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## Civil Evidence

Linda L. Addison

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# CIVIL EVIDENCE

Linda L. Addison\*

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**D**URING the Survey period, the Texas appellate courts handed down numerous decisions construing various rules of civil evidence. The cases of greatest significance arose in the following substantive areas: (1) Article I — General Provisions; (2) Article II —

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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

The Texas Rules of Civil Evidence apply in all civil proceedings except as otherwise provided by statute.<sup>1</sup> Texas Rule of Civil Evidence 102 provides that civil evidence rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence so that the truth may be ascertained and proceedings justly determined.<sup>2</sup> One appellate court during the Survey period considered the trial court's conduct of a trial in this context of Rule 102, as well as Rule 611, which provides that the court shall exercise reasonable control over presentation of evidence so as to make the interrogation and presentation effective for the ascertainment of the truth.<sup>3</sup>

Texas Rule of Civil Evidence 103(a)(1) provides that error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of a party is affected and, in the case of a ruling admitting evidence, a timely objection or motion to strike appeared of record, stating the specific ground of objection if the specific ground is not apparent from the context.<sup>4</sup> In order for an objection to be timely, it must be made before the witness responds to the question if it is reasonably obvious that the question calls for inadmissible evidence.<sup>5</sup> However, where an answer is nonresponsive, an adverse party's objection to nonresponsiveness of testimony is not untimely if made after the question has been asked and answered.<sup>6</sup>

Texas Rule of Civil Evidence 103(a)(2) provides that in the case of a ruling excluding evidence, error is not preserved unless the substance of the evidence was made known to the court by offer.<sup>7</sup> An appellant's failure to make an offer of proof following the trial court's sustaining of a

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1. TEX. R. CIV. EVID. 101(b); In re G.F.O., 874 S.W.2d 729, 731 (Tex. App.—Houston [1st Dist.] 1994, no writ) (applying the Texas Rules of Civil Evidence to discretionary transfer of juvenile to criminal district court under TEX. FAM. CODE § 56.01).

2. TEX. R. CIV. EVID. 102.

3. *Sims v. Brackett*, 885 S.W.2d 450, 454 (Tex. App.—Corpus Christi 1994, no writ) (citing TEX. R. CIV. EVID. 102 & 611).

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

5. *Beall v. Ditmore*, 867 S.W.2d 791, 794 (Tex. App.—El Paso 1993, writ denied).

6. *Id.* (motorist's attorney was not required to object until after accident victim gave unresponsive testimony on insurance policy limits in response to motorist's attorney's question on how victim had determined level of damages to seek a lawsuit).

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

hearsay objection to certain testimony precluded appellate review of appellant's claim that exclusion was error.<sup>8</sup>

To preserve a complaint that the trial court improperly excluded evidence, the complaining party must make an offer of proof as to what the excluded witness would have testified.<sup>9</sup> A bench conference outside the hearing of the jury that apprised the court of the nature of certain testimony was an informal offer of proof and was sufficient to satisfy the requirements of Texas Rule of Civil Evidence 103(b) and Texas Rules of Appellate Procedure 52(a) and (b), where the judge who excluded the evidence as cumulative could not properly have so ruled unless he knew the essential substance of the excluded testimony.

Texas Rule of Civil Evidence 105(a) provides that evidence that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose shall be restricted as to its proper scope by the court upon request of a party.<sup>10</sup> Evidence admitted for a limited purpose can be considered for only that purpose and may not be weighed in determining sufficiency of evidence for a matter outside of the specific limitation of the evidence.<sup>11</sup>

## II. ARTICLE II — JUDICIAL NOTICE

Texas Rule of Civil Evidence 201, which governs judicial notice of adjudicative facts,<sup>12</sup> permits a court to take judicial notice of a wide variety of facts. Judicial notice is usually limited to matters that are generally known or easily proven and that cannot be reasonably disputed.<sup>13</sup> A court may take judicial notice that a pleading has been filed in a case, but may not take judicial notice of the truth of the allegations in the pleadings.<sup>14</sup>

Texas Rule of Civil Evidence 201(c) provides that a court may take judicial notice whether requested or not.<sup>15</sup> One court during the Survey period took judicial notice on its own motion of federal court orders in related proceedings.<sup>16</sup>

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8. *Mosley v. Employers Casualty Co.*, 873 S.W.2d 715, 718 (Tex. App.—Dallas 1994, writ granted).

9. *Sims*, 885 S.W.2d at 454 (citing TEX. R. CIV. EVID. 102 & 611).

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

11. *Texas Commerce Bank Reagan v. Lebco Constructors*, 865 S.W.2d 68, 76 (Tex. App.—Corpus Christi 1994, writ denied) (evidence on fraud and negligent misrepresentation charges brought by general contractor against bank for failure to fund loan to owner was insufficient to support any award for direct losses in excess of \$1.73 million).

12. TEX. R. CIV. EVID. 201.

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

14. *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508-09 (Tex. App.—Austin 1994, n.w.h.) (court could not take judicial notice of truth of statements in sworn inventory and appraisal filed in divorce proceeding, but not admitted into evidence at trial).

15. TEX. R. CIV. EVID. 201(c).

16. *Alcorn v. Vaksman*, 877 S.W.2d 390, 412 (Tex. App.—Houston [1st Dist.] 1994, writ requested).

Judicial notice may be taken at any stage of the proceeding.<sup>17</sup> During the Survey period the Texas Supreme Court affirmed the propriety of an appellate court is taking judicial notice for the first time on appeal in *Office of Public Utility Council v. Public Utility Commission of Texas*.<sup>18</sup> As the propriety of judicial notice is reviewed by standard appellate principles, a trial court committed harmless error at most by taking judicial notice of the net worth of a defendant found to have fraudulently induced a contract.<sup>19</sup>

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.<sup>20</sup> Nothing was preserved for appellate review where a party did not object to a trial court's fact gathering, did not request a hearing, and did not show that he was harmed in any way by *the trial courts impliedly taking judicial notice of a child's being born in full-term in a paternity action*.<sup>21</sup>

Texas Rule of Civil Evidence 202 governs termination of the laws of other states.<sup>22</sup> Under Rule 202, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.<sup>23</sup> Absent a request to take judicial notice of the laws of another state, or absent proper proof of the laws of another state, Texas courts presume the laws to be the same as Texas law.<sup>24</sup>

In *Keene Corp. v. Rogers*,<sup>25</sup> Alabama law was properly applied to a proximate cause issue in a Texas asbestos exposure case arising from alleged exposure to asbestos products in Alabama. The plaintiffs did not prove, and the trial court did not judicially notice, any Alabama law on the issue. The trial court, however, announced it was applying Alabama law and specifically stated it was using Alabama submissions in the jury charge. The defendant-manufacturer failed to object to application of Alabama law at any time in the proceeding.

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17. TEX. R. CIV. EVID. 201(f).

18. 878 S.W.2d 598, 600 (Tex. 1994) (court of appeals erred by refusing to take judicial notice of the published order of Public Utility Commission); *see also* *Wright v. Wright*, 867 S.W.2d 807, 817 (Tex. App.—El Paso 1993, writ denied) (in a proceeding to modify child support, appellate court took judicial notice for the first time on appeal that the distance between appellant's place of residence in San Antonio and children's place of residence in Odessa is 335 miles).

19. *Hoechst Celanese Corp. v. Arthur Bros., Inc.*, 882 S.W.2d 917, 930 (Tex. App.—Corpus Christi 1994, writ requested).

20. TEX. R. CIV. EVID. 201(e).

21. *In re Martin*, 881 S.W.2d 531, 534 (Tex. App.—Texarkana 1994, n.w.h.).

22. TEX. R. CIV. EVID. 202.

23. *Id.*

24. *Burns v. Resolution Trust Corp.*, 880 S.W.2d 149, 151 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.) (where RTC asked trial court to take judicial notice of Colorado law and provided it with copies of Colorado statutes concerning mortgages, deeds of trust, and foreclosure proceedings conducted by public trustee in Colorado, court of appeals presumed Colorado law was the same as Texas law on all other issues).

25. 863 S.W.2d 168, 174-75 (Tex. App.—Texarkana 1994, writ request stayed).

Texas Rule of Civil Evidence 203, which governs the determination of laws of foreign countries, requires a party who intends to raise an issue concerning the law of a foreign country to give notice in its pleadings or other written notice at least thirty days prior to trial and to furnish opposing parties with written materials or sources he intends to use as proof of the foreign law. In *Lawrenson v. Global Marine, Inc.*<sup>26</sup> the Texarkana court of appeals held that in a summary judgment proceeding, an affidavit explaining the applicable laws of England was sufficient notice and proof for a court to have taken judicial notice of English laws under Texas Rule of Civil Evidence 203.<sup>27</sup>

Texas Rule of Civil Evidence 204 governs the determination of city and county ordinances, the contents of the Texas Register, and the rules of agencies published in the Administrative Code.<sup>28</sup> City charters have been likened to municipal ordinances of which Texas courts have refused to take judicial notice when not submitted in verified form, even though Rule 204 has no verification requirement.<sup>29</sup>

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

Article III of the Federal Rules of Evidence addresses presumptions. Because the Texas Rules of Civil Evidence lack a corresponding Article III, Texas common law continues to govern the law of presumptions.

