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Evidence

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EVIDENCE

by

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

I. ARTICLE I—GENERAL PROVISIONS

Article I of the Texas Rules of Evidence contains many important substantive provisions. Texas Rule of Evidence 103(a)(1) provides that a timely objection or motion to strike must appear in the record as a condition for an appellate attack on an evidentiary ruling.[1] The objection must state the specific ground of objection, if that ground is not apparent from the context.[2] This rule changes prior Texas practice.[3] In *Crider v. Appelt*[4] an objection to testimony that the defendant was never criminally prosecuted for driving while intoxicated was not preserved for appeal because the record failed to disclose the grounds for the objection.[5]

When evidence admissible for one purpose or as to one party is not admissible for another purpose or as to another party, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly . . . ."[6] In *State v. Buckner Construction Co.*[7] the Houston court of appeals wrote that the state engineer's entire file for a bridge painting project was properly excluded because the state had failed to sustain its burden of separating the inadmissible parts of the file from the admissible parts.[8] The court explained that because appellee objected to the entire file on the ground that it contained inadmissible matters, it became the state's burden

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1. TEX. R. EVID. 103(a)(1).
2. *Id.*
3. Unobjected to hearsay is no longer denied probative value. *Id.* 802.
4. 696 S.W.2d 55 (Tex. App.—Austin 1985, no writ).
5. *Id.* at 57.
6. TEX. R. EVID. 105.
7. 704 S.W.2d 837 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
8. *Id.* at 847.

to separate the inadmissible parts from the admissible parts, and offer just those admissible parts.[9]

II. ARTICLE II—JUDICIAL NOTICE

Article II of the Texas Rules of Evidence governs judicial notice.[10] Several courts during the Survey period held taking judicial notice of statistical facts proper under Texas Rule of Evidence 201. The Fort Worth court of appeals held that the discount rates on ninety-day commercial paper in effect at a federal reserve bank, which were reported in Federal Reserve bulletins, were a proper subject for judicial notice when determining whether contractual interest was usurious.[11] Another court found that the population of a county was a proper subject for judicial notice for purposes of determining the extrajudicial authority of a city within a county.[12]

Several courts have upheld the taking of judicial notice of papers on file in a case.[13] When considering the question of attorney's fees in an action for specific performance of a contract, an appellate court permitted the trial court to take judicial notice of the entire case file, including a demand letter not introduced into evidence but attached to the amended petition.[14] Although a court may take judicial notice of its own file, two courts have held that a trial judge cannot consider testimony introduced at a previous trial unless such testimony was admitted into evidence.[15] In *State v. Sun Growth VI, California Ltd.*[16] the Austin court of appeals held that an appellate court may judicially notice facts even though the trial court was not requested to do so.[17] This notice is proper under Texas Rule of Evidence 201(f), which provides that judicial notice may be taken at any stage of the proceeding.[18]

Texas Rule of Evidence 203 governs the determination of the laws of foreign countries. Rule 203 requires that a party who intends to raise an issue

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9. *Id.*

10. TEX. R. EVID. art. II.

11. Wagner & Brown v. E.W. Moran Drilling Co., 702 S.W.2d 760, 773 (Tex. App.—Fort Worth 1986, no writ). TEX. R. EVID. 201(b) is a verbatim adoption of FED. R. EVID. 201(b). During the Survey period the Fifth Circuit held that a district court may properly take judicial notice of prevailing interest rates. Transorient Navigators Co., S.A. v. M/S Southwind, 788 F.2d 288, 293 (5th Cir. 1986).

12. Projects Am. Corp. v. Hilliard, 711 S.W.2d 386, 388 (Tex. App.—Tyler 1986, no writ).

13. *See, e.g.*, Victory v. State, 138 Tex. 285, 288, 158 S.W.2d 760, 763 (1942) (Texas courts may take judicial notice of their own records); Klein v. Dimock, 705 S.W.2d 408, 410-11 (Tex. App.—Fort Worth 1986, no writ) (trial judge could take judicial notice of the papers on file in the case, and therefore had sufficient evidence to determine appellant's application to set aside probate filed beyond the statute of limitations); Texas Sec. Corp. v. Peters, 463 S.W.2d 263, 265 (Tex. Civ. App.—Forth Worth 1971, no writ) (trial judge can take judicial notice of records of his court and of facts shown by court records of the case on trial).

14. Carrington v. Hart, 703 S.W.2d 814, 818 (Tex. App.—Austin 1986, no writ).

15. Traweek v. Larkin, 708 S.W.2d 942, 946-47 (Tex. App.—Tyler 1986, writ ref'd n.r.e.); Muller v. Leyendecker, 697 S.W.2d 668, 675 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

16. 713 S.W.2d 175 (Tex. App.—Austin 1986, no writ).

17. *Id.* at 178.

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

concerning the law of a foreign country should give notice in its pleadings or other reasonable written notice, and at least thirty days prior to the date of trial furnish all parties copies of any written materials or sources that he intends to use as proof of the foreign law.[19] In *Ossorio v. Leon*[20] the appellant introduced proof of Mexican law after the pleadings had been filed. The San Antonio court of appeals held that the appellant complied with Rule of Evidence 203 because the trial court allowed her leave to file the documents and granted her a postponement in order to comply with the rule's requirements.[21]

Administrative rules and regulations are also proper subjects for judicial notice.[22] During the Survey period, one court upheld the propriety of judicially noticing Tax Board guidelines in a case challenging an appraisal made to determine ad valorem taxes.[23] Texas Rule of Evidence 204 permits the taking of judicial notice of the contents of the Texas Register.[24] The Dallas court of appeals found that it was proper in a medical malpractice suit to notice judicially treatments and procedures established by the Texas Medical Disclosure panel and published in the Texas Register.[25]

During the Survey period, courts found various topics improper for judicial notice. Such topics included the degrees of illness, disease, or impairment, probable effects of treatment, or likelihood of recovery.[26] In addition, in a divorce action, a court found the subject matter involved in the former husband's cause of action against his employer was not proper for judicial notice when determining whether proceeds from that lawsuit were divided by the divorce decree.[27]

III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence governs presumptions.[28] Because the Texas Rules of Evidence contain no corresponding article III, the law of presumptions continues to be governed by Texas common law.

In *Jackson v. Green*[29] the Corpus Christi court of appeals explained that the plaintiff does not always have the burden of proof.[30] Texas common law recognizes that courts should place the burden on the party having peculiar knowledge of the facts to be proved.[31] As a result, in an action by the wife to

19. *Id.* 203.
20. 705 S.W.2d 219 (Tex. App.—San Antonio 1985, no writ).
21. *Id.* at 222.
22. TEX. R. EVID. 204.
23. Bower v. Edwards County Appraisal Dist., 697 S.W.2d 528, 530 (Tex. App.—San Antonio 1985, no writ).
24. TEX. R. EVID. 204.
25. Price v. Hurt, 711 S.W.2d 84, 88 (Tex. App.—Dallas 1986, no writ).
26. Carter v. Service Life & Casualty Insur. Co., 703 S.W.2d 349, 352 (Tex. App.—Corpus Christi 1985, no writ).
27. Boaz v. Boaz, 708 S.W.2d 901, 904-05 (Tex. App.—Houston [14th Dist.] 1986, writ dism'd).
28. FED. R. EVID. art. III.
29. 700 S.W.2d 620 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
30. *Id.* at 621.
31. *Id.* at 622.

partition the husband's military nondisability retirement benefits not previously apportioned by the divorce decree, the Corpus Christi court put the burden on the former husband to establish his rank and the value of his military retirement benefits at the time of divorce.[32]

Presumptions and inferences are sometimes merely assumptions of facts that have not been rebutted.[33] During the Survey period, the Texas Supreme Court wrote that an action of the Texas Employment Commission carries a presumption of validity, so that the party seeking to set aside the agency's decision has the burden of showing that the decision was not supported by substantial evidence.[34] A bailor makes a presumptive case of negligence when he proves that he gave goods to a bailee and that the goods were either not returned or were returned in a damaged condition.[35] Texas has an exception to this rule: when the goods are shown to have been damaged by fire, there is not a presumption of negligence against the bailee, and the burden of showing negligence is on the bailor.[36] In *Mayhar v. Triana*[37] the Eastland court of appeals rejected this fire exception to the general rule and wrote that the exception should no longer be followed in Texas.[38] The Texas Supreme Court refused the bailee's application for writ of error with the notation "refused."[39]

In *P.T. & E. Co. v. Beasley*[40] the Beaumont court of appeals wrote that a strong presumption exists that a deceased exercised ordinary care for his own safety. The burden in this case was upon defendants to overcome that presumption by presenting competent evidence in such a conclusive manner that reasonable minds could not differ with respect to issues of contributory negligence.[41]

A trial court can make inferences against a party about the circumstances of a collision based partially on that party's failure to call an important witness.[42] During the Survey period, the Fifth Circuit wrote that a district court did not err by refusing to make such an adverse inference from a vessel owner's failure to call as a witness the vessel's port pilot.[43] Neither court considered the absent pilot's testimony important because the other vessel owner did not point to any still-disputed fact that the pilot's testimony could

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32. *Id.* at 621-22.

33. *See generally* 1 R. RAY, TEXAS PRACTICE, LAW OF EVIDENCE §§ 51-56 (3d ed. 1980).

34. Mercer v. Ross, 701 S.W.2d 830, 831 (Tex. 1986).

35. Buchanan v. Byrd, 519 S.W.2d 841, 843 (Tex. 1975).

36. Lufkin Indus., Inc. v. Mission Chevrolet, Inc., 614 S.W.2d 596, 598 (Tex. Civ. App.—Waco 1981, no writ).

37. 701 S.W.2d 325 (Tex. App.—Eastland 1985, writ ref'd).

