PREPARING FOR EVIDENTIARY HEARINGS
Family Law Section Program

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EVIDENCE DEMONSTRATIONS

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I. SCOPE OF ARTICLE

A trial attorney can never feel complacent about the rules of evidence. Knowledge of the rules and proper application not only preserves appellate error, but greatly enhances the presentation of the client’s case. This paper and presentation is intended to provide the practitioner with some tips on effective presentation as it relates to certain rules of evidence which the authors believe to be, not misunderstood, but misused. The rules covered are very limited in content and the reader is directed to the other articles dealing with evidence which are included in the course book. Every trial lawyer possesses his or her own style and this paper is by no means an attempt to alter the way one tries their case. This writing is an attempt to provide the trial lawyer with some helpful guidelines that will hopefully embellish one’s individual style.

II. THE BASICS

Regardless of one’s knowledge of the law and the rules of evidence, many lawyers continue to overlook the most basic fundamentals in the presentation of their case. At the risk of being overly simplistic, the following are but a few of the mistakes that the authors continue to observe in the courtroom. Failure to adhere to some of these basics will result in a sloppy presentation, an angry fact finder and court reporter, and the possible exclusion of crucial evidence.

A. The Proponent - Common Oversights.

The party offering evidence has the burden to lay the proper predicate. This is usually accomplished through the testimony of a witness. The proffered evidence must be both relevant and probative. In most cases, these two elements are inferred from the nature of the offer itself. Assuming this hurdle is cleared the evidence must be offered and a ruling obtained on its admissibility or exclusion. Tex. R. Civ. Evid. 103(b). However, before one gets to this phase, they should make every effort to avoid some of the following pitfalls.

1. Failure to Mark Exhibits.

To alleviate this potential mistake, always pre-mark the exhibits prior to trial. Prepare an exhibit list. Pre-marking exhibits with an accompanying list will place the Advocate in esteem with the court reporter and trial judge, and provide the attorney with a relatively clear road map of where they are going.

2. Failure to Refer to the Exhibit Number.

When Questioning Witness More than often the attorney generically refers to the “exhibit” when questioning the witness as opposed to the specific exhibit by number. One cannot appreciate the severity of this mistake until they read the statement of facts in the appeal and discover that the record is unclear as to what exhibit was being referenced.

3. Failure to Offer the Evidence.

All trial attorneys have at one time or another been guilty of this faux pas. It occurs after counsel has done a masterful job in laying the predicate and identifying the document. After all the hard work is done then he or she lays the item on the bench never to find its way into the appellate record. This is yet another reason to have an exhibit list with an “offered and admitted” box to check.

4. Failure to Have the Necessary Predicate(s) Available and Ready.

Should a particular piece of evidence have a predicate that counsel does not have committed to memory, he or she should always have it written out or the necessary authority handy to present to the court.

5. Failure to Have Enough Copies.

Very few moments in a trial are more frustrating than proponent’s counsel, opposing counsel, the judge, parties, and court reporter all trying to look at the only copy of the exhibit. Always have a copy of the exhibit available for all involved.

6. Failure to Obtain a Stipulation on Ruling Prior to Starting Trial.

If at all possible counsel should attempt to secure a stipulation from opposing counsel or obtain a pretrial ruling from the judge prior to the heat of battle. The proponent’s case flows smoothly and the patience of all involved is extended greatly.

7. Failure to Make Offers of Proof.

If a crucial piece of evidence has been excluded by the Judge, the proponent’s job is not over. An offer of the excluded evidence must be made to preserve error. Tex. R. Civ. Evid. 103(a)(2). The offer can be made at the time the ruling is obtained or at anytime prior to time the jury is charged or the trial court renders. Offer of proof may be in the form of a concise statement so long as it adequately apprizes the court of the substance of the testimony and adequately preserves complaint. Chance v. Chance , 911 S.W.2d 40, 51 (Tex.App.–Beaumont 1995, writ denied.)

B. The Opponent - Common Oversights.

Just as the law of physics demonstrates that for every action there is an equal reaction, counsel for the party opposing the admission of evidence can be guilty of similar human error.
1. Premature Objections.
   It is both disruptive and annoying to the fact-finder to listen to a multitude of objections during the course of questioning by the opposing side. Unless the preliminary questioning is really harmful to the case, wait until the offer is actually made prior to stating the objection.