During the Survey period, the Texas Supreme Court discussed presumptions at length in *General Motors Corp. v. Saenz*.<sup>30</sup> In *Saenz*, a products liability action alleging failure to warn or inadequate warning, the Texas Supreme Court held that a products liability plaintiff alleging failure to warn or inadequate warning is entitled to a presumption that an adequate warning would have been read and followed, but that such presumption is not conclusive and is subject to rebuttal by the defendant.<sup>31</sup> The supreme court explained that the effect of an evidentiary presumption is to shift the burden of producing evidence to the party against whom it operates, and that once that burden is discharged and evidence contradicting the presumption has been offered, the presumption disappeared and was not to be weighed or treated as evidence.<sup>32</sup> The supreme court held that a products liability plaintiff who ignored a manufacturer's warning that would have prevented the injury is not entitled to a presumption that some additional warning would have been heeded.<sup>33</sup>

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26. 869 S.W.2d 519 (Tex. App.—Texarkana 1994, writ denied).

27. *Id.* at 525-26.

28. TEX. R. CIV. EVID. 204.

29. *Fields v. City of Texas City*, 864 S.W.2d 66, 69 (Tex. App.—Houston [14th Dist.] 1993, writ requested).

30. 873 S.W.2d 353 (Tex. 1993).

31. *Id.* at 358-59.

32. *Id.* at 359.

33. *Id.* at 359-61.

Although reasonable inferences from evidence are permissible,<sup>34</sup> “a possible cause only becomes ‘probable’ when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue can be submitted to the jury.”<sup>35</sup>

The Texas Supreme Court discussed the operation of a shifting burden of proof in *County of Alameda, California v. Smith*.<sup>36</sup> *Smith* was a paternity action in which the alleged father refused to submit to paternity testing.<sup>37</sup> The trial court concluded that the alleged father’s failure to submit to testing shifted to him the burden of proof on the issue of paternity, which effectively created a presumption of fatherhood under section 13.06(d) of the Texas Family Code. In reversing and remanding the trial court’s holding that *Smith* was the child’s biological and legal father and awarding child support, the court of appeals held that the state bears the burden of coming forward with evidence sufficient to support a default judgment and placing on the alleged father the burden of persuasion on the paternity issue. The court of appeals reversed and remanded the trial court’s holding that *Smith* was the child’s biological and legal father and awarding child support. The court of appeals held that although *Smith*’s refusal to submit to paternity testing shifted to him the burden of proving that he is not the child’s father, the state bears the burden of coming forward with evidence sufficient to support a default judgment. In reversing the judgment of the court of appeals and affirming the trial court’s judgment, the Texas Supreme Court held that an alleged father’s refusal to submit to paternity testing shifted to him the burden of proof on the issue of paternity, effectively creating a presumption of fatherhood, and in the absence of evidence from the alleged father, a mother’s sworn paternity affidavit is sufficient to support a finding of paternity under section 13.06(d) of the Texas Family Code.<sup>38</sup>

In *Texas Tech University Health Center v. Apodaca*<sup>39</sup> the El Paso court of appeals considered the burden of proof in a *Batson*<sup>40</sup> violation. A party who fails to meet its burden of proof loses.<sup>41</sup> A *prima facie* case

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34. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, No. 13-92-540-CV, 1994 WL 86436, at \*3 (Tex. App.—Corpus Christi, Mar. 17, 1994, n.w.h.).

35. *Id.* at 8-9 (citing *Parker v. Employers Mut. Liab. Ins. Co. of Wis.*, 440 S.W.2d 43, 47 (Tex. 1969)) (expert testimony that radiation exposure “could have” caused plaintiff’s cancer was held to be “no evidence” of causation); *Bradley v. Rogers*, 879 S.W.2d 947, 954 (Tex. App.—Houston [14th Dist.] 1994, writ requested).

36. 867 S.W.2d 767 (Tex. 1993).

37. *Id.* at 768.

38. *Id.* at 769.

39. 876 S.W.2d 402 (Tex. App.—El Paso 1994, writ requested).

40. *Batson v. Kentucky*, 476 U.S. 79 (1986) (the due process clause of the 14th Amendment is violated if prospective jurors are excluded from service in criminal trials on the basis of race or ethnicity). This holding has been extended to civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

41. *Gulf State Util. Co. v. Coalition of Cities*, 883 S.W.2d 739, 744 n.6 (Tex. App.—Austin 1994, n.w.h.) (where party failed to meet its burden of proof on the prudence of \$1.453 billion claimed as cost of construction of nuclear power facility, the PUC effectively disallowed that amount from the rate base).

represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true, and the burden of establishing a *prima facie* case is on the movant.<sup>42</sup> To establish a *Batson* violation, it is no longer necessary that the complaining party's struck venire member be of the same race, but only that the venire member be of a minority.<sup>43</sup> A complaining party who establishes a *prima facie* case of a *Batson* violation is entitled to an adversarial hearing to challenge the opposing counsel's possible discriminatory selection of the venire, but if the complaining party fails to establish a *prima facie* case, the district court can safely deny the complaining party's *Batson* objections.<sup>44</sup> If an adversarial hearing is held to challenge the opposing counsel's possible discriminatory selection of the venire, the burden is on the opposing counsel to articulate racially neutral reasons for the preemptory strikes at issue, and once the opposing counsel has asserted its racially neutral explanation, the burden of persuasion rests on the complaining party to prove by a preponderance of the evidence the invalidity of that explanation.<sup>45</sup> A *Batson* hearing is an evidentiary hearing held on the record in open court with the district court serving as the fact finder.<sup>46</sup> Because it is an adversary proceeding with clearly identified burdens, the usual procedural and evidentiary rules apply.<sup>47</sup> In *Apodaca* civil defendants failed to establish the required *prima facie* case showing that plaintiffs preemptory strikes were exercised in an effort to purposefully discriminate, where the defendant specifically objected to striking of six unidentified venire members because they were different ethnic persuasions than plaintiff but, other than identifying the sole African-American on the venire, the defendant wholly failed to establish the racial background of the remaining venire members who were peremptorily challenged by the plaintiff.<sup>48</sup> Where the movant failed to establish that any excluded venire person is a member of a minority group, no inference could be drawn that such venire persons were excluded from the venire simply because of their race or ethnic origin.<sup>49</sup>

During the Survey period the Texas Supreme Court also considered the burden of persuasion in *Ex parte Roosth*.<sup>50</sup> *Roosth* was a petition for writ of habeas corpus by a father held in contempt for failure to pay child

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42. *Apodaca*, 876 S.W.2d at 407 (in order to challenge possible discriminatory selection of a jury venire, the complaining party must make a *prima facie* showing that he is a member of a cognizable racial group, that the opposing counsel has exercised preemptory challenges to remove from the venire members of a minority group, and these facts and any other relevant circumstances raise inference that opposing counsel excluded venire persons from the venire because of their race). *Id.* at 407 (citing TEX. CRIM. PROC. CODE ANN. art. 35.261).

43. 876 S.W.2d at 407-08 (citing TEX. CRIM. PROC. CODE ANN. art. 35.261).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 408.

49. *Id.* at 408-09.

50. 881 S.W.2d 300 (Tex. 1994).



support.<sup>51</sup> In holding that inability to pay child support is an affirmative defense to the offense of contempt that must be proved by a preponderance of the evidence, the Texas Supreme Court wrote that due process requires that an alleged criminal contemnor not shoulder the burden of persuasion to disprove an element of the offense of contempt.<sup>52</sup>

In *Mentis v. Barnard* the Texas Supreme Court held that a litigant who seeks to deny an opponent the right to use a witness has the burden of producing evidence to show that the designation of the witness was not made "as soon as practical"<sup>53</sup> under Texas Rule of Civil Procedure 166b(6)(b). Similarly, in other discovery disputes, the movant has the burden of producing evidence supporting its claims.<sup>54</sup> Two courts during the Survey period considered the burden of persuasion. The party who asserts that a statute is unconstitutional has the burden of persuasion.<sup>55</sup> Even though the burden of production shifts in employment discrimination cases, the burden of persuasion remains continuously on the plaintiff.<sup>56</sup> In *Humphreys v. Caldwell*<sup>57</sup> the Texas Supreme Court held that a movant cannot meet its burden of producing evidence supporting privilege claims with legally insufficient affidavits.<sup>58</sup> However, the work product privilege that was evident from the fact of documents at issue was supported by the trial court's *in camera* inspection alone.<sup>59</sup>

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

The most significant relevance case decided during the Survey period did not discuss any specific rule of civil evidence. In *Transportation Insurance Co. v. Moriel*<sup>60</sup> the Texas Supreme Court held that evidence of the defendant's net worth, which is generally relevant only to the amount

51. *Id.*

52. *Id.* at 300-301.

53. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994); *see also Sims*, 885 S.W.2d at 454 (citing *Mentis v. Barnard*).

54. *Kessell v. Bridewell*, 872 S.W.2d 837 (Tex. App.—Waco 1994, orig. proceeding) (in mandamus action challenging trial court's order to allow claimants against an insurer to discover employees' performance evaluation records, employees did not establish that they had such privacy interest in the records sought from the insurer as to compel nondisclosure).

55. *Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 484 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (oil marketing company's action for declaratory judgment that state law providing for permitting of overweight vehicles preempted the power of the county to require separate county permit).

56. *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (once plaintiff has established *prima facie* case of employment discrimination, burden of production shifts to employer to articulate legitimate, nondiscriminatory reasons for any allegedly unequal treatment; after this is established by employer, burden then shifts back to plaintiff to prove that employer's articulated reasons are pretext for unlawful discrimination).

57. *Humphreys v. Caldwell*, 888 S.W.2d 469 (Tex. 1994).

58. *Id.* at 470 (affidavits that failed to unequivocally show that they are based on personal knowledge and that contained no representation that the facts disclosed therein were true and correct were legally insufficient to support claims of privilege).

