

**DON'T YOU (FORGET ABOUT ME):
KEEPING APPEALS IN MIND
WHEN TRYING A CASE**

31st Annual Juvenile Law Conference

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What We Are Going to Talk About

- Right to Appeal
- Preserving Error at Trial
 - What Is A Record?
 - Raise it or waive it!
 - The Texas Three Step
 - Keeping Your Record Clean
- Basics of Appeal

**Child's Right to Appeal
TFC § 56.01**

Child May Appeal:

- A finding that child engaged in delinquent conduct (Adjudication) or CINS
- The Disposition or Modification
- A Mental Health Commitment (Chapter 55)
- A finding Requiring Sex Offender Registration
- The Transfer/Release Hearing

Child's Right to Appeal
TFC § 56.01

- ⦿ Certification as an adult – Accelerated
TFC § 56.01(h), (h-1)

- ⦿ No Appeal if a plea bargain agreement unless:
 - Court grants permission
 - Based on written pre-trial motions
 - TFC § 56.01(n)

Child's Right to Appeal

- ⦿ Court must advise the child of his right to appeal upon entering an appealable order. TFC § 56.01(e)

Child's Right to Appeal

Appellate Court shall dismiss an appeal upon the State's motion if the child has escaped from custody pending the appeal and has not voluntarily returned on or before the 10th day after the date of escape. TFC § 56.01(k)

State's Right to Appeal
TFC § 56.03

- ⦿ Must appeal within 15 days
- ⦿ Order exempting child from sex offender registration
- ⦿ **Determinate Sentence Cases:**
 - Decision dismissing all or part of petition
 - Decision that arrests or modifies judgment
 - Decision that grants a new trial
 - Decision that sustains claim of former jeopardy
 - Decision granting a motion to suppress

Preserving Error at Trial

What is a Record?

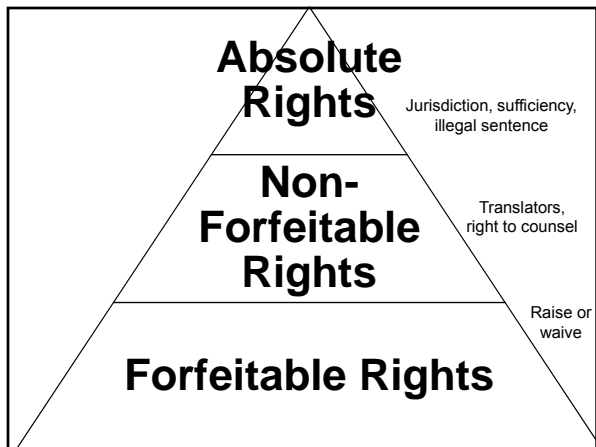
- ⦿ **The Clerk's Record**
 - Designate What Material Is Included in the Record
 - Request Specific Items to be Included
- ⦿ **The Reporter's Record**
 - Consists of all testimony, exhibits, and statements in open court
 - Request for record must be made in writing & becomes part of the Clerk's Record



Raise It or Waive It

- ◎ **All Error Is Preserved In The Trial Court**
 - By Motion
 - By Objection
 - By Specific Request

- ◎ **Give The Court The Chance To Fix It**



**TRE 103 – PRESERVING
ERROR**

- Are you Keeping It Out Or Putting It In?
- Harmless Error v. Fundamental Error
 - Substantial right
 - OBJECTION
 - Offer of Proof/Bill
- Running Objections
- Offers of Proof
 - 2 purposes (trial & appellate)
 - ASAP but before charge
 - WARNING: court can add



WHAT WHY HOW

- What
 - Make your request specific
 - The record must show what's objectionable
- Why
 - State why something shouldn't come in
 - One objection won't preserve another
- How
 - Give the judge the way to keep this out
 - One legal ground won't preserve another


**Always
make a
constitutional
objection**



When To Object

- ◉ “Contemporaneous Objection Rule”
 - Usually when evidence is admitted
 - Prior to the response from the witness
- ◉ Not 3:00am the morning after cross...
- ◉ A question of strategy

The Texas Three Step



The Key Is to ***NOT*** Get What You Ask For

1. Object
2. Ask for Instruction
3. Ask for a Mistrial

Make Sure It's On The Record

- ⦿ Bench Conferences **Not** Recorded
- ⦿ In Chambers **Not** Recorded
- ⦿ Off the record **Not** Recorded

Specific Motion Requirements

- ⦿ Motion For Continuance *must* be in writing
- ⦿ Motion for new trial in writing within *30 days*
- ⦿ A motion in limine *preserves nothing*

Keeping Your Record Clean

"When you first heard the gunshot *where* were you when you saw the defendant with the gun?"

"I was right here"

"Right there?"

"Yes, right here."

"And that's where you saw him?"

"Yes, right there."