38. *Id.* at 327.

39. 29 Tex. S. Ct. J. 314 (Apr. 12, 1986).

40. 698 S.W.2d 190 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

41. *Id.* at 194.

42. Barrois Bros. v. Lake Tankers Corp., 188 F. Supp. 300, 303 (E. D. La. 1960), *aff'd sub nom.* National Marine Serv., Inc. v. Barrois Bros., 286 F.2d 573 (5th Cir. 1961).

43. United Overseas Export Lines, Inc. v. Medluck Compania Maviera, S.A., 785 F.2d 1320, 1325-26 (5th Cir. 1986).

have clarified.[44]

The Fifth Circuit also considered the operation of rebuttable presumptions in *Pennzoil Co. v. Federal Energy Regulatory Commission*.[45] The Fifth Circuit wrote that it followed the "Thayer" or "bursting bubble" theory of presumptions.[46] According to these theories, the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact.[47] If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears, leaving a factual issue to be determined by the trier of fact.[48]

A rebuttable presumption exists that a properly addressed and stamped letter will be delivered in the due course of the mails.[49] In *Gulf Insurance Co. v. Cherry*[50] an insurance company had to rebut the presumption that a properly addressed and stamped letter was received in due course of the mails. Due to the large volume of mail and an automated system, the company could not present a witness who could remember receipt of one letter. The court held that the insurer's testimony that the insured's payment could not have been received before the cancellation date, coupled with the insurer's presentation of a cancelled check and a billing statement bearing a post-accident date, were sufficient to rebut this presumption.[51]

The Texas Supreme Court twice considered inferences during the Survey period. In *Hernandez v. Kroger Co.*[52] the Texas Supreme Court in a per curiam opinion wrote that the store policy of placing floor rugs in the foyer indicated that Kroger was aware that moisture or debris could have been tracked into the store.[53] The court also wrote that the jury could have inferred that the existence of moisture and debris in the foyer could constitute an unreasonable risk of harm.[54] In *Spoljaric v. Percival Tours, Inc.*[55] the Texas Supreme Court wrote that although a court usually determines a party's intent at the time the party made a representation, the court may also infer such intent from the party's subsequent acts after the representation is made.[56]

The Fifth Circuit held that the correct inference arising from an expert witness's testimony regarding whether a defect in a grenade could have been detected by x-ray inspection was a question for the jury.[57] Another question for the jury was the inference arising from the expert's testimony that, in thirty years of experience, he had never heard of a missing delay column in a

44. *Id.*
45. 789 F.2d 1128 (5th Cir. 1986).
46. *Id.* at 1136.
47. *Id.*
48. *Id.* at 1136-37.
49. Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 455, 159 S.W.2d 854, 857 (1942).
50. 704 S.W.2d 459 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
51. *Id.* at 461.
52. 711 S.W.2d 3 (Tex. 1986).
53. *Id.* at 4.
54. *Id.*
55. 708 S.W.2d 432 (Tex. 1986).
56. *Id.* at 434.
57. McGonigal v. Gearhart Indus., Inc., 788 F.2d 321, 327 (5th Cir. 1986).

fully assembled grenade.[58]

IV. ARTICLE IV—RELEVANCY AND ITS LIMITS

Article IV of the Texas Rules of Evidence specifically governs relevancy and its limits.[59] Relevant evidence means "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."[60] All relevant evidence is admissible, except as otherwise provided by the Constitution, by statute, or by other rules.[61] Evidence that is not relevant is inadmissible.[62]

Several cases during the Survey period considered whether certain evidence was relevant. In *Thompson v. Mayes*[63] the Eastland court of appeals reviewed a suit to impose a constructive trust on the devised assets of a devisee who killed a devisor. The court held that the devisee's tapes, made before his suicide, but more than two years after the devisor's disappearance, were not relevant.[64] The Corpus Christi court of appeals, in *Group Hospital Services, Inc. v. Daniel*,[65] held that testimony that a group health insurer had denied similar claims was immaterial and irrelevant in a group health beneficiary's action against the insurer for breach of contract, fraud, and violations of the Texas Insurance Code.[66]

In *Sinko v. City of San Antonio*[67] the San Antonio court of appeals explained that evidence of an out-of-court experiment, made without the presence of the opposing party, may only be admissible if a substantial similarity exists between the conditions at the time of the experiment and those surrounding the event giving rise to the litigation.[68] The court in *Bauer v. Lavaca-Navidad River Authority*[69] held that evidence of recent sales of other property, meeting the test of similarity, should be admitted in an eminent domain proceeding.[70] OSHA regulations are admissible into evidence as being relevant to the standard of conduct that a defendant should have employed.[71]

Texas Rule of Evidence 403 provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of

58. *Id.*
59. TEX. R. EVID. art. IV.
60. *Id.* 401. One court during the Survey period explained that evidence is probative when it is more than a surmise or a suspicion and tends to prove the proposition. Cactus Util. Co. v. Larson, 709 S.W.2d 709, 715 (Tex. App.—Corpus Christi 1986, writ granted).
61. TEX. R. EVID. 402.
62. *Id.*
63. 707 S.W.2d 951 (Tex. App.—Eastland 1986, no writ).
64. *Id.* at 954.
65. 704 S.W.2d 870 (Tex. App.—Corpus Christi 1986, no writ).
66. *Id.* at 879.
67. 702 S.W.2d 201 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).
68. *Id.* at 204.
69. 704 S.W.2d 107 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
70. *Id.* at 110.
71. Baker Marine Corp. v. Herrera, 704 S.W.2d 58, 61 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[72] Several cases during the Survey period considered the propriety of excluding relevant evidence, especially in situations in which the evidence had a tendency to mislead or confuse the jury. One court, affirming the admission of certain evidence, explained that relevant evidence is inherently prejudicial, and only evidence that is unfairly prejudicial may be excluded.[73] The court further explained that evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as, commonly, an emotional one.[74] To determine whether to exclude relevant evidence because of its potential for prejudicial or inflamatory effects upon the jury, a court must weigh the prejudicial potential against the probative value of the evidence.[75] The court in *Missouri-Kansas-Texas Railroad v. Alvarez*[76] held that the trial court properly excluded evidence of a passenger's intoxication in an action by the passenger against the railroad for injuries sustained in a train-automobile collision because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.[77] Another court considered the potential prejudice against the manufacturer arising from the introduction of an outboard motor's 1983 operations manual that contained warnings about the absence of a kill-switch. The court held that the manual's relevance in establishing the feasibility of providing warnings in prior years outweighed any potential prejudice and was, therefore, admissible.[78]

Texas Rule of Evidence 408, which excludes evidence of settlements and offers to settle, does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice, or interest of a witness or a party.[79] An exception to the rule excluding settlement agreements is granted for agreements that cause misalignments of the parties, such as "Mary Carter" settlements, which present false or misleading portrayals of the real interests of the parties to the jury.[80] The benefit of the exception is normally granted to the party who will be harmed, the nonsettling defendant.[81] In *Scurlock Oil Co. v. Smithwick*[82] appellees called a nonparty as an adverse witness to establish what the court of appeals characterized as an "unquestionably prejudicial guaranteed settlement agreement"[83] from an-

72. TEX. R. EVID. 403.
73. United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1562 (E.D. Tex. 1986).
74. *Id.* at 1562-63.
75. Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1075 (5th Cir. 1986).
76. 703 S.W.2d 367 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
77. *Id.* at 370.
78. Reece v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416, 1429 (5th Cir. 1986).
79. TEX. R. EVID. 408.
80. City of Houston v. Sam P. Wallace & Co., 585 S.W.2d 669, 673-74 (Tex. 1979); Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 635 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).
81. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 857-58 (Tex. 1977).
82. 701 S.W.2d 4 (Tex. App.—Corpus Christi 1985), *rev'd*, 724 S.W.2d 1 (Tex. 1986).
83. *Id.* at 9.

other trial, even after the adverse witness denied knowledge of that agreement.[84] The court of appeals wrote that an agreement from another trial with different parties might be admissible under other circumstances, but was not admissible under those circumstances.[85] The court of appeals found, however, that Scurlock waived the error in its closing argument to the jury by using the inadmissible evidence for its own purposes.[86] The Texas Supreme Court reversed, explaining that "[h]aving properly objected, Scurlock was not required to sit idly by and take its chances on appeal or retrial when incompetent evidence was admitted .... Scurlock was entitled to defend itself by explaining, rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving its objection."[87]

Courts often have difficulty determining whether a settlement agreement is a "Mary Carter" agreement. In *Singleton v. Crown Central Petroleum Corp.*[88] the Houston court of appeals explained that the test for a Mary Carter agreement is whether the settling defendant had a financial stake in the success of the plaintiff's recovery.[89] Courts disfavor such agreements because they may alter the posture of the parties and induce the settling defendant to promote the plaintiff's cause of action against the nonsettling defendant. The *Singleton* court found that under the terms of the settlement agreement at issue, the financial interest of the appellant and the settling party were not the same, and that the trial court properly excluded the evidence of settlement from the jury.[90] Compare *Kennon v. Slipstreamer, Inc.*,[91] in which the Fifth Circuit found that it was within the discretion of the district court to admit evidence of the settlement agreement in order to explain the absence of the settling defendants and avoid jury confusion.[92] It was error, however, for the court to disclose to the jury the amount of the settlement in the absence of compelling circumstances demanding disclosure.[93]

One court held evidence of settlement negotiations inadmissible in an action for tortious interference with contract for the limited purpose of showing malice.[94] Although evidence that a party to the settlement liked the appellee may have been a proper subject for consideration by the jury, the court explained that such evidence must come from some source other than