59. *Id.*

60. 879 S.W.2d 10 (Tex. 1994).

of punitive damages, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case, and therefore concluded that a trial court presented with a timely motion should bifurcate the determination of the amount of punitive damages from the remaining issues.<sup>61</sup>

Texas Rule of Civil Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>62</sup> Several courts during the Survey period cited Rule 401 as a basis for admitting or excluding evidence. In a paternity action, the defendant was not entitled to present evidence of the mother's sexual activity with others outside of the ninety-day period during which the child had been conceived because such evidence was not relevant to any issue in the case.<sup>63</sup> In a mandamus proceeding arising out of orders denying a patient's motion to compel discovery in a medical malpractice case, the physician's mental health records were held to be relevant to the patient's claim that the physician was impaired by intoxicant abuse during the time he treated the patient.<sup>64</sup> In a partnership's suit against its general partner for breach of fiduciary duty alleging payment of excessive management fees and expenses, a memorandum executed by the general partner and the limited partners' representative, which provided for payment of a management fee to the general partner, was relevant and admissible where it was alleged that the general partner acted under and relied upon the memorandum in payment of his management fee, and then paid himself in excess of the allowed amounts.<sup>65</sup> Hotel bills previously incurred by an alien hotel guest and his family were relevant and admissible in a resident alien hotel employee's action against the guest for false imprisonment, gross negligence, terroristic threat, assault, reckless conduct, and intentional infliction of emotional distress, because the bills helped to demonstrate the hotel's motive for pressuring the employee after the incident so as to explain some of the employee's actions after the incident.<sup>66</sup> In a third party action seeking contractual contribution from a corporation for its negligence in connection with an underlying personal injury suit, excluded expert testimony that the defendant's project violated certain OSHA reg-

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61. *Id.* at 30 (not citing TEX. R. CIV. EVID. 401, 402, or 403).

62. TEX. R. CIV. EVID. 401.

63. *In re Martin*, 881 S.W.2d 531, 534 (Tex. App.—Texarkana 1994, no writ) (citing TEX. R. CIV. EVID. 401).

64. *Gustafson v. Chambers*, 871 S.W.2d 938, 943 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (citing TEX. R. CIV. EVID. 401).

65. *Murphy v. Seabarge, Ltd.*, 868 S.W.2d 929, 932 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing TEX. R. CIV. EVID. 401).

66. *Haryanto v. Saeed*, 860 S.W.2d 913, 924 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing TEX. R. CIV. EVID. 401).

ulations was held to be plainly relevant to plaintiffs' negligence per se theory under Texas Rule of Civil Evidence 401.<sup>67</sup>

In a civil case seeking tort damages for sexual assault, evidence that the defendant had assaulted another woman under similar circumstances twenty-six months earlier was relevant to the material issue of defendant's intent where the defendant admitted sexual intercourse but claimed that intercourse was consensual.<sup>68</sup>

In a negligence case against a hospital for injuries sustained by a patient when he fell while recuperating from a severe head injury, expert testimony concerning a patient's future medical needs and expenses was relevant and material because it was for the jury to determine future medical expenses that were reasonable and necessary and were proximately caused by the hospital fall rather than a previous head injury.<sup>69</sup>

Texas Rule of Civil Evidence 402 provides that all relevant evidence is admissible except as otherwise provided by Constitution, statute, or rule, and that irrelevant evidence is not admissible.<sup>70</sup> Because irrelevant evidence is not admissible under Rule 402, an objection to the comments of plaintiff's counsel's in a work related injuries case that the plaintiff/worker was not covered by any workers compensation insurance should have been sustained, although it was not the basis of reversible error absent a record demonstrating harm requiring reversal.<sup>71</sup>

Because under Rule 402 all relevant evidence is admissible except as otherwise provided, before illegally obtained wiretap tapes can be held to be inadmissible, the objecting party must show that their exclusion was required under either federal or state statute.<sup>72</sup> Upon a showing that the taped conversations were the subject of a criminal statute that criminalizes the dissemination of intercepted communications, and a civil statute providing a method to prevent dissemination, the Court of Appeals for the First District of Houston held that illegally obtained tapes were not admissible and should not have been given to an expert witness for use in forming her opinion on the issue of custody.<sup>73</sup>

Texas Rule of Civil Evidence 403 excludes relevant evidence on a variety of grounds.<sup>74</sup> During the Survey period, relevant evidence was excluded where it was cumulative.<sup>75</sup> While not mentioning the specific part

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67. *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.).

68. *McLellan v. Benson*, 877 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1994, no writ) (citing TEX. R. CIV. EVID. 401, 403, and 404(b)).

69. *St. Elizabeth Hosp. v. Graham*, 883 S.W.2d 433, 438-39 (Tex. App.—Beaumont 1994, writ requested) (citing TEX. R. CIV. EVID. 401 and 403).

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

71. *F.F.P. Operating Partners, L.P. v. Love*, 884 S.W.2d 898, 899 (Tex. App.—Texarkana 1994, n.w.h.).

72. *Collins v. Collins*, No. 01-91-00782-CV, 1994 WL 416442, at \*6-7 (Tex. App.—Houston [1st Dist.], Aug. 11, 1994, n.w.h.).

73. *Id.* at \*7.

74. TEX. R. CIV. EVID. 403.

75. *Texas Beef Cattle Co. v. Green*, 883 S.W.2d 415, 428-29 (Tex. App.—Beaumont 1994, writ requested) (affirming exclusion of bill of exception submitted by prospective

of Rule 403 supporting the exclusion of evidence that would confuse the issues or mislead the jury, one appellate court during the Survey period held that the trial court did not abuse its discretion in excluding evidence of a plaintiff's attempt to enforce restrictions on the use of property in another similar case, where the admission would have required a trial within a trial.<sup>76</sup> Evidence of a defendant's alleged sexual assault on another woman twenty-six months earlier was admissible in a civil tort suit for sexual assault to show that the defendant intended to have sexual intercourse with the plaintiff without her consent, notwithstanding the prejudicial effect of the evidence on the defendant, where the jury was instructed to consider the testimony only on the contested issue of intent or consent, where the probative value of such extraneous prior misconduct was particularly compelling, and where plaintiff had a compelling need for the testimony.<sup>77</sup> During the Survey period, exclusion of evidence under Rule 403 was held to be both harmful<sup>78</sup> and harmless.<sup>79</sup>

Texas Rule of Civil Evidence 404(b) provides that evidence of other wrongs or acts is not admissible to prove character to show conduct in conformity with the other wrongs or acts, but may be admissible for other purposes.<sup>80</sup> When evidence of an extraneous act or offense is offered, the opponent must timely and properly object in order to preserve error.<sup>81</sup> If the proponent of misconduct evidence persuades the trial court that evidence is relevant to a material issue, such as intent, the court may rule the evidence admissible; if the opponent then makes timely further requests, the trial judge should instruct the jury that the evidence is to be used only for its relevant purpose.<sup>82</sup> In *McLellan v. Benson*,<sup>83</sup> a civil tort suit seeking damages for sexual assault, evidence that the defendant had assaulted

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purchasers alleged to have tortiously interfered with contractual relationship of cattle seller to buyer, where the bill was cumulative and also involved an attempt to relitigate issues that had been precluded by operation of res judicata); *Parker v. Miller*, 860 S.W.2d 452, 458 (Tex. App.—Houston [1st Dist.] 1993, no writ) (summary of prior assaultive conduct record of mentally retarded client at state school who beat and stomped another client to unconsciousness was properly excluded from evidence in a personal injury suit where summary was of records that were already in evidence and was therefore cumulative).

76. *New Braunfels Factory Outlet Ctr., Inc. v. IHOP Realty Corp.*, 872 S.W.2d 303, 311-12 (Tex. App.—Austin 1994, no writ).

77. *McLellan v. Benson*, 877 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1994, no writ).

78. *Sims*, 885 S.W.2d at 450, 455 (excluded expert testimony had great probative value and was not merely cumulative; "The test is not merely whether the evidence to be adduced from the two witnesses is similar, but also whether the excluded testimony would have added substantial weight to the offering party's case. If so, it is error to exclude.") (citing *Bohmfolk v. Linwood*, 742 S.W.2d 518 (Tex. App.—Dallas 1987, no writ) (trial court improperly excluded disinterested witness whose testimony corroborated testimony of interested witness)).

79. *In re Martin*, 881 S.W.2d 531, 534 (Tex. App.—Texarkana 1994, no writ) (in a paternity action, error, if any, in exclusion of letter written by mother to putative father before the time when child could have been conceived was not reversible error because it was not of the character that would cause the rendition of an improper verdict).

80. TEX. R. CIV. EVID. 404(b).

81. *McLellan*, 877 S.W.2d at 457.

82. *Id.*

83. *Id.*

another woman under similar circumstances twenty-six months earlier was relevant to the material issue of defendant's intent, where the defendant admitted sexual intercourse but claimed that intercourse was consensual.<sup>84</sup>

Although Texas Rule of Civil Evidence 404(b) excludes evidence of other wrongs or acts to prove conduct in conformity therewith, Texas Rule of Civil Evidence 406 admits evidence of "habit" or routine practice.<sup>85</sup> In *Durbin v. Dal-Briar Corp.*,<sup>86</sup> a wrongful termination case, the trial court's exclusion of evidence that the employer had terminated other employees after they suffered on-the-job injuries and filed their compensation claims was held to be error. The El Paso Court of Appeals found the evidence to be a routine practice that should have been admitted under Rule 406, and an exception to the doctrine of *res inter alios acte* that admits prior acts or transactions with other persons to show a party's intent or material, if they are so connected with the transaction at issue that they may all be parts of a system, scheme, or plan.<sup>87</sup> Additionally, the court of appeals found that the opening statement by employer's counsel that "no one was ever fired as a result of a worker's comp claim," opened the door to the employee's evidence indicating a company policy of dismissing employees filing workers compensation claims.<sup>88</sup>

Texas Rule of Civil Evidence 407 provides that although evidence of subsequent remedial measures that would have made the event less likely to occur is not admissible to prove negligence or culpable conduct in connection with the event, Rule 407 does not require exclusion of evidence of subsequent remedial measures when offered for another purpose.<sup>89</sup> Even where evidence is admitted in violation of Rule 407, unless the improper admission of evidence is shown to have caused rendition of an improper judgment, the case will not be reversed.<sup>90</sup>

Under Texas Rule of Civil Evidence 408, offers to compromise disputed claims are not admissible.<sup>91</sup> A trial court may exercise its discretion in determining whether a communication amounts to a compromise offer.<sup>92</sup> The test as to whether a job offer by an employer whom a former employee had sued for failing to rehire him after the employee had filed a workers' compensation claim would amount to an offer of compromise so

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84. *Id.* at 457-58.

