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## Civil Evidence

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# CIVIL EVIDENCE

Linda L. Addison\*

**D**URING the Survey period, the Texas appellate courts handed down numerous decisions construing various rules of civil evidence. The cases of greatest significance arose in the following substantive areas: (1) Article I - General Provisions; (2) Article II - Judicial Notice; (3) Burden of Proof, Presumptions, and Inferences; (4) Article IV - Relevancy and Its Limits; (5) Article V - Privileges; (6) Article VI - Witnesses; (7) Article VII - Opinions and Expert Testimony; (8) Article VIII - Hearsay; (9) Article IX - Authentication and Identification; (10) Article X - Contents of Writings, Recordings, and Photographs; and (11) Parol Evidence.

## I. ARTICLE I — GENERAL PROVISIONS

Texas Rule of Civil Evidence 103(a)(2) provides that error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of a party is affected.<sup>1</sup> In *Western Co. of North America v. Southern Pacific Transportation Co.*<sup>2</sup> the Austin court of appeals held that in the absence of a special exception, Texas Rule of Civil Evidence 103(a) permitted a party that had plead a general allegation of contributory negligence to introduce evidence of any specific ground of negligence.<sup>3</sup>

Texas Rule of Civil Evidence 103(a)(2) provides that error may not be predicated on a ruling excluding evidence unless the substance of the evidence was made known to the court by offer.<sup>4</sup> In *Hartford Insurance Co. v. Jiminez*,<sup>5</sup> a Houston court of appeals held that where plaintiff did not show the content of excluded expert testimony by a bill of exception, he did not preserve his challenge to the exclusion of the expert testimony for appellate review under Texas Rule of Civil Evidence 103(a)(2).<sup>6</sup>

Texas Rule of Civil Evidence 104 governs preliminary questions of admissibility.<sup>7</sup> In determining preliminary questions of admissibility, the trial court is not bound by the rules of evidence except those with respect to privi-

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1. TEX. R. CIV. EVID. 103(a).

2. 819 S.W.2d 952 (Tex. App.—Austin 1991, no writ).

3. *Id.* at 955.

4. TEX. R. CIV. EVID. 103(a)(2).

5. 814 S.W.2d 551 (Tex. App.—Houston [1st Dist.] 1991, no writ).

6. *Id.* at 552.

7. TEX. R. CIV. EVID. 104.

leges.<sup>8</sup> In *Utica National Insurance Co. of Texas v. McDonald*,<sup>9</sup> the Fort Worth court of appeals rejected an argument that because Rule 104 provides that a trial court is not bound by the rules of evidence in determining preliminary questions of admissibility, the evidentiary prerequisites for admission of co-conspirators' statements were eliminated. The *Utica* court explained that Rule 104(a) does not change the common-law requirement that hearsay evidence of conspiracy is admitted only when accompanied by tangible, material evidence of the conspiracy.<sup>10</sup>

Texas Rule of Civil Evidence 105(a) provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."<sup>11</sup> In the absence of such a request, the court's action in admitting evidence without limitation is not a grounds for complaint on appeal.<sup>12</sup>

In *Wal-Mart Stores, Inc. v. Berry*<sup>13</sup> the Texarkana court of appeals held that where statements of two Sam's employees were admitted over a general hearsay objection and the objecting party did not request any limiting instruction, it was not error to admit the testimony for all purposes.<sup>14</sup>

Texas Rule of Civil Evidence 106, commonly known as the "rule of optional completeness," provides that when a party introduces a written or recorded statement, an adverse party may at that time introduce any other part or any other written or recorded statement that ought in fairness to be considered contemporaneously.<sup>15</sup> The Texarkana court of appeals considered the proper remedy under Rule 106 when one party offers a videotaped deposition presenting testimony out of the chronological sequence in which it was given in *Jones v. Colley*.<sup>16</sup> At issue in *Colley* was whether the trial court erred in excluding plaintiff's offer of a videotaped deposition simply because the plaintiff elected, as a matter of trial strategy, to put the questions and answers in a particular order.<sup>17</sup> Defendants argued on appeal that the videotape was properly excluded under the rule of optional completeness, Texas Rule of Civil Evidence 106.<sup>18</sup> The Texarkana court disagreed and held that defendants had no right to prevent the use of the edited videotape.<sup>19</sup> The Texarkana court explained that under Rule 106, defendants' remedy was to introduce the unedited deposition or their own edited version

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8. *Id.* at 104(a).

9. 814 S.W.2d 234 (Tex. App.—Fort Worth 1991, writ denied). For additional discussion of this case, see *infra*, text accompanying notes 211-12, and 247-49.

10. *Id.* at 236, (citing *Daggett v. Farmers' National Bank*, 259 S.W. 198, 202 (Tex. Civ. App.—Fort Worth 1923), *aff'd*, 2 S.W.2d 834 (Tex. Comm'n App. 1928, judgment adopted)).

11. TEX. R. CIV. EVID. 105(a).

12. *Id.*

13. 833 S.W.2d 587 (Tex. App.—Texarkana 1992, writ requested).

14. *Id.* at 593.

15. TEX. R. CIV. EVID. 106.

16. 820 S.W.2d 863 (Tex. App.—Texarkana 1991, writ denied).

17. *Id.* at 866.

18. *Id.*

19. *Id.*

in response.<sup>20</sup>

## II. ARTICLE II — JUDICIAL NOTICE

Article II of the Texas Rules of Civil Evidence governs judicial notice. During the Survey period, one court affirmed a trial court's judicial notice of the bankruptcy status of a manufacturer of asbestos products.<sup>21</sup> Another court took judicial notice that there was no legislatively established statutory probate court, county court at law, or other statutory court exercising jurisdiction of a probate court in a particular county.<sup>22</sup> The Tyler court of appeals held that whether Highway 96 North links Center and the neighboring Shelby County community of Tenaha is a fact of such notoriety that there was no need for an accompanying request for judicial notice with additional information.<sup>23</sup>

In *May v. May*<sup>24</sup> the Corpus Christi court of appeals held that a trial court may not judicially notice or even consider testimony taken at a previous hearing of the same case unless such testimony is admitted into evidence.<sup>25</sup> In *Marble Slab Creamery, Inc. v. Wesic, Inc.*,<sup>26</sup> a Houston court of appeals held that a trial court is entitled to take judicial notice of its own records where the same subject matter between the same parties is involved.<sup>27</sup>

Texas Civil Practice & Remedies Code section 38.004 permits a court to take judicial notice of usual and customary attorney's fees in a proceeding before the court.<sup>28</sup> During the Survey period, a Houston court of appeals held that even when a plaintiff did not request the trial court to take judicial notice, and the trial court did not announce that it had done so, a reviewing court may nevertheless presume that the trial court took judicial notice of reasonable attorney's fees.<sup>29</sup>

Texas Rule of Civil Evidence 204 permits a court, either upon its own motion or upon the motion of a party, to take judicial notice of Texas municipal and county ordinances, the contents of the Texas Register, and of the codified agency rules published in the Administrative Code.<sup>30</sup> During the Survey period, the San Antonio court of appeals took judicial notice of the charter of the City of San Antonio, even though the trial court was not re-

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20. *Id.*

21. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 695 (Tex. App.—Texarkana 1991, writ denied). For additional discussion of this case, see *infra* text accompanying notes 54-57, 71-74, and 185-88.

22. *Eppenauer v. Eppenauer*, 831 S.W.2d 30, 31 (Tex. App.—El Paso 1992, no writ).

23. *Apostolic Church v. American Honda Motor Co., Inc.*, 833 S.W.2d 553, 555-56 (Tex. App.—Tyler 1992, writ denied).

24. 829 S.W.2d 373 (Tex. App.—Corpus Christi 1992, writ denied).

25. *Id.* at 376.

26. 823 S.W.2d 436 (Tex. App.—Houston [14th Dist.] 1992, no writ).

27. *Id.* at 439.

28. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1992).

29. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

30. TEX. R. CIV. EVID. 204.

quested to do so and did not announce that it had done so.<sup>31</sup> The Austin court of appeals refused to take judicial notice of a challenged municipal ordinance that had not been included in the record of the trial court proceeding in *Metro Fuels, Inc. v. City of Austin*.<sup>32</sup> The Austin court explained that because municipal and county ordinances were difficult to research and verify, there would be no assurance that the version submitted to the appeals court was the same version considered by the trial court in this case in which the validity of the ordinance was issue.<sup>33</sup> In *Hollingsworth v. King*<sup>34</sup> the Amarillo court of appeals also refused to take judicial notice on appeal of unauthenticated copies of municipal ordinances.<sup>35</sup>

### III. BURDEN OF PROOF, PRESUMPTIONS AND INFERENCES

Article III of the Federal Rules of Evidence addresses presumptions. Because the Texas Rules of Civil Evidence lack a corresponding article III, Texas common law continues to govern the law of presumptions. During the Survey period, the Austin court of appeals reiterated that when a party has the burden to prove a fact, no affirmative evidence is required to support its non-existence or to permit a negative finding on the issue.<sup>36</sup>

### IV. ARTICLE IV — RELEVANCE AND ITS LIMITS

Article IV of the Texas Rules of Civil Evidence governs relevancy and its limits.<sup>37</sup> Relevant evidence is admissible, except as otherwise provided by constitution, by statute, or by other rules.<sup>38</sup> Evidence that is not relevant is not admissible.<sup>39</sup>

In *State v. Malone Service Co.*,<sup>40</sup> a civil environmental enforcement action, the Texas Supreme Court considered the relevance of certain evidence to the defense of discriminatory enforcement. At trial, Malone had sought to support its claim of discriminatory enforcement with an enforcement log generated by the Texas Water Commission. The log listed the names of hundreds of companies against which the Commission had some type of enforcement activity under the Solid Waste Disposal Act. Malone contended that six of the companies were customers and investors of one of Malone's competitors, the Gulf Coast Waste Disposal Authority. Although all six had been classified by the Commission as large polluters, Malone claimed that the log showed that the Commission had taken enforcement action against

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31. *International Ass'n of Fire Fighters Local 624 v. City of San Antonio*, 822 S.W.2d 122, 127 (Tex. App.—San Antonio 1991, writ denied).

32. 827 S.W.2d 531 (Tex. App.—Austin 1992, no writ).

33. *Id.* at 532.

34. 810 S.W.2d 772 (Tex. App.—Amarillo 1991), *writ denied per curiam*, 816 S.W.2d 340 (Tex. 1991).

35. *Id.* at 774.

36. *Slentz v. American Airlines, Inc.*, 817 S.W.2d 366, 370 (Tex. App.—Austin 1991, writ denied).

37. TEX. R. CIV. EVID. 402.

38. *Id.* For the definition of relevance, see *id.* 401.

39. *Id.* 402.

40. 829 S.W.2d 763 (Tex.), *cert. denied*, — U.S. —, 113 S. Ct. 464 (1992).

only four of the six companies and had assessed no penalties in any of those cases. Malone contended that the state's enforcement action against it was motivated solely to benefit the Gulf Coast Waste Disposal Authority.

The trial court sustained the state's objection to the log and admitted the log with the columns reflecting the penalties assessed and collected excised.<sup>41</sup> On appeal, Malone argued that the trial court had erred in excluding the evidence of penalties assessed against Malone's competitors. The court of appeals agreed, explaining that the excised column should have been admitted in support of Malone's defense of discriminatory enforcement.<sup>42</sup> The Texas Supreme Court disagreed and held that the trial court did not abuse its discretion in excluding the penalty amounts in the enforcement log.<sup>43</sup> The court explained that "[e]vidence will generally be relevant to the defense of discriminatory enforcement if it tends to show either that the government has singled the defendant out for prosecution or that the government has acted on the basis of impermissible considerations."<sup>44</sup> The court held that, as a matter of law, the evidence offered by Malone failed to establish the defense of discriminatory enforcement.<sup>45</sup> The court explained that Malone offered no evidence suggesting that benefits to Gulf Coast would flow directly to the state, nor any evidence suggesting that the state's action against Malone was based on race, religion, or any other impermissible consideration.<sup>46</sup>

Several courts of appeals also considered the relevance of certain evidence. In a former employee's action against his former employer to recover for breach of an implied employment contract, the Texarkana court of appeals found that the trial court had properly admitted evidence of the Collective Bargaining Agreement purporting to be the exclusive contract between members of the International Electrical Workers Union and the former employer.<sup>47</sup> The Texarkana court explained that because the Collective Bargaining Agreement purported to be the exclusive contract, it was relevant to the former employee's assertion that he had had a separate agreement. The court explained that the Agreement was also relevant to the former employer's assertion that there had been no separate agreement and that federal law preempted the former employee's claim.<sup>48</sup> The Texarkana court also explained that the former employee's failure to pursue an appeal through the grievance procedure was relevant to the former employer's contention that he had voluntarily resigned.<sup>49</sup> In another former employee's action alleging

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41. *Id.* at 766.

42. *Malone Serv. Co.*, 804 S.W.2d 174, 176 (Tex. App.—Houston [14th Dist.] 1991).

43. *Malone Serv. Co.*, 829 S.W.2d at 767.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 71-72 (Tex. App.—Texarkana 1992, writ denied).

48. *Id.* at 72.

49. *Id.*

violation of the Texas Whistleblower Act<sup>50</sup> and the First Amendment,<sup>51</sup> a Houston court of appeals held that the testimony of an expert witness, who was a city council member and former county attorney, as to the hesitation by city employees to report wrongdoing and the policy of local government officials not to disclose that information was relevant to the issue of whether the city has a policy of retaliating against whistleblowers.<sup>52</sup> The Houston court explained that the fact that the witness' opinion was based on observations made both before and after the whistleblowing employee was discharged went to the weight of the witness' testimony, not its admissibility.<sup>53</sup>

In another action brought against manufacturers of asbestos products to recover for injuries to or deaths of workers, the Texarkana court of appeals held relevant certain letters discussing the hazards of asbestos during the 1930s and 1940s to show that the dangers of asbestos were known during that period, even though the defendant manufacturers were not aware of or recipients of the letters, and companies involved in the letters did not make the liquid products containing asbestos as did one defendant manufacturer.<sup>54</sup> While agreeing that the trial court had erroneously excluded evidence that could have shown that defendant Johns-Manville, and not defendant Flintkote, caused injuries to the appellees, the Texarkana court held that the exclusion of the evidence did not require reversal because the defendants were joint tortfeasors, and the evidence would not have supported a fact-finding that the insolvent defendants were the sole cause of the plaintiffs' injuries.<sup>55</sup> The Texas Supreme Court granted writ of error on these points,<sup>56</sup> but later withdrew the order and denied the writ.<sup>57</sup>

In *Jones v. Red Arrow Heavy Hauling, Inc.*<sup>58</sup> the widow of a self-employed truck driver who had contracted to deliver freight in a trailer owned by the defendant brought suit for breach of the defendant's contract with the driver by withholding sums from the driver's paychecks for purposes of obtaining workers' compensation coverage and then failing to obtain coverage. The Beaumont court of appeals held that evidence of the widow's settlement of the death benefits claim with the workers' compensation carrier prior to bringing the breach of contract action was not relevant and was inadmissible.<sup>59</sup> The Beaumont court explained that evidence that the injured party received benefits from a collateral source is inadmissible under the rules of relevancy.<sup>60</sup>

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50. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 1-6 (Vernon Supp. 1992).

51. U. S. CONST. amend. I.

52. *City of Houston v. Leach*, 819 S.W.2d 185, 190-91 (Tex. App.—Houston [14th Dist.] 1991, no writ).

53. *Id.* at 191.

54. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 668-70 (Tex. App.—Texarkana 1991, writ denied). For additional discussion of this case, see *supra* text accompanying note 21, and *infra* notes 71-74 and 185-88.

55. *Id.* at 695.

56. 35 TEX. SUP. CT. J. 682 (May 2, 1991).

57. 36 TEX. SUP. CT. J. 612 (Nov. 11, 1992)(writ denied as improvidently granted).

58. 816 S.W.2d 134 (Tex. App.—Beaumont 1991, writ denied).

59. *Id.* at 136.

60. *Id.*

"Evidence of an experiment made out of court is admissible only when there is substantial similarity between conditions existing at the time of the occurrence giving rise to the litigation and the conditions created in the experiment."<sup>61</sup> In *University of Texas at Austin v. Hinton*<sup>62</sup> the Austin court of appeals held that a videotape of an out-of-court experiment was sufficiently similar to the actual event that was the subject of litigation to show the videotape to the jury.<sup>63</sup> The court explained that the conditions of the occurrence and the experiment need not be identical and that the videotape would not have confused the jury by causing them to believe the incident occurred precisely as depicted on the videotape.<sup>64</sup>

Texas Rule of Civil Evidence 403 allows the exclusion of relevant evidence on special grounds such as unfair prejudice, confusion of the issues, or if the evidence is merely cumulative.<sup>65</sup> The exclusion of evidence under Rule 403 is discretionary.<sup>66</sup> In *Dudley v. Humana Hospital Corp.*,<sup>67</sup> a Houston court of appeals held that evidence that the defendant physician in a medical negligence suit was under federal investigation for illegally dispensing prescription drugs at the time he performed surgeries on the patient and opinion evidence concerning effects of the investigation were properly excluded as unduly prejudicial in a patient's medical malpractice action because there was no evidence that the physician actually exhibited symptoms of stress at the time of the surgeries.<sup>68</sup> In *Farr v. Wright*,<sup>69</sup> a medical malpractice action against a doctor who performed a discogram in the course of treatment of a back injury, the Corpus Christi court of appeals held that the high probative value of other cases of discitis in proving breach of sterile technique and negligent failure to diagnose substantially outweighed the prejudicial effect of the admission of evidence of these prior cases on the jury.<sup>70</sup> In *Fibreboard Corp. v. Pool*,<sup>71</sup> the Texarkana court of appeals held that the danger of unfair prejudice from certain letters showing knowledge of asbestos hazards during the 1930s and 1940s did not outweigh the overall probative value in a failure-to-warn case against asbestos products manufacturers who were not recipients of the letters, even though the portion of the letters dealing with a proposed cover-up should have been deleted.<sup>72</sup> The Texas Supreme Court had granted writ of error on this point,<sup>73</sup> but then withdrew the order and

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61. *Lopez v. Foremost Paving, Inc.* 796 S.W.2d 473, 480 (Tex. App.—San Antonio 1990), *abated and remanded*, 35 TEX. SUP. CT. J. 725 (May 6, 1992)(remanded in aid of settlement).

