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EVIDENCE

by

Linda Leuchter Addison*

DURING the survey period, the Texas appellate courts handed down numerous decisions construing various rules of evidence. This is the first survey period in which a substantial number of decisions interpreted the Texas Rules of Evidence because it has taken this long for cases tried after the effective date of the rules¹ to work their way through the appellate courts of Texas.

The cases of greatest significance arose in the following substantive areas: 1) Article I—General Provisions; 2) Article II—Judicial Notice; 3) Burden of Proof, Presumptions, and Inferences; 4) Article IV—Relevancy and Its Limits; 5) Article V—Privileges; 6) Article VI—Witnesses; 7) Article VII—Opinions and Expert Testimony; (8) Article VIII—Hearsay; (9) Article IX—Authentication and Identification; (10) Article X—Contents of Writings, Recordings, and Photographs; and (11) Parol Evidence.

I. ARTICLE I—GENERAL PROVISIONS

Article I of the Texas Rules of Evidence contains many important substantive provisions.² Texas Rule of Evidence 103(a)(1) provides that a timely motion to strike or objection must appear in the record as a condition for an attack on an evidentiary ruling on appeal.³ This changes prior Texas practice.⁴ In *City of Austin v. Avenue Corp.*⁵ the Austin court of appeals did not allow the appellant to attack on appeal the method of proof regarding lost profits, explaining that because no objection was made to the evidence when offered, error was not preserved under Texas Rule of Evidence 103.⁶ The Texas Supreme Court reversed on other grounds, yet disagreed with the Austin court, holding that the city's filing of a motion for judgment n.o.v. and a motion for new trial alleging the evidence was legally insufficient to support the damage judgment was sufficient to preserve the point on appeal.⁷

In *Foster v. Bailey*⁸ the appellant was not allowed to cross-examine the

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1. Adopted by the Supreme Court of Texas effective September 1, 1983.

2. TEX. R. EVID. art I.

3. *Id.* 103(a)(1).

4. Unobjected to hearsay is no longer denied probative value. *Id.* 802.

5. 685 S.W.2d 453 (Tex. App.—Austin 1985), *rev'd*, 94 Tex. S. Ct. J. 171 (Jan. 25, 1986).

6. *Id.* at 455.

7. 29 Tex. S. Ct. J. at 172.

8. 691 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1985, no writ).

appellee, a plaintiff claiming damages for chemical burns to her scalp received during a visit to the appellant's beauty shop. The appellant's question whether the plaintiff tried to change her hair color after leaving the beauty shop was disallowed by the trial court because no evidence supported it. The appellant argued that because proximate cause was a disputed issue in this negligence case, no predicate was required to support this line of questioning. The Houston court of appeals agreed.⁹ Furthermore, because the right to cross-examine the sole adverse party on an ultimate disputed issue does not depend upon a showing that the cross-examination will be successful, error was not waived by the appellant's failure to make an offer of proof under Texas Rule of Evidence 103(a)(2).¹⁰

II. ARTICLE II—JUDICIAL NOTICE

Judicial notice is now governed by article II of the Texas Rules of Evidence.¹¹ Texas Rule of Evidence 201,¹² governing judicial notice of adjudicative facts, is a verbatim adoption of Federal Rules of Evidence 201¹³ and basically does not alter prior Texas practice. Texas Rule of Evidence 201 defines the facts of which a court may properly take judicial notice.¹⁴ The rule also prescribes when the taking of judicial notice is discretionary or mandatory, the timing of taking a judicial notice, and the accompanying instructions to the jury.¹⁵ Other rules in article II govern the determination of laws of other states¹⁶ and of foreign countries.¹⁷ Prior to Texas Rule of Evidence 203, Texas courts refused to take judicial notice of foreign laws.¹⁸ In *San Benito Bank & Trust Co. v. Rio Grande Music Co.*,¹⁹ decided during the survey period but tried prior to the effective date of the rules, the Corpus Christi court of appeals refused to take judicial notice of the law of Mexico and declined to apply Texas Rule of Evidence 203 retroactively.²⁰

During the survey period, Texas Rule of Evidence 204 was added, permitting judicial notice of Texas city and county ordinances, the contents of the Texas Register, and the codified rules of the agencies published in the Administrative Code.²¹ A pre-rules case that would have been decided differ-

9. *Id.* at 803.

10. *Id.*; see TEX. R. EVID. 103(a)(2).

11. TEX. R. EVID. art. II.

12. *Id.* 201.

13. FED. R. EVID. 201.

14. TEX. R. EVID. 201. A fact proper for judicial notice "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*

15. *Id.*

16. *Id.* 202.

17. *Id.* 203.

18. *Franklin v. Smallldridge*, 616 S.W.2d 655, 657 (Tex. App.—Corpus Christi 1981, no writ).

19. 686 S.W.2d 635 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

20. *Id.* at 639 n.1.

21. TEX. R. EVID. 204.

ently under rule 204, *Estate of Murphy v. McCall*,²² refused to notice judicially a city ordinance.²³ The court explained that a city ordinance had to be proved just like any other fact.²⁴

During the survey period the appellate courts of Texas considered the bounds of the proper subject matter for judicial notice. The Supreme Court of Texas ruled that Texas courts are required to take judicial notice of the public statutes of the state.²⁵ The courts of appeals have held many matters proper for judicial notice: that the present value of the discount rate was a certain rate,²⁶ that the city of Garland held a municipal election on January 21, 1984;²⁷ that the contents of the State Register constituted prima facie evidence of the text of documents published therein and that those documents were in effect on and after the date of notation;²⁸ and that prior to the effective date of the amended venue statute, far too many appeals were taken on venue questions, resulting in needless delay.²⁹ Subjects held improper for judicial notice were the correlation of minimum stopping distance with speed,³⁰ the location of a particular subdivision mentioned in a contract to purchase real property,³¹ and the local rules of the district courts absent a showing that the local rules have been filed with the Supreme Court of Texas.³² One court incorrectly held that the reasonableness of attorneys' fees was not a proper subject for judicial notice.³³

Texas Rule of Evidence 202 provides that a party requesting the taking of judicial notice of the law of a foreign state must furnish the court with "sufficient information to enable it properly to comply with the request."³⁴ This rule does not require that the judge receive an actual copy of the foreign

22. 678 S.W.2d 530 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

23. *Id.* at 532.

24. *Id.*

25. *Kish v. Van Note*, 692 S.W.2d 463, 467 (Tex. 1985); see *Prairie View A & M Univ. v. Thomas*, 684 S.W.2d 169, 170 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (courts of appeals must take judicial notice of the public laws of the state).

26. *Taylor Publishing Co. v. Systems Mktg., Inc.*, 686 S.W.2d 213, 217 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

27. *City of Garland v. Louton*, 683 S.W.2d 725, 726 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 691 S.W.2d 603, 605 (Tex. 1985).

28. *Mullinax, Wells, Baab & Cloutman v. Sage*, 692 S.W.2d 533, 536 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

29. *Reserve Life Ins. Co. v. Blackstock*, 691 S.W.2d 15, 16 (Tex. App.—Beaumont 1985, no writ).

30. *Eikel v. Corry*, 687 S.W.2d 488, 489 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

31. *Garner v. Redeaux*, 678 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The court held that the location of the addition was not a matter of common knowledge in the community and, therefore, was an improper subject for judicial notice. *Id.* Under TEX. R. EVID. 201(b)(2) this opinion would be in error because the location of the addition is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" as stated by that rule. *Id.*

32. *Chow v. Dole*, 677 S.W.2d 220, 221 (Tex. App.—Houston [1st Dist.] 1984, no writ).

33. *Palmer v. Liles*, 677 S.W.2d 661, 666 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Where the court determines the issue of attorneys' fees, "the court may in its discretion take judicial knowledge of the usual and customary fees in such matters . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon Pam. 1986).

34. TEX. R. EVID. 202.

statute as a prerequisite to taking judicial notice.³⁵

Texas Rule of Evidence 201(f) provides that judicial notice may be taken at any stage of the proceeding.³⁶ This rule, like the common law,³⁷ allows judicial notice to be taken on appeal. In a case in which the jurisdiction of the trial judge was challenged on appeal, one court took judicial notice that the presiding trial judge was a retired district court judge who timely filed an election to continue in his judicially capacity.³⁸ In another case, the San Antonio court of appeals incorrectly refused to take judicial notice of the Railroad Commission's actions because the trial court did not have the opportunity to examine and take into consideration these actions.³⁹ If a fact is not subject to "reasonable dispute,"⁴⁰ whether the trial court had an opportunity to consider the fact should not matter. Additionally, the Texas Rules of Evidence provides that judicial notice is mandatory⁴¹ and may be taken at any state of the proceeding.⁴²

III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence governs presumptions.⁴³ Because the Texas Rules of Evidence contain no article III, the law of presumptions continues to be governed by Texas common law.

Presumptions and inferences are sometimes merely assumptions of facts that have not been rebutted.⁴⁴ The Fifth Circuit explained in *Simpson v. Home Petroleum Corp.*⁴⁵ that although a presumption shifts the burden of going forward with the evidence, it does not shift the burden of persuasion.⁴⁶ In *City of Houston v. Jones*⁴⁷ a Houston court of appeals held that the burden of proof on a statutory exception rests on the party seeking to benefit from the exception.⁴⁸

Although facts may be established circumstantially, the circumstances themselves must be shown by direct evidence; circumstances cannot be inferred from other circumstances, nor can a presumption of fact rest upon a fact presumed.⁴⁹ Stacking inferences to reach an ultimate conclusion is not

35. *Cal Growers, Inc. v. Palmer Warehouse & Transfer Co.*, 687 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist.] 1985, no writ).

36. TEX. R. EVID. 201(f).

37. See, e.g., *Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 535 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); *Vehlsing, Inc. v. Missouri Pac. Ry.*, 563 S.W.2d 669, 674 (Tex. Civ. App.—Corpus Christi 1978, no writ).

38. *Olivares v. State*, 693 S.W.2d 486, 489 (Tex. App.—San Antonio 1985, writ dismissed).

39. *Duderstadt Surveyors Supply, Inc. v. Alamo Express, Inc.*, 686 S.W.2d 351, 354 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

40. TEX. R. EVID. 201(b) requires a reasonable dispute.

41. *Id.* 201(d).

42. *Id.* 201(f).

43. FED. R. EVID. art. III.

44. See generally 1 R. RAY, TEXAS PRACTICE, LAW OF EVIDENCE §§ 51-56 (3d ed. 1980) (classification of presumptions).

45. 770 F.2d 499 (5th Cir. 1985).

46. *Id.* at 505.

47. 679 S.W.2d 557 (Tex. App.—Houston [14th Dist.] 1984, no writ).

48. *Id.* at 559.

