
January 1992

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Recommended Citation

John W. Bickel & William A. Brewer, *Civil Evidence*, 45 Sw L.J. 1345 (1992)
<https://scholar.smu.edu/smulr/vol45/iss4/4>

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CIVIL EVIDENCE

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DURING the Survey period, the rules of evidence underwent their usual heavy scrutiny in the appellate courts of Texas and federal courts in the Fifth Circuit. In discussing some of the more interesting and instructive cases construing both the Texas Rules of Civil Evidence (Texas Rule(s)) and the Federal Rules of Evidence (Federal Rule(s)), the authors have organized this Article sequentially according to the order of the evidentiary rules.

I. ARTICLE I - GENERAL PROVISIONS

Article I of the Texas Rules contains a number of general provisions. Among them is Rule 103, which governs the general procedures required to make and preserve objections.¹ During the Survey period there were a number of published opinions which underscored the fact that a litigant must establish a complete record to preserve an evidentiary objection for appeal.

Texas Rule 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"² During the Survey period, the supreme court reiterated its previous provision that erroneously admitted evidence that is not dispositive of the case or is merely cumulative of previously admitted evidence, constitutes only harmless error.³ In *Castro v. Sebesta*⁴ the Houston court of appeals (1st Dist.) held that a party need not prove that a different judgment would have resulted if the evidence had not been erroneously excluded.⁵ Rather, the party need only show that an improper judgment prob-

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The authors gratefully acknowledge the significant contribution of Eric G. Calhoun, an associate with Bickel & Brewer.

1. See TEX. R. CIV. EVID. 103.

2. TEX. R. CIV. EVID. 103(a). See also TEX. R. APP. P. 81(b)(1) (No judgment will be reversed unless the asserted error of law amounted to such a denial of rights as was reasonably calculated to cause and probably did cause rendition of an improper judgment, or was such that it probably prevented the appellant from making a proper presentation of the case to the appellate court.)

3. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 230 (Tex. 1990).

4. 808 S.W.2d 189 (Tex. App.—Houston [1st Dist.] 1991, no writ).

5. *Id.* at 192.

ably resulted.⁶ Although the distinction is subtle, it is significant to the appellant in that it affords a slightly greater theoretical opportunity for a litigant seeking to reverse a trial court on the basis that it kept out certain crucial evidence.

However, to preserve its appellate rights, the litigant must be mindful of Texas Rule 103(a)(2). Rule 103(a)(2) provides that in the case of alleged error based upon the exclusion of evidence by the trial court, the substance of the evidence must be made known to the court by offer of proof in order to preserve the error for appeal.⁷ During the Survey period, the breadth of Rule 103(a)(2) was reaffirmed by the Dallas court of appeals when it held that where a party obtains a preliminary adverse ruling on a motion in limine, the party must offer the evidence at trial in order to preserve the error for appeal.⁸

Texas Rule 103(a)(1) provides that an objection to a ruling admitting evidence may not be a predicate for error unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."⁹ In order to insure its preservation, a valid objection should include a citation to the particular rule of evidence alleged to be violated by admission of that evidence.¹⁰ For example, in *Smith Motor Sales*¹¹ the Austin court of appeals held that a general objection to the admission of a market survey on the ground that it constituted hearsay was insufficient under Rule 103(a) to preserve the appellant's hearsay objection.¹² The court declared that the use of the term "hearsay," without specific reference to both a legal basis and how it applied to the offered exhibit, failed to preserve the objection for review.¹³

Federal Rule 103(a)(1) contains language identical to that found in the first sentence of Texas Rule 103(a)(1) quoted above.¹⁴ During the Survey period, the Fifth Circuit held that where an objection to the admission of evidence was made on the record, but the basis for the objection and the ruling were made at a bench conference off the record, the objection was not preserved for appeal.¹⁵

Texas Rule 104(a) provides that a trial court, when making preliminary

6. *Id.*

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

8. *Methodist Hosps. v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, writ denied). Of course, if a trial court hears objections to offered evidence out of the presence of the jury, the objections are deemed to apply to such evidence without the necessity of repetition when the evidence is subsequently admitted before the jury. See TEX. R. CIV. EVID. 103(a)(1).

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

10. *City of Mesquite v. Moore*, 800 S.W.2d 617, 619 (Tex. App.—Dallas 1990, no writ); see *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n.*, 809 S.W.2d 268, 272 (Tex. App.—Austin 1991, writ denied).

11. 809 S.W.2d 268 (Tex. App.—Austin 1991, writ denied).

12. *Id.* at 272.

13. *Id.*

14. See FED. R. EVID. 103(a)(1).

15. *Genmoora Corp. v. Moore Business Forms, Inc.*, 939 F.2d 1149, 1154-56 (5th Cir. 1991).

determinations of admissibility, is not bound by the rules of evidence except for those governing privileges.¹⁶ Accordingly, evidence not otherwise admissible may be considered by the trial judge in making a preliminary determination of admissibility. Litigants should know, however, that some common law requirements may have survived the implementation of the Texas rules. For example, in *Utica National Insurance Co. v. McDonald*¹⁷ the Fort Worth court of appeals held, in a fire insurance case, that the advent of Texas Rule 104(a) did not change the common law requirement that hearsay evidence of conspiracy can be admitted only when accompanied by tangible, material evidence of conspiracy.¹⁸

Finally, Texas Rule 106 requires the admission of any part of a writing or statement sought to be introduced by a party which ought to be considered contemporaneously with the offered portion of such writing or statement.¹⁹ In *Meuth v. Hartgrove*²⁰ the Austin court of appeals explained that Texas Rule 106 does not, however, require that a writing or recording be excluded if it evidences only part of an occurrence.²¹ Rather, Rule 106 provides for the admission of a complete document or recording, or of related documents or recordings, at the same time that the incomplete document or recording is being offered.²²

II. ARTICLE II - JUDICIAL NOTICE

During the Survey period, Texas courts had occasion to apply the rules pertaining to the manner by which trial and appellate courts may take judicial notice. The Supreme Court of Texas, applying Texas Rules 201(b) and (c), held that a trial court could properly take judicial notice that a particular day was not a statutory holiday in order to determine that service of citation was made during business hours.²³

Texas Rule 201(f) provides that "[j]udicial notice may be taken at any stage of the proceeding."²⁴ The Fort Worth court of appeals recently used Rule 201(f) in taking judicial notice of an adjudicative fact for the first time on appeal.²⁵ Despite this, the Fort Worth court has held that in reviewing a record, it will not infer that a trial judge took judicial notice.²⁶ The Beaumont court, however, took a different stance when it stated that even without any indication in the record from below, a trial court faced with

16. TEX. R. CIV. EVID. 104(a).

17. 814 S.W.2d 234 (Tex. App.—Fort Worth 1991, writ requested).

18. *Id.* at 236.

19. TEX. R. CIV. EVID. 106.

20. 811 S.W.2d 626 (Tex. App.—Austin 1990, writ denied).

21. *Id.* at 629.

22. *Id.*

23. *Higginbotham v. General Life & Accident Ins. Co.*, 796 S.W.2d 695, 696 (Tex. 1990).

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

25. *Trapnell v. John Hogan Interests, Inc.*, 809 S.W.2d 606, 608 (Tex. App.—Corpus Christi 1991, writ denied); *see also City of Mesquite v. Moore*, 800 S.W.2d 617, 619 (Tex. App.—Dallas 1990, no writ) (Judicial notice of population of City of Mesquite taken for the first time on appeal).

26. *Sansom v. Sprinkle*, 799 S.W.2d 776, 777 (Tex. App.—Fort Worth 1990, no writ).

calculating an award of attorneys' fees will be presumed to have taken judicial notice of the file before him, the proceedings conducted in his presence, and the usual and customary attorneys' fees for the claim involved.²⁷

Texas Rule 202 provides that a court may take judicial notice of the law of another jurisdiction.²⁸ During the Survey period, the Corpus Christi court of appeals noted that once the requirements for judicial notice under the law of another jurisdiction are met, the trial court is presumed to have the same knowledge of that jurisdiction's law as of its own law.²⁹ Nonetheless, cases decided during the Survey period underscore that the practitioner should be wary of the application of Rule 202. The San Antonio court of appeals held that Rule 202 does not permit a trial court to take judicial notice of "private" orders, such as a stipulated order signed by a governmental agency.³⁰ In *O'Connor v. Sam Houston Medical Hospital, Inc.*³¹ the Houston court of appeals (1st Dist.) held that it could not judicially notice local court rules on appeal unless a certified copy was provided to the court.³² However, the other Houston court of appeals (14th Dist.) held that it would take judicial notice of a domestic judgment without a party having offered the document sought to be noticed.³³

Ordinarily, an appellate court will only take judicial notice of facts outside the record for purposes of determining jurisdiction over an appeal or to resolve matters ancillary to decisions which are mandated by law.³⁴ Appellate courts are reluctant to take judicial notice of matters which go to the merits of a dispute.³⁵ Accordingly, in *SEI Business Systems* the Dallas court of appeals refused to take judicial notice that a corporation had changed its name, despite being provided with a certified copy of an amendment to the corporation's articles of incorporation, because the identity of the corporation was a question of fact for the trial court.³⁶ Finally, Texas Rule 204 provides that a court may take judicial notice of the ordinances of municipalities in Texas.³⁷ Yet, one court of appeals held that in order for such ordinances to be judicially noticed, the proponent must provide the court with either authenticated or certified copies, or a proper citation to enable verification of unauthenticated copies.³⁸

27. *Lacy v. First Nat'l Bank*, 809 S.W.2d 362, 367 (Tex. App.—Beaumont 1991, no writ).

28. TEX. R. CIV. EVID. 202.

29. *State Nat'l Bank v. Academia, Inc.*, 802 S.W.2d 282, 290 (Tex. App.—Corpus Christi 1990, writ denied).

