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Civil Evidence

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CIVIL EVIDENCE

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DURING 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) provides that error may not be predicated on a ruling that admits or excludes evidence unless a substantial right of the party is affected.[1] Reversible error does not usually occur in connection with rulings on questions of evidence unless the complaining party can demonstrate that the whole case turns on the particular evidence admitted or excluded.[2] In *Service Lloyds Insurance Co. v. Martin*[3] the Dallas Court of Appeals, citing Rule 103, implied that a substantial right of the party had not been affected because the excluded evidence about which appellant complained on appeal was not admissible.[4]

Texas Rule of Civil Evidence 103(a)(1) provides that error may not be predicated on a ruling admitting evidence absent a timely objection or motion to strike.[5] During the Survey period, three courts held that failure to object waived any complaint on appeal.[6]

Texas Rule of Civil Evidence 103(a)(2) provides that error may not be

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

2. *See, e.g.*, Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 837 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 994 (1988).

3. 855 S.W.2d 816 (Tex. App.—Dallas 1993, no writ).

4. *Id.* at 822-23.

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

6. Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 149 (Tex. App.—Austin 1993, writ requested) (failure to timely object to expert opinion testimony); De La Garza v. Salazar, 851 S.W.2d 380, 383 (Tex. App.—San Antonio 1993, no writ) (failing to object to informal presentation of evidence to the court in a nonjury case failed to preserve the right to complain about the absence of sworn evidence); *In re* A.V., 849 S.W.2d 393, 396 (Tex. App.—Fort Worth 1993, no writ) (appellant's failure to object to prior introduction of a doctor's report about test results waived any complaint regarding subsequent testimony about the test results).

predicated upon a ruling admitting or excluding evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the court by offer.[7] In *Hood v. Hays County*,[8] a county's suit against a taxpayer to recover property taxes and to foreclose a lien securing payment of the taxes, the Austin Court of Appeals held that the taxpayer had properly preserved her complaint for review by offering testimony as to the value of the property in 1987 and 1988. In *Weng Enterprise, Inc. v. Embassy World Travel, Inc.*[9] the Houston [1st Dist.] Court of Appeals found that although the trial court had abused its discretion by precluding a witness from testifying, appellant failed to preserve error by failing to make a bill of exception or offer of proof demonstrating the substance of the excluded testimony to the appellate court.

Texas Rule of Civil Evidence 104(a) provides that preliminary questions concerning the qualification of a person to be a witness shall be determined by the court.[10] In *Warner v. Hurt*[11] the Houston [14th Dist.] Court of Appeals rejected the appellant's argument that an expert's testimony in a medical malpractice case should be excluded if the expert cannot define the standard of care. The *Warner* court explained that such a failure may ultimately go to the weight of the expert's testimony, but not to its admissibility, nor to the qualification of the witness to testify.[12]

Rule 104(a) also provides that preliminary questions concerning the admissibility of evidence shall be determined by the court.[13] In *In re A. V.*[14] the Fort Worth Court of Appeals held that a trial court had not abused its discretion in determining that a witness who held an advanced degree in science and social work and whose job consisted of attempting to rehabilitate accused sex offenders qualified as an expert witness, particularly in the absence of an appropriate objection.[15]

The admissibility of a photograph is conditioned upon its identification by a witness as a correct portrayal of the facts.[16] In *Reichhold Chemical, Inc. v. Puremco Manufacturing Co.*[17] the Waco Court of Appeals held that where the identifying witness testified that the photographs did not show the true condition of an underground storage tank at the relevant time, the trial court did not abuse its discretion in excluding the photographs.[18]

In *Prudential Insurance Co. of America v. Jefferson Association, Ltd.*[19] the Austin Court of Appeals held that the trial court did not abuse its discretion

7. TEX. R. CIV. EVID. 103(a)(2).
8. 836 S.W.2d 327, 328-29 (Tex. App.—Austin 1992, no writ).
9. 837 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1992, no writ).
10. TEX. R. CIV. EVID. 104(a).
11. 834 S.W.2d 404 (Tex. App.—Houston [14th Dist.] 1992, no writ).
12. *Id.* at 407.
13. TEX. R. CIV. EVID. 104(a).
14. 849 S.W.2d 393.
15. *Id.* at 398.
16. Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314-15 (Tex. 1987).
17. 854 S.W.2d 240 (Tex. App.—Waco 1993, writ denied).
18. *Id.* at 248.
19. 839 S.W.2d 866 (Tex. App.—Austin 1992, writ granted).

in admitting the pleadings of a party from a prior lawsuit.[20] The pleadings were admitted to prove the party had once taken a position contradictory to its position in the present case. The court noted that the party made no objections to the admission of the pleading, nor did it request any type of limiting instruction.[21]

The facts or data on which an expert witness bases an opinion need not be admissible "[i]f of a type reasonably relied upon by experts in the field in forming opinions . . . ."[22] Whether experts in the field reasonably rely on such data is a matter for preliminary determination by the trial court pursuant to Rule 104(a). One court during the Survey period held that the appellate court looks to the entire record in reviewing the trial court's preliminary determination.[23]

Texas Rule of Civil Evidence 104(b) governs relevancy conditioned on fact.[24] Rule 104(b) is the authority for the practice known as "connecting up" evidenced later. In *Wal-Mart Stores, Inc. v. Cordova*[25] the El Paso Court of Appeals held that in permitting plaintiff's expert to testify out of order about Wal-Mart's net worth, the trial court was led into error by the representation of plaintiff's attorney that he would prove a prima facie case of gross negligence later.[26] The El Paso court held that in the absence of such prima facie evidence of gross negligence, it was reversible error to admit expert testimony regarding net worth of the defendant.[27]

Texas Rule of Civil Evidence 105(a) provides that when evidence admissible as to one party or for one purpose but not as to another party or for another purpose is admitted, the court shall limit the evidence to its proper scope by giving a limiting instruction if so requested.[28] In *Cigna Insurance Co. v. Evans*[29] the Texarkana Court of Appeals held that where the opponent of the evidence had not requested a limiting instruction and the court did not give one, the jury was entitled to consider the evidence for any and all purposes.[30] In *City of Austin v. Houston Lighting & Power Co.*[31] the Dallas Court of Appeals wrote that it is the opponent's burden to obtain the limiting instruction, and that absent a request for a limiting instruction, the admission of the evidence without limitation is not a ground for complaint on

20. *Id.* at 874.
21. *Id.*
22. TEX. R. CIV. EVID. 703.
23. St. Paul Medical Ctr. v. Cecil, 842 S.W.2d 808, 815-16 (Tex. App.—Dallas 1992, no writ) (expert witness formulating treatment plan in determining special education and rehabilitation costs for damage award properly relied upon tuition costs obtained from special schools, where he testified that he and other experts routinely rely on costs obtained from schools to prepare treatment plan and to adapt plans to their patients available resources).
24. TEX. R. CIV. EVID. 104(b).
25. 856 S.W.2d 768 (Tex. App.—El Paso 1993, writ requested).
26. *Id.* at 772-73.
27. *Id.* at 773-74.
28. TEX. R. CIV. EVID. 105(a).
29. 847 S.W.2d 417 (Tex. App.—Texarkana 1993, no writ).
30. *Id.* at 421.
31. 844 S.W.2d 773 (Tex. App.—Dallas 1992, writ denied).

appeal.[32]

No rule requires that a deposition be read or played to the jury in the chronological sequence in which it was taken. For the second time in two years, a Texas appellate court has held that extensively edited videotaped deposition testimony was admissible.[33] The court stated there was no harm to the opponent because the trial court allowed the opponent to present its own videotape of the same witness immediately following the showing of the edited videotaped deposition.[34]

II. ARTICLE II — JUDICIAL NOTICE

To be the proper subject of judicial notice, a fact must not be subject to reasonable dispute because "it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[35] During the Survey period, courts found various topics improper for judicial notice. Such a topic included whether the cities of Beaumont, Port Arthur, and Orange, Texas, were in the same metropolitan area for purposes of enforcing a covenant not to compete.[36] In addition, in an equitable bill of review proceeding brought to challenge the dismissal of a case for want of prosecution, a court of appeals found that it was improper for the trial court to take judicial notice of what had occurred at the summary judgment hearing, where the parties disputed what had happened at the hearing, and the hearing was not recorded.[37] The court explained that personal knowledge is not judicial knowledge and that a judge may personally know a fact of which she may not properly take judicial notice.[38] Another court took judicial notice of a final judgment in another case because it had been asked by stipulation of the parties to do so, but noted that in general a court cannot judicially notice the records of another court.[39] Whether a county court at law was a "statutory probate court" was a fact that could be determined by a resort to state law, and because it was capable of accurate determination from sources whose accuracy could not reasonably be questioned, it was held to be an adjudicative fact that could be judicially noticed.[40]

Texas Rule of Civil Evidence 201(f) provides that judicial notice may be

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32. *Id.* at 793.

33. 855 S.W.2d at 151.

34. *Id.*; *see also* Jones v. Colley, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied) (party allowed to play edited videotape of deposition, provided opposing party allowed to show balance of deposition immediately following the edited demonstration).

35. TEX. R. CIV. EVID. 201(b).

36. Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 774 (Tex. App.—Beaumont 1992, writ denied).

37. Levit v. Adams, 841 S.W.2d 478 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 850 S.W.2d 469 (Tex. 1993).

38. *Id.* at 485.

39. Southwestern Elec. Power Co. v. Martin, 844 S.W.2d 229, 236 (Tex. App.—Texarkana 1992, writ denied).

40. Hartley v. Coker, 843 S.W.2d 743, 746-47 (Tex. App.—Corpus Christi 1992, no writ).

taken at any stage of the proceeding.[41] In *Dunn v. City of Tyler*[42] the Eastland Court of Appeals took judicial notice of a 1988 Manual on Uniform Traffic Control Devices that was not presented to the trial court by appellants as part of their summary judgment proof below. The Eastland court took judicial notice of the "certification" page of the manual because it is a portion of a document promulgated by the State Highway & Public Transportation Commission.[43]

Section 38.004 of the Texas Civil Practice and Remedies Code permits a court to take judicial notice of an amount representative of typical attorney's fees in a matter before the court.[44] In *Budd v. Gay*[45] the court of appeals found that the trial court had abused its discretion in refusing to award attorney's fees to a plaintiff who prevailed in her action for breach of a written residential earnest money contract, even though the plaintiff's counsel could only testify as to the facts of his representation and not as an expert witness. The court of appeals explained that the trial court took judicial notice of the usual and customary fee in Harris County, and determined that a fee of $13,000 was appropriate.[46] Because defendants presented no evidence to contradict the presumption that the fees were reasonable,[47] the trial court abused its discretion to deny attorney's fees entirely.[48]

Appellate courts presume that a trial court awarding attorney's fees took judicial notice of the usual and customary attorney's fees.[49] In *General Electric Supply Co. v. Gulf Electroquip, Inc.*[50] the Houston [1st Dist.] Court of Appeals held that cases dealing with the fixing of attorney's fees by the trial judge when acting as a trier of fact have no application to a summary judgment. Where the amount of attorney's fees is not conclusively established, summary judgment is improper.[51]

Texas Rule of Civil Evidence 202 governs judicial notice of the laws of other states. In a widow's suit to recommence payments of workers' compensation benefits suspended upon her alleged remarriage, the San Antonio Court of Appeals took judicial notice of the statutory law of the state of Kentucky to rule that nothing in the statute indicated that a common law marriage terminated the benefits at issue.[52] In another case, an asbestos manufacturer was held to have waived its claim that Alabama law should apply to claims where asbestos-related injuries occurred in Alabama because