84. *Id.*
85. *Id.*
86. *Id.*
87. 724 S.W.2d at 4.
88. 713 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).
89. *Id.* at 122.
90. *Id.* at 122-23; *see also* Browning-Ferris, Inc. v. Mack Trucks, Inc., 714 S.W.2d 405, 406 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (trial court properly refused to inform jury of settlement between plaintiff and one defendant when that defendant did not change its position at trial after it settled with plaintiff).
91. 794 F.2d 1067 (5th Cir. 1986).
92. *Id.* at 1070.
93. *Id.*
94. Rural Dev., Inc. v. Stone, 700 S.W.2d 661, 668 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

conduct and statements made at a settlement meeting.[95]

V. ARTICLE V—PRIVILEGES

Article V of the Texas Rules of Evidence governs privileges. No person has a privilege to refuse to disclose any matter[96] unless such a privilege is recognized in the Rules of Evidence[97] or specifically granted by statute[98] or by Constitution.[99] The Dallas court of appeals wrote that, under the provisions of Texas Rule of Evidence 502, Texas courts would be compelled to honor a foreign jurisdiction's privilege when that jurisdiction requires by law that certain information not be reported.[100] The court held that appellee failed to meet her burden of proving that certain information contained in an investigation report of the Tel Aviv police was privileged under Israeli law.[101]

Texas Rule of Evidence 503 codifies the prior common law lawyer-client privilege.[102] The lawyer-client privilege protects statements and advice of the attorney as well as communications of the client.[103] In *Dewitt & Rearick, Inc. v. Ferguson*[104] defendants filed a counterclaim and third-party action seeking to recover the amount they paid to a third-party in settlement of a prior suit. Plaintiffs filed a motion to compel discovery regarding the basis of the settlement. Plaintiffs contended that the defendants could not countersue to recover the $350,000 paid in settlement on counsel's advice and refuse discovery as to the substantive nature of the advice. The El Paso court of appeals agreed, and held that the counter-plaintiffs were forced in this case to elect to claim their privilege or abandon their claim.[105] The Texas Supreme Court in *Ginsberg v. Fifth Court of Appeals*[106] explained that a plaintiff cannot seek affirmative relief and simultaneously shield pertinent and proper questions that may have a bearing upon the right to maintain the actions by asserting a privilege.[107]

A communication under the attorney-client privilege is confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal serv-

95. *Id.*
96. TEX. R. EVID. 501(2).
97. *See id.* 501-513.
98. *See* TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1987), *repealed by* TEX. R. EVID. 509-510 (eff. Sept. 1, 1983) *and* TEX. R. CRIM. EVID. 509-510 (eff. Sept. 1, 1986) (confidential communications between physician and patient relating to professional services rendered by the physician are privileged).
99. U.S. CONST. amend. V.
100. Great Nat'l Life Ins. Co. v. Davidson, 708 S.W.2d 476, 478 (Tex. App.—Dallas 1986, no writ); *see* TEX. R. EVID. 502.
101. 708 S.W.2d at 478.
102. TEX. R. EVID. 503.
103. Harrell v. Atlantic Ref. Co., 339 S.W.2d 548, 550 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.).
104. 699 S.W.2d 692 (Tex. App.—El Paso 1985, no writ).
105. *Id.* at 694.
106. 686 S.W.2d 105 (Tex. 1985).
107. *Id.* at 107.

ices to the client . . . ."[108] In *Lewis v. State*[109] a statement made by a sexual abuse complainant's sister to the attorney ad litem for the complainant was held not to be a privileged communication between attorney and client because it was made in the presence of the complainant and state case worker, both of whom the sister considered to have an interest adverse to her own at the time.[110] In *United States v. Ballard*[111] the Fifth Circuit wrote that a defendant's malpractice suit against his former counsel may have arisen from the same transactions that comprised the basis of the criminal suit at issue.[112] The malpractice suit did not operate as a waiver of the attorney-client privilege for purposes of admitting the former counsel's testimony as to conversations with the defendant concerning the subject matter of the prosecution. The Fifth Circuit found, however, that the testimony was not a privileged communication under the crime exception to the attorney-client privilege.[113] The Fifth Circuit explained that once the party seeking disclosure of the attorney-client confidences makes a prima facie case that the attorney-client relationship was used to promote an intended criminal activity, the confidences within the relationship are no longer shielded.[114]

Texas Rule of Civil Procedure 166b contains a "post-accident privilege" that protects from discovery the post-accident communications of an agent, representative, or employee of a party made in connection with the prosecution, investigation, or defense of the claim, or the investigation of the occurrence or transaction out of which the claim has arisen.[115] Like the attorney-client privilege, this privilege can be waived when the party asserting it divulges the information to third parties.[116] In *Atchison, Topeka & Santa Fe Railway v. Kirk*[117] the Eastland court of appeals held that the railroad did not waive its privilege to the post-accident communications of its special agent who had participated in the investigation of a train wreck when the railroad allowed the special agent to testify at a formal investigation hearing at which third parties inquired into the train collision.[118] Federal regulations required the railroad to reveal all data concerning train wrecks to these third parties, and disclosure thus was not voluntary on the part of the railroad.[119] The court further explained that a compulsory disclosure of privileged material in compliance with federal or state law does not constitute a waiver of the privilege sought to be asserted in a later state court

108. TEX. R. EVID. 503(a)(5).
109. 709 S.W.2d 734 (Tex. App.—San Antonio 1986, pet. ref'd, untimely filed).
110. *Id.* at 736.
111. 779 F.2d 287 (5th Cir.), *cert. denied*, 106 S. Ct. 1518, 89 L. Ed. 2d 917 (1986).
112. 779 F.2d at 292.
113. *Id.*; *see, e.g.*, TEX. R. EVID. 503(d)(1) (no privilege is afforded if attorney's services were sought for commission of a crime).
114. 779 F.2d at 292.
115. TEX. R. CIV. P. 166b(3)(d).
116. Dobbins v. Gardner, 377 S.W.2d 665, 668 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).
117. 705 S.W.2d 829 (Tex. App.—Eastland 1986, no writ).
118. *Id.* at 832-33.
119. *Id.*

proceeding.[120]

In *Mosby v. State*[121] the defendant's admission of guilt to a psychologist, privileged at the time it was made, did not remain privileged after a subsequent, pretrial enactment of an exception to the physician-patient privilege excluding from the privilege conversations made by a patient who is a defendant in a criminal prosecution.[122] The court explained that article 5561h is a procedural rule because it relates to the admissibility of evidence, and it applied to the pending litigation as of its effective date.[123]

To be privileged under the fifth amendment,[124] testimony need not be certain to result in a finding of guilt; it need only have tendency to incriminate, although the possibility of self-incrimination must not be "remote and speculative."[125] Several cases decided during the Survey period considered the fifth amendment privilege against self-incrimination. *Johnson v. State*[126] involved the trial court's questioning of a defendant who had declared he would not take the stand and testify. Despite the defendant's refusal to testify, the trial judge still asked him whether he was the individual whose convictions were reflected in the state's exhibits and whether he had in fact been convicted. The appellate court held that such questioning violated the defendant's fifth amendment privilege against self-incrimination and constituted reversible error.[127] Like other privileges, the fifth amendment privilege against self-incrimination can be waived. In *United States v. Coppola*[128] the Fifth Circuit held that the defendant waived any personal privilege he might have had with regard to the production of corporate documents by voluntarily complying with the subpoena and failing to move to quash it.[129] The Fifth Circuit explained that ordinarily a corporate agent cannot assert a fifth amendment privilege against producing corporate records regardless of whether they contain information incriminating him, because the corporation itself has no fifth amendment privilege.[130] However, an individual may have a fifth amendment privilege against being personally compelled to produce documents.[131] A witness also loses his privilege against self-incrimination after he has been convicted of the same offense, as occurred in *Hayes v. State*.[132]

120. *Id.* at 833.

121. 703 S.W.2d 714 (Tex. App.—Corpus Christi 1985, pet. granted).

122. *Id.* at 720; *see* TEX. REV. CIV. STAT. ANN. art. 5561h, § 4(a)(5) (Vernon Supp. 1987) *repealed by* TEX. R. CRIM. EVID. 509 (eff. Sept. 1, 1986) (in criminal proceedings no physician-patient privilege exists).

123. 703 S.W.2d at 721.

124. U.S. CONST. amend. V.

125. United States v. Whittington, 786 F.2d 644, 645-46 (5th Cir. 1986).

126. 704 S.W.2d 139 (Tex. App.—Beaumont 1986, pet. ref'd).

127. *Id.* at 141.

128. 788 F.2d 303 (5th Cir. 1986).

129. *Id.* at 309.

130. *Id.* at 308.

131. *Id.* at 309.

132. 709 S.W.2d 780, 783 (Tex. App.—Houston [1st Dist.] 1986, no writ).

VI. ARTICLE VI—WITNESSES

Texas does not set a minimum age for the competency of a child witness. Texas Rule of Evidence 601(a) provides that to be competent as a witness, a child must demonstrate to the court that he or she understands the responsibilities of the oath and has sufficient intellect to discuss transactions while under interrogation.[133] Inconsistencies in a child's testimony do not render a child incompetent as a witness.[134]

Texas courts have deemed the dead man's statute[135] repealed as to civil actions in conjunction with the adoption of the Texas Rules of Evidence. This statute has been replaced by Texas Rule of Evidence 601(b), which applies only to uncorroborated oral statements "[i]n actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such . . . ."[136] Rule 601(b) extends to and includes "all actions by or against the heirs of legal representatives of a decedent based in whole or in part on such oral statement."[137] Rule 601(b) is much more liberal than its predecessor, article 3716, which prohibited testimony "as to any transaction with, or statement by, the testator, intestate or ward."[138] Rule 601(b) does not exclude evidence of any transaction. Rule 601(b) only excludes testimony as to any oral statement by the testator, intestate, or ward if the testimony to the oral statement is not corroborated.[139]

The first case interpreting Texas Rule of Evidence 601(b), *Tramel v. Estate of Billings*,[140] suggests that courts will strictly construe the rule and will apply it only in very narrowly circumscribed cases.[141] *Tramel* was an insurer's interpleader action to determine which of two claimants was entitled to the proceeds of two policies insuring the life of the deceased. The deceased's ex-wife and his estate each claimed to be the legal beneficiary of the life insurance proceeds. In considering whether rule 601(b) applied to this case, the San Antonio court of appeals wrote that the determining factor is the capacity in which the parties were sued.[142] The administrator was not named as a party.[143] The court distinguished *Tramel* from a case in which the administrator is sued in that capacity and where judgment may thus be

133. TEX. R. EVID. 601(a)(2); Heckathorne v. State, 697 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd).

134. 697 S.W.2d at 11.

135. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926), *repealed by* TEX. R. EVID. 601(b) (eff. Sept. 1, 1983).

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

137. *Id.*

138. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926), *repealed by* TEX. R. EVID. 601(b) (eff. Sept. 1, 1983).

139. TEX. R. EVID. 601(b). Like its predecessor, article 3716, this rule can be waived if "the witness is called *at the trial* to testify thereto by the opposite party . . . ." (emphasis added). *Id.* The words "at the trial" were added in the amendment to the rule effective Nov. 1, 1984. Unlike its predecessor, the rule will not be waived by questions to the opposite party during discovery.

140. 699 S.W.2d 259 (Tex. App.—San Antonio 1985, no writ).

141. *Id.* at 261-62.

142. *Id.* at 263.

143. In *Tramel* the insurance company sought a declaration of the rightful legal beneficiary of the proceeds of the policies. It sued the estate and the ex-wife as possible beneficiaries. An

rendered against him as such.[144] This distinction is impossible. "[T]he 'estate' of a decedent is not a legal entity and may not properly sue or be sued as such."[145] The *Tramel* opinion does not consider whether the estate could have become a party without naming the administrator. The court stated that because he was not named as a party, the administrator "is not [a person] for or against whom judgment may be rendered."[146] But judgment cannot be rendered for or against the estate, which is not a legal entity. It is also questionable that the estate could "seek recovery only in [its] own right"[147] without ultimately subjecting the estate to a judgment for or against "the heirs or legal representatives of a decedent,"[148] in which case rule 601(b) would apply to this case.

The *Tramel* court held that rule 601(b) did not apply.[149] The court reasoned that because of the nontestamentary character of the proceeds,[150] and because a specific beneficiary had been designated,[151] the right to the proceeds of the policies was not one based upon any right inherited from the decedent.[152] Rule 601(b), however, does not condition its applicability on the testamentary character of the interest in controversy.[153] Rule 601(b) permits testimony as to an oral statement of the testator if the testimony is corroborated, but the rule does not state how such testimony is corroborated.

In *Tramel* the trial court admitted the estate administrator's testimony as to the deceased's oral statement that he wished to change the beneficiary of the proceeds of the two life insurance policies. Following this conversation, the administrator sent a letter to the insurance company requesting the change of beneficiary. The company made this change before the insured's death. The trial court concluded that the administrator's testimony as to the oral statement was corroborated by the administrator's letter to the insur-

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estate, however, is not a legal entity. *See infra* notes 144-48 and accompanying text. Apparently this party defect never was raised, nor was it discussed by the court.

144. 699 S.W.2d at 263.

145. Price v. Estate of Anderson, 522 S.W.2d 690, 691 (Tex. 1975).

146. 699 S.W.2d at 263.

147. *Id.*

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

149. 699 S.W.2d at 264.

150. *Id.* at 262. Considering § 450(a)(1) of the Texas Probate Code, the court stated, "It is plain the right to the proceeds does not accrue as a testamentary right to those who will take under the laws of descent and distribution. In that respect they are not 'heirs'. Proceeds of an insurance policy are by statutory definition nontestamentary in nature." *Id.* at 262 (citing TEX. PROB. CODE ANN. § 450(a)(1) (Vernon 1980).

151. "A beneficiary is defined as one to whom a policy of insurance effected is payable." *Id.* (citing TEX. INS. CODE ANN. art. 3.01, § 9 (Vernon 1981).

152. The court explained that both the estate and the wife were in the posture of a legal beneficiary, basing its decision on TEX. INS. CODE ANN. art. 3.01, § 9 (Vernon 1981). The court reasoned that if the ex-wife or the estate had sued the insurance company, either would stand on its own right and not upon any right claimed as inherited from the decedent. "The same can be said of [their] position in this interpleader suit." 699 S.W.2d at 262. "In the context of this suit, there are no heirs." *Id. But see supra* text accompanying notes 150-51.

153. The rule applies, by its own terms, "[i]n actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such . . . ," and extends to and includes "all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement." TEX. R. EVID. 601(b).

ance company.[154]

The San Antonio court of appeals did not determine whether the administrator's letter was independent corroboration of an oral statement because of its conclusion that Texas Rule of Evidence 601(b) did not apply. The opinion, however, contains much dicta regarding the requirements for corroborative evidence.[155] The court seems to have reached the correct result not because rule 601(b) did not apply, but because the administrator's testimony as to the oral statement was corroborated by documentary evidence that would have been legally sufficient under the standard articulated in the opinion.[156]

In *Bobbit v. Bass*[157] the El Paso court of appeals considered how much corroboration Texas Rule of Evidence 601(b) requires. Rejecting the strict test that evidence must be sufficient to go to the jury and on which a verdict might be returned,[158] the El Paso court adopted a line of cases holding that the corroborating evidence need not be sufficient standing alone to support the verdict, but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth.[159]

The *Tramel* court characterized the testimony in question as relating to a transaction with the deceased, rather than to an oral statement.[160] Although it is not at all clear that this testimony related to a transaction and not to an oral statement, the court correctly noted that testimony as to transactions with a decedent may now come into evidence through testimony that courts would have excluded in the past.[161] "The phrase 'any transaction with' obviously included more than uncorroborated oral statements of a deceased . . . ."[162]

It is regrettable that two justices[163] concurred in *Tramel*'s result without writing a concurring opinion, and even more regrettable that *Tramel* has no writ history. The last Texas Supreme Court case to consider the dead man's statute[164] seemed to adopt by implication the widespread, severe criticism of

154. 699 S.W.2d at 262.

155. *Id.*

156. *Id.*

157. 713 S.W.2d 217 (Tex. App.—El Paso 1986, writ dism'd).

158. *Id.* at 220.

159. *Id.*; *see* Schwartz v. Davis Mfg. Co., 31 Mich. App. 451, 189 N.W.2d 1, 3 (1971) (no longer necessary that corroborating evidence must, standing alone, tend to prove essential allegations); Peck v. Wright, 70 N.M. 259, 372 P.2d 831, 832 (1962) (corroborating evidence no longer needs to be able to stand alone and unsupported to be admissible); Hereford v. Paytes, 226 Va. 604, 311 S.E.2d 790, 792 (1984) (in case involving Virginia dead man's statute, corroborating evidence need not be sufficient by itself to support a verdict, but only tend to confirm and strengthen witness's testimony).

160. 699 S.W.2d at 264.

161. *Id.*

162. Black, *Article VI, Witnesses*, 20 HOUS. L. REV. 409, 412 (1983) (Tex. R. Evid. Handbook). Included within the definition of transaction was "every method by which one person can derive impressions or information from the conduct, condition, or language of another." Dominguez v. Garcia, 36 S.W.2d 299, 299 (Tex. Civ. App.—Austin 1931), *aff'd*, 53 S.W.2d 459 (Tex. Comm'n App. 1932, judgmt adopted).

163. Justices Cantu and Reeves concurred in the result but not in the opinion.

164. Lewis v. Foster, 621 S.W.2d 400 (Tex. 1981).

it,[165] and the Texas Supreme Court in the past has construed the dead man's statute narrowly.[166] Notwithstanding the State Bar Liaison Committee's recommendation to eliminate the dead man's statute,[167] the Texas Supreme Court promulgated rule 601(b).[168] The Texas Supreme Court obviously intended to retain portions of the dead man's statute. The supreme court has written that the purpose of the rule is to render incompetent testimony that the deceased, if living, could controvert, and to prevent one party from taking advantage of the other because the lips of the deceased are sealed.[169]

The *Tramel* court seems to have reached the right result for the wrong reasons. Under *Tramel*'s reasoning, a party would seem to be able to avoid application of rule 601(b) by filing suit against an estate without naming the executor or administrator and hoping, as apparently happened in *Tramel*, that the opposing party neither notices nor complains of the defect in a necessary party. *Tramel* should have limited precedential value. Even when a court applies it correctly, Texas Rule of Evidence 601(b) will exclude far less evidence than its predecessor.

Texas Rule of Evidence 605 provides that a presiding judge at a trial may not testify as a witness.[170] In *Duvall v. Sadler*[171] the Texarkana court of appeals held that a presiding judge's recitation of the facts in a case for the purposes of clarifying the record did not constitute an unchallenged qualification of the bill of exceptions under the terms and provisions of Texas Rule of Civil Procedure 372(e).[172] The court explained that the qualification consists of the testimony of the presiding judge, and that such testimony will not be considered for any purpose.[173]

Federal Rule of Evidence 606(b), which is identical to Texas Rule of Evidence 606(b), provides that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations . . . except . . . on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[174] In *Jones v. Frank*[175] the Western District of Texas, Austin Division, considered the appeal by an unsuccessful plaintiff to inquire into the thought processes of the jury. Since the juror in question had testified that no outside influence affected the decision of any juror and that the jury did not consider any extraneous prejudicial information during its deliberations, the plaintiff had no such right of

165. *Id.* at 402-403; *see also* 1 R. RAY, *supra* note 33, § 337 (dead man's statute does more harm than good because it frequently prevents establishment of meritorious claims).

