

**TOP TEN THINGS YOU SHOULD KNOW
TO ASK ABOUT HANDLING KID CASES**

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I. INTRODUCTION

This article will provide the family law practitioner with a list of ten key items to ask or give thought to when handling a custody dispute in the context of divorce. The list

focuses on the often difficult questions that arise when seeking effective injunctions, discovery, and releases that sometimes are overlooked.

In the spirit of David Letterman, let us

ask...

WHAT ARE THE TOP TEN THINGS YOU SHOULD KNOW TO ASK WHEN HANDLING KID CASES?

10. Words Can Hurt–But Can You Use Them Anyway?

The temporary restraining order is often the first item of business in a custody case. The general thought is that everything should be kept at the *status quo* to protect the interests of the parties and the children. *See, Mussina v. Morton*, 657 S.W.2d 871, 873 (Tex.App.–Houston [1st Dist.] 1983, no writ.).

Texas Family Code §6.502 provides for the issuance of temporary orders in a dissolution of a marriage, including the prohibitions of certain acts as proscribed in Tex. Fam. Code §6.501. Tex. Fam. Code §6.501 allows a court to issue a temporary restraining order that is necessary for the protection of the parties. Frequently, testimony is presented at the hearing from one or both parents that, during the initial period of separation, one parent has made some disparaging remarks about the other parent in front of the child. Often, such testimony results in the entry of an order prohibiting both parents from using disparaging remarks about the other in the presence of the children. The logic behind that order is simple—the best interest of the children are never served by repeated ugly remarks by one parent about the other in the presence of the children. But, is the prohibition enforceable or a violation of each parent’s rights of free speech?

For an order to be enforceable, it must “spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.” *See Ex Parte Slavin*, 412 S.W.2d 43, 44 (Tex.1967). Therefore, drafters of an injunction relating to

An often heard question from a client during a divorce action is when can the children and I move? Until recently, the

the use of disparaging language should identify with some degree of particularity the type of language that should not be used in front of the children.

An argument could be made, however, that an injunction against the use of disparaging language violates the U.S. Constitution right to free speech. As a general rule, the First Amendment bars the government from dictating what people see, read, speak, or hear. However, the “freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography....” *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring). Courts that impose an injunction against parents are not intruding upon a protected area of speech. Rather, courts are reiterating what is already known: people are not free to defame another person.

Additionally, there is certainly an argument that the imposition is justified by a compelling state interest—to protect the best interest of the child. Courts in Texas are charged with ensuring that the child’s best interest is preserved during divorce and custody actions. Certainly, experts can be found in the field of psychologists who will testify that hearing one parent defame the other in the presence of the child is contrary to the child’s best interest. Thus, the court can justify its minor intrusion upon the speech of *both* parents by prohibiting such damaging language. Neither parent is restricted from speaking about the other in any sense but one that is already not constitutionally protected—defamation.

9. Can We Take the Next Train Out?

answer was generally “you can’t”. One of the most standard permanent injunctions ordered by our family courts in a divorce proceeding

is the restriction of residence on the parent who has the exclusive right to establish the child's primary residence. *See*, Tex. Fam. Code §153.134. Generally, issues of relocation arise subsequent to the divorce. But, it should be considered when you are advising your client during a divorce proceeding. Recent caselaw illustrates an emerging trend that allows the parent having the exclusive right to establish the child's primary residence to successfully relocate with their child.

Texas Family Code §153.001 sets forth our public policy for all suits affecting the parent-child relationship, which is to:

(1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child;

(2) provide a safe, stable and nonviolent environment for the child; and

(3) encourage parents to share in the rights and duties of raising their child after the parents have operated or dissolved their marriage.

The argument with regard to relocation, therefore, has been that the public policy cannot be honored while allowing the parent having the right to establish the child's residence to relocate to a remote location from the other parent. How can parent's possibly share in the rights and duties of raising their child if they don't live close by?