2. Permitting the Witness to Testify from the Exhibit Prior to its Admission.
   Until the subject exhibit is admitted into evidence by the court, it is not evidence. One should never permit the tendering witness to testify from the exhibit until it has been admitted. The witness’ primary function prior to admission is to identify the exhibit prior to offer.

3. Failure to Request the Witness on Voir Dire.
   If it becomes apparent from the preliminary questioning that the witness does not have adequate personal knowledge to qualify the exhibit, counsel should request to take the witness on Voir Dire. Ask concise questions, relevant only to the issues relating to the exhibit. This is not cross-examination.

4. Failure to Timely and Properly Object.
   Depending on the subject of the offer, the opponent of the evidence must be prepared to timely and properly object or error will be waived. The objection must be material and specific or waiver will occur. If objecting as to relevancy, state in the objection as to why the offer is irrelevant.

III. SELECTIVE EXAMPLES OF PROPER EXAMINATION

A. Impeachment With A Prior Inconsistent Statement.
   The impeachment of a witness with a prior inconsistent statement can be one of the most dramatic moments of a trial. If done well, it can leave a witness’s credibility in tatters with no one in the courtroom believing a thing the witness has to say. But a poorly executed attempt at impeachment can have the effect of actually bolstering a witness’s credibility and turning the judge and jury against the cross examining lawyer. The following is a discussion of how to effectively impeach a witness with a prior inconsistent statement.

   In civil litigation, impeachment with a prior inconsistent statement usually arises because the witness’s testimony at trial differs in some respect from the witness’s deposition testimony. Depositions are such a ubiquitous part of family law practice that it is quite common for discrepancies to occur between the witness’s testimony at trial and in a deposition. Impeachment with a prior inconsistent statement can also occur when the witness has given a written statement or made oral statements that differ from the trial testimony, but these are much less common than impeachment with a deposition.

1. The Law.
   The witness must be told the contents of the statement, time, place and person to whom statement was made, and must be afforded the opportunity to explain or deny the statement. Ramsey v. Lucky Stores, Inc., 853 S.W.2d 623, 637 (Tex.App.–Houston [1st Dist.] 1993, writ denied); TEX. R. CIV. EVID. 612. Before impeaching a witness with a prior inconsistent statement, the witness must be "told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement.". TEX.CIV. R. EVID. 613(a); Osteen v. State , 61 S.W.3d 90, 91 (Tex. App. - Waco 2001, no pet.). Not to be confused with Recorded Recollection [TEX. R. CIV. EVID. 803 (5)]. The witness does not have total memory failure as to the event, but relies on a writing to refresh his recollection of the event. If the witness uses the writing to refresh his memory, the opposing party is entitled to use it to cross examine and introduce the portions relating to the witness’s testimony. The court reserves the right to conduct an in camera inspection of the writing and excise any irrelevant portions.

   Practice Note: Use of an otherwise privileged writing to refresh a party’s memory will constitute a waiver of that privilege. City of Denison v. Grisham , 716 S.W. 2d 121, 123 (Tex. App. - Dallas 1986, orig proceeding).

2. Prior Consistent Statements.
   Recent fabrication of events or a statement are commonplace in family law cases. A counterpart to impeachment by use of a prior inconsistent statement is the use of a prior consistent statement of a witness to cure any such accusations. When applicable, the questioner is permitted to show that the witness did, in fact, previously testified the same as in trial. See, Missouri Pacific R. Co. v. Vlach , 687 S.W.2d 414 (Tex. App. – Houston 14th Dist. 1985).

3. Tactical Considerations.
   Impeach only on important matters. Witnesses have fallible memories just as do judge and jurors. As a result, judges and jurors tend to be forgiving of minor errors in a witness’s testimony. Impeaching a witness with a prior inconsistent statement over trivial matter with no importance to the case is likely to engender a response from the judge and jury of “So what?” or questions about why the examining lawyer is picking on the witness. Impeachment should be saved for
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important matters where the judge and jury can easily see that this is a matter where an honest witness would not make a mistake.

The prior statement must actually be inconsistent with the witness’s trial testimony. Merely because a witness testifies using different language than in the prior statement is not enough; the previous statement and the present testimony must be inconsistent. For example, there is no inconsistency if the witness testifies in the deposition that “the car was going fast,” but at trial states the car was going 30 miles over the speed limit.” A useful rule of thumb is to ask whether the witness could testify truthfully to what is in the prior statement and what is being said at trial. Impeachment is appropriate if only one of the versions can be correct.

