

**SAMPLE
CAUSE NO. _____**

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
	§	
CHILDREN	§	_____ COUNTY, TEXAS
	§	
CHILDREN	§	_____ JUDICIAL DISTRICT

PETITIONER’S MOTION IN LIMINE

This Petitioner’s Motion in Limine is brought by the Texas Department of Family and Protective Services, “Department”. The Department requests that the Court:

- Instruct the attorneys for Respondents, not to mention, refer to, or bring before the jury, directly or indirectly, upon voir dire examination, reading of the pleadings, statement of the case, interrogation of the witnesses, argument, objections before the jury, discussions before the bench, or in any other manner any of the matters set forth below, unless and until such matters have first been called to the Court's attention out of the presence and hearing of the jury and a favorable ruling received on the admissibility of such matters.
- Instruct the attorneys for the Respondents to inform all witnesses called by the Respondents to refrain from mentioning or referring to, in any way, in the presence or hearing of the jury, any of the matters set out below, unless specifically permitted to do so by ruling of the Court.
- Instruct the attorneys for the Respondents that violation of any of these instructions may cause harm to the Department and deprive the Department of a fair and impartial trial, and the failure to abide by such instructions may constitute contempt of court.

The matters prohibited are:

1. Testimony, objections, or argument suggesting or implying to the jury:
 - A) That the Department has filed this Motion;
 - B) That the Court has made any ruling on this Motion;
 - C) That the Respondents have witnesses, evidence, or other information or proof that they are not being allowed to put before the jury; or
 - D) That the Department in any way has wrongfully or improperly moved to prohibit proof.¹

GRANTED DENIED

2. Testimony, objections, or argument:
- A) Suggesting or implying to the jury that any party has made offers to settle this suit out of court;
 - B) Suggesting or implying that the parties have attempted settlement negotiations or had discussions regarding settlement of this suit out of court; or
 - C) Referring to the specific content of any settlement negotiations.²

GRANTED DENIED

3. Any attempt within the jury's presence or hearing to seek from or request the Department to produce documents, to stipulate to any fact, or to make any agreement.

GRANTED DENIED

4. Any testimony or argument suggesting or implying to the jury that any party has made attempts or requests outside the jury's presence for the Department to produce documents, to stipulate to any fact, or to make any agreement.

GRANTED DENIED

5. Any testimony, objections, or argument suggesting or implying to the jury:
- A) That the Department has failed to produce in response to the Respondents' discovery requests documents that the Department is attempting to introduce into evidence; or
 - B) That the Department has failed to disclose any witness and/or the subject matter of any witness's testimony in response to the Respondents' discovery requests.

GRANTED DENIED

6. Any attempt to introduce into evidence, or elicit testimony on, any document or tangible thing until counsel for the Department has the opportunity to view the document or tangible thing outside the presence of the jury.

GRANTED DENIED

7. Testimony, objections, or argument regarding any:
- A) Expert or fact witness not disclosed in response either to discovery requests by the Department or in accordance with any Scheduling Order signed by the Court;
 - B) Document or tangible thing not disclosed in response either to discovery requests by the

Department or in accordance with any Scheduling Order signed by the Court; or

C) Legal theory or factual basis for a claim or defense not disclosed in response either to discovery requests by the Department or in accordance with any Scheduling Order signed by the Court.³

GRANTED DENIED

8. Testimony, objections, or argument suggesting or implying to the jury that any statements made by the Department's attorney concerning either the facts or applicable law are in any way "misstated," "incorrect," "improper," or "misleading."⁴

GRANTED DENIED

9. Any argument, question, statement, comment, or observation from the Respondents' counsel regarding:

A) Counsel's personal or professional history or background; or

B) The personal or professional history or background of the Department's counsel.⁵

GRANTED DENIED

10. Testimony, objections, or argument:

A) Suggesting or implying to the jury that the Department failed to call a particular fact or expert witness;

B) Mentioning by name a specific fact or expert witness who does not testify at trial; or