85. TEX. R. CIV. EVID. 406.

86. 871 S.W.2d 263 (Tex. App.—El Paso 1994, writ denied).

87. *Id.* at 268-69.

88. *Id.* at 270.

89. TEX. R. CIV. EVID. 407.

90. *State v. McKinney*, 886 S.W.2d 302 (Tex. App.—Houston [1st Dist.] July 28, 1994, writ requested) (three items of evidence offered to show negligence in violation of Rule 407 did not require reversal).

91. TEX. R. CIV. EVID. 408.

92. *Tatum v. Progressive Polymers, Inc.*, 881 S.W.2d 835 (Tex. App.—Tyler 1994, no writ) (trial court did not abuse its discretion in ruling that the job offer discussion was not inadmissible settlement negotiations between the parties where no concession was made by either party).

as to be inadmissible under Rule 408 was whether something was given up by one or both of the parties to avoid the litigation.<sup>93</sup>

Texas Rule of Civil Evidence 408 does not require exclusion of compromise evidence when offered for a purpose other than proving liability for or invalidity of a claim or its amount.<sup>94</sup> Where no "other purposes" could be found, one court of appeals affirmed the trial court's exclusion of letters containing settlement offers.<sup>95</sup>

Texas Rule of Civil Evidence 411 provides that liability insurance is not admissible on the issues of negligence or wrongful conduct.<sup>96</sup> Two courts during the Survey period held that the mere mention of insurance during trial before the jury, even though erroneous, does not result in an automatic mistrial or reversal.<sup>97</sup>

## V. ARTICLE V — PRIVILEGES

Article V of the Texas Rules of Civil Evidence governs privileges. No person has a privilege to refuse to disclose any matter<sup>98</sup> unless rules of evidence recognize the privilege,<sup>99</sup> or a statute<sup>100</sup> or constitution<sup>101</sup> grants the privilege. Some of the specific privileges provided for in the Texas Rules of Civil Evidence include: (1) lawyer-client privilege,<sup>102</sup> (2) husband-wife communication privilege,<sup>103</sup> (3) communications to clergymen,<sup>104</sup> (4) trade secrets,<sup>105</sup> and (5) physician-patient privilege.<sup>106</sup>

Texas Rule of Civil Evidence 503 governs the attorney-client privilege. Several courts during the Survey period considered issues relating to the attorney-client privilege that arose during mandamus proceedings. In *Pittsburgh Corning Corp. v. Caldwell*,<sup>107</sup> a corporation's action seeking

93. *Id.*

94. TEX. R. CIV. EVID. 408.

95. *Barrett v. United States Brass Corp.*, 864 S.W.2d 606, 633 (Tex. App.—Houston [1st Dist.] 1994, writ granted) (evidence of settlement letter offers made by manufacturer of plumbing systems to buyers of homes in which systems were installed, offered to directly defeat manufacturer's liability and amount of damages claimed in buyer's DTPA suit were properly excluded from evidence).

96. TEX. R. CIV. EVID. 411.

97. *F.F.P. Operating Partners, L.P. v. Love*, 884 S.W.2d 898 (Tex. App.—Texarkana 1994, n.w.h.) (absent the complete statement of facts, appellate court could not review the entire record to support appellant's argument of harmful error requiring reversal of the judgment); *Beall v. Ditmore*, 867 S.W.2d 791, 796 (Tex. App.—El Paso 1994, writ denied) (objection to testimony on existence of insurance did not require reversal where evidence supported the findings on motorist's negligence in damages claims).

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

99. TEX. R. CIV. EVID. 502-510.

100. See TEX. REV. CIV. STAT. ANN. 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).

101. See U.S. CONST. amend. V; TEX. CONST. art. I, § 10.

102. TEX. R. CIV. EVID. 503.

103. TEX. R. CIV. EVID. 504.

104. TEX. R. CIV. EVID. 505.

105. TEX. R. CIV. EVID. 507.

106. TEX. R. CIV. EVID. 509.

107. 861 S.W.2d 423 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

mandamus relief from a district court's order requiring the corporation to produce all or portions of documents allegedly protected by the attorney-client privilege, the Court of Appeals for the Fourteenth District of Houston held that a memorandum concerning trial strategy that was authored by the claims director for the corporation's insurance carrier that provided defense counsel for the corporation was protected from production by the attorney-client privilege. Rejecting plaintiffs' claim that the document did not fall within Rule 503 in light of the Texas Supreme Court's opinion in *National Tank Co. v. Brotherton*,<sup>108</sup> the court of appeals distinguished the portion of *Brotherton* on which plaintiffs relied, explaining that although the work product privilege under Texas Rule of Civil Procedure 166(b)(3) does not extend to all facts that an attorney may acquire, the trial court did not have authority to shield portions of a document from discovery by redaction of information covered by the attorney-client privilege while allowing production of the remainder of the document.<sup>109</sup> The court held that once it is established that a document contains confidential information, the attorney-client privilege extends to the entire document, not merely to specific portions relating to legal advice, opinions, or mental analyses.<sup>110</sup> In considering whether the attorney-client privilege attached to documents produced as a result of a large meeting guarding asbestos lawsuits held between the corporation's representatives and its attorneys, the court of appeals held that the uncontroverted affidavit of the corporation's attorney was sufficient to establish the attorney-client privilege.<sup>111</sup> Similarly, in *Marathon Oil Co. v. Moyé*,<sup>112</sup> once the movant made a *prima facie* claim of privilege by pleading the privilege, submitting affidavits from its attorneys and its privilege log, and entering the documents for the trial court's *in camera* review, the burden shifted to the opposing party to refute the privilege claim. In conditionally granting the writ of mandamus, the Dallas Court of Appeals explained that the subject matter of a completed attorney-client communication is immaterial when deciding whether the privilege applies, and that the trial court's conclusion that the communications between *Marathon* and its attorneys concerned business activities was not determinative.<sup>113</sup>

Two courts during the Survey period held that the attorney-client privilege did not apply to the documents at issue. The attorney-client privilege did not apply to documents that related or referred to occasions upon which a physician who was being sued for medical malpractice allegedly sought treatment for use of intoxicants.<sup>114</sup> Nor did the attorney-

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108. 851 S.W.2d 193 (Tex. 1993) (orig. proceeding).

109. 861 S.W.2d at 426.

110. *Id.* at 425-26.

111. *Id.* at 424.

112. No. 05-94-00040-CV, 1994 WL 718445, at \*4 (Tex. App.—Dallas, Aug. 16, 1994, orig. proceeding).

113. *Id.* at 1994 WL 718445, at \*4.

114. *Gustafson v. Chambers*, 871 S.W.2d 938 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).

client privilege apply to questions to a party regarding her reasons for apportioning a settlement fund.<sup>115</sup>

Texas Rule of Civil Evidence 505 contains the clergy-communicant privilege. In *Simpson v. Tennant*,<sup>116</sup> a mandamus action arising out of a suit by parents of a child injured in a church playground accident, the Court of Appeals for the Fourteenth District of Houston considered an issue of first impression in Texas — whether the clergy-communicant privilege provided in Rule 505 protects the identity of the communicant. In holding that the privilege prevented disclosure of the identity of a communicant in the underlying tort suit, the court of appeals accepted the clergyman's testimony that the unidentified communicant understood that his identity would not be revealed.<sup>117</sup> The court of appeals explained that confidentiality regarding a communicant's identity is critical to the relationship between communicants and clergymen, that the relationship between communicants and clergy is highly valued by society, and that the benefit of preserving the clergy privilege outweighed the possible benefit of disclosing the identity of the person who made the privileged communication.<sup>118</sup>

Texas Rule of Civil Evidence 507 provides a qualified privilege for trade secrets. In *Humphreys v. Caldwell*<sup>119</sup> conclusory allegations in an affidavit that information sought in a discovery request was proprietary in nature and constituted trade secrets failed to support the claim of privilege under Rule 507.<sup>120</sup>

Several cases during the Survey period considered both the physician/patient privilege contained in Texas Rule of Civil Evidence 509, and the mental health information privilege contained in Rule 510. In *Groves v. Gabriel*,<sup>121</sup> a personal injury action alleging *inter alia*, intentional infliction of emotional distress, the Texas Supreme Court held that although the tort plaintiff alleging severe emotional damages including "post-traumatic stress disorder" waived any privilege as to medical records relevant to her claim for emotional damages, medical records unrelated to plaintiff's emotional condition remained privileged and not subject to discovery, citing both Rules 509(b)(2) and 510(b)(2).<sup>122</sup>

In *Gustafson v. Chambers*<sup>123</sup> neither the physician/patient privilege, nor the mental health information privilege, protected from discovery information regarding occasions upon which the defendant physician in a medical malpractice case sought treatment for abusive intoxicants.

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115. *Insurance Co. of N. Am. v. Wright*, No. 01-93-00327-CV, 1994 WL 456789, at \*9 (Tex. App.—Houston [1st Dist.] 1994, writ requested).