49. *Estate of Clifton v. Southern Pac. Transp. Co.*, 686 S.W.2d 309, 319 (Tex. App.—San

allowed.⁵⁰

During the survey period the appellate courts of Texas articulated numerous varied presumptions. When parties enter into a contract, the law presumes that they intend the consequences of the contract's performance.⁵¹ A presumption exists that governmental authorities will discharge their duties according to law.⁵² People are assumed to love life and avoid danger, and in order to establish contributory negligence on the part of the deceased in a wrongful death action, some evidence is necessary to overcome the presumption that the deceased exercised ordinary care for her own safety.⁵³ When a product has no warning a presumption exists that the user would have read and heeded a proper warning had one been given.⁵⁴ The law presumes that property acquired during marriage is part of the community estate, and only clear and convincing or clear and satisfactory proof identifying and tracing the claimed property can overcome this presumption.⁵⁵ A letter, properly addressed, stamped, and mailed, gives rise to a rebuttable presumption that the addressee duly received the letter.⁵⁶ This presumption is rebuttable by actual evidence of nondelivery to the addressee.⁵⁷ When so rebutted, facts underlying the presumption remain for consideration by the trier of fact.⁵⁸ An agency relationship shown to have once existed is ordinarily presumed to continue.⁵⁹ In civil cases a test showing blood alcohol content of 0.119 does not raise a presumption of intoxication.⁶⁰ A presumption that foreign law is the same as the law of the State of Texas cannot be used to overthrow the presumed validity of the judgment of a sister state.⁶¹

Antonio 1985), *rev'd*, 29 Tex. S. Ct. J. 152 (Jan. 18, 1986). Without discussing presumptions, the supreme court explained that the court of appeals erred in remanding on a point not preserved on appeal. 29 Tex. S. Ct. J. at 153.

50. *Nagy v. First Nat'l Gunn Banque Corp.*, 684 S.W.2d 114, 117 (Tex. App.—Dallas 1984, writ *ref'd n.r.e.*).

51. *Curry Auto Leasing, Inc. v. Byrd*, 683 S.W.2d 109, 112 (Tex. App.—Dallas 1984, no writ).

52. *Charles Schreiner Bank v. Kerrville Indep. School Dist.*, 683 S.W.2d 466, 472 (Tex. App.—San Antonio 1984, no writ).

53. *Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548, 553 (Tex. App.—Houston [14th Dist.] 1984), *rev'd on other grounds*, 696 S.W.2d 549, 556 (Tex. 1985).

54. *Howard v. Faberge, Inc.*, 679 S.W.2d 644, 650 (Tex. App.—Houston [1st Dist.] 1984, writ *ref'd n.r.e.*).

55. *Whorral v. Whorral*, 691 S.W.2d 32, 35 (Tex. App.—Austin 1985, writ *dism'd*).

56. *Jim Walter Homes, Inc. v. Valencia*, 679 S.W.2d 29, 35 (Tex. App.—Corpus Christi 1984), *modified on other grounds*, 690 S.W.2d 239, 242 (Tex. 1985).

57. *Id.*

58. *Id.*

59. *Carroll Instrument Co. v. BWB Controls, Inc.*, 677 S.W.2d 654, 659 (Tex. App.—Houston [1st Dist.] 1984, no writ).

60. *See Ford Motor Co. v. Pool*, 688 S.W.2d 879, 883 (Tex. App.—Texarkana 1985), *rev'd*, 29 Tex. Sup. Ct. J. 204 (Feb. 12, 1986). The supreme court wrote that the court of appeals erred in giving presumptive weight to the blood alcohol test because the DWI statute in effect at the time of the accident did not provide for a presumption of intoxication in civil actions. 29 Tex. Sup. Ct. J. at 205.

61. *McFadden v. Farmers & Merchants Bank*, 689 S.W.2d 330, 332 (Tex. App.—Fort Worth 1985, no writ).

IV. ARTICLE IV—RELEVANCY AND ITS LIMITS

Article IV of the Texas Rules of Evidence specifically governs relevancy and its limits.⁶² During the survey period, Texas Rule of Evidence 401, the test of relevancy, was amended to make it identical to Federal Rule of Evidence 401.⁶³ The other rules contained in article IV did not change from those originally adopted.

Certain of the Texas Rules of Evidence substantially liberalize the common law concept of relevant evidence. Texas Rule of Evidence 405⁶⁴ allows a witness's opinion testimony to prove character. Prior to the adoption of the rules, character could be proven only by reputation.⁶⁵ Texas Rule of Evidence 406⁶⁶ also departs from prior Texas practice⁶⁷ in that it allows evidence of habit or the routine practice of an organization to prove conduct on a particular occasion irrespective of the presence of eye witnesses. One of the most controversial of all the Texas Rules of Evidence is rule 407, which allows evidence of subsequent remedial measures in products liability cases, but not in negligence cases.⁶⁸

Texas Rule of Evidence 403 provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence.⁶⁹ Two cases decided during the survey period interpreted rule 403. In *Perez v. Baker Packers*⁷⁰ a Houston court of appeals affirmed the admission of a physician's testimony, on cross examination, that he suspected that the plaintiff's wound was self-inflicted.⁷¹ The court explained that the doctor was quick to point out that his observations were merely suspicions, and that the plaintiff-appellant had ample opportunity to explore the testimony on redirect to diminish if not eliminate any damaging effects. As a result, the court could not hold that the trial court's balancing test, weighing the probative value of the evidence against its prejudicial nature, was incorrect.⁷² In *Ford Motor Co. v. Pool*⁷³ the Texas Supreme Court found harmless error in the trial court's exclusion of evidence that the plaintiff had engaged in violent conduct towards his former wife, that she had placed him under a peace bond on two occasions, that the plaintiff had filed for a divorce from his wife, that his wife had sought a restraining order against the plaintiff's mother from interfering with their marriage, and that the plaintiff and his wife were separated at time of

62. TEX. R. EVID. art. IV.

63. *Id.* 401; *see* FED. R. EVID. 401.

64. TEX. R. EVID. 405.

65. *See generally* 2 R. RAY, *supra* note 44, § 1491 (use of reputation to prove character).

66. TEX. R. EVID. 406.

67. *See generally* 2 R. RAY, *supra* note 36, § 1511 (discussing the early use of habit and custom to establish probative value).

68. TEX. R. EVID. 407.

69. *Id.* at 403.

70. 694 S.W.2d 138 (Tex. App.—Houston [14th Dist.] 1985, writ *ref'd n.r.e.*).

71. *Id.* at 143.

72. *Id.* at 140-41.

73. 29 Tex. S. Ct. J. 204, 208-09 (Feb. 15, 1986).

trial. The court explained that the excluded evidence was either cumulative or irrelevant.⁷⁴

Texas Rule of Evidence 403⁷⁵ is a verbatim adoption of Federal Rule of Evidence 403,⁷⁶ which the Fifth Circuit interpreted in *Shipp v. General Motors Corp.*⁷⁷ In this products liability action brought on a crashworthiness theory, the exclusion of the defendant manufacturer's film demonstrating occupant movement in a rollover accident was held not an abuse of discretion.⁷⁸ The court's rationale was that the filmed "accident" was a multiple rollover, whereas the accident under consideration was a single rollover and involved a different vehicle with a substantially different roof and passenger compartment.⁷⁹ That the visual aspect of the excluded exhibit may have greatly impressed the jury did not lessen its cumulative nature.⁸⁰

In *Olin Corp. v. Dyson*,⁸¹ a negligence action for personal injuries sustained when a car collided with a portable crane owned and operated by the appellant, the appellant complained of the trial court's exclusion of circumstantial evidence of alcohol consumption. Immediately after the collision the car had a strong odor of beer, contained an unopened cold beer, spilled beer, and loose ring tabs. The appellant had sought to introduce this evidence to impeach the plaintiff's credibility as to the cause of the collision and to prove contributory negligence. In affirming the exclusion, the court of appeals held that circumstantial evidence of alcohol consumption is inadmissible unless it is connected to the person alleged to have acted negligently.⁸² Because the plaintiff's car carried two passengers, it was impossible to tell from the evidence whether it was the plaintiff who was consuming the alcohol.⁸³

Texas Rule of Evidence 410 governs the inadmissibility of guilty pleas, plea discussions and related statements, and pleas of *nolo contendere*.⁸⁴ A plea of *nolo contendere* is not admissible against a defendant who made the plea unless another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it.⁸⁵ In *Cox v. Bohman*⁸⁶ the Corpus Christi court of appeals reversed and remanded a case in which evidence was admitted that the defendant had received and paid a traffic ticket arising out of an automobile collision. The court treated the payment of the fine as a plea of *nolo contendere* because in cases involving moving traffic violations

74. *Id.* at 209.

75. TEX. R. EVID. 403.

76. FED. R. EVID. 403.

77. 750 F.2d 418 (5th Cir. 1985).

78. *Id.* at 427.

79. *Id.*

80. *Id.* at 428.

81. 678 S.W.2d 650 (Tex. App.—Houston [14th Dist.] 1984), *rev'd on other grounds*, 692 S.W.2d 456 (Tex. 1985).

82. 678 S.W.2d at 654.

83. *Id.*

84. TEX. R. EVID. 410.

85. *Id.*

86. 683 S.W.2d 757, 758 (Tex. App.—Corpus Christi 1984, writ *ref'd n.r.e.*).

for which the maximum punishment is a fine, payment of the fine constitutes a finding of guilty "as though a plea of *nolo contendere* had been entered by the defendant."⁸⁷ The court explained that under Texas Rule of Evidence 410 such pleas cannot be admitted in a civil suit for damages arising out of the same incident.⁸⁸

Several cases decided during the survey period discussed common law principles of relevance without interpreting the Texas Rules of Evidence. One court explained that any evidence is relevant to a proposition if it tends to prove or disprove any material fact about that proposition.⁸⁹ Texas Rule of Evidence 401, as amended on November 1, 1984, also 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."⁹⁰

Considering the relevance of similar facts and transactions in cases of real estate valuation, a court explained that the prices paid for improved lots cannot be used to establish the value of unimproved lots.⁹¹ The court held that admitting testimony of the value of improved land in an action to condemn unimproved land was reversible error.⁹² Another pre-rules case held that although personal opinion of good character reputation and evidence of good character reputation generally was not proper, as it is now under Texas Rule of Evidence 405,⁹³ any error was harmless because an instruction sufficiently cured the improper impeachment of the defendant's expert by a single act of misconduct.⁹⁴

Texas Rule of Evidence 608⁹⁵ prohibits the use of specific instances of the conduct of a witness, other than conviction of a crime as provided for in Texas Rule of Evidence 609,⁹⁶ for the purpose of attacking or supporting his credibility.⁹⁷ Furthermore, evidence of other wrongs or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith.⁹⁸ Evidence of other wrongs, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.⁹⁹ In a pre-rules case, *Frank B. Hall & Co. v. Buck*,¹⁰⁰ the court held that the doctrine of *res*

87. TEX. CODE CRIM. PROC. ANN. art. 27.14 (Vernon Pam. Supp. 1986).

88. 683 S.W.2d at 758.