C) Suggesting or implying to the jury what the testimony would have been from a particular fact or expert witness who did not testify at trial.⁶

GRANTED DENIED

11. Any argument, question, statement, comment, or observation from counsel regarding any face-to-face, written, or telephone communications counsel may have had with any caseworker, supervisor, attorney, or other employee or agent of the Department, concerning the legal or factual issues of this case.⁷

GRANTED DENIED

12. Testimony, objections, or argument:

A) Inconsistent with the Respondents' pleadings filed with the Court prior to the filing of this Motion; or

B) Referring to or regarding any alleged claims, affirmative defenses, or other issues or subject matter not expressly contained within the Respondents' pleadings filed with the Court prior to the filing of this Motion.⁸

GRANTED DENIED

13. Testimony, objections, or argument suggesting or implying to the jury that the Department, or any employee or agent of the Department, may have deviated from federal law, state law, or the Department's procedures, including opinions from any "expert" witness concerning the current procedures and rules governing Child Protective Services.⁹

GRANTED DENIED

14. Any opinion testimony from any "expert" witness unless and until the witness has been qualified as an expert, and counsel for the Respondents has properly established that the witness's basis for his or her opinion is both relevant and reliable.¹⁰

GRANTED DENIED

15. Any argument, question, statement, comment, or observation from the Respondents' counsel that, by suggestion or implication either directly or indirectly brings into issue or otherwise questions the neutrality or impartiality of any expert witness appointed by the court.¹¹

GRANTED DENIED

16. Any testimony or argument as to any "conversion experience" and/or commitment to Christianity by the Respondents, or any other evidence or argument of the Respondents' beliefs or opinions on matters of religion for the purpose of enhancing the Respondents' credibility.¹²

GRANTED DENIED

17. Any argument, question, statement, comment, or observation from the Respondents' counsel regarding:

A) Counsel's local ties to the community, county, or region in which the trial is being conducted;

B) Any witness's local ties to the community, county, or region in which the trial is being conducted;

- C) Opposing counsel not having any local ties to the community, county, or region in which the trial is being conducted; or
- D) Any witness not having any local ties to the community, county, or region in which the trial is being conducted.¹³

GRANTED DENIED

The Department prays that the Court grant this Motion in Limine.

Respectfully Submitted,

Attorney for Petitioner,

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been delivered via the method indicated to the following individuals and/or parties on _____.

Attorney for the Petitioner

The following endnotes provide research and authority for some of the individual items in the Sample Motion in Limine

¹ **Authority:** The purpose of a motion *in limine* is to prevent the jury from being exposed to potentially prejudicial information before a ruling on admissibility can be obtained. *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331,335 (Tex. 1963) and to avoid the injection into trial of matters that are irrelevant, inadmissible, and prejudicial. *Wilkins v. Royal Indem. Co.* 592 S.W.2d 64,66 (Tex. Civ. App.–Tyler 1979, no writ). Attorneys should not comment on matters in violation of a court’s order *in limine*. *Nat’l Un. Fire Ins. Co. v. Kwiatkowski*, 915 S.W.2d 662, 664 (Tex. App.–Houston [14th Dist.] 1996, no writ). Any attempt by counsel, either by suggestion, by wording of a question, or by indirection, to present to the jury that any matter has been excluded not only is error, but also is a violation of professional standards and of counsel’s duty to the court. *Kendrix v. Southern Pacific Transp. Co.*, 907 S.W.2d 111, 114 (Tex. App.–Beaumont 1995, writ denied); *Burdick v. York Oil Co.*, 364 S.W.2d 766, 770 (Tex. Civ. App.–San Antonio 1963, writ ref’d n.r.e.).