116. 871 S.W.2d 301 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding).

117. *Id.* at 305-06.

118. *Id.* at 306-10.

119. 881 S.W.2d 940 (Tex. App.—Corpus Christi 1994, orig. proceeding), *overruled on other grounds*, *Humphreys v. Caldwell*, 888 S.W.2d 469 (Tex. 1994).

120. *Id.* at 946.

121. 874 S.W.2d 660 (Tex. 1994) (orig. proceeding).

122. *Id.* at 661.

123. 871 S.W.2d 938 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).



A private meeting between a physician who had treated an injured party and counsel for the store in which the injury took place was not improper, where the injured party had waived the physician/patient privileges to matters relevant to the lawsuit; the injured party had met with the physician only once for medical care in connection with the injury allegedly sustained as a result of the fall in the store; and, there was no indication that the physician communicated any privileged information to the store's counsel.<sup>124</sup>

*R.K. v. Ramirez*<sup>125</sup> resolved a split that had developed in the courts of appeals about the application of the patient-litigant exception to the physician/patient privilege and the mental health information privilege.<sup>126</sup> Two appellate courts held that the exception applied only when the objecting party attempted to make "offensive" use of the privilege, while three other courts of appeals applied the language of the amended rule literally.<sup>127</sup> In *Ramirez* the Texas Supreme Court held that the patient-litigant exception is independent from and unrelated to the offensive use doctrine articulated by the Texas Supreme Court in *Ginsberg v. Fifth Court of Appeals*.<sup>128</sup> In *Ramirez*, a mandamus proceeding arising out of a medical malpractice case, the Texas Supreme Court held that for a patient's condition to be part of a claim or defense, the condition itself must be of legal consequence to a party's claim or defense,<sup>129</sup> namely that a "jury determination that the condition exists [must be] of legal significance to [a party's] claim or defense."<sup>130</sup> After the court of appeals ruled that the trial court abused its discretion in ordering the doctor's medical records produced, absent any pleading placing the doctor's medical condition in issue,<sup>131</sup> plaintiffs amended their petition to allege that the doctor's medical and emotional problems affected his ability to care for one of the plaintiffs.<sup>132</sup> The doctor reasserted Rule 509 and 510 privileges and the trial court ordered his records produced.<sup>133</sup> The supreme court agreed with the trial court that the pleadings were sufficient to show that

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124. *Hogue v. Kroger Store No. 107*, 875 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (citing TEX. R. CIV. EVID. 509(d)(4)).

125. 887 S.W.2d 836 (Tex. 1994).

126. TEX. R. CIV. EVID. 509(d)(4); TEX. R. CIV. EVID. 510(d)(5).

127. Compare *K.P. v. Packer*, 826 S.W.2d 664 (Tex. App.—Dallas 1992, orig. proceeding) (in mental health record discovery request, nonoffensive use of privilege was upheld); *Dossey v. Salazar*, 808 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) (in personal injury action, mental health condition not at issue); and *Scheffey v. Chambers*, 790 S.W.2d 879 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding) (in medical malpractice case, nonoffensive use of privilege was upheld) with *Gustafson v. Chambers*, 871 S.W.2d 938 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding); *R.K. v. Ramirez*, 855 S.W.2d 204 (Tex. App.—Corpus Christi 1993, orig. proceeding); and *S.A.B. v. Schattman*, 838 S.W.2d 290 (Tex. App.—Fort Worth 1992, orig. proceeding) (medical malpractice privilege upheld).

128. 686 S.W.2d 105 (Tex. 1985) (orig. proceeding).

129. *Ramirez*, 887 S.W.2d at 840-41 (citing TEX. R. CIV. P. 509(d)(4) and 510(d)(5)).

130. *Id.* at 844.

131. *Ramirez*, 855 S.W.2d at 206.

132. *Ramirez*, 887 S.W.2d at 839.

133. *Id.*

plaintiffs were placing the doctor's medical condition at issue.<sup>134</sup> However, in holding that the trial court's production order was overly broad,<sup>135</sup> the supreme court wrote that the trial court must ensure that the patient's record be revealed "only to the extent necessary to provide relevant evidence relating to the condition alleged" and that "trial courts should use their authority to prevent the unwarranted invasion of personal, constitutional, or property rights."<sup>136</sup>

Texas Rule of Civil Evidence 511 governs waiver of privilege by voluntary disclosure. In *Marathon Oil Co. v. Moyé*<sup>137</sup> the Dallas Court of Appeals considered whether a party impliedly waived its privilege by producing other privileged documents in a previous lawsuit. Reasoning that the claim of waiver was only a general statement alleging that documents previously produced covered a broad range of subject matters and that the contested documents covered the same subject matter, the Dallas Court of Appeals held that such a general allegation of implied waiver of privilege does not defeat a *prima facie* showing of privilege.

## VI. ARTICLE VI — WITNESSES

Texas Rule of Civil Evidence 603 requires that before testifying, every witness be required to swear or affirm that he will testify truthfully.<sup>138</sup> Citing, *inter alia*, Rule 603, one court during the Survey period explained that factual statements by an attorney during opening statement and jury argument are not competent evidence that could support the jury's finding.<sup>139</sup>

Texas Rule of Civil Evidence 606, which governs competency of jurors as witnesses, narrowly circumscribes proof of jury misconduct.<sup>140</sup> Upon inquiry into the validity of a verdict, Rule 606(b) prohibits a juror from testifying about any matter or statement occurring during the course of the jury's deliberations.<sup>141</sup> In a wrongful termination case, statements by the presiding juror as to the effect that workers compensation suits would have on the employer would not support a claim of jury misconduct, even if the juror's voir dire answers amounted to deliberate concealment.<sup>142</sup> Although a juror's failure to disclose bias and prejudice can amount to jury misconduct justifying a new trial, the complaining party must obtain

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134. *Id.* at 840-43.

135. *Id.*, at 844 (citing TEX. R. CIV. EVID. 509(d)(e) and 510(d)(5)).

136. *Id.*, at 843, 844.

137. No. 05-94-00040-CV, 1994 WL 718445 (Tex. App.—Dallas, Dec. 12, 1994, orig. proceeding).

138. TEX. R. CIV. EVID. 603.

139. *Border Apparel-East, Inc. v. Guadian*, 868 S.W.2d 894, 898 n.6 (Tex. App.—El Paso 1993, no writ).

140. TEX. R. CIV. EVID. 606(b).

141. *Id.*

142. *Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 272-73 (Tex. App.—El Paso 1994, writ denied).

proof of a lie or concealment from some source other than the jury's deliberations.<sup>143</sup>

Texas Rule of Civil Evidence 607 provides that the credibility of a witness may be attacked by any party.<sup>144</sup> In a personal injury and products liability case alleging exposure to asbestos-containing products, the Dallas Court of Appeals held that the trial court did not err in limiting cross-examination of an epidemiologist to exclude expert criticism of the epidemiologist's earlier research, where the criticism was not relevant to the epidemiologist's disposition to truthfully testify.<sup>145</sup>

Texas Rule of Civil Evidence 608(a) provides that subject to certain limitations, the credibility of a witness may be attacked by evidence in the form of an opinion or reputation.<sup>146</sup> Texas Rule of Civil Evidence 608(b) provides that specific instances of conduct of a witness, other than conviction of a crime, may not be proved by extrinsic evidence for purposes of attacking the credibility of the witness.<sup>147</sup> In a summary judgment case, a counter-affidavit that asserted that the affiants whose affidavits supported a summary judgment had testified falsely in a related proceeding was held not to be sufficient controverting evidence to create a fact issue precluding summary judgment.<sup>148</sup>

Texas Rule of Civil Evidence 609, which governs impeachment of a witness by evidence of conviction of a crime, requires the trial court to determine that the probative value of admitting the conviction outweighs its prejudicial effect to a party.<sup>149</sup> In a case involving a dispute over the ownership of funds on deposit in two bank accounts, a trial court's exclusion of evidence concerning one of the possible recipients of the funds, in order to discredit her credibility, was held not to be reversible error.<sup>150</sup> Assuming *arguendo* that the trial court erred by excluding the evidence, the Houston Fourteenth District Court of Appeals held that the error was not reversible where the entire case did not turn upon the credibility of the witness.<sup>151</sup>

Texas Rule of Civil Evidence 611, which governs the mode and order of interrogation and presentation of evidence, must be construed so that the truth may be ascertained and proceedings justly determined, as required by Texas Rule of Civil Evidence 102.<sup>152</sup> In considering the trial court's conduct as background for appellant's complaints, the Corpus Christi

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143. *Id.*

144. TEX. R. CIV. EVID. 607.

145. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 580 (Tex. App.—Dallas 1993, no writ) (also holding that the manufacturer waived claim on appeal by failing to obtain adverse ruling during the evidentiary portion of the trial).

146. TEX. R. CIV. EVID. 608(a).

147. TEX. R. CIV. EVID. 608(b).

148. *Closs v. Goose Creek Consol. Sch. Dist.*, 874 S.W.2d 859, 870 n.7 (Tex. App.—Texarkana 1994, no writ).

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

150. *Oadra v. Stegall*, 871 S.W.2d 882 (Tex. App.—Houston [14th Dist.] 1994, no writ).

151. *Id.*

152. *Sims v. Brackett*, 885 S.W.2d 450, 455 (Tex. App.—Corpus Christi 1994, no writ) (citing TEX. R. CIV. EVID. 102 and 611).