30. *Centex Corp. v. Dalton*, 810 S.W.2d 812, 824 (Tex. App.—San Antonio 1991, writ granted).

31. 802 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1990), *rev'd on other grounds*, 807 S.W.2d 574 (Tex. 1991).

32. *Id.* at 252.

33. *Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex. App.—Houston [14th Dist.] 1991, no writ).

34. *SEI Business Systems, Inc. v. Bank One Texas*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ).

35. *Id.*

36. *Id.*

37. TEX. R. CIV. EVID. 204.

38. *Hollingsworth v. King*, 810 S.W.2d 772, 774 (Tex. App.—Amarillo 1991), *writ denied per curiam*, 816 S.W.2d 340 (Tex. 1991).

III. ARTICLE III - BURDENS OF PROOF AND PRESUMPTIONS

Federal Rule 301 governs presumptions generally in civil actions and proceedings in federal court.³⁹ Federal Rule 302 provides that "the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law."⁴⁰ Hence, Texas substantive law affects the operation of presumptions in both state and federal courts. Article III of the Texas Rules does not contain any rules at this time. Therefore, various Texas statutes and common law govern burdens of proof and presumptions. The cases reported during the survey period illustrate the interrelated nature of presumptions and burdens.

In *State v. Seventeen Thousand and No/100*⁴¹ the Corpus Christi court of appeals reconfirmed that a defendant moving for summary judgment has the burden of showing that at least one element of the plaintiff's cause of action has been conclusively established against plaintiff.⁴² If defendant accomplishes that task, plaintiff then has the burden of introducing evidence sufficient to raise an issue of fact with respect to that element.⁴³ Defendant cannot satisfy his burden by showing that plaintiff does not have sufficient evidence at the time of summary judgment to prove an element of a claim.⁴⁴ The Corpus Christi court reversed the trial court's grant of summary judgment because defendant failed to provide affirmative summary judgment evidence negating a specific element of plaintiff's claim.⁴⁵

In a workers compensation case, the burden is on an employee who has worked less than 210 days to establish her average weekly wage.⁴⁶ In *Transamerica Insurance Co. v. Green*⁴⁷ the Corpus Christi court of appeals stated that in order to do so, the employee has the burden of introducing evidence of the average daily wage of an employee of her same class, in the same or similar employment, in the same or a neighboring place, who had worked at least 210 days during the year preceding the claimant's injury.⁴⁸ The Corpus Christi court reversed the claimant's verdict because the evidence submitted to the jury improperly assumed that the testifying employee was in the same class as the claimant and the claimant had the burden of proof on this issue.⁴⁹

*Hot Shot Messenger Service, Inc. v. State*⁵⁰ involved the presumption that a letter properly addressed, stamped and mailed is presumed to have been

39. FED. R. EVID. 301.

40. FED. R. EVID. 302.

41. 809 S.W.2d 637 (Tex. App.—Corpus Christi 1991, no writ).

42. *Id.* at 639.

43. *Id.*

44. *Id.* at 640.

45. *Id.*

46. See *Transamerica Ins. Co. v. Green*, 797 S.W.2d 171, 173 (Tex. App.—Corpus Christi 1990, no writ) (citing TEX. REV. CIV. STAT. ANN. art. 8309 § 1(1)-(3) (Vernon 1967)).

47. *Id.*

48. *Id.*

49. *Id.* at 174-75.

50. 798 S.W.2d 413 (Tex. App.—Austin 1990, writ denied).

received by the addressee in due course.⁵¹ After a default judgment was entered against the appellant,⁵² a notice containing a reference to the judgment was placed in the mail addressed to appellant's post office box, thereby giving rise to the presumption of receipt.⁵³

In *Lorentzen v. Kliesing*⁵⁴ the trial court entered a default judgment against defendant when she failed to appear for trial.⁵⁵ Texas Rule of Civil Procedure 21a creates a presumption that notice of a trial setting has been duly received when the notice was properly addressed and mailed to the party.⁵⁶ But the Houston court of appeals reversed the trial court, holding that the presumption of receipt was effectively rebutted by defendant's sworn testimony that she did not receive notice.⁵⁷

In *Garcia v. City of Houston*⁵⁸ the El Paso court of appeals addressed the presumption that an employee driving a company vehicle is acting in the course of his employment when involved in an accident.⁵⁹ Once the employer presents evidence that the employee is not so engaged, the presumption is overcome and the burden shifts to the injured party to show that the employee was acting within the scope of his employment.⁶⁰

In *Miller v. Kendall*⁶¹ plaintiff brought an action against his former partner, alleging breach of fiduciary duty based upon self-dealing.⁶² The Houston court of appeals noted that, under Texas law, once a fiduciary relationship is pleaded and shown, the burden of proving the fairness of a transaction is upon the fiduciary party who entered into it.⁶³

In *Amis v. Ashworth*⁶⁴ the underlying action involved a claim and cross-claim for assault, arising from an altercation between the parties.⁶⁵ The relator sought review by the court of appeals of an order by the trial court directing him to submit to a mental examination.⁶⁶ The Tyler court of appeals stated that a party moving for a compulsory mental examination bears the burden of proving that the opponent's mental condition is in controversy and that good cause exists for the examination.⁶⁷ The Tyler court granted a conditional writ of mandamus because, although the relator's "state of mind" at the time of the alleged assault may have been in issue, the movant had neither shown how the relator's current "mental health" was "in con-

51. *Id.* at 415.

52. *Id.* at 414.

53. *Id.* at 415.

54. 810 S.W.2d 16 (Tex. App.—Houston [14th Dist.] 1991, no writ).

55. *Id.* at 18.

56. Tex. R. Civ. P. 21a; see *Lorentzen*, 810 S.W.2d at 19.

57. 810 S.W.2d at 20.

58. 799 S.W.2d 496 (Tex. App.—El Paso 1990, writ denied).

59. *Id.* at 498.

60. *Id.*

61. 804 S.W.2d 933 (Tex. App.—Houston [1st Dist.] 1990, no writ).

62. *Id.* at 936.

63. *Id.* at 939.

64. 802 S.W.2d 374 (Tex. App.—Tyler 1990, orig. proceeding [leave denied]).

65. *Id.* at 375.

66. *Id.* at 377.

67. *Id.*

troversy," nor proffered any evidence of a mental defect.⁶⁸

Finally, the Fort Worth court of appeals discussed how burdens of proof affect the phraseology for raising points of error on appeal. In *Cockrell v. Citizens National Bank*⁶⁹ the Fort Worth court of appeals observed that when a party having the burden of proof on a jury question appeals from an adverse fact finding, the appropriate statement of the point of error is that the jury's finding was "against the great weight and preponderance of the evidence."⁷⁰ Conversely, the party without the burden of proof on an adversely determined jury question should refer to the asserted point of error as "insufficient evidence" to support the jury's finding.⁷¹

IV. ARTICLE IV - RELEVANCY AND ITS LIMITS

For the practitioner, one of the most heavily debated concepts is that of relevancy. During the Survey period, a number of opinions considered the interplay of relevancy and countervailing policies against disclosure. Of course, the oft-stated boundary of what is relevant is some logical connection, either directly or by inference, between the proffered evidence and the ultimate fact to be proved.⁷² In *Trans-State Pavers, Inc. v. Haynes*⁷³ the Beaumont court of appeals reversed a lower court which excluded evidence that the plaintiff-driver had been drinking immediately prior to being involved in a one-vehicle accident.⁷⁴ The court noted that while evidence of alcohol consumption standing alone is inadmissible unless there is further evidence of negligence or improper conduct on the part of the user,⁷⁵ evidence of alcohol consumption was relevant here because it bore on the issues of causation and contributory negligence.⁷⁶

In *Fibreboard Corp. v. Pool*⁷⁷ an asbestos product liability case, the Texarkana court of appeals held that certain letters between unrelated third parties were relevant to show the state of scientific knowledge concerning the hazards of asbestos during the 1930s and 40s.⁷⁸ The court held that any unfair prejudice to defendant from admitting the letters did not outweigh their overall probative value.⁷⁹ The court also ruled that autopsy photographs of the individual upon whose death a claim was based were relevant to the issue of the cause of the individual's death.⁸⁰ The court stated the general rule that photographs relevant to any issue in the case are admissi-

68. *Id.* at 378-79.

69. 802 S.W.2d 319 (Tex. App.—Fort Worth 1990, writ requested).

70. *Id.* at 324.

71. *Id.*

72. *Cooke v. Dykstra*, 800 S.W.2d 556, 563 (Tex. App.—Houston [14th Dist.] 1990, no writ), *opinion corrected and modified on rehearing*, 1990 WL 310627 (Tex. App.—Houston [14th Dist.] 1990, no writ).

73. 808 S.W.2d 727 (Tex. App.—Beaumont 1991, writ denied).

74. *Id.* at 731.

75. *Id.* at 733.

76. *Id.*

77. 813 S.W.2d 658 (Tex. App.—Texarkana 1991, no writ).

78. *Id.* at 668-70.

79. *Id.* at 669.