41. TEX. R. CIV. EVID. 201(f).
42. 848 S.W.2d 305 (Tex. App.—Eastland 1993, no writ).
43. *Id.* at 307 n.3 (manual promulgated pursuant to the provisions of TEX. REV. CIV. STAT. ANN. 6701(d) § 29 (Vernon 1977)).
44. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1986).
45. 846 S.W.2d 521 (Tex. App.—Houston [14th Dist.] 1993, no writ).
46. *Id.* at 524.
47. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 1986).
48. 846 S.W.2d at 524.
49. *See, e.g.*, Ross v. 3D Tower Ltd., 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
50. 857 S.W.2d 591 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
51. *Id.* at 601-02.
52. Texas Employers' Ins. Ass'n v. Borum, 834 S.W.2d 395, 398 (Tex. App.—San Antonio 1992, writ denied).

it failed to request that the trial court apply Alabama law.[53]

Texas Rule of Civil Evidence 203 permits a Texas court to judicially notice law of a foreign country.[54] The rule permits a trial court determining the law of a foreign nation to "consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises."[55] In *Owens-Corning Fiberglass Corp. v. Baker*[56] the Texarkana Court of Appeals presumed that the trial court determining Canadian law considered an affidavit previously filed in the action and considered argument of counsel regarding Canadian law in a plea to the jurisdiction. Rule 203 requires the trial court considering other sources of foreign law to give the parties notice and an opportunity to comment on the sources and to submit further material to the court.[57] Even though the record did not reflect that the trial court gave the parties such notice or opportunity, the court of appeals held that the failure did not appear to have been such as was reasonably calculated to cause a rendition of an improper judgment, and that even if comment on the court's sources had been allowed, it is not likely that the court's decision would have been different.[58]

Texas Rule of Civil Evidence 204 permits a court to take judicial notice of the ordinances of municipalities and counties of Texas, the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code.[59] One court during the Survey period declined to take judicial notice of a municipal ordinance because it was not submitted in verified form.[60]

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, Texas appellate courts continued to further develop the law of presumptions, burden of proof, and inferences.

In *City of Seven Points v. Anderson*,[61] an appeal from a judgment that directed an election on a disincorporation petition, the Tyler Court of Appeals held that "[u]nencumbered by a presumption that the mayor's count

53. Keene Corp. v. Gardner, 837 S.W.2d 224 (Tex. App.—Dallas 1992, writ denied); *cf.* Keene Corp. v. Rogers, 863 S.W.2d 168, 174-76 (Tex. App.—Texarkana 1993, writ requested) (applying Alabama law in case regarding asbestos-related inquiries although plaintiff failed to request judicial notice of Alabama law, since manufacturer failed to object to use of Alabama law).

54. TEX. R. CIV. EVID. 203.

55. *Id.*

56. 838 S.W.2d 838 (Tex. App.—Texarkana 1992, no writ).

57. TEX. R. CIV. EVID. 203.

58. 838 S.W.2d at 841.

59. TEX. R. CIV. EVID. 204.

60. City of Houston v. Southwest Concrete Constr., Inc., 835 S.W.2d 728, 733 n.5 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (citing Metro Fuels, Inc. v. City of Austin, 827 S.W.2d 531, 532 & n.3 (Tex. App.—Austin 1992, no writ)).

61. 834 S.W.2d 519 (Tex. App.—Tyler 1992, no writ).

was accurate, the petitioners had to show by a preponderance of the evidence that at least two-thirds of the qualified voters had signed the petition [at issue]; this is precisely the burden of proof that the petitioners met."[62] In *Flores v. Texas Department of Health*,[63] an action challenging a permit for expansion of a county's solid waste disposal site, the Austin Court of Appeals held that the health department's admission that it acted arbitrarily and capriciously in setting a ground water table under a landfill created a strong presumption that was not contradicted by the record in the proceeding for a solid waste disposal permit.[64]

An inference is a conclusion that the jury may reasonably draw from proven facts.[65] During the Survey period, two courts held that an inference may not be stacked upon an inference.[66] One court of appeals reiterated the principle that on motion for summary judgment, evidence supportive of the nonmovant will be presumed as true, with all reasonable inferences indulged in the nonmovant's favor and any doubts resolved to its advantage.[67]

IV. ARTICLE IV — RELEVANCY AND ITS LIMITS

Article IV of the Texas Rules of Civil Evidence governs relevancy and its limits. Rule 401 defines relevance.[68] Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by constitution, statute, or other rules.[69] Evidence that is not relevant is not admissible.[70] During the Survey period, several Texas appellate courts used the definition of relevance contained in Texas Rule of Civil Evidence 401 as a basis for admitting[71] and excluding evidence.[72] Several courts used Texas Rule of Civil Evidence 402

62. *Id.* at 520.

63. 835 S.W.2d 807 (Tex. App.—Austin 1992, writ denied).

64. *Id.* at 811.

65. Page v. Lockley, 176 S.W.2d 991 (Tex. Civ. App.—Eastland 1943), *rev'd on other grounds*, 142 Tex. 594, 180 S.W.2d 616 (1944).

66. Caller-Times Publishing Co., Inc. v. Triad Communications, Inc., 855 S.W.2d 18, 24 (Tex. App.—Corpus Christi 1993, no writ) ("A trier of fact may not stack an inference upon an inference."); Ice Bros. Inc. v. Bannowsky, 840 S.W.2d 57, 61 (Tex. App.—El Paso 1992, no writ) ("An inference does not constitute evidence in support of a proposition unless the inference is based upon facts established by direct evidence. . . . an inference cannot be drawn from facts established by another inference; i.e. an inference based on an inference.").

67. *Ice Bros., Inc.*, 840 S.W.2d at 62.

68. TEX. R. CIV. EVID. 401.

69. TEX. R. CIV. EVID. 402. For the definition of relevance, see TEX. R. CIV. EVID. 401.

70. TEX. R. CIV. EVID. 402.

71. *Reichhold Chem., Inc.*, 854 S.W.2d at 248 (photographs and accounting evidence); Bexar County Appraisal Review Bd. v. First Baptist Church, 846 S.W.2d 554, 562 (Tex. App.—San Antonio 1993, writ denied) (door opened to admission of charitable works of corporate party); A.V.I., Inc. v. Heathington, 842 S.W.2d 712 (Tex. App.—Amarillo 1992, writ denied) (testimony of representatives' representations to third parties to prove representative engaged in deceptive trade practices to plaintiff); Collum v. City of Abilene, 840 S.W.2d 1 (Tex. App.—Eastland 1991, writ denied) (evidence that firefighters received extra pay for certification as intermediate or advanced firefighters was relevant and admissible in an action by firemen to recover overtime pay).

72. Service Lloyds Ins. Co. v. Martin, 855 S.W.2d at 816 (collateral matter to prove character in an effort to show action and conformity therewith); *Keene Corp.*, 837 S.W.2d at 224 (impeachment of expert regarding his research on beryllium irrelevant and collateral to his testimony regarding knowledge and awareness of asbestos-related disease); Travelers Cos. v.

to admit[73] and exclude[74] certain evidence.

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.[75] The exclusion under Rule 403 is discretionary.[76] During the Survey period, the Beaumont Court of Appeals held that the probative value of a urinalysis result showing the decedent was positive for marijuana outweighed its prejudicial effect in a wrongful death action arising from an automobile collision.[77] The court explained that the evidence was offered on the intoxication issue and as an explanation for why decedent's vehicle had crossed the center line causing the collision.[78]

In a railroad employee's suit against the railroad seeking damages for personal injuries, once the railroad offered evidence that it was mandatory that the plaintiff-worker be tested by a certified vocational evaluator and that no job offer would ever be made to him because he was not so tested, the injured worker was not precluded under Rule 403 from offering rebuttal testimony by another injured worker that the railroad had offered him a job, that he had not been tested by the evaluator, and that he had in fact been tested by the same doctor who tested plaintiff.[79] The Eastland Court of Appeals explained that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.[80] The court further explained that the rail-

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Wolfe, 838 S.W.2d 708, 714 (Tex. App.—Amarillo 1992, no writ) (statement of amount of uninsured loss of computer equipment valued at $8,060 was not relevant to inventory of fire loss of $179,000).

73. *Reichhold Chem., Inc.*, 854 S.W.2d at 248; Rhodes v. Batilla, 848 S.W.2d 833, 847 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (testimony by client's co-defendant in IRS collection action regarding circumstances of meeting with the attorney and circumstances of client's filling out IRS form was relevant in legal malpractice suit brought against attorney); *Bexar County Appraisal Review Bd.*, 846 S.W.2d at 562 (door opened to admission of charitable works of corporate party); Carter v. Exxon Corp., 842 S.W.2d 393 (Tex. App.—Eastland 1992, writ denied) (in lessor's action against oil and gas lessee alleging lessee failed to pay correct amount of gas royalties, evidence concerning oil royalties paid was relevant after lessor "opened the door" by introducing such evidence); L.S.R. Joint Venture No. 2 v. Callewart, 837 S.W.2d 693 ((Tex. App.—Dallas 1992, writ denied) (trial court erred in excluding evidence of the dollar amount of tax benefits purchaser received from the purchase in a DTPA case).

74. Carter v. Exxon Corp., 842 S.W.2d at 393 (in lessor's action against oil and gas lessee alleging lessee failed to pay correct amount of gas royalties, evidence concerning oil royalties paid was relevant after lessor "opened the door" by introducing such evidence); James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 243 (Tex. App.—Texarkana 1992, no writ) (statements of children were not relevant to any issue in a case in an action to terminate parental rights); *Travelers Cos.*, 838 S.W.2d at 714 (statement of amount of uninsured loss of computer equipment valued at $8,060 was not relevant to inventory of fire loss of $179,000).

75. TEX. R. CIV. EVID. 403.

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

77. Nichols v. Howard Trucking Co., Inc., 839 S.W.2d 155 (Tex. App.—Beaumont 1992, no writ).

78. *Id.* at 158.

79. Missouri Pac. R.R. Co. v. Roberts, 849 S.W.2d 367 (Tex. App.—Eastland 1993, writ denied).

80. *Id.* at 370.

road had invited the rebuttal testimony.[81]

L.S.R. Joint Venture No. 2 v. Callewart[82] involved a purchaser's action against vendors alleging fraud and Deceptive Trade Practices Act violations. The Dallas Court of Appeals held that the trial court abused its discretion by excluding evidence of the dollar amount that the purchaser received in tax benefits from the real estate transaction, which had been offered for purposes of vendors' ratification and waiver defenses.[83] The court explained that the evidence indicated that the purchaser knew about the fraud at the time of the alleged ratification and waiver, that the purchaser held the property for one and one half years after becoming aware of the alleged fraud without filing a cause of action, that an actual dollar amount of the tax benefits was required to be admitted to fully show the relevance of the benefit, and that the purchaser had actually received $550,000 in tax benefits would tend to establish that the purchaser intentionally chose to ratify the transaction to capitalize on his tax consequences.[84]

In *Carter v. Exxon Corp.*[85] the Eastland Court of Appeals held that although evidence of the wealth of a litigant would ordinarily be inadmissible, once the door was opened by one party's introduction of such evidence, the other party's rebuttal with similar evidence was not unfairly prejudicial because it tended to offset the prejudice caused by the initial introduction of such evidence.[86]

Several courts during the Survey period held that the probative value of certain evidence was substantially outweighed by the danger of unfair prejudice or confusion of the issues. In a workers' compensation case, the Dallas Court of Appeals held that the probative value of evidence that the worker had made previous claim for workers' compensation and that on subsequent employment applications he had stated that he was free of any defects or disabilities was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and misleading of the jury where none of the other injuries involved the claimant's left shoulder, for which present compensation was being sought.[87] In a mother's appeal from a judgment that the putative father was not the child's father, the Corpus Christi Court of Appeals held that it was an abuse of discretion for the court to exclude under Rule 403 a prior judgment that disestablished the mother's husband as the child's biological father.[88]

