

# Preparing for the Expected— and the Unexpected

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Special thanks to Paul Leopold

# Starting at the Beginning— What You Expect

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# Know the Facts

- Client resources (initial intake sheet, websites, links)
- Client interview
- Client timeline
- Client homework (SAPCR or other paperwork)
- Start telling the client's story

# Client Homework



## Client Homework:

Client Child Custody/Conservatorship/Possession Questionnaires

for Divorce, Modification & SAPCR

# Know the Law

- Bring the right statutes
  - Print for the Court
  - Bring your Code Book
  - Applications on your phone
  - CLE Papers
- Bring the right cases
  - Legal research (Westlaw, Google Scholar, etc.)
  - Using Facebook



# Fastcase



# TRCP/TFC/TCPRC/TRAP Apps

Open the Mac App Store to buy and download apps.



## Texas Rules of Civil Procedure (LawStack's TX Law) 4+

Tekk Innovations LLC

Designed for iPad

★★★★★ 5.0 • 1 Rating

Free · Offers In-App Purchases

[View in Mac App Store ↗](#)



# Facebook as a Resource

- Ask about Courts and Judges
- Ask for briefs
- Ask for motions or other orders
- Ask about research
- Find local counsel
- Use other attorneys (run things by them)
  
- BE CAREFUL NOT TO ACCIDENTALLY EX PARTE



# Know What Has Already Happened

- Coming into the case?
  - Bring the relevant pleadings
  - Bring deposition transcripts
  - Bring prior hearing or trial transcripts
  - REMINDER: On appeal, if evidence is not presented at the trial or hearing, neither the factfinder nor the appellate court can consider it. *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

# PREDICATES MANUAL 4.0



*Texas Family Law Foundation*

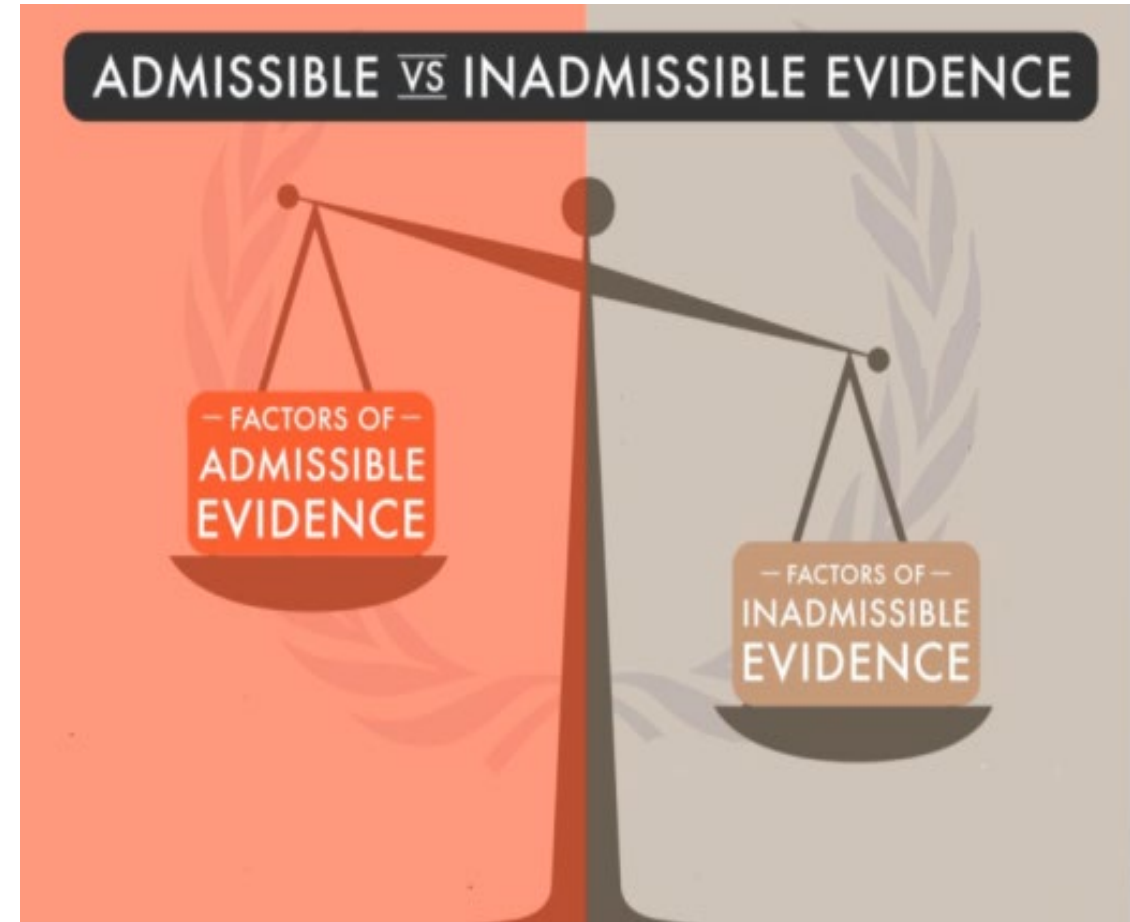
## General Hearing Preparation Tips

- Determine your witnesses
- Determine your exhibits
- Write out the direct/cross/opening/closing
- Bring objection list (a great resource is the Family Law Toolkit)
- Predicates for exhibits (Predicate Manual)
- Checklist/Exhibit list
- Bring notepads, pens, sticky notes for your client
- Do you need a helper/paralegal?