62. 822 S.W.2d 197 (Tex. App.—Austin 1991, no writ).

63. *Id.* at 203.

64. *Id.* at 203.

65. TEX. R. CIV. EVID. 403.

66. *Id.* "Although relevant, evidence *may* be excluded if . . ." *Id.* (emphasis added).

67. 817 S.W.2d 124 (Tex. App.—Houston [14th Dist.] 1991, no writ).

68. *Id.* at 127.

69. 833 S.W.2d 597 (Tex. App.—Corpus Christi 1992, writ denied).

70. *Id.* at 602-03.

71. 813 S.W.2d 658 (Tex. App.—Texarkana 1991, writ denied). For additional discussion of this case, see *supra*, text accompanying notes 21 and 54-57 and *infra*, text accompanying notes 185-88.

72. *Id.* at 695.

73. 35 TEX. SUP. CT. J. 682 (May 2, 1992).



denied the writ.<sup>74</sup>

With a few exceptions, character is not admissible to prove conduct on a particular occasion.<sup>75</sup> For example, Texas Rule of Civil Evidence 404(b) excludes from evidence "other wrongs, or acts" intended to prove the character of a person to show that he acted in conformity with that previous conduct.<sup>76</sup> Such evidence may be admissible for other purposes, however, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."<sup>77</sup> In *Castro v. Sebesta*,<sup>78</sup> an accident victim's case against an allegedly negligent driver, a Houston court of appeals held that the exclusion of witnesses' testimony regarding the defendant's use of drugs both before and after the accident which involved the use of drugs was calculated to and probably did cause the rendition of an improper judgment on the issue of punitive damages, warranting reversal.<sup>79</sup>

Texas Rule of Civil Evidence 406 provides that evidence of the habit of a person or of the routine practice of an organization 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.<sup>80</sup> In *Strickland v. Coleman*,<sup>81</sup> a holder's action against the maker to recover the face value of a note, a Houston court of appeals, citing Rule 406, affirmed the trial court's consideration of all similar transactions between the parties to determine the actual agreement between the parties.<sup>82</sup> The Houston court explained that the case involved a routine practice and the course of dealing between the parties, which was probative and admissible to prove the actual terms of the contract.<sup>83</sup>

Texas Rule of Civil Evidence 408 excludes evidence of compromise and offers to compromise when offered to prove liability or the invalidity of a claim or its amount.<sup>84</sup> In a former daughter-in-law's action seeking damages for intentional infliction of emotional distress arising from a wrongful foreclosure and eviction by her former father-in-law, the former father-in-law's offer to establish a trust for his grandson was held properly excluded because it was made in compromise negotiations.<sup>85</sup> In a products liability and negligence action against a crane owner, crane distributor, and crane manufacturer, evidence of a "Mary Carter" agreement between plaintiff and settling defendants was held improperly excluded, depriving a non-settling defendant of his right to a fair evaluation of evidence by the jury and requiring

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74. 36 TEX. SUP. CT. J. 162 (Nov. 11, 1992) (writ denied as improvidently granted).

75. TEX. R. CIV. EVID. 404.

76. *Id.* 404(b).

77. *Id.*

78. 808 S.W.2d 189 (Tex. App.—Houston [1st Dist.] 1991, no writ).

79. *Id.* at 193-94.

80. TEX. R. CIV. EVID. 406.

81. 824 S.W.2d 188 (Tex. App.—Houston [1st Dist.] 1991, no writ).

82. No copy.

83. *Id.* at 192.

84. TEX. R. CIV. EVID. 408.

85. *LaCoure v. LaCoure*, 820 S.W.2d 228, 235 (Tex. App.—El Paso 1991, writ denied).

reversal and remand in *Mi-Jack Products, Inc. v. Braneff*.<sup>86</sup> In *Mi-Jack*, the Houston court of appeals explained that Rule 408 does not limit the admissibility of "Mary Carter" agreements to impeachment of the testifying witness.<sup>87</sup>

In *General Motors Corp. v. Saenz*,<sup>88</sup> a products liability action, the Corpus Christi court of appeals held that it was error to exclude evidence that the owner of the paving company who had modified the manufacturer's cab and chassis by placing a water tank on a truck had settled claims of the survivors of those fatally injured when the truck subsequently rolled over.<sup>89</sup> However, the Corpus Christi court held that the error was not reversible because there was other evidence, including expert testimony, establishing causation.<sup>90</sup>

## V. ARTICLE V — PRIVILEGES

Article V of the Texas Rules of Civil Evidence governs privileges. No person has a privilege to refuse to disclose any matter<sup>91</sup> unless the rules of evidence recognize the privilege<sup>92</sup> or a statute<sup>93</sup> or constitution<sup>94</sup> grants the privilege. Some of the specific privileges provided in the Texas Rules of Civil Evidence include: (1) lawyer-client privilege;<sup>95</sup> (2) husband-wife communication privilege;<sup>96</sup> (3) communications to clergymen;<sup>97</sup> (4) trade secrets;<sup>98</sup> and (5) physician-patient privilege.<sup>99</sup>

Texas Rule of Civil Evidence 503 codifies the common law lawyer-client privilege. In *Cole v. Gabriel*<sup>100</sup> a lawyer-client privilege case, an attorney sought writ of mandamus ordering a district judge to vacate an order that the attorney respond to questions concerning his communications to his client. On a grant of rehearing, the Fort Worth court of appeals held that the attorney did not have standing in his individual capacity to seek a writ of mandamus attacking the court's order respecting the privilege of his client.<sup>101</sup>

In *Perez v. Kirk & Carrigan*<sup>102</sup> a truck driver involved in a fatal school bus accident brought an action against the attorneys who took a statement from

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86. 827 S.W.2d 493 (Tex. App.—Houston [1st Dist.] 1992, no writ).

87. *Id.* at 498.

88. 829 S.W.2d 230 (Tex. App.—Corpus Christi 1991, writ granted).

89. *Id.* at 243.

90. *Id.*

91. TEX. R. CIV. EVID. 501(2).

92. *See id.* 502-10.

93. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5561h, *repealed by* TEX. R. CIV. EVID. 509-510 as to civil cases *and* TEX. R. CRIM. EVID. 509-510 as to criminal cases (confidential communications between physicians and patients relating to professional services rendered by a physician privilege).

94. *See, e.g.*, U. S. CONST. amend. V; TEX. CONST. art. I, § 10.

95. TEX. R. CIV. EVID. 503.

96. *Id.* 504.

97. *Id.* 505.

98. *Id.* 507.

99. *Id.* 509.

100. 822 S.W.2d 296 (Tex. App.—Fort Worth 1992, orig. proceeding).

101. *Id.* at 297.

102. 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied).

him the day after the accident while he was still hospitalized. The driver claimed that the lawyers, who represented his employer, told him they were his lawyers too, and that anything he told them would be kept confidential.<sup>103</sup> With this understanding, the driver gave the lawyers a sworn statement concerning the accident.<sup>104</sup> After taking the driver's statement, the lawyers arranged for a criminal defense attorney to represent the driver and the lawyers who had taken the statement had no further contact with the driver.<sup>105</sup> Some time after the criminal defense attorney had begun to represent the driver, the lawyers who had taken the statement, without telling either the driver or his criminal defense attorney, gave the driver's statement to the district attorney's office.<sup>106</sup> Partly on the basis of this statement, the district attorney was able to obtain a grand jury indictment of the driver for involuntary manslaughter.<sup>107</sup> The lawyers moved for summary judgment on the ground that no attorney-client or other fiduciary relationship existed. The Corpus Christi court of appeals held that an agreement to form the attorney-client relationship may be implied from the conduct of the parties<sup>108</sup> and, combined with the truck driver's cooperation in giving his statement, may have created an attorney-client relationship that gave rise to fiduciary duties of good faith and fair dealing, although the lawyers did not receive a fee from the driver.<sup>109</sup> Citing Texas Rule of Civil Evidence 503, the Corpus Christi court held that certain communications between attorney and client are privileged from disclosure in either civil or criminal proceedings<sup>110</sup> and reversed and remanded the case for trial.<sup>111</sup>

There is no lawyer-client privilege if the services of the lawyer were obtained to enable someone to knowingly commit or plan to commit a crime or fraud.<sup>112</sup> During the Survey period, a Houston court of appeals held that based on its review of the disputed documents submitted with a mandamus petition, movants made a *prima facie* showing of fraud, which was sufficient to bring the disputed documents, which bore a relationship to the alleged fraud, within the crime-fraud exception to the attorney-client and work product privileges.<sup>113</sup> The Texas Supreme Court agreed.<sup>114</sup>

Texas Rule of Civil Evidence 505 privileges confidential communications

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103. *Id.* at 263.