Well, the tide is shifting and courts, at least in the modification arena, are reconsidering the stoic position once asserted with regard to relocation. Now, courts and social scientists alike, are recognizing that "the divorced family is a fundamentally different unit than the marital family and that a child's circumstances may actually be improved by a relocation when other positive factors are present." *See* Edwin J. (Ted) Terry, *Relocation: Moving Forward or Moving Backward?*, Tex. L.Rev. 983, 984 (2000). And in recognizing that premise, they

are also acknowledging that "the high incidence of divorce, remarriage, second divorce, unpredictability of the employment market, and competing economic factors are all forces that affect the lives of many families and render the possibility of relocation a condition to be faced by most." *Id.*

In Texas, as well as numerous other states, relocation is becoming a part of reality, rather than a stumbling block to creating the new divorced family. For example, in *Lenz v. Lenz*, 40 S.W.3d 111 (Tex.App.—San Antonio 2000, pet. filed 3-21-01) a mother petitioned the Court for a modification allowing her to relocate residence with the children to Germany. The matter was heard and decided by a jury. *Id.* The jury verdict, upheld by the Supreme Court, allowed relocation and opened the way for further decisions in favor of relocation. *Id.* The Supreme Court, in *Lenz*, conducted a thorough review of caselaw from other jurisdictions illustrating the arguments in favor of allowing relocation. Such analysis is worthy of review when facing a difficult relocation case, either in the context of a divorce or modification of an existing decree.

In *Echols v. Olivarez*, 85 S.W.2d 475, (App.-Austin, 2002), the Court found in favor of a mother attempting to relocate from Texas to Tennessee for the purpose of advancement of employment opportunities. The Court found that such relocation would be a positive improvement for the child. *Id.* at 475. In *Echols*, the Court noted that the child's best interest cannot be determined in a vacuum. *Id.* at 482. The Court reasoned that "slavish adherence to such policy ignores the realities of a family that has been dissolved." *Id.* at 480. The *Echols* Court noted that "although consideration of the visitation rights of the noncustodial parent is important, we must primarily concentrate on the general quality of life for both the child and the custodial parent in assessing whether a change is positive and in the child's best interest." *Id.* at 482.

Finally, the El Paso Court of Appeals, in *Bates v. Tesar*, 81 S.W.3d 411, (App.–El Paso, 2002), found that relocation, regardless of distance, will not suffice to establish a material and substantial change in circumstances, but if the custodial parent does move a significant distance, a finding of changed circumstances may be appropriate. *Id.* at 431. The Court noted such factors for consideration in a relocation case as “the distance involved; the quality of the relationship between the non-custodial parent and the child; the nature and quantity of the child’s contacts with the non-custodial parent; whether the relocation would deprive the noncustodial parent of regular and meaningful access to the children; the impact of the move on the quantity and quality of the child’s future contact with the noncustodial parent; the motive for the move; and the motive for opposing the move.” *Id.*

While the tide may be turning in the direction of allowing more frequent relocation, it has not completed its journey. Practitioners should be cautious of becoming too optimistic when advising their clients that a move will be in order. Rather, focus should be placed on building a case that demonstrates that the move will not harm the existing relationship between noncustodial parent and child, while making an improvement in the child’s life that will be in that child’s overall best interest.

8. To Tell or Not to Tell? That is the Question

As any family law attorney knows, the use of mental health professionals is prevalent during a divorce. Often, parties have been seeing a therapist prior to the inception of the litigation, while others begin therapy during the litigation. Naturally, when preparing the case, the records become critical to analyzing a party’s position and formulating a strategy. Thus, requests are made for mental health records through Requests for Production and

Written Interrogatories, subpoenas, and depositions. But beware when answering those requests—all of the information obtained through a child’s mental health records may not *really* be discoverable.

Texas Rules of Evidence 510(b)(2) provides that “records of the identity, diagnosis, evaluation, or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases.” The privilege may be claimed by the patient or by a representative of the patient acting on the patient’s behalf. Tex. R. Evid. 510 (c).

As with many rules of evidence or procedure, there are exceptions. One exception to the rules states that “as to a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party’s claim or defense.” Tex. R. Evid. 510 (d)(5). Parties will argue, naturally, that the mental health records of a child fall under that exception because the condition is relied upon as part of a claim or defense. However, parties should not leap to the assumption that *all* mental health records are discoverable under that exception. Similarly, parties should not voluntarily disclose the information without first considering all of the factors required to disclose such records to the opposing party.

In *R.K., M.D. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), the Supreme Court of Texas held that not all mental health records fall within the above stated exception, even when a party claims that the condition is part of that party’s claim or defense. Rather, the Court held that the exceptions to the mental health privileges apply when “(1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party’s claim or defense, meaning

that the condition itself is a fact that carries some legal significance.” Before the test applies, both prerequisites must be met.