166. *See* 621 S.W.2d at 404 (a court should not apply the dead man's statute when the testimony of the deceased as to a given transaction has been given and preserved, and is available to both parties to the suit).

167. Black, *supra* note 162, at 413.

168. *Id.*

169. 621 S.W.2d at 402.

170. TEX. R. EVID. 605.

171. 711 S.W.2d 369 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

172. *Id.* at 376.

173. *Id.*

174. FED. R. EVID. 606(b).

175. 622 F. Supp. 1119 (W.D. Tex. 1985).

inquiry.[176]

In *Clancy v. Zale Corp.*[177] the appellant offered evidence of alleged jury misconduct in an action against a handgun manufacturer. The evidence included an affidavit by a juror that quoted the jury foreman as stating that the jury could not try law or change law, and could not penalize manufacturers for doing something within the law. Other affidavits by the juror stated that during jury deliberations there was a major discussion about the legality of the sale of the handgun; that the jury did not balance the risk against the utility of the handgun; and that the jury discussed paint thinner and concluded that the manufacturer should not be sued because a teenager sustained brain damage from sniffing paint thinner. The court concluded that these statements were not admissible as evidence of outside influence upon a jury.[178]

Texas Rule of Evidence 608(a) provides that an adverse party may attack a witness's truthful character before the witness can offer evidence of truthful character.[179] In *Rose v. Intercontinental Bank*[180] the Houston court of appeals affirmed the exclusion of a witness's personal opinion of a party's character. The court explained it did not need to decide whether Rose's character had been attacked, such as to allow rehabilitating evidence under rule 608, because the evidence offered as to his good character was inadmissible personal opinion of a party's character.[181] This decision is wrong because Texas Rule of Evidence 608(a) provides that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . . ,"[182] if the evidence refers only to character for truthfulness.[183] In *United States v. Dotson*[184] the Fifth Circuit held that the fact that a government agent investigated the defendant, knew the defendant, or had some contacts with defendant's witnesses, is not a sufficiently reliable basis for that agent to state his opinion or to testify before the jury in order to contradict the testimony of the defendant and his witnesses.[185] In the absence of some underlying basis to demonstrate that the opinion was rationally based on perception of the witness and will be helpful to the jury in determining the fact of credibility, the opinion should not be part of the evidence.[186]

Texas Rule of Evidence 609(a) provides that evidence that a witness has been convicted of a crime is admissible only if the crime was a felony or

176. *Id.* at 1121.
177. 705 S.W.2d 820 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
178. *Id.* at 828-29.
179. TEX. R. EVID. 608(a).
180. 705 S.W.2d 752 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
181. *Id.* at 757.
182. TEX. R. EVID. 608(a).
183. *Id.* 608(a)(1).
184. 799 F.2d 189 (5th Cir. 1986).
185. *Id.* at 193.
186. *Id.* FED. R. EVID. 701, which is identical to TEX. R. EVID. 701, provides that lay opinion testimony is limited to those opinions that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

involved moral turpitude.[187] In *Dewberry v. Brookshire Brothers*[188] the Beaumont court of appeals held that the admission of the plaintiff's municipal court conviction for the theft of a 51 cent carton of chocolate milk was harmful error in the plaintiff's action against the store for false imprisonment.[189] The court, nevertheless, allowed the plaintiff to show that the county court had dismissed the municipal court conviction.[190]

Texas Rule of Evidence 612(a) governs prior inconsistent statements.[191] In *Phelan v. Lopez*[192] the court admitted evidence of an injured worker's settlement of a workers' compensation claim for the purpose of showing that the worker had made prior inconsistent statements.[193] The injured worker sought relief in a negligence action against the owners of the building. The settlement offer was admissible because it showed that the worker had not alleged a back injury but had mentioned only a knee injury in his workers' compensation claim.[194]

VII. ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

A. Lay Opinion

The Texas Rules of Evidence have greatly liberalized the admission of opinion testimony by lay witness.[195] Texas law has always been liberal, however, in allowing an owner of property to testify as to his opinion of its value.[196] An owner of property can give such testimony even though he would not qualify to testify as an expert regarding the value of the same property if it were owned by another person.[197] However, it must still be shown that the owner is qualified to so testify.[198] In *Vista Chevrolet, Inc. v. Lewis*[199] a buyer of an automobile who revoked her acceptance was not qualified to testify regarding the value of the automobile.[200]

B. Competency of Expert

Texas Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

187. TEX. R. EVID. 609(a).
188. 699 S.W.2d 685 (Tex. App.—Beaumont 1985, no writ).
189. *Id.* at 686.
190. *Id.*
191. TEX. R. EVID. 612(a).
192. 701 S.W.2d 327 (Tex. App.—Beaumont 1985, no writ).
193. *Id.* at 334.
194. *Id.*
195. TEX. R. EVID. 701 (a lay witness may testify if his opinions are rationally based and help to clarify facts or misunderstandings).
196. 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).
197. *Id.*
198. Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 146-47 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).
199. 704 S.W.2d 363 (Tex. App.—Corpus Christi 1985), *rev'd on other grounds per curiam*, 709 S.W.2d 176 (Tex. 1986).
200. 704 S.W.2d at 371.

evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise."[201] During the Survey period one court held an attorney-defendant in a malpractice action to be qualified to offer expert opinion to establish the standard of competence for legal representation in his locale.[202] Similarly, a physician-defendant was held to be a proper expert to establish the standard of care owed to the patient.[203] A rehabilitation counselor who was familiar with the plaintiff's injuries, job skills, and employment potentials was qualified to testify as to the effect of the worker's disability on plaintiff's returning to his prior line of work.[204] In an action against a fire insurer for a breach of contract another court properly admitted the testimony of a witness who was hired by the insured to make repair estimates.[205] The witness had a general knowledge of the value of houses in the area, had been in the construction business for many years, and had attended a real estate appraisal seminar.[206] Courts have held that a landowner's testimony as to the cost of restoring his property is not admissible in an action arising after the county removed dirt from his property to reconstruct access to a river crossing.[207] A court also found inadmissible an expert's testimony as to the functionality of reconfiguration of an ice shaving machine, when the witness had no education beyond high school and no experience in the area of ice shaving machine design.[208]

C. *Facts Forming Basis of Opinion*

An expert may base his opinions on facts perceived by him or made known to him at or before trial.[209] If of a type reasonably relied upon by experts in particular field, the facts or data need not be admissible in evidence.[210] In *Ossorio v. Leon*[211] the court held that affidavits of a lawyer's legal opinion on Mexican law were not based on hearsay because, being legal opinions, they were properly based on the facts as related to the affiants.[212] In an action to impose a constructive trust on the devised assets of the devisee the court concluded that testimony of an expert on a "psychological autopsy" that concerned a devisee's state of mind at the time he allegedly killed the devisor was not admissible.[213] The testimony, which was based on infor-

201. TEX. R. EVID. 702.
202. Tijerina v. Wennermark, 700 S.W.2d 342, 347 (Tex. App.—San Antonio 1985, no writ).
203. Beal v. Hamilton, 712 S.W.2d 873, 876 (Tex. App.—Houston [1st Dist.] 1986, no writ).
204. Baker Marine Corp. v. Herrera, 704 S.W.2d 58, 61-62 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
205. Hochheim Prairie Farm Mut. Ins. Ass'n v. Burnett, 698 S.W.2d 271 (Tex. App.—Fort Worth 1985, no writ).
206. *Id.* at 276.
207. Uvalde County v. Barrier, 710 S.W.2d 740, 744 (Tex. App.—San Antonio 1986, no writ).
208. Sno-Wizard Mfg. Inc. v. Eisemann Prod. Co., 791 F.2d 423, 426 (5th Cir. 1986).
209. TEX. R. EVID. 703.
210. *Id.*
211. 705 S.W.2d 219 (Tex. App.—San Antonio 1985, no writ).
212. *Id.* at 221.
213. Thompson v. Mayes, 707 S.W.2d 951, 956-57 (Tex. App.—Eastland 1986, no writ).

mation gathered after the devisee's suicide, was held not to be the type of scientific, technical, or specialized knowledge needed by the jury to decide whether the devisee intentionally and wrongfully killed the devisor.[214]

D. *Subject of Expert Testimony*

1. *Matters Directly in Issue*

Texas Rule of Evidence 704 provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[215] In *Tarrant County Hospital District v. Ray*[216] the Fort Worth court of appeals excluded the testimony of a medical expert that an injury could have occurred without proximately being caused by negligence of any party not because the question invaded the province of the jury, but because it embraced a mixed question of law and fact.[217] In *Withrow v. Shaw*[218] a Department of Public Safety officer testified "that defendant was making a 'legal pass' to the left of plaintiff and 'was not violating the law or any traffic violations when he tried and attempted to pass [plaintiff].' "[219] In reversing and remanding, the Beaumont court of appeals explained that even though the officer was qualified as an accident reconstruction expert, he was not permitted to give statements of law.[220]

2. *Proper Subjects for Expert Testimony*

Several cases decided during the Survey period concerned the nature of subjects upon which experts may express an opinion. Courts held proper subjects for expert testimony to be: testimony that the "line of vegetation" around a beach corresponded to the existing sea wall, for purposes of a statute providing that the public could establish prescriptive right in a beach up to the line of vegetation;[221] testimony by the government's two attorneys relating to the opinions about ownership of seized property;[222] and testimony identifying a tract of land claimed by adverse possession, which included testimony interpreting aerial photographs of the tracts of land in question.[223] Courts also admitted testimony of plaintiff's experts that a proper engineering analysis and design approach could have avoided the failures that occurred in the vehicle manufactured by defendant.[224] This testi-