104. *Id.*

105. *Id.* at 264.

106. *Id.*

107. *Id.*

108. *Id.* at 265.

109. *Id.*

110. *Id.*

111. *Id.* at 269.

112. TEX. R. CIV. EVID. 503(d)(1).

113. *Freeman v. Bianchi*, 820 S.W.2d 853, 861-63 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) *mandamus denied*, *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992) (orig. proceeding). For additional discussion of this case, see *infra*, text accompanying note 134-36.

114. *Granada Corp.* 844 S.W.2d 223.

made to clergymen.<sup>115</sup> In *Nicholson v. Wittig*,<sup>116</sup> physicians named as defendants in an underlying medical malpractice and wrongful death case filed a petition for writ of mandamus to compel the trial judge to permit discovery of the hospital patient's wife's conversations with the hospital chaplain. *Nicholson* held that the clergy communication privilege attaches when a person makes a communication with the reasonable expectation of confidentiality to a member of the clergy acting in his or her professional or spiritual capacity.<sup>117</sup> The *Nicholson* court held that the privilege was not waived even though the conversations between the hospital chaplain and the patient's wife occurred in front of other persons because Rule 505(a)(2) expressly acknowledges that others might be present while such communications were made.<sup>118</sup> The court rejected the physicians' argument that because the underlying proceeding was a medical malpractice case in which the testimony concerned the care and treatment of the deceased and not matters of a confidential or spiritual nature, the clergy communication privilege did not apply.<sup>119</sup> The court also rejected the physicians' argument that because the plaintiffs in the underlying proceeding were making claims of mental anguish, they were attempting to make an offensive use of the clergy communication privilege to prevent the physicians from learning whether the alleged mental anguish was caused by the physicians or by plaintiffs' own conduct, which delayed the deceased's medical treatment and surgery.<sup>120</sup> The court explained that it would not accept the relators' invitation to "en-graft an express, written exception found in the physician-patient privilege<sup>121</sup> onto the clergy-communicant privilege."<sup>122</sup> The court rejected the physicians' argument that the chaplain should have the opportunity to determine which communications the wife made to him while he acted in his capacity as spiritual advisor to her, and which merely concerned her husband's treatment.<sup>123</sup> The court explained that the clergy-communicant privilege belonged to the communicant, not to the member of the clergy, and that the clergyman should not have the opportunity to determine which aspects of the counseling opportunity are not privileged, reasoning that persons facing crisis decisions regarding loved ones should not be required to be guarded in their disclosures to a spiritual advisor.<sup>124</sup>

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115. TEX. R. CIV. EVID. 505.

116. 832 S.W.2d 681 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding [leave denied]).

117. *Id.* at 685.

118. *Id.*

119. *Id.* at 685-86.

120. *Id.* at 686.

121. The physician-patient privilege, contained in Texas Rule of Civil Evidence 509, expressly provides exceptions to the privilege in court proceedings "when the proceedings are brought by the patient against a physical, including but not limited to malpractice proceedings," and "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." *Id.* 509(d)(1) and (4).

122. *Nicholson*, 832 S.W.2d at 686.

123. *Id.* at 687.

124. *Id.*

The chaplain should not be allowed to wear two hats and switch roles from hospital employee to spiritual advisor, depending on the nature of the communication. . . . because most hospitals employ their chaplains, this Court's ruling in favor of [the physicians'] position would have far-reaching consequences: any individual who is counseled by a hospital chaplain would be subject to the same possibility of disclosure of information that rule 505's clergy communication privilege clearly intended to remain confidential.<sup>125</sup>

The court held that the chaplain was an employee of the hospital was not dispositive.<sup>126</sup> Nor did the fact that the hospital summoned the chaplain have any bearing on whether the communications to him were made in his capacity as a spiritual advisor and thus were made privately and not intended for disclosure.<sup>127</sup>

Texas Rule of Civil Evidence 510 provides for confidentiality of mental health information.<sup>128</sup> An exception to the confidentiality of mental health information exists when the disclosure is relevant in any suit affecting the parent-child relationship.<sup>129</sup> In *Cheatham v. Rogers*<sup>130</sup> the Tyler court of appeals held that Texas Rule of Civil Evidence 510(d)(6), which provides that mental health records may be disclosed when the disclosure is relevant in any suit affecting the parent-child relationship, applies to non-parties and parties alike, and permitted a father to discover the personal mental health records of his children's court-appointed psychological counselor.

Under Texas Rule of Civil Evidence 511 the holder of a privilege waives the privilege if he voluntarily discloses or consents to disclose any significant part of the privileged matter unless such disclosure itself is privileged.<sup>131</sup> In *Riggs v. Sentry Insurance*<sup>132</sup> a Houston court of appeals held that an automobile insurer did not disclose significant parts of allegedly privileged material and did not waive its attorney-client or work-product privileges when it responded to interrogatories by stating that the absence of coverage was its reason for rejecting the injured passengers' offer to settle a lawsuit against the insurer.<sup>133</sup> In *Freeman v. Bianchi*<sup>134</sup> a Houston court of appeals held that the defendants had waived any attorney-client privilege that may have attached to documents they submitted for *in camera* review where their previous disclosure to plaintiffs was made voluntarily and was neither compelled or made without opportunity to raise a claim of privilege.<sup>135</sup> The Texas Supreme Court held that the defendant had failed to sustain its bur-

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125. *Id.*

126. *Id.*

127. *Id.*

128. TEX. R. CIV. EVID. 510.

129. *Id.* 510(d)(6).

130. 824 S.W.2d 231 (Tex. App.—Tyler 1992, orig. proceeding).

131. TEX. R. CIV. EVID. 511.

132. 821 S.W.2d 701 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

133. *Id.* at 709-10.

134. 820 S.W.2d 853 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding), *mandamus denied*, *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992) (orig. proceeding). For additional discussion of this case, see *supra*, text accompanying notes 113-27.

135. *Freeman*, 820 S.W.2d at 859-61.

den of proving the disclosure was involuntary.<sup>136</sup>

## VI. ARTICLE VI — WITNESSES

Texas Rule of Civil Evidence 602 provides that a witness may not testify to a matter unless he has personal knowledge of the matter.<sup>137</sup> For example, in an automobile insurer's action seeking a declaration that the insured's policy had lapsed due to non-payment of the renewal premium, the testimony of the insurer's claim specialist that the insured and another person thought that the insured still had insurance was held beyond the specialist's personal knowledge where the question to the witness did not indicate that he was being asked for an expert opinion.<sup>138</sup>

Texas Rule of Civil Evidence 611(c) permits leading questions on cross-examination and discourages the use of leading questions on direct examination except as may be necessary to develop the testimony of a witness.<sup>139</sup> In *GAB Business Services, Inc. v. Moore*,<sup>140</sup> the Texarkana court of appeals held that a trial court properly excluded the defendant's former employee's deposition testimony which consisted of responses to leading questions asked on the cross-examination portion of the deposition by defendant's counsel.<sup>141</sup> The court explained that although the witness no longer worked for the defendant when she was deposed, she could still be characterized as a friendly witness to the defense.<sup>142</sup>

Texas Rule of Civil Evidence 614, commonly known as "the rule," requires a court to order certain witnesses excluded so they cannot hear the testimony of other witnesses.<sup>143</sup> In *Kennedy v. Eden*,<sup>144</sup> a mandamus proceeding, the Texas Supreme Court held that the trial court had clearly abused its discretion in issuing an instruction that a certain witness be prohibited from attending the plaintiffs' depositions and from conversing with other witnesses or any other person about the case, other than counsel of record.<sup>145</sup> The court explained that because the trial court's order was perpetual in duration, the witness could never talk to anyone about the underlying litigation as long as the order remained in effect.<sup>146</sup> The court explained that if the trial court was authorized to issue such an instruction, an issue on which it expressed no opinion, nothing in the record before it suggested that the trial court was justified in doing so under the circumstances.<sup>147</sup>

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136. *Granada Corp.*, 844 S.W.2d at 226.