With few exceptions, character is not admissible to prove conduct on a particular occasion.[89] For example, in a workers' compensation action, a claimant's job application in which he falsely answered "no" to the question

81. *Id.*
82. 837 S.W.2d at 693.
83. *Id.* at 699-700.
84. *Id.* at 699-701.
85. 842 S.W.2d at 393.
86. *Id.* at 400.
87. Service Lloyds Ins. Co. v. Martin, 855 S.W.2d at 816.
88. Silva v. Enz, 853 S.W.2d 815 (Tex. App.—Corpus Christi 1993, writ denied).
89. TEX. R. CIV. EVID. 404.

of whether he had ever been injured on the job was not admissible because the job application raised a collateral matter to prove the claimant's character in an effort to show that he acted in conformity therewith.[90] Another court of appeals held that although evidence of charitable activity of a corporate party to a lawsuit would normally be excluded under Rules 404 and 405, such testimony was admissible where one party "opened the door."[91]

Prior acts or transactions by one of the parties with other persons, commonly referred to as *res inter alios acta*, are irrelevant.[92] In *Missouri Pacific R.R. Co. v. Roberts*[93] the Eastland Court of Appeals held that the general rule of *res inter alios acta*, which holds that prior acts or transactions by one of the parties with other persons are irrelevant, no longer exists independent of the evidentiary rules governing relevance and other acts.[94]

Although character evidence is not admissible to prove conduct on a particular occasion,[95] 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. During the Survey period, one court properly held that evidence of a single instance of misconduct does not rise to the level of "habit" as contemplated by Rule 406.[96] Similarly, evidence of a police officer's past driving record and the police department's assessment of that record was not admissible in an automobile negligence case as evidence of habit where the officer had suffered only three low-speed accidents in a six-year period.[97] In *A.V.I., Inc. v. Heathington*,[98] a deceptive trade practices action by farmers against a leasing company alleging that the leasing representative made a misrepresentation concerning the purchase of irrigation systems at the end of the lease, the Amarillo Court of Appeals affirmed the testimony of other farmers concerning similar representations made to them to establish that the representation was made to plaintiff, under rubric of "habit" evidence.[99] Although this evidence appears to have been excludable under Rule 404(b), it appears that no such objection was made.[100] In *Kavanaugh v. Perkins*,[101] a mandamus proceeding arising out of a medical malpractice action seeking punitive damages and alleging that the physician performed surgery in an impaired state, a physician sought a writ of manda-

90. Service Lloyds Ins. Co. v. Martin, 855 S.W.2d at 823.

91. *Bexar County Appraisal Review Bd.*, 846 S.W.2d at 554.

92. Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873 (Tex. App.—Corpus Christi 1988, writ denied); Texas Farm Bureau Mut. Ins. Co. v. Baker, 596 S.W.2d 639 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

93. 849 S.W.2d at 367.

94. *Id.* at 369-70 (citing TEX. R. CIV. EVID. 401, 402, 403, and 404(b)).

95. TEX. R. CIV. EVID. 404.

96. Borden, Inc. v. Rios, 850 S.W.2d 821 (Tex. App.—Corpus Christi 1993), *judgment set aside by agreement*, 859 S.W.2d 70 (Tex. 1993).

97. Waldon v. City of Longview, 855 S.W.2d 875 (Tex. App.—Tyler 1993, no writ).

98. 842 S.W.2d 712 (Tex. App.—Amarillo 1992, writ denied).

99. *Id.* at 715-16.

100. "A.V.I. fails to cite any rule that would render the questioned testimony inadmissible." *Id.* at 716.

101. 838 S.W.2d 616 (Tex. App.—Dallas 1992, orig. proceeding).

mus directing the trial court to set aside a discovery order because it required the physician to produce documents and information regarding his alcohol and substance abuse. In denying the writ of mandamus, the Dallas Court of Appeals explained that a defendant's routine use of drugs is relevant to the context of his actions in question and thus is relevant to punitive damages.[102]

Texas Rule of Civil Evidence 407(a) provides that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event at issue.[103] In *Pennington v. Brock*,[104] a medical malpractice action, evidence that the hospital subsequently remedied the alleged deficiencies was not admissible to prove negligence in a suit by a patient whose postoperative infection was allegedly due to unsanitary hospital conditions. In *Keetch v. Kroger Co.*,[105] a patron's action against a grocery store for injuries sustained when she allegedly slipped and fell in an accumulation of plant spray in the floral department, the Dallas Court of Appeals held that evidence of the supervisor's post-accident instruction to an employee to be more careful was properly excluded as a basis for impeachment.[106] In *Chapa v. Garcia*,[107] a mandamus proceeding arising out of a suit against a rifle manufacturer seeking to discover documents containing alternative design information, Justice Doggett in a concurring opinion wrote that the documents were generated after the rifle at issue was manufactured "precludes neither their discoverability nor admissibility at trial."[108]

Texas Rule of Evidence 408 excludes evidence of compromise and offers to compromise when offered to prove liability or the invalidity of a claim or its amount.[109] In *United States Fire Insurance Co. v. Millard*,[110] a mandamus proceeding, the Houston [1st Dist.] Court of Appeals found that a trial judge had abused his discretion in refusing to sever an uninsured motorist case from a bad faith case, where the bad faith claims were based on the alleged inadequacy of the insurer's settlement offer.[111] Following the reasoning of another court of appeals in *State Farm Mutual Automobile Insurance Co. v. Wilborn*,[112] the *Millard* court explained that when an uninsured motorist case is combined with a bad faith case, a trial court has two competing interests: either it refuses to admit evidence of settlement offer, honoring defendant's right under Rule 408 but denying plaintiff the right to use it to establish essential elements of a bad faith claim, or the trial court admits the evidence of settlement offer, and permits plaintiff to satisfy its proof re-

102. *Id.* at 619.
103. TEX. R. CIV. EVID. 407(a).
104. 841 S.W.2d 127 (Tex. App.—Houston [14th Dist.] 1992, no writ).
105. 845 S.W.2d 276 (Tex. App.—Dallas 1990), *aff'd*, 845 S.W.2d 262 (Tex. 1992).
106. *Id.* at 282.
107. 848 S.W.2d 667 (Tex. 1992) (orig. proceeding).
108. *Id.* at 671-72 n.6 (Doggett, J., concurring).
109. TEX. R. CIV. EVID. 408.
110. 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).
111. *Id.* at 672-73.
112. 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

quirements but denies defendant's right to exclude such evidence.[113] The *Millard* court agreed with the *Wilborn* court and held that the resolution of this conflict requires severing of the two causes of action and abating the bad faith claim until final disposition of the uninsured motorist claim.[114]

Rule 408 excludes evidence of compromise and offers to compromise when offered to prove liability or the invalidity of a claim or its amount. The rule does not, however, require exclusion of such evidence when offered for another purpose.[115] An example of such a purpose occurred in *Gilbert v. Pettiette*,[116] in which the court of appeals affirmed the admission of a settlement where appellee filed a counterclaim alleging that appellant had breached a contract to settle.[117]

Texas Rule of Civil Evidence 411 provides that evidence of liability insurance is not admissible regarding the issue of the insured's negligence or other wrongful acts.[118] In *Hall v. Martin*[119] a negligence and gross negligence action by a minor and her next friend against her parents, the Beaumont Court of Appeals held that evidence that the minor's mother had liability insurance was not relevant to the issue of whether she acted negligently in connection with her minor daughter's motorcycle accident and that insurance could not create a legal duty or "vitiate the parental immunity doctrine."[120]

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[121] unless rules of evidence recognize the privilege,[122] or a statute[123] or constitution[124] grants the privilege. Some of the specific privileges provided for in the Texas Rules of Civil Evidence include: (1) lawyer-client privilege,[125] (2) husband-wife communication privilege,[126] (3) communications to clergymen,[127] (4) trade secrets,[128] and (5) physician-patient privilege.[129]

Texas Rule of Civil Evidence 503 codifies the common law lawyer-client privilege. With few exceptions, attorney-client communications are pro-

113. 847 S.W.2d at 673.
114. *Id.* at 673 (citing *Wilborn*, 835 S.W.2d at 262).
115. TEX. R. CIV. EVID. 408.
116. 838 S.W.2d 890 (Tex. App.—Houston [1st Dist.] 1992, no writ).
117. *Id.* at 892.
118. TEX. R. CIV. EVID. 411.
119. 851 S.W.2d 905 (Tex. App.—Beaumont 1993, writ denied).
120. *Id.* at 910.
121. TEX. R. CIV. EVID. 501(2).
122. TEX. R. CIV. EVID. 502-10.
123. *See* TEX. REV. CIV. STAT. ANN. art. 5561h, *repealed by* TEX. R. CIV. EVID. 509-10 as to civil cases and TEX. R. CRIM. EVID. 509-10 as to criminal cases (confidential communications between physician and patient relating to professional services rendered by a physician privilege).
124. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 10.
125. TEX. R. CIV. EVID. 503.
126. TEX. R. CIV. EVID. 504.
127. TEX. R. CIV. EVID. 505.
128. TEX. R. CIV. EVID. 507.
129. TEX. R. CIV. EVID. 509.

tected from discovery by Rule 503.[130] One court during the Survey period held that the attorney-client privilege applies only in connection with rendition of legal services, and communications for other purposes are not protected merely because one of the parties is licensed to practice law.[131]

In *Turner v. Montgomery*,[132] a mandamus proceeding arising out of a divorce case, a wife sought discovery of documents regarding the value of her husband's law partnership. The court of appeals held that denial of the wife's discovery was not justified where at least twelve of the fourteen requests did not seek privileged communications between an attorney and client relating to her husband's law practice.[133] The court further held that the husband waived his objection to the request by failing to request an inspection by the trial court or present evidence supporting his claim of attorney-client privilege.[134] For these reasons, the court of appeals held that the trial court abused its discretion in denying discovery.[135]

Texas Rule of Civil Evidence 503 provides that a client has a privilege to refuse to disclose confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.[136] Rule 503 covers not only communications between the client and the lawyer, but also extends to representatives of the client. Rule 503(a)(2) defines a representative of the client as one "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."[137] The Texas Supreme Court recently considered who is a "representative of the client" in *National Tank Co. v. Brotherton*.[138] *Brotherton* was a mandamus proceeding arising out of a lawsuit brought by the wife of a deceased, individually and on behalf of her children and the estate, arising out of a plant explosion that killed one worker and injured others.[139] At issue in *Brotherton* was whether accident reports and witness statements were privileged from discovery.[140] The Texas Supreme Court held that communications between employees of the manufacturing plant as witnesses to the accident and representatives of the corporate owner's legal department were not protected by the attorney-client privilege because the employee witnesses were not authorized to seek legal counsel on behalf of the corporation, as required under Rule 503(a)(2) for purposes of asserting the lawyer-client privilege.[141] The Texas Supreme Court held that Rule 503(a)(2) "clearly adopts the control group test"[142] even though the United

130. Rhodes v. Batilla, 848 S.W.2d at 846.
131. Thacker v. State, 852 S.W.2d 77, 82 (Tex. App.—Austin 1993, writ denied).
132. 836 S.W.2d 848 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).
133. *Id.* at 850-51.
134. *Id.* at 851.
135. *Id.*
136. TEX. R. CIV. EVID. 503(b).
137. TEX. R. CIV. EVID. 503(a)(2).
138. 851 S.W.2d 193 (Tex. 1993).
139. *Id.*
140. *Id.* at 195.
141. *Id.* at 197.
142. 851 S.W.2d at 198. Under the "control group" test, previously recognized by many federal courts, a corporation could claim the attorney-client privilege only as to statements

States Supreme Court rejected the "control group" test.[143] Rejecting appellant's argument that a lower echelon employee may be a representative of the corporation if the employee speaks with the "blessing" of corporate management, the Texas Supreme Court explained that this "subject matter test" was clearly available to but not selected by the drafters of the Texas rules.[144] The Texas Supreme Court held that witness statements taken by the employer's liability insurer for the employer's corporate counsel were not protected from disclosure by the lawyer-client privilege, because even if the insurer was a representative of the lawyer under Rule 503(a)(4), there was no evidence that the witnesses who made the statements were representatives of the client under 503(a)(2).[145] Finding no abuse of discretion,[146] the Texas Supreme Court denied the writ.