80. *Id.* at 673.

ble,⁸¹ and held that “[t]he fact that photographs are gruesome does not render them inadmissible.”⁸² Specifically, the court held that the photographs were admissible to assist an expert in explaining and supporting his opinion that asbestos, and not lung cancer, was the cause of the individual’s death.⁸³

In *Castro v. Sebesta*⁸⁴ the Houston court of appeals held that it was error to exclude photographs of the scene of an automobile accident. The court stated that the photographs would have helped the jury to better understand the accident and the harm caused by defendant’s conduct.⁸⁵ Defendant, while smoking marijuana, drove head-on into an oncoming car, killing two people and seriously injuring seven others.⁸⁶ Prior to trial, defendant stipulated to actual negligence, gross negligence and proximate causation.⁸⁷ Applying Texas Rule 404(b), the Houston court held that the trial court improperly excluded testimony that defendant had a history of using and selling drugs and had smoked marijuana in the past while driving.⁸⁸ The court determined that defendant’s indifference to the dangers of driving while smoking marijuana was relevant to the degree of culpability of defendant and, hence, the determination of punitive damages.⁸⁹ The Houston appellate court also held that defendant’s driving record was relevant and admissible to show the context of his actions on the night of the accident.⁹⁰

In *Texas Department of Human Services v. White*⁹¹ a case involving involuntary termination of a mother’s parental rights, the trial court had admitted a staged photograph of the daughter and the foster family.⁹² The Supreme Court of Texas reversed the Dallas court of appeals’ finding that it was reversible error to admit a staged photograph.⁹³ The Dallas court, based on Texas Rule 403, had determined that the prejudicial effect of the photograph greatly outweighed its probative value.⁹⁴ However, the Supreme Court of Texas stated that, based on the record as a whole, the parent failed to show that its admission probably did cause the rendition of an improper verdict.⁹⁵ Hence, no reversible error existed.⁹⁶

81. *Id.* at 671.

82. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 671 (Tex. App.—Texarkana 1991, no writ) (citing *Texas Employers Ins. Ass’n. v. Crow*, 218 S.W.2d 230 (Tex. Civ. App.—Eastland 1949), *aff’d*, 148 Tex. 113, 221 S.W.2d 235 (1949)).

83. *Id.* at 673.

84. 808 S.W.2d 189 (Tex. App.—Houston [1st Dist.] 1991, no writ).

85. *Id.* at 193.

86. *Id.* at 191.

87. *Id.*

88. *Id.* at 194.

89. *Id.*

90. *Id.* at 195.

91. 817 S.W.2d 62 (Tex. 1991).

92. *Id.* at 63.

93. *Id.*

94. *Vanessa W. v. Texas Dept. of Human Servs.*, 810 S.W.2d 744 (Tex. App.—Dallas 1991), *rev’d*, 817 S.W.2d 62 (Tex. 1991).

95. 817 S.W.2d at 63.

96. *See* TEX. R. APP. P. 81(b)(1).

In *Davis v. Davis*⁹⁷ the Corpus Christi court of appeals noted that evidence which is otherwise admissible may not be excluded in a civil case because it has been wrongfully obtained.⁹⁸ Similarly, in *Barham v. Turner Construction Co.*⁹⁹ the Dallas court of appeals held that the trial court properly admitted photographs, which arguably may have been obtained in violation of Disiplinary Rule 7-104,¹⁰⁰ to impeach a plaintiff's testimony concerning the extent of his injuries.¹⁰¹

Texas Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."¹⁰² In *Southwestern Bell Telephone Co. v. Vollmer*¹⁰³ the Corpus Christi court of appeals noted that, as a general rule, prior acts of a party with persons unrelated to the case at bar are inadmissible on the grounds of relevancy, materiality and prejudice.¹⁰⁴ But, in determining that the trial court properly excluded similar acts evidence, the court of appeals noted that this type of evidence may be used if the proponent establishes the required predicate; specifically, (1) the existence of similar or reasonably similar conditions; (2) a special connection between the present act and prior acts; and (3) that the acts occurred by means of the same instrumentality.¹⁰⁵

Texas Rule 405(b) provides that where the "character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."¹⁰⁶ In *Eoff v. Hal & Charlie Peterson Foundation*¹⁰⁷ a negligence case brought by a patient against an emergency room physician and a hospital, the San Antonio court of appeals held that once plaintiff had placed the character of the doctor in issue by questioning him on cross-examination concerning his preparation, experience and ability, the hospital could properly call several physicians to testify as to the doctor's reputation as an emergency room physician.¹⁰⁸

Texas Rule 407(a) provides that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, but that it may be admissible for some other purpose.¹⁰⁹ In *E.V.R. II Associates v.*

97. 801 S.W.2d 22 (Tex. App.—Corpus Christi 1990, no writ).

98. *Id.* at 23.

99. 803 S.W.2d 731 (Tex. App.—Dallas 1990, writ denied).

100. Supreme Court of Texas, Code of Professional Responsibility, DR 7-104 (repealed effective Jan. 1, 1990 by order of the Supreme Court of Texas dated Oct. 17, 1989).

101. *Barham*, 803 S.W.2d at 740. *But see*, *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W. 2d 361 (Tex. App.—Fort Worth 1990, no writ), in which the Fort Worth court of appeals held that an appraisal obtained by trespass could be excluded as a discovery sanction. *See* TEX. R. CIV. P. 215(3).

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

103. 805 S.W.2d 825 (Tex. App.—Corpus Christi 1991, writ requested).

104. *Id.* at 831.

105. *Id.* at 831-32.

106. TEX. R. CIV. EVID. 405(b).

107. 811 S.W.2d 187 (Tex. App.—San Antonio 1991, no writ).

108. *Id.* at 197.

109. TEX. R. CIV. EVID. 407(a).

*Brundige*¹¹⁰ a slip and fall case, the Dallas court of appeals held that the trial court properly admitted into evidence photographs showing that a crack in the sidewalk, where plaintiff claimed he fell, had been repaired.¹¹¹ The Dallas court presumed the trial judge found that the pictures would assist the jury to understand the lay of the land, the proximity of nearby structures and other matters relevant to the jury's determination.¹¹² The court of appeals also noted that those photographs were the only known pictures of the scene where plaintiff claimed to have fallen.¹¹³

Texas Rule 408 states the general rule that settlement negotiations are inadmissible to prove liability.¹¹⁴ The rule also provides that evidence offered for some other purpose is not required to be excluded.¹¹⁵ In *Haney v. Purcell Co.*¹¹⁶ plaintiffs' counsel presented a copy of the movie "Poltergeist" to defendants' attorneys at a settlement conference.¹¹⁷ When plaintiff was asked on the stand if her attorneys took the movie to the settlement conference, she responded that she did not know.¹¹⁸ The trial court then sustained an objection to questioning concerning the movie on the basis that it was related to pretrial settlement.¹¹⁹ During subsequent examination of Ms. Haney, however, the trial court overruled a similar objection to further questioning concerning the delivery of the movie.¹²⁰ The court of appeals overruled plaintiffs' point of error challenging the admission of statements concerning the movie. The court reasoned that plaintiffs failed to show that the presentation of the movie was part of the settlement negotiations and that it was not offered at trial for some other purpose.¹²¹

In *C & H Nationwide, Inc. v. Thompson*¹²² the Houston court of appeals also discussed the different types of settlement agreements, holding that the trial court properly excluded a settlement agreement which neither gave the settling defendants a financial stake in any eventual recovery by plaintiffs against the other defendants, nor created a misalignment of the parties.¹²³ The Houston court distinguished "Mary Carter" settlement agreements, which give the settling defendant a financial stake in plaintiff's recovery, and are admissible to show the interest or bias of a co-defendant.¹²⁴

In *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Ven-*

110. 813 S.W.2d 552 (Tex. App.—Dallas 1991, no writ).

111. *Id.* at 556-57.

112. *Id.*

113. *Id.* at 556.

114. TEX. R. CIV. EVID. 408.

115. *Id.*

116. 796 S.W.2d 782 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

117. *Id.* at 789.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 789-90.

122. 810 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1991, writ requested).

123. *Id.* at 270.

124. *Id.* at 269.

ture¹²⁵ however, the Beaumont court of appeals held that a "Mary Carter" agreement was not admissible to show bias on the part of a witness where the settling tort-feasor did not actually remain a party to the suit at the time of trial.¹²⁶ The court held that the rationale for admission of "Mary Carter" settlement agreements was not applicable in that case because there was no misalignment of the parties or misconception of the litigants' respective positions.¹²⁷ The appellate court therefore affirmed the exclusion of the "Mary Carter" agreement offered to show bias on the part of a witness despite the witness' potential financial interest in the outcome of the trial.¹²⁸

Evidence that a person possesses liability insurance coverage is generally not admissible to show whether that person acted wrongfully.¹²⁹ Evidence of insurance, however, is admissible under Texas Rule 411 if offered regarding some other issue relevant to the case.¹³⁰ For example, in *Meuth v. Hartgrove*¹³¹ the Austin court of appeals affirmed the trial court's admission of insurance certificates to rebut appellant's denial of ownership of an entity.¹³²

Finally, in *Eoff v. Hal & Charlie Peterson Foundation*¹³³ the San Antonio court of appeals held that it was not error for the trial court to exclude evidence of a hospital's liability insurance after a witness for the hospital testified that it was a charitable institution.¹³⁴ Specifically, the court determined that testimony concerning the hospital's status as a non-profit charitable institution did not open the door to admission of the fact that the hospital carried liability insurance, because its non-profit status was not relevant to its liability for damages.¹³⁵

V. ARTICLE V - PRIVILEGES

During the Survey period there were a number of cases that the practitioner should be aware of in determining the scope of a number of evidentiary privileges. The rules contained in article V explain the scope of some of these evidentiary privileges, including reports privileged by statute,¹³⁶ the lawyer-client privilege,¹³⁷ the husband-wife communication privilege,¹³⁸ the communications to clergyman privilege,¹³⁹ the political vote privilege,¹⁴⁰ the

125. 798 S.W.2d 805 (Tex. App.—Beaumont 1990), writ *dism'd*, 811 S.W.2d 541, cert *denied*, 112 S.Ct. 180 (1991).

126. *Id.* at 814-15.

127. *Id.* at 815.

128. *Id.* at 814-15.

129. TEX. R. CIV. EVID. 411.

130. *Id.*

131. 811 S.W.2d 626 (Tex. App.—Austin 1990, writ denied).

132. *Id.* at 628.

133. 811 S.W.2d 187 (Tex. App.—San Antonio 1991, no writ).