Sometimes the prior inconsistent statement is favorable to the impeaching side although most often it is unfavorable. In those situations where the prior statement is favorable, the goal usually is not to discredit the witness, but to have the fact finder accept the prior statement as true. The method of impeachment is conducted differently when the goal is to discredit the witness. The examining lawyer must decide on the objective--discredit the witness or credit the prior statement--before beginning the impeachment.

Where a friendly witness has made a mistake, it is usually more effective to attempt to refresh the witness’s memory than to impeach the witness. If necessary to impeach, it is usually done with a friendlier and gentle tone of voice. Similarly, a more friendly and gentle tone of voice is usually used, even with hostile witnesses, when the goal is to have the fact finder accept the prior inconsistent statement as true.


Impeaching with a prior inconsistent statement is most easily done by following the three “C’s”--Confirm, Credit, and Confront. The following are the steps of a successful impeachment with a prior inconsistent statement using the three “C’s” approach.

a. C = Confirm the Testimony Being Impeached.

The first step is to confirm the statement being impeached. The reason for confirming the statement is to make the contrast as vivid as possible between the witness’s testimony and the prior inconsistent statement. There are two methods for setting up the contrast. The first method is simply to have the witness repeat the statement being impeached:

Q. Are you telling us the light was red for the westbound traffic?

Or

Q. Did you just testify the light was red for the westbound traffic?

If this method is used, it is important that the question be asked with a skeptical or incredulous tone of voice. If the question is asked in the same tone of voice as used in other parts of the examination, there is a risk that the judge and jury will believe that the examiner is merely confirming the previous testimony because it is true. Therefore, it is necessary to ask the question with pronounced skepticism and with an incredulous tone. The skeptical or incredulous tone of voice, because it is out of the ordinary, will also alert the judge or jury that something important is about to occur.

The second approach is to confirm the prior inconsistent statement by using the exact language of the prior statement. For example, if the witness has testified that the light was red for the westbound traffic, but the deposition testimony is the light was green, the question would be:

Q. The light was green for the westbound traffic?

The expected answer is “No, the light was red.”

Pointers: Please note that the testimony to be impeached should never be confirmed when the objective is to have the fact finder accept the prior inconsistent statement as true. Instead, the goal is to have the fact finder quickly forget what the witness has testified and to only remember the prior inconsistent statement. Repeating the trial testimony being impeached only increases the chances that the judge and jury will accept it as the true version of events.

b. C = Credit the Prior Inconsistent Statement.

The second step in the process is to build up the importance of the prior inconsistent statement. The goal is to make it appear that the only explanation for the differences between the prior inconsistent statement and the present testimony is because the witness is a liar and therefore should never be believed.

Start by alerting the fact finder to the fact that the witness is about to be impeached:

Q. That hasn’t always been your testimony, has it? or
Q. You have testified in the past that the light was green?

Where the prior inconsistent statement was oral or written, the question would be:
Q. That isn’t what you said before this trial, it?

Although the Texas Supreme Court has never held such, some trial court judges believe that some form of the above question is a necessary prerequisite to impeaching the witness with a prior inconsistent statement.

Assuming this is a jury trial and the witness denies testifying differently, the crediting process continues:

Q. You have testified about this accident before today?
Q. You came to my office on May 5th of last year?
Q. I was there?
Q. The lawyer for Mr. Smith was there?
Q. And a court reporter was there?
Q. Just like the court reporter we have here? [pointing to the court reporter]
Q. The court reporter had you raise you right hand? [the lawyer’s right hand is raised while asking this question]
Q. And you swore to tell the truth, the whole truth and nothing but the truth?
Q. Just like the oath you took here today?
Q. Then I asked you questions about the accident?
Q. And in answering my questions you testified under oath about the accident?
Q. You were testifying only six months after the accident? [this question is asked if the goal is to have the fact finder believe the prior inconsistent statement is true]
Q. It is now two years after the accident? [same]
Q. The court reporter took down everything I said and everything you said?
Q. Just like the court reporter here? [again pointing to the court reporter]
Q. And after you were through testifying, the court reporter typed up my questions and your answers into a booklet? [lawyer holds up deposition transcript while asking the question]
Q. You had an opportunity to read over my questions and your answers? [if the witness has actually made corrections, the question can be changed to “you read my questions and your answers?”—never ask whether the witness actually read the transcript unless you know that the witness has done so]
Q. And you had the opportunity to correct your answers?