Texas Rule of Civil Evidence 503(a)(4) defines "representative of the lawyer."[147] A representative of a lawyer is "one employed by the lawyer to assist the lawyer in rendition of professional legal services," or "an accountant who is reasonably necessary for the lawyer's rendition of professional legal services."[148] In *I.M.C. Fertilizer v. O'Neill*,[149] a mandamus proceeding, the Houston [14th Dist.] Court of Appeals held that the attorney-client privilege protected from discovery testimony of investigators hired by a plan operator for off-site investigation concerning an explosion at the plant, where counsel for the plant operator established by affidavit that the investigators were hired at his request to assist in his representation of the plant operator, and that at no time had the information gathered by the investigators been disseminated to any third parties.[150]

In *Keene Corp. v. Caldwell*[151] a mandamus proceeding arising out of two asbestos personal injury actions, the Houston [14th Dist.] Court of Appeals held that neither the attorney-client privilege nor the work-product exemption requires that the privileged communication or work product contain an attorney's mental impressions, legal advice, or opinions in order to retain their privileged nature.[152] The court explained that the subject matter of the information communicated between the attorney and client and of the work product generated by an attorney is of no concern in determining whether

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made by employees in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney. "Courts applying this test generally protect only statements made by the upper echelon of corporate management. . . . The control group test reflects the distinction between the corporate entity and the individual employee and is based on the premise that only an employee who controls the actions of the corporation can personify the corporation." *Id.* at 197.

143. The United States Supreme Court rejected the control group test in Upjohn Co. v. United States, 449 U.S. 383 (1981).

144. 851 S.W.2d at 198.

145. *Id.* at 198-99.

146. *Id.* at 200.

147. TEX. R. CIV. EVID. 503(a)(4).

148. *Id.*

149. 846 S.W.2d 590 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

150. *Id.* at 592.

151. 840 S.W.2d 715 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

152. *Id.* at 719.

the privilege or exemption is applicable to documents.[153] The court held that the trial court erred in determining privilege based on the contents of the documents rather than their nature as communications between an attorney and a client under Rule 503(b)[154] and work product under Texas Rule of Civil Procedure 166(b)(3)(a).[155] The court further explained that if a document is privileged or exempted from discovery under the rules, that certain information within the documents may be discoverable through other means does not overcome the privilege or exemption.[156] In another mandamus case with the same trial judge as respondent, the same court of appeals held that the attorney-client privilege is not limited to communications that constitute legal advice or opinion, and that it attaches not only to legal advice but also to communications between the client and the counsel, including factual information communicated.[157]

In *Republic Insurance Co. v. Davis*[158] the Texas Supreme Court held that the "offensive use" doctrine of waiver of privilege, enunciated by the Texas Supreme Court in *Ginsberg v. Fifth Court of Appeals*,[159] applies to the attorney-client privilege, although it did not apply in the case at bar.[160] The supreme court listed three factors that should guide the trial court in determining whether a waiver has occurred: (1) the party asserting the privilege must seek affirmative relief; (2) the privileged information sought must be such that, if believed by the fact finder, in all probability would be outcome determinative of the cause of action asserted, and that mere relevance is insufficient; and (3) disclosure of the confidential communication must be the only means by which the agreed party can obtain the evidence.[161] The supreme court explained that if any one of these requirements is lacking, the trial court must uphold the privilege.[162] The Texas Supreme Court explained that here, waiver had not occurred because the underlying declaratory judgment action out of which the mandamus case arose was not an action seeking affirmative relief.[163]

Texas Rule of Civil Evidence 503(d)(1) provides an exception to the lawyer-client privilege if the services of a lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or a fraud.[164] In *Granada Corp. v. First Court of Appeals*[165] the Texas Supreme Court held that the crime-fraud exception to the lawyer-client privilege applied to documents

153. *Id.* at 720.
154. *Id.*
155. *Id.*
156. *Id.*
157. GAF Corp. v. Caldwell, 839 S.W.2d 149, 151 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).
158. 856 S.W.2d 158 (Tex. 1993).
159. 686 S.W.2d 105 (Tex. 1985) (orig. proceeding).
160. 856 S.W.2d at 163.
161. *Id.* at 163.
162. *Id.*
163. *Id.* at 164.
164. TEX. R. CIV. EVID. 503(d)(1).
165. 844 S.W.2d 223 (Tex. 1992) (orig. proceeding).

discovered by a stockholder in an action against the corporation, where other documents suggested that the corporation fraudulently misled the stockholders to give up their stock in exchange for royalty certificates, while the corporation was seeking legal advice regarding proposals that would nullify the value of their certificates.[166] Explaining that the crime-fraud exception applies only if a prima facie case is made of contemplated fraud, the supreme court held that sufficient proof had been offered to establish a prima facie case of fraud.[167]

Citing *Granada* for the proposition that a party who asserts the crime-fraud exception must first establish a prima facie case showing a violation sufficiently serious to defeat the privilege, and the proposition that there must be a relationship between the document for which the privilege is challenged and the prima facie proof offered, the Houston [14th Dist.] Court of Appeals in *Arkla, Inc. v. Harris*[168] held that the crime fraud exception did not apply where there was no showing that the services of the attorneys who prepared title opinions and related documents were sought or obtained with any fraudulent or illegal intent.[169] Similarly, where there was no evidence that a defendant corporation sought a lawyer's advice to commit fraud, the crime-fraud exception to the lawyer-client privilege was held not to be applicable.[170] The party claiming the crime-fraud exception has the burden of establishing the prima facie case, which requirement is met when the proponent offers evidence establishing elements of fraud and that the fraud was ongoing or about to be committed when the document was prepared.[171] That the plaintiff's cause of action involved fraudulent conduct is insufficient to establish a prima facie case.[172] Another court of appeals, finding that such a prima facie showing had been made, held that the trial court abused its discretion by granting a protective order in its entirety without first conducting an *in camera* inspection to determine whether the communications are privileged or come within the exception.[173]

Texas Rule of Civil Evidence 503(d)(5) provides that in litigation between commonly represented clients, the lawyer-client privilege does not attach to matters that are of mutual interest between or among any of the clients.[174] In *Scrivner v. Hobson*[175] a mandamus proceeding arising out of a legal malpractice case against an attorney who represented joint clients in an environmental lawsuit, and who allegedly settled the lawsuit without the clients'

166. *Id.* at 227.
167. *Id.*
168. 846 S.W.2d 623 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).
169. *Id.* at 630.
170. Cigna Corp. v. Spears, 838 S.W.2d 561 (Tex. App.—San Antonio 1992, orig. proceeding).
171. *Id.* at 569.
172. *Id.* The court reiterated that a court may look to the documents themselves to determine whether a prima facie case has been established (citing Freeman v. Bianchi, 820 S.W.2d 853, 861 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave granted]).
173. Volcanic Gardens Management Co., Inc. v. Paxson, 847 S.W.2d 343, 348 (Tex. App.—El Paso 1993, orig. proceeding).
174. TEX. R. CIV. EVID. 503(d)(5).
175. 854 S.W.2d 148 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

authority, the Houston [14th Dist.] Court of Appeals found that the joint clients exception to the attorney-client privilege and attorney-work-product privilege applied to portions of the attorney's file, including information regarding the actual basis for the calculations of the amount due each client on behalf of whom the attorney settled the lawsuit.[176] The court also held that because the contents of the documents were relevant to the plaintiffs' claims that the proceeds of the aggregate settlement were improperly and fraudulently distributed among the various plaintiffs in the environmental lawsuit, the joint clients exception to the attorney-client or attorney-work-product privilege regarding breach of duty by a lawyer also permitted discovery of the documents.[177]

Texas Rule of Civil Evidence 507 privileges trade secrets.[178] A person has a privilege to refuse to disclose and to prevent others from disclosing trade secrets if allowing the privilege will not tend to conceal fraud or otherwise work injustice.[179] The protection of Rule 507 is qualified and not absolute.[180]

Texas Rule of Civil Evidence 509 governs the physician/patient privilege. In *Kavanaugh v. Perkins*[181] a physician sought a writ of mandamus directing the trial court to set aside a discovery order that required the physician to produce documents and information regarding his alcohol and substance abuse, his mental, physical, and emotional condition, and information provided or gathered by the medical review committees of the State Board of Medical Examiners. The Dallas Court of Appeals held that the physician failed to prove that the authorization was overly broad on its face because he failed to provide the appellate court with a copy of the authorization.[182] The court also held that the physician failed to establish that the information about him was privileged because he did not make any attempt to prove whether the allegedly privileged information was contained in a record prepared by a medical review committee or the State Board of Medical Examiners.[183] Finally, the court held that the physician waived his claim of privilege by failing to specifically plead privilege in response to the discovery requests seeking the documents.[184]

Both Rule 509, governing the physician/patient privilege, and Rule 510, governing confidentiality of mental health information, contain exceptions to the privileges in proceedings by the patient against a physician or health care professional where the disclosure is relevant to the claim or defense of the physician or professional.[185] In *R.K. v. Ramirez*,[186] a mandamus proceeding

176. *Id.* at 152.
177. *Id.*
178. *Id.*
179. TEX. R. CIV. EVID. 507.
180. Chapa v. Garcia, 848 S.W.2d at 670-71.
181. 838 S.W.2d at 616.
182. *Id.* at 620-21.
183. *Id.* at 622. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.032(c) (Vernon 1992).
184. *Id.* at 620.
185. TEX. R. CIV. EVID. 509(d)(1); TEX. R. CIV. EVID. 510(d)(1).
186. 855 S.W.2d 204 (Tex. App.—Corpus Christi 1993, orig. proceeding [leave denied]).

arising out of a medical malpractice action, the Corpus Christi Court of Appeals held that the trial court abused its discretion in ordering the doctor's medical records produced absent any pleading showing that the plaintiffs were placing the doctor's medical condition in issue.[187]

Rules 509 and 510 also provide exceptions to the privileges in any suit affecting the parent-child relationship.[188] These exceptions apply to medical and mental health records of both parties and nonparties.[189] In *Smith v. Gayle*[190] the Houston [14th Dist.] Court of Appeals held that based on its *in camera* inspection, it was unable to hold that the trial court abused its discretion when it ruled that medical records of a mother's close friend were irrelevant to issues in the underlying child custody proceeding in which he was not a party, thus making the exception that the physician/patient privilege and mental health information privilege for disclosure inapplicable.[191]

Texas Rule of Civil Evidence 511 provides that a privilege is waived if the holder or his predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.[192] In *Arkla, Inc. v. Harris*[193] a mandamus proceeding seeking to compel the trial court to set aside its order compelling production of documents, the Houston [14th Dist.] Court of Appeals held that "[o]nce a prima facie case of privilege [was] established, and the documents [were] tendered to the trial court," the trial court abused its discretion by refusing to conduct an *in camera* inspection.[194] The appellate court explained that the trial court could not have made a proper determination that the privilege had been waived without reviewing the tendered documents.[195] In *Granada Corp. v. First Court of Appeals*[196] a mandamus proceeding, the Texas Supreme Court held that a corporation had waived the attorney-client privilege by inadvertently producing the documents pursuant to a document production in which 150,000 pages of documents were produced for inspection by the opposing party.[197] The corporation argued that inadvertent production of necessity was involuntary, but the Texas Supreme Court disagreed.[198] The Texas Supreme Court held that "[i]nadvertent production is distinguishable from involuntary production," and that "[a] party who permits access to unscreened documents may, due to inattention unwittingly, but nonetheless voluntarily, disclose a privileged document."[199] The supreme court explained that "[w]hen deciding the issue of voluntariness, a court should