Court of Appeals held that the trial court's refusal to permit re-cross and re-direct examination to speed the trial, magnified the harmful effect of excluding the testimony of one of appellant's experts.<sup>153</sup>

## VII. ARTICLE VII — OPINIONS AND EXPERT TESTIMONY

### A. QUALIFICATIONS OF EXPERTS

Texas Rule of Civil Evidence 702, which governs testimony by experts, requires an expert to be qualified by scientific, technical, or other specialized knowledge.<sup>154</sup> Several courts during the Survey period considered the qualifications of experts. In *James v. Hudgins*<sup>155</sup> the El Paso Court of Appeals held that a party did not establish that its proffered expert was an expert in the issues asserted, where it failed to ask the witness any questions about his qualifications or experience with regard to those issues, and no deposition testimony regarding his expertise was solicited by either party.<sup>156</sup> The court explained that the party offering expert opinion has the burden of establishing that the expert is qualified, namely, that the expert possesses a higher degree of knowledge than an ordinary person or the trier of fact, and that this burden can only be met by showing that the expert is trained in the science of which he or she testifies, or has knowledge of the subject of the fact in question.<sup>157</sup>

Other courts during the Survey period found experts to be qualified. One trial court did not abuse its discretion in determining that an attorney was qualified to testify as an expert on the issue of the standard of care for a reasonably prudent insurer. The insurer assumed the duty to represent the insured, and its attorney testified that he had worked as outside counsel for insurance firms defending insureds as well as his experience as a personal injury lawyer and as educational and experiential background in the context of insurance-related lawsuits.<sup>158</sup> Another court held that a rehabilitation counselor and rehabilitation specialist was qualified to express an opinion as to a life-care plan for a plaintiff who sustained injuries when he fell at a hospital while recuperating from a severe head injury.<sup>159</sup>

While the Rules of Criminal Evidence require a party against whom expert opinion is being offered be given an opportunity to conduct voir dire examination, the Texas Rules of Civil Evidence have no such provision.<sup>160</sup>

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153. *Id.*

154. TEX. R. CIV. EVID. 702.

155. 876 S.W.2d 418 (Tex. App.—El Paso 1994, writ denied).

156. *Id.* at 422.

157. *Id.* at 421.

158. *State Farm Fire & Casualty Co. v. Gandy*, 880 S.W.2d 129, 136 (Tex. App.—Texarkana 1994, writ granted).

159. *St. Elizabeth Hosp. v. Graham*, 883 S.W.2d 433, 439 (Tex. App.—Beaumont 1994, writ requested).

160. *Brook v. Brook*, 865 S.W.2d 166, 172 (Tex. App.—Corpus Christi 1993), *aff'd*, 881 S.W.2d 297 (Tex. 1994).

## B. MEDICAL CAUSATION/BASES OF EXPERT OPINION

The leading case decided during the Survey period regarding medical causation and the bases for expert opinion is *Merrell Dow Pharmaceuticals, Inc. v. Havner*.<sup>161</sup> *Havner* was a products liability case seeking damages for birth defects caused by Bendectin, a morning sickness drug manufactured by appellant. The Corpus Christi Court of Appeals found that in such cases causation must be proved, if at all, by scientific expert testimony as to the reasonable probability of the causal link alleged.<sup>162</sup> To constitute proof, the expert testimony must establish the "reasonable probability" of a causal connection.<sup>163</sup> Proof of mere possibilities will not support the submission of an issue to a jury.<sup>164</sup> The court noted that while reasonable inferences from evidence are permissible, a possible cause only becomes probable when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action.<sup>165</sup> The Corpus Christi court held that even when an expert expresses his opinion using the magic words, "reasonable probability," the entire substance of the expert's testimony must be examined to determine whether the opinion is based on demonstrable facts and not solely on assumptions, possibility, speculation, and surmise.<sup>166</sup> The Corpus Christi court also held that when the phrase "reasonable medical probability" is used, it will amount to some evidence only when it represents the overall substance of the expert's opinion and is based on more than purely speculative conclusions or personal opinion on ungrounded scientific reality. "Reasonable probability cannot be created by the mere utterance of magic words by someone designated [as] an expert."<sup>167</sup> Assuming *arguendo* that the Havners' experts were correct that all the animal studies and all the human epidemiologic studies on which Merrell Dow relied were wrong, the Corpus Christi court explained that the most it could conclude was that Merrell Dow had no conclusive evidence showing Bendectin never causes birth defects in humans.<sup>168</sup> The Corpus Christi Court of Appeals explained further that absence of evidence of a fact, standing alone, does not amount to some evidence of its converse.<sup>169</sup> The Corpus Christi court further held that despite the use of magic words by the Havners' experts, there was no evidence of the causal link between Bendectin and the alleged birth defects.<sup>170</sup> The court re-

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161. No. 13-92-540-CV, 1994 WL 86436 (Tex. App.—Corpus Christi, Mar. 17, 1994, n.w.h.) (citing TEX. R. CIV. EVID. 702, 703, and 705).

162. *Id.* at \*3.

163. *Id.* at \*3-4.

164. *Id.* at \*3 (citing *Duff v. Yellin*, 751 S.W.2d 175, 176 (Tex. 1988)).

165. *Id.* at \*3 (citing *Parker v. Employers Mut. Liab. Ins. Co. of Wis.*, 440 S.W.2d 43, 47 (Tex. 1969)) (expert testimony that radiation exposure "could have" caused plaintiff's cancer was held to be no evidence of causation)).

166. *Havner*, 1994 WL 86435, at \*3.

167. *Id.* at \*3.

168. *Id.* at \*5.

169. *Id.*

170. *Id.* at \*10.

jected the Havners' argument that this case presented a classic battle of experts which meant it should defer to the jury's determination as it did in *American Cyanamid Co. v. Frankson*.<sup>171</sup> The court distinguished *American Cyanamid*, another product liability action, because there was underlying, scientifically based opinion testimony on both sides of the controversy, whereas in this case, all the primary researchers who have studied Bendectin have reached one conclusion, which did not support the theory postulated by the Havners' experts.<sup>172</sup>

During the Survey period one court citing *Havner* held in a medical malpractice case that reasonable inferences drawn from the evidence are permissible.<sup>173</sup> In another medical malpractice case that preceded *Havner*, the Amarillo Court of Appeals held that expert testimony was not sufficient to show a causal connection between nurses' alleged negligence in monitoring a mother's condition and an injury suffered by her daughter at birth. An expert stated that warning signs "hopefully" would have been picked up early and the nurses' failure to see the warning signs "probably" caused the obstetrician to deliver the daughter vaginally and not by caesarian section. The court held the expert's testimony was "based upon mere speculation and conjecture."<sup>174</sup>

Whether there is a reasonable probability that a patient's injuries were caused by a doctor's negligence is determined by consideration of the substance of the expert's testimony, "does not turn on semantics or use by the witness of any term or phrase."<sup>175</sup> A medical expert's testimony in the abstract about mortality was not evidence of proximate cause in a medical malpractice action against a physician where the expert did not state that the patient would have lived longer if surgery had been performed earlier.<sup>176</sup> Similarly, a medical expert's testimony that more of the patient's skin and subcutaneous tissue may have survived had surgery been performed earlier was only evidence of mere possibility and did not establish proximate cause in the medical malpractice case against the physician for failure to diagnose properly.<sup>177</sup>

The facts or data upon which expert opinion is based need not be admissible into evidence if of a type reasonably relied upon by experts in the particular field to form an opinion or inferences upon the subject.<sup>178</sup> "An expert witness can testify from a published hearsay article as one of the bases for his or her expert opinion."<sup>179</sup> Although "opinions based

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171. 732 S.W.2d 648 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

172. *Havner*, 1994 WL 86436, at \*10.

173. *Bradley*, 879 S.W.2d at 954.

174. *Lopez v. Central Plains Regional Hosp.*, 859 S.W.2d 600 (Tex. App.—Amarillo 1993, no writ).

175. *Bradley v. Rogers*, 879 S.W.2d 947, 954 (Tex. App.—Houston [14th Dist.] 1994, writ requested).

176. *Id.* at 957-58.

177. *Id.* at 959-60.

178. TEX. R. CIV. EVID. 703.

179. *New Braunfels Factory Outlet Ctr., Inc. v. IHOP Realty Corp.*, 872 S.W.2d 303, 310 n.5 (Tex. App.—Austin 1994, no writ) (citing TEX. R. CIV. EVID. 703).

entirely on inadmissible facts or data may be admitted if . . . of a type reasonably relied upon by experts in the field," hearsay facts or data on which the expert relies must be reliable in and of themselves.<sup>180</sup> The expert testimony of an actuary and of an actuarial study was held properly excludable where it was so infected by untrustworthy data that it would not prove helpful to the factfinder.<sup>181</sup>

### C. OPINION ON ULTIMATE ISSUE

In *Crum & Forster, Inc. v. Monsanto Co.*,<sup>182</sup> appellants complained of the trial court's ruling to allow an expert witness to testify regarding the propriety of Mary Carter agreements. At the time of testimony Mary Carters were against the public policy of the State of Texas as pronounced by the Texas Supreme Court.<sup>183</sup> The witness' testimony involved a mixed question of law and fact, as permitted by *Birchfield v. Texarkana Memorial Hospital*.<sup>184</sup> The Texarkana Court of Appeals held that most of the witness' testimony pertained to the facts of the case, and that to the extent that the legal principles involving a Mary Carter Agreement were applied to the facts of the case, they constituted a mixed question of law and fact.<sup>185</sup> The court also held that the witness' testimony was not objectionable just because it was sprinkled with legal ramifications, such as explaining the term "subrogation" to the jury.<sup>186</sup> The Texarkana court stated that because this was a case about litigation, it would be impossible to discuss the case without bringing in legal principles.<sup>187</sup>

In another case, expert testimony was admissible by a former Texas Supreme Court justice stating procedures required by law to protect a child were not followed during settlement procedures with a fifteen year old survivor of an automobile accident.<sup>188</sup> Finding that the testimony would have assisted the trier of fact to understand the evidence, the court permitted the to testify that the insurance company had a duty to deal with the child fairly, honestly and in good faith. Once the choice was made by the carrier to deal with the child, a fiduciary relationship existed.<sup>189</sup>

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180. *Texas Workers' Compensation Comm'n v. Garcia*, 862 S.W.2d 61, 105 (Tex. App.—San Antonio 1993, writ granted).