134. *Id.* at 197.

135. *Id.*

136. TEX. R. CIV. EVID. 502.

137. TEX. R. CIV. EVID. 503.

138. TEX. R. CIV. EVID. 504.

139. TEX. R. CIV. EVID. 505.

140. TEX. R. CIV. EVID. 506.

privilege not to disclose trade secrets,¹⁴¹ the privilege of the government not to reveal the identity of an informer,¹⁴² the physician-patient privilege,¹⁴³ and the privilege relating to mental health information.¹⁴⁴

In *Axelson, Inc. v. McIlhany*¹⁴⁵ the trial court denied discovery of an internal investigation performed by one of defendants in part on the ground that it was protected by attorney-client privilege.¹⁴⁶ The Supreme Court of Texas reversed, noting that any claim of privilege had been waived under Texas Rule 511, because there was evidence that the investigation was disclosed to the FBI, IRS and the *Wall Street Journal*.¹⁴⁷

In *Enron Oil and Gas Co. v. Flores*¹⁴⁸ the San Antonio court of appeals reviewed an order of the trial court granting discovery of documents, which the relator asserted contained privileged trade secrets, and which the trial court granted discovery of without first having viewed the documents in camera to determine whether they should be protected.¹⁴⁹ The court cited Texas Rule of Civil Procedure 166b(4)¹⁵⁰ for the proposition that an in camera review is not automatically required whenever a privilege with respect to documents is claimed.¹⁵¹ The rules require the trial court to weigh the need for discovery against the desirability of preserving the secrecy of the material in question before permitting disclosure.¹⁵² The court of appeals determined that the trial court had received sufficient testimony concerning the documents to enable it to issue the discovery order without first reviewing the documents in camera.¹⁵³

In *State v. Lowry*¹⁵⁴ the Supreme Court of Texas considered the scope of the informant and investigative privileges available to the Attorney General of Texas.¹⁵⁵ In the underlying matter, an antitrust action by the State against a number of insurers, the trial court ordered the Attorney General to produce documents obtained through civil investigative demands and required the identification of the authors of citizen complaint letters.¹⁵⁶ In the mandamus proceeding before the supreme court, the Attorney General asserted a statutory privilege against disclosure of investigative materials, citing the Texas Business and Commerce Code section 15.10(i).¹⁵⁷ Section 15.10 permits disclosure if ordered by a court for good cause shown.¹⁵⁸ The

141. TEX. R. CIV. EVID. 507.

142. TEX. R. CIV. EVID. 508.

143. TEX. R. CIV. EVID. 509.

144. TEX. R. CIV. EVID. 510.

145. 798 S.W.2d 550 (Tex. 1990).

146. *Id.* at 553-54.

147. *Id.* at 554.

148. 810 S.W.2d 408 (Tex. App.—San Antonio 1991, orig. proceeding [leave denied]).

149. *Id.* at 410-11.

150. TEX. R. CIV. P. 166b(4).

151. *Id.*; *Enron Oil and Gas Co.*, 810 S.W.2d at 413.

152. *Id.* at 413.

153. *Id.*

154. 802 S.W.2d 669 (Tex. 1991, orig. proceeding).

155. *Id.* at 673-74.

156. *Id.* at 670.

157. *Id.* at 671.

158. TEX. BUS. & COM. CODE ANN. § 15.10 (Vernon 1987).

supreme court rejected the insurers' argument that the permissive discovery language found in the Texas Rules of Civil Procedure overrides the confidentiality provisions of section 15.10.¹⁵⁹ Nonetheless, the court found that the insurers had demonstrated good cause for disclosure by showing that they had a substantial need of the materials and were unable to obtain the materials by other means.¹⁶⁰

The Attorney General also sought to protect portions of complaint letters that would identify the authors, unless their consent had been obtained.¹⁶¹ The court stated that the informant privilege under Texas Rule 508 requires a showing that the author provided information assisting in the investigation of a possible violation of the law to a law enforcement officer.¹⁶² Despite the failure of the Attorney General to offer any factual predicate for the privilege, the supreme court held that it was error for the trial court to order production of the letters without first reviewing them in camera to determine whether the letters themselves established the required foundation for exerting the informant privilege.¹⁶³

*Eoff v. Hal and Charlie Peterson Foundation*¹⁶⁴ presents a seemingly anomalous look at Texas Rule 509. In that case, defendant offered the medical records of one of plaintiff's witnesses for purposes of impeaching the witness' testimony.¹⁶⁵ Rule 509 provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed."¹⁶⁶ When the witnesses' medical records were offered, plaintiff's counsel objected.¹⁶⁷ Despite this the trial court held that because counsel for plaintiffs did not represent the witness, counsel was not qualified to claim the privilege.¹⁶⁸ Texas Rule 509(c)(1) provides that the privilege may only be claimed by the patient or by a representative of the patient acting on the patient's behalf.¹⁶⁹ A further look at the physician-patient relationship is presented by *Garay v. County of Bexar*.¹⁷⁰ In that case the San Antonio court of appeals stated the rule that the physician-patient relationship is contractual, wholly voluntary and is created by agreement, either express or implied.¹⁷¹ The court appears to have held that although the patient at issue was unconscious at the time and could not agree to the medical examination, a physician-patient relationship was established because medical personnel had the responsibility to examine the patient.¹⁷²

159. *Lowry*, 802 S.W.2d at 672.

160. *Id.* at 673 (citing TEX. R. CIV. P. 166b(3)).

161. *Id.*

162. *Id.*; see TEX. R. CIV. EVID. 508(a).

163. *Lowry*, 802 S.W.2d at 673.

164. 811 S.W.2d 187 (Tex. App.—San Antonio 1991, no writ).

165. *Id.* at 194.

166. TEX. R. CIV. EVID. 509(b)(2).

167. *Eoff*, 811 S.W.2d at 195.

168. *Id.*

169. TEX. R. CIV. EVID. 509(c)(1).

170. 810 S.W.2d 760 (Tex. App.—San Antonio 1991, writ denied).

171. *Id.* at 764.

172. *Id.*

Texas Rule 510 provides that the records of the identity, diagnosis, evaluation or treatment of a patient kept by a "professional" are confidential and shall not be disclosed.¹⁷³ In *Dossey v. Salazar*¹⁷⁴ the Houston court of appeals considered the exception found in Texas Rule 510(d)(5), which permits disclosure of records regarding the physical, mental or emotional condition of a patient in a proceeding where the party relies upon the condition as a part of the party's claim or defense.¹⁷⁵ The court noted that Rule 510(d)(5) is intended to prevent the offensive use of the physician-patient privilege, such as where a party places his mental or physical condition at issue and then attempts to use the privilege to conceal evidence of that condition.¹⁷⁶ Here, the court reversed the trial court's broad discovery order on the ground that defendant had not placed his mental condition in issue.¹⁷⁷

VI. ARTICLE VI - WITNESSES

During the Survey period there were a number of cases which emphasize for the trial practitioner the opportunities and restrictions which arise under Article VI in determining witnesses at trial. Texas Rule 601(a) states the general rule that every person is competent to be a witness except as otherwise provided in the Rules of Evidence.¹⁷⁸ For example, in *Mobil Oil Corp. v. Floyd*¹⁷⁹ a personal injury case sounding in negligence, Mobil sought a writ of mandamus to reverse the trial court's denial of its motion to compel the deposition of the injured party.¹⁸⁰ In a prior proceeding, the injured party had been declared non compos mentis and a permanent guardian was appointed for him.¹⁸¹ Mobil argued that the injured party was not per se "insane" within the meaning of Texas Rule 601(a)(1).¹⁸² The Beaumont court of appeals agreed and held that the fact of a guardianship does not automatically render a party-witness incompetent to testify, it merely creates a presumption of incompetency.¹⁸³ The court reserved, however, until trial, the determination of the admissibility of the testimony at trial.¹⁸⁴

Texas Rule 601(b) is the present version of the Dead Man's Statute in

173. TEX. R. CIV. EVID. 510(b)(2).

174. 808 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [leave denied]).

175. *Id.* at 147; TEX. R. CIV. EVID. 510(d)(5).

176. *Dossey*, 808 S.W.2d at 147.

177. *Id.* at 148.

178. TEX. R. CIV. EVID. 601(a).

179. 810 S.W.2d 321 (Tex. App.—Beaumont 1991, orig. proceeding).

180. *Id.* at 323.

181. *Id.*

182. *Id.* at 323-24.

183. *Id.* The court of appeals also emphasized that a party to a suit ordinarily has the right to depose an opposing party, citing TEX. R. CIV. P. 200(1). *Id.* at 323.

184. *Id.* at 324.

Texas.¹⁸⁵ In *Quitta v. Fossatti*¹⁸⁶ the Corpus Christi court of appeals construed Rule 601(b) narrowly, holding that it did not prevent a tenant from testifying as to oral agreements between a tenant and his deceased landlord.¹⁸⁷ Specifically, the court found that Rule 601(b) did not apply because the opposing parties were neither heirs nor legal representatives of the deceased, but were co-owners of the leased property.¹⁸⁸ The court stated that even assuming Rule 601(b) applied, there was sufficient independent corroborating evidence in the form of testimony from the decedent's brother that was consistent with the existence of an alleged oral modification of the lease.¹⁸⁹

Texas Rule 603 and its counterpart Federal Rule 603 provide that before testifying, a witness is required to make an oath or affirmation that she will testify truthfully.¹⁹⁰ In *Ferguson v. Commissioner*¹⁹¹ the Tax Court dismissed a taxpayer's lawsuit for lack of prosecution after she refused on religious grounds to swear or affirm prior to giving testimony.¹⁹² The Fifth Circuit reversed, holding that the judge erred by summarily dismissing the taxpayer's religious beliefs and by conditioning her right to testify on what she perceived as a violation of those beliefs.¹⁹³

Texas Rule 607 provides that the credibility of a witness may be attacked by any party.¹⁹⁴ In *Trans-State Pavers, Inc. v. Haynes*¹⁹⁵ the Beaumont court of appeals held that it was error for the trial court to exclude evidence of alcohol consumption by the driver of an automobile involved in an accident once he had denied taking anything that would have affected his ability to drive safely.¹⁹⁶ The court determined that the failure by the trial court to permit impeachment of the driver with respect to his consumption of alcohol was reversible error.¹⁹⁷

During the Survey period, amendments to Federal Rule 609(a), which concerns impeachment by evidence of conviction of a crime, became effec-

185. See *Quitta v. Fossatti*, 808 S.W.2d 636, 641 (Tex. App.—Corpus Christi 1991, writ denied). Rule 601(b) provides in part:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement.