137. TEX. R. CIV. EVID. 602.

138. *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 708-09 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

139. TEX. R. CIV. EVID. 611(c).

140. 829 S.W.2d 345 (Tex. App.—Texarkana 1992, no writ).

141. *Id.* at 351.

142. *Id.* at 351.

143. TEX. R. CIV. EVID. 614.

144. 837 S.W.2d 98 (Tex. 1992).

145. *Id.*

146. *Id.*

147. *Id.*

## VII. ARTICLE VII — OPINIONS AND EXPERT TESTIMONY

### A. OPINION TESTIMONY BY LAY WITNESSES

The Texas Rules of Civil Evidence permit lay witnesses to offer rationally based opinions to help clarify facts or misunderstandings.<sup>148</sup> The rules have greatly liberalized the admission of lay witness' opinion testimony. Texas law has always been liberal, however, in allowing an owner of property to offer his opinion on the property's value.<sup>149</sup> A property owner can give opinion testimony regarding the value of his property even though he would not qualify as an expert regarding the value of the same property if owned by someone else.<sup>150</sup> During the Survey period, one Texas court recognized the admissibility of lay testimony by permitting an automobile owner to testify about the cost of repairing his car.<sup>151</sup> Another court permitted a former resident bringing an action for intentional infliction of emotional distress in connection with a wrongful foreclosure and eviction to testify as to the value of the property, explaining that it was within the jury's province to determine how much weight to put on her value testimony.<sup>152</sup>

### B. TESTIMONY BY EXPERTS

Texas Rule of Civil Evidence 702 permits expert opinion testimony from a witness "qualified as an expert by knowledge, skill, experience, training or education."<sup>153</sup> Texas Rule of Civil Evidence 104(a) provides that preliminary questions regarding qualification of the witness shall be determined by the court.<sup>154</sup> In *Havner v. E-Z Mart Stores, Inc.*,<sup>155</sup> the Texas Supreme Court approved the admission of expert testimony from investigating police officers regarding the inadequacy of E-Z Mart's security precautions in a case brought by the estate of a convenience store clerk who was abducted from the store at which he was working and murdered.<sup>156</sup> On remand, the Texarkana court of appeals held that expert opinion testimony that had there been an alarm system at the robbed convenience store at the time of the clerk's death, the police would have had an opportunity to arrive before she was abducted from the store was some evidence that the store's negligence caused the clerk's death, but was factually insufficient to support the jury's finding.<sup>157</sup>

The El Paso court of appeals affirmed the admission of expert testimony

148. TEX. R. CIV. EVID. 701.

149. See, e.g., *Classified Parking Sys. v. Kirby*, 507 S.W.2d 586, 588-89 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ)(owner of car stolen from parking garage competent to testify as to car's value).

150. *Id.*

151. *Coker v. Burghardt*, 833 S.W.2d 306, 309-11 (Tex. App.—Dallas 1992, writ denied).

152. *LaCoure v. LaCoure*, 820 S.W.2d 228 (Tex. App.—El Paso 1991, writ denied).

153. TEX. R. CIV. EVID. 702.

154. *Id.* 104(a).

155. 825 S.W.2d 456 (Tex. 1992).

156. *Id.* at 458-60 n.4.

157. *E-Z Mart, Inc. v. Havner*, 832 S.W.2d 368, 374 (Tex. App.—Texarkana 1992, writ denied).

from a mechanical engineer as an expert in the field of earth compacting equipment.<sup>158</sup> A Houston court of appeals affirmed the admission of sworn testimony from an attorney representing a party in the suit concerning the award of attorneys' fees, holding it to be competent expert testimony.<sup>159</sup> The Dallas court of appeals affirmed the expert credentials of a witness in the field of biomechanics, affirming the admission of his testimony as to the issue of helmet safety and how it related to a motorcycle accident.<sup>160</sup>

### C. BASES OF OPINION TESTIMONY

Texas Rule of Civil Evidence 703 outlines the proper bases of expert opinion testimony.<sup>161</sup> If experts in the same field as the witness would reasonably rely on certain data, the data can form the basis of the expert's opinion and need not be admissible in evidence.<sup>162</sup> For example, in a condemnation case, a real estate appraiser's expert testimony regarding the value of the entire property before the taking and the value of the remainder after the taking was held properly admitted even though the appraiser's opinion was based largely on arguably inadmissible evidence of unaccepted third-party offers to buy that property.<sup>163</sup> In another condemnation proceeding, one appellate court held that the trial court did not abuse its discretion by allowing the jury to consider the condemnees's expert's testimony that it was "reasonably probable" in the reasonable future for the condemnee's property to be available for commercial use, even though the opinion was based upon the expert's experience in the real estate market and did not involve a poll of surrounding homeowners to determine whether the majority of them would support a change in deed restrictions prohibiting commercial use.<sup>164</sup> Another court held that the testimony of an economist was admissible in a negligence action against an oil company for injuries that a service station cashier sustained in an armed robbery, even though the testimony was based wholly upon a psychologist's report, part of which was stricken, where the psychologist's ultimate determinations were admissible.<sup>165</sup>

### D. OPINION ON ULTIMATE ISSUE

Texas Rule of Civil Evidence 704 provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it

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158. *Lujan v. Tampo Mfg. Co., Inc.*, 825 S.W.2d 505, 509 (Tex. App.—El Paso 1992, no writ).

159. *Goudeau v. Marquez*, 830 S.W.2d 681, 683 (Tex. App.—Houston [1st Dist.] 1992, no writ).

160. *Thompson v. Kawasaki Motors Corp., U.S.A.*, 824 S.W.2d 212, 218 (Tex. App.—Dallas 1991, writ requested).

161. TEX. R. CIV. EVID. 703.

162. *Id.*

163. *State v. Resolution Trust Corp.*, 827 S.W.2d 106, 108 (Tex. App.—Austin 1992, writ denied).

164. *State v. Tigner*, 827 S.W.2d 611, 613 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

165. *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 469-70 (Tex. App.—Dallas 1991, writ granted).



embraces an ultimate issue to be decided by the trier of fact. The Texas Supreme Court has specifically held that it is permissible to admit expert opinion testimony on mixed questions of law and fact.<sup>166</sup> During the Survey period, the Corpus Christi court of appeals held that whether a company that sold signs to a hospital had a legal duty to inspect the signs that had been installed by others was not an appropriate subject for expert testimony in a negligence action by a hospital worker.<sup>167</sup> The court explained that the expert's "naked legal conclusion" that a duty exists has no probative value, and without more, was not sufficient to carry the plaintiff's burden.<sup>168</sup>

#### E. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

Texas Rule of Civil Evidence 705 governs the disclosure of facts or data underlying expert opinion.<sup>169</sup> Rule 705 provides that the expert may disclose on direct examination the facts or data underlying his opinion.<sup>170</sup> While paying lip service to the proposition that there is no absolute right on the part of an expert to disclose all the facts and underlying data on which his opinion is based, and that the better position is not to allow the affirmative admission of otherwise inadmissible matters merely because they happened to be underlying data upon which an expert relies, the Amarillo court of appeals found other grounds on which to affirm the admission of a challenged army report admitted through the testimony of an expert witness who relied upon it.<sup>171</sup> Similarly, the Fort Worth court of appeals held that any error by the trial court in admitting hearsay data on which an expert witness pathologist had testified was not such a denial of appellant's rights as was calculated to cause the rendition of an improper judgment.<sup>172</sup>

#### F. EFFECT OF OPINION TESTIMONY

A jury can accept lay testimony over expert testimony when presented with conflicting evidence.<sup>173</sup> During the Survey period, the Waco court of appeals held that where expert testimony on causation did "not stand unimpeached or uncontradicted," it was not binding on the jury.<sup>174</sup>

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166. *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

167. *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 401-02 (Tex. App.—Corpus Christi 1991, writ denied).

168. *Id.* at 402.

169. TEX. R. CIV. EVID. 705.

170. *Id.*

171. *Beavers v. Northrop Worldwide Aircraft Servs., Inc.*, 821 S.W.2d 669, 674 (Tex. App.—Amarillo 1991, writ denied). For additional discussion of this case, see *infra*, text accompanying notes 234-38.

172. *Kramer v. Lewisville Mem. Hosp.*, 831 S.W.2d 46 (Tex. App.—Fort Worth 1992, writ granted).

173. See *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986).

174. *Johnson Roofing, Inc. v. Staas Plumbing Co.*, 823 S.W.2d 783, 789 (Tex. App.—Waco 1992, no writ).