² **Authority:** Evidence of offers to compromise is not admissible. Rule 408, TEXAS RULES OF EVIDENCE. An offer of settlement or compromise “implies merely a desire for peace, not a concession of wrong done.” 1 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1061, at 36 (3d ed. 1940). Rule 408 is premised “primarily on the notion that without this protection parties would be deterred from entering into settlement discussions with their opponents.” STEVEN GOODE, OLIN GUY WELLBORN, III, & M. MICHAEL SHARLOT, TEXAS PRACTICE: COURTROOM HANDBOOK ON TEXAS EVIDENCE, *Relevancy and Its Limits*, at 280 (1997).

Evidence of conduct or statements made in compromise negotiations is not admissible. Rule 408, TEXAS RULES OF EVIDENCE.

³ **Authority:** Any material or information not timely disclosed may not be introduced into evidence unless the trial court finds that good cause sufficient to require admission exists. Rule 193.6, TEXAS RULES OF CIVIL PROCEDURE. Inadvertence of counsel; lack of surprise, unfairness, or ambush; uniqueness of the excluded evidence; and the fact that a witness has been deposed, are factors to be considered but, considered alone, do not constitute good cause. *Henry S.*

Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex. 1992); *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671 (Tex. 1990).

⁴ **Authority:** Arguments on questions of law shall be addressed to the court. Rule 269(d), TEXAS RULES OF CIVIL PROCEDURE. It is improper to argue that opposing counsel has made misrepresentations to the jury where there is no basis in the record. *Beavers v. Northrop Worldwide Aircraft Servs., Inc.*, 821 S.W.2d 669, 680 (Tex. App.–Amarillo 1991, writ denied). It is improper for an attorney to argue to the jury that opposing counsel has made misstatements or misrepresentations of the facts or of the law as such argument is an attack upon the integrity of the opposing counsel. *Amelia's Automotive, Inc. v. Rodriguez*, 921 S.W.2d 767, 773 (Tex. App.–San Antonio 1996, no writ) (attacks upon the integrity of opposing counsel are “categorically prohibited”).

⁵ **Authority:** Argument referring to the corporate character or nonresident status of a party is improper. *Lone Star Ford, Inc. v. Carter*, 848 S.W.2d 850, 855 (Tex. App.–Houston [14th Dist.] 1993, no writ).

⁶ **Authority:** It is appropriate for counsel to comment on the opposing party's failure to call a witness only under the following circumstances: (1) the witness must be under the opposing party's control or must stand in some special relationship to the opposing party; (2) the witness must have been in a position to obtain material information unfavorable to the opponent about an issue in the case; (3) the record must show that the witness is legally available; and (4) it must be clear that the uncalled witness may have adverse knowledge about a material disputed fact. *Bexar County Appraisal Review Bd. v. First Baptist Church*, 846 S.W.2d 554, 565 (Tex. App.–San Antonio 1993, writ denied) (“Surely our legal system should not permit one advocate to implicitly criticize the other in final argument for getting to the crux of the case instead of presenting testimony about each and every minute matter that might have some relevance to the issues.”).

⁷ **Authority:** A lawyer shall not assert personal knowledge of facts in issue except when testifying as a witness. Rule 3.04(c)(2), TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT. A lawyer shall not serve as an advocate in an adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client. Rule 3.08, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT.

⁸ **Authority:** Under Rule 401, TEXAS RULES OF EVIDENCE, for evidence to be “relevant” in the broad sense, it must be (1) material (the evidence must support a proposition that is a provable or controlling matter); and (2) relevant (the offered evidence tends to prove the proposition for which it was offered). TEXAS RULES OF EVIDENCE HANDBOOK, at 194 (3d ed. 1998). Whether a fact or proposition is material (provable or controlling) in turn depends on the pleadings of the parties. TEXAS RULES OF EVIDENCE HANDBOOK, at 195 (3d ed. 1998); *San Antonio Traction Co. v. Higdon*, 123 S.W. 732, 734-35 (Tex. Civ. App. 1909, writ ref'd) (holding that the test of materiality depends upon the issues of fact and law raised by the pleadings). Evidence of any fact not in conformity with, or outside of, the written pleadings is immaterial, and thus, irrelevant evidence.