TEX. R. CIV. EVID. 601(b).

186. 808 S.W.2d 636 (Tex. App.—Corpus Christi 1991, no writ).

187. *Id.* at 641.

188. *Id.*

189. *Id.* at 641-42.

190. TEX. R. CIV. EVID. 603; FED. R. EVID. 603.

191. 921 F.2d 588 (5th Cir. 1991).

192. *Id.* at 589.

193. *Id.* at 590-91.

194. TEX. R. CIV. EVID. 607.

195. 808 S.W.2d 727 (Tex. App.—Beaumont 1991, writ denied).

196. *Id.* at 733.

197. *Id.* at 732-34.

tive.¹⁹⁸ The amendment effects two changes to Rule 609(a). First, the restriction that evidence of a conviction may only be elicited on cross-examination was eliminated.¹⁹⁹ Second, the change clarifies the distinction between impeachment of an accused who chooses to testify and impeachment of other witnesses.²⁰⁰

Texas Rule 611(a) gives the trial court broad discretion to exercise control over the mode and order of interrogating witnesses and presenting evidence. For example, a trial court may, pursuant to Texas Rule 611(a)(2), grant a motion to the effect that one defendant's objection preserves error for all defendants.²⁰¹ Such a ruling eliminates time consuming objections from multiple defendants and enables each defendant to rely on any other defendant's objections as if it were his own.²⁰²

In *Miles v. Olin Corp.*²⁰³ the Fifth Circuit noted that the district court, in exercising its discretion under Federal Rule 611(a), must maintain both objectivity and the appearance of neutrality when it intervenes to terminate the examination of a witness.²⁰⁴ Still, the trial court's latitude is wide. In *Miles* the court determined that the district court's comments concerning the redundant, repetitive and argumentative nature of counsel's cross-examination were supported by the record and well within the bounds of acceptable conduct.²⁰⁵

VII. ARTICLE VII - OPINIONS AND EXPERT TESTIMONY

As expected, there was significant activity during the Survey period in the area of expert opinion testimony. Generally, the cases signal stricter scrutiny by the courts prior to admitting opinion testimony. Of interest are the proposed amendments to Federal Rules 702 and 705. These were proposed on June 13, 1991, by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.²⁰⁶ The Advisory Committee

198. Rule 609 now reads as follows:

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a) (as amended by order of the United States Supreme Court dated January 26, 1990, effective December 1, 1990).

199. *Id.*

200. *Id.*

201. See *Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.—Corpus Christi 1990, no writ).

202. *Id.* at 201-02.

203. 922 F.2d 1221 (5th Cir. 1991).

204. *Id.* at 1228.

205. *Id.* at 1228-29.

206. See Proposed Amendments to the Federal Rules of Evidence, cited at 112 S.Ct. CXCIV-CXCVII. The text of the proposed Amendment to Federal Rule 702 reads as follows: Testimony providing scientific, technical, or other specialized information, in

Notes specify that the amendment is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues.²⁰⁷ The Advisory Committee Notes indicate that the proposed amendment to Rule 705²⁰⁸ will eliminate a conflict with proposed Rule 702 which endorses prior disclosure of underlying facts.²⁰⁹

Texas Rule 701 provides that the testimony of a lay witness in the form of opinions or inferences is limited to those which are either rationally based on the perception of the witness or are helpful to a clear understanding of his testimony regarding the fact at issue.²¹⁰ In *E-Z Mart Stores, Inc. v. Haver*²¹¹ defendant appealed a jury finding that its negligence was a proximate cause of a store clerk's death.²¹² In that case, a store clerk working the late shift at E-Z Mart disappeared sometime during the night and was found dead five days later.²¹³ A police officer offered an opinion on behalf of the estate that if there had been a security system which had sounded an alarm in the police station, the clerk would be alive today.²¹⁴ The Texarkana court of appeals held that the officer's opinion was not based upon his perception of the facts and was pure speculation.²¹⁵

Another witness, who was qualified as an alarm expert under Texas Rule 702, also gave an opinion that the clerk would likely be alive had there been an alarm system at E-Z Mart at the time of her death.²¹⁶ Texas Rule 702 provides that in order to give an opinion concerning specialized knowledge, a witness must be qualified as an expert by virtue of his knowledge, skill, experience, training or education.²¹⁷ The court determined that the alarm expert's opinion was also based merely upon his speculation or feelings about non-scientific and non-technical matters and did not constitute probative evidence of proximate cause.²¹⁸ Accordingly, the appellate court disregarded

the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference, or reason or basis therefor, that has not been seasonably disclosed as required by Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure.

Id. at CXCIV.

207. *Id.*

208. The proposed amendment to Federal Rule 705 reads as follows:

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Id. at CXCVII.

209. *Id.*

210. TEX. R. CIV. EVID. 701.

211. 797 S.W.2d 116 (Tex. App.—Texarkana 1990, writ granted).

212. *Id.* at 117.

213. *Id.*

214. *Id.* at 119.

215. *Id.*

216. *Id.*

217. TEX. R. CIV. EVID. 702.

218. *E-Z Mart*, 797 S.W.2d at 119.

these opinions and held that there was insufficient evidence from which reasonable minds could infer that E-Z Mart's conduct was a cause in fact of the clerk's death.²¹⁹ Thus, the court reversed the jury verdict.²²⁰

In *Jones v. Jones*,²²¹ a divorce action, the Texarkana court of appeals, citing Texas Rule 701, held that the trial court properly admitted the wife's testimony to the effect that her husband would have beaten her if she had not executed certain deeds transferring title to marital property.²²² The Texarkana court noted that there was extensive evidence in the record to support her fears of violence and determined that her testimony was an admissible opinion rationally based on her knowledge under Rule 701.²²³ Hence, the key to such situations is the question of speculation.

In a significant opinion, *Christophersen v. Allied-Signal Corp.*,²²⁴ a divided Fifth Circuit, sitting en banc, affirmed the district court's exclusion of crucial expert testimony in a wrongful death action brought under the substantive law of Texas.²²⁵ In *Christophersen* the plaintiffs alleged that the deceased employee contracted colon cancer as a result of his repeated exposure to nickel and cadmium at a Marathon Manufacturing Company plant in Waco, Texas.²²⁶ In response to defendant Marathon's motion for summary judgment, plaintiffs presented the affidavit of their expert witness who concluded that the decedent's exposure at Marathon caused the cancer resulting in his death.²²⁷ The district court determined that the expert's opinion, which was the sole evidence of causation, should be excluded and granted Marathon's motion for summary judgment.²²⁸

On appeal, the Fifth Circuit established a four-step approach for determining the admissibility of expert testimony.²²⁹ First, the trial court must determine whether the witness is qualified under Federal Rule 702 to express an expert opinion.²³⁰ Second, the trial court must determine whether the facts upon which the expert relies are the same type as those relied upon by other experts in the field, as required by Federal Rule 703.²³¹ Third, the district court must determine whether the expert, in reaching his conclusion, used a well-founded methodology.²³² Once the expert testimony has passed the first three tests, the district court must screen the testimony under Federal Rule 403 to determine whether the testimony's potential for unfair prej-

219. *Id.* at 119-20.

220. *Id.*

221. 804 S.W.2d 623 (Tex. App.—Texarkana 1991, no writ).

222. *Id.* at 627.

223. *Id.*

224. *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, (5th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 12, 1991) (No. 91-785).

225. *Id.* at 1108.

226. *Id.*

227. *Id.* at 1109.

228. *Id.*

229. *Id.* at 1110 (the en banc Fifth Circuit reversed the prior panel decision).

230. *Id.*

231. *Id.*

232. *Id.* (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). This is known as the "Frye" test.

udice substantially outweighs its probative value.²³³ Significantly, the *Christophersen* opinion endorses careful scrutiny at each step of the inquiry prior to allowing the admission of expert testimony.²³⁴

Having so stated, the Fifth Circuit then affirmed the trial court's exclusion of plaintiff's expert's testimony based on both Rule 703 and the *Frye* test.²³⁵ Applying Federal Rule 703, the Fifth Circuit held that where the factual information underlying an expert's opinion is found to be critically incomplete or grossly inaccurate, a district court may exclude the expert's opinion altogether.²³⁶ The Fifth Circuit stated that "[d]istrict judges may reject opinions founded on critical facts that are plainly untrustworthy, principally because such an opinion cannot be helpful to the jury."²³⁷

In discussing the *Frye* test, the Fifth Circuit stated that the trial court should ask "whether the methodology or reasoning that the expert uses to connect the facts to his conclusion is generally accepted within the relevant scientific community."²³⁸ Applying that standard to the case at bar, the court determined that the methodology used by plaintiff's expert lacked support in the scientific community.²³⁹ The Fifth Circuit also noted that the trial judge, applying Federal Rule 702, properly scrutinized the expert's lack of specialized experience and knowledge in the particular area for which he was providing an opinion.²⁴⁰

In *Slaughter v. Southern Talc Co.*²⁴¹ the Fifth Circuit construed the requirements of Federal Rule 703. The panel affirmed the trial court's exclusion of expert testimony under Rule 703 because the reports relied on by the experts contained many obvious errors, which would cause his testimony to be of no value to the trier of fact.²⁴² The panel also rejected the appellant's contention that Federal Rule 705 does not require that factual support for the expert's opinion expressed in an affidavit be contained therein.²⁴³

*Ramsey v. Jones Enterprises*²⁴⁴ involved a dispute between several parties with regard to the title to certain real property.²⁴⁵ The Beaumont court held that the trial court erred in allowing the prevailing party to prove up title by nothing more than the oral expert testimony of an attorney.²⁴⁶ The Beaumont court then stated that where documents pertaining to title exist, the testimony of an expert witness, standing alone, constitutes no evidence whatsoever as to title.²⁴⁷ Although the case is significant to the practitioner as an

233. *Id.*

234. *Id.*

235. *Id.* at 1113-16.