# Knowing How to Get in Evidence

## *Prerequisites to Admissibility*

- Relevant **FRE 401-402**
- **Probative Value vs. Unfair Prejudice** **FRE 403**
- Not Hearsay **FRE 801-805**
- **Authentic** **FRE 901-902**
- Original/Duplicate **FRE 1001**



# FAKE SOCIAL NETWORKING

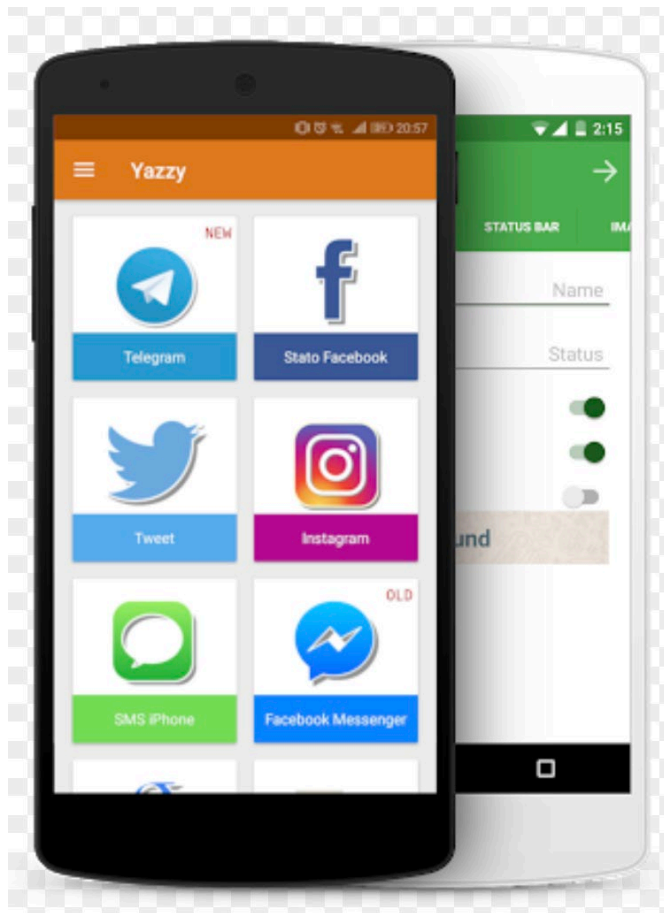




## Social Dummy

- **App that creates and shares fake social posts and statuses.**
- **“A simple alternative for either fooling your friends or to have access to your own fake social media accounts.”**

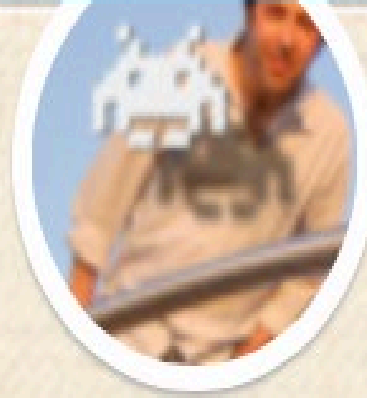
# Yazzy



- Make fake conversations to “make fun of your friends.”

Follow thewallmachine

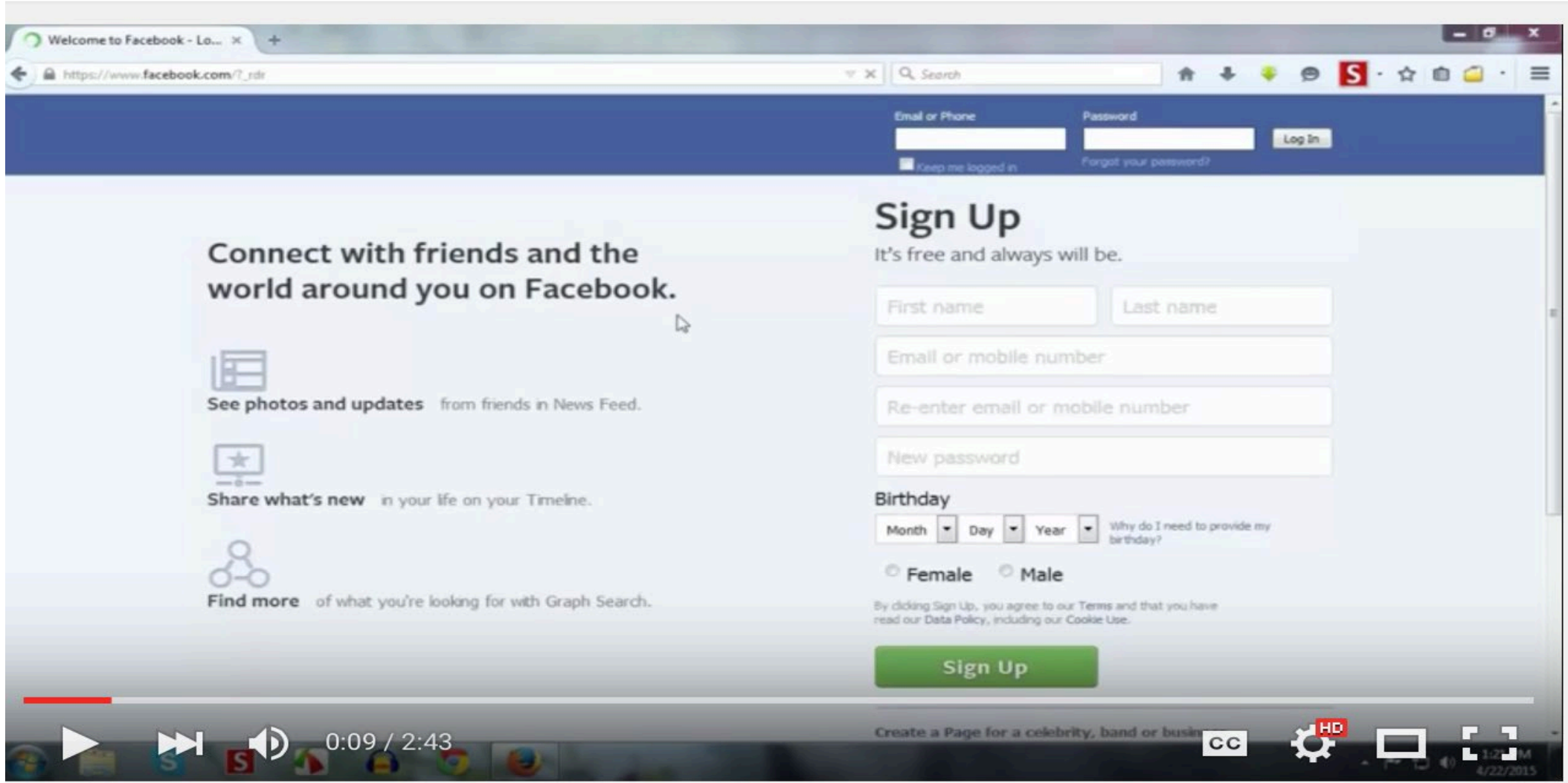
## ABOUT ME



The Wall Machine is a WYSIWYG Fake Facebook Wall Creator.