Basics of Appeal

Trial Counsel's Responsibilities TFC § 56.01(f)

- SHALL file the notice of appeal
- Inform the juvenile court whether trial counsel will handle the appeal

Getting off the Case

- File Motion to Withdraw ASAP after verdict
- Notify appellate counsel ASAP

Advising the Client

- Child is the client – not the parent
- Make sure the child wants to appeal
- Advise child of the differences between a trial and an appeal.
- Court can assess the costs of appeal against the child or parent. TFC § 56.01(l)

Appellate Process

- An appeal does not suspend the juvenile court's order or release the child from custody unless the juvenile court so orders. TFC § 56.01(g)
- If court orders placement outside the home, the appeal takes precedence over all other cases. TFC § 56.01(h)
- Appellate court may provide for a personal bond. TFC § 56.01(g)
- Appeal from certification hearing does not stay adult criminal proceedings. TFC § 56.01(g-1)

Right to Appeal TFC § 56.01(a), (b)

- Appeals "as in civil cases generally"
 - Rules of Civil Procedure
 - Final Appeal to Texas Supreme Court
- Must include the juvenile court's adjudication and all rulings contributing to the adjudication

Perfecting the Appeal

Establishing Indigence for Appeal

1. Trial Court Finding

- Findings upon conclusion of a hearing; or
- Hearing on the issue (within a few days of the final hearing)
- Must have an order of indigence signed. Docket entry not enough.

2. Affidavits

- Parent signs a new affidavit of indigence (pauper's oath) (TRAP 20.1)

AND

- Parent signs affidavit of inability to pay the costs of appeal
- Must file with the notice of appeal

Contest by District Clerk

- District Clerk may file a contest.
- Hearing must be held within 10 days of filing the notice of appeal
- Child and parent must be present
- Court will SUSTAIN or OVERRULE contest (or make parent pay for partial record)
- It is the State's burden to prove prior indigence finding is no longer valid

What happens if you don't do this?

- You are the attorney of record
- You will have to pay the filing fee in the Court of Appeals – not reimbursed by the County
- You may be required to pay for the record

Notice of Appeal

- Required information must be included in the notice of appeal. TRAP 25.1(d)
- Due 30 days after judgment signed UNLESS appealing certification which is due 20 days after judgment signed. TFC § 56.01(h-1)
- Appeal for child in placement takes precedence. TFC § 56.01(h)

Notice of Appeal

- May file early. TRAP 27.1(a)
- May extend for 15 days. TRAP 10.5(b)(2); TRAP 26.3

Get the Record TFC § 56.02

- Clerk's Record
- Reporter's Record
- Request ASAP
- If retained, must pay for the reporter's record. TFC § 56.02(a)

Supplementing and Correcting

- **Request in Writing**
 - What Would We Be Asking For???
- **Corrections to the record**
 - Agree OR
 - Have a Hearing

Lost or Destroyed Record

☉ Clerk's Record

- Parties can agree -OR-
- Trial Court will determine an accurate replacement

☉ Reporter's Record – new trial IF:

1. Timely requested
2. No fault of appellant
3. Necessary to the appeal
4. Cannot be replaced

☉ If appointed counsel on appeal, file a copy of your appointment order with the Court of Appeals ASAP.

☉ Be sure to redact the child's name.

The Brief

☉ Due 30 days after record filed

☉ See TFC § 56.01 (precedence over other appeals)

☉ Extensions?

☉ Must include certain documents in the Appendix. TRAP 38.1(k)

Anders Procedures

- Frivolous points and attorney duties
- *Anders* procedures

Format and Word Count

- 14 point Typeface; 12 point footnotes
- Double spaced
- 15,000 words for Brief
- 7,500 words for Reply Brief
- 4,500 words for Petition for Review and Response
- Certificate of Compliance
- Electronic Filing

Redaction

- You may NOT identify the child by name in the brief. You must refer to the child by initials. Also, omit any identifying information. TRAP 9.8
- Redact parent's names or any other means of identifying the child
- TFC § 56.01(j) – Opinion may not identify the child or his family

Appendix to Brief
TRAP 38.1(k)

- ◎ Necessary Contents (must redact identifying information)
 - Trial Court's judgment or appealable order
 - Jury charge and verdict or Findings of Fact and Conclusions of Law
 - Text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which argument is based
 - Any other pertinent items (excerpts from reporter's record, relevant court opinions)

Practical Tips and Personal Preferences

- ◎ Do NOT withdraw immediately after the final hearing
 - New counsel has no information to contact the parent to get the proper affidavits signed and executed within the time deadlines.
 - If a jury verdict, must file MNT to preserve a factual sufficiency challenge on appeal.

- ◎ If client is in TJJD, must file an open records request to determine his/her location.
- ◎ The record in a juvenile appeal is under seal. You must go to the Court of Appeals to pick up a copy or sign up for the attorney portal to have access to the documents.

Court of Appeals' Decision
TFC § 56.01(i)

- May affirm, reverse or modify the order
- May reverse or modify the disposition while affirming the adjudication
- May remand a reversal for further proceedings

Court of Appeals' Decision

- Motion for Rehearing Due within 15 days
- Motion for Reconsideration *En Banc*
- Purpose – to correct errors of law or fact
- Extend time to File Petition for Review

Review in Texas Supreme Court

- Petition due with 45 days of COA's judgment or ruling on last motion. TRAP 53.7
- Must state why petition should be granted. TRAP 53.2(i); TRAP 56.1
- If appointed, include redacted order finding indigence and appointing counsel.
- Appendix must include the COA's opinion. TRAP 53.2(k)



Attorney at Law

February 11, 2018

, Court Reporter
District Court

RE: **In the Matter of**
Case No(s).