89. *Rego Co. v. Brannon*, 682 S.W.2d 677, 682 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

90. TEX. R. EVID. 401.

91. *City of Odessa v. Meek*, 695 S.W.2d 775, 776 (Tex. App.—El Paso 1985, no writ).

92. *Id.*

93. TEX. R. EVID. 405.

94. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 678 S.W.2d 278, 294 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

95. TEX. R. EVID. 608.

96. *Id.* 609.

97. FED. R. EVID. 608(b), unlike the Texas rule, allows evidence of specific instances of a witness's conduct to be used for impeachment.

98. TEX. R. EVID. 404(b).

99. *Id.*

100. 678 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd, n.r.e.), *cert. denied*, 105 S. Ct. 2704, 86 L. Ed. 2d 720 (1985).

inter alios acta, which provides that a party's prior acts or transactions are not admissible to prove that similar acts have reoccurred, did not preclude the admission of certain evidence not offered to prove that the parties had engaged in the same pattern of conduct, but rather offered as evidence that the witness was "beholden" to the defendant.¹⁰¹

V. ARTICLE V—PRIVILEGES

Article V of the Texas Rules of Evidence governs privileges. The article creates no new privileges.

The Texas Rules of Evidence provide confidentiality for communications¹⁰² and for records¹⁰³ of a patient¹⁰⁴ who consults a professional¹⁰⁵ for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction.¹⁰⁶ The general rule of privilege for communication between patient and professional contained in rule 510(b) is substantially the same as that created by its statutory predecessor, article 5561h,¹⁰⁷ which was deemed repealed as to civil actions¹⁰⁸ with the adoption of the Texas Rules of Evidence.

Rule 510(d) creates exceptions to the privilege not previously found in article 5561h.¹⁰⁹ Rule 510(d)(5) creates an exception to the privilege when relevant to

an issue of the physical, mental or emotional condition of a patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense. . . .¹¹⁰

This exception corrects the inequity of allowing a plaintiff to seek damages for mental or emotional injuries while preventing a defendant from inquiring about the plaintiff's mental condition prior to the subject incident.

Rule 510(d)(5) reduces the mental health information privilege.¹¹¹ A person who places his mental or emotional condition in issue in a civil lawsuit falls within an exception to the privilege of confidentiality, an exception that

101. 678 S.W.2d at 628.

102. TEX. R. EVID. 510(b)(1).

103. *Id.* 510(b)(2).

104. "Patient" is defined in *id.* 510(a)(2).

105. "Professional" is defined in *id.* 510(a)(1).

106. The privilege for communications by drug abusers originated in TEX. CODE CRIM. PROC. ANN. art. 38.101 (Vernon 1979).

107. TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1986) (repealed by order of the Supreme Court of Texas insofar as it relates to civil actions, effective September 1, 1983).

108. Rule 510 "only governs disclosures of patient/client-professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. ANN. art. 5561h." TEX. R. EVID. 510 official comment.

109. An exception to the privilege now exists when disclosure is relevant in any suit affecting the parent-child relationship. TEX. R. EVID. 510(d)(6).

110. *Id.* 510(d)(5). The entire language of rule 510(d)(5) was substituted, effective November 1, 1984. *Id.* The new language expands the previous exception by including defenses as well as claims, and proceedings by any party after the patient's death. *Id.*

111. *Id.*

did not exist under article 5561h.¹¹² The first decision under this exception to the privilege was *Wimberly Resorts Property, Inc. v. Pfeuffer*.¹¹³ Relying on rule 510(d)(5), the Austin court of appeals conditionally granted a writ of mandamus ordering the trial judge to set aside a protective order quashing the deposition of the psychiatrist of a plaintiff who sought monetary damages for personal injuries including emotional trauma.¹¹⁴

A plaintiff does not have the right to use the psychotherapist/patient privilege offensively to shield information that would be material and relevant to the defense of the plaintiff's claims. *Ginsberg v. The Fifth Court of Appeals*¹¹⁵ was an original mandamus proceeding to the Texas Supreme Court contesting the authority of the court of appeals to issue a mandamus directing the trial court to cease discovery into certain allegedly privileged matters. At issue was whether the plaintiff's psychiatric records were discoverable in a trespass to try title suit. The plaintiff alleged that the defendant had fraudulently tricked her into signing a deed. The records reflected that the plaintiff had told her psychiatrist that the building to which she claimed title had been sold.

The Texas Supreme Court agreed that the court of appeals abused its discretion by allowing the plaintiff to maintain her action and, simultaneously, allowing her to shield relevant and damaging information behind the curtain of an asserted privilege.¹¹⁶ The supreme court reversed the decision of the Dallas court of appeals.¹¹⁷ Because the plaintiff's attempted use of the privi-

112. TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08(4) (Vernon Supp. 1986), part of the Medical Practices Act, which governed the confidentiality of communications between a physician and a patient, did contain a similar provision. Article 4495b, § 5.08 was also deemed repealed as to civil actions in conjunction with the adoption of the Texas Rules of Evidence. For a discussion of the difference between art. 4495b, § 5.08 and art. 5561h, see *Dial v. State*, 658 S.W.2d 823, 826 (Tex. App.—Austin 1983, no writ); see also *Op. Tex. Atty' Gen. No. MW-569* (1983) (discussing difference between art. 5561h and art. 4495b, § 5.08).

113. 691 S.W.2d 27 (Tex. App.—Austin 1985, no writ). In attempting to avoid his psychiatrist's deposition under rule 510(d)(5), plaintiff argued that art. 5561h controls, and that no exception to art. 5561h required plaintiff's psychiatrist to disclose information about plaintiff. Plaintiff argued that the adoption of the Texas Rules of Evidence did not repeal art. 5561h because the supreme court has authority "to make and establish rules of procedure not inconsistent with the laws of the State . . ." TEX. CONST. OF 1876 art. V, § 25 (1891). Article 1731a, § 2 provides that such rules shall not abridge, enlarge, or modify the substantive rights of any litigant. Because rule 510(d)(5) reduces the statutory privilege of art. 5561h, plaintiff contended the rule was invalid. Relying on *ex parte Abel*, 613 S.W.2d 255, 262 (Tex. 1981), the Austin court of appeals ruled that because the rule relates to the admissibility of evidence, it is procedural and not substantive in nature, and that the repeal of art. 5561h is within the legislative grant of authority of art. 1731a. 691 S.W.2d at 29.

114. 691 S.W.2d at 29.

115. 686 S.W.2d 105 (Tex. 1985).

116. *Id.* at 108.

117. *Ginsberg v. Johnson*, 673 S.W.2d 942, 943 (Tex. App.—Dallas 1984), *rev'd*, 686 S.W.2d 105 (Tex. 1985); *Gaynier v. Johnson*, 673 S.W.2d 899, 903 (Tex. App.—Dallas 1984), *rev'd*, 686 S.W.2d 105 (Tex. 1985). Although reversed, the opinion is significant because the Dallas court of appeals considered the effect of an erroneous order of production of psychiatric records by the trial court. 673 S.W.2d at 943. The court held that the plaintiff did not waive the privilege, despite the defendants' possession of the psychiatric records as a result of a prior erroneous order of production and despite the claim that the records contained evidence favorable to the defendants. *Id.* Although the Dallas court based its holding on TEX. R. EVID. 510, the holding also casts light on the operation of *id.* 512, which provides that a claim

lege was offensive rather than defensive, the supreme court held that it was outside of the intended scope of Texas Rule of Evidence 510 and its predecessor, article 5561h.¹¹⁸ In disallowing an offensive use of the privilege, the court stated that a plaintiff who chooses to put his condition in issue "may be forced to elect whether to claim his privilege or abandon his claim."¹¹⁹

Ginsberg should not be construed "as granting license to litigants to engage in 'fishing expeditions' into privileged matters."¹²⁰ The Texas Supreme Court specifically emphasized that the trial court, upon an *in camera* examination, had found the psychiatric records in question to be relevant to the subject matter of the lawsuit. Reasoning that the admission of evidence and the scope of discovery lie within the discretion of the trial court, the supreme court explained that the trial court was properly within its discretion when it deemed the psychiatric records discoverable.¹²¹ The court of appeals abused its discretion by ordering the trial court to refrain from further discovery pertaining thereto, because the denial of proper discovery constitutes a clear abuse of discretion.¹²²

During the survey period the Amarillo court of appeals considered the attorney-client privilege in *Bearden v. Boone*.¹²³ In *Bearden* an investigator hired by an attorney for the husband in a pending divorce action to gather information about the wife brought a mandamus action seeking relief from an interlocutory discovery order. The order required the investigator to reveal, in the wife's invasion of privacy suit against him, information he had gathered in his investigation of the wife. The court held that the investigator's statute,¹²⁴ which provides that the holder of a private security commission shall not divulge any information he has acquired except as required by law, did not prevent the investigator from answering questions pursuant to court order.¹²⁵ In conditionally granting the writ of mandamus, the court explained that the investigator had the authority to claim the attorney-client privilege on behalf of the husband under Texas Rule of Evidence 503 and

of privilege is not defeated by a disclosure that was compelled erroneously. In its earlier opinion, the court also held that when the patient did not testify under deposition as to what she told her psychiatrist and did not demonstrate an intent to relinquish the confidential communications, her testimony that she had been treated by a psychiatrist, had been hospitalized, and had received shock treatment, was not sufficient to waive the privilege under rule 510. 673 S.W.2d at 905-07.

118. 686 S.W.2d at 107.

119. *Id.* (citing *Henson v. Citizens Bank*, 549 S.W.2d 446, 448 (Tex. Civ. App.—Eastland 1977, no writ) (fifth amendment privilege against self-incrimination)). A compelling criticism of this reasoning is contained in *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976): "There is nothing voluntary about the injury suffered If he seeks redress . . . [he is compelled] to choose between his privacy and his right to seek legal redress. That Hobson's choice is not a waiver" *Id.* at 1074 (Hufstedler, J., concurring in part and dissenting in part).

One commentator notes that because plaintiff's mental condition will be publicly disclosed in making his case, disclosure of earlier information is relatively insignificant. Goode and Sharlot, *Article V: Privileges*, 20 HOUS. L. REV. 273, 375-76 (1983) (Tex. R. Evid. Handbook).

120. 686 S.W.2d at 108.

121. *Id.*

122. *Id.* (citing *Jampole v. Touchy*, 673 S.W.2d 569, 572 (Tex. 1984)).

123. 693 S.W.2d 25 (Tex. App.—Amarillo 1985, no writ).