Attorneys are required to confine their argument strictly to the evidence and to the arguments of opposing counsel. Rule 269(e), TEXAS RULES OF CIVIL PROCEDURE; *Circle Y v. Blevins*, 826 S.W.2d 753, 758 (Tex. App.–Texarkana 1992, writ denied); *Lone Star Ford, Inc. v. Carter*, 848 S.W.2d 850, 853 (Tex. App.–Houston [14th Dist.] 1993, no writ). Counsel's argument may not go outside the limits of the evidence presented at trial. Counsel may discuss the reasonableness of the evidence and its probative effect, but only as to the facts and issues raised by the evidence admitted under the ruling of the court. *Texas Sand Co. v. Shield*, 381 S.W.2d 48, 57-8 (Tex. 1964).

An avoidance or affirmative defense must be pleaded by a party or the defense is waived. Rule 94, TEXAS RULES OF CIVIL PROCEDURE; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). Pleading an affirmative defense permits the introduction of evidence which does not tend to rebut the factual propositions asserted in the petitioner's case, but which seeks to establish an independent reason why the petitioner should not succeed in its suit. An affirmative defense is one of avoidance, rather than a defense in denial. *Gorman v. Life Ins. Co. of North America*, 811 S.W.2d 542, 546 (Tex. 1991).

⁹ **Authority:** In a termination case, the only relevant issues are (1) did the parent commit one of the enumerated grounds for termination; and (2) is termination in the best interest of the child. Whether the Department may have deviated from federal law or its own regulations is irrelevant to the issue of termination and conservatorship. In *James v. Texas Dept. of Human Services*, 836 S.W.2d 236, 245 (Tex. App.–Texarkana 1992, no writ), James' attorney requested the court to submit jury questions on a counterclaim she had filed. These were nine questions dealing with whether the Department of Human Services followed the correct procedure in attempting to terminate her parental rights. The appellate court, in affirming the trial court's refusal to submit the jury questions, stated, “The Department of Human Services may have deviated from its own regulations and the requirements of the Adoption Assistance and Child Welfare Act of 1980. This, however, has no bearing on whether there were grounds for termination and whether the termination was in the best interests of the children.”

¹⁰ **Authority:** “The trial court’s gatekeeping function under Rule 702 does not supplant cross-examination as ‘the traditional and appropriate means of attacking shaky but admissible evidence.’ [footnote omitted] But neither does the availability of cross-examination relieve the trial court of its threshold responsibility under Rule 702 ‘of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’” “All expert testimony should be shown to be reliable before it is admitted.” *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 & 728 (Tex. 1998).

¹¹ **Authority:** Under Rule 204.4, TEXAS RULES OF CIVIL PROCEDURE, the court, on its own initiative or on motion of a party, may appoint a psychologist or psychiatrist to make mental examinations of any party. When the court appoints a psychologist or psychiatrist to examine any party, the professional acts “as a functionary” of the court, to “fulfill quasi-judicial functions intimately related to the judicial process” by serving “as a fact finder for the court” “to provide information essential to the decision-making process.” *Delcourt v. Silverman*, 919 S.W.2d 777, 782-83 (Tex. App.–Houston [14th Dist.] 1996, writ denied), *cert. denied*, 520 U.S. 1213 (1997).

¹² **Authority:** Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced. Rule 610, TEXAS RULES OF EVIDENCE.

¹³ **Authority:** References to the local ties of one litigant or attorney or references of an opposing attorney as being from “out of town” is improper argument and is an “unfair effort to prejudice a jury” by appealing to “geographical prejudice.” *Twin City Fire. Ins. Co. v. King*, 510 S.W.2d 370, 375 (Tex. Civ. App.–Houston [1st Dist.] 1974, writ ref’d n.r.e.). Argument referring to the corporate character or nonresident status of a party is improper. *Lone Star Ford, Inc. v. Carter*, 848 S.W.2d 850, 855 (Tex. App.–Houston [14th Dist.] 1993, no writ).