236. *Id.* at 1114.

237. *Id.*

238. *Id.* at 1115.

239. *Id.*

240. *Id.* at 1112-13.

241. 919 F.2d 304 (5th Cir. 1990).

242. *Id.* at 307.

243. *Id.* at 307 n.4.

244. 810 S.W.2d 902 (Tex. App.—Beaumont 1991, writ denied).

245. *Id.* at 903.

246. *Id.* at 904.

247. *Id.* at 905.

example of the pitfalls that may exist for the inexact and unprepared lawyer, *Ramsey* should not be read to preclude testimony by an expert as to the ultimate issue to be decided in a case.²⁴⁸

The opinion in *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*²⁴⁹ illustrates that a witness qualified by virtue of education to testify as an expert in one area of expertise, may also be qualified by virtue of practical experience to testify as an expert in an overlapping area.²⁵⁰ In *White Budd* the Beaumont court of appeals sustained the lower court and held that a witness who was qualified as an engineer by virtue of his education could, based on his work experience, also give an opinion with regard to the professional standard of care for an architect responsible for an architectural project or for a combined engineering and architectural project.²⁵¹ The Beaumont court further determined that the expert's testimony and opinion were probably helpful to the triers of fact as required by Texas Rule of Civil Evidence 702.²⁵²

But, in *Prellwitz v. Cromwell, Truemper, Levy, Parker and Woodsmale, Inc.*,²⁵³ another case involving allegations of architectural/engineering malpractice, the Dallas court of appeals applied the rule that expert testimony about the standard of care within a particular licensed profession must come from one licensed in that profession.²⁵⁴ In an apparent conflict with *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*²⁵⁵ the Dallas court stated that because Texas requires a person to obtain a license to practice as an architect or a registered mechanical engineer, the trial court appropriately excluded the proffered testimony of two witnesses not licensed in those professions.²⁵⁶

Texas Rule 704 provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the jury.²⁵⁷ In *Harvey v. Culpepper*²⁵⁸ the Corpus Christi court of appeals noted that an expert may state an opinion on a mixed question of fact and law, so long as the opinion is limited to the relevant issues and is founded upon proper legal concepts.²⁵⁹ Specifically, the Corpus Christi court affirmed the trial court's exclusion of the opinion of defendant's expert that defendant was not negligent, since the expert was not asked to assume a legally correct definition of negligence before he was asked

248. See TEX. R. CIV. EVID. 704 (opinion on ultimate issue).

249. 798 S.W.2d 805 (Tex. App.—Beaumont 1990, writ *dism'd*, 811 S.W.2d 541, cert. denied, 112 S.Ct. 180 (1991)).

250. *Id.* at 815-16.

251. *Id.*

252. *Id.* at 816.

253. 802 S.W.2d 316 (Tex. App.—Dallas 1990, no writ).

254. *Id.* at 317.

255. 798 S.W.2d 805 (Tex. App.—Beaumont 1990, writ *dism'd*, 811 S.W.2d 541, cert. denied, 112 S.Ct. 180 (1991)).

256. *Prellwitz*, 802 S.W.2d at 318.

257. TEX. R. CIV. E. 704.

258. 801 S.W.2d 596 (Tex. App.—Corpus Christi 1990, no writ).

259. *Id.*

that ultimate question in the case.²⁶⁰

In *Decker v. Hatfield*²⁶¹ the Eastland court of appeals considered the relationship between Texas Rules 703, 705, and 802, where an expert used hearsay testimony as a basis for his opinion and thereafter was asked to explain the basis for that opinion.²⁶² Texas Rule 703 provides that the facts or data relied on by an expert need not be admissible in evidence if they are of a type reasonably relied on by experts in the particular field in forming opinions or inferences on the subject.²⁶³ Texas Rule 705 provides that an expert may disclose, during examination, the facts or data underlying his opinion.²⁶⁴ The Eastland court distinguished precedent from the Supreme Court of Texas to the effect that ordinarily an expert witness should not be permitted to recount a hearsay conversation even if that conversation forms a part of the basis for his opinion.²⁶⁵ The Eastland appellate court held that an expert is entitled to explain the basis for his opinions under Rule 705 even if that opens the door to hearsay testimony.²⁶⁶ The court specifically noted, however, that in this case the appellant failed to raise an argument, based on Texas Rule 403, that the probative value of the testimony was outweighed by the danger of unfair prejudice.²⁶⁷ Hence, the court overruled the appellant's objection based on hearsay grounds alone.²⁶⁸

VIII. ARTICLE VIII - HEARSAY

During the Survey period, a number of cases were decided which illustrate the intricacies of the rules governing hearsay. Texas Rule 802 states the general rule that hearsay, as defined in Rule 801, is not admissible.²⁶⁹ Texas Rule 803 provides the exceptions to the general rule.²⁷⁰ In *Anthony Pools v. Charles & David, Inc.*²⁷¹ the Houston court of appeals held that it was error for the trial court to admit an affidavit made two years prior to the affiant's deposition.²⁷² The court reasoned that the affidavit was hearsay and that its proponent failed to qualify it under any of the exceptions listed under Texas Rule 803.²⁷³ In *Worley v. Butler*²⁷⁴ a suit by an attorney to recover legal fees incurred in bringing a lawsuit, the Corpus Christi court of appeals held

260. *Id.* at 601.

261. 798 S.W.2d 637 (Tex. App.—Eastland 1990, writ dismissed w.o.j.).

262. *Id.* at 638-39.

263. TEX. R. CIV. EVID. 703. The first sentence of Texas Rule of Civil Evidence 703 was amended effective September 1, 1990, to conform it to the rules of discovery by replacing the phrase "made known to him" with "reviewed by the expert." See Vernon's Texas Rules Annotated, 1991 Special Pamphlet p. 72 (West 1991).

264. TEX. R. CIV. EVID. 705.

265. *Decker*, 798 S.W.2d at 638 (citing *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987)).

266. *Id.* at 639.

267. *Id.*

268. *Id.*

269. TEX. R. CIV. EVID. 802.

270. TEX. R. CIV. EVID. 803.

271. 797 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

272. *Id.* at 676.

273. *Id.*

274. 809 S.W.2d 242 (Tex. App.—Corpus Christi 1990, no writ).

that the transcript of the client's testimony during that prior lawsuit as to his fee arrangement was not hearsay.²⁷⁵ The Corpus Christi court determined that the client's prior testimony constituted an admission by a party-opponent within the meaning of Texas Rule 801(e)(2)(A), because it was made in his individual capacity.²⁷⁶

In *Rosendorf v. Blackmon*²⁷⁷ a suit involving a dispute over custody of a minor child, the trial court admitted testimony by one parent and also from a child protective services specialist, to the effect that the child had made statements to them suggesting sexual abuse by the other parent.²⁷⁸ The Corpus Christi court of appeals reversed, holding that the statements were inadmissible hearsay.²⁷⁹ Specifically, the Corpus Christi court held that the statements were not admissible under Texas Rule 801(e)(2), as admissions by a party-opponent, because the statements were not offered against the child-declarant.²⁸⁰ The court further held that the child's statements were not admissible as excited utterances under Texas Rule 803(a)(2) because the child's statements were not spontaneous utterances made under the immediate influence of an exciting event.²⁸¹ Rather, the alleged abuse preceded the alleged statements by several weeks.²⁸²

In *Marshall v. Telecommunications Specialists, Inc.*²⁸³ the Houston court of appeals (1st Dist.) reversed the judgment of the trial court, which was based primarily upon hearsay testimony.²⁸⁴ The suit involved a dispute over alleged unpaid rentals under a lease agreement.²⁸⁵ The only evidence of the amount of the unpaid rentals was the testimony of the appellee's collection department supervisor from a document not admitted into evidence.²⁸⁶ The court reasoned that because the document was a statement made by someone other than the witness, and the material derived from the document was offered into evidence to prove the truth of the matter asserted, the testimony was inadmissible hearsay as defined in Texas Rule 801(d).²⁸⁷

Federal Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.²⁸⁸ In *Sanford v. Johns-Manville Sales Corp.*²⁸⁹ the Fifth Circuit's determination under Federal Rule

275. *Id.* at 245.

276. *Id.*

277. 800 S.W.2d 377, (Tex. App.—Corpus Christi 1990, no writ).

278. *Id.* at 379-80.

279. *Id.* at 380.

280. *Id.*

281. *Id.*

282. *Id.*

283. 806 S.W.2d 904 (Tex. App.—Houston [1st Dist.] 1991, no writ).

284. *Id.* at 906.

285. *Id.* at 905-06.

286. *Id.*

287. *Id.* at 906.

288. FED. R. EVID. 801(d)(2)(D). The corresponding provision in the Texas rules is Texas Rule of Civil Evidence 801(e)(2)(D).

289. 923 F.2d 1142 (5th Cir. 1991).