187. *Id.* at 207.
188. TEX. R. CIV. EVID. 509(d)(6); TEX. R. CIV. EVID. 510(d)(6).
189. Cheatham v. Rogers, 824 S.W.2d 231, 234 (Tex. App.—Tyler 1992, orig. proceeding).
190. 834 S.W.2d 105 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).
191. *Id.* at 107.
192. TEX. R. CIV. EVID. 511.
193. 846 S.W.2d 623 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).
194. *Id.* at 631.
195. *Id.*
196. 844 S.W.2d 223 (Tex. 1992).
197. *Id.* at 226.
198. *Id.*
199. *Id.*

evaluate all circumstances of the disclosure."[200] The supreme court found it relevant that here the corporation "did not avail itself of opportunities to prevent disclosure of the memoranda, although it had many."[201] Noting that Granada did not segregate out the documents in its initial review, did not detect the documents when the opposing party notified Granada of its designations for photocopying or when the copies were sent to the opposing party, and did not inventory the documents at various points before production, the supreme court explained that "Granada's conclusory assertion that the disclosure was inadvertent and therefore involuntary offer[ed] no circumstantial justification for the disclosure."[202] Therefore, the supreme court held that Granada "failed to sustain its burden of establishing that its disclosure of the documents was involuntary."[203]

VI. ARTICLE VI — WITNESSES

Texas Rule of Civil Evidence 601 governs competency and incompetency of witnesses.[204] "Every person is competent to be a witness except as otherwise provided in [the] rules."[205] Although 601 provides that insane persons[206] and children[207] are incompetent to testify in any proceeding subject to the Texas Rules of Civil Evidence, the rules do not provide that convicted felons are incompetent witnesses. In *Parrish v. Brooks*[208] the Texarkana Court of Appeals held that the affidavit of a doctor who had been convicted of a felony was not rendered incompetent by his conviction.[209] Explaining that it found "no authority holding that a convicted felon cannot be a competent witness,"[210] the court explained that the affidavit was prepared before the conviction, and although the conviction might impair the credibility of the witness, it did not render the affidavit incompetent.[211]

Texas Rule of Civil Evidence 602 provides that a witness may not testify to a matter unless he has personal knowledge of the matter.[212] During the Survey period, one court held that "a litigant's lack of personal knowledge of a fact does not conclusively negate the existence of the fact."[213]

Texas Rule of Civil Evidence 608 governs evidence that may be intro-

200. *Id.* at 227.
201. *Id.*
202. *Id.*
203. *Id.*
204. TEX. R. CIV. EVID. 601.
205. TEX. R. CIV. EVID. 601(a).
206. TEX. R. CIV. EVID. 601(a)(1).
207. TEX. R. CIV. EVID. 601(a)(2).
208. 856 S.W.2d 522 (Tex. App.—Texarkana 1993, writ denied).
209. *Id.* at 528.
210. *Id.* The court noted that until its repeal in 1985, a Texas statute had specifically provided that a convicted felon could be a competent witness. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 3717, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3322).
211. 856 S.W.2d at 528.
212. TEX. R. CIV. EVID. 602.
213. Rampel v. Wascher, 845 S.W.2d 918, 923 (Tex. App.—San Antonio 1992, writ denied) (citing Lesbrookton, Inc. v. Jackson, 796 S.W.2d 276, 285 (Tex. App.—Amarillo 1990, writ denied)) (husband's testimony at his deposition that he was "not aware of anything" that

duced concerning the character and conduct of witnesses.[214] In *Service Lloyds Insurance Co. v. Martin*[215] a workers' compensation case, the Dallas Court of Appeals considered whether the trial court erred in excluding plaintiff's 1981 job application in which he falsely answered "no" to the question of whether he had ever been injured on the job. The Dallas Court of Appeals explained that the impeachment method at issue was governed by Rule 608, which "explicitly prohibits impeaching a witness's testimony by inquiring about specific acts of the witness other than criminal convictions as provided by rule 609."[216] The Dallas Court of Appeals held that the job application was not admissible as direct evidence under Rule 404(b), nor as impeachment evidence under Rules 608(a) and (b).[217]

Texas Rule of Civil Evidence 609 defines the circumstances under which a witness's credibility can be attacked with evidence that he has been convicted of a crime.[218] Before admitting the conviction into evidence, the trial court must determine that the probative value of the evidence outweighs the prejudicial effect to the person against whom the evidence is offered.[219] In *Borden, Inc. v. Rios*[220] a former salesman's suit for defamation against his supervisor who accused him of being a thief, the Corpus Christi Court of Appeals held that the trial court committed no error by permitting defendants to impeach the salesperson with his conviction of a misdemeanor "hot check" offense three and a half years prior to trial.[221]

Texas Rule of Civil Evidence 611 controls the mode and order of interrogation and presentation of evidence.[222] The decision to allow witnesses to testify out of order is ordinarily a matter within the discretion of the trial court.[223] One court of appeals during the Survey period, however, held that a trial court had abused its discretion by permitting plaintiff's expert to testify about the net worth of Wal-Mart before the plaintiff had shown a prima facie case of gross negligence.[224] The El Paso Court of Appeals noted that "the trial judge was led into error by the representation of [plaintiff's] counsel that he would prove up a prima facie case of gross negligence," which he never did.[225]

Texas Rule of Civil Evidence 611 provides that "[a] witness may be cross-examined on any manner relevant to any issue in the case, including credibil-

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his wife did to cause her own death was not a judicial admission of fact because his lack of personal knowledge did not conclusively negate the existence of the fact).

214. TEX. R. CIV. EVID. 608.

215. 855 S.W.2d 816 (Tex. App.—Dallas 1993, no writ).

216. *Id.* at 823 (citing TEX. R. CIV. EVID. 608(b)).

217. *Id.*

218. TEX. R. CIV. EVID. 609.

219. TEX. R. CIV. EVID. 609(a).

220. 850 S.W.2d 821 (Tex. App.—Corpus Christi), *judgment set aside by settlement*, 859 S.W.2d 70 (Tex. 1993).

221. *Id.* at 834.

222. TEX. R. CIV. EVID. 611.

223. *See* TEX. R. CIV. EVID. 611(a).

224. Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 773 (Tex. App.—El Paso 1993, writ requested).

225. *Id.*

ity."[226] One court during the Survey period held that in cases in which both parties designate the same expert witness, the trial court should permit the other side to cross-examine the witness about those subjects on which the witness was designated, regardless of whether the witness testified to them on direct examination.[227] The court noted that "[o]nly if the scope of cross-examination exceeds the designation of the expert's testimony should the trial court require the cross-examining party to show good cause or risk of having the scope of the cross-examination limited."[228] The court specifically rejected appellant's argument that it should limit cross-examination to the scope of direct examination because a limit "would be in direct contravention of the long-standing tradition in Texas of unlimited cross-examination."[229] In *Palmer v. Miller Brewing Co.*[230] a challenge that the trial court erroneously limited cross-examination was not preserved for appeal because the party did not obtain an answer to the improperly excluded question.[231]

Texas Rule of Civil Evidence 613 governs impeachment and support of witnesses with prior statements.[232] The proper foundation for admitting a prior statement to impeach a witness includes establishing where, when, and to whom the prior statement was made.[233] Upon cross-examination, if the witness admits unequivocally to having made the prior statement, then the impeachment is complete, and the prior statement is not admissible.[234] In *Downen v. Texas Gulf Shrimp Co.*,[235] a seaman's personal injury action, the vessel captain did not unequivocally admit to making prior statements in his deposition; therefore, portions of his prior statement were admissible to impeach his testimony.[236]

For the prior inconsistent statement to be admissible, "the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement."[237] In *Ramsey v. Lucky Stores, Inc.*[238] evidence of witnesses' prior inconsistent statements was proper where the witnesses were "told of their prior statements and were given several opportunities to explain them."[239] For instance, one witness remembered speaking with an investigator "but denied specific assertions, stating that he was unable to remember the substance of his statement even when reminded of it."[240] An-

226. TEX. R. CIV. EVID. 611(b).
227. Kreymer v. North Tex. Mun. Water Dist., 842 S.W.2d 750, 753 (Tex. App.—Dallas 1992, no writ).
228. *Id.*
229. *Id.*
230. 852 S.W.2d 57 (Tex. App.—Fort Worth 1993, writ denied).
231. *Id.* at 67.
232. TEX. R. CIV. EVID. 613.
233. TEX. R. CIV. EVID. 613(a).
234. *Id.*
235. 846 S.W.2d 506 (Tex. App.—Corpus Christi 1993, writ denied).
236. *Id.* at 513.
237. TEX. R. CIV. EVID. 613(a).
238. 853 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
239. *Id.* at 637.
240. *Id.*

other witness remembered giving a statement, "but he did not recall the date, did not with certainty recognize his own voice on tape, and did not remember making the specific statements reflected by the tape."[241]

Texas Rule of Civil Evidence 613(b) permits impeachment of a witness "by proof of circumstances or statements showing bias or interest on the part of [the] witness."[242] In *Keetch v. Kroger Co.*,[243] a patron's suit against a grocery store for injuries sustained when she allegedly slipped and fell in an accumulation of plant spray in the floral department, the patron was not entitled to impeach a store employee by asking her whether the store had instructed her not to admit that anything that she did might be dangerous to the customer. The Dallas Court of Appeals explained that the prior statement at issue was not made by the store employee and in no way showed bias on the part of the store employee.[244]

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.[245] The rules have greatly liberalized the admission of lay witness's opinion testimony. Texas law has always been liberal, however, in allowing an owner of property to offer his opinion on the property's value.[246] 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.[247] During the Survey period, one Texas court recognized the admissibility of lay testimony by permitting an automobile owner to testify what it would cost to rent an automobile while her automobile was being repaired, reasoning that the testimony concerned the market value of the ownership of the automobile and was thus admissible.[248] In a taxpayer's suit for review of an appraisal district's valuation of property, another appellate court affirmed the admission of the testimony of the property owner about the market value of his property.[249] Both courts reiterated the well-established principle that an owner can testify as to the market value of his property as long as the testimony shows that it refers to market value and not intrinsic value.[250]

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241. *Id.*
242. TEX. R. CIV. EVID. 613(b).
243. 845 S.W.2d 276 (Tex. App.—Dallas 1990), *aff'd.*, 845 S.W.2d 262 (Tex. 1992).
244. 845 S.W.2d at 281-82.
245. TEX. R. CIV. EVID. 701.
246. *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).
247. *Id.* at 588.
248. Star Houston, Inc. v. Kundak, 843 S.W.2d 294, 298 (Tex. App.—Houston [14th Dist.] 1992, no writ).
249. Bailey County Appraisal Dist. v. Smallwood, 848 S.W.2d 822, 824 (Tex. App.—Amarillo 1993, no writ).
250. 843 S.W.2d at 298; 848 S.W.2d at 824.

