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Civil Evidence

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CIVIL EVIDENCE

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AS was the case last year, the most significant activity in the evidence field has been in the areas of expert testimony and privileges. Both the United States Supreme Court and the Texas Supreme Court issued opinions further clarifying the landmark cases *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] and *E. I. Du Pont de Nemours and Co., Inc. v. Robinson.*[2]

Also significant in Texas state practice was the unification of the civil and criminal rules of evidence. Most of the changes necessary to unify Rules were minor; however, there are a few significant changes to note relating to the attorney-client privilege and inferences that can be drawn from the assertion of a privilege.

Finally, as always, there are a few cases of note dealing with unique circumstances or rarely applied rules of evidence.

While we make no claim that this Article encompasses every development of the past year, we hope that it will give the reader an idea of some of the significant developments in the area of civil evidence.

I. ADMISSIBILITY OF EXPERT TESTIMONY

A. *DAUBERT* AND *DU PONT*

In 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[3] holding that under Rule 702 of the Federal Rules of Evidence, scientific evidence is not admissible unless it is "scientifically valid" and reliable.[4] The *Daubert* Court rejected the long followed rule set out in *Frye v. United States*,[5] which held scientific evidence

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1. 509 U.S. 579 (1993).
2. 923 S.W.2d 549 (Tex. 1995).
3. 509 U.S. 579 (1993).
4. *Id.* at 597.
5. 293 F. 1013 (D.C. Cir. 1923).

admissible when the offering party established that the technique or principle had "gained general acceptance in the particular field in which it belongs."[6] Instead, the Court adopted a "flexible"[7] analysis, which included consideration of the following factors in determining "whether a theory or technique is scientific knowledge that will assist the trier of fact":[8]

(1) whether it can be (and has been) tested;[9]
(2) whether the theory or technique has been subjected to peer review and publication;[10]
(3) in the case of a particular scientific technique, the known or potential rate of error;[11] and
(4) general acceptance.[12]

Because the federal and state rules governing the admissibility of expert testimony are identically worded,[13] it was not long before the Texas Supreme Court was faced with the same issue. In *E. I. Du Pont de Nemours and Co., Inc. v. Robinson*,[14] the court followed *Daubert*'s footsteps, holding that Rule 702 "requires the proponent to show that the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation."[15] In determining the reliability of scientific evidence, the court set out a list of non-exclusive factors it considered relevant to the inquiry:

(1) the extent to which the theory has been or can be tested;
(2) the extent to which the technique relies upon the subjective interpretation of the expert;
(3) whether the theory has been subjected to peer review or publication;
(4) the technique's potential rate of error;
(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
(6) the non-judicial uses which have been made of the theory or technique.[16]

Last year, both the state and federal courts decided cases further refining and clarifying these rules.

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6. *Id.* at 1014.
7. *Daubert*, 509 U.S. at 594.
8. *Id.* at 593.
9. *Id.*
10. *Id.*
11. *Id.* at 594.
12. *Id.*
13. *Compare* FED. R. EVID. 702 *with* TEX. R. EVID. 702. Both rules state the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

14. 923 S.W.2d 549 (Tex. 1995).
15. *Id.* at 556.
16. *Id.* at 557 (citation and footnote omitted).

B. THE FEDERAL DECISIONS

In *General Electric Co. v. Joiner*,[17] the Supreme Court considered the standards under which appellate courts should review a decision by the trial court to exclude expert testimony. Both sides conceded that the standard was abuse of discretion; however, the controversy centered around whether the Eleventh Circuit had applied too narrow an abuse of discretion standard.[18]

Robert Joiner, an electrician in the Water & Light Department of Thomasville, Georgia, was exposed regularly to dielectric fluid that was later found to be contaminated with PCBs, a known hazard to human health. When Joiner, who was a smoker and had a family history of lung cancer, was diagnosed in 1991 with small cell lung cancer, he sued General Electric and Westinghouse Electric (collectively "GE"), among others, claiming that as manufacturers of the dielectric fluid they were liable because the fluid "promoted" his cancer.[19] The trial court granted GE's motion for summary judgment in part on the grounds that Joiner's experts had failed to show a link between exposure to PCBs and small cell lung cancer.

