing *ex parte* proceedings, in general.

A. Due Process Requires Assistance of Experts Where Issue Will Be Significant Factor At Trial

Due process requires that trial courts provide indigent defendants with competent expert assistance when such assistance will pertain to a "significant factor" in the defense.[355] What constitutes a "significant factor" in the defense is a matter left to be determined by the facts of the particular case, the needs of the particular defensive strategy, and, to some extent, the creativity of the defense attorney.

Once counsel has identified the "significant factor" for which expert testimony is essential to the presentation of the defense, counsel must prepare to make the

[354] *See* TEX. FAM. CODE § 51.10 (i).

[355] *Ake v. Oklohoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1096 (1985); Texas courts have also recognized the right to expert assistance under the Texas Constitution's due course of law provisions. *See e.g., Rey v. Sta*te, 897 S.W.2d 333, 342-43 (Tex. Crim. App. 1995). In either event, counsel should always seek assistance on both grounds as separate and independent bases for expert assistance.

preliminary showing required to implicate the constitutional right to assistance.

C. Making the Request for Assistance: Drafting the Motion

As with other pre-trial motions, the form and content of the motion seeking expert assistance will be determined, in large part, by the threshold showings required in the case law interpreting the constitutional right. In this regard, in order to establish a due process right to appointment of an expert, an indigent defendant must make a substantial showing[356] that the issue upon which the expert assistance is sought will be a significant factor in her defense.[357]

At a minimum, then, the motion should contain a thorough recitation of the following matters[358]:

1. The defensive strategy and its relationship to the elements of the offense, matters on which the jury may be charged in the court's charge, defensive issues such as justification, necessity, *etc.*, party liability;

2. The particular issue within the defensive strategy for which the expert assistance is sought;

3. How the particular issue is an issue properly a matter of expert assistance and beyond that of the counsel or jury's common sense[359];

4. How the issue will be a "significant factor" in the defense and how the defense will be deprived without such evidence.

5. Request for Hearing in the event that motion is denied in whole or in part.

6. Request that court make findings of fact and conclusions of law of any deficiencies or reasons for denying motion in whole or in part.

7. Harm Allegation. The motion should always state that the accused will be reversible without a harm analysis and that denial of the motion, in part or whole, will amount to a denial of due process because assistance of an expertise "structural error".[360]

The right to proceed *ex par*te will ensure that a properly drafted and thorough motion will not reveal defensive strategy to the State.

D. The Right to Proceed Ex Parte

Although *Ake's* language concerning the accused's ability to make his threshold showing *ex parte* was dicta, the Court of Criminal Appeals has since mandated that

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356 As will be discussed herein, the constitution guarantees that this "showing" can be made *ex parte.*

357 *See Ake v. Oklahoma*, 470 U.S. at 86, 105 S.Ct. at 108; *DeFreece v. State*, 848 S.W.2d at 158.

358 No such list can be comprehensive or, for that matter, even considered to be authoritative. The listing represents those matters which have arisen in case law in which the appellate courts have found significant in reviewing a claim of denial of the right to expert assistance.

359 *See e.g., Jackson v. State,* No. 72,622 1999 (indigent defendant not entitled to polygraph expert because credibility is the type of issue that jury's routinely resolve).

360 *See Rey v. State*, 897 S.W.2d at 345.

such a showing be made *ex parte*.[361] The Court found that allowing the defense to file a motion for the appointment of an expert without informing the prosecution is consistent with the due process principles upon which *Ake* is based; the fact that the accused must make a proffer of her defensive strategy and the specific need and uses to which the expert testimony will be put requires such an *ex parte* showing.[362] Moreover, to require the accused to make this showing under the eyes of the prosecutor would state her "work product" and defensive strategies. These two factors would create the dilemma of forcing counsel to choose between revealing defensive strategies or foregoing expert assistance. Consequently, the accused has an absolute right to proceed *ex parte* on her request for expert assistance.[363]

Procedural Guide to Filing the Motion for Expert Assistance

There are various different ways to seek expert assistance fully utilizing the right to proceed ex parte while making a sufficient threshold showing and different attorneys have different methods. The following procedure is a suggested method and may be altered to suit any particular cases' needs.

(1) *Motion for Leave to Proceed Ex Parte*. First, counsel file a motion requesting leave to proceed *ex parte*. This motion should cite the reasons for seeking leave to proceed *ex parte* and the right under *Rey v. State* to do so. It should not divulge either the type of expert sought or even the identity of the expert. Indeed, it may simply assert that leave is requested to litigate a constitutional right for which there is an absolute right to proceed *ex*

361 *Williams v. State*, 958 S.W.2d 186, 191 (Tex. Crim. App. 1997, *reh'g. denied*).

362 *See Rey v.State*, 897 S.W.2d at 338-39.

Finally, counsel should ensure that she has legible copy of all of these motions in her file.

F. What Types of Experts Are Covered

Initially, *Ake* and its early progeny were read to be limited to the appointment of mental health experts in insanity cases in capital cases. However, it has since been made clear that *Ake's* requirement of the provision of expert assistance to indigent defendants is applicable to other experts and in non-capital contexts.[364] Indeed, the constitutional requirement has been held applicable to medical experts on the cause of death[365] What this means is that it is the significance of the issue, not the type of expert that characterizes the constitutional right.[366]

G. The Quality of Expert

As important as the right to an expert assistance, is the right to an *interested* expert assistance; a neutral or disinterested expert is not a *defense* expert.[367] The indigent accused is entitled to an expert whose assistance is not consistent with a "neutral" witness.[368]

G. What the Right Does Not Mean or Require

While the indigent juvenile respondent may be entitled to expert assistance, she will not be entitled to the expert of her choice of that the state must purchase for the indigent defendant all of the expert that his wealthy counterpoint can afford.[369] Instead, the purpose of the constitutional rule is to level the playing field and give the accused access to a competent expert who can assist in the evaluation, preparation, and presentation of the defense.[370]

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364 *See e.g., Rey v.State*, 897 S.W.2d at 342-43 and *DeFreece v. State*, 848 S.W.2d 150, 160 (Tex. Crim. App. 1993).

365 *Rodriguez v. State*, 906 S.W.2d 70, 73 (Tex. App.—San Antonio 1995, *pet. granted.*

366 *See e.g., Rey v. State*, 897 S.W.2d at 338 (question in each case must not be what field the particular expert knowledge is involved but, rather, the importance of the scientific issue to the case and how much help a defense expert could have given*); see also Griffieth v. State*, 983 S.W.2d 282, 288 (Tex. Crim. App. 1998).

367 *DeFreece v. State,* 848 S.W.2d at 158; *see Rodriguez v. State*, 906 S.W.2d 70, 75 (Tex. App.—San Antonio, *pet. granted*).

368 *See Taylor v. State*, 939 S.W.2d 148, 152-53 (Tex. Crim. App. 1993).

369 *Ake v. Oklohoma*, 470 US. At 83, 105 S.Ct. at 1096; *Cantu v. State*, 939 S.W,2d 627, 638-39 (Tex. Crim. App. 1997).

370 *Rey v. State*, 897 S.W.2d at 337.