Pointers: The elaborate explanation of the deposition process is not required in a bench trial and will only offend the judge if done so. Instead, it is only necessary to ask:

Q. You gave a deposition in this case on May 5th of last year?

C. Confront the Witness with the Impeaching Statement.

The final step of the process is to confront the witness with the prior inconsistent statement. This is the conclusion to the impeachment and should be done in a dramatic manner so the judge and jury realize that something important is happening.

Q. Let’s now look at what you testified to under oath about the color of the light. Your Honor, may I approach the witness?
Q. I am handing to you your deposition testimony. Turn to Page 24, Line 6. [many lawyers announce the page and line as they approach the witness. “Counsel, Page 24, Line 6.”]
Q. I asked you the following question, “What color was the light for the westbound traffic?” Did I read that correctly?
Q. And your answer, under oath, was, “The light was green for the westbound traffic?”

Pointers: The last two questions and answers about the prior inconsistent statement should be asked slowly, with pauses, and with a dramatic tone of voice. The examiner’s voice and manner should compel the fact finder to pay attention. The questions and answers must be read verbatim. Paraphrasing is objectionable and runs the risk of drawing an answer of “No, that is not what you asked me.” If the judge permits, standing over the witness while pointing to the questions and answers is an effective method of controlling the witness. Be careful, however, that a male lawyer does not appear to be intimidating a female witness. If the page and line are not announced, there is a risk that at the dramatic moment opposing counsel will interrupt the examination to ask what page and line is being referred to.

It is usually ineffective to test the witness’s memory about what occurred in the deposition before the witness is able to see and read the testimony being attacked. Instead, put the deposition in front of the witness while asking about the questions and answers. Always ask “I read that correctly, didn’t I?” rather than “That’s what I asked you, isn’t it?” With the latter question there is a substantial risk that the witness will say “No, that’s not what I recall.” Asking whether the question has been read correctly has the same effect, but it is nearly impossible for the witness to deny, assuming the question was read correctly.

It is very effective in jury trials to project the deposition page so the jury can read the impeaching testimony along with the lawyer and witness.
d. **C = Contrast.**

Some lawyers add a fourth “C,” Contrast. The problem with adding the fourth “C” is that most witnesses do not enjoy being humiliated and therefore will attempt to explain away the prior inconsistent statement. The more questions asked after the witness is confronted with the prior inconsistent statement, the more likely the witness will be able to slip in the explanation. Therefore, it is recommended that if the fourth C is added, it is limited to no more than the following two questions.

Q. You did not testify the light was green?
Q. You testified the light was red?

**Pointers:** Although it is great fun to ask, most courts consider the question “Were you lying then or are you lying now?” to be argumentative.

**B. Refreshing Recollection.**

1. **The Law.**

Although a bit different that impeachment in the true sense of the word, this form can be just as effective as prior inconsistent statements. A writing used to refresh memory should not be confused with Recorded Recollection. TEX. R. CIV. EVID. 803(5). These two rules are often used interchangeably they are very different. With a writing used to refresh memory the witness does not have total memory failure as to the event, but relies on a writing to refresh his recollection of the event. If the witness uses the writing to refresh his memory, the opposing party is entitled to use it to cross examine and introduce the portions relating to the witness’s testimony. The court reserves the right to conduct an in camera inspection of the writing and excise any irrelevant portions.

2. **Steps For Refreshing Recollection.**

While theoretically a witness’s memory can be refreshed with anything that will trigger the witness’s recall, in reality a writing of some sort is almost always used. The following series of questions lays out the steps in refreshing a witness’s recollection.

Q. On what day did you see this happen?
A. I don’t remember.
Q. Would it help you to remember if you were able to look at your deposition testimony about when you saw it happen?
Q. Was that deposition testimony given six months after the incident?
Q. Were those events still fresh in your mind at the time your deposition was taken?
Q. Is it now two years after the incident?