On appeal, the Eleventh Circuit reversed. It held that "because the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony."[20] Applying that standard, the appeals court concluded that the trial court had impermissibly substituted its opinion for that of the expert.

The Supreme Court reversed. It first rejected the notion that there should be any difference in the standard of review applicable to a decision to exclude an expert's testimony and the standard applicable to a decision to admit an expert's testimony.[21] It then concluded that the court of appeals had failed to give the requisite deference to the trial court's decision excluding the evidence.[22]

Joiner's experts testified that it was "more likely than not" that Joiner's lung cancer was linked to smoking and PCB exposure.[23] The trial court, however, held that the facts did not support this conclusion. First, the court found that Joiner's experts could not explain how the results of animal studies, in which infant mice were injected with massive doses of PCBs, could be extrapolated to humans. In the other four epidemiological studies upon which Joiner's experts relied, the authors were either unwilling to conclude there was a link between the cancer and PCB exposure or the studies themselves involved substances other than PCBs.

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17. 118 S. Ct. 512 (1997).
18. *See id.* at 515, 517.
19. *Id.* at 516.
20. *Id.* (citation and internal quotation marks omitted).
21. *See id.* at 517.
22. *See id.*
23. *Id.* at 518.

The Supreme Court held:

> Trained experts commonly extrapolate from existing data[,] . . . nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit [i.e., bare assertion] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[24]

Discovering this "analytical gap" between an expert's conclusions and the underlying data has been the focus of a number of decisions in the lower state and federal courts following *Joiner*. In *Moore v. Ashland Chemical Inc.*,[25] the Fifth Circuit held the district court did not abuse its discretion in excluding Moore's proffered expert. Moore was exposed to a mixture of chemicals that had leaked from sealed drums carried inside his truck. Soon after exposure, Moore began to suffer from a condition known as "reactive airways dysfunction syndrome."[26] At issue was whether this respiratory ailment was caused by exposure to those chemicals. At trial, Moore offered the testimony of two clinical physicians, Drs. Jenkins and Alvarez, who had examined and treated him. The trial court excluded the testimony by Dr. Jenkins that exposure to the chemicals had caused Moore's illness, but allowed the substantially similar testimony of Dr. Alvarez. The jury returned a verdict against Moore, finding that the defendants' conduct did not cause his illness. On appeal, the defendants did not challenge the district court's decision to admit Dr. Alvarez's opinion, so the only issue presented was whether the court's failure to admit Dr. Jenkins' testimony was an abuse of discretion.[27]

Judge Davis, writing for the en banc majority, concluded that Dr. Jenkins had failed to causally link his conclusion with the facts offered in support. For instance, his training and experience and his examination of Moore and evaluation of Moore's test results, while important to his diagnosis, gave no indication on their face as to how they were helpful in reaching his conclusion that exposure to the chemicals caused the ailment.[28] In addition, the article Dr. Jenkins relied on contained speculative conclusions and involved a level and duration of exposure that was several times greater than that experienced by Moore.[29] The court of appeals also found that the district court did not abuse its discretion when it concluded that the material safety data sheet (MSDS) was of limited value to Dr. Jenkins because he did not know what tests had been conducted in generating the MSDS and had no information on the level of exposure necessary to sustain the injuries about which the MSDS warned.[30]

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24. *Id.* at 519.
25. 151 F.3d 269, 279 (5th Cir. 1998) (en banc), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 17, 1998) (No. 98-992).
26. *See id.* at 272.
27. *See id.* at 273.
28. *See id.* at 277-78.
29. *See id.* at 278.
30. *See id.*

The court also rejected Dr. Jenkins' attempt to extrapolate causation based on the temporal proximity between the exposure and the injury.[31] "In the absence of an established scientific connection between exposure and illness, or compelling circumstance . . ., the temporal connection between exposure chemicals and an onset of symptoms, standing alone, is entitled to little weight in determining causation."[32] Not only did Dr. Jenkins not have accurate information about the level of Moore's exposure to the fumes, he could not articulate a scientific connection between the time of exposure and onset of symptoms.[33]

Finally, the court rejected Dr. Jenkins' fall-back position that any irritant to the lungs could cause the respiratory ailment in a susceptible patient. The court found that none of the *Daubert* factors had been met: "Dr. Jenkins theory had not been tested; the theory had not been subjected to peer review or publication; the potential rate of error had not been determined or applied; and the theory had not been generally accepted in the scientific community."[34]