<http://thewallmachine.com>

The Wall Machine  
Creates "Funny Fake Facebook Walls"



how to create unlimited fake facebook accounts without genuine email address



# Prank Me Not

## Facebook Status Generator

Prank your friends or imitate celebrities. You can make fake facebook status updates in any creative way you like. Upload profile picture, write status, select likes, add comments and many more cool features. Start using our **Facebook Status generator** now.

Create Facebook Status

## Facebook Chat Generator

Create **fake facebook chat** and prank your friends. You can even imitate celebrities to chat with you to fool your friends. Upload profile picture for you and the other person, write as many chat messages as you like. Start using our Facebook Chat generator for Free!

Create Facebook Chat

## Tweet Generator

Create Hilarious tweets and Fool your friends. You can make **fake tweets** in any creative way you like. Upload profile picture, select username, write message, change date and many more cool settings. Start using our **Tweet Generator** for Free!

Create Tweet

## Twitter Message Generator

Create fake twitter messages and prank your friends. You can even imitate celebrities to chat with you to fool your friends. Upload profile picture for you and the other person, write as many chat messages as you like. Build your own fake twitter messages now.

Create Twitter Message

# SpoofCard



## Protect Your Privacy

Call and text from a secondary number to protect your personal information and privacy. It's easy to use and works on any phone. Try it for FREE when you sign up on our mobile apps!

Download on the  
**App Store**

GET IT ON  
**Google play**

*Trusted by over 5 Million people who value their privacy.*

Settings

Conversation

Sender  Sender  Receiver

Add message to conversation

Name

Blur name

Operator Clock

"Messages" "Edit"

Connection

3G  Wi-Fi  EDGE  None

Battery status

97%  44%  13%  Hide

Spouse

Enter His Email Address.  
See Social Profiles,  
Pictures & Videos Now!

Update! Fake iOS7 Text Message now available

High quality & NO watermark on final image!



Contact Name:

Carrier:  Time:

Line 1:

Line 2:

Line 3:

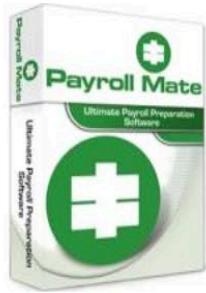
Line 4:

# Fake Documents





***TurboTax***

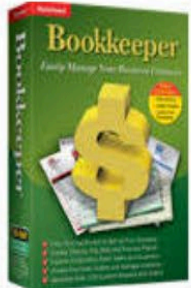


## Payroll Mate® Payroll Software

**\$99.00** from Real Business Solutions

"Comprehensive payroll **software** that fits the needs of accountants, CPAs, small to medium size businesses (SMBs), agricultural employers

...



## Avanquest Bookkeeper 2014 - Bookkeeping and Payroll Software - Bo...

**\$27.97** from Avanquest Software ★★★★★ 311 seller reviews

Bookkeeping and Payroll **Software** for Small Businesses. Easy Start-Up Wizard to Set Up & Manage Your Business. Create Checks & Pay Bills. Over 125 ...

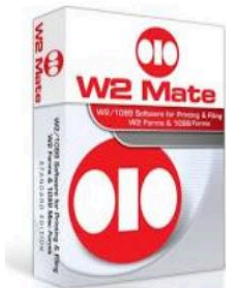


## Quicken Starter Edition 2016 - Box Pack

**\$29.99** from 25+ stores

★★★★★ 14 product reviews

NET not installed Display: 1024x768 or higher, 1280x1024 for large fonts Internet: 56Kbps modem (Broadband Recommended for Online Services) Sound ...



## W2 Mate® W2 / 1099 Software

**\$39.00** from Real Business Solutions

"W2 Mate® is W2 1099 **Software** to print, and file IRS Forms 1099-MISC, W2, 1096 and W3. EFile (electronic filing) and 1099-INT, 1099-DIV, 1099-R ...

# Replace Your Docs

Replacement documents for **proof of income**  
and **proof of address** for novelty use

- [Replaceyourdoc.com](https://replaceyourdoc.com)
- Edit any existing document with details you provide.
- Add your own transactions, names, dates and addresses to bank statements, utility bills and paystubs.
- Option to print it from home the very same same.
- Unlimited changes and modifications until you are satisfied.
- “Novelty” proof of income documents.