214. *Id.*
215. TEX. R. EVID. 704.
216. 712 S.W.2d 271 (Tex. App.—Fort Worth 1986, no writ).
217. *Id.* at 274.
218. 709 S.W.2d 759 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).
219. *Id.* at 760.
220. *Id.*
221. Villa Nober Resort, Inc. v. State, 711 S.W.2d 120, 126 (Tex. App.—Corpus Christi 1986, no writ).
222. United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986).
223. De Alonzo v. Solis, 709 S.W.2d 690, 692 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).
224. Ford Motor Co. v. Durrill, 714 S.W.2d 329, 337 (Tex. App.—Corpus Christi 1986, no writ).

mony was evidence that a design defect or negligent design caused the occurrence in question. Courts also admitted expert testimony that most people buy hand guns for self-defense, that less than one percent of hand guns manufactured were involved in homicides, suicides, and accidents, and that poor people had the greatest need for hand guns as protection.[225]

During the Survey period several courts allowed experts to express opinions regarding due care and proper conduct. In a medical malpractice action a court held that testimony about the cause of the decedent's cardiac arrest and its foreseeability was admissible.[226] Courts also admitted expert testimony that absent reduction of breast size, breast lift surgeries on a patient whose breasts were both large and sagging would fail,[227] and testimony by an expert who examined a metal stilt following an accident as to whether it contained a design defect.[228] The Fifth Circuit held that the district court did not abuse its discretion in rejecting an expert's testimony that supported a stevedore's widow's contention that the crating of masonite hardwood was not reasonably adequate and safe, where at least two other witnesses disagreed with the expert.[229]

Other subjects that courts held to be proper for expert testimony included: a veterinarian's testimony that the cause of certain dogs' medical problems was bacterial infection from pollution from a city's sewage treatment plant;[230] testimony of a naval architect that a barge, when loaded and before ballast was added, met Coast Guard stability requirements;[231] an accountant's opinion on the declining value of a business;[232] testimony of real estate experts that a high-pressure natural gas pipeline would reduce the market value of land suited for rural subdivision purposes;[233] and the testimony of an expert that the failure of a safety suit manufacturer to warn that the suit did not protect from convective heat was a producing cause of injuries and death of an employee wearing this suit at the time a flash fire occurred at an ammunitions plant.[234] Also held to be admissible were an economist's testimony as to the present value of an injured employee's earnings over his thirty-two year work-life expectancy,[235] and expert testimony concerning

225. Clancy v. Zale Corp., 705 S.W.2d 820, 827-28 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

226. Ortiz v. Santa Rosa Medical Center, 702 S.W.2d 701, 705 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

227. Wall v. Noble, 705 S.W.2d 727, 730 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

228. Dura-Stilts Co. v. Zachry, 697 S.W.2d 658, 662 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

229. Gilmore v. Waterman Steamship Corp., 790 F.2d 1244, 1246 (5th Cir. 1986).

230. City of Uvalde v. Crow, 713 S.W.2d 154, 158 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

231. Bosnor, S.A. De C.V. v. Tug L.A. Barrios, 796 F.2d 776, 780-81 (5th Cir. 1986).

232. West v. Carter, 712 S.W.2d 569, 572 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

233. Devco, Ltd. v. Murray, 705 S.W.2d 836, 839 (Tex. App.—Eastland 1986, writ granted).

234. Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 718 (5th Cir. 1986).

235. Knight v. Texaco, Inc., 786 F.2d 1296, 1300 (5th Cir. 1986).

foregone interest on money lost through unauthorized trades.[236]

In *Missouri-Kansas-Texas Railroad v. Alvarez*[237] the Austin court of appeals held that a witness disqualified as an expert because of late disclosure could not testify as a fact witness concerning certain related matters.[238] The court determined that he would be testifying in an expert capacity even though called a "fact witness."[239] Because he was disqualified as an expert, the disqualification encompasses all matters of fact to which he testified in giving his expert opinion.[240]

E. Effect of Opinion Testimony

When several values are given for an item or property, or a witness concedes that the value may be lower or higher than his estimate, the trial court's finding on value should be within the range of values in evidence.[241] Juries are not bound to follow expert testimony, and may disregard it and base their decision on their collective judgment and experience.[242]

VIII. ARTICLE VIII—HEARSAY

A. Identifying Hearsay

Whether a record or statement offered to prove its own truth is hearsay is often difficult to determine.[243] " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[244] In *Tejas Gas Corp. v. Herrin*[245] the court held that newspaper accounts were not hearsay under Texas Rule of Evidence 801(d) because the parties did not offer them into evidence for the truth of the matters asserted, but used them to test the basis of the expert's opinions on the public's fear of a pipeline.[246] Compare *Clancey v. Zale Corp.*,[247] in which newspaper articles attached to a motion for new trial were unsworn and held to be hearsay under Texas Rule of Evidence 801(a).

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236. Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1278 (5th Cir. 1986).

237. 703 S.W.2d 367 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

238. *Id.* at 371.

239. *Id.*

240. *Id.*

241. Mata v. Mata, 710 S.W.2d 756, 758 (Tex. App.—Corpus Christi 1986, no writ).

242. Moore v. Johns-Manville Sales Corp., 781 F.2d 1061, 1064-65 (5th Cir. 1986).

243. TEX. R. EVID. 801-806 comprehensively define the hearsay rule and its exceptions. Additionally, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *Id.* 602.

244. *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.

245. 705 S.W.2d 177 (Tex. App.—Texarkana 1985), *rev'd on other grounds*, 716 S.W.2d 45 (Tex. 1986).

246. 705 S.W.2d at 181.

247. 705 S.W.2d 820, 828 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

B. Statements That Are Not Hearsay

Texas Rule of Evidence 801(c) excludes from the definition of hearsay prior statements by a witness,[248] admissions by party-opponents,[249] and depositions.[250]

1. Prior Statement by Witness

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 perjury,[251] or if they 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,[252] or if they constitute identification of person made after perceiving him.[253] Additionally, prior statements are admissible only if the declarant testifies at trial and is subject to cross-examination concerning the statement.[254]

2. Admission by Party Opponent

a. Party's Own Statement. A statement is not hearsay if the statement is offered against a party and if it is his own statement in either his individual or representative capacity.[255] In *Rose v. Intercontinental Bank, N.A.*[256] the court properly admitted a witness's testimony that the defendant told him the defendant's truck line was in bankruptcy because it was defendant's own statement and it was offered against him.[257]

b. Judicial Admissions. A fact that is judicially admitted does not require supporting evidence, and the judicial admission establishes the fact as a matter of law, thereby precluding the fact finder from finding any contrary facts.[258] A judicial admission is actually a substitute for evidence.[259] 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.[260]

During the Survey period several courts considered judicial admissions. One court held that a defaulting garnishee bank's admission in its brief of

248. TEX. R. EVID. 801(e)(1).
249. *Id.* 801(e)(2).
250. *Id.* 801(e)(3).
251. *Id.* 801(e)(1)(A).
252. *Id.* 801(e)(1)(B).
253. *Id.* 801(e)(1)(C).
254. *Id.* 801(e)(1).
255. *Id.* 801(e)(2)(A).
256. 705 S.W.2d 752 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
257. *Id.* at 757.
258. 1A R. RAY, *supra* note 33, § 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. *Id.* at 202-07, 338 S.W.2d at 418-19.
259. 1A R. RAY, *supra* note 33, § 1127.
260. *See* TEX. R. EVID. 801(e)(2).

service of a writ of garnishment was a judicial admission precluding the bank from asserting that service was defective.[261] In a divorce proceeding a sworn inventory and appraisement by the wife listing two-thirds of her jewelry as community property was a judicial admission that not all jewelry was her separate property.[262] In addition, when appellant admitted in his verified answer that he was the record holder of the vehicle in question, the Fort Worth court of appeals overruled his objection that there was no evidence as to the record owner.[263]

If a statement is to be held a judicial admission, it must be deliberate, clear, and unequivocal.[264] A court held that a corporate president's statements that he reserved the right to determine the extent and direction of the corporation's growth concerning water lines, and that he had the duty to fix problems relating to corporate responsibility were not judicial admissions.[265] Because the statements were consistent with the president's control of the corporation and function as president, the statements were not judicial admissions that the corporation was the president's alter ego.[266] The Corpus Christi court of appeals held that an occupant of property may assert an interest in the property in a trespass to try title action because he and his former wife signed an affidavit of tenancy years earlier, and no evidence existed that they made the affidavit of tenancy in the course of a judicial proceeding.[267] Another court held that deposition testimony contradicting rather than clarifying an affidavit statement did not rise to the level of a judicial admission.[268] Similarly, testimony of a party that merely contradicts some other portion of the party's testimony did not have conclusive effect and was not a judicial admission.[269]

c. Vicarious Admissions. Texas Rule of Evidence 801(e)(2)(D) reversed the much criticized holding of *Big Mack Trucking Co. v. Dickerson*.[270] In *Big Mack* the Texas Supreme Court limited the category of agent or servant admissions that are admissible against the principal.[271] Under the new rule, admissions of agents or employees are admissible if the agent makes them

261. First Nat'l Bank v. Peterson, 709 S.W.2d 276, 280-81 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

262. Roosevelt v. Roosevelt, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd w.o.j.).

263. One 1984 Ford v. State, 698 S.W.2d 279, 286 (Tex. App.—Fort Worth 1985, no writ).

264. William B. Roberts, Inc. v. McDrilling Co., 579 S.W.2d 335, 345 (Tex. Civ. App.—Corpus Christi 1979, no writ).

265. Aztec Management & Inv. Co. v. McKenzie, 709 S.W.2d 237, 238 (Tex. App.—Corpus Christi 1986, no writ).

266. *Id.*

267. Balaban v. Balaban, 712 S.W.2d 775, 778 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

268. Adams v. Tri-Continental Leasing Corp., 713 S.W.2d 152, 154 (Tex. App.—Dallas 1986, no writ).

269. Miller v. Miller, 700 S.W.2d 941, 949 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

270. 497 S.W.2d 283 (Tex. 1973).