C. The State Decisions

The Texas courts of appeals have also rejected experts whose conclusions are not supported by valid scientific knowledge and data. In *Mitchell Electric Corp. v. Bartlett*,[35] for instance, the plaintiff landowners relied on the testimony of two experts—a geochemist and a petroleum engineer—to prove that hydrogen sulfide from the defendant's wells migrated to their water and caused their injuries. The petroleum engineer provided no evidence of causation because he did not testify that gas from the well was found in any of the plaintiffs' water.[36] The geochemist's testimony was similarly unhelpful because his testimony consisted of using unsupported "magic" phrases such as "reasonable degree of certainty" and "certainly could have come."[37] The court concluded that "[u]nless the expert provides supporting facts, his bare conclusion is not evidence."[38]

Another case in which the bare conclusion of an expert was rejected is *Minnesota Mining & Manufacturing Co. v. Atterbury*.[39] In that case, the issue was whether users of silicone gel breast implants presented sufficient reliable evidence to support the jury's conclusion that the implants caused their illnesses. The court concluded that the opinions of the plaintiffs' three experts were unreliable and should have been excluded.[40]

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31. *See id.*
32. *Id.* at 278 (citations omitted).
33. *See id.* at 278-79.
34. *Id.* at 279.
35. 958 S.W.2d 430 (Tex. App.—Fort Worth 1997, pet. denied).
36. *See id.* at 446.
37. *Id.* at 447.
38. *Id.*
39. 978 S.W.2d 183 (Tex. App.—Texarkana 1998, pet. denied).
40. *See id.* at 196-203.

After exhaustively reviewing the precedent concerning expert witness testimony and the precedent on expert witness testimony in silicone cases, the court evaluated the plaintiffs' experts. All three experts had testified that based upon a reasonable medical probability, the breast implants more likely than not caused the injuries. The Texarkana court, however, found the analytical gap between this conclusion and the facts and data underlying it too wide to warrant admitting the testimony.

The first step the court took in analyzing the evidence was to identify "the types of evidence necessary in a legal and factual sufficiency of the evidence review to support a finding of causation in toxic tort cases."[41] The court held that reliable epidemiological evidence along with other evidence that links the plaintiffs to the population in the study and eliminates other possible causes of the plaintiffs' injuries are necessary, but not sufficient:[42] "[O]ne reliable epidemiological study that has a statistically significant association will not be enough to satisfy a legal insufficiency review."[43] The proponent of the epidemiological study must also produce another study to verify the results of the study being offered.[44] Moreover, the court expressed the view that the Texas Supreme Court "places the . . . factor of peer-reviewed publication at a higher level than does the United States Supreme Court."[45]

Since the plaintiff was unable to obtain reliable epidemiological evidence, the court identified, but rejected, alternative methods of proving causation. "Abstracts that reanalyze other epidemiological evidence and that do not state the methodologies used, specifically the significance level, the confidence level, and the choice of the control group, will not be considered."[46] The court also held that animal studies, standing alone, were unlikely to constitute sufficient evidence of causation.[47] In addition, "isolated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered."[48] Finally, differential studies—that is, diagnosing illness through the elimination of other causes—is "most likely . . . not sufficient under current standards promulgated by the Texas Supreme Court . . . based upon what appears to be the court's total reliance on objective evidence and its disdain for any form of subjective analysis."[49]

The court went through the testimony of each of the plaintiffs' experts and found them all wanting. Two of the experts had used abstracts that had not been published or subjected to peer review.[50] One of the experts relied on two epidemiological studies, but did not articulate the studies'

41. *Id.* at 198.
42. *See id.*
43. *Id.*
44. *See id.*
45. *Id.*
46. *Id.* at 199.
47. *See id.*
48. *Id.* (citations and internal quotation marks omitted).
49. *Id.*
50. *See id.* at 200-01.

methodologies or their error rates.[51] The court rejected the testimony of the plaintiffs' third expert on the grounds that while his diagnostic methodologies were based on generally accepted medical practice, those practices were based on subjective analysis. Moreover, there was "no generally accepted criteria by which doctors can link injuries and illnesses to implants."[52]

In sum, the court held that the plaintiffs had the burden to prove "that the agent he or she alleges caused injury or illness (1) could do so in the general population, and (2) did so to him or her specifically."[53] The plaintiffs did not meet their burden as to the first, and the court reversed the jury verdict.