So, what are some of the factors considered in this balancing test? First, communications and records should not be subject to discovery if the patient’s condition is an evidentiary or intermediate issue of fact. *See, R.K., M.D. v. Ramirez* at 842. The patient’s condition must be a significant fact under substantive law. *Id.* The condition must be of some legal consequence.

The bottom line when addressing whether mental health and medical records should be disclosed is that the practitioner should review the issues in the case and the requests carefully. Most often, it seems, that the practitioner should claim the privilege and decline to disclose a client’s medical and mental health records until a more thorough analysis can be conducted and a ruling can be obtained.

7. It’s My Child—Must They Show Me the Records?

Imagine a parent is sitting in your office demanding that you subpoena the records from the child’s therapist. As a parent, surely they have an absolute right to their *own* child’s records, right? The short answer to that question is no.

Section 611.0045 of the Health and Safety Code states that “a professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient’s physical, mental, or emotional health.” Additionally, Section 611.0045(f) provides that “the content of a confidential record shall be made available to a parent *who is acting on the patient’s behalf.*”

So, it seems clear that a mental health professional is not bound to provide access to a child’s confidential records to a parent who is not acting on behalf of the child. *See,*

But the analysis doesn’t end by merely determining that the condition has significant legal consequence to the lawsuit. Rather, the court should make certain that, following an *in camera* inspection of the documents in question, the documents provided do not contain information that is broader than necessary. *Id.* The request for the records and the records disclosed should be “closely related in time and scope to the claims made [in the lawsuit].” *Id.* If the documents requested do not meet these standards, they remain privileged.

Abrams v. Jones, 35 S.W.3d 620, 626 (Tex. 2000). But the analysis doesn’t end there. A therapist may also deny access to the records of a child if the release would be harmful to the child’s physical, mental, or emotional health, even if the parent is acting in the child’s best interest. *Id.* The Court held in *Abrams* that “although a parent’s responsibilities with respect to his or her child necessitate access to information about the child, if the absence of confidentiality prevents communications between a therapist and the patient because the patient fears that such communication may be revealed to their detriment, neither the purposes of confidentiality nor the needs of the parents are served.” *Id.* at 626.

So, does the client seeking access to the records have any recourse if the mental health professional denies such access? Yes. Under Texas Health and Safety Code §611.0045(e), the professional denying access must allow examination and copying of the record by a consulting professional selected by the parent to treat the patient for the same or related condition.

The bottom line when asking whether your client is entitled to see his or her child’s records is what the motivation is behind the request. Simply because a parent wants to look at the records is not sufficient to meet the burden of showing that the release of such

records is in the child's best interest.

6. Who are the Experts?

Family law cases frequently involve the use and designation of experts. While it may seem obvious to many practitioners, often the rule regarding the time limitations to designate experts goes unnoticed.

Texas Rules of Civil Procedure 195.2 states that parties have the duty to designate experts by the later of the following two dates: 30 days after the request [for Disclosure] is served, or—(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery

Rules 194 and 195 do not address the depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party.

Therefore, careful thought should be given to whether a particular expert is really under the control of the party. For example, if a child has an existing therapist at the time a lawsuit is filed, it is likely that the therapist is not controlled by or retained by either party. If an expert is not controlled by or retained by that party, the rules relating to depositions and reports are inapplicable. If that is the case, then the party wishing to depose an expert has the option to utilize Rules 176 and 205 relating to subpoenas and discovery from nonparties.

So, what happens in the unfortunate instance that an expert is not disclosed in a Rule 194 request? Well, the simple answer is the expert may be prohibited from giving expert testimony. Texas Rules of Civil Procedure 194.2(f)(4) provides that testimony of a witness who was not timely identified must be excluded unless the court finds that: (1) there was good cause for the failure to identify; or (2) the failure would not unfairly surprise or prejudice the other parties. *See, Snider v. Stanley*, 44 S.W.3d 713 (Tex.App.—Beaumont, 2001) (finding that defendants did not supplement discovery and lacked good

period; (b) with regard to all other experts, 60 days before the end of the discovery period.