# UTILITY BILLS

(click image to enlarge)

## Npower



## Southern Electric



## BT



## British Gas



## Talk Talk



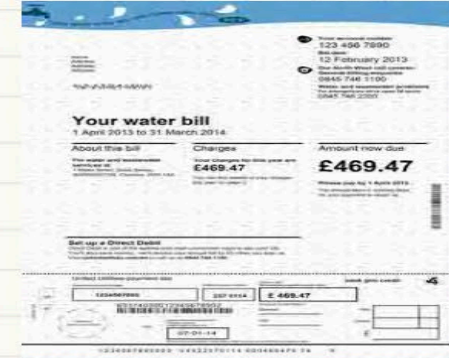
## EDF



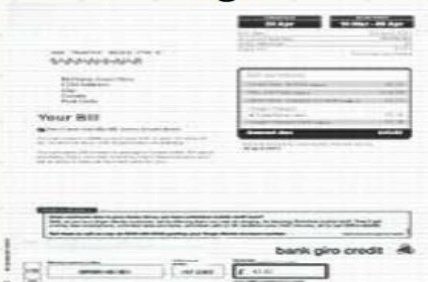
## E-ON



## United Utilities



## Virgin



## DWR



## Three



## Thames



# BANK STATEMENTS

(click image to enlarge)  
Yorkshire Bank

**Your Current Account statement.**

Date	Description	Debit	Credit	Balance
01 Nov	Balance b/fwd			£1,234.56
02 Nov	Direct Debit - Water	£15.00		£1,219.56
05 Nov	Salary		£1,500.00	£2,719.56
08 Nov	Direct Debit - Gas	£20.00		£2,699.56
12 Nov	ATM Withdrawal	£50.00		£2,649.56
15 Nov	Interest		£1.00	£2,650.56
18 Nov	Direct Debit - Insurance	£30.00		£2,620.56
22 Nov	Standing Order - Savings	£100.00		£2,520.56
25 Nov	Interest		£0.50	£2,521.06
28 Nov	Direct Debit - Council Tax	£40.00		£2,481.06
30 Nov	Balance c/fwd			£2,481.06

HSBC

**Your Statement**

Date	Description	Debit	Credit	Balance
01 Aug	Balance b/fwd			£1,500.00
05 Aug	Salary		£1,200.00	£2,700.00
10 Aug	Direct Debit - Water	£15.00		£2,685.00
15 Aug	ATM Withdrawal	£50.00		£2,635.00
20 Aug	Interest		£1.00	£2,636.00
25 Aug	Direct Debit - Gas	£20.00		£2,616.00
30 Aug	Balance c/fwd			£2,616.00

Barclays

**Your Premier Current Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,000.00
05 Feb	Salary		£1,500.00	£2,500.00
10 Feb	Direct Debit - Water	£15.00		£2,485.00
15 Feb	ATM Withdrawal	£50.00		£2,435.00
20 Feb	Interest		£1.00	£2,436.00
25 Feb	Direct Debit - Gas	£20.00		£2,416.00
30 Feb	Balance c/fwd			£2,416.00

Santander

**Your account summary for 12 Jan 2013 to 12 Feb 2013**

Date	Description	Debit	Credit	Balance
12 Jan	Balance b/fwd			£1,200.00
15 Jan	Salary		£1,000.00	£2,200.00
20 Jan	Direct Debit - Water	£15.00		£2,185.00
25 Jan	ATM Withdrawal	£50.00		£2,135.00
30 Jan	Interest		£1.00	£2,136.00
05 Feb	Direct Debit - Gas	£20.00		£2,116.00
12 Feb	Balance c/fwd			£2,116.00

RBS

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,500.00
05 Feb	Salary		£1,200.00	£2,700.00
10 Feb	Direct Debit - Water	£15.00		£2,685.00
15 Feb	ATM Withdrawal	£50.00		£2,635.00
20 Feb	Interest		£1.00	£2,636.00
25 Feb	Direct Debit - Gas	£20.00		£2,616.00
30 Feb	Balance c/fwd			£2,616.00

Lloyds

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,000.00
05 Feb	Salary		£1,500.00	£2,500.00
10 Feb	Direct Debit - Water	£15.00		£2,485.00
15 Feb	ATM Withdrawal	£50.00		£2,435.00
20 Feb	Interest		£1.00	£2,436.00
25 Feb	Direct Debit - Gas	£20.00		£2,416.00
30 Feb	Balance c/fwd			£2,416.00

Lloyds Business

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,000.00
05 Feb	Salary		£1,500.00	£2,500.00
10 Feb	Direct Debit - Water	£15.00		£2,485.00
15 Feb	ATM Withdrawal	£50.00		£2,435.00
20 Feb	Interest		£1.00	£2,436.00
25 Feb	Direct Debit - Gas	£20.00		£2,416.00
30 Feb	Balance c/fwd			£2,416.00

CO-OP

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,200.00
05 Feb	Salary		£1,000.00	£2,200.00
10 Feb	Direct Debit - Water	£15.00		£2,185.00
15 Feb	ATM Withdrawal	£50.00		£2,135.00
20 Feb	Interest		£1.00	£2,136.00
25 Feb	Direct Debit - Gas	£20.00		£2,116.00
30 Feb	Balance c/fwd			£2,116.00

Natwest

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,500.00
05 Feb	Salary		£1,200.00	£2,700.00
10 Feb	Direct Debit - Water	£15.00		£2,685.00
15 Feb	ATM Withdrawal	£50.00		£2,635.00
20 Feb	Interest		£1.00	£2,636.00
25 Feb	Direct Debit - Gas	£20.00		£2,616.00
30 Feb	Balance c/fwd			£2,616.00

Nationwide Version 1

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,000.00
05 Feb	Salary		£1,500.00	£2,500.00
10 Feb	Direct Debit - Water	£15.00		£2,485.00
15 Feb	ATM Withdrawal	£50.00		£2,435.00
20 Feb	Interest		£1.00	£2,436.00
25 Feb	Direct Debit - Gas	£20.00		£2,416.00
30 Feb	Balance c/fwd			£2,416.00