Q. I am handing you your deposition. Please look at Page 52, line 6 and read it silently to yourself.
Q. Have you now read it over?
Q. Please hand me the deposition?
Q. Having read what you said in your deposition, do you now remember when you saw this happen?
Q. Let me ask you again when you first saw this happen?

**Pointers:** Although not required by the Rules of Evidence, it is usually more persuasive to have the witness explain why whatever is being used to refresh recollection is a credible source. For example, in the above illustration the lawyer contrasts the date of the deposition testimony with the date of trial thereby suggesting why the witness has suffered a memory lapse. The lawyer also suggests that the witness’s memory is being refreshed by something that is accurate and true.

**C. Past Recollection Recorded.**

Past recollection recorded should be distinguished from refreshing recollection. The former is an exception to the hearsay rule and is codified in TEX. R. CIV. EVID. 803(5). With past recollection recorded, the witness “has insufficient recollection to enable the witness to testify fully and accurately.” But if the events in question have been reduced to writing and adopted by the witness as true at a time when the witness could remember the events, the writing can be read to the fact finder in substitution for the witness’s testimony. In contrast, refreshing recollection is only triggering the witness’s memory about the events, but the witness is still testifying to the events.

1. **The Law.**

The law applicable to Past Recollection Recorded is best described by the following holding: “The predicate for past recollection recorded is set forth in Rule 803(5) and requires that four elements be met: (1) the witness must have had firsthand knowledge of the event, (2) the written statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum. 2 J. Strong, et al., McCormick On Evidence §§ 279-283 (4th ed.1992). In particular, to meet the fourth element, the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. Id. at § 283. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters accurately or to check them for accuracy. Ibid. At the extreme, it is even
sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time. Ibid; 3 Wigmore, Evidence § 747 (Chadbourn rev.1970). However, the witness must acknowledge at trial the accuracy of the statement. 2 J. Strong, et al., McCormick On Evidence § 283 (4th ed.1992). An assertion of the statement's accuracy in the acknowledgment line of a written memorandum or such an acknowledgment made previously under oath will not be sufficient. Ibid. No statement should be allowed to verify itself, especially by boilerplate language routinely added by police, lawyers, or others experienced in litigation. 4 Louisell & Mueller, Federal Evidence §§ 445, 628-29 (1980).” Johnson v. State, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998, pet. denied.)

2. Steps For Introducing A Past Recollection Recorded.

The steps for using a past recollection recorded are as follows.

Q. Do you remember the contents of the safe deposit box?
A. Not completely. There are too many items in there for me to remember now.

Q. Is there an inventory of the box?
Q. If I showed you that inventory would it refresh your memory about what is in the box?
A. No, there are too many items in there.

Q. Did you make the inventory?
Q. How did you make the inventory?
Q. When did you make the inventory?
Q. Was the inventory accurate when you made it?
Q. Showing you Exhibit 2, is this the inventory?
Q. Please read the inventory to the court?

Pointer: Please note that an opposing party can introduce the actual writing into evidence if they choose to do so. The party offering the past recollection recorded can only read it to the judge and jury. TEX. CIV. EVID. 803(5).

D. Photographs, Videos & Other Recordings.

Many trial lawyers still do not have the understanding or the ability to properly authenticate and proffer photographs and recordings. The majority of the case law in this area arises out of criminal matters. The same application is appropriate in civil cases. Below is a brief discussion of the applicable principles which form the foundation for admissibility of this type of evidence.

1. Authentication.

As with any of form of documentary evidence, the offering party must establish the authenticity of the item. As set forth in the Rules, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” TEX. R. CIV. EVID. 901(a). Simply stated, does it accurately reflect what it purports to represent and is it trustworthy?


Whenever the terms or contents of a writing or recording are to be proved, the original of same is the best evidence and must be offered unless otherwise provided for in the rules or by law. TEX. R. CIV. EVID. 1002. However, the best evidence rule will not apply to photographs, unless the content of the photograph is the center of the controversy. TEX. R. CIV. EVID. 1004 (e). In most cases, photographs are offered to substantiate or illustrate the witness’ testimony and not to prove the contents of the photo.