Additionally, under Rule 195.3, a party requesting affirmative relief must make an expert *retained by, employed by, or otherwise in the control of* the party available for deposition as follows: (1) if no report is furnished, the party must make the expert available for deposition reasonably promptly after the expert is designated; (2) if a report is furnished, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

cause for failing to timely designate their witness as an expert). *But See, Mares v. Ford Motor Company*, 53 S.W.3d 416 (Tex.App.—San Antonio, 2001)(holding that the trial court did not abuse its discretion in admitting the testimony of an expert witness when appellant had all the details and the witness only made minor refinements in the testimony or opinion).

5. To Pay or Not to Pay? That is the Question

As indicated above, the use of expert witnesses is prevalent in custody cases. Often, the scales of conservatorship can be tipped simply by the use of a well qualified expert. Many times, however, the child in question has been seeing a therapist prior to the filing of the lawsuit. In those cases, the question often arises as to how the therapist will be treated under the rules concerning experts.

Texas Rules of Civil Procedure 195 addresses discovery regarding testifying expert witnesses. Generally, as discussed above, a party who designates an expert must either furnish a report or make that expert available for deposition. The rule requires that the expert be “retained by, employed by, or otherwise subject to the control of the party”. The party who has retained the expert

then pays for the costs of any depositions taken by the opposing party.

The question arises, though, if the child has an *existing* therapist at the inception of the case, who is responsible for furnishing the report and for the payment of any fees associated with the deposition and testimony of the witness. The caselaw is virtually void of guidance on this issue. However, argument can be made that an *existing* therapist is not controlled by either party and should be treated as any other fact witness. The comments to Rule 195 state that “this rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party.... Parties may obtain this discovery, however, through Rules 176 [relating to subpoenas] and 205 [relating to discovery from nonparties].” As such, neither party, even when listing the therapist as a witness, has a duty to furnish a report to the other or make the party available for deposition.

Then, the question remains—who pays for the costs of the deposition or trial testimony of the child’s existing therapist?

Family court judges may appoint psychologists or psychiatrists to make any and all appropriate mental examinations of the children or parties who are subjects of the suit. Under Texas Rules of Civil Procedure 204, the Court may issue an order for examination “only for good cause shown and only in the following circumstances: (1) when the mental or physical condition of a party or of a person in the custody, conservatorship, or under the legal control of a party, is in controversy; or (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist’s records for possible use at trial.

Let’s assume that, prior to the divorce proceeding, both parents were paying for the child’s therapist. Thus, when faced with deposing a child’s therapist that predates the litigation, it can be argued that, while the expert should still be designated as a testifying expert in a Request for Disclosure, fees for the witness at a deposition should likely be borne by the requesting party. On the other hand, it can be argued that the costs of a child’s therapist, presumably looking out for the best interest of the child, who is called as a witness at trial should be covered by both parents since they originally covered the costs of the therapist pre-litigation.

4. Does He/She Need to See a Shrink?

In many custody cases, the issue of mental health of one or both parties comes into question. So, how does one go about having a party examined?

A party can file a Motion for Mental Examination under Texas Rules of Civil Procedure 204. If filing a Motion for Mental Examination, the motion must be filed no later than 30 days before the end of the discovery period.

Given those requirements, how is good cause demonstrated? The requirement of good cause for a mental examination is satisfied when the movant establishes three elements. *See, Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988). First, an examination must be relevant to issues that are genuinely in controversy in the case. *Id.* Second, the movant must show a reasonable nexus between the condition in controversy and the examination. *Id.* Finally, the movant must demonstrate that it is not possible to obtain the desired information through less intrusive means. *Id.*

Though good cause may be demonstrated, it is also necessary to show that the mental condition of the party of whom the examination is being sought is in controversy.

In demonstrating that the mental condition is in controversy, however, the movant must allege something more than routine mental anguish or emotional distress. *Id.* The plaintiff must assert “mental injury that exceeds the common emotional reaction to an injury or loss.” *Id.* The Court must balance the interests of the movant’s right to a fair trial and to obtain evidence with the other party’s right of privacy. *Id.* Thus, the two requirements must be met prior to the Court’s order of a psychological evaluation.

Therefore, careful consideration should be given to requesting a psychological evaluation in a custody matter. There should be good cause and a real controversy about the party’s mental health before such a motion is filed. As any practitioner who has litigated custody cases knows, psychological evaluations can be both expensive and time consuming, both increasing the costs of the litigation and the amount of anguish the parties face in the process.