181. *Id.* (quoting the study itself as stating that information available was far from perfect and that preparers had to rely on non-Texas data, outdated information, noninsurance data, and that it was not possible to predict near-term effects of 1989 Workers' Compensation Act precisely, and that statistical significance could not be attributed to calculations of State Board of Insurance benefits).

182. 887 S.W.2d 103 (Tex. App.—Texarkana 1994, writ requested).

183. *Id.* at 132-33.

184. 747 S.W.2d 361, 365 (Tex. 1987).

185. *Crum & Forster*, 887 S.W.2d at 135.

186. *Id.*

187. *Id.*

188. *Transport Ins. Co. v. Faircloth*, 861 S.W.2d 926, 937-39 (Tex. App.—Beaumont 1994, writ granted).

189. *Id.* at 938.

## VIII. ARTICLE VIII — HEARSAY

## A. IDENTIFYING HEARSAY

Whether a record or statement offered to prove the truth of the matter constitutes hearsay is often difficult to determine.<sup>190</sup> Specifically, “[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>191</sup> Exceptions to this general rule are set forth in Rules 803 through 806.<sup>192</sup>

During the Survey period, several Texas appellate courts considered whether proffered evidence was hearsay. Where an out-of-court statement was not offered for the truth of the matter asserted, but rather to show that it was made, the statement was not hearsay.<sup>193</sup> In a personal injury action, the deposition of a government official was inadmissible hearsay as to an engineering firm when the deposition was taken in another lawsuit where the engineering firm was not a party.<sup>194</sup> In a medical malpractice case where a physician’s statement was hearsay and not admitted for the truth of the matter asserted but to show the emotional impact the statement made, the statement to the patient’s husband was not probative of causation.<sup>195</sup>

Additionally, contracts admitted under the business records exception to the hearsay rule were deemed admitted for the truth of the matter asserted.<sup>196</sup> The court rejected the appellant’s contention that the records were admitted only as business records.<sup>197</sup> On the other hand, failure to authenticate a document renders it inadmissible hearsay, even if the document is otherwise relevant and admissible.<sup>198</sup>

## B. 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.”<sup>199</sup> During the Survey period, the San Antonio

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190. TEX. R. CIV. EVID. 801-806 comprehensively define the hearsay rule and its exceptions. 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.

191. 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.

192. TEX. R. CIV. EVID. 803-806.

193. *Closs*, 874 S.W.2d at 870 n.6. (citing TEX. R. CIV. EVID. 801(d)).

194. *Romero v. Parkhill, Smith & Cooper, Inc.*, 881 S.W.2d 522, 527 (Tex. App.—El Paso 1994, no writ) (citing TEX. R. CIV. EVID. 801).

195. *Bradley*, 879 S.W.2d at 957.

196. *Overall v. Southwestern Bell Yellow Pages*, 869 S.W.2d 629, 632-33 (Tex. App.—Houston [14th Dist.] 1994, no writ).

197. *Id.*

198. *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 23-24 (Tex. App.—Corpus Christi 1994, writ denied) (excluded report arguably admissible under TEX. R. CIV. EVID. 801(e)(2)(B) where it was not authenticated).

199. TEX. R. CIV. EVID. 802.



Court of Appeals held that absent any hearsay objection, an affidavit opposing summary judgment had probative value even though it contained inadmissible hearsay.<sup>200</sup> Similarly, where no hearsay objection was made, the Austin Court of Appeals admitted hearsay evidence because it supported an important finding by the Board of Medical Examiners. The Board found a physician violated the Medical Practice Act by aiding or abetting the practice of medicine by an unlicensed corporation as well as another section of the Act by signing bills or health insurance claims forms without providing any direct or indirect patient treatment, causing the revocation of his license.<sup>201</sup>

Although hearsay evidence admitted without objection has probative value, when hearsay is admitted over appropriate objection, it has no probative value. It should not be considered in evaluating sufficiency of the evidence,<sup>202</sup> or to prove causation.<sup>203</sup>

### C. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT AND MATERIAL

#### 1. *Then Existing Mental, Emotional or Physical Condition*

Texas Rule of Civil Evidence 803(3) admits into evidence statements of the declarant's then existing state of mind, emotion, sensation, or physical condition.<sup>204</sup> Under Rule 803(3), the testimony of a consulting professional engineer, who was also the president of an oil and gas company, was admissible against another oil company. The expert's statement regarding the company's willingness to buy oil and gas leases, including its offer of a bonus to the lessee, was admitted to show the amount of the contemplated bonus allegedly lost as a result of the lessee's failure to release his interest.<sup>205</sup>

#### 2. *Business Records*

Texas Rule of Civil Evidence 803(6) governs the introduction of records of regularly conducted activities, commonly known as business records.<sup>206</sup> Rule 803(6) requires that the records be kept "in the course of a regularly conducted business activity" by a person with knowledge of the recorded information and as a regular practice of the business.<sup>207</sup> A defendant's objection that an exhibit did not comply with Rule 803(6) was sufficient to raise a hearsay objection, and where the custodian did

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200. *Casas v. Gilliam*, 869 S.W.2d 671, 673 (Tex. App.—San Antonio 1994, no writ).

201. *Guerrero-Ramirez v. Texas Bd. of Medical Examiners*, 867 S.W.2d 911, 921 (Tex. App.—Austin 1994, no writ).

202. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App.—Corpus Christi 1994, writ denied) (finding hearsay objection preserved error but that evidence objected to was admissible under TEX. R. CIV. EVID. 803(3)).

203. *Bradley*, 879 S.W.2d at 957.

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

205. *Atkinson*, 878 S.W.2d at 243.

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

207. *Id.*

not verify that the information contained in the record complied with the requirements of Rule 803(6), the records were hearsay.<sup>208</sup> Where contracts were admitted under the business records exception to the hearsay rule, they were admitted for the truth of the matter asserted.<sup>209</sup>

### 3. *Market Reports, Commercial Publications*

Texas Rule of Civil Evidence 803(17) admits into evidence, as exceptions to the hearsay rule, “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.”<sup>210</sup> For example, *Consumer Reports* article of the “Best Meals Best Deals” was erroneously admitted under Rule 803(17). However, it did not require a reversal because several articles of the same nature had already been admitted without objection during the testimony of an expert witness. Further, another expert witness testified to essentially the same facts as those contained in the article.<sup>211</sup>

### 4. *Judgment of Previous Conviction*

Texas Rule of Civil Evidence 803(22) admits into evidence, as exceptions to the hearsay rule “[e]vidence of a judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction.”<sup>212</sup> In an attorney and accountant malpractice case, a plaintiff’s criminal conviction was admissible, collaterally estopping the plaintiff from asserting that he relied on the advice of the defendants, because such reliance would have been a defense in the criminal proceeding.<sup>213</sup>

### 5. *Statements Against Interest*

A statement that is so contrary to the declarant’s interest at the time it is 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).<sup>214</sup> If a statement is not against interest at the time it is made, it is not admissible as a statement against interest.<sup>215</sup> Further, a statement against interest is

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208. *Sholdra v. Bluebonnet Sav. Bank, FSB*, 858 S.W.2d 533 (Tex. App.—Fort Worth 1994, writ denied).

209. *Overall*, 869 S.W.2d at 633.

210. TEX. R. CIV. EVID. 803(17).

211. *New Braunfels Factory Outlet Ctr., Inc. v. IHOP Realty Corp.*, 872 S.W.2d 303, 310 (Tex. App.—Austin 1994, no writ).

212. TEX. R. CIV. EVID. 803(22).

213. *Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 449-50 (Tex. App.—Houston [1st Dist.] 1993, no writ).

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

215. *Cartwright v. MBank Corpus Christi*, 865 S.W.2d 546, 551 (Tex. App.—Corpus Christi 1993, writ denied) (holding declaration by assignor made after assigning full interest in promissory note was not admissible against assignee).

not admissible where it is offered against someone other than the declarant.<sup>216</sup>

#### D. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

Texas Rule of Civil Evidence 804 narrowly circumscribes three hearsay exceptions based on the unavailability of the declarant.<sup>217</sup> Under certain circumstances, declarant unavailability allows the admission of testimony given by a witness at another hearing on the same matter, at a different procedure, or in a deposition taken in the course of another proceeding.<sup>218</sup> Unavailability is defined in Texas Rule of Civil Evidence 804(a).<sup>219</sup> Unavailability did not exist simply because counsel stated that an expert did not appear in past trials due to ill health. The expert's presence at the current trial was necessary in order to admit a videotaped deposition taken in connection with unrelated litigation.<sup>220</sup>

### IX. ARTICLE IX — AUTHENTICATION AND IDENTIFICATION

Texas Rule of Civil Evidence 901(a) requires authentication or identification of evidence as a condition precedent to its admission.<sup>221</sup> The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."<sup>222</sup> In an action to reform an assignment of interest in a right to produce oil, gas, and other hydrocarbons, a corporate officer's admission on cross-examination, classifying a letter an "internal document" of the corporation was "sufficient to support its admission."<sup>223</sup> In a hearing to determine whether a juvenile should be tried as an adult on murder charges, the juvenile's confession was admitted after proper authentication. The arresting officer testified that the confession was a true and correct copy of the statement given by the juvenile, as well as identifying the juvenile in the courtroom.<sup>224</sup> An unsigned report discussing a perceived connection between exposure to asbestos and certain forms of cancer could not be

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216. *State and Dallas v. Heal*, 884 S.W.2d 864, 870 (Tex. App.—Dallas 1994, writ requested) (holding notice of appraised value of property prepared by the Dallas Central Appraisal District not admissible against the City of Dallas where no affirmative act of the City was required to institute the district's appraisal).