271. 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 matter, that the statements were authorized. *Id.* at 287.

during the existence of an employment relationship and they concern matters within the scope of the employment relationship, even though the agent or servant has no authority to speak.[272] In *State v. Buckner Construction Co.*[273] the court admitted a state auditor's statement regarding the state's attitude towards a contractor's claim in a breach of contract action against the state. The court held that the statement was an admission by a party opponent concerning a matter within the scope of his employment under Texas Rule of Evidence 801(e)(2)(D).[274] Similarly, a court held that an attorney's statements concerning any matter in the scope of his employment were admissible as vicarious admissions under Federal Rule of Evidence 801(d)(2)(D), which is identical to Texas Rule of Evidence 801(e)(2)(D).[275]

d. Depositions. Depositions taken and offered in accordance with the Texas Rules of Civil Procedure are not hearsay.[276] During the Survey period, the San Antonio court of appeals, in *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*,[277] admitted deposition testimony as an admission of a party opponent under Texas Rule of Evidence 801(e)(2).[278]

C. Hearsay Exceptions: Availability of Declarant Immaterial

1. Then Existing Mental, Emotional, or Physical Condition

Texas Rule of Evidence 803(3) admits into evidence, as exceptions to the hearsay rule, statements of the declarant's then existing state of mind, emotion, sensation, or physical condition.[279] In *Knesek v. Witte*[280] the court held that the testatrix's former husband's statements were admissible to show an oral contract for wills.[281] The court concluded that the statements by the testatrix's former husband that they had made a will for the purpose of leaving all the property to her former husband's nieces and nephews were admissible under Texas Rule of Evidence 803(3) as statements depicting the former husband's existing state of mind.[282] In *Payne v. Edmonson*[283] the court allowed evidence about negotiations between the owner of an allegedly dominant estate and the owner of the servient estate. The negotiations concerned a lease for easement rights before the dominant estate owner purchased the tract. The court concluded that these negotiations and statements that the dominant estate owner never claimed the right to use the property without a lease were admissible under Texas Rule of Evidence 803(3).[284] The court wrote that this evidence was probative of the claim that

272. TEX. R. EVID. 801(e)(2)(D).
273. 704 S.W.2d 837 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
274. *Id.* at 845-46.
275. United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540 (E.D. Tex. 1986).
276. TEX. R. EVID. 801(e)(3).
277. 703 S.W.2d 345 (Tex. App.—San Antonio 1985, no writ).
278. *Id.* at 348.
279. TEX. R. EVID. 803(3).
280. 715 S.W.2d 192 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
281. *Id.* at 197.
282. *Id.*
283. 712 S.W.2d 793 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
284. *Id.* at 797.

the dominant estate owner did not rely on an oral promise by the servient estate owner to permit parking on the property.[285]

2. *Business Records*

Texas Rule of Evidence 803(6)[286] governs the introduction of 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."[287] Preserving the statutory requirements of repealed article 3737(e),[288] rule 803(6) requires that a person with knowledge at or near the time of the matter recorded must have kept the information and records in the course of a regularly conducted business activity, and that it was the regular practice of the business to make such records.[289] The court in *Curran v. Unis*[290] held partnership income tax returns admissible as business records.[291] In *Ronk v. Parking Concepts of Texas, Inc.*[292] alleged police records were not admissible because the records custodian testified that he had not seen them before and that he could not testify that the documents were true and accurate copies of documents on file at the police department.[293] When the business records that a party seeks to introduce are computer records, the party need not prove that the particular computing equipment involved is recognized as standard equipment by persons who understand the operation of the equipment and whose regular duty is to operate it.[294] Such matters go to the weight of the evidence and not its admissibility, one court held during the Survey period.[295]

3. *Public Records and Reports*

Texas Rule of Evidence 803(8) admits as exceptions to the hearsay rule records, reports, statements, or data compilations of public offices or agencies setting forth their activities, matters observed pursuant to duties imposed by law on which they have a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.[296] This rule is identical to Federal Rule of Evidence 803(8). Two cases

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285. *Id.*

286. 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. 3737e (Vernon Supp. 1987), *repealed by* TEX. R. EVID. 803 (eff. Sept. 1, 1983).

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

288. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1987), *repealed by* TEX. R. EVID. 803 (eff. Sept. 1, 1983).

289. TEX. R. EVID. 803(6).

290. 711 S.W.2d 290 (Tex. App.—Dallas 1986, no writ).

291. *Id.* at 295.

292. 711 S.W.2d 409 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

293. *Id.* at 416.

294. Longoria v. Greyhound Lines, Inc., 699 S.W.2d 298, 302 (Tex. App.—San Antonio 1985, no writ).

295. *Id.*

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

decided during the Survey period reviewed evidence that did not meet the standards of rule 803(8). In *Horvath v. Baylor University Medical Center*[297] a publication of the United States Department of Health, Education, and Welfare containing recommended guidelines for a phenylketonuria screening program lacked the reliability displayed by public records of factual events and was properly excluded as hearsay.[298] In *Koonce v. Quaker Safety Products & Manufacturing Co.*[299] the Fifth Circuit held that an interoffice memorandum written soon after a fatal accident describing the steps taken by the employer as a result of the accident was inadmissible as hearsay, when the memo outlined future inquiries into safety measures and offered opinions on expected results, and did not involve a hearing or comprehensive investigation.[300]

4. Statement Against Interest

Texas Rule of Evidence 803(24) admits into evidence, as exceptions to the hearsay rule, statements that at the time of their making were so far contrary to the declarant's pecuniary or proprietary interests that a reasonable person would not have made them unless the declarant believed them to be true.[301] In *Robinson v. Harkins & Co.*[302] the Texas Supreme Court held that the husband's filing of an injury report notice to the Industrial Accident Board and the husband's inculpatory statements to his wife after the accident were admissible in the wife's personal injury suit against the husband's employer.[303] The court based its ruling on the ground that the declarations were against the husband's pecuniary, penal, and social interest, and therefore were admissible as exceptions to the hearsay rule under Texas Rule of Evidence 803(24).[304]

D. Hearsay Exceptions: Declarant Unavailable

Texas Rule of Evidence 804 contains exceptions to the hearsay rule if the declarant is unavailable as a witness.[305] Texas Rule of Evidence 804(a)(3) defines unavailability to include a witness who "testifies to a lack of memory of the subject matter of his statement."[306] Federal Rule of Evidence 804(a)(3) is identical to Texas Rule of Evidence 804(a)(3). In *North Mississippi Communications, Inc. v. Jones*[307] the Fifth Circuit held that Federal Rule of Evidence 804(a)(3), which makes hearsay testimony admissible if a witness testified that he has no memory of events to which his hearsay statement relates, did not apply to a witness who stated that he lacked memory as

297. 704 S.W.2d 866 (Tex. App.—Dallas 1985, no writ).
298. *Id.* at 870.
299. 798 F.2d 700 (5th Cir. 1986).
300. *Id.* at 720.
301. TEX. R. EVID. 803(24).
302. 711 S.W.2d 619 (Tex. 1986).
303. *Id.* at 621.
304. *Id.*
305. TEX. R. EVID. 804.
306. *Id.* 804(a)(3).
307. 792 F.2d 1330 (5th Cir. 1986).

to the particular detail of a conversation but did remember the general subject matter discussed.[308] A statement made by a declarant while believing that his death was imminent, and concerning the cause or circumstances of what he believed to be his impending death, is not excluded by the hearsay rule if the declarant is unavailable as a witness.[309] In a case in which the cause or circumstances of the declarant's death were not relevant to the case at bar, one court held that the declarant's tape recorded statements were not admissible as dying declarations under Texas Rule of Evidence 804(b)(2).[310]

IX. ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

Texas Rule of Evidence 901 requires authentication or identification of evidence as a condition precedent to admissibility.[311] The authentication requirement is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[312] In *Bundick v. Weller*[313] the San Antonio court of appeals held that testimony sufficiently established the chain of custody of a bullet jacket allegedly removed from the victim's back to permit its introduction in a civil action for injuries resulting from a shooting assault.[314] The court held that the witnesses' testimony regarding the steps followed in recovery, examination, and custody of the bullet was a sufficient predicate for admission.[315]

Texas Rule of Evidence 901(b) gives examples of authentication or identification conforming with the requirements of rule 901(a). Rule 901(b)(2) provides that nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation, is permissible authentication.[316] Federal Rule of Evidence 901(b)(2) is identical to Texas Rule of Evidence 901(b)(2). In *InterFirst Bank v. Lull Manufacturing*[317] the Fifth Circuit held that the signatures to promissory notes and security agreements were properly authenticated by such nonexpert testimony.[318] Federal Rule of Evidence 902(9) is identical to Texas Rule of Evidence 902(9), which provides that commercial paper, signatures thereof, and documents relating thereto are self-authenticating.[319] Because Texas's Uniform Commercial Code provides that each signature on an instrument is admitted unless specifically denied in the pleadings,[320] the *Lull* court held that the commercial paper in question was properly admitted when the pleadings contained no

308. *Id.* at 1336-37.
309. TEX. R. EVID. 804(b)(2).
310. Thompson v. Mays, 707 S.W.2d 951, 957 (Tex. App.—Eastland 1986, no writ).
311. TEX. R. EVID. 901.
312. *Id.* 901(a).
313. 705 S.W.2d 777 (Tex. App.—San Antonio 1986, no writ).
314. *Id.* at 780-81.
315. *Id.*
316. TEX. R. EVID. 901(b)(2).
317. 778 F.2d 228 (5th Cir. 1985).
318. *Id.* at 234.
319. TEX. R. EVID. 902(9).
320. TEX. BUS. & COM. CODE ANN. § 3.307(a) (Vernon 1986).

such denial.[321] In *Ford Motor Co. v. Durrill*[322] the Corpus Christi court of appeals held that an exhibit submitted under a certificate signed by the Deputy Director of the National Archives, which certificate stated that it was a true and correct copy of a transcript by the Archives of a tape in its custody, was properly authenticated under Texas Rule of Evidence 902(1), allowing self-authentication of domestic public documents under seal.[323]

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

Article X of the Texas Rules of Evidence governs the admission of the contents of writings, recordings, and photographs.[324] Although the bulk of this article codifies prior Texas law, the rules are much more liberal than prior Texas practice in several respects.