3. May I See the Records?

Often, one or both parties have or are seeing a therapist, psychologist, or psychiatrist who may have information to

But once a party has obtained the records, does that party have a right to speak directly to the therapist or physician who has treated the opposing party? The caselaw is divided as to whether a party has a right to speak to the opposing party’s therapist absent that party’s counsel. In an unpublished Dallas opinion, *In re Trostel*, the Court upheld the issuance of a protective order preventing the requesting party from having *ex parte* communication with the opposing party’s treating doctor. 2001 WL 670490 (Tex.App.–Dallas). However, in a 2002 ruling out of the Fort Worth Court of Appeals, the Court upheld the propriety of an *ex parte* communication between party’s counsel and opponent’s treating physician. Given the caselaw, a provision stating that no communication directly with the opponent

share relevant to the custody litigation. If so, the question arises how does one party get the other’s records? There are primarily two means that specifically provide a mechanism to obtain medical and mental health records of a party. First, such information is available through a Rule 194 Request for Disclosure. Second, as discussed above, a party can file a Motion for Mental Examination. Beyond that, though, a party can obtain such information through the traditional means of discovery—interrogatories and request for production.

In a request for production, a party can furnish either the requested documents, or an authorization that allows the requesting party to obtain the documents directly from the medical professional. If utilizing a medical authorization under the Health & Safety Code §241.152(b), the authorization must (1) be in writing; (2) be dated and signed by the patient or legal representative, (3) identify the information to be disclosed, (4) identify the person or entity to whom the information is to be disclosed, and (5) be contained in a separate document from the one that contains the consent to medical treatment obtained from the patient.

party’s physician should occur without all counsel being present. Such a provision would likely prevent further litigation over the propriety of such communication.

2. What’s Going on Behind Closed Doors?

A common tool in custody litigation for gathering information about both parties is the social study. Under Texas Family Code §107.051 “(a) the court may order the preparation of a social study into the circumstances and condition of the child and of the home of any person requesting managing conservatorship or possession of the child; (b) the social study may be made by a private entity, a person appointed by the court, or a state agency, including the Department of Protective and Regulatory Services if the department is a party to the

suit; and (c) in a suit in which adoption is requested or possession of or access to the child is an issue and in which the Department of Protective and Regulatory Services is not a party, the court shall appoint a private agency or another person, including a domestic relations office, to conduct the social study. It is within the court's discretion to order a social study, based upon the facts of a given case. *See, In re Gaza*, 981 S.W.2d 438, 442 (Tex.App–San Antonio 1998, orig. proceeding).

Courts have the independent power to order a social study, but an individual party may also request one. Careful thought should be given as to whether a social study is truly needed. First, the costs of the social study can offset the benefits if it appears that both parents might be considered as good managing conservators and, therefore, a virtual tie. If the Court appoints an agency, the costs are minimized, but the length of time that it takes to complete the social study is generally greater. Second, the reports that are generated contain inadmissible hearsay.

But if a court ordered social study is requested, and a lengthy period of time goes by between the completion of the social study and the trial during which the social study will be presented, it is incumbent upon the parties to request an updated social study if necessary. Failure to do so waives error at trial for appeal purposes. *See, Bott v. Bott*, 962 S.W.2d 626 (App. Houston, 14th Dist.–1997) (when a party does not request an updated social study or object to the trial court's failure to order one, the party has waived error.)

Under the above statute, to prevail on a modification, a party must show (1) modification would be in the child's best interest and (2) the circumstances of the child, a conservator, or any other party affected by the order have materially and substantially changed since the date of the

AND THE NUMBER ONE THING YOU SHOULD ASK ABOUT HANDLING KID CASES IS...

1. To Go Behind the Decree or Not To Go Behind the Decree? That is the Question.

So, the divorce is over. The ink is finally dry on the decree. Does that mean the parties go their merry ways, everyone gets along according to the provisions of the decree, and the court never again has to see the parties again? Sometimes that happens, but frequently it doesn't. Often, one party becomes involved with another person who creates problems in what was otherwise a workable decree. Other times, circumstances with employment, health, or personalities conflict with the provisions of the decree and a modification becomes necessary.

Texas Family Code §156.001 provides that "a court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child." The grounds for modification include: "the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of the rendition of the order; the child is at least 12 years of age and has filed with the court, in writing, the name of the conservator who is the child's preference to have the exclusive right to determine the primary residence of the child; or the conservator who has the exclusive right to establish the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months." *See* Tex. Fam. Code §156.101.

rendition of the order. *See also, Bates v. Tesar*, 81 S.W.3d 411 (Tex.App–El Paso, 2002). But how do you know if there has been a material change in circumstances, and more importantly, how do you prove it?