Nationwide Version 2

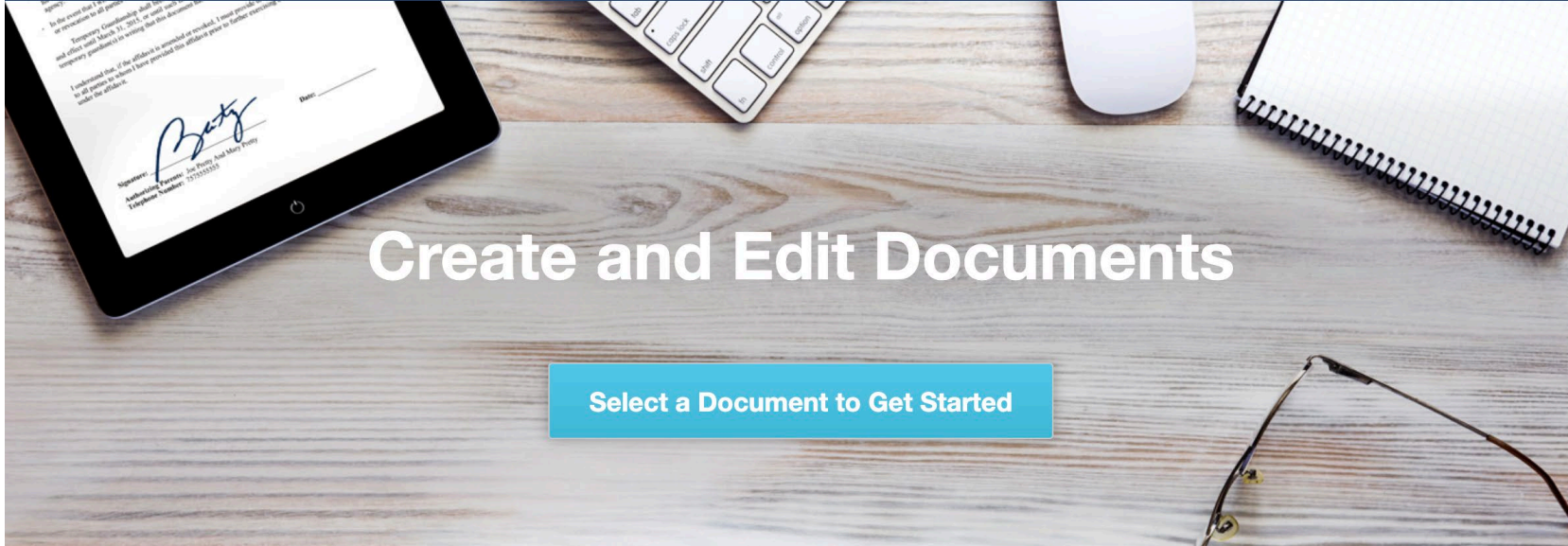
**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,000.00
05 Feb	Salary		£1,500.00	£2,500.00
10 Feb	Direct Debit - Water	£15.00		£2,485.00
15 Feb	ATM Withdrawal	£50.00		£2,435.00
20 Feb	Interest		£1.00	£2,436.00
25 Feb	Direct Debit - Gas	£20.00		£2,416.00
30 Feb	Balance c/fwd			£2,416.00

TSB

**Statement of Account**

Date	Description	Debit	Credit	Balance
01 Feb	Balance b/fwd			£1,200.00
05 Feb	Salary		£1,000.00	£2,200.00
10 Feb	Direct Debit - Water	£15.00		£2,185.00
15 Feb	ATM Withdrawal	£50.00		£2,135.00
20 Feb	Interest		£1.00	£2,136.00
25 Feb	Direct Debit - Gas	£20.00		£2,116.00
30 Feb	Balance c/fwd			£2,116.00



# Create and Edit Documents

Select a Document to Get Started



## Create Documents

Select a template from our library of 500+ documents. Then fill out a step-by-step questionnaire and export your completed document in Word or PDF.

Create a Document



## Edit PDFs

Upload and edit PDFs with our dynamic PDF editor. You can add text, images, checkmarks, and save and update your PDF at any time.

Upload a PDF

## Fake USA Utility Bills

**Step 1/2. Please select your Utility Bills choice below:**  
Please see our [samples page](#) for a larger image.

*Providing incorrect or inaccurate information for the purpose of misleading others is committing fraud. You must be the original owner of the original documents to place an order. We are not affiliated or connected with any of the companies below. You should contact your original provider for the official documents.*

USA - Florida Utility Bill



USA - Texas Utility Bill



USA - California Utility Bill



USA - Virginia Utility Bill



USA - Georgia Utility Bill



USA - Comcast Utility Bill



USA - Frontier Communications Bill



USA - Spectrum Bill

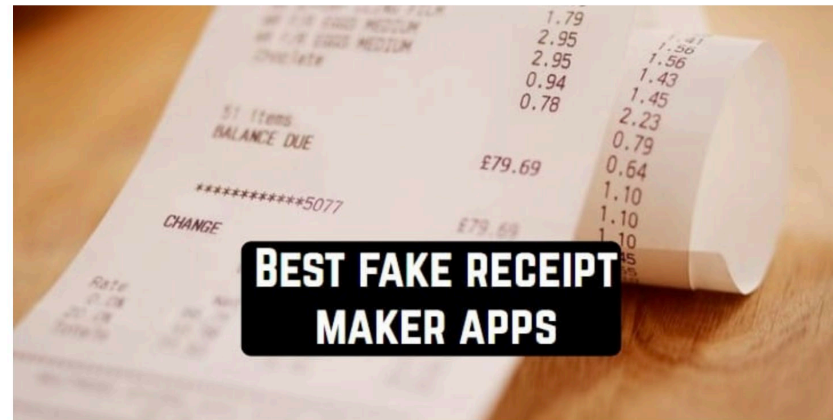


USA - Time Warner Cable Bill



# Google “Best Fake Receipt Makers”

- Invoice home
- Invoice maker
- Billdu
- Invoice 2go
- Quick receipt
- Tiny invoice
- Easy Receipts Generator





# ACCURATE AND DEPENDABLE DOCUMENTS RIGHT TO YOUR EMAIL QUICKLY AND EASILY!

Feedback

MAKE YOUR  
PAYSTUB  
NOW!

EXAMPLE

MAKE YOUR  
UTILITY  
BILL NOW!