## VIII. ARTICLE VIII — HEARSAY

## A. IDENTIFYING HEARSAY

Whether a record or statement offered to prove the truth of the matter constitutes hearsay is often difficult to determine.<sup>175</sup> Specifically, “[h]earsay is a statement, other than one made by the declarant, while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>176</sup> The exceptions to this general rule are set forth in rules 803 through 806.<sup>177</sup>

During the Survey period the Texas Supreme Court considered whether proffered evidence was hearsay.<sup>178</sup> In *McCraw v. Maris*,<sup>179</sup> an action to determine whether the surviving spouse or the surviving children were entitled to the proceeds of a life insurance policy, the Texas Supreme Court considered whether a duplicate beneficiary designation form constitutes hearsay, and if it does, whether it qualified under any exception to the hearsay rule. The duplicate beneficiary designation form had been offered to prove that the deceased followed her usual habit of typing and filing a form from the draft.<sup>180</sup> Although the duplicate beneficiary form is an out-of-court statement, the court held that it was not hearsay because it was not offered to prove the truth of any matter asserted within it, but only that it existed.<sup>181</sup> The supreme court reversed the judgment of the court of appeals and remanded the cause to the trial court, explaining that the exclusion of the form was reasonably calculated to cause and probably did cause rendition of an improper judgment.<sup>182</sup>

Several courts of appeals also considered whether proffered evidence was hearsay. In *Dallas County Bail Bond Board v. Black*<sup>183</sup> the Dallas court of appeals held that value placed upon real property for tax assessment purposes, without participation of the landowner, is not evidence of its value for purposes other than taxation and is considered hearsay and cannot support a finding of fact.<sup>184</sup> In *Fibreboard Corp. v. Pool*,<sup>185</sup> an action against asbestos manufacturers to recover for injuries to or deaths of workers, the Texarkana court of appeals held that a color poster prepared by the Oil Chemical & Atomic Workers International Union declaring the hazards of asbestos and

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175. Rules 801-06 of the Texas Rules of Civil Evidence comprehensively define the Hearsay Rule and its exceptions. TEX. R. CIV. EVID. 801-06. Additionally, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.” *Id.* 602.

176. *Id.* 801(d). “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by law.” *Id.* 802.

177. *Id.* 803-806.

178. *McCraw v. Maris*, 828 S.W.2d 756 (Tex. 1992).

179. *Id.* at 757.

180. *Id.*

181. *Id.*

182. *Id.* at 758.

183. 833 S.W.2d 247, 248 (Tex. App.—Dallas 1992, no writ).

184. *Id.* at 248.

185. 813 S.W.2d 658 (Tex. App.—Texarkana 1991, writ denied). For additional discussion of this case, see *supra*, text accompanying notes 21, 54-57, and 71-74.

stating that it is causing an "epidemic on the same scale as the bubonic plague which killed millions during the Middle Ages,"<sup>186</sup> was hearsay. The Texas Supreme Court had granted writ of error to consider, *inter alia*, several evidentiary points in this case,<sup>187</sup> the court, however, has currently withdrawn the order and denied the writ.<sup>188</sup>

## B. STATEMENTS THAT ARE NOT HEARSAY

Texas Rule of Civil Evidence 801(e) excludes from the definition of hearsay prior statements by a witness,<sup>189</sup> admissions by a party opponent,<sup>190</sup> and depositions.<sup>191</sup>

### 1. Admissions By Party Opponents

Texas Rule of Civil Evidence 801(e)(2) governs party admissions.<sup>192</sup>

#### a. Judicial Admissions

A judicially admitted fact does not require supporting evidence and the judicial admission establishes the fact as a matter of law, thereby precluding the factfinder from making any contrary findings.<sup>193</sup> A judicial admission is actually a substitute for evidence.<sup>194</sup> The Texas Rules of Civil Evidence, while not specifically distinguishing judicial admissions from other admissions, treat admissions not as exceptions to the hearsay rule, but rather as statements that are not hearsay.<sup>195</sup> During the Survey period, Texas appellate courts held factual allegations in a motion for summary judgment,<sup>196</sup> and factual statements contained in trial pleadings to be judicial admissions.<sup>197</sup>

In *Miller v. Gann*,<sup>198</sup> a suit to determine whether a tract of land was owned individually or by a partnership, a Houston court of appeals held that one party's listing of a tract of land as community property in a property settlement agreement incorporated as part of his divorce decree did not judicially estop him from taking an inconsistent position in a subsequent case because he did not give testimony before the court in the divorce proceeding.<sup>199</sup> In denying applications for writ of error, the Texas Supreme Court

186. *Id.* at 676.

187. 35 Tex. Sup. Ct. J. 682 (May 2, 1992).

188. 36 Tex. Sup. Ct. J. 162 (Nov. 11, 1992) (writ denied as improvidently granted).

189. TEX. R. CIV. EVID. 801(e)(1).

190. *Id.* 801(e)(2).

191. *Id.* 801(e)(3).

192. *Id.* 801(e)(2).

193. R. RAY, TEXAS PRACTICE, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL 1A § 1127 (3d ed. 1980).

194. *Id.*

195. TEX. R. CIV. EVID. 801(e)(2).

196. *Hill v. Steinberger*, 827 S.W.2d 58, 61 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).

197. *Thompson v. Thompson*, 827 S.W.2d 563, 566 (Tex. App.—Corpus Christi 1992, writ denied).

198. 822 S.W.2d 283 (Tex. App.—Houston [1st Dist.] 1991), *writ denied per curiam*, 842 S.W.2d 641 (Tex. 1992).

199. *Id.* at 288-89.

stated that “[t]his assertion by the court of appeals is inconsistent with the settled law of this state. The applicability of judicial estoppel is not limited to oral testimony, but applies with equal force to any sworn statement — whether oral or written — made in the course of a judicial proceeding.”<sup>200</sup>

#### b. Vicarious Admissions

Texas Rule of Civil Evidence 801(e)(2)(D) provides that statements by agents or servants concerning matters within the scope of their agency or employment, made during the existence of the employment relationship, are not hearsay.<sup>201</sup> In *Wal-Mart Stores, Inc. v. Berry*<sup>202</sup> the Texarkana court of appeals rejected an argument that declarant’s agency relationship was not established because he was not identified by name.<sup>203</sup> The Texarkana court distinguished *Norton v. Martin*<sup>204</sup> explaining that *Norton* involved an unnamed declarant and no evidence that the declarant was even employed by the defendant.<sup>205</sup> The Texarkana court held that where there is evidence of employment, the failure of the witness to remember the declarant’s name affects only the weight and credibility of the testimony and not its admissibility.<sup>206</sup>

Admissions made in superseded pleadings lose their binding force as judicial admissions.<sup>207</sup> Admissions in abandoned pleadings, however, do have value as evidentiary admissions and can be introduced into evidence.<sup>208</sup> During the Survey period, the Tyler court of appeals affirmed the admission of an abandoned pleading to prove up factual admissions therein.<sup>209</sup>

#### c. Co-conspirator Admissions

Texas Rule of Civil Evidence 801(e)(2)(E) provides that statements by co-conspirators of a party are not hearsay.<sup>210</sup> In *Utica National Insurance Co. of Texas v. McDonald*<sup>211</sup> the Fort Worth court of appeals held that the statements implicating a party were not party admissions under 801(e)(2)(E) by

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200. 842 S.W.2d at 641.

201. TEX. R. CIV. EVID. 801(e)(2)(D).

202. 833 S.W.2d 587 (Tex. App.—Texarkana 1992, writ requested).

203. *Id.* at 593.

204. 703 S.W.2d 267, 271-72 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).

205. 833 S.W.2d at 593.

206. *Id.* at 593; (citing *Yellow Freight Sys., Inc. v. North Amer. Cabinet Corp.*, 670 S.W.2d 387, 389-90 (Tex. App.—Texarkana 1984, no writ)).

207. *See, e.g., Corsi v. Nolana Dev. Ass’n*, 674 S.W.2d 874, 878 (Tex. App.—Corpus Christi), *rev’d on other grounds*, 682 S.W.2d 246 (Tex. 1984). Admissions in abandoned pleadings are evidence that a jury is entitled to consider, and the probative value of the admission against interest is a question of fact for the jury. Although any admission in an abandoned pleading ceases to bind a pleader, such pleading remains a statement seriously made and can be introduced into evidence as an admission. *See Valadez v. Barrera*, 647 S.W.2d 377, 382-83 (Tex. App.—San Antonio 1983, no writ).

208. *Valdez*, 647 S.W.2d at 382.

209. *Willingham Auto World v. Jones*, 833 S.W.2d 232, 235 (Tex. App.—Tyler 1992, writ denied).