124. TEX. REV. CIV. STAT. ANN. art. 4413 (29bb), § 28 (Vernon Supp. 1986).

125. 693 S.W.2d at 27.

also that the confidential communications between the investigator and the husband, or the husband's attorney, were protected under the work product exemption during the pendency of the divorce litigation.¹²⁶

Several cases decided during the survey period considered the fifth amendment privilege against self-incrimination. In *Ex parte Burroughs*¹²⁷ the Houston court of appeals held that the privilege against self-incrimination was not violated by forcing a witness to give his name, profession, and office location.¹²⁸ In *In re Grand Jury Subpoena*¹²⁹ the Fifth Circuit held that the privilege did not preclude an individual's producing, pursuant to a grand jury's subpoena, records of eight organizations he held in a representative capacity.¹³⁰ The witness, however, could not be compelled to identify an entity as one of which he had control if the identification would tend to incriminate him or furnish a link in the chain of evidence needed to prosecute him.¹³¹ Finally, in *United States v. Cid-Molina*¹³² the Fifth Circuit held that compelling a defendant to comply with a grand jury subpoena by executing a consent directed to any bank or trust company at which he had a bank account for production of bank records did not violate the privilege against self-incrimination because the general language of the consent decree contained no disclosure, no admission, and had no inculpatory effect.¹³³

VI. ARTICLE VI—WITNESSES

Several of the Texas Rules of Evidence specifically govern impeachment of witnesses¹³⁴ and substantially liberalize the impeachment of witnesses. While Texas common law permitted impeachment of a witness by a prior conviction only if the conviction was not too remote in time to be probative,¹³⁵ rule 609(b) defines remoteness as the elapsing of ten years from the date of conviction or release of the witness from confinement, whichever is later.¹³⁶ Rule 608(a) expands prior Texas common law by allowing the use of opinion as well as reputation testimony to impeach the character of a witness.¹³⁷

126. *Id.* at 28.

127. 687 S.W.2d 444 (Tex. App.—Houston [14th Dist.] 1985, no writ).

128. *Id.* at 446.

129. 767 F.2d 1130 (5th Cir. 1985).

130. *Id.* at 1131.

131. *Id.*

132. 767 F.2d 1131 (5th Cir. 1985).

133. *Id.* at 1132. Note the contrary holding by a different lower court in *In re Grand Jury Investigation, John Doe*, 599 F. Supp. 746, 748 (S.D. Tex. 1984), which held that compelling respondent to execute consent forms to allow foreign banks to supply the government with bank records and consequently circumvent the foreign government's secrecy laws would be a testimonial communication that might incriminate the respondent and thus violate his fifth amendment privilege. *Id.*

134. See TEX. R. EVID. 607 (who may impeach); *id.* 608 (evidence of character and conduct of witness); *id.* 609 (evidence of conviction of crime).

135. *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649, 650-51 (Tex. 1970). (trial judge, who weighs all the facts and circumstances, has discretion to determine remoteness).

136. TEX. R. EVID. 609(b).

137. *Id.* 608(a); *id.* 405 (allows opinion or reputation testimony to prove witness's character).

Rule 612(a) allows impeachment of a witness by examination concerning a prior inconsistent statement.¹³⁸ During the survey period rule 612 was amended by adding the provision "[if] written, the writing need not be shown to him at that time, but on request the same shall be shown to opposing counsel" to both subsections of the rule.¹³⁹

Pre-rule case law, which appears unchanged by the rules, held that a prior statement used for impeachment cannot be used as substantive evidence of the truth of the facts stated therein.¹⁴⁰ No Texas case decided during the survey period interpreted any of the article VI rules governing impeachment.¹⁴¹

VII. ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

A. *Texas Rules of Evidence*

Some of the most significant changes wrought by the Texas Rules of Evidence are contained in article VII, governing opinions and expert testimony.¹⁴² Article VII allows far more liberal admission of expert opinions and lay witness opinions based on personal perceptions than did prior case law. Lay witnesses may now state their opinions as long as their opinions are helpful and rationally based on perception.¹⁴³ Further, Texas Rule of Evidence 704 provides that opinion testimony is not objectionable solely because it embraces an ultimate issue to be decided in the case.¹⁴⁴ The facts that form the bases of an expert's opinion may now be outside the record if they are the type of hearsay reasonably relied upon by experts in the same field.¹⁴⁵

While rule 703¹⁴⁶ defines the permissible substance of an expert's opinion, rule 705 defines the method of offering it. Rule 705 contains a very important change from prior Texas practice. No longer is it necessary for an expert witness to present his opinions in answer to hypothetical questions. An expert may now state an opinion without stating its foundation, leaving opposing counsel to inquire as to the basis of the opinion.¹⁴⁷ The court, however, can still require an expert to state the data underlying his opinion prior to admitting the opinion.¹⁴⁸

138. *Id.* 612(a).

139. *Id.* 612.

140. *Cecil v. Zivley*, 683 S.W.2d 853, 857 (Tex. App.—Houston [14th Dist.] 1984, no writ).

141. *See supra* note 134 and accompanying text; *see also supra* notes 95-101 and accompanying text (discussing pre-rule cases that dealt with impeachment).

142. TEX. R. EVID. art. VII.

143. *Id.* 701.

144. *Id.* 704.

145. *Id.* 703. This rule may nullify the limitation of *Moore v. Grantham*, 599 S.W.2d 287, 289 (Tex. 1980), that the testimony of an expert may not be based solely on hearsay. Virtually all expert testimony is necessarily based at least partially on hearsay, and rule 703 seems to abolish the limitation on how much hearsay an expert may consider in formulating his opinions. TEX. R. EVID. 703.

146. TEX. R. EVID. 703.

147. *Id.* at 705.

148. *Id.* Another important change in examination of experts is contained in *id.* 803(18), the hearsay exception governing learned treatises. Learned treatises may now be proved by

B. *Qualifications of Experts and Admissibility of Testimony*

If the trier of fact would be assisted in understanding evidence or determining a fact issue by specialized knowledge, then "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."¹⁴⁹ An expert may also draw inferences from facts and evidence that a jury is not competent to draw.¹⁵⁰ To justify the use of expert opinion testimony, however, the subject of the inference or conclusion must be beyond the knowledge of the typical layman.¹⁵¹ The witness must also have sufficient skill, knowledge, or experience within the particular field to demonstrate that he is qualified to express an opinion.¹⁵²

The trial court has tremendous discretion to determine the admissibility of expert testimony, and an appeals court will not disturb a trial court's decision to admit or exclude expert testimony absent an abuse of discretion.¹⁵³ During the survey period the Corpus Christi court of appeals in *Walter Baxter Seed Co. v. Rivera*¹⁵⁴ upheld the trial court's decision to admit expert opinion testimony from farmers.¹⁵⁵ The court explained that farmers may become experts in matters particularly within their knowledge and that practical experience is an acceptable way of gaining expertise.¹⁵⁶ Each of the farmers called as witnesses testified as to their years of experience in farming, the amount of ground they farmed, accepted farming practices, and their specific knowledge in the areas in which the crops in question were planted.¹⁵⁷

C. *Effect of Opinion Testimony*

Several appellate courts during the survey period considered the effects of expert opinion testimony and the extent to which either a court or a jury is bound by the opinions of an expert. In upholding the right of a jury to disbelieve an expert who was neither impeached nor contradicted a Houston court of appeals held in *Herbert v. Pan American Van Lines, Inc.*¹⁵⁸ that testimony of experts is only evidentiary and not binding upon the trier of

one's expert on direct examination, by other expert testimony, or by judicial notice. *Id.* If admitted, the statements may be read into evidence but may not be received as exhibits. *Id.* Prior Texas law allowed learned treatises to be used only to cross-examine an expert regarding his opinions, not as substantive evidence. *Bowles v. Borden*, 148 Tex. 1, 4, 219 S.W.2d 779, 783 (1949). Prior case law also required that the expert being examined recognize the treatise as authoritative as a prerequisite to its use in cross-examination. *Id.*

149. TEX. R. EVID. 702.

150. See 2 R. RAY, *supra* note 44, § 1400, at 23-27.

151. *Id.*

152. *Id.*

153. See *Wilson v. Scott*, 412 S.W.2d 299, 303-04 (Tex. 1967) (testimony of retired doctor with no special knowledge of satapedectomy properly excluded).

154. 677 S.W.2d 241 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

155. *Id.* at 244.

156. *Id.*

157. *Id.*

158. 681 S.W.2d 221 (Tex. App.—Houston [14th Dist.] 1984, no writ).

fact.¹⁵⁹ The trier of fact is the sole judge of the credibility of a witness and the weight to be given his testimony. Opinion evidence is usually insufficient to establish a fact issue at trial.¹⁶⁰

The jury's discretion, however, is limited to the resolution of conflicting evidence. The jury does not have the power to ignore evidence and decide an issue in accordance with its own whims.¹⁶¹ In *Kiel v. Texas Employers Insurance Association*¹⁶² a Houston court of appeals reversed a jury's finding that an employee's heart attack did not occur in the course of employment because the finding was so against the great weight of the evidence as to be manifestly unjust.¹⁶³ The court explained that unrebutted expert testimony may be considered as conclusive if the subject matter required the jury to be guided solely by the testimony of experts and the evidence is otherwise credible and free from contradiction or inconsistency.¹⁶⁴ The court explained that although the unrebutted expert testimony did not conclusively establish causation as a matter of law, causation was neither rebutted nor weakened on cross-examination, and, therefore, the jury's finding was simply unjust.¹⁶⁵

During a survey period, experts were allowed to express opinions on a variety of subjects. Expert testimony was held proper to impute to a building contractor knowledge of industry standards as codified¹⁶⁶ and that u-bolts on the rear suspension of a pickup had not been torqued to the same degree as at the factory.¹⁶⁷ In *Delaporte v. Preston Square, Inc.*¹⁶⁸ the Dallas court of appeals allowed an experienced, licensed architect to testify in a case alleging violations of deed restrictions that the additions in question were inconsistent with the original design of the development.¹⁶⁹

In *Shipp v. General Motors Corp.*,¹⁷⁰ a products liability crashworthiness case complaining of roof design, expert opinion was held sufficient to establish a standard of due care and proper conduct even though no other passenger car manufactured used the roof design that the plaintiff's expert proffered.¹⁷¹ In other cases expert opinion testimony was held sufficient evidence to support judgments for fair market value of rent,¹⁷² and attorney's

159. *Id.* at 222.

160. *Teal v. Powell Lumber Co.*, 262 S.W.2d 223, 239 (Tex. Civ. App.—Beaumont 1953, no writ).

161. *Mack v. Moore*, 669 S.W.2d 415, 418 (Tex. App.—Houston [1st Dist.] 1984, no writ).

162. 679 S.W.2d 656 (Tex. App.—Houston [1st Dist.] 1984, no writ).

163. *Id.* at 659.

164. *Id.*

165. *Id.*

166. *Jim Walter Homes, Inc. v. Gonzalez*, 686 S.W.2d 715, 718 (Tex. App.—San Antonio 1985, no writ).

167. *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 882 (Tex. App.—Texarkana 1985), *rev'd on other grounds*, 29 Tex. Sup. Ct. J. 204 (Feb. 12, 1986). The court held that when coupled with evidence that the u-bolt had fallen off, this expert testimony was sufficient to sustain a finding that the u-bolt was defective. *Id.*

168. 680 S.W.2d 561 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

169. *Id.* at 565.