801(d)(2)(D) that a report introduced at trial was properly admitted turned on the application of the Texas law of agency.²⁹⁰ In this asbestosis case, plaintiff went to the office of defendant's testifying expert physician for the purposes of an examination.²⁹¹ When the expert witness was unavailable, his partner performed an examination of plaintiff which revealed asbestosis.²⁹² Remarkably, a subsequent examination by the expert witness found no evidence of asbestosis.²⁹³ The trial court ruled the report by the expert witness' partner inadmissible. The Fifth Circuit held that the report was properly excluded and did not fall within Rule 801(d)(2)(D), because the expert witness' partner was not an agent of the nine defendant asbestos manufacturers under Texas law.²⁹⁴ Under Texas law, an agent is a person authorized to act for and on behalf of the principal, subject to the principal's control.²⁹⁵

In *Cooke v. Dykstra*²⁹⁶ the Houston court of appeals held that a document offered for the limited purpose of showing reliance on a statement in the document by a party was not hearsay because it was not offered to prove the truth of the matter asserted in the document.²⁹⁷ In *C & H Nationwide, Inc. v. Thompson*²⁹⁸ the Houston court of appeals determined that the two prior written statements offered were statements other than ones made by the witness while testifying, offered into evidence to prove the truth of the matter asserted, and therefore hearsay as defined in Texas Rule 801(d).²⁹⁹ However, the court held that it was harmless error for the trial court to admit the statements into evidence.³⁰⁰ The statements were admitted after the witness' deposition testimony was read into evidence and were consistent with that deposition testimony.³⁰¹ In *Reviea v. Marine Drilling Co.*³⁰² the Corpus Christi court of appeals held that testimony which technically constituted hearsay within hearsay was, nevertheless, admissible.³⁰³ Texas Rule 805 provides that hearsay included within hearsay is not excluded as hearsay if both statements fall within a hearsay exception.³⁰⁴ In *Reviea* a personal injury action under the Jones Act, a claims investigator testified that a co-worker of plaintiff told the claims investigator that plaintiff had complained to the co-worker of a prior knee injury.³⁰⁵

290. *Id.* at 1149-50.

291. *Id.* at 1149.

292. *Id.*

293. *Id.*

294. *Id.* at 1149-50.

295. *Id.* at 1149 (citing *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 269 (5th Cir. 1980)).

296. 800 S.W.2d 556 (Tex. App.—Houston [14th Dist.] 1990, *opinion corrected and modified on reh'g* 1990 WL 310627 (Tex. App.—Houston [14th Dist.] 1990).

297. *Id.* at 562.

298. 810 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1991, writ requested).

299. *Id.*

300. *Id.* at 268.

301. *Id.*

302. 800 S.W.2d 252 (Tex. App.—Corpus Christi 1990, writ denied).

303. *Id.* at 257.

304. TEX. R. CIV. EVID. 805.

305. *Reviea*, 800 S.W.2d at 257.

In its analysis, the Corpus Christi court determined that the statement by plaintiff to the co-worker was a statement by a party offered against a party and therefore admissible under Texas Rule 801(e)(2)(A).³⁰⁶ Ordinarily, the statement by the claims investigator relating the co-worker's statement would be inadmissible hearsay, but in this case, the co-worker testified at trial and was subject to cross-examination concerning his statement about plaintiff's prior knee injury.³⁰⁷ The co-worker's testimony at trial was consistent with his statement to the claims investigator, but was alleged to have been fabricated.³⁰⁸ The court held that the claims investigator's testimony was admissible pursuant to Texas Rule 801(e)(1)(B) as a prior consistent statement offered to rebut plaintiff's implied charge of recent fabrication of the testimony at trial.³⁰⁹

In *In re Marriage of D. M. B.*,³¹⁰ a custody proceeding, the trial court excluded double hearsay statements reflected in the records of an examining psychologist which were allegedly made to the psychologist by the minor child.³¹¹ Without deciding the hearsay issues, the Amarillo court of appeals held that the Texas Rules did not eliminate the common law requirement that in a custody proceeding, any testimony by a child as to its preference may only be received if the child is of a sufficiently mature age to make reliable expressions of his or her preferences.³¹² The Amarillo court then determined that the eight-year-old child was not yet of a mature enough age to testify as to preference.³¹³ Therefore, the testimony by the psychologist, as reflected in his report, was inadmissible.³¹⁴

In *Wilson v. Zapata Off-Shore Co.*³¹⁵ the Fifth Circuit addressed a double hearsay problem in the context of the business record exception of Federal Rule 803(6).³¹⁶ The trial court admitted a written record of statements made by plaintiff's sister to a hospital social worker to the effect that plaintiff was a habitual liar.³¹⁷ The Fifth Circuit noted that if the source of the information and the recorder of the information are acting in the regular course of business, the multiple hearsay is allowed in under Federal Rule 803(6).³¹⁸ The court, however, looked at the two levels of hearsay separately. The court found first, that the record made by the social worker fell within the ambit of Rule 803(6).³¹⁹ Second, the hearsay statements made to the social

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* Texas Rule 801(e)(1)(B) provides, in part, that a statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement and the statement is consistent with this testimony and is offered to rebut an express or implied charge against him of recent fabrication. TEX. R. CIV. EVID. 801(e)(1)(B).

310. 798 S.W.2d 399 (Tex. App.—Amarillo 1990, no writ).

311. *Id.* at 401.

312. *Id.* at 402-03.

313. *Id.* at 403.

314. *Id.*

315. 939 F.2d 260 (5th Cir. 1991)

316. *Id.* at 271.

317. *Id.*

318. *Id.*

319. *Id.* at 271-72.

worker may have been admissible under Rule 803(4) as statements made for purposes of medical diagnosis or treatment.³²⁰ Nonetheless, the Fifth Circuit stated that even though the credibility of the patient was important to the treating psychiatrists, the value of the statements may have been compromised by their generality and conclusory nature.³²¹ Despite this, the Fifth Circuit still held that even if the admission of the statements was error, it was harmless error in this case.³²²

In *Rock v. Huffco Gas & Oil Co.*³²³ the Fifth Circuit affirmed a number of rulings by the district court excluding evidence on hearsay grounds. The *Rock* panel focused on the trustworthiness, or lack thereof, of the proffered hearsay statements.³²⁴ In *Rock*, an employee of an offshore catering service alleged that he was injured when his foot fell through a rusted step on an oil platform and that the injury was later aggravated when he slipped and fell on a greasy spot on a drilling rig.³²⁵ Mr. Rock eventually died from a heart attack, which was allegedly caused in part by circulatory problems arising from his ankle injury.³²⁶ In response to summary judgment motions filed by defendants, plaintiff offered statements made by Rock to physicians treating his ankle and memorialized in their medical logs.³²⁷ The Fifth Circuit upheld the district court's exclusion of the statements on hearsay grounds, finding that the hearsay exception for statements made for purposes of medical diagnosis, found in Federal Rule 803(4), did not apply.³²⁸ The Fifth Circuit stated that the "[a]dmissibility of a statement made to one's physician turns on the guarantee of the absent declarant's trustworthiness."³²⁹ The Fifth Circuit then engaged in a review of the physician's deposition testimony to determine whether plaintiff's statements concerning the cause of his injuries were pertinent and therefore trustworthy.³³⁰ Because the court concluded the statements were not pertinent to the physicians' diagnosis and treatment, the court found were not trustworthy and therefore inadmissible under Rule 803(4).³³¹

The *Rock* panel also rejected plaintiff's argument that the hearsay statements fell within the business record exception found in Rule 803(6).³³² The Fifth Circuit determined that because Rock was not acting in the regular course of business when he made his statements to the doctors, Rule 803(6) did not apply.³³³ The Fifth Circuit endorsed the proposition that if anyone

320. *Id.*

321. *Id.* at 272.

322. *Id.*

323. 922 F.2d 272 (5th Cir. 1991).

324. *Id.* at 277-83.

325. *Id.* at 275-76.

326. *Id.* at 276. Mr. Rock's wife then became the plaintiff, individually, as executrix, and on behalf of two minor children. *Id.* at 277.

327. *Id.* at 277.

328. *Id.* at 277-78.

329. *Id.* at 277.

330. *Id.* at 278.

331. *Id.*

332. *Id.* at 279.

333. *Id.*

participating in the record keeping process was not acting in the regular course of his business, the records are not admissible under Rule 803(6).³³⁴

In *Rock* plaintiff also tendered copies of various accident reports and logs prepared with respect to his injuries.³³⁵ The Fifth Circuit affirmed the trial court's holding that none of the reports and logs fit into any of the hearsay exceptions of Rule 803, including Rule 803(3).³³⁶ The Fifth Circuit determined that Rock's statements reflecting his state of mind were not admissible under Rule 803(3), because his state of mind was not at issue in the case.³³⁷ The *Rock* panel also found that due to evidence of Rock's motive to fabricate his statements, which were made to defendants' supervisory personnel, there was too great a risk of inaccuracy and untrustworthiness to permit admission under any provision of Rule 803.³³⁸

Plaintiff in *Rock* also sought admission of the accident reports filed by defendants on the theory that they constituted admissions of a party-opponent under Federal Rule of Evidence 801(d)(2).³³⁹ The Fifth Circuit rejected this argument as well, holding that the reports merely documented Rock's account of his injuries and there was no evidence to suggest that they were adopted by defendants.³⁴⁰ Finally, plaintiff also tendered statements by family members concerning Rock's account of the injury, arguing that they fell within the residual hearsay exceptions found in Federal Rules 803(24) and 804(b)(5).³⁴¹ The Fifth Circuit determined, however, that the statements were properly excluded on the ground that they lacked the circumstantial guarantees of trustworthiness required by those Rules.³⁴² The panel concluded that testimony by family members of a deceased person relating to statements the person, made prior to death, and that go to the cause of his injury are inherently unreliable.³⁴³

In *Fibreboard Corp. v. Pool*³⁴⁴ a personal injury case linked to asbestos the Texarkana court of appeals held that it was error for the trial court to admit a poster prepared by a third party illustrating the hazards of asbestos, because the poster was inadmissible hearsay.³⁴⁵ Appellees asserted on appeal that the poster was admissible under the public records exception of Texas Rule 803(8).³⁴⁶ Rule 803(8) provides that public records and reports meeting the requirements of the rule are not excluded as hearsay despite the availability of the declarant.³⁴⁷ The Texarkana court held that the poster, which was on file with the Occupational Safety & Health Administration

334. *Id.*

335. *Id.*

336. *Id.* at 279-81.