3. The Proper Foundation.

The same evidentiary predicate or foundation that applies to photographs also applies to video recordings without sound—the video must accurately represent what it purports to picture and it is relevant. It is not necessary to have the person who took the video testify or even a person shown in the video or who was even present when the video was taken. Instead, all that is necessary is the testimony of anyone who has seen what is depicted in the video and can testify that the video accurately represents what is pictured in the video. See, e.g, Dunn v. Bank-Tec South, 134 S.W.3d 315, (Tex.App.-Amarillo 2003); State v. Farrell, 837 S.W.2d 395 (Tex.App.-Dallas 1992), aff’d, 964 S.W.2d 501 (Tex.Crim.App. 1993).

Laying the predicate or foundation for a video recording is quite straightforward:

Q. Were you present when Mr. Smith struck Mrs. Smith that day?
A. I was.
Q. Were you able to see him when he struck her?
A. I was.
Q. What were you doing while Mr. Smith was striking Mrs. Smith?
A. I was making a video recording of them?
Q. I am handing you what has been marked as Exhibit 1, do you recognize this?
A. Yes.
Q. What is it?
A. This is the video recording I made.
Q. Since making the recording, have you watched it?
A. I have.
Q. Does the video recording, Exhibit 1, fairly and accurately show what you saw that day as Mr. Smith struck Mrs. Smith?
Q. It does.
Q. Is the video recording complete?
A. It is.
Q. Has it been edited in any way?
A. It has not. It is the exact same video I made that day.
Q. I offer Exhibit 1 and ask that it be played for the court and jury.

Where the recording also includes voices, either as part of a video recording or as a separate audio recording, TEX. R. CIV. EVID. 901 applies to the authentication of the voices on the recording. See, e.g., State v. Jones, 80 S.W.3d 686 (Tex.App.-Houston [1 Dist.] 2002). Specifically, TEX. R. CIV. EVID. 901(b)(5) states that:

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

The voices on the recording may be authenticated by other means as well such as by someone who was present during the videoing and heard what was reproduced in the recording, TEX. R. CIV. EVID. 901(b)(1); circumstantial evidence indicating the identity of the person on the tape, TEX. R. CIV. EVID. 901(b)(4); or by any other means that will establish both the accuracy of the recording and the identity of the speaker. TEX. R. CIV. EVID. 901(a).

Take the example of a recording of a meeting.

Q. Were you present during the argument?
A. I was.
Q. Were you able to hear everything that was said?
A. I was.
Q. Did you make an audio recording of the argument?
A. I did.
Q. I am handing you what has been marked as Exhibit 2 and ask you if you recognize it?
A. I do.
Q. What is it?
A. It is the recording I made of the argument.
Q. Have you had an opportunity to listen to the recording since you made it?
A. I have.

Q. Does the recording fairly and accurately record what you heard that day as you listened to the argument?
A. It does.
Q. Is the recording complete?
A. It is.
Q. Has the recording been edited in any way?
A. No, it contains everything I heard.
Q. Are you able to recognize the voices of the persons in the recording?
A. I am.
Q. Whose voices are they?
A. The man’s voice is that of Mr. Smith and the woman’s voice is that of Mrs. Smith.
Q. Are you familiar with their voices?
A. I am.
Q. How are you familiar with their voices?
A. I have known both of them for the past 20 years.
Q. Do you recognize their voices in the recording?
A. I do.
Q. I offer Exhibit 1 and ask that it be played for the court and jury.

It is even possible to authenticate a recording when there was no witness present to hear in person what is preserved in the recording. For example, if a person set up a recorder and then left the house, it is possible to authenticate what was recorded, such as the sounds of someone moving around the house while the person was away. This is done by showing that the recorded was in proper working condition and properly recorded what is contained in the recording. TEX. R. CIV. EVID. 901(b)(9).

**Pointers:** It is discretionary with the court as to whether to permit the playing of the recording when one who was present during the conversation testifies as to the content. See In re Bates, 555 S.W.2d 420, 423 (Tex. 1977); Drake v. State, 488 S.W.2d 534, 538 (Tex.Civ.App.--Dallas 1972, writ ref'd n.r.e.). It is the opinion of the authors that the playing should be permitted in most cases. In many instances, the voice inflection can have an extremely forceful impact with the trier of fact, i.e. screaming, threatening, etc. It should also be noted that if a transcript of an audio recording is available it does not mean that it should be admitted. The evidence is the tape itself. The transcript, when properly authenticated, can be admitted as an aid to the fact finder, but not as evidence of the conversation.