In addition to the analytical gap issues raised by the expert testimony precedent, another issue that arises is whether the *Daubert/Robinson* factors apply to all expert testimony or only scientific expert testimony or even novel scientific expert testimony. Last year, the Fifth Circuit resolved the issue in *Watkins v. Telsmith, Inc.*,[54] holding that the *Daubert* factors are relevant to evaluating the admissibility of any expert testimony under Rule 702.[55] This year, the Texas Supreme Court addressed the issue in *Gammill v. Jack Williams Chevrolet, Inc.*.[56] The Texas Supreme Court, like the Fifth Circuit, concluded that *Robinson* applied to all expert testimony.[57] The court, however, made clear that even though expert testimony must be reliable and relevant, "considerations listed in *Daubert* and *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony."[58] Nonetheless, the court must discharge its gatekeeper duty in evaluating the reliability of the evidence proffered by the expert and not leave the matter solely to the jury and opposing counsel's ability to effectively cross-examine the witness.[59]

Although relevance and reliability are issues considered only after an expert is determined to be qualified, the issue of expert qualification does sometimes arise. In *Hall v. Huff*,[60] the Texarkana Court of Appeals decided an interesting case involving a claim that an expert's qualifications

51. *See id.* at 200.
52. *Id.* at 202.
53. *Id.* at 203.
54. 121 F.3d 984 (5th Cir. 1997).
55. *See id.* at 991. The extent to which a trial court performs the gatekeeper function when the expert testimony offered is non-scientific is a matter that will soon be decided by the Supreme Court when it hears Kumho Tire Co. v. Carmichael, 66 U.S.L.W. 3793 (No. 97-1709). That case, on appeal from the Eleventh Circuit, will review the conclusion that "[e]xpert testimony that implicates scientific principles but that is based on expert's experience and observations need not be subject to four-part analysis outline in Daubert v. Merrell Dow Pharm., Inc. for admission of scientific evidence." *Id.* (citation omitted). The issue presented is: "May trial judge consider four factors set out in *Daubert* . . . in FED. R. EVID. 702 analysis of admissibility of engineering expert's testimony?" *Id.*
56. 972 S.W.2d 713 (Tex. 1998).
57. *See id.* at 726.
58. *Id.*
59. *See id.* at 728.
60. 957 S.W.2d 90 (Tex. App.—Texarkana 1997, pet. denied).

were defeated by application of the locality rule. Beth Ann Hall, on behalf of the estate of her husband, Arthur Hall filed suit against William K. Huff, M.D. and Good Shepard Hospital, Inc. (GSH), alleging that their malpractice caused the death of her husband. The trial court granted the defendants' motions for summary judgment. As to GSH, the trial court struck the testimony of Hrehorovich, the only expert Hall offered against GSH, after GSH argued he was not qualified to render an opinion concerning nursing standards of care.

The court of appeals reviewed the trial court's decision for abuse of discretion.[61] GSH claimed the trial court did not abuse its discretion because Hrehorovich was unfamiliar with the standards of care in Texas. The court, however, disagreed. It pointed out that "Hrehorovich stated by affidavit that he was familiar with the standard of care for appropriate catheter placement and diagnosis and emergency treatment of cardiac tamponade that exist *under same or similar circumstances.*"[62] Finding "no evidence that nursing standards of care in Texas greatly differ from or are inferior to national standards,"[63] the court held Hrehorovich qualified and his testimony admissible. The court disavowed a complete abrogation of the locality rule, but held that is was best served by the use of "same or similar circumstances" language.[64]

Another case from the El Paso Court of Appeals reveals an anomaly in the law qualifying certain individuals to testify as to the reasonableness and necessity of medical bills. In *Castillo v. American Garment Finishers Corp.*,[65] Castillo sued his former employer, American Garment, for injuries he sustained as a result of inhalation of chemical fumes at work. At trial, Castillo attempted to substantiate the reasonableness and necessity of his medical bills with the live testimony of the custodian of records. The court excluded the testimony.