Opinion testimony by lay witnesses must be more than mere legal conclusions.[251] During the Survey period, one court held that "[m]ere legal conclusions by a lay witness [did] not prove the existence of a partnership or joint venture."[252] Another court held that "[a] legal conclusion in an affidavit [was] insufficient to raise an issue of fact in response to a motion for summary judgment."[253]

A fact witness cannot testify to matters that will require him or her to give an expert opinion.[254] During the Survey period, a witness's general description of the effects on a person who inhaled benzaldehyde went beyond the specific facts of the case and was held to constitute inadmissible expert opinion from a lay fact witness.[255] Another court, however, held that a state trooper's testimony in a negligence case alleging that a truck driver made an improper left turn from the highway, cutting off the automobile driver as he was trying to pass, was improperly excluded as expert testimony.[256] The court explained that a police officer may give lay opinion testimony if the testimony is "based on his own personal observations and experiences as a police officer" and disagreed with the trial court "that the trooper's description of the proper method for making a left turn [was] expert testimony."[257]

One appellate court during the Survey period held that whether a beneficiary under a will exerted undue influence on a testator "is a question of ultimate fact for the fact finder" and that lay opinion offered on that subject was "neither rationally based on [the witness's] perceptions nor . . . helpful to a clear understanding of his testimony or the determination of the undue influence issue."[258] Another court permitted lay opinion testimony about another's state of mind from an employer's physician's assistant, who testified that the decision to discharge an employee had been influenced by the employee's settlement of a workers' compensation claim because the assistant had direct knowledge of the pattern of conduct regarding medical disqualification of employees by the physician, even though the physician did not make the final discharge decision.[259] One member of the Texas Supreme Court wrote that "it is difficult to conceive of an instance in which lay opinion would be helpful to a determination of outrageousness" of conduct in a suit for intentional infliction of emotional distress.[260]

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251. *See* Ben Fitzgerald Realty Co. v. Muller, 846 S.W.2d 110 (Tex. App.—Tyler 1993, writ denied); Hennigan v. I. P. Petroleum Co., 848 S.W.2d 276 (Tex. App.—Beaumont 1993), *rev'd in part on other grounds*, 858 S.W.2d 371 (Tex. 1993).

252. 846 S.W.2d at 121.

253. 848 S.W.2d at 279.

254. *See* Missouri-Kansas-Texas R.R. v. Alvarez, 703 S.W.2d 367, 371 (Tex. App.—Austin 1986, writ ref'd n.r.e).

255. Baylor Medical Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69, 74 (Tex. App.—Texarkana 1992, writ denied).

256. Carter v. Steere Tank Lines, 835 S.W.2d 176, 182 (Tex. App.—Amarillo 1992, writ denied).

257. *Id.* at 182.

258. Green v. Earnest, 840 S.W.2d 119, 123 (Tex. App.—El Paso 1992, writ denied).

259. Ethicon, Inc. v. Martinez, 835 S.W.2d 826, 831 (Tex. App.—Austin 1992, writ denied).

260. Twyman v. Twyman, 855 S.W.2d 619, 632 (Tex. 1993) (Hecht, J., concurring in part and dissenting in part).

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."[261] Several courts during the Survey period considered whether witnesses were qualified as experts. One court held that a recently licensed part-time practicing general dentist was properly qualified as a patient's expert in a dental malpractice action, even though the dentist was not licensed when the patient received the treatment at issue from the defendant dentist.[262] Another court held that an out-of-state chiropractor who was not licensed in Texas could testify as an expert regarding the reasonableness of an automobile accident plaintiff's chiropractic bill because the chiropractor qualified as an expert, and his giving testimony did not constitute the practice of chiropractic medicine for which a Texas license was required.[263] Another court held that "[n]on-physicians may qualify as medical experts" and permitted a neuroscience expert to testify in a medical malpractice action as to the cause of an infant's brain damage, even though the expert was not a physician.[264] The court explained that the expert was the type of professional who is "responsible for teaching medical students and medical specialists" about neuroscience.[265] Another court held that a pharmacist, who was not a physician, was not competent to render expert opinion on the proper standard of care for a physician practicing a medical specialty, despite the pharmacist's declaration of expertise, where there was no evidence suggesting "that one schooled in pharmacy . . . [was] recognized as being on an equal footing with a board certified orthopedic surgeon in diagnosing and treating infections associated with surgical implants."[266] Furthermore, a police lieutenant was not qualified to give expert opinion in a wrongful death action, in which the officer admitted he had no formal training relating to train-pedestrian collisions or railroad accident reconstruction, but only as to traffic accidents, and where his opinion was not limited to nontechnical aspects of accident reconstruction.[267] A witness who was not a lawyer and not experienced in the field of interstate commerce on which he opined was held not to be competent to express expert opinion as to the terms and provisions of a fibre optics agreement between a railroad and a telephone company or of the effect of the agreement itself.[268] The testimony of a fact witness was not permitted to go beyond specific facts of a case into the realm of expert opin-

261. TEX. R. CIV. EVID. 702.

262. Smith v. O'Neal, 850 S.W.2d 797, 800 (Tex. App.—Houston [14th Dist.] 1993, no writ).

263. Goodwin v. Camp, 852 S.W.2d 698, 699 (Tex. App.—Amarillo 1993, no writ).

264. Ponder v. Texarkana Memorial Hosp., 840 S.W.2d 476, 478 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

265. *Id.*

266. Nail v. Laros, 854 S.W.2d 250, 252 (Tex. App.—Amarillo 1993, no writ).

267. Lopez v. Southern Pac. Transp. Co., 847 S.W.2d 330, 335 (Tex. App.—El Paso 1993, no writ).

268. Missouri Pac. R.R. v. Buenrostro, 853 S.W.2d 66, 77 (Tex. App.—San Antonio 1993, writ requested).

ion.[269] Similarly, an attorney for a party who testifies to reasonable and necessary attorney's fees is an expert witness, not a fact witness, and must be designated as an expert for his testimony to be admissible.[270]

Several courts during the Survey period considered the proper subject matter for expert opinion testimony. One court held that "[n]et worth and other aspects of the proper amount of punitive damages are technical and specialized matters," and "[e]xpert testimony may be properly admitted to assist the jury in determining the proper amount of punitive damages."[271] Another court held that the trial court did not abuse its discretion by admitting the testimony of a purported expert concerning his interpretation and conclusions based on the results of a penile plethysmograph test, but did not place any weight upon any evidence regarding the result of the test where the proponent failed to establish the reliability of the test.[272] One court held that an appraisal of the husband's respiratory care business by the wife's expert should not have been admitted because it did not exclude good will and because it concerned husband's personal future earning capacity, rather than valuation of the husband's business.[273] Another court held that a trial court erred in overruling an objection to expert opinion testimony as to the truthfulness of the children from an expert witness concerning sexually abused children.[274] The court explained that opinions as to the truthfulness of another are generally not allowed.[275] In a concurring and dissenting opinion, Justice Hecht wrote that in a suit for intentional infliction of emotional distress, whether certain conduct was outrageous "involves no 'scientific, technical, or other specialized knowledge' as to which a witness could be qualified as an expert 'by knowledge, skill, experience, training, or education' " under Texas Rule of Civil Evidence 702.[276]

Although the threshold question in a medical malpractice case is the standard of care, medical experts are no longer required to first state the standard of care before giving their opinions.[277] While such a failure "may ultimately go to the weight or value of the expert's testimony to the factfinder, [it should not go to] its admissibility, or to the qualifications of the witness to testify."[278] Another court affirmed the granting of summary judgment to a defendant physician in a medical malpractice case, finding an

269. Baylor Medical Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69, 74 (Tex. App.—Texarkana 1992, writ denied).

270. Bailey County Appraisal Dist. v. Smallwood, 848 S.W.2d 822, 825-26 (Tex. App.—Amarillo 1993, no writ).

271. Browning-Ferris Indus. v. Lieck, 845 S.W.2d 926 (Tex. App.—Corpus Christi 1992, writ granted).

272. *In re* A.V., 849 S.W.2d 393, 348 (Tex. App.—Fort Worth 1993, no writ).

273. Smith v. Smith, 836 S.W.2d 688, 692 (Tex. App.—Houston [1st. Dist.] 1992, no writ).

274. James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 244 (Tex. App.—Texarkana 1992, no writ).

275. *Id.*

276. Twyman v. Twyman, 855 S.W.2d 619, 632 (Tex. 1993) (Hecht, J., concurring and dissenting in part).

277. *See* Warner v. Hurt, 834 S.W.2d 404, 407 (Tex. App.—Houston [14th Dist] 1992, no writ).

278. *Id.*

affidavit that the physician's standard of care conformed to that of the community sufficient, even though the affidavit did not state what the standards were.[279] Another court affirmed a summary judgment for the defendant hospital in a medical malpractice case where a physician's affidavit did discuss the standard of care and the conduct of the nursing staff by reviewing medical records, and expressed opinions about the necessity of a blood transfusion to the plaintiff patient.[280]

C. BASES OF OPINION TESTIMONY

Texas Rule of Civil Evidence 703 outlines the proper bases of opinion testimony.[281] 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.[282] In *Baylor Medical Plaza Services Corp. v. Kidd*[283] the Texarkana Court of Appeals rejected an argument that "an expert may not rely on statements of third parties that are not properly in evidence."[284] The court explained that Rule 703 "specifically provides that inadmissible facts or data may be relied upon by an expert in forming an opinion if they are of the type reasonably relied upon by other experts to make opinions or draw inferences."[285] The *Kidd* court permitted a doctor to make an assumption based on the statements of an expert whose testimony was inadmissible because he was not listed as an expert witness during discovery.[286]

An expert witness formulating a treatment plan and determining special education and rehabilitation costs for a damage award in a negligence action properly relied on tuition costs obtained from special schools, where he testified that he and other experts routinely rely on costs obtained from schools to prepare treatment plans and to adapt plans to their patients' available resources.[287] In a mother's suit to terminate the father's parental rights due to the father's alleged sexual abuse of the child, a trial court did not err by admitting testimony of a certified social worker concerning his interpretation and conclusions based on results of a penile plethysmograph test administered to the father by a Ph.D., where the father did not object prior to the introduction into evidence of the Ph.D.'s report, the witness held an advanced degree in science and social work, and the witness testified that he routinely used results of penile plethysmographs.[288]

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279. Smith v. Ponton, 855 S.W.2d 849, 852 (Tex. App.—El Paso 1993, no writ).

280. Jaime v. St. Joseph Hosp. Found., 853 S.W.2d 604, 609 (Tex. App.—Houston [1st Dist.] 1993, no writ).

281. TEX. R. CIV. EVID. 703.

282. *Id.*

283. 834 S.W.2d 69 (Tex. App.—Texarkana 1992, writ denied).

284. *Id.* at 76.

285. *Id.*

286. *Id.*

287. St. Paul Medical Ctr. v. Cecil, 842 S.W.2d 808, 815 (Tex. App.—Dallas 1992, no writ).

288. *In re* A.V., 849 S.W.2d 393, 396 (Tex. App.—Fort Worth 1993, no writ).

D. Opinion on Ultimate Issue

Texas Rule of Civil Evidence 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[289] The Texas Supreme Court has specifically held that it is permissible to admit expert testimony on mixed questions of law and fact.[290] Two courts during the survey admitted such testimony on mixed questions of law and fact. One court held that a former police chief's testimony that a property manager's handling of a resident's apartment key amounted to gross negligence was "not objectionable because it embrace[d] an ultimate issue to be decided by the trier of fact."[291] In a suit by a discharged employee against her former employer alleging retaliatory firing under the Whistle Blower Act,[292] the Austin Court of Appeals affirmed the admission of expert testimony "based on the facts provided, that [the discharged employee] had been the victim of retaliation."[293] However, whether a beneficiary under a will exerted undue influence on a testator was held to be "a question of ultimate fact for the fact finder," and lay witness testimony was excluded, where the lay opinions were held "neither rationally based on his perceptions nor are they particularly helpful to a clear understanding of his testimony or the determination of the undue influence issue."[294]

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.[295] Rule 705 provides that the expert may disclose on direct examination the facts or data underlying his opinion.[296] One court during the Survey period held expert affidavits to be "not competent summary judgment evidence because they state[d] mere conclusions and fail[ed] to meet the requirements" of Texas Rule of Civil Procedure 166a(f).[297] In so holding, the court rejected what it called an "inartfully drafted" argument that Texas Rule of Civil Evidence 705 did "not require an expert to testify to all the information upon which he has relied for his conclusions, in order to give an expert opinion."[298]

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289. TEX. R. CIV. EVID. 704.

290. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 365 (Tex. 1987).

291. Berry Property Management, Inc. v. Bliskey, 850 S.W.2d 644, 667 (Tex. App.—Corpus Christi 1993, writ granted).

292. TEX. REV. CIV. STAT. ANN. art. 6252-16(a) (Vernon Supp. 1993), *repealed by* Acts 1993, 73d Leg., R.S., ch. 268, § 46(1).

293. Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 149 (Tex. App.—Austin 1993, writ requested).

294. Green v. Earnest, 840 S.W.2d 119 (Tex. App.—El Paso 1992, writ denied).

295. TEX. R. CIV. EVID. 705.

296. *Id.*

297. Jordan v. Geigy Pharmaceuticals, 848 S.W.2d 176, 180 (Tex. App.—Fort Worth 1992, no writ).

298. *Id.* at 180 n.2.

F. EFFECT OF OPINION TESTIMONY

One court during the Survey period reiterated the well established principle that a "trier of fact may believe or disbelieve any witness, may resolve any inconsistencies in testimony of any witness, and may accept lay testimony over that of experts."[299] A case during the Survey period held that the "jury is the sole judge of the weight and credibility to be given to each witness's testimony," and "[w]hen the jury relies on expert opinion, the jury may regard that opinion as conclusive, if it is otherwise credible and free from contradiction and inconsistencies."[300] In neither of these cases was the expert testimony sufficiently conclusive to preclude submission to the jury.

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.[301] 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."[302] Exceptions to this general rule are set forth in Rules 803 through 806.[303]

During the Survey period, many Texas appellate courts considered whether proffered evidence was hearsay. In a suit to terminate parental rights, statements of children made to Department of Human Services Worker that their parents committed acts that were sexually and emotionally abusive were hearsay.[304] In a tenant's suit against an apartment owner for conversion of his personal property, the tenant's testimony that the defendant was the owner of the apartment was hearsay where the tenant admitted that the sole source of his knowledge of the ownership was acquired from statements made to him by third parties.[305]

Held not to be hearsay were alleged "dope notes" in a car, which were offered in a forfeiture proceeding "to show that the vehicle contained a pad with 'dope notes' ";[306] newspaper articles to show not their truth or falsity but to show that city council made accusations against its representatives,

299. *In re* S.H., 846 S.W.2d 103, 107 (Tex. App.—Corpus Christi 1992, no writ).

300. Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd., 848 S.W.2d 724 (Tex. App.—Dallas 1992, writ denied). *See also* Gober v. Wright, 838 S.W.2d 794 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

301. 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." TEX. R. CIV. EVID. 602.

302. TEX. R. CIV. EVID. 801(d). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by law." TEX. R. CIV. EVID. 802.

303. TEX. R. CIV. EVID. 803-06.

304. James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 242-43 (Tex. App.—Texarkana 1992, no writ).

305. Brekalo v. Ballard, 836 S.W.2d 783, 786 (Tex. App.—Fort Worth 1992, no writ).

306. $445.00 in U.S. Currency and One 1976 Chevrolet Automobile, VIN 1Z37L6S428075 v. State, 856 S.W.2d 852, 853 (Tex. App.—Fort Worth 1993, no writ).

and to show what a city's citizens were reading at the time;[307] an owner's opinion of the market value of the use of her automobile for one month, even though her opinion was based on hearsay;[308] and a wife's testimony that a Mexican judge had pronounced her divorced from her first husband, when offered to prove not the fact of her divorce but her state of mind.[309]

B. STATEMENTS THAT ARE NOT HEARSAY

Texas Rule of Civil Evidence 801(e) excludes from the definition of hearsay prior statements by a witness,[310] admissions by a party opponent,[311] and depositions.[312]

1. Admissions by Party-Opponent

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 fact finder from making any contrary findings.[313] A judicial admission is actually a substitute for evidence.[314] 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.[315]

A party's testimony can have the effect of a judicial admission and preclude that party's recovery if it satisfies the requirements cited in *Griffin v. Superior Insurance Co.*[316] *Griffin* required that "the declaration relied upon was made during the course of a judicial proceeding"; "[t]hat the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony"; "[t]hat the statement was deliberate, clear and unequivocal"; "[t]hat giving of conclusive effect to the declaration will be consistent with public policy"; and that the statement is not also destructive of the opposing parties theory of recovery.[317] During the Survey period, several Texas appellate courts held that admissions in a

307. City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 791 (Tex. App.—Dallas 1992, writ denied).

308. Star Houston, Inv. v. Kundak, 843 S.W.2d 294, 298-99 (Tex. App.—Houston [14th Dist.] 1992, no writ).

309. Chandler v. Chandler, 842 S.W.2d 829, 830 (Tex. App.—El Paso 1992, writ denied).

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

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

312. TEX. R. CIV. EVID. 801(e)(3).

313. ROY R. RAY, TEXAS PRACTICE: TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL 1(a) § 1127 at 277 (3d ed. 1980).

314. *Id.* at 279.

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

316. 161 Tex. 195, 338 S.W.2d 415, 419 (1960).

317. 338 S.W.2d at 419.

pleading,[318] a brief,[319] and testimony[320] all precluded recovery by the party making the various admissions. Consistent with Griffin's requirement that testimonial admissions be deliberate, clear, and unequivocal, a husband's statement at his deposition that he was "not aware of anything" that his wife did to cause her own death was not a judicial admission, because "lack of personal knowledge of a fact does not conclusively negate the existence of a fact."[321]

b. Prior Pleadings

Admissions made in superseded pleadings lose their binding force as judicial admissions.[322] Admissions in abandoned pleadings do, however, have value as evidentiary admissions and can be introduced into evidence.[323] During the Survey period, one court affirmed the admission of a prior pleading of a party in a separate unrelated lawsuit because it contained statements that were inconsistent with various positions taken in the instant lawsuit.[324]

2. Admission by Party Opponent — Specific Examples

In a wrongful death action arising from drowning of a motorist swept away from the street by flood waters, a former city director of public works directed an employee not to put a low water crossing sign on a portion of the street where a motorist was drowned when crossing water during flooding. The direction was held to be an admission by the city as a party opponent under Rules 801(e)(2)(C) & (D), where the employee working under the for-

318. Flores v. Texas Dep't of Health, 835 S.W.2d 807 (Tex. App.—Austin 1992, writ denied) (Health Department's admission that it acted arbitrarily and capriciously in setting ground water table under landfill in an action challenging a permit for expansion of the county's solid waste disposal site).

319. General Elec. Capital Corp. v. City of Corpus Christi, 850 S.W.2d 596 (Tex. App.—Corpus Christi 1993, writ denied) (taxpayer's admission in its brief that it "held" mobile home units "as a secured party on the January 1 in question" was sufficient evidence to support imposition of liability against taxpayer for delinquent property taxes for year listed).

320. Hedley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826 (Tex. App.—Amarillo 1993, writ requested) (admission by sole stockholder of feedlot that feedlot manager had authority to enter transaction with trust established that manager's acts were within the scope of his employment and were therefore authorized or ratified); Pako Corp. v. Thomas, 855 S.W.2d 215 (Tex. App.—Tyler 1993, no writ) (owner's testimony regarding the time in which she discovered defect in photo processing equipment).

321. Rampel v. Wascher, 845 S.W.2d 918, 923 (Tex. App.—San Antonio 1992, writ denied) (quoting Lesbrookton, Inc. v. Jackson, 796 S.W.2d 276, 285 (Tex. App.—Amarillo 1990, writ denied).

322. *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. *See* Valadez v. Barrera, 647 S.W.2d 377, 382-83 (Tex. App.—San Antonio 1983, no writ). Although an admission in an abandoned pleading ceases to bind the pleader, such pleading remains "a statement seriously made, and it can be introduced in evidence as an admission." *Id.*

323. *Id.*

324. Prudential Ins. Co. of Am. v. Jefferson Assocs., 839 S.W.2d 866, 874 (Tex. App.—Austin 1992, writ granted). *See also* Annesley v. Tricentrol Oil Trading, Inc., 841 S.W.2d 908 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (superseded pleading properly admitted to impeach party's testimony).

mer director had an official duty to respond truthfully to the new director's inquiry, where properly marking streets was clearly within the employee's official duties, and where the former director was authorized to speak about marking street as low water crossing.[325] In a negligent case holding a prior statement by the plaintiff describing the accident for the police to be a judicial admission, one court explained that unlike the rule governing prior statements by a witness,[326] there is no inconsistency prerequisite to admissibility of statements of parties.[327]

C. PROBATIVE VALUE OF HEARSAY ADMITTED WITHOUT OBJECTION

Texas Rule of Civil Evidence 802 provides that "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."[328] During the Survey period, two appellate courts held that the hearsay objection was waived where it was not asserted in a trial court, and that "[e]ven hearsay evidence, if admitted without objection, will be not be denied some probative force."[329]

D. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL

1. Then Existing Mental, Emotional, or Physical Condition

Texas Rule of Civil Evidence 803(3) admits into evidence, as exceptions to the hearsay rule, statements of the declarant's "then existing state of mind, emotion, sensation, or physical condition."[330] During the Survey period, one court held that in a suit to set aside a divorce decree on the grounds that their marriage was void, the wife's testimony that a Mexican judge had pronounced her divorced from her first husband was excepted from the application of the hearsay rule as a statement of her then existing state of mind, if offered to prove that she reasonably believed she was divorced from her first husband.[331] In a suit to terminate parental rights, another court held that statements of children made to a Department of Human Services worker that parents had committed acts that were sexually and emotionally abusive of the children were hearsay and did not fall under the state of mind exception because the statements did not relate to the children's state of mind at

325. City of San Antonio v. Rodriguez, 856 S.W.2d 552, 560-61 (Tex. App.—San Antonio 1993, writ granted).

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

327. Waldon v. City of Longview, 855 S.W.2d 875, 878 (Tex. App.—Tyler 1993, no writ).

328. TEX. R. CIV. EVID. 802.

329. City of Los Fresnos v. Gonzalez, 848 S.W.2d 910, 913 (Tex. App.—Corpus Christi 1993, no writ). *See also* De La Garza v. Salazar, 851 S.W.2d 380 (Tex. App.—San Antonio 1993, no writ); Eads v. American Bank, N.A., 843 S.W.2d 208 (Tex. App.—Waco 1992, no writ) (in a summary judgment proceeding, where record does not reflect that the court ruled on a hearsay objection to summary judgment evidence, the appellate court cannot determine whether the trial court considered the hearsay in granting the judgment; therefore, the objected-to evidence remains part of the summary judgment evidence unless an order sustaining the objection is reduced to writing, signed, and entered).

330. TEX. R. CIV. EVID. 803(3).

331. Chandler v. Chandler, 842 S.W.2d 829, 831 (Tex. App.—El Paso 1992, writ denied).

the time made.[332]

2. Business Records

Texas Rule of Civil Evidence 803(6) governs the introduction of records of regularly conducted activities, commonly known as business records.[333] 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.[334] In a former employee's action against the former employer to recover on a promissory note, documents that included a bank deposit slip, a copy of a bank statement, a ledger tape, and an exhibit relating to an inheritance checks sent to the former employee's wife was admissible under Rule 803(6) because the former employee's testimony established the Rule 803(6) criteria.[335] Absent the authentication required by Rule 803(6), hearsay records were not admissible either as trial evidence[336] or as summary judgment evidence.[337]

3. Learned Treatises

Statements contained in learned treatises are admissible as exceptions to the hearsay rule "[t]o the extent called to the attention of an expert witness on cross-examination or relied upon by him in direct examination," if "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."[338] In *Carter v. Steere Tank Lines*[339] the Amarillo Court of Appeals held that cross-examination of an expert witness with a learned treatise is "limited to publications which the witness recognizes as authoritative or publications upon which expert has relied."[340] Although prior to the promulgation of the Texas Rules of Civil Evidence, an expert could be cross-examined with only those learned treatises that the expert recognized as authoritative.[341] Under Texas Rule of Civil Evidence 803(18), an expert witness cannot "at the outset block cross-examination by refusing to concede reliance or authoritativeness."[342] If an expert refuses to admit the authoritativeness of a treatise, its authority may be established "by other expert testimony or by judicial notice."[343]

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332. James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 243 (Tex. App.—Texarkana 1992, no writ).