Certainly, one way to prove it is

through the use of traditional discovery devices—requests for production, requests for admission, requests for disclosure, and interrogatories. Other ways include the use of social studies, experts, psychological evaluations, and school records.

But how do you know how far back to go to gather the information needed to prevail in a modification? The general rule is that the evidence used to prove a modification is in the best interest of the child must be subsequent to the entry of the divorce decree.

See Tex. Fam. Code §156.101. See also, *In the Interest of (C.Q.T.M.)*, 25 S.W.3d 730 (Tex.App.—Waco, 2000). The theory behind the exclusion of evidence pre-divorce decree is that said evidence is “*res judicata* of the best interests of the child as to conditions existing at that time.” *Id.* at 734. Evidence is generally relevant only to the extent that “it reflects a change of circumstances occurring after the date of rendition of the decree to be modified.” *Dunker v. Dunker*, 659 S.W.2d 106, 108 (Tex.App.—Houston[14th Dist.] 1983, no writ). *Res judicata* bars relitigation between the same parties or those in privity with them of claims finally adjudicated in a prior proceeding. *Id.* While there is no definition of privity, it generally exists for *res judicata* purposes when “(1) a party to a subsequent proceeding exercised control over the prior proceeding though not a party thereto; (2) the interests of the subsequent party were represented by another in the prior proceeding; or (3) the subsequent party is a successor in interest to a party to the prior proceeding.” *Id.* (citing *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex.1996)).

While the rule sounds daunting when attempting to obtain pre-divorce evidence, lawyers should beware in dismissing the quest for pre-divorce evidence. Rather,

Texas Rules of Evidence 406 states that “evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”

attorneys should look at the “big picture” or theme of their case and ask—how would such evidence help prove a material change in circumstances.

For example, pre-divorce evidence may be relevant in the realm of a remarriage by one of the parties. See *In the Interest of (C.Q.T.M.)*, 25 S.W.3d 730 (Tex.App.—Waco, 2000). The Court held that “if a parent becomes involved in a relationship with another after entry of a custody decree and then marries that person, the parent’s spouse would not have been a party to the prior custody litigation nor in privity with the parent who was a party to that litigation. *Id.* (citing *Cf. Getty Oil Co.*, 845 S.W.2d at 801 (*res judicata* does not bar assertion of claim in subsequent proceeding which could not have been raised in prior proceeding)). The Court concluded that “*res judicata* would not bar the introduction of evidence regarding the conduct and parental abilities of that spouse, even if such evidence concerned events occurring prior to rendition of the previous custody decree.” *Id.* Thus, it would be necessary to obtain evidence predating the divorce that might not otherwise be useful.

Another prime example of when pre-divorce evidence may be used in a modification is to prove the continuing course of conduct of a party. Often, what a person did prior to the divorce is relevant to demonstrate that no material change of circumstance has occurred. In other words, the person acted in the same manner today as he or she did prior to the entry of the divorce decree. Thus, it is likely that discovery would need to be done to obtain evidence that pre-dated the divorce. Such evidence is relevant to the extent that it shows the party’s continuing course of conduct and thus, would be discoverable under the rules.

The Texas Supreme Court has held that “the habit or custom of a person doing a particular act is relevant in determining his conduct on the occasion in question.” See *Acker v. Water Comm’n*, 790 S.W.2d 299, 302 (Tex.1990). Thus, to establish a continuing course of conduct by one parent, it may be necessary to obtain evidence predating the

divorce decree.

It is likely that there are numerous examples that could be offered to suggest that lawyers should not contain their discovery requests to post-divorce evidence. Evidence that comes pre-divorce could be used to show a continuing course of conduct of one party, to help prove changes in mental health, to prove that one party was taking affirmative steps to correct unfavorable behavior prior to the divorce and then stopped immediately upon or shortly after the rendition of the decree.

In short, when facing a modification, attorneys should, early in their case, begin to develop the theme of their litigation. Then, step out of the box and ask “what is really necessary to prove a material change in circumstances.” Sometimes, what is necessary may involve the gathering of pre-divorce evidence.