170. 750 F.2d 418 (5th Cir. 1985).

171. *Id.* at 422.

172. *Baugh v. Myers*, 694 S.W.2d 64, 66 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

fees.¹⁷³ Expert opinion was also held sufficient evidence of causation to establish that the foundation of a building settled due to failure of the builder to compact the filled dirt property, thus supporting a finding of breach of implied warranty of construction in a good and workmanlike manner.¹⁷⁴

By contrast, in a products liability case an expert opined that the failure of the manufacturer to place a warning on the machine in question was a producing cause of the plaintiff's injuries, and that removal of the start-up key for the machine, as well as affixing a warning to the machine, would have likely prevented the accident in question.¹⁷⁵ Although these facts provided some evidence that failure to warn was a producing cause of the occurrence in question, the San Antonio court of appeals held that these factors were insufficient to support a jury finding for the plaintiff on the causation issue.¹⁷⁶ In a will contest a Houston court of appeals held that the opinion testimony of the attorney who drafted the will in question was competent to show what he thought the testatrix intended to do, but was incompetent to show the testatrix's actual intention as expressed in the will.¹⁷⁷ Finally, conflicting expert testimony as to whether a movable scaffolding was unreasonably dangerous for its intended use created a fact issue for the jury as to whether the scaffolding was defective.¹⁷⁸

D. Testimony of Medical Experts

The trier of fact usually determines the issue of causation, even when expert testimony demonstrates probable causation.¹⁷⁹ The burden of proof in a medical malpractice cause is on the patient.¹⁸⁰ The patient must prove that the physician has undertaken a mode or form of treatment that a reasonable and prudent doctor would not have undertaken under the same or similar circumstances.¹⁸¹ Expert testimony is required to meet this burden of proof. In considering the standard to which expert testimony must rise, the Fifth Circuit in *Ayres v. United States*,¹⁸² a medical malpractice action governed by Texas law, held that expert testimony need only show that the negligence was a proximate cause of the injuries, not that it was the sole proximate cause.¹⁸³ *Barclay v. Campbell*¹⁸⁴ involved a patient's medical

173. *Barclay v. Johnson*, 686 S.W.2d 334, 339 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

174. *De Los Santos v. Alamo Lumber Co.*, 683 S.W.2d 48, 51 (Tex. App.—San Antonio 1984, no writ).

175. *Ragsdale Bros., Inc. v. Magro*, 693 S.W.2d 530, 539 (Tex. App.—San Antonio 1985, no writ).

176. *Id.*

177. *Kaufhold v. McIver*, 682 S.W.2d 660, 667 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

178. *Sharpe v. Safway Scaffolds Co.*, 687 S.W.2d 386, 392 (Tex. App.—Houston [14th Dist.] 1985, no writ).

179. *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970) (doctor testified as to possible causes for separation of sutures of mesentery).

180. *Hood v. Phillips*, 454 S.W.2d 160, 165 (Tex. 1977).

181. *Id.*

182. 750 F.2d 449 (5th Cir. 1985).

183. *Id.* at 454.

malpractice suit against his physician for failing to disclose certain risks associated with a prescribed medication. In *Barclay* the Dallas court of appeals wrote that expert testimony that the condition is an "inherent" risk, which means that some statistical probability of risk exists, however small, is different from testimony that a condition is "inherently dangerous," which means an activity accompanied by an unusual or extraordinary risk.¹⁸⁵ Holding that no jury issue of informed consent was presented, the Dallas court explained that the inherent risk must be more than negligible or theoretical when viewed prospectively at the time a medical procedure is recommended.¹⁸⁶

The Texas Supreme Court reversed, holding that the expert testimony raised a jury issue on informed consent.¹⁸⁷ The court explained that the issue is "whether 'a reasonable person' could have been influenced in making a decision whether to give or withhold consent to the procedure had he known of the risk."¹⁸⁸

E. Basis of Expert Opinion

During the survey period, one case dealt with the basis of expert opinion. In *McKnight v. Hill & Hill Exterminators, Inc.*,¹⁸⁹ a case involving termite infestation, the Texas Supreme Court recognized that the date of termite infestation cannot be exactly determined.¹⁹⁰ The court held, however, that an expert may form a conclusion as to the approximate date of infestation through his examination of the premises and his analysis of the damaged wood.¹⁹¹

F. Examination of Experts

The Texas Rules of Evidence have made a significant change in examination of experts by reference to authorities within their areas of expertise. This change is illustrated by one pre-rules case decided during the survey period, *Wendell v. Central Power & Light Co.*¹⁹² At common law a book recognized as authoritative by a witness or relied on by him in forming his opinion could be used to cross-examine him by a reading of excerpts from that book.¹⁹³ Prior to the Texas Rules of Evidence, technical literature was admissible, if at all, only through cross-examination of an expert who recog-

184. 683 S.W.2d 498 (Tex. App.—Dallas 1984), *rev'd*, 29 Tex. Sup. Ct. J. 124, 125 (Jan. 8, 1986).

185. 683 S.W.2d at 500-01.

186. *Id.* The court also held that expert opinion is required to establish the materiality of the risk, if it is not one of those listed by a panel of experts, to determine which risks related to medical care should be disclosed under Texas Revised Civil Statutes art. 4590i. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1986).

187. 29 Tex. Sup. Ct. J. at 125.

188. *Id.*

189. 689 S.W.2d 206 (Tex. 1985).

190. *Id.* at 208.

191. *Id.*

192. 677 S.W.2d 610 (Tex. App.—Corpus Christi 1984, writ *ref'd n.r.e.*).

193. *Id.* at 620.

nized the work as authoritative and for the limited purpose of questioning his expertise.¹⁹⁴ Under Texas Rule of Evidence 803(18), however, an expert can be cross-examined on statements contained in a published treatise if the treatise is established as a reliable authority by him or "by other expert testimony or by judicial notice."¹⁹⁵ Contrary to the correct pre-rules holding of *Wendell*, no longer can an expert thwart cross-examination by refusing to recognize a learned treatise as authoritative.

G. Lay Opinions

As noted above, the Texas Rules of Evidence have greatly liberalized the admission of opinion testimony by lay witnesses.¹⁹⁶ Texas case law has always been liberal, however, in allowing an owner of property to testify as to his opinion of its value.¹⁹⁷ An owner of property can give such testimony even though he would not be qualified to testify as an expert regarding the value of the same property if it were owned by another person.¹⁹⁸ During the survey period an owner was allowed to testify not only as to the value of his stolen automobile, but also as to the value of one-hundred tapes in his car at the time it was stolen.¹⁹⁹

H. Effect of Lay Opinion

Although the Texas Rules of Evidence have greatly liberalized the admission of opinion testimony by lay witnesses, lay opinion testimony still has its limitations. During the survey period the court in *Fitzgerald v. Caterpillar Tractor Co.*²⁰⁰ held that the lay testimony of the plaintiff, who was neither an engineer nor an expert on forklift or forklift blade assembly design, could not raise a fact issue as to the design, material, or manufacture of a complicated piece of machinery, such as a forklift.²⁰¹

VIII. ARTICLE VIII—HEARSAY

A. Identifying Hearsay

Whether a record or statement offered to prove its truth is hearsay is often difficult to determine.²⁰² " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to

194. See, e.g., *Bowles v. Bourdon*, 148 Tex. 1, 6, 219 S.W.2d 779, 783 (1949).

195. TEX. R. EVID. 803(18).

196. *Id.* 701; see *supra* text accompanying notes 143-44.

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

198. *Id.*

199. *Aatco Transmission Co. v. Hollins*, 682 S.W.2d 682, 686 (Tex. App.—Houston [1st Dist.] 1984, no writ).

200. 683 S.W.2d 162 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

201. *Id.* at 164.

202. TEX. R. EVID. 801-806 comprehensively define the hearsay rule and its exceptions. Additionally, *id.* 602 provides that "[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."

prove the truth of the matter asserted.”²⁰³ In *Cook v. Cook*²⁰⁴ the San Antonio court of appeals held that a letter that was not properly authenticated and introduced in evidence was hearsay.

B. Statements That Are Not Hearsay

1. *Prior Statement by Witness.* Texas Rule of Evidence 801(e) excludes from the definition of hearsay prior statements by a witness,²⁰⁵ admissions by party-opponents,²⁰⁶ and depositions.²⁰⁷ Not all prior statements by a witness are admissible. Prior statements are admissible only if they are inconsistent with the declarant's present trial testimony and given under oath subject to the penalty of perjury²⁰⁸ or are consistent with the declarant's testimony and are offered to rebut an express or implied charge of recent fabrication or improper influence or motive,²⁰⁹ or if they constitute identification of a person made after perceiving him.²¹⁰ Additionally, prior statements are admissible only if the declarant testifies at trial and is subject to cross-examination concerning the statement.²¹¹

During the survey period, a Houston court of appeals affirmed the exclusion of a prior consistent statement of a witness accused of recent fabrication.²¹² The court recognized that the witness already had been excused from the courtroom at the time the statements were offered; as a result, had the statement been admitted, the opposing party would have had no opportunity to cross-examine the witness.²¹³

2. *Vicarious Admissions.* Texas Rule of Evidence 801(e)(2)(D) reversed the much criticized holding of *Big Mac Trucking Co. v. Dickerson*.²¹⁴ In *Big Mac* the court limited the category of agent or servant admissions that are admissible against the principal.²¹⁵ Under the new rule, admissions of agents or employees are admissible if they are made during the existence of an employment relationship and concern matters within the scope of the employment relationship, even though the agent or servant has no authority to speak.²¹⁶

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

204. 679 S.W.2d 581, 584 (Tex. App.—San Antonio 1984, no writ).

205. TEX. R. EVID. 801(e)(1).

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

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

208. *Id.* 801(e)(1)(A).

209. *Id.* 801(e)(1)(B).

210. *Id.* 801(e)(1)(C).

211. *Id.* 801(e)(1).

212. *Missouri Pac. R.R. v. Vlach*, 687 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1985, no writ).

213. *Id.* at 418.

214. 497 S.W.2d 283 (Tex. 1973).

215. The Texas Supreme Court held that the hearsay statements of an agent or employee should be admitted against a principal as vicarious admissions only when the trial judge finds, as a preliminary fact, that the statements were authorized. *Id.* at 287.