337. *Id.* at 279.

338. *Id.* at 280.

339. *Id.* at 281.

340. *Id.*

341. *Id.*

342. *Id.* at 282.

343. *Id.*

344. 813 S.W.2d 658 (Tex. App.—Texarkana 1991, no writ).

345. *Id.* at 676.

346. *Id.*

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

and adopted by the United States Department of Labor, was not admissible under the Rule 803(8) because the exhibit was not prepared by either public officials, or employees under their supervision, in the performance of their official duties.³⁴⁸ The court noted further that even if the poster had been prepared by a public official, it still did not meet the test of Rule 803(8) because it did not purport to set forth (1) activities of OSHA, (2) matters observed pursuant to a duty imposed by law, or (3) factual findings resulting from an investigation authorized by law.³⁴⁹

In *Castro v. Sebesta*³⁵⁰ the Houston court of appeals held that the trial court erroneously excluded defendant's driving record since it was a public record within the meaning of Rule 803(8).³⁵¹ The Houston court held further, however, that defendant's urine analysis report was properly excluded since the report was never properly authenticated.³⁵² In *Bingham v. Bingham*, another case construing Rule 803(8), the Fort Worth court of appeals held that a portion of a court-ordered study conducted by a non-testifying social worker was properly admitted.³⁵³ The Fort Worth court determined that the study constituted both matters observed pursuant to a duty imposed by law under Rule 803(8)(B), and factual findings resulting from an investigation pursuant to lawful authority under Rule 803(8)(C).³⁵⁴

In *Moss v. Ole South Real Estate, Inc.*³⁵⁵ a civil rights action alleging racial discrimination, the Fifth Circuit interpreted the federal version of the public records exception to the hearsay rule found in Federal Rule 803(8).³⁵⁶ The Fifth Circuit criticized the analysis of the magistrate below, which was used to exclude findings of discrimination made by the Department of Housing and Urban Development and the Air Force.³⁵⁷ The court noted that opinions and conclusions of public agencies, as well as facts, fall within the public records exception of Rule 803(8)(C).³⁵⁸ The Fifth Circuit also stated that agency evaluative reports are presumed admissible under Rule 803(8)(C) unless there are indications of untrustworthiness.³⁵⁹ The court determined that the magistrate overstepped his role by assessing the credibility of the witnesses interviewed by the agencies.³⁶⁰

The Fifth Circuit opined that the proper focus is upon the reliability of the reports, as reflected by the preparation process.³⁶¹ The court endorsed a four step analysis in determining the trustworthiness of evaluative reports: "(1) the timeliness of the investigation; (2) the special skill or expertise of the

348. *Fibreboard*, 813 S.W.2d at 676.

349. *Id.*

350. 808 S.W.2d 189 (Tex. App.—Houston [1st Dist.] 1991, no writ).

351. *Id.* at 195.

352. *Id.* at 195-96.

353. 811 S.W.2d 678, 684 (Tex. App.—Fort Worth 1991, no writ).

354. *Id.*

355. 933 F.2d 1300 (5th Cir. 1991).

356. *Id.* at 1305.

357. *Id.* at 1305-09.

358. *Id.* at 1305.

359. *Id.*

360. *Id.* at 1306-07.

361. *Id.* at 1307.

official; (3) whether a hearing was held and at what level; and (4) possible motivational problems.”³⁶² After applying these four factors to the reports in issue, the court determined that the HUD report was untrustworthy and inadmissible in its entirety, but that the factual findings in the Air Force reports were trustworthy and admissible.³⁶³

In *Harris County v. Allwaste Tank Cleaning, Inc.*³⁶⁴ the Houston court of appeals construed Texas Rule 803(10), which permits admission of proof of the absence of a public record despite its hearsay nature.³⁶⁵ *Allwaste* involved a suit by the county against a polluter for operating without a required permit.³⁶⁶ Plaintiff sought to introduce an affidavit of a director of the Air Control Board stating that a diligent search failed to indicate any trace of a special permit exemption or any other type of authorization.³⁶⁷ The purpose for which plaintiff sought to introduce the affidavit was to prove that the phrase “or any other authorization” meant that the director signing the affidavit construed a particular order not to grant the authority equivalent to a permit.³⁶⁸ The Houston court held that plaintiff’s reason for offering the affidavit rendered it hearsay when measured against the purpose of Texas Rule 803(10).³⁶⁹ Accordingly, the Houston court of appeals sustained the trial court’s exclusion of the affidavit.³⁷⁰

IX. ARTICLE IX - AUTHENTICATION AND IDENTIFICATION

Texas Rule 901(a) provides that the requirement of authentication or identification, as a condition precedent to admissibility, is satisfied by evidence which supports a finding that the matter in question is what is claimed.³⁷¹ In *City of Mesquite v. Moore*³⁷² the Dallas court of appeals held that a document was properly authenticated by virtue of having been accompanied by a cover letter from the party seeking to exclude the evidence.³⁷³ In *Steenbergen v. Ford Motor Co.*,³⁷⁴ a wrongful death action, the Dallas court of appeals upheld the trial court’s exclusion of a number of documents produced by defendant in response to a discovery request.³⁷⁵ The court noted that a number of the documents were not created by defendant and that no witness vouched for their accuracy.³⁷⁶ In *Steenbergen* plaintiff also sought to admit, pursuant to Texas Rule 901(b)(4), crash test

362. *Id.* at 1305, 1307.

363. *Id.* at 1310.

364. 808 S.W.2d 149 (Tex. App.—Houston [1st Dist.] 1991, writ dismissed w.o.j.).

365. *Id.* at 152.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

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

372. 800 S.W.2d 617 (Tex. App.—Dallas 1990, no writ).

373. *Id.* at 619.

374. 814 S.W.2d 755 (Tex. App.—Dallas 1991, writ requested).

375. *Id.* at 760.

376. *Id.*

data bearing the Ford logo and other distinctive characteristics.³⁷⁷ The court of appeals upheld the trial court's exclusion of the crash test data because plaintiff's expert had obtained it from an attorney in another case involving defendant and the expert could not verify that the data had not been altered.³⁷⁸

In *Castro v. Sebesta*³⁷⁹ the Houston court of appeals (1st Dist.) held that a party's driving record was properly authenticated in accordance with Texas Rule 902(4) because it was certified by the custodian of records.³⁸⁰ A urine analysis report, however, was not properly authenticated because no offering witness vouched for its authenticity under Texas Rule 901 and it was not self-authenticating under Rule 902.³⁸¹ Texas Rule 901(b)(6) and the identical Federal Rule 901(b)(6), illustrate the means for authenticating telephone calls. In *First State Bank v. Maryland Casualty Co.*³⁸² the Fifth Circuit rejected appellant's challenge to the admission of a telephone conversation made on the ground that the call was not properly authenticated.³⁸³ The court noted that the illustrations listed under Federal Rule 901(b) are not the exclusive means of identification or authentication.³⁸⁴ The Fifth Circuit ruled that to authenticate a telephone call, a party need only present sufficient evidence of authenticity to make a prima facie case and to allow the issue of identity to be decided by the jury.³⁸⁵ The panel held that this requirement was satisfied where the caller testified that she dialed the correct number, that a person answered the phone giving the last name of the residents, and that the person answering then stated that a particular resident was not home.³⁸⁶ The Fifth Circuit also rejected challenges to the hearsay nature of the testimony, citing Federal Rules 803(1) and 803(24).³⁸⁷

X. ARTICLE X - CONTENTS OF WRITING, RECORDINGS AND PHOTOGRAPHS

Texas Rule 1002, otherwise known as the best evidence rule, provides that to prove a writing's content, or the content of a recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in the rules or by law.³⁸⁸ In *Ramsey v. Jones Enterprises*³⁸⁹ the Beaumont court of appeals held that in actions where title of property is the ultimate issue for determination, proof of such title must be shown by the

377. *Id.* at 761.

378. *Id.*

379. 808 S.W.2d 189 (Tex. App.—Houston [1st Dist.] 1991, no writ).

380. *Id.* at 195.

381. *Id.* at 195-96.

382. 918 F.2d 38 (5th Cir. 1990).

383. *Id.* at 41.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 41-42.

388. TEX. R. CIV. EVID. 1002.

389. 810 S.W.2d 902 (Tex. App.—Beaumont 1991, writ denied).

instruments of title themselves.³⁹⁰ The court opined that Rule 1002 requires that if documentary evidence exists as to title to real property, such documentary evidence must be produced and admitted.³⁹¹ The court also held that hearsay testimony may not be used as a substitute for the title documents without a proper showing that the documents were unavailable through no fault or failure on the part of the party offering the hearsay testimony.³⁹² In contrast, in *Harris v. Varo Inc.*,³⁹³ the Dallas court of appeals held that the best evidence rule requires that the original writing be presented only when the writing is offered to prove the contents of the original writing.³⁹⁴ The existence of a document may be proved by affidavit.³⁹⁵

390. *Id.* at 905.

391. *Id.*

392. *Id.*

393. 814 S.W.2d 520 (Tex. App.—Dallas 1991, no writ).

394. *Id.* at 523.

395. *Id.*