210. TEX. R. CIV. EVID. 801(e)(2)(E).

211. 814 S.W.2d 234 (Tex. App.—Fort Worth 1991, writ denied). For additional discussion of this case, see *supra* discussion accompanying notes 9-10 and *infra*, notes 247-49.

virtue of their being made by a co-conspirator during the course and in the furtherance of the conspiracy because no evidence other than the statements themselves established a *prima facie* case of conspiracy.<sup>212</sup>

### C. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL

#### 1. *Excited Utterance*

Texas Rule of Civil Evidence 803(2) admits into evidence, as exceptions to the hearsay rule, statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.<sup>213</sup> The ultimate determination as to whether a statement is admissible as an excited utterance is whether it was the result of reflective thought or rather was a spontaneous reaction to an exciting event.<sup>214</sup> Two courts during the Survey period held statements to have been made spontaneously in reaction to exciting events.<sup>215</sup> In *Texas Utilities Electric Company v. Gold Kist, Inc.*<sup>216</sup> the Eastland court of appeals held that the statement of a trucking company manager that he had told the utility to move a utility pole guy wire "a dozen times," was an excited utterance where the traffic manager had made the statement within fifteen minutes after the electrical lines broke and started a fire in a nearby produce warehouse, where the traffic manager was at the scene of the fire at the time he made the statement, and where the traffic manager was attempting to determine whether the trucking company driver had hit the utility pole guy wire, causing the electrical lines to break and fall.<sup>217</sup> In *Almaraz v. Burke*,<sup>218</sup> a motorist's action against the driver of a van, the Fort Worth court of appeals held that the testimony of the investigating officer as to the van's license plate, which number the officer had obtained from motorists who had either been involved in or witnessed the accident, was admissible as a statement made while under stress or excitement caused by a startling event or condition.<sup>219</sup>

#### 2. *Business Records*

Texas Rule of Civil Evidence 803(6) governs the introduction of records of

212. *Id.* at 236.

213. TEX. R. CIV. EVID. 803(2).

214. *See, e.g.,* City of Dallas v. Donovan, 768 S.W.2d 905, 908 (Tex. App.—Dallas 1989, no writ); First Southwest Lloyd's Ins. Co. v. MacDowell, 769 S.W.2d 954, 959 (Tex. App.—Texarkana 1989, writ denied).

215. *Almaraz v. Burke*, 827 S.W.2d 80 (Tex. App.—Fort Worth 1992, writ denied); *Texas Utilities Elec. Co. v. Gold Kist, Inc.*, 817 S.W.2d 749 (Tex. App.—Eastland 1991), *rev'd on other grounds*, 830 S.W.2d 91 (Tex. 1992).

216. 817 S.W.2d 749 (Tex. App.—Eastland 1991), *rev'd on other grounds*, 830 S.W.2d 91 (Tex. 1992).

217. *Id.* at 755-56.

218. 827 S.W.2d 80 (Tex. App.—Fort Worth 1992, writ denied). For additional discussion of this case, see *infra*, text accompanying note 252.

219. *Id.* at 82-83.

regularly conducted activities, commonly known as business records.<sup>220</sup> Rule 803(6) requires that the records be kept "in the course of a regularly conducted business activity" by a person with knowledge of the recorded information and as a regular practice of the business.<sup>221</sup> In *Welex v. Broom*,<sup>222</sup> the San Antonio court of appeals held that an employment record belonging to the employer of a plaintiff in a negligence case was properly excluded as not being a business record, where the report in question was not dated, where no effort had been made to ascertain whether the person to whom the statements allegedly were made had personal knowledge, and where the plaintiff's boss was unable to recall when the documents were prepared and did not recall preparing reports any time soon after the accident in question.

The 1988 amendment to Rule 803(6) added the cross reference that the records may be authenticated by an affidavit that complies with Texas Rule of Civil Evidence 902(10).<sup>223</sup> Rule 902(10) permits the introduction of business records accompanied by an affidavit that conforms to the requirements set forth in that rule.<sup>224</sup> In *Fullick v. City of Baytown*,<sup>225</sup> a Houston court of appeals held that the form of the affidavit contained in Rule 902(10) was not exclusive, and that substantial compliance with the rule would suffice.<sup>226</sup> Because 803(6) permits business records to be authenticated by "the testimony of the custodian or other qualified witness,"<sup>227</sup> two courts during the Survey period rejected challenges to the admission of business record on the grounds that the authenticating witness was not the custodian.<sup>228</sup>

In *GT & MC, Inc. v. Texas City Refining, Inc.*,<sup>229</sup> a buyer's action against a seller to establish the cost of moving oil that was kept in a tank after the tank failed, a Houston court of appeals held that invoices held by a buyer of an oil storage tank were admissible under the business records exception to the hearsay rule.<sup>230</sup> The Houston court explained that although the invoices were initially authored by outside vendors, employees of the buyer had placed numerous markings on the invoices after receipt by the buyer, so that the invoices became the buyer's primary record of information about the underlying transaction.<sup>231</sup>

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220. TEX. R. CIV. EVID. 803(6).

221. *Id.*

222. 806 S.W.2d 855 (Tex. App.—San Antonio 1991), *judgment vacated by* 816 S.W.2d 340 (Tex. 1991), *rev'd on other grounds*, 823 S.W.2d 704 (Tex. App.—San Antonio 1992, writ denied).

223. TEX. R. CIV. EVID. 803(6).

224. *Id.* 902(10).

225. 820 S.W.2d 943 (Tex. App.—Houston [1st Dist.] 1991, no writ). For additional discussion of this case, see *infra* text accompanying note 258.

226. *Id.* at 945-46.

227. TEX. R. CIV. EVID. 803(6).

228. *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 112-13 (Tex. App.—Dallas 1991, no writ); *Hanks v. NCNB Tex. Nat'l Bank*, 815 S.W.2d 763, 765 (Tex. App.—Eastland 1991, no writ).

229. 822 S.W.2d 252 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

230. *Id.* at 257-58.

231. *Id.*

### 3. *Public Records and Reports*

Records and reports of public offices or agencies setting forth their activities or matters observed pursuant to duty imposed by law to which there was a duty to report, or factual findings resulting from investigations made pursuant to authority granted by law, are admissible as exceptions to the hearsay rule under Texas Rule of Civil Evidence 803(8).<sup>232</sup> Such public records are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness."<sup>233</sup> In *Beavers v. Northrop Worldwide Aircraft Services, Inc.*,<sup>234</sup> a wrongful death case, the Amarillo court of appeals held that the trial court did not abuse its discretion in admitting an army report concerning the cause of a helicopter crash despite questions raised as to the qualifications of the civilian investigator.<sup>235</sup> The court explained that the investigator's activities were only part of the report and many other persons whose qualifications were not attacked were also involved in preparation of the report.<sup>236</sup> The court's holding found further support because the report was undertaken in a timely manner after the helicopter crashed, and was not prepared with litigation intentions.<sup>237</sup> The court further explained that there was a presumption of admissibility of public records and reports, and that the party opposing the admission of such report must prove the report's untrustworthiness, with the trial court's action on the tender being measured by an abuse of discretion standard.<sup>238</sup> Another court during the Survey period held that affidavits regarding whether service of papers in New York was made as required by law were hearsay and not admissible as business records in a subsequent action in Texas seeking to enforce the New York judgment.<sup>239</sup>

### 4. *Statements in Ancient Documents*

Statements in a document in existence twenty years or more whose authenticity has been established are admissible as exceptions to the hearsay rule under Texas Rule of Civil Evidence 803(16).<sup>240</sup> In *Fibreboard Corp. v. Pool*,<sup>241</sup> a products liability case against manufacturers of asbestos products to recover for injuries to or deaths of workers, the Texarkana court of appeals held that letters showing knowledge about asbestos during the 1930s and 1940s were admissible as both business records and ancient docu-

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232. TEX. R. CIV. EVID. 803(8).

233. *Id.*

234. 821 S.W.2d 669 (Tex. App.—Amarillo 1991, writ denied). For additional discussion of this case, see *supra* text accompanying note 171.

235. *Beavers*, 821 S.W.2d at 675.

236. *Id.*

237. *Id.*

238. *Id.* at 674.

239. *Harbison - Fischer Mfg. Co., Inc. v. Mohawk Data Sciences Corp.*, 823 S.W.2d 679, 686 (Tex. App.—Fort Worth 1991), *judgment set aside*, 840 S.W.2d 383 (Tex. 1992).