216. TEX. R. EVID. 801(e)(2)(D).

In *Southmark Management Corp. v. Vick*²¹⁷ a Houston court of appeals affirmed the admission into evidence of a tenant's conversation with the property manager about continuing an existing lease. The court explained that the conversations were not hearsay but were admissions by the landlord through its employee concerning a matter within the scope of her employment made during that employment.²¹⁸ In *Elliot Valve Repair Co. v. B.J. Valve & Fitting Co.*,²¹⁹ a suit on a sworn account for a company's alleged failure to pay for a valve, the company's sales person's conversation with the plaintiff inquiring about the availability of valves was not hearsay as it was a statement by an agent of the company within the scope of his agency or employment and admissible under Texas Rule of Evidence 801(e)(2)(D).²²⁰

3. *Judicial Admissions.* A fact that is judicially admitted does not require evidence and establishes the fact admitted as a matter of law, thereby precluding the fact finder from finding any contrary facts.²²¹ A judicial admission is really a substitute for evidence.²²² The Texas Rules of Evidence, while not specifically distinguishing judicial admissions from other admissions, treat admissions not as exceptions to the hearsay rule, but rather, as statements that are not hearsay.²²³

A party or someone authorized to make statements on his behalf, such as his attorney, can make judicial admissions.²²⁴ During the survey period, *Kennesaw Life & Accident Insurance Co. v. Gross*²²⁵ held a statement in a trial pleading to be a judicial admission, requiring no proof of the admitted fact and precluding the introduction of any evidence to the contrary.²²⁶ A statement in a pleading was also held to be a judicial admission in *Hobbs v. Hobbs*.²²⁷ Another court found the statement of the appellant's attorney in arguments to the court to be a judicial admission that bound the appellant to the position stated.²²⁸

Although a party may not introduce his own abandoned pleading for the purpose of proving his own case, where an abandoned pleading and affidavit of adverse possession were introduced into evidence by the opposing party in

217. 692 S.W.2d 157 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

218. *Id.* at 160.

219. 675 S.W.2d 555, 562-63 (Tex. App.—Houston [1st Dist.]), *rev'd on other grounds*, 679 S.W.2d 1 (Tex. 1984).

220. TEX. R. EVID. 801(e)(2)(D).

221. 1A R. RAY, *supra* note 44, § 1147. The Texas Supreme Court established five requirements for judicial admissions in *Griffin v. Superior Ins. Co.*, 161 Tex. 195, 201, 338 S.W.2d 415, 419 (1960). This opinion, as well as the strong dissent by four justices, contains a comprehensive discussion of the nuances involved in judicial admissions.

222. 1A R. RAY, *supra* note 44, § 1127.

223. *See* TEX. R. EVID. 801(e)(2).

224. *Id.*

225. 694 S.W.2d 115 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

226. *Id.* at 117; *see* *Hinojosa v. Castellow Chevrolet Oldsmobile, Inc.*, 678 S.W.2d 707, 714 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (statements in trial pleadings are judicial admissions).

227. 691 S.W.2d 75, 76 (Tex. App.—Dallas 1985, writ dismissed).

228. *Carrol Instrument Co. v. B.W.B. Controls, Inc.*, 677 S.W.2d 654, 659 (Tex. App.—Houston [1st Dist.] 1984, no writ).

a trespass to try title suit, and the party introducing them did not limit the purpose for which the exhibits were admitted, plaintiff could rely on the metes and bounds description contained in the exhibits to provide a legal description of a tract of land.²²⁹ A judicial admission may also be made in the form of a party's own testimony.²³⁰ For a party's testimony to be conclusive against him, it must be made during the course of a judicial proceeding, the statement must be contrary to an essential fact embraced in his theory of recovery or defense, the statement must be deliberate, clear, and unequivocal, and the statement must not be destructive of the opposing party's theory of recovery.²³¹ The rule that bars a party's recovery by his own testimonial declarations is one of public policy. To allow a party to recover after he has clearly and unequivocally sworn himself out of court would be absurd and unjust, as explained in *City of San Antonio v. Miranda*.²³² The testimony of parties to a suit must be regarded as evidence, however, and not taken as facts admitted.²³³

Judicial admissions must be clear and unequivocal. One court during the survey period held that when the transcription of a venue hearing failed to convey with any degree of lucidity what was actually said or meant by the party's attorneys, no judicial admission could be found.²³⁴ *Bray v. McNeely*,²³⁵ a breach of contract action, held that because the plaintiff's testimony regarding a money transaction was ambiguous at best, characterization of the transaction as a loan rather than an investment was not an admission.²³⁶

C. Hearsay Exceptions: Availability of Declarant Immaterial

1. *Recorded Recollections.* Texas Rule of Evidence 803(5) admits into evidence as an exception to the hearsay rule:

A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness.²³⁷

The proper predicate for the admission of a written record requires a showing that the witness had insufficient recollection to enable him to testify fully

229. *Stafford v. Jackson*, 687 S.W.2d 784, 787 (Tex. App.—Houston [14th Dist.] 1985, no writ).

230. *Brown v. Carroll*, 683 S.W.2d 61, 63 (Tex. App.—Tyler 1984, no writ).

231. *United States Fidelity & Guar. Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

232. 683 S.W.2d 517, 520 (Tex. App.—San Antonio 1984, no writ).

233. *United States Fidelity & Guar. Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

234. *Canales v. Estate of Canales*, 683 S.W.2d 77, 81-82 (Tex. App.—San Antonio 1984, no writ).

235. 682 S.W.2d 615 (Tex. App.—Houston [1st Dist.] 1984, no writ).

236. *Id.* at 618.

237. TEX. R. EVID. 803(5).

and accurately.²³⁸ In *In re: Corrugated Container Anti-Trust Litigation*²³⁹ the Fifth Circuit affirmed the exclusion from evidence of a transcribed interview when the record contained no evidence that a witness was unable to recall the events in question or that a recorded interview with the witness correctly reflected what was fresh in his memory at the time.²⁴⁰ The Fifth Circuit relied on Federal Rule of Evidence 803(5), which is substantially similar to Texas Rule of Evidence 803(5).²⁴¹

2. *Business Records.* Texas Rule of Evidence 803(6)²⁴² governs the introduction of records of regularly conducted activities. Rule 803(6) replaces the previous statutory exception to the hearsay rule that allowed the admission of business and other records.²⁴³ This survey period was the first during which any Texas court considered the operation of rule 803(6).

Texas Rule of Evidence 803(6) allows into evidence as exceptions to the hearsay rule the records of regularly conducted activities, commonly known as business records, once certain prerequisites of that rule are "shown by the testimony of the custodian or other qualified witness."²⁴⁴ Preserving the statutory requirements of repealed article 3737e, rule 803(6) requires that information in the records must have been kept in the course of a regularly conducted business activity by a person with knowledge at or near the time of the matter recorded, and that it was the regular practice of the business to make such records.²⁴⁵ *Pfeffer v. Southern Texas Laborers' Pension Trust Fund*²⁴⁶ interpreted the personal knowledge requirement. The court held that payroll audit records were admissible under rule 803(6) when the records that the auditor reviewed were provided by a party with personal knowledge, notwithstanding the auditor's lack of personal knowledge of the hours actually worked by the laborers in question.²⁴⁷

Texas Rule of Evidence 803(6) does not establish any additional predicate when the records offered are electronically generated. *McAllen State Bank v. Linbeck Construction Corp.*²⁴⁸ established that whether business records are maintained in a computer rather than in company books is immaterial in determining their admissibility, provided the opposing party is given the same opportunity to inquire into the accuracy of the input procedures used

238. *Id.*

239. 756 F.2d 411 (5th Cir. 1985).

240. *Id.* at 414.

241. *Id.*

242. TEX. R. EVID. 803(6). The new practice of qualifying business records remains substantially the same as the procedure under former TEX. REV. CIV. STAT. ANN. art. 3737(e) (Vernon Supp. 1986) (repealed as to civil actions in 1983).

243. TEX. REV. CIV. STAT. ANN. art. 3737(e) (Vernon Supp. 1986). Article 3737(e) was repealed in 1983, insofar as it applied to civil actions, in conjunction with the adoption of the Texas Rules of Evidence.

244. TEX. R. EVID. 803(6). *Id.* 902(10) permits the introduction of business records accompanied by an affidavit that conforms to the requirements set forth in that rule.

245. *Id.* 803(6).

246. 679 S.W.2d 691 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

247. *Id.* at 693.

248. 695 S.W.2d 10 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

as he would have to inquire into the accuracy of written business records.²⁴⁹ Once the requirements of rule 803(6) are met, computerized business records are admissible without any additional predicate.²⁵⁰ No longer is the proponent of computerized business records required to lay a predicate showing that "the particular computing equipment is recognized as standard equipment . . . and that the records were prepared by persons who understood operation of the equipment and whose regular duty was to operate it."²⁵¹ Such matters now go to the weight of the evidence, not its admissibility.²⁵²

In *Clark v. Walker-Kurth Lumber Co.*²⁵³ a Houston court of appeals held that invoices representing sales were properly admitted under rule 803(6).²⁵⁴ The testimony of the appellee's credit manager established that the invoices were prepared by salesmen with knowledge of the transactions, that supplies could not be collected for pickup or delivery without an invoice specifying the materials needed, and that each invoice was signed by the party receiving the goods. In affirming the admission of the invoices into evidence, the court explained that the predicate for admissibility under rule 803(6) is sufficiently established if a party can demonstrate that the documents are records generated pursuant to a course of regularly conducted business activity and that the records are, as a practical matter, always created by or from information transmitted by a person with knowledge, at or near the time of the event.²⁵⁵ The credit manager's testimony established this predicate for admission.²⁵⁶

3. *Statement Against Interest.* A distinction exists between two frequently confused exceptions to the hearsay rule: the declarations against interest

249. *Id.* at 17.

250. *Id.* *McAllen* did not consider the relationship, if any, between TEX. R. EVID. 803(6) and *id.* 901(b)(9), which requires authentication of systems used to produce a result as a condition precedent to admissibility. Texas rule 901(b)(9) was copied from Federal rule 901(b)(9), which was "designed for situations in which the accuracy of the result is dependent upon a process or system which produces it." FED. R. EVID. 901(b)(9) advisory committee note. The federal rules specifically contemplated the application of rule 901(b)(9) to computers and the possibility of taking judicial notice of the accuracy of the processing system. *Id.*

One commentator has argued that, given the significant role of computers in contemporary society, rule 901(b)(9) should be interpreted as incorporating prior Texas law that did not require a special foundation for computerized business records. "When a process or system has become so well established that it is commonplace, as is the case with computers, testimonial description and endorsement of accuracy are no longer needed, and the foundation can be assumed or established by judicial notice." Hippard, *Article X: Contents of Writings, Recordings, and Photographs*, 20 HOUS. L. REV. 595, 601 (1983 Tex. R. Evid. Handbook). This suggested presumption of reliability would shift the burden of evaluating the reliability to the opponent of the evidence and would shift the form for ascertaining defects from trial to discovery. See Comment, *Admitting Computer Generated Records: A Presumption of Reality*, 18 J. MAR. L. REV. 115, 121 (1984).

251. *Railroad Comm'n v. Southern Pac. Ry.*, 468 S.W.2d 125, 129 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.); see *O'Shee v. IBM Corp.*, 578 S.W.2d 844, 848 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (recognizing correct steps to follow in establishing predicate to introduce computerized business records into evidence).

252. 1A R. RAY, *supra* note 44, § 1264.

253. 689 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

254. *Id.* at 281.