On appeal, the Castillo argued the custodian's testimony was admissible under sections 18.001 and 18.002 of the Texas Civil Practice and Remedies Code, which permit a non-expert custodian of records to testify via affidavit that medical bills are reasonable and necessary. The court rejected this argument, finding the statute to be a limited exception to rule that "expert testimony is required to establish that medical expenses are reasonable and necessary."[66]

The last case of note on the issue of experts reminds practitioners again of the importance of preserving error. In *Maritime Overseas Corp. v. Ellis*,[67] Ellis was exposed to Diazinon while serving on a ship owned by Maritime. At trial, Ellis' experts testified that the exposure caused irre-

61. *See id.* at 99-100.
62. *Id.* at 101 (emphasis added).
63. *Id.*
64. *Id.*
65. 965 S.W.2d 646 (Tex. App.—El Paso 1998, no pet.).
66. *Id.* at 654.
67. 971 S.W.2d 402 (Tex. 1998), *cert. denied*, 119 S. Ct. 541 (1998).

versible "delayed neurotoxicity" or "neuropathy."[68] Maritime did not object at trial to the admission of the expert testimony, but rather complained on appeal that the scientific methodology was ill-founded, which rendered the experts' testimony unreliable and no evidence of causation.

The Texas Supreme Court rejected Maritime's argument. The court explained that the *Daubert*, *Robinson*, and *Havner* decisions emphasize the trial court's role as gatekeeper and its function to make preliminary determinations as to whether offered testimony meets the relevance and reliability standards.[69] Thus, to preserve a complaint that expert testimony is unreliable and, therefore, no evidence, the party must object to the evidence before trial or at the time the evidence is offered at trial.[70] This ensures the offering party an opportunity to cure any defect and prevents trial and appeal by ambush.[71] In addition, requiring the opposing party to object promotes certainty and fairness and gives notice to both the litigants and the courts as to what issues remain.[72] Finally, appellate courts "must base their decisions on the record as made and brought forward, not on a record that should have been made or could have been made."[73]

II. PRIVILEGES

On March 1, 1998, the new Texas Rules of Evidence became effective, consolidating what had previously been separate rules for civil and criminal cases.[74] Although most of the changes in the rules are minor, one of the more significant changes involves the law of attorney/client privilege. The new evidence rules reject the "control group test" for corporate clients set forth in *National Tank Co. v. Brotherton*,[75] and instead adopt the more commonly accepted "subject matter test."[76] A communication is now protected if made to a representative of a client, which includes "any . . . person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."[77]

One other change, though not as significant, deals with the inferences that may be drawn by a jury upon the invocation of a privilege. Rule 513(d) now permits, upon request, an instruction to the jury that no adverse inference may be drawn from the assertion of a privilege in a civil case.[78] This rule, however, still does not apply to a *party's* claim of the

68. *Id.* at 405.
69. *See id.* at 409.
70. *See id.* at 411.
71. *See id.* at 409.
72. *See id.* at 411.
73. *Id.*
74. *See* TEX. R. OF EVID., 61 TEX. B.J. 374 (1998).
75. 851 S.W.2d 193 (Tex. 1993).
76. *See* TEX. R. EVID. 503 (comment to 1998 change); *see also* Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (articulating the subject matter test).
77. TEX. R. EVID. 503(a)(2)(B).
78. *See id.* 513(d).

privilege against self-incrimination.[79]

The other cases of note concerning privileges arise in such varied contexts as attorney disqualification, joint venture disputes, and grievance proceedings. In the decision of *In re Meador*,[80] the issue was whether an attorney was subject to disqualification where, through no wrongdoing of the client, the attorney received an opponent's privileged materials. Meador, a former consultant for Conley, Lott, Nichols Machinery Company (CLN), sued the company, alleging various employment-related claims. Peterson, the assistant to CLN's president, came across privileged documents relating to Meador's case. Peterson copied the documents and later met with Meador's attorney, Masterson, to discuss whether she should bring her own claim against CLN. During this meeting, Peterson gave Masterson a copy of the privileged documents. CLN discovered Masterson had obtained copies of the documents, and when Masterson refused to return them, CLN moved to have him disqualified. The trial court refused to disqualify Masterson but did order Masterson to return all copies of the documents and prohibited him from using them in the Meador litigation.