TO THE OFFICIAL COURT REPORTER:

I was court appointed to represent the Appellant in the above-styled and numbered cause. Pursuant to Rule 34.6(b), Texas Rules of Appellate Procedure, I am making this written request that a reporter's record be prepared to include the following:

1. The jury voir dire examination;
2. All the testimony of all the witnesses who testified during the adjudication and disposition hearings;
3. If a plea hearing, all of the admonishments and testimony of the witnesses;
4. All hearings, held outside the presence of the jury, as well as all communications between the Court and the jury, and the Court and the parties;
5. All pre-trial hearings and conferences;
6. All jury arguments during the hearings on adjudication and disposition;
7. All testimony presented during any hearings concerning any motion for new trial or bill of exception; and
8. All testimony presented during any hearings, including motion to

modify hearings.

I would further request that the reporter's record include copies of the exhibits admitted during the proceedings, including but not limited to juror information cards, photographs, written reports and documents, penitentiary packets, and transcripts of voice recordings, if any.

The TRIAL/HEARING occurred on _____. A Motion for New Trial has (or has not) been filed.

If another court reporter took the testimony please contact me immediately so that I can contact that court reporter.

Thank you again and, if any problems arise, please call me.

Sincerely,

State Bar Number:

Attorney For Respondent On Appeal Only

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that this document has been e-served on _____ on _____.

No. _____

IN THE INTEREST OF

§

IN THE ____ JUDICIAL

_____,

§

DISTRICT COURT

A CHILD

§

_____ COUNTY, TEXAS

ORDER ON COUNSEL'S MOTION TO WITHDRAW AND
APPOINT APPELLATE COUNSEL

Came on to be considered _____ Motion to Withdraw and Appoint Appellate Counsel. Said Motion is hereby granted.

IT IS ORDERED that _____ be and he/she is hereby authorized to withdraw as counsel of record and shall have no responsibility for the representation of Respondent after the signing of this Order.

IT IS FURTHER ORDERED that the below listed attorney be and is hereby appointed to represent said Respondent in his/her appeal of this matter.

Appellate Counsel: _____

State Bar Number: _____

Address: _____

Phone Number: _____

Fax: _____

Signed this _____ day of _____, 20____.

JUDGE PRESIDING

WHEREFORE, PREMISE CONSIDERED, _____ prays this Court will grant this Motion to Withdraw and appoint appellate counsel.

Respectfully submitted,

State Bar No. 18532800

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document has been e-served on _____ on _____.

14. Original Answer
15. Motion to Modify
16. 1st Amended Motion
17. Request for Agreed Order
18. Agreed Order
19. Terms and Conditions of Probation
20. Motion to Modify
21. Psychological Consultation
22. Psychological Assessment
23. Addendum #4 Supplemental PDR
24. Petition for Delinquent Conduct
25. 1st Amended Petition
26. Victim Services Report
27. PDR
28. Psychological Assessment
29. Psychological Consultation
30. Explanation of Rights
31. Judgment to TYC
32. TYC Letter
33. TYC Report
34. Psychological Evaluation Exhibit #2
35. Order/Judgment to TDCJ
36. Notice of Appeal
37. Affidavit of Indigency

- 38. Docket Sheet
- 39. Motion for New Trial
- 40. Grand Jury Approval of Determinate Sentence.

WHEREFORE, PREMISE CONSIDERED, the Defendant/Appellant respectfully requests that these matters be contained within the record of this appeal.

Respectfully submitted,

State Bar No.

Attorney For Respondent (On Appeal Only)

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Designation has been e-served on _____, on _____.

CAUSE NO.

IN THE MATTER OF	§	IN THE _____
_____	§	DISTRICT COURT
A CHILD	§	_____ COUNTY, TEXAS

**ORDER ON CONTEST OF PAUPER'S OATH/
AFFIDAVIT OF INABILITY TO PAY COSTS ON APPEAL**

ON THIS DAY came on to be heard the clerk of the District Court's Contest of Pauper's Oath on Appeal. Both sides announced ready and judicial notice was taken of the fact that Respondent is a child. Evidence was presented that the Respondent was without means to pay for an appeal. Evidence was also presented that the Respondent's parent or guardian was without means to pay for an appeal. Both sides rested and closed.

After considering the evidence and hearing arguments of counsel, the Court finds that Respondent, _____, and his parent/guardian are indigent persons and are unable to pay the costs for an appeal to the Court of Appeals as well as unable to give security for same. The Contest of Pauper's Oath/Inability to Pay Costs on Appeal is, therefore, **OVERRULED**.

SIGNED this _____ day of _____, 20__.

JUDGE PRESIDING