255. *Id.*

256. *Id.*

exception and the admissions of party-opponents exception.²⁵⁷ Admissions of party-opponents are admissible into evidence without satisfying any of the requirements for declarations against interest.²⁵⁸ Generally stated, statements of a person that are inconsistent with proprietary or pecuniary interest are considered to be declarations against interest.²⁵⁹ Admissions do not need to be against the interest of the party when made, and the party making the admission need not be unavailable.²⁶⁰ The Texas Rules of Evidence, while treating statements against interest as exceptions to the hearsay rule, treat party-opponent admissions as statements that are not hearsay.²⁶¹ The Houston court of appeals considered the hearsay exception for statements against interest in *Leigh v. Weiner*.²⁶² The court held that a testatrix's hearsay statements that she had promised to leave her estate to her deceased husband's children were admissible as declarations against her pecuniary interest.²⁶³

4. *Public Records and Reports.* Texas Rule of Evidence 803(8) governs the introduction of public records and reports and replaces the previous statutory exception to the hearsay rule allowing the admission of official documents.²⁶⁴ Generally stated, records of public offices or agencies setting forth the activities of the office or agency, matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law are admissible in evidence, unless the sources of the information or other circumstances indicate lack of trustworthiness.²⁶⁵ No Texas case had yet interpreted rule 803(8), but one case decided during the survey period explained the operation of its statutory forerunner, article 3731a. In *Railroad Commission v. Rio Grande Valley Gas Co.*²⁶⁶ the court affirmed the exclusion of two documents offered under the official documents exception to the hearsay rule.²⁶⁷ The court explained that the official documents exception is applicable only when public officials or employees under their supervision in the performance of their official duties prepare the documents.²⁶⁸ Furthermore, documents prepared by private individuals and simply filed with the Railroad Commission were not "official documents" as

257. TEX. R. EVID. 801(e)(2) defines admissions of party opponents, and *id.* 803(24) defines statements against interest.

258. *See generally* 1A R. RAY, *supra* note 44, § 1122 (distinction between admissions and declarations against interest).

259. *Id.* § 1001, at 248.

260. *Id.* Note that TEX. R. EVID. 803(24), governing statements against interest, makes the availability of the declarant immaterial to the admission of the statement against interest.

261. TEX. R. EVID. 801(e).

262. 679 S.W.2d 46 (Tex. App.—Houston [14th Dist.] 1984, no writ).

263. *Id.* at 49 (citing TEX. R. EVID. 803(24)).

264. TEX. REV. CIV. STAT. ANN. art. 3731a (Vernon Supp. 1986) (repealed as to civil actions 1983).

265. TEX. R. EVID. 803(8).

266. 683 S.W.2d 783 (Tex. App.—Austin 1984, no writ).

267. *Id.* at 789.

268. *Id.* at 788.

contemplated by article 3731a.²⁶⁹

D. Hearsay Exceptions: Declarant Unavailable

Texas Rule of Evidence 804 allows into evidence as exceptions to the hearsay rule former testimony, dying declarations, and statements of personal or family history, if the declarant is unavailable as a witness.²⁷⁰ *Compton v. WWV Enterprises*²⁷¹ held affidavits of heirship inadmissible.²⁷² The court concluded that the affidavits of heirship would have been admissible as a statement of personal or family history if there had been a showing of unavailability of the declarant.²⁷³

E. Effect of Unobjected-to Hearsay

Texas Rules of Evidence 802 provides that “[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.”²⁷⁴ The Houston court of appeals in *K-Mart Apparel Fashions Corp. v. Ramsey*²⁷⁵ applied this rule in a default judgment case. The court held that in a negligence action the affidavit of a neurosurgeon showing plaintiff’s medical expenses had probative value when it was not objected to as hearsay.²⁷⁶

IX. ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

Texas Rule of Evidence 901 requires authentication or identification of evidence as a condition precedent to admissibility.²⁷⁷ The authentication requirement is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”²⁷⁸ In *Cook v. Cook*,²⁷⁹ a pre-rules case, the San Antonio court of appeals held that a letter that had not been properly authenticated and introduced into evidence was hearsay.²⁸⁰ Although not decided under article IX, the result would clearly be the same under the rules.

Texas Rule of Evidence 902 governs self-authentication, namely, documents for which extrinsic evidence of authenticity is not required as a condition precedent to admissibility.²⁸¹ A self-authenticated document is not necessarily admissible, however. A self-authenticated document will be excluded if it is hearsay that does not fall within an exception to the hearsay

269. *Id.*

270. TEX. R. EVID. 804(B)(1)-(3). *Id.* 804(a) defines unavailability.

271. 679 S.W.2d 668 (Tex. App.—Eastland 1984, no writ).

272. *Id.* at 670.

273. *Id.* at 671.

274. TEX. R. EVID. 802.

275. 695 S.W.2d 243 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.).

276. *Id.* at 247.

277. TEX. R. EVID. 901.

278. *Id.* 901(a).

279. 679 S.W.2d 581 (Tex. App.—San Antonio 1984, no writ).

280. *Id.* at 584.

281. TEX. R. EVID. 902.

rule, as in *Compton v. WWV Enterprises*.²⁸²

Article 3731(a) previously governed self-authentication.²⁸³ Article 3731(a) made no distinction between sealed and unsealed documents.²⁸⁴ However, Texas Rule of Evidence 902(1) gives special treatment to original sealed documents.²⁸⁵ Rule 902(1) makes this distinction and presumes the authenticity of documents bearing both a seal purporting to be that of the United States or of any state, district, commonwealth, territory, insular possession, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or of a political subdivision department, officer, agency, or a signature purporting to be an attestation or execution.²⁸⁶ Rule 902(1) requires only a seal and a signature.²⁸⁷ No longer must the proponent of an out-of-state sealed document obtain both an attestation and a proper certificate as formerly required under article 3731(a), section 4.²⁸⁸ A pre-rules case that would have been decided differently under rule 902(1) is *Starzl v. Starzl*.²⁸⁹ In *Starzl* the Dallas court of appeals found inadmissible a foreign judgment that did not contain a certification from the judge of a court of record that the official custodian did in fact have official custody of the judgment.²⁹⁰ The court held that the foreign judgment was not properly authenticated and not in compliance with article 3731(a).²⁹¹ The court specifically noted that the case was tried prior to the effective date of the Texas Rules of Evidence.²⁹²

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

Article X of the Texas Rules of Evidence governs the admission of contents of writings, recordings and photographs.²⁹³ While the bulk of this article codifies prior Texas law, the new rules are much more liberal than prior Texas practice.

Texas Rule of Evidence 1003 virtually eliminates the best evidence rule.²⁹⁴ Rule 1003 permits the admission of a duplicate to the same extent as an original unless a question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original.²⁹⁵ The effect of this rule is that the best evidence rule now will apply primarily only to oral

282. 679 S.W.2d 668, 670 (Tex. App.—Eastland 1984, no writ).

283. TEX. REV. CIV. STAT. ANN. art. 3731a (Vernon Supp. 1986) (repealed as to civil actions 1983).

284. *Id.*

285. TEX. R. EVID. 902(1).

286. *Id.*

287. *Id.*

288. TEX. REV. CIV. STAT. ANN. art. 3731(a), § 4 (Vernon Supp. 1986) (repealed as to civil actions 1983).

289. 686 S.W.2d 203 (Tex. App.—Dallas 1984, no writ).

290. *Id.* at 205-10.

291. *Id.*

292. *Id.* at 205.

293. TEX. R. EVID. art. X.

294. *Id.* 1003.

295. *Id.*

testimony attempting to characterize or summarize matters contained in writings, recordings, or photographs.

*Mercer v. Daoran Corp.*²⁹⁶ is a pre-rules case that would have been decided differently had Texas Rule of Evidence 1003 been in effect at time of trial. The Texas Supreme Court in *Mercer* reversed a summary judgment entered in favor of a purchaser at a trustee's sale on the grounds that the original promissory note had not been produced and no explanation was forthcoming for the failure to produce the original.²⁹⁷ The Texas Supreme Court explained that if the original writing is not produced or its nonproduction is unaccounted for, evidence of its contents is inadmissible.²⁹⁸

During the survey period the Amarillo court of appeals held that the National Electric Safety Code was inadmissible to establish a standard of care in *Pate v. Texline Feed Mills, Inc.*²⁹⁹ The court ruled that the Code does not have the force of law and represents only the conflicting views of its compilers.³⁰⁰

In *U.S. Fire Insurance Co. v. Twin City Concrete, Inc.*³⁰¹ the appellant complained that the trial court erred in excluding copies of its insurance documents, including a draft and a loss draft acceptance authority. The appellant claimed that a portion of the bond application that provided that copies of drafts or other evidences of the appellant's payment would be prima facie evidence of the appellant's liability in a suit between the appellant and the appellee. In affirming the trial court's exclusion of this evidence, a Houston court of appeals explained that the agreement defining prima facie evidence cannot alter the categories of admissible and inadmissible evidence.³⁰² Because the copies of the draft and the loss draft acceptance authority did not show payment, they could not be admitted to prove payment.³⁰³

Photographs³⁰⁴ that portray relevant facts or facts in issue are admissible if they are identified by a witness as accurately representing those facts.³⁰⁵ The authenticating witness need not be the photographer, nor is it necessary that the witness be present at the photograph's taking or have any knowledge regarding the taking of the photographs.³⁰⁶ The witness must testify that he knows the scene or object in question and that the photograph accu-

296. 676 S.W.2d 580 (Tex. 1984).

297. *Id.* at 584.

298. *Id.* at 583.

299. 689 S.W.2d 238 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).

300. *Id.* at 245.

301. 684 S.W.2d 171 (Tex. App.—Houston [14th Dist.] 1984, no writ).

302. *Id.* at 174.

303. *Id.*

304. "'Photographs' include still photographs, X-ray films, video tapes, and motion pictures." TEX. R. EVID. 1001(2).

305. See generally 2 R. RAY, *supra* note 44, § 1466 (photograph must be verified by witness before admissible in evidence).