CLN petitioned for a writ of mandamus compelling Masterson's disqualification. The court of appeals granted relief, adopting the standard of conduct set forth in an American Bar Association Formal Opinion:

> A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.[81]

On petition for relief from that decision, the Texas Supreme Court disagreed with the court of appeals and declined to hold that the trial court had abused its discretion in refusing to disqualify Masterson.[82]

The court held that the absence of a Texas Rule of Disciplinary Procedure applicable to the situation did not resolve the issue. Because the disciplinary rules are only guidelines, "a court has the power, under appropriate circumstances, to disqualify an attorney even though he or she has not violated a specific disciplinary rule."[83] Under these circumstances, the court concluded the ABA's Formal Opinion "represent[ed] the standard to which attorneys should aspire in dealing with an oppo-

79. *See id.* 513(c).
80. 968 S.W.2d 346 (Tex. 1998).
81. *Id.* at 349 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994)).
82. *See Meador*, 968 S.W.2d at 354.
83. *Id.* at 351.

nent's privileged information."[84] In accordance with that Opinion, the court held the trial court should consider the following factors in determining whether to exercise its discretion to disqualify counsel "when a lawyer receives an opponent's privileged materials outside the normal course of discovery:"[85]

(1) whether the attorney knew or should have known that the material was privileged;
(2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
(3) the extent to which the attorney reviews and digests the privileged information;
(4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate the prejudice;
(5) the extent to which movant may be at fault for the unauthorized disclosure;
(6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.[86]

Applying these factors, the court determined the trial court did not abuse its discretion in refusing to disqualify Masterson. There was no evidence, the court held, that the information contained in the improperly disclosed documents would "significantly prejudice CLN's claims and defenses."[87] In addition, the court found there was evidence that Meador would suffer significant hardship if Masterson were disqualified.[88]

Another decision out of the Houston Court of Appeals dealt with the interrelationship between the joint client exception to the attorney/client privilege and fiduciary duties joint venturers owe each other. In the decision of *In re Valero*,[89] Valero Transmission, L.P. (Valero) filed a petition for writ of mandamus against Teco Pipeline Company (Teco) after the trial court ordered Valero to produce documents Valero alleged were protected by the attorney-client privilege. Teco and Valero were joint venturers in operating a gas pipeline. The "parties competed with each other to secure customers for the transportation of gas," but "had to account to the joint venture for use of the pipeline by paying a tariff set by the operating agreement."[90] In 1996, Teco sued Valero, claiming that Valero had diverted opportunities and profits belonging to the joint venture. Teco propounded discovery that asked, in part, for documents prepared by Valero's in-house counsel. Teco claimed it was entitled to the documents under the joint client exception because it was billed for the

84. *Id.*
85. *Id.* at 352.
86. *Id.* at 351-52.
87. *Id.* at 352.
88. *Id.* at 352-53.
89. 973 S.W.2d 453 (Tex. App.—Houston [14th Dist.] 1998, no pet.).
90. *Id.* at 455.

legal services performed by Valero's in-house counsel for the joint venture.

The Texas Rules of Evidence provide there is no attorney/client privilege "[a]s to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients."[91] The court of appeals held that although Teco and Valero were joint venturers who owed certain fiduciary duties towards each other, they were not joint clients. The court analogized the situation to the relationship between a trustee and the trust's beneficiary. In *Huie v. DeShazo*,[92] the Texas Supreme Court held that a trust beneficiary could not discover the confidential communications between a trustee and the lawyer retained by that trustee. However, the trustee was under a "duty to disclose material facts[ ] or to provide a full accounting to the beneficiary, even as to information conveyed to the trustee's attorney, so long as it did not reveal confidential attorney-client communications."[93] Similarly, while joint venturers owe each other fiduciary duties, they are entitled to seek confidential advice from counsel concerning their duties as pipeline operators.[94] The fact that Teco paid for part of the services rendered by Valero's in-house counsel did not change the result: "The fact that Valero's attorneys rendered undefined legal services to the joint venture or that Teco paid for some undisclosed portion of the joint venture's legal expenses, without more, is insufficient to establish that Teco and Valero were joint clients."[95]