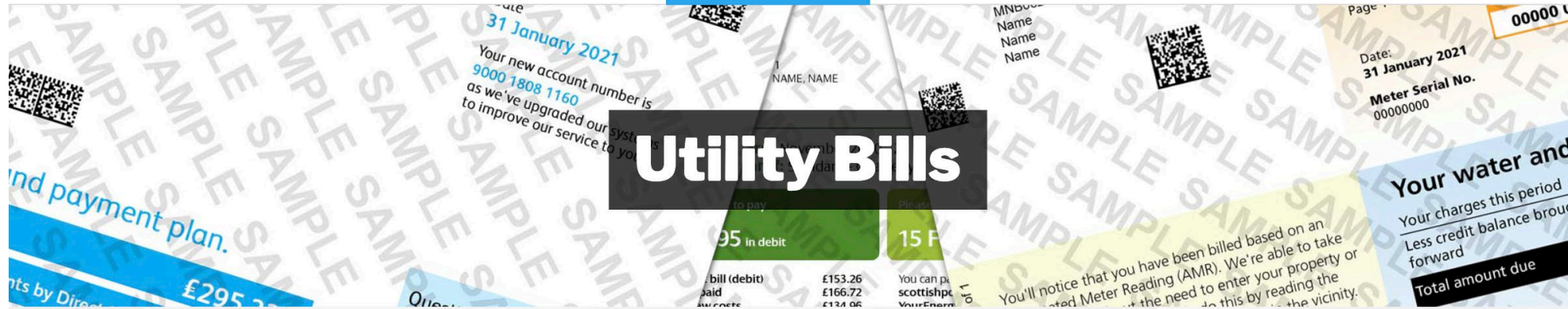
EXAMPLE

MAKE YOUR  
W-2 NOW!

EXAMPLE

MAKE YOUR  
1099 NOW!

EXAMPLE



[Home](#) / [Buy Docs](#) / [Utility Bills](#)

**SUBMIT ORDER FORM**

- ✓ Our team of professionals will always make your required modifications to your documents using a fake utility bill generator for better suiting to your particular needs.
- ✓ We make use of high quality 100 gm paper for printing the hard copy of your novelty utility bill.
- ✓ The printed copy of your replica document will reach you within 3 working days. The soft copy will be emailed to you the next business day after you place your utility bill order.
- ✓ Your novelty utility bill document will have a front as well as a back page to make it look more authentic.
- ✓ Our documents do not feature words like “sample” or “specimen”.
- ✓ The novelty utility bills generated by our dedicated team appear original and authentic.



# Fake-Documents.com

Fabulously Fake documents just for Fun!

## Welcome

There are many reasons why you might want to make a joke document, and as long as you're just doing it for **FUN** you've come to the right place.

For just a couple of bucks you can get realistic looking joke document that you can print on your printer. **Note that this is not just a blank document that you have to fill in by hand. All your information is printed in a fancy font on the document.**

You might like to spice up your family tree by adopting some new (and very famous) parents.

Who would not be impressed to discover that you are actually the love child of <.... Insert your favorite Stars here ....>. One of our Joke [Birth Certificates](#) left casually on your desk will do the trick.

The possibilities are limited only by your imagination. And of course if your creative side is a currently a little blocked, we have plenty of suggestions.

Alternatively what better way to prove your ability to Time Travel than a copy of your own [Death Certificate](#)?

Your street cred cannot fail to be influenced by a certificate stating that you were once (briefly) married to one of the Kardashian ... and you'll have the [Wedding Certificate](#) and [Divorce Decree](#) to prove it!

**N.B. Our docs are NOT of any use for Fraud or Criminal deception.**

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## how to make fake documents with photoshop



Avuthkar Ram

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## *Creating a Predicate—Authentication*

*Citing to* **TIENDA**, 358 S.W.3d 633, Tex. Crim. App. 2012

**Distinctive Characteristics** (Myspace)

**TRE 901(b)(4)** [equivalent of FRE 901(b)(4)]

- Photos of tattoos, unique sunglasses, earring.
- Reference to victim's death and funeral music.
- Reference to his gang.
- Instant messages referring to the shooting.
- Comments about snitching.
- Reference to ankle monitoring (with photo).
- Profile contained his email addresses and nickname.



# Evidence Predicate Example

- Written questions to prove up business record:
- Q. What is your position with the company?
- Q. How long have you been employed?
- Q. What are your responsibilities?
- Q. Do your responsibilities include bookkeeping?
- Q. Are you familiar with the bookkeeping practices of the company?

# Evidence Predicate Example

- Q. Attached is Exhibit 1. Please describe it.
- Q. What information do these documents reflect?
- Q. When were these documents prepared?
- Q. Who prepared those documents?
- Q. Do you have personal knowledge regarding the preparation of these documents?
- Q. Was the preparation of these documents a regularly conducted business activity of the business?
- Q. Was it the regular practice of the business to make these records in this way?

# Text Messages Predicate

- Do you recognize this document?
  - Yes.
- What is it?
  - It's a screenshot/print-out of a text message.
- Do you recognize the screen name at the top of the screenshot?
  - Yes.
- Whose screen name is it?
  - My husband's.

# Text Messages Predicate (cont.)

- What cell number is that screen name attached to in your phone contacts?
  - My husband's cell number.
- Have you received text messages from your husband before?
  - Yes.
- Is that a normal way that you communicate with your husband?
  - Yes.

# Text Messages Predicate (cont.)

- When the message came in, did you reply to it?
  - Yes.
- And did your husband reply back?
  - Yes.
- Is the screen shot of the message a fair and accurate depiction of the conversation that took place that day?
  - Yes.
- Have you changed or deleted any portions of the conversation?
  - No.

## REPLY LETTER DOCTRINE

- A letter received in the due course of mail purportedly in answer to another letter is *prima facie* genuine and admissible without further proof of authenticity.
- A reply letter needs no further authentication because it is unlikely that anyone other than the purported writer would know and respond to the contents of the earlier letter addressed to him.