306. See, e.g., *Vardilos v. Reid*, 320 S.W.2d 419, 423 (Tex. Civ. App.—Houston 1959, no writ); 2 R. RAY, *supra* note 44, § 1466.

rately reflects it.³⁰⁷ Once this predicate is laid, the photograph is admissible.³⁰⁸

A change in the scene or object photographed does not preclude the photograph's admission if the changes are explained so that the photograph will help the jury understand the nature of the condition at the relevant time.³⁰⁹ Nor does the length of time between the incident in question and the taking of the photograph preclude admission if the photograph is identified as an accurate depiction of conditions at the relevant time.³¹⁰ These questions were recently considered in *Cheek v. Zalta*.³¹¹ *Cheek* was a consumer's action alleging misrepresentations that an older boat sold by the defendant to the plaintiff was a new, unused 1978 model. At issue was whether the trial court erred in admitting into evidence a September 1982 photograph of the boat that had been delivered to the plaintiff in April 1979. An independent boat appraiser and expert witness testified that he took the photographs of the boat in 1982 and that they truly and accurately represented the boat at that time. He also testified that the purpose of his appraisal and testimony was to demonstrate that the identification numbers on the boat's hull had been altered. The appraiser's testimony established that he could discern the original number, which indicated 1975 as the date of manufacture, but that the number had been changed to show the boat was manufactured in 1978. The Houston court of appeals affirmed the admission of the photographs into evidence.³¹²

A dispute as to the accuracy of some part of the photograph does not render it inadmissible, but goes to the weight of the evidence and presents a fact question for the jury.³¹³ The trial court has broad discretion in ruling on the admissibility of photographs, and only an abuse of discretion will cause a reversal of the trial court's ruling.³¹⁴ The jury is the sole judge of the degree of weight given to a photograph once it is admitted.³¹⁵ In *Cheek* the testimony of the store manager from whom the appellant purchased the boat

307. See *McRoy v. Riverlake Country Club, Inc.*, 426 S.W.2d 299, 305 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.); 2 R. RAY, *supra* note 44, § 1466.

308. In most cases the best evidence rule, now codified in TEX. R. EVID. 1002, does not apply to photographs because they are usually admitted as demonstrative evidence to illustrate the authenticating witness's testimony, not as primary evidence to prove their content. See FED. R. EVID. 1002 advisory committee notes. The best evidence rule applies when the contents of a photograph are sought to be proved; for example, a copyright, defamation, or invasion of privacy suit, or where the photograph has independent probative value, such as an automatic photograph of an alleged bank robber. *Id.* Note, however, that an "original" of a photograph includes the negative or any print therefrom. TEX. R. EVID. 1001(3).

309. *Howell v. Missouri-Kansas-Texas R.R.*, 380 S.W.2d 842, 844 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.).

310. *Meehan v. Pickett*, 463 S.W.2d 481, 483 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

311. 693 S.W.2d 632 (Tex. App.—Houston [14th Dist.] 1985, no writ).

312. *Id.* at 635-36.

313. See 2 R. RAY, *supra* note 44, § 1466; see also *Briones v. Levine's Dep't Store, Inc.*, 435 S.W.2d 876, 882 (Tex. Civ. App.—Austin 1968), *aff'd*, 446 S.W.2d 7 (Tex. 1969).

314. *Lilly v. Southern Pac. Transp. Co.*, 584 S.W.2d 720, 724 (Tex. Civ. App.—Tyler 1979, no writ); *Briones v. Levine's Dep't Store, Inc.*, 435 S.W.2d 876, 882 (Tex. Civ. App.—Austin 1968), *aff'd*, 446 S.W.2d 7 (Tex. 1969).

315. 435 S.W.2d at 880.

conflicted with the testimony of the appraiser who identified the photograph as to the date of manufacture.³¹⁶ The court ruled that this conflict did not preclude the admission of the photographs. The court did rule, however, that the conflict presented a question for the jury as to the weight to be accorded to the photographs.³¹⁷

XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.³¹⁸ The court may allow extrinsic evidence only if it finds a contract to be ambiguous.³¹⁹ The rule also prohibits parol evidence if a contract is integrated.³²⁰

During the survey period, the appellate courts of Texas rejected attempt to introduce parol evidence on varied and ingenious grounds. The Texas courts of appeals refused to allow evidence of a memorandum of lease offered to interpret an unambiguous lease,³²¹ parol evidence as to the intent of the parties in reserving a royalty interest when both parties agreed that the deed was unambiguous,³²² and evidence of custom and usage of course of dealing to contradict the express terms of unambiguous invoices which clearly indicated the seller's risks and responsibilities.³²³ Also excluded was evidence of the intent of the parties regarding indemnification when the obligation to protect the indemnitee against the consequences of its own negligence was expressed in clear and unequivocal language in a contract,³²⁴ evidence of additional consideration not mentioned in releases that were found to be unambiguous,³²⁵ and evidence of an alleged oral agreement to repurchase real estate when none of the complete and unambiguous documents regarding the subject transactions suggested that a prior or contemporaneous repurchase agreement existed.³²⁶ A court rejected parol evidence that an assignment provision was really a right of first refusal in a complete,

316. *Cheek*, 693 S.W.2d at 635-36.

317. *Id.* at 636.

318. See 2 R. RAY, *supra* note 44, § 1601, at 310.

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

320. Intergration is the practice of embodying a transaction into a final written agreement that is intended to incorporate in its terms the entire transaction. See 2 R. RAY, *supra* note 44, § 1602, at 312-14.

321. *Walker v. Horine*, 695 S.W.2d 572, 577 (Tex. App.—Corpus Christi 1985, no writ).

322. *Averyt v. Grande, Inc.*, 686 S.W.2d 632, 634 (Tex. App.—Texarkana 1984, writ granted).

323. *Liberty Enters. v. Moore Transp. Co.*, 679 S.W.2d 779, 785 (Tex. App.—Fort Worth 1984), *rev'd on other grounds*, 690 S.W.2d 570 (Tex. 1985).

324. *Channel 20, Inc. v. World Wide Tower Servs.*, 596 F. Supp. 928, 930 (S.D. Tex. 1984).

325. *Jeanes v. Hamby*, 685 S.W.2d 695, 698 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

326. *Young v. Simpson*, 607 F. Supp. 67, 70 (S.D. Tex. 1985); *cf. Commerce Sav. Ass'n v. S.C. Management 108, Ltd.*, 681 S.W.2d 200 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), in which the court held that evidence of an oral agreement was admissible under the parol evidence rule because it was offered to establish the existence of a separate accord and satisfaction and not to vary the terms of the written earnest money contract. *Id.* at 202. The oral evidence concerned an agreement between the debtor and realtor whereby the debtor was to obtain a purchaser for property in return for a release from liability from the realtor under a real estate note and guaranty.

unambiguous written instrument.³²⁷

Several appellate courts during the survey period admitted parol evidence under varying circumstances. For example, one court allowed parol evidence to show whether the agent-employee, principal-employer or both were liable on a nonnegotiable note when the note disclosed the principal but did not show the capacity in which the employee signed and contained language consistent with the liability of agent as well as that of the principal.³²⁸ Another court permitted parol evidence to determine the parties' meaning of the term "water well" in a contract for sale of a water well, when the court found the term to be susceptible of different interpretations.³²⁹ Courts also admitted parol evidence regarding the intention of the parties' use of the term "includes" in a joint venture agreement, when the court found the contract ambiguous,³³⁰ and permitted evidence of an oral agreement that a broker would first attempt to collect his commission from the purchaser and, if the purchaser would not pay, the obligation to pay reverted back to vendor, when the listing agreement was held to be ambiguous.³³¹ One court admitted parol evidence to explain the true intentions of the parties concerning a contractual agreement incorporated into a divorce decree. The divorce decree stated that the wife was to receive certain real property "subject to the indebtedness thereon." The trial court received extrinsic evidence because the extrinsic evidence did not vary or contravene the language of the divorce decree, but rather clarified and explained the essential agreement contemplated by the parties by identifying the particular indebtedness to be assured.³³²

Because the parol evidence rule proscribes the use of extrinsic evidence to interpret only unambiguous intergrated writings, the parol evidence rule will not always apply. For example, during the survey period the parol evidence rule was held not to apply to an incomplete instrument, namely one in which matters were not included or for which the instrument did not provide.³³³ If the instrument in question appears to be partial or incomplete, then it may be supplemented by proof of other oral or written terms outside the agreement.³³⁴ In such a situation, parol evidence was held to be admissible to determine the agreement to sell real property where the agreement was written by hand on the back of a cashier's check and when the handwriting was

327. *Palmer v. Liles*, 677 S.W.2d 661, 665-66 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

328. *Byrd v. Southwest Mutli-Copy, Inc.*, 693 S.W.2d 704, 706 (Tex. App.—Houston [14th Dist.] 1985, no writ); see *A. Duda & Sons, Inc. v. Mandra*, 687 S.W.2d 83, 85 (Tex. App.—Houston [1st Dist.] 1985, no writ) (allowing extrinsic evidence to show that parties agreed or otherwise understood that signer of promissory note would not be personally liable).

329. *Exxon Corp. v. Bell*, 695 S.W.2d 788, 790 (Tex. App.—Texarkana 1985, no writ).

330. *Great Nat'l Corp. v. Campbell*, 687 S.W.2d 450, 451-52 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

331. *Jauregui v. Jones*, 695 S.W.2d 258, 263 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

332. *Patterson v. Patterson*, 679 S.W.2d 621, 625 (Tex. App.—San Antonio 1984, no writ).

333. *Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683, 688 (Tex. App.—Houston [1st Dist.] 1984, no writ).

334. *Id.*

not intended as a complete embodiment of the agreement between the parties.³³⁵ The parol evidence rule also does not apply to evidence introduced for purposes other than varying the rights or liability defined by the terms of a writing; for example, in the case where a creditor is sued on the underlying loan obligations and not on the promissory note.³³⁶

The parol evidence rule does not preclude evidence of fraud in the inducement.³³⁷ In *Weitzel v. Barnes*³³⁸ the Texas Supreme Court held that the exclusion of parol evidence of fraud in the inducement is reversible error in a Deceptive Trade Practices Act (DTPA)³³⁹ case when a written contract exists.³⁴⁰ *Weitzel* is the first case in which the Texas Supreme Court addressed the question of the admissibility of oral representations in a DTPA case when a written contract exists. The Supreme Court reversed the court of appeals' holding that the purchasers waived their contractual inspection and repair rights because of the failure to have their home inspected within twenty days from the effective date of the contract.³⁴¹ The supreme court explained that the oral misrepresentations, which were made both before and after the execution of the agreement, constituted the basis of the cause of action.³⁴² The supreme court writing held that even under a contract allowing inspection an affirmative misrepresentation is actionable under the DTPA.³⁴³ The court further explained that the court of appeals erred by reading into the DTPA a requirement of proof of reliance on the misrepresentation as a prerequisite to recovery.³⁴⁴

335. *Garner v. Redeaux*, 678 S.W.2d 124, 128-29 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

336. *National Mar-Kit, Inc. v. Forrest*, 687 S.W.2d 457, 459 (Tex. App.—Houston [14th Dist.] 1985, no writ).

337. *Baker v. Missouri Pac. Truck Lines, Inc.*, 616 S.W.2d 389, 393 (Tex. App.—Houston [1st Dist.] 1985, no writ).

338. 691 S.W.2d 598 (Tex. 1985).

339. TEX. BUS. & COM. CODE ANN. § 17.41-.63 (Vernon Supp. 1986).

340. 691 S.W.2d at 600.

341. *Barnes v. Weitzel*, 678 S.W.2d 747, 750 (Tex. App.—Fort Worth 1984), *rev'd*, 691 S.W.2d 598 (Tex. 1985).

342. 691 S.W.2d at 600.

343. *Id.* at 601.

344. *Id.* at 600.