Texas Rule of Evidence 1003 virtually eliminates the "best evidence" rule.[325] Rule 1003 permits the admission of a duplicate to the same extent as an original unless a party raises a question of the authenticity of the original or if it would be unfair to admit the duplicate in lieu of the original.[326] The effect of this rule is that the "best evidence" rule will now apply primarily only to oral testimony attempting to characterize or summarize matters contained in writings, recordings, or photographs. In *Centennial Bonding Agency v. State*[327] a copy of a bond was admissible, under Texas Rule of Evidence 1003, in a bond forfeiture proceeding because the authenticity of the original was not placed in issue and the court found that the introduction of the copy was not unfair to the surety.[328] In *Curran v. Unis*[329] photocopies of partnership income tax returns were admissible where the bookkeeper-custodian of the partnership's records and the comptroller-custodian of the partnership testified that the photocopies appeared to be true and correct copies of the originals, which were submitted to the Internal Revenue Service.[330]

Texas Rule of Evidence 1005 provides that the contents of an official record, or of a document authorized to be recorded or filed, may be proven by a certified copy or by testimony of a witness who has compared it with the original, if the document is otherwise admissible.[331] In *Hickson v. Martinez*[332] the Dallas court of appeals held that the failure to admit a photocopy of federal regulations concerning the mandatory standard of care at hospi-

321. 778 F.2d at 234.
322. 714 S.W.2d 329 (Tex. App.—Corpus Christi 1986, no writ).
323. *Id.* at 339; *see* TEX. R. EVID. 902(1).
324. TEX. R. EVID. art. X.
325. *Id.* 1003.
326. *Id.*
327. 705 S.W.2d 865 (Tex. App.—Fort Worth 1986, no writ).
328. *Id.* at 868.
329. 711 S.W.2d 290 (Tex. App.—Dallas 1986, no writ).
330. *Id.* at 292-94.
331. TEX. R. EVID. 1005.
332. 707 S.W.2d 919 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

tals receiving Medicare and Medicaid funds was improper.[333] The court concluded that when no objection about the photocopy's authenticity is made, the photocopy must be admitted under Texas Rule of Evidence 1005.[334] Without mentioning the Texas Rules of Evidence the court in *Peery v. Peery*[335] held that the judge's own personal notes made during a divorce hearing were not official records, were not part of the record, and were not admissible.[336]

Texas Rule of Evidence 1006 provides that the contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot be conveniently examined in court, may be presented in the form of a chart or summary.[337] In *State v. Buckner Construction Co.*,[338] a contract action against the state, the court admitted into evidence a contractor's payroll records, journals, ledgers, and summaries prepared from business records regardless of whether the underlying invoices and checks were available for examination.[339] Federal Rule of Evidence 1006 is identical to Texas Rule of Evidence 1006. In *Moore v. Johns-Manville Sales Corp.*,[340] a product liability case brought against manufacturers of asbestos-containing products by workers suffering from asbestosis, the product identification list that set out various job sites at which each plaintiff worked, and the insulation with which each plaintiff worked during his insulating career were admissible under Federal Rule of Evidence 1006.[341]

XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.[342] A court may allow extrinsic evidence only if it finds a contract to be ambiguous.[343] The rule also prohibits parol evidence if a contract is integrated.[344]

During the Survey period the appellate courts of Texas rejected attempts to introduce parol evidence on varied and ingenious grounds. One Texas court of appeals refused to allow parol evidence interpreting the extent of a contractual exception in a contract between the city and the intervenor that gave the intervenor exclusive hotel rights, subject to preexisting rights of an

333. *Id.* at 926.
334. *Id.*
335. 709 S.W.2d 392 (Tex. App.—Fort Worth 1986, no writ).
336. *Id.* at 395.
337. TEX. R. EVID. 1006.
338. 704 S.W.2d 837 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
339. *Id.* at 843.
340. 781 F.2d 1061 (5th Cir. 1986).
341. *Id.* at 1066.
342. *See* 2 R. RAY, *supra* note 33, § 1601.
343. *See* Sun Oil Co. v. Madeley, 626 S.W.2d 726, 732 (Tex. 1981) (construction of unambiguous oil and gas lease).
344. Integration 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 33, § 1602.

original lessee.[345] Other courts refused to allow parol evidence of: (1) a promise to provide a potential purchaser for resale of property, which promise was collateral to and not consideration for a promissory note that was unambiguous as to the considerations therefor;[346] (2) testimony attempting to vary the terms in a contract of a condition subsequent that a fee would be paid only if publication was accepted and funded;[347] and (3) of the intent of parties to a deed.[348] In a payee's action on a promissory note against a corporate maker, the parol evidence rule barred testimony that the payee agreed to prepare the promissory note in the name of the corporate maker rather than the actual maker, the corporation's president, and that the payee was to extend notes beyond their due date.[349] The payee, therefore, could not alter the terms of the promissory note that the president signed in his individual capacity.[350] Absent allegations of deception, parol evidence was not admissible in the suit on a guaranty agreement to establish fraud in the inducement.[351]

During the Survey period the Texas Supreme Court considered the parol evidence rule in *Island Recreational Development Corp. v. Republic of Texas Savings Association*.[352] A developer and owner of a condominium brought action against the bank for alleged breach of contract and for failure to fund permanently the first mortgages of the condominium units in accordance with the terms of a commitment letter. The evidence at trial showed that prior to commencing construction and in order to arrange interim construction financing, Island Recreational executed an assignment of the letter of commitment to Allied Merchants Bank. Island Recreational contended that the assignment was merely a collateral assignment, as the record reflected and as Republic's attorney conceded at trial. Evidence showed that Republic was fully aware at the time the commitment letter was issued that Island Recreational would necessarily acquire interim construction financing, and that it was customary in this type of transaction that the commitment of long-term financing would be collaterally assigned to the lender of the construction financing. The Texas Supreme Court held that an assignment, though absolute in form, can be shown by parol evidence to be intended only as collateral security.[353]

Several appellate courts during the Survey period admitted parol evidence under varying circumstances. One court admitted parol evidence to deter-

345. Marriott Corp. v. Azar, 697 S.W.2d 60, 64 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

346. Albritton Dev. Co. v. Glendon Invs., Inc. 700 S.W.2d 244, 247 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

347. Rincones v. Windberg, 705 S.W.2d 846, 847-48 (Tex. App.—Austin 1986, no writ).

348. Smith v. Graham, 705 S.W.2d 705, 706 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.).

349. Daniell Motor Co. v. Northwest Bank, 713 S.W.2d 808, 811-12 (Tex. App.—Fort Worth 1986, no writ).

350. *Id.*

351. Friday v. Grant Plaza Huntsville Assoc., 713 S.W.2d 755, 756-57 (Tex. App.—Houston [1st Dist.] 1986, no writ).

352. 710 S.W.2d 551 (Tex. 1986).

353. *Id.* at 556.

mine the proper construction of a trust account in which an ambiguity arose from a printed form.[354] The ambiguity arose from the use of a printed form normally used to create a joint savings account, but with handwritten additional terms indicating an intent to create a trust account. Another court permitted parol evidence to define an agreement between a builder and homeowners that the homeowners would do electrical work and that the builder would furnish them the materials at his cost.[355] The court supported its holding on the basis that no integrated agreement existed that covered the entire transaction and that the furnishing of electrical equipment at cost was a separate, distinct, collateral agreement to the contract.[356]

Parol evidence was admissible to show mutual mistake of fact,[357] and to show fraud in the inducement.[358] Parol evidence was admissible to prove the signature of an agent in his representative capacity, when the instrument named the person represented but did not show that the person signed in a representative capacity,[359] and also was admissible to show the insured's intent when error was made in the name of the designated beneficiary under a contract leading to a dispute as to the identity of the beneficiary.[360] Finally, in a Deceptive Trade Practices Act[361] case, proof of oral representations by a foundation repair company's agents was admissible to vary the terms of a written contract.[362] The oral representations went to the quality of goods or services and were admissible to show that the company committed false, deceptive, or misleading practices in not performing the services that it promised to do for the consumer.[363]

354. Isbell v. Williams, 705 S.W.2d 252, 256 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).
355. Terrell v. Miller, 697 S.W.2d 454, 457 (Tex. App.—Beaumont 1985, no writ).
356. *Id.*
357. Okon v. MBank, N.A., 706 S.W.2d 673, 675 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
358. Coronado Transmission Co. v. O'Shea, 703 S.W.2d 731, 734 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
359. Gulf & Basko Co. v. Buchanan, 707 S.W.2d 655, 657-58 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
360. Oates v. Hodge, 713 S.W.2d 361, 364 (Tex. App.—Dallas 1986, no writ).
361. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1968 & Supp. 1987).
362. Brown Found. Repair & Consulting, Inc. v. McGuire, 711 S.W.2d 349, 351-52 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
363. *Id.*