240. TEX. R. CIV. EVID. 803(16).

241. 813 S.W.2d 658 (Tex. App.—Texarkana 1991, writ denied). The trial court properly refused admission of another letter in the case because no predicate was laid as to where the letter was kept, therefore causing doubt as to the letter's authenticity. *Id.* at 693-94.

ments.<sup>242</sup> The Texas Supreme Court has granted writ of error to consider several evidentiary issues in this case,<sup>243</sup> however, the court later reconsidered and denied the writ.<sup>244</sup>

### 5. *Statements Against Interest*

Texas Rule of Civil Evidence 803(24) admits statements against interest as exceptions to the hearsay rule.<sup>245</sup> A statement against interest is one that was at the time of its making

so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true.<sup>246</sup>

In *Utica National Insurance Company of Texas v. McDonald*<sup>247</sup> the Fort Worth court of appeals held that testimony that the insured's brother had told a witness how the insured and his brother conspired to burn their home in order to receive insurance proceeds was a statement against interest.<sup>248</sup> The court explained, however, that the testimony was irrelevant, and therefore its exclusion was not reversible error in the absence of other admissible testimony proving that the insured engaged in a conspiracy.<sup>249</sup>

### D. HEARSAY WITHIN HEARSAY

Hearsay within hearsay is not excluded under the hearsay rule "if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."<sup>250</sup> Finding hearsay contained within an investigating officers' testimony to be an excited utterance,<sup>251</sup> the Fort Worth court of appeals permitted the investigating officer to testify as to a van's license plate, which number he had obtained from motorists who had either been involved in or witnessed the accident, because the motorists' excited utterances would otherwise have been admissible standing alone under Texas Rule of Civil Evidence 803(2).<sup>252</sup>

## IX. ARTICLE IX — AUTHENTICATION AND IDENTIFICATION

Texas Rule of Civil Evidence 901 requires authentication or identification

242. *Id.* at 669.

243. 35 TEX. SUP. CT. J. 682 (May 2, 1992).

244. 36 TEX. SUP. CT. J. 612 (Nov. 11, 1992, writ denied as improvidently granted).

245. TEX. R. CIV. EVID. 803(24).

246. *Id.*

247. 814 S.W.2d 234 (Tex. App.—Fort Worth 1991, writ denied). For additional discussion of this case, see *supra* text accompanying notes 9-10 and 211-12.

248. *Id.* at 235-36.

249. *Id.* at 235.

250. TEX. R. CIV. EVID. 805.

251. For additional discussion of excited utterances, see *supra* text accompanying notes 213-19.

252. *Almaraz v. Burke*, 827 S.W.2d 80, 82-83 (Tex. App.—Fort Worth 1991, writ denied). For additional discussion of this case, see *supra*, text accompanying note 218-19.



of evidence as a condition precedent to admitting the offered evidence.<sup>253</sup> The authentication requirement is satisfied by evidence that is sufficient to show that the matter in question is what its proponent alleges.<sup>254</sup>

Texas Rule of Civil Evidence 902(4) treats certified copies of public records as self-authenticating documents for which no extrinsic evidence of authenticity is required as a condition precedent to admissibility.<sup>255</sup> In *Klein Independent School District v. Noack*,<sup>256</sup> a Houston court of appeals held that a trial court erred in overruling a hearsay objection to a document that had been offered as a public record but was not properly certified and was not authenticated by other extrinsic evidence.<sup>257</sup> In another case, the same court held that documents that were not properly self-authenticated under Rule 902(4) because they did not bear seals were properly self-authenticated as business records accompanied by affidavit under Texas Rule of Civil Evidence 902(10), which treats business records accompanied by affidavits as self-authenticating documents for which no extrinsic evidence of authenticity is required as a condition precedent to admissibility.<sup>258</sup>

#### X. ARTICLE X — CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Article X of the Texas Rules of Civil Evidence governs the admission of the contents of writings, recordings, and photographs.<sup>259</sup> Texas Rule of Civil Evidence 1002 requires that contents of writings, recordings, or photographs be proven by the original writing, recording, or photograph except as otherwise provided in the rules or by law.<sup>260</sup> Duplicates are admissible to the same extent as the originals unless a question is raised as to the authenticity of the original, or in circumstances where it would be unfair to admit the duplicate.<sup>261</sup> In *White v. Bath*,<sup>262</sup> a partnership dissolution case, the trial court imposed discovery sanctions striking defendant's pleadings and entering a default judgment for plaintiff. During the sanction hearing, plaintiff's counsel testified concerning what the defendant had said at his deposition. Defendant's attorney objected, citing the best evidence rule. The trial court overruled the best evidence objection to an answer given by plaintiff's counsel concerning statements made by the defendant during the defendant's deposition. The *White* court held that the best evidence rule did not apply in this case.<sup>263</sup> The court explained that the best evidence rule applies only

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253. TEX. R. CIV. EVID. 901(a).

254. *Id.*

255. TEX. R. CIV. EVID. 902(4).

256. 830 S.W.2d 796 (Tex. App.—Houston [14th Dist.] 1991, no writ).

257. *Id.* at 797-99.

258. *Fullick v. City of Bagtown* 820 S.W.2d 943, 945-46 (Tex. App. For additional discussion of this case, see *supra*, text accompanying note 225-26.

259. TEX. R. CIV. EVID. art. X.

260. TEX. R. CIV. EVID. 1002.

261. TEX. R. CIV. EVID. 1003.

262. 825 S.W.2d 227 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

263. *Id.* at 231.

when one seeks to prove the contents of the document<sup>264</sup> The aim in this case was not to prove the contents of the deposition, but rather to determine whether any discovery abuses had occurred.<sup>265</sup>

Texas Rule of Civil Evidence 1006 provides that the otherwise admissible contents of voluminous writings, recordings, or photographs that cannot be examined conveniently in court may be presented in the form of a chart or summary.<sup>266</sup> In *Hugh Wood Ford, Inc. v. Galloway*,<sup>267</sup> a Houston court of appeals considered whether the trial court erred in admitting into evidence a certain exhibit because it was a summary whose supporting documents had not been supplied to the opposing party. In ruling that there was no error in admitting the exhibit, the court explained that the exhibit was not a summary of voluminous writings that could not be conveniently examined in court, but rather a list of extra expenses appellees claimed they incurred.<sup>268</sup> Because both plaintiffs testified concerning these expenses, the Houston court held that there was no error in admitting the exhibit.<sup>269</sup>

## XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.<sup>270</sup> The court may allow extrinsic evidence if it finds a contract to be ambiguous.<sup>271</sup> The rule prohibits parol evidence concerning the terms in a contract if the contract is integrated.<sup>272</sup> Several courts during the Survey period excluded parol evidence to interpret an unambiguous written contract.<sup>273</sup> One court held that the parol evidence rule did not bar extrinsic proof of mutual mistake relating to the enforceability of a release.<sup>274</sup> Another court held that a grantee's oral disclaimer of any interest in land that was subsequently conveyed to a purchaser through the forgery of grantor's agent was admissible in a trespass to try title action to show that no agreement or intent to transfer the property ever existed.<sup>275</sup>

The Texas Supreme Court considered whether evidence from corporate

264. *Id.*

265. *Id.*

266. TEX. R. CIV. EVID. 1006.

267. 830 S.W.2d 296 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

268. *Id.* at 298.

269. *Id.*

270. See RAY, *supra* note 193, 2 § 1601.

271. See *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 732 (Tex. 1981) (construction of unambiguous oil and gas lease).

272. Integration is the practice of embodying a transaction into a final written agreement intended to incorporate in its terms the entire transaction. See RAY, *supra* note 193, 2 § 1602.

273. *Simmons v. Compania Financiera Libano*, 830 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Oadra v. Stegall*, 828 S.W.2d 460, 465 (Tex. App.—Houston [14th Dist.] 1992, writ granted); *Litton v. Hanley*, 823 S.W.2d 428, 429-31 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.); *Birdwell v. Birdwell*, 819 S.W.2d 223, 229 (Tex. App.—Fort Worth 1991, writ denied).

274. *Sweeney v. Taco Bell, Inc.*, 824 S.W.2d 289, 291-92 (Tex. App.—Fort Worth 1992, writ denied).

275. *Bellaire Kirkpatrick Joint Venture v. Loots*, 826 S.W.2d 205, 213 (Tex. App.—Fort Worth 1992, writ denied).

minutes was precluded by the parol evidence rule in *Gannon v. Baker*,<sup>276</sup> a minority shareholder's action against a majority shareholder in a corporation seeking appraisal and other relief. The trial court granted summary judgment regarding an alleged oral agreement to "level" the parties' ownership of stock once the majority shareholder's personal guaranty was no longer needed. The minority shareholder appealed and the Houston court of appeals affirmed.<sup>277</sup> In reversing and remanding, the Texas Supreme Court held that the minutes of the corporation's organizational meeting did not reflect an agreement and, therefore, the parol evidence rule did not bar evidence of an alleged oral agreement to "level" the ownership of shares once the majority shareholder's personal guarantee was no longer needed.<sup>278</sup> The Texas Supreme Court explained that here the corporate minutes did not reflect an agreement but merely recited the consideration for issuance of corporate stock.<sup>279</sup> The court held that the parol evidence rule does not apply to mere statements or recitals of past facts.<sup>280</sup>

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276. 818 S.W.2d 754 (Tex. 1991).

277. 807 S.W.2d 793 (Tex. App.—Houston [1st Dist.] 1991), *rev'd in part*, 818 S.W.2d 754 (Tex. 1991).

278. *Ganon*, 818 S.W.2d at 756.

279. *Id.*

280. *Id.*