In *Berger v. Lang*,[96] the Houston Court of Appeals had to decide whether the rule affording blanket confidentiality to grievance proceedings could be waived. Rule 2.15 of the Texas Rules of Disciplinary Procedure provides, in relevant part, that "[a]ll information, proceedings, hearing transcripts, statements, and any other information coming to the attention of the investigatory panel of the Committee must remain confidential and may not be disclosed to any person or entity (except the Chief Disciplinary Counsel) unless disclosure is ordered by the court."[97] Despite the absolute nature of the wording of this rule, the court determined that a party who made statements on the record during a trial concerning a disciplinary proceeding "impliedly invites or consents" to being cross-examined on the subject.[98] In this case, Berger disclosed that a grievance had been filed against him and implied a favorable outcome. On cross-examination, however, the trial court permitted Berger's opponent to ask

91. TEX. R. EVID. 503(d)(5).
92. 922 S.W.2d 920, 924 (Tex. 1996).
93. *Valero*, 973 S.W.2d at 458-59 (citing *Huie*, 922 S.W.2d at 923).
94. *See id.* at 459.
95. *Id.*
96. 976 S.W.2d 833 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
97. *Id.* at 836 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 2.15, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1998)).
98. *Id.* at 837.

him questions concerning the true outcome of the proceeding, finding that Berger waived his right to confidentiality.[99]

The court of appeals held the trial court did not abuse its discretion in allowing the examination. The court looked to Rule 511 of the Texas Rules of Evidence, which provides that a privileged conferred under the Evidence Rules is waivable. The court, however, did not explain how Rule 511 applied to a privilege conferred by the Disciplinary Rules, but instead relied on a Dallas Court of Appeals opinion, which held a party could waive the statutory hospital committee privilege.[100]

III. MISCELLANEOUS DECISIONS OF NOTE

The last two decisions of note this year concern the admissibility of prior bad acts and matters of which a court may take judicial notice.

In *Stokes v. Puckett*,[101] three former employees of Dr. Stokes sued him for assault and intentional infliction of emotional distress. Stokes had made repeated sexual advances to the three women and numerous sexually suggestive comments. At trial, the court allowed deposition testimony of other former Stokes employees to be read to the jury. These former employees also testified that Stokes had made sexual advances towards them. Stokes' counsel objected on the grounds that the deposition testimony was inadmissible character evidence and that under Rule 403 its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or the needless presentation of cumulative evidence.[102]

On appeal, the court affirmed, holding the deposition testimony was admissible under Rule 406 of the Texas Rules of Evidence.[103] Rule 406 provides:

> 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.[104]

The court also overruled the Rule 403 objection and concluded that the deposition testimony involved conduct by the "same supervisory personnel (Stokes), the same work place, and the same pattern of conduct."[105] Finally, the court found the testimony was admissible under Rule 404(b) of the Texas Rules of Evidence to "show Stokes' motive, intent, plan, or absence of mistake or accident."[106]

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99. *See id.* at 835.
100. *See id.* at 837 (citing Terrell State Hosp. v. Ashworth, 794 S.W.2d 937, 940 (Tex. App.—Dallas 1990) (orig. proceeding)).
101. 972 S.W.2d 921 (Tex. App.—Beaumont 1998, no pet. h.).
102. *See id.* at 926.
103. *See id.* at 926-27.
104. TEX. R. EVID. 406.
105. *Stokes*, 972 S.W.2d at 926-27.
106. *Id.* at 927.

The court's decision in *Allstate Insurance Co. v. Lincoln*,[107] serves as a reminder of the importance of refuting the reasonableness of attorneys' fees. In that case, the issue was whether there was sufficient evidence to sustain an award of attorneys' fees for breach of contract when the party seeking fees failed to offer any testimony that the fees sought were usual and customary. Usual and customary fees are presumed reasonable.[108] The Waco Court of Appeals held that the decision to grant or deny fees was within the discretion of the court and that because the court heard evidence of the amount of fees incurred, it was "entitled to take judicial notice of the usual and customary fees."[109]

IV. CONCLUSION

As has been the case in recent years, the significant developments in evidentiary law have centered around expert testimony. Perhaps reflecting the increasing complexity of trial practice, these decisions teach that the courts, especially Texas courts, are exercising an ever increasing gatekeeper role and that the unwary practitioner must pay careful attention to the sufficiency and reliability of the expert's testimony.

107. 976 S.W.2d 873 (Tex. App.—Waco 1998, no pet. h.).

108. *See id.* at 877 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 1997)).

109. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1997)).