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

334. *Id.*

335. Texmarc Conveyor Co. v. Arts, 857 S.W.2d 743, 748-49 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

336. Sholdra v. Bluebonnet Sav. Bank, F.S.B., 858 S.W.2d 533, 535 (Tex. App.—Fort Worth 1993, writ requested).

337. Coleman v. United Sav. Ass'n of Tex., 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ).

338. TEX. R. CIV. EVID. 803(18).

339. 835 S.W.2d 176 (Tex. App.—Amarillo 1992, writ denied).

340. *Id.* at 182.

341. Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949); Webb v. Jorns, 530 S.W.2d 847, 856-57 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e).

342. FED. R. EVID. 803(18) advisory committee's note.

343. TEX. R. CIV. EVID. 803(18).

4. Reputation Concerning Boundaries or General History

Texas Rule of Civil Evidence 803(20) provides that "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community," are admissible as exceptions to the hearsay rule.[344] In an easement dispute between a land owner and his neighbors, one court of appeals held that a neighbor's testimony of a claimed oral agreement between his grandfather and the land owner's predecessor in title granting an easement to the neighbor's family over a road located on the land owner's property were properly excluded from trial.[345] In this case, there was "no contention of the community's interest in or the community's knowledge of the . . . claim," "no contention of existence of general reputation within the community concerning this right of access," and "no proof of recognized 'vehicles of reputation' " concerning the alleged easement.[346]

5. Judgment of Previous Condition

"Evidence of a judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a felony" is admissible as an exception to the hearsay rule "to prove any fact essential to sustain the judgment of conviction," although "[t]he pendency of an appeal renders such evidence inadmissible."[347] In *Francis v. Marshall*,[348] a contingent beneficiary's declaratory judgment action that she was entitled to life insurance policy proceeds because of the primary beneficiary's conviction for murdering the insured, the Houston [14th Dist.] Court of Appeals held that the husband's conviction for murder of the wife was properly before the probate court and county courts under Rule 803(22) and that the Probate Code required the probate court to bar the husband from recovering any proceeds.

6. Statements Against Interest

A statement that was so contrary to the declarant's interest at the time it was made "that a reasonable man in his position would not have made the statement unless he believed it to be true" is admissible as an exception to the hearsay rule under Texas Rule of Civil Evidence 803(24).[349] Where a statement was not against interest at the time it was made, it was not admissible as a statement against interest.[350] Rule 803(24) also provides that statements that tend to subject the declarant to civil or criminal liability can be statements against interest.[351] In an election contest, affidavits of illegal vot-

344. TEX. R. CIV. EVID. 803(20).
345. Robert v. Allison, 836 S.W.2d 185, 191 (Tex. App.—Tyler 1992, writ denied).
346. *Id.*
347. TEX. R. CIV. EVID. 803(22).
348. 841 S.W.2d 51, 53-54 (Tex. App.—Houston [14th Dist.] 1992, no writ).
349. TEX. R. CIV. EVID. 803(24).
350. Travelers Co. v. Wolfe, 838 S.W.2d 708, 714 (Tex. App.—Amarillo 1992, no writ).
351. TEX. R. CIV. EVID. 803(24).

ers were held properly admitted as statements against interest.[352] In another case, *ex parte* affidavits obtained by police officers from a defendant's co-arrestees during custodial investigation were admissible to establish that controlled substances were consumed in a vehicle so as to subject the vehicle to forfeiture, even though the affidavits were to a certain extent self-serving, because numerous statements contained in the affidavits were against the affiants' penal interest.[353]

IX. ARTICLE IX — AUTHENTICATION AND IDENTIFICATION

Texas Rule of Civil Evidence 901 requires authentication or identification of evidence as a condition precedent to admitting the offered evidence.[354] The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[355] In *First Heights Bank, F.S.B. v. Gutierrez*[356] the Corpus Christi Court of Appeals held that documents in the files of an insolvent savings and loan in 1986 were sufficiently authenticated.[357] Authentification was satisfied by the testimony of a auditor who "testified that he examined [the] files in August of 1986 and he confirmed that the information found in the summaries was in the loan files at that time."[358] Other ways were by the testimony of a Federal Home Loan Bank examiner who "testified that he found the same information in the files in early 1987" and because the documents were found in the successor's files in 1990 in response to a request for production.[359] The examiner of the successor's files, who testified that he was told the files were obtained from the insolvent predecessor by an answer to a request for admission admitting that the successor took possession of the files and business records of the solvent predecessor was another method of authentication, as was the testimony of an employee of both the insolvent predecessor and successor savings and loans who is familiar with the files, who testified that the successor preserved the integrity of the files it received from the predecessor.[360] In *Seibert v. General Motors Corp.*[361] the Houston [14th Dist.] Court of Appeals held that a television transcript was not authenticated by the "reply letter doctrine," which allows the "genuineness of the signature to a reply letter [to] be shown by circumstantial evidence."[362]

Texas Rule of Civil Evidence 902(6) treats printed materials purporting to

352. Green v. Reyes, 836 S.W.2d 203, 206 (Tex. App.—Houston [14th Dist.] 1992, no writ).
353. A 1985 Cadillac Limousine v. State, 835 S.W.2d 822, 826 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
354. TEX. R. CIV. EVID. 901(a).
355. *Id.*
356. 852 S.W.2d 596 (Tex. App.—Corpus Christi 1993, writ denied).
357. *Id.* at 616.
358. *Id.*
359. *Id.*
360. *Id.*
361. 853 S.W.2d 773 (Tex. App.—Houston [14th Dist.] 1993, no writ).
362. *Id.* at 778-79 (citing Gibraltar Colorado Life Co. v. Taylor, 132 Tex. 328, 123 S.W.2d 318, 321 (1939)).

be newspapers or periodicals as self-authenticating documents for which no extrinsic evidence of authenticity is required as a condition precedent to admissibility.[363] In *Hardy v. Hannah*[364] an election contest, the Austin Court of Appeals affirmed the admission of copies of newspaper articles without requiring extrinsic evidence of authenticity for purposes of showing that the voters were provided information about the contents of the amendment at issue.

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.[365] "The admissibility of a photograph is conditioned upon its identification by a witness as an accurate portrayal of the facts, and on verification by that witness or a person with knowledge that the photograph is a correct representation of such facts."[366] In *Reichhold Chemical, Inc. v. Puremco Manufacturing Co.*[367] the trial court did not abuse its discretion in refusing to admit photographs of an underground storage tank, where the sponsoring witness said that the excluded photograph did not show the true condition of the tank at the time that the damage was alleged to have occurred.

Texas Rule of Civil Evidence 1006 provides that the otherwise admissible contents of voluminous writings, recordings, or photographs that "cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."[368] In *First Heights Bank, F.S.B. v. Gutierrez*[369] the Corpus Christi Court of Appeals, without referencing Rule 1006, held that a printed summary prepared in advance separating out each of nine properties, denoting purchasers, purchase prices, size of liens, their appraisal values, and projected annual and operating incomes, based on documents found in the files of an insolvent plaintiff's savings and loan, was properly admitted.

XI. PAROL EVIDENCE

During the Survey period, the United States Court of Appeals for the Fourth Circuit certified a question to the Texas Supreme Court regarding the interpretation of the Real Estate Licensing Act in *Boyert v. Tauber*.[370] The Texas Supreme Court held that in an action to recover a real estate commission based on a document signed by a purchaser acknowledging a debt to "outside brokers" but not providing a complete listing of names, parol evidence may not be permitted to identify a broker to whom a commis-

363. TEX. R. CIV. EVID. 902(6).
364. 849 S.W.2d 355, 359 (Tex. App.—Austin 1992, writ denied).
365. TEX. R. CIV. EVID. 1001-1008.
366. Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314-15 (Tex. 1987).
367. 854 S.W.2d 240 (Tex. App.—Waco 1993, writ denied).
368. TEX. R. CIV. EVID. 1006.
369. 852 S.W.2d 596, 617 (Tex. App.—Corpus Christi 1993, writ requested).
370. 834 S.W.2d 60 (Tex. 1992).

sion was owed.[371] The supreme court further held that the sale of real property does not, under the doctrine of partial performance, "corroborate the name of the broker" for purposes of the statutory writing requirement, "when the name is not supplied by a memorandum of the agreement between the broker and the person who [was] to pay the commission."[372]

Several courts during the Survey period excluded parol evidence to interpret an unambiguous written contract.[373] Where neither party argued that a covenant in a contract was ambiguous but disagreed on its meaning, one court, finding no ambiguity in the covenant, excluded parol evidence, noting that parol evidence is "not admissible to create ambiguity or to give the contract a different meaning."[374] One court held that the term "hail" as used in the casualty policy was "susceptible to more than one reasonable construction" and was ambiguous, and therefore affirmed the admission of extrinsic evidence to determine the intended meaning of the term in a declaratory judgment action regarding whether the insured's property damage fell within the policy coverage for damage caused by hail.[375]

It is well established that parol evidence is admissible to show fraud in the inducement of a written contract.[376] To establish fraud in the inducement sufficient to permit an exception to the parol evidence rule, there must be a showing of some type of trickery, deceit, or device employed.[377] Absent such trickery or fraud, there will be no showing of fraudulent inducement.[378] Where fraudulent inducement was shown, two courts during the Survey period permitted parol evidence to vary the term of an unambiguous written contract.[379]

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371. *Id.* at 62-63.

372. *Id.* at 63.

373. Thompson v. Chrysler First Business Credit Corp., 840 S.W.2d 25 (Tex. App.—Dallas 1992, no writ); West Gathering Co. v. Exxon Corp., 837 S.W.2d 764 (Tex. App.—El Paso), *rev'd on other grounds*, No. D-3041, 1993 WL 233407 (Tex. June 30, 1993); Johnson v. Dale, 835 S.W.2d 216 (Tex. App.—Waco 1992, no writ) (parol evidence was inadmissible to prove location of easement at variance with unambiguous description and deed).

374. General Devices, Inc. v. Bacon, 836 S.W.2d 179, 182 (Tex. App.—Dallas 1991), *judgment vacated*, 830 S.W.2d 106 (Tex. 1992) (order published by the Texas Supreme Court June 3, 1992).

375. Commonwealth Lloyds Ins. Co. v. Downs, 853 S.W.2d 104, 110 (Tex. App.—Fort Worth 1993, writ denied).

376. *See* Thompson v. Chrysler First Business Credit Corp., 840 S.W.2d 25 (Tex. App.—1992, no writ); Tracy v. Annie's Attic, Inc., 840 S.W.2d 527 (Tex. App.—Tyler 1992, writ denied).

377. *See, e.g.*, Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd) (fraudulent inducement by payee to maker of promissory note).

378. Edlund v. Bounds, 842 S.W.2d 719, 725 (Tex. App.—Dallas 1992, writ denied).

379. Southampton Min. Corp. v. Coastal Oil & Gas Corp., 846 S.W.2d 609 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (admitting false representations made after a letter agreement to show fraud both before and after signing the agreement); Tracy v. Annie's Attic, Inc., 840 S.W.2d 527 (Tex. App.—Tyler 1992, writ denied).