*Butler v. State*

459 S.W.3d 595 (Tex. Crim. App. 2015)


Reply Letter Doctrine Applied to **Electronic Messages**

- An **electronic communication** received in the due course of mail purportedly in answer to another **electronic communication** is *prima facie* genuine and admissible without further proof of authenticity.
- A reply **electronic communication** needs no further authentication because it is unlikely that anyone other than the purported writer would know and respond to the contents of the earlier **electronic communication** addressed to him.



Reply  
Letter  
Doctrine

- [*FRE 901(b)(4) distinctive characteristics test*]
  - *Used a special nickname;*
  - *Accent shown in words;*
  - *Knowledge of specific information.*
- When the [*email/text/instant message*] came in, did you reply to it?
  - I did.



## Reply Letter Doctrine

- Did your husband reply back to that [*email/text/instant message*]?
  - Yes.
- Did you respond back?
  - Yes.
- Did this reply and response between you and your husband continue?
  - Yes.

# Direct/Cross Example—Writing a Script

- **Smith DIRECT AND CROSS**
- **Direct—Husband**
- Name
- Occupation
- How long have you been married
- Your wife has a background as a teacher
- During the marriage, would it be fair to say that you worked and your wife stayed at home.
- Even though she was a stay at home mom, how would you characterize your involvement with your kids.
- Did you go to their activities
- **EXHIBIT 7 PICTURES OF DAD AND KIDS**
- Your son John, does he have any diagnoses?

# Direct/Cross Example

- **Smith DIRECT AND CROSS**
- **Cross—Wife**
- Do you agree that you and Mr. Smith are both equally important in your children's lives.
- Do you agree that you and Mr. Smith should have an equal influence on your children.
- Yet, you want all decision making power, and for Mr. Smith to see the children 8 or 9 days out of the month.
- In fact you don't even want to consult with Mr. Smith or involve him in decisions with your children.
- It's true ma'am that the reason you don't want him to have equal time is because you want child support.
- Child support is more important to you than your children spending equal time with their dad.

# What do you need for the predicate?



RFP: Request for text messages between Husband and Wife, Husband and girlfriend, etc. (BE SPECIFIC in a request)—iCloud, other storage device, screenshots.



ROGS: ROGS asking to identify if text messages exist.



Authentication ROGS: ROGS to authenticate text messages.



Deposition (Duces Tecum): Request for text messages.



Weekley Homes Procedure

# Preparing for Temporary Orders

- Financial Information Statement/Expense Statement
- Financials required by the local rules (Rule 11 to exchange if possible)
- Inventory
- Summary of Requested Relief (Created like a checklist)
- Summary of testimony
- Photos



# Preparing for the Enforcement

- Motion
- Proof for each violation
- Witness to prove up (Remember, the other party can plead the 5<sup>th</sup>!!!)
- Proposed order
- Personal Service





# Preparing for the Motion to Compel

- Motion
- Document list of what was produced
- Missing list of documents
- Proposed order
- Bring the actual documents (or at least bring them virtually)
- Bring the document index list
- Proof for attorney's fees



# The Trial Notebook

- 1. List of relief requested;
  - 2. Summary of disputed issues;
  - 3. Stipulations or agreements;
  - 4. Relevant pleadings and orders;
  - 5. Proposed division of property;
  - 6. Inventory and appraisalment form;
  - 7. Appraisals;
  - 8. Business valuations;
  - 9. Proposed parenting plan;
  - 10. Social studies;
  - 11. Discovery;
  - 12. Witness list;
  - 13. Designations of fact and expert witnesses;
  - 14. Deposition transcripts;
  - 15. Expert reports;
  - 16. Exhibit list;
  - 17. List of agreed exhibits; and
  - 18. Trial briefs on special points of law, together with relevant cases.
- And for SAPCRs:
- 1. Checklist of rights and duties;
  - 2. Possible visitation schedules;
  - 3. Travel schedules and expenses;
  - 4. Proposed child support;
  - 5. Parenting coordinator / facilitator proposals;
  - 6. Counseling requests or reports.

# Preparing for the Jury Trial

- Jury Questionnaire
- Voir Dire Questions
- Seating Chart for Jury
- Jury Charge
- Talking to a jury consultant (what to wear, where to sit, how to present the case)

What You Don't Expect!

# The Unexpected from Opposing Counsel

- Opposing Counsel tries to introduce exhibits never produced in discovery.
- WHAT DO YOU DO?!
  - Assert TRCP 193.6—
    - A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
      - **(1)** there was good cause for the failure to timely make, amend, or supplement the discovery response; OR
      - **(2)** the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

# The Unexpected from Opposing Counsel

- Opposing Counsel tries to bring up new claims or arguments, for the first time, with no prior notice.
- WHAT DO YOU DO?!
  - Object to the timeliness!
  - If the Judge lets it in, ask for a continuance, get a ruling on the record, and submit an order.
  - Ask for leave of Court for your own pleading amendments.

# The Unexpected from Opposing Counsel

- Opposing Counsel tries to request the Court take your client's electronic devices and inspect them, with no notice.
- WHAT DO YOU DO?!
  - Follow the *In re Weekley Homes procedures*.

How can I get in there legally?  
In Re Weekley Homes, 295 S.W.3d 309  
(Tex. 2009).





# *Weekley Homes*

## Step 1

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Request the information in a discovery motion, such as a request for production.

# *Weekley Homes*

## Step 2

- The responding party must then produce any electronic information that is “responsive to the request and...reasonably available to the responding party in its ordinary course of business.” “Reasonably available” information includes active data, near-line data, and offline data, but does **not** include backup tapes or erased/damaged data.

# *Weekley Homes*

## Step 3

- If “the responding party cannot—through reasonable efforts— retrieve the data or information requested or produce it in the form requested”, the responding party **MUST OBJECT**.