217. TEX. R. CIV. EVID. 804.

218. TEX. R. CIV. EVID. 804(b)(1).

219. TEX. R. CIV. EVID. 804(a).

220. *Keene*, 863 S.W.2d at 178-79.

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

222. *Id.*

223. *E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 153-154 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (citing TEX. R. CIV. EVID. 901(a) and 901(b)).

224. *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App.—Houston [1st Dist.] 1994, no writ) (citing TEX. R. CIV. EVID. 901(a)).

authenticated by its author's videotape deposition, where the deposition itself was inadmissible hearsay.<sup>225</sup>

Texas Rule of Civil Evidence 902 permits self-authentication of documents under certain circumstances.<sup>226</sup> A document that is not self-authenticating and is not authenticated in some other manner, is inadmissible, even if it might have been admissible had it been authenticated.<sup>227</sup> Copies of an application for an order accepting the closing of bankruptcy proceedings were self-authenticated where they were certified by the bankruptcy court. Therefore, the copies were competent summary judgment evidence.<sup>228</sup> The affidavit of a school district superintendent satisfied the requirement of personal knowledge, even though no specific recitation was made. The affidavit was submitted in support of the school district's motion for summary judgment. It established the superintendent as the district's custodian of records allowing the authentication of various school records as true and correct copies of original documents.<sup>229</sup>

Texas Rule of Civil Evidence 902(6) permits self-authentication of domestic public documents not under seal.<sup>230</sup> An authentication certificate of a foreign judgment was upheld even though the judge failed to fill in the blank identifying the clerk of the court.<sup>231</sup> The certificate purported to bear the signature of a court clerk and certification by a judge of its accuracy.

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

Article X of the Texas Rule of Civil Evidence governs the admission of the contents of writings, recordings, and photographs.<sup>232</sup> Texas Rule of Civil Evidence 1001 defines the items "original" and "duplicate."<sup>233</sup> A duplicate is a counterpart produced by the same process that produced the original, or by other processes that accurately reproduce the original.<sup>234</sup> Although after a proper predicate is laid, the trial court can in its discretion admit audiotape recordings into evidence, a transcript made from an audiotape recording is neither an "original" as defined by Rule

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225. *Keene Corp. v. Rogers*, 863 S.W.2d 168, 178-79 (Tex. App.—Texarkana 1993, writ requested stayed) (citing TEX. R. CIV. EVID. 901(b)(1)).

226. TEX. R. CIV. EVID. 902.

227. *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 23-24 (Tex. App.—Corpus Christi 1993, writ denied) (citing TEX. R. CIV. EVID. 902).

228. *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 246 (Tex. App.—Amarillo 1994, no writ) (citing TEX. R. CIV. EVID. 902).

229. *Closs*, 874 S.W.2d at 868.

230. TEX. R. CIV. EVID. 902(6).

231. *Tri-Steel Structures, Inc. v. Hackman*, 883 S.W.2d 391, 396 (Tex. App.—Fort Worth 1994, writ requested) (citing TEX. R. CIV. EVID. 902(2)).

232. TEX. R. CIV. EVID. 1001-1008.

233. TEX. R. CIV. EVID. 1001(3) and 1001(4).

234. TEX. R. CIV. EVID. 1001(4).

1001(3), nor a "duplicate" as defined by Rule 1001(4).<sup>235</sup> As such, written transcripts of portions of audiotapes were inadmissible after the audiotapes themselves were admitted.<sup>236</sup> However, the error was found harmless after the special master listened to each admitted audiotape in its entirety, paying special attention to context and audibility.

Texas Rule of Civil Evidence 1003 provides that a duplicate is admissible to the same extent as an original unless there is a question over the authenticity of the original or the fairness of admitting the duplicate in lieu of the original.<sup>237</sup> Where a party neither attacked the authenticity of the original documents nor claimed it would be unfair to admit duplicates, one appellate court during the Survey period rejected a party's argument regarding inadmissible copies where the absence of the originals had not been explained.<sup>238</sup>

## XI. PAROL EVIDENCE

Several courts during the Survey period excluded parol evidence to interpret an unambiguous written contract.<sup>239</sup> A defendant's affidavit attached to his response to a motion for summary judgment constituted impermissible parol evidence. The affidavit stated that the parties who drafted a promissory note intended that the affiant be personally liable only through his guaranty.<sup>240</sup> Where no ambiguity in a contract exists, but the parties disagree about the interpretation of the contract, parol evidence cannot be used to create an ambiguity.<sup>241</sup> An expressed or implied covenant not to obstruct a property owner's view could not be established by parol evidence because it would create a negative easement.

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235. *In re Thoma*, 873 S.W.2d 477, 487 (Tex. Rev. Trib. 1994) (judicial disciplinary proceeding).

236. *Id.* at 488.

237. TEX. R. CIV. EVID. 1003.

238. *Closs*, 874 S.W.2d at 868.

239. *Romero*, 881 S.W.2d at 526-27 (holding parol evidence not admissible to place duty on engineering firm or to enlarge its responsibilities in contradiction of clear terms of contract to provide engineering services for construction of sewage treatment plant where contract was not ambiguous); *Robbins v. HNG Oil Co.*, 878 S.W.2d 351, 355 (Tex. App.—Beaumont 1994, writ dismissed w.o.j.) (regarding an unambiguous deed); *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 461 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding parol evidence excluded absent pleading or argument that arbitration agreement at issue was ambiguous); *Banks v. Browning*, 873 S.W.2d 763, 764-65 (Tex. App.—Fort Worth 1994, writ denied) (holding unambiguous account cards creating joint account with right of survivorship on file at banks); *LA&N Interests, Inc. v. Fish*, 864 S.W.2d 745, 749-50 (Tex. App.—Houston [14th Dist.] 1993, no writ) (holding parol evidence inadmissible to supply essential elements of brokerage agreement).

240. *Fimberg v. FDIC*, 880 S.W.2d 83, 86 (Tex. App.—Texarkana 1994, writ requested) (holding parol evidence inadmissible to interpret a promissory note).

241. *Markert v. Williams*, 874 S.W.2d 353, 355 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (unambiguous commercial lease containing both an option to purchase at fixed price and right of first refusal).

Such an agreement could not be performed within one year, making it subject to the statute of frauds<sup>242</sup> which requires written agreement.<sup>243</sup>

Several courts during the Survey period admitted parol evidence in order to interpret ambiguous contracts.<sup>244</sup> The meaning of an ambiguous contract presents a question of fact for the jury to decide. Where parol evidence was admitted to interpret an ambiguous contract, a trial court erred by not submitting jury questions on the meaning of the ambiguous contract.<sup>245</sup> The parol evidence rule does not bar extrinsic proof of mutual mistake for purposes of seeking rescission of a contract.<sup>246</sup> In an uninsured motorist case, the defendant insurer refused to pay claiming that the plaintiff never obtained its written permission to sue the uninsured motorist. The trial court erred by construing the letter as part of the insurance contract and excluding it from evidence.<sup>247</sup>

The existence and terms of a written contract for the sale of an interest in real property may be proved by parol evidence if the written and signed memorandum is lost or destroyed. If the parties seeking to prove the agreement are unable to produce the written memorandum in court, proof of the memorandum and its terms must be clear and convincing.<sup>248</sup> One court found a party's proof of a signed agreement insufficient to supply the terms of the lost agreement.<sup>249</sup>

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242. TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987).

243. *Ramsey v. Lewis*, 874 S.W.2d 320, 324 (Tex. App.—El Paso 1994, no writ).

244. *626 Joint Venture v. Spinks*, 873 S.W.2d 73, 75-76 (Tex. App.—Austin 1993, no writ) (references in note and other sale documents to individual as "Trustee" were ambiguous and thus parol evidence did not bar introduction of evidence showing that individual was acting as representative of joint venture with respect to purchase of real property where references to "Trustee" showed that note was signed by individual in representative capacity, but did not show for whom he was acting); *Enochs v. Brown*, 872 S.W.2d 312, 319 (Tex. App.—Austin 1994, no writ) (where contingent attorney fee contract was ambiguous because document referred to "my" claim that those claims were based on child's injury even though original petition named child's mother individually and as child's next friend, and written provision of contract provided for waiver of attorney's fees if recovery was simply "limits of liability" but did not define that term, contingent fee contract was unclear as to whose claims were covered, and thus court properly admitted parol evidence to clarify meaning of ambiguous terms); *Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 828-30 (Tex. App.—El Paso 1994, writ requested) (written employment contract applicable to ramp, provisioning, and operations agents of airline was ambiguous as to whether operations supervisor was covered by agreement, and thus supervisor's testimony was admissible parol evidence to determine subjective intent of the parties at the time of contract formation).

245. *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 146 (Tex. App.—Beaumont 1993, writ requested).

246. *De Monet v. Pera*, 877 S.W.2d 352, 357 (Tex. App.—Dallas 1994, no writ).

247. *Azima v. State Farm Mut. Auto. Ins. Co.*, 884 S.W.2d 900, 903 (Tex. App.—San Antonio 1994, n.w.h.).

248. *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1950, no writ).

249. *E.P. Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 (Tex. App.—Corpus Christi 1994, writ requested).