# *Weekley Homes*

## Step 4

- The parties should make reasonable efforts to resolve the dispute without court intervention.

# *Weekley Homes*

## Step 5

- If no resolution, either party can ask for a hearing. Further, the Responding party must prove that the requested information is not reasonably available because of undue burden or cost.

# *Weekley Homes*

## Step 6

- If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, subject to the limitations of TEXAS RULES OF CIVIL PROCEDURE Rule 192.4.

# *Weekley Homes*

## Step 7

- If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

# *Weekley Homes*

## Step 8

- Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.



# Rule 191.1 Modification of Procedures

- TRCP Rule 191.1
  - For good cause, the Court may modify the procedures and limitations of the discovery rules.
  - Utilize this rule to ask for:
    - Discovery Master
    - Forensic Computer Expert
    - Emergency TRO to Image Devices

# The Unexpected from Opposing Party

- During discovery, you learn that the opposing party has deleted text messages your client needed to prove their case.
- WHAT DO YOU DO?!
  - File a motion for sanctions regarding spoliation.
  - *Brookshire Brothers* case.



**SPOILIATION**

WHAT IS SPOILIATION?

- The withholding, alteration, or destruction of evidence relevant to a legal proceeding.

## Brookshire Bros., Ltd. v. Aldridge 438 S.W.3d 9 (Tex. 2014)

- Slip and fall case
- Recorded the fall
- Store routinely recorded over footage every 30 days, so the footage was not preserved
- Plaintiff argued deleted video would have shown where substance on floor originated

# Spoliation Note

- **Create a spoliation letter.**
- **Send to your client and the opposing side.**
- **Make sure in your spoliation letter your client isn't accidentally deleting information from cloud based services during back up (such as icloud).**
- **And include this specific request in your letter to the opposing side.**

HOW TO PROVE SPOILIATION?



- Screenshots
- Downloading a copy of data
- Hiring a computer expert
- Duplicate in the cloud?



# The Unexpected from Opposing Party

- During the hearing, the opposing party refuses to admit his Facebook page is actually his Facebook page.
- WHAT DO YOU DO?!
  - Try to prove it up using your Predicates Manual.
  - If he still does not admit it, try circumstantial evidence.
    - Do these look like your photos?
    - Are you friends on Facebook with the people listed here?
    - Any reason to believe someone else would have posted this?
  - If he still does not admit it, try reading from the document.
  - If that doesn't work, try another witness.

The Witness Does Not Recognize The Evidence!



# Electronic Evidence Example

- You do an AWESOME prove up—BUT, the witness does not recognize the document!
- STEP 1: Try to authenticate through distinctive characteristics.
  - Ask the witness prove up questions.
  - Recognize the number? The name? The content? Remember the conversation?
  - If this doesn't work, go to STEP 2.

# Electronic Evidence Example

- You do an AWESOME prove up—BUT, the witness does not recognize the document!
- STEP 2: Try to use the evidence (and any other evidence to refresh memory).
  - TRE 612
  - Do you recognize this to be a copy of your Facebook page?
  - You don't recall calling your wife slutterific?
  - Please review this document and read it silently.
  - Now that you have had a chance to refresh your memory, do you now recognize this? *The FB page is not put into evidence.*
  - If this doesn't work, go to STEP 3.

# Recorded Recollection

- A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. Tex. R. Evid. 803(5).
- If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. *Id.*

# Recorded Recollection

- *Gomez v. State*, 552 S.W.3d 422 (Tex. App.—Fort Worth 2018, no pet.).
- D was convicted of family-violence assault
- Lam, D's wife and the victim, spoke primarily Vietnamese
- Lam had told her daughter, in Vietnamese, what happened, and the daughter transcribed it in English
- Daughter read it back to Lam, and Lam signed it
- State offered the writing as a recorded recollection because Lam could not remember the day of the dispute
- D argued that the note was not trustworthy because there was nothing to show that it was accurately transcribed into English
- COA held that, because Lam told her daughter, the daughter wrote it down and read it back, and Lam subsequently signed it, it was sufficiently reliable as a recorded recollection

# Electronic Evidence Example

- You do an AWESOME prove up—BUT, the witness does not recognize the document!
- STEP 3: Ask the witness cross examination questions.
  - The FB status says “My wife is slutterific.”
  - The witness doesn’t recognize the page or remember the page.
  - You tried to refresh the witness’s memory, didn’t work.
  - Ask: “You have called your wife slutterific?”
  - This works in TONS of instances—the document has other hearsay you can’t get in, it’s a comment on someone else’s Facebook you can’t authenticate, you can reverse the order of this too.



# The Unexpected from The Judge

- You are set for 2 hours, and the Judge says you only get 30 minutes.
- **WHAT DO YOU DO?!**
  - Ask for a continuance.
  - Ask the Court to make a finding that you objected (or object on the record if there is a record).
  - Ask the Judge to limit the time for both sides.
  - Ask the Court to allow additional time and have that requested granted or denied on the record.

# Zoom

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- Prepare summaries
- Create exhibits suitable for sharing
- Make a powerpoint presentation
- Folder with exhibits on your computer
- Virtual background



# USING POWERPOINT WHEN TIME IS LIMITED



## *THE EVIDENCE WILL SHOW:*

### Relevant Time-Line

- July 2018 Parties move in together in Fort Worth, TX
- **July 21, 2019** **Child is born in Fort Worth, TX**
- Sept 2019 Parties entered into a 12-month lease on a residence in Fort Worth, TX (*Response Ex. A*)
- Nov 9, 2019 Father paid for Mother and Child to travel to Washington to visit Mother's sister. (*First time child leaves Texas*)
- Dec 2019 Father traveled to visit Mother's sister. (*Response Ex. B-1&2*)
- Jan 2020 Mother, Father and Child vacationed together in San Diego (*Response Ex. C*)

# Thank you!

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