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EVIDENCE

by

Linda L. Addison*

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 Evidence¹ contains many important substantive provisions. Texas Rule of Evidence 103(a) provides that admission or exclusion of evidence is not error “unless a substantial right of the party is affected” Whether a substantial right of the party is affected depends upon the facts of the particular case. For example, in *Neily v. Aaron*,² a court of appeals held that the exclusion of certain testimony did not affect any of the appellant’s substantial rights, while in *Portland Savings & Loan Association v. Bernstein*³ a court of appeals held that the exclusion of evidence did deprive appellant of a substantial right.

Texas rules require that a timely objection or motion to strike appear in the trial record as a prerequisite to appeal of an evidentiary ruling.⁴ In *Masi v. Scheel*⁵ the appellant’s failure to object precluded the appeal of any error. To preserve error for appeal, the objection must state the specific grounds for objection if the specific grounds are not apparent from the context.⁶ In *Stedman v. Stedman*⁷ the court held that a general objection that did not state the grounds for objection failed to preserve error.

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1. Effective January 1, 1988, the Texas Rules of Evidence were renamed the Texas Rules of Civil Evidence. Since this article deals with evidence rulings prior to the name change, the old citation form is used throughout.

2. 724 S.W.2d 908, 912 (Tex. App.—Fort Worth 1987, no writ).

3. 716 S.W.2d 532, 540 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.), cert. denied, 475 U.S. 1016 (1986).

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

5. 724 S.W.2d 438, 439 (Tex. App.—Dallas 1987, no writ).

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

7. 731 S.W.2d 706, 708 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Texas rules also provide that a party may not appeal a ruling excluding evidence unless the substance of the evidence was made known to the court or was apparent from the context.⁸ In *Life Insurance Co. of the Southwest v. Brister*⁹ the court of appeals found that excluded testimony regarding the appellee's withdrawal as a representative party from a similar federal class action had a direct bearing on whether the case at bar should be certified as a class action. The court of appeals held that the error was not reversible "because appellants failed to meet their burden of showing that these errors were reasonably calculated to cause and probably did cause a rendition of an improper judgment."¹⁰

Although article VII governs opinion and expert testimony, Texas Rule of Evidence 104(a) provides that preliminary questions regarding the qualification of all witnesses shall be made by the court. An expert need not base his opinions on admissible facts or data so long as the opinions are based on the type of information used by experts in the same field.¹¹ In *Souris v. Robinson*¹² the court held that the trial court must make a preliminary determination whether experts in the field reasonably rely on particular data. Applying the clearly erroneous standard the court of appeals affirmed exclusion of the portions of an expert's testimony not based on the type of information reasonably relied upon by experts in his field.¹³

Authentication and identification, governed by article IX of both the Texas and Federal Rules of Evidence, relate to relevancy.¹⁴ Both the Texas and federal rules provide that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit the evidence, subject to later introduction of evidence fulfilling the condition.¹⁵ In *In Re Bobby Boggs, Inc.*¹⁶ the Fifth Circuit found that the condition of fact relevant to the authenticity of certain bonds had been fulfilled pursuant to Federal Rule of Evidence 104(b).

Under Texas Rule of Evidence 105(a) the court must, upon request, give a limiting instruction when evidence is admitted as to one party or for one purpose, but not as to another party or for another purpose. In *Larson v. Cactus Utility Co.*¹⁷ the Texas Supreme Court held that, absent a request for a limiting instruction, appellant waived his complaint.

Texas Rule of Evidence 106 is commonly known as the "rule of optional

8. TEX. R. EVID. 103(a)(2). Effective January 1, 1988, the rule was amended to delete the "apparent from context" provision.

9. 722 S.W.2d 764, 776-77 (Tex. App.—Fort Worth 1986, no writ).

10. *Id.* at 777.

11. TEX. R. EVID. 703.

12. 725 S.W.2d 339, 341-42 (Tex. App.—Houston [14th Dist.] 1987, no writ).

13. *Id.*

14. "Authentication and identification represent a special aspect of relevancy . . . This requirement of showing authenticity . . . falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b)." FED. R. EVID. 901(a) (advisory committee's note).

15. FED. R. EVID. 104(b); TEX. R. EVID. 104(b).

16. 819 F.2d 574, 581 (5th Cir. 1987).

17. 730 S.W.2d 640, 642 (Tex. 1987).

completeness."¹⁸ When one side introduces all or part of a writing or recording, an adverse party may at that time introduce any other part or any other writing that in fairness should be considered contemporaneously with the admitted evidence.¹⁹ In *Azar Nut Co. v. Caille*²⁰ the court of appeals affirmed the admission of a letter written by the appellee's attorney that responded to a letter offered by the appellant.

II. ARTICLE II—JUDICIAL NOTICE

Article II of the Texas Rules of Evidence governs judicial notice. During the Survey period courts affirmed taking judicial notice of prior judgments²¹ and of a city charter.²² Without referencing the rules of evidence, another court judicially noticed that the Tarrant County Child Support Office was a section of the Tarrant County Domestic Relations Office.²³ An appellate court may take judicial notice for the first time on appeal.²⁴ An appellate court cannot, however, judicially notice local court rules unless the local rules have been filed with the Texas Supreme Court.²⁵

Texas Rule of Evidence 202 governs the determination of laws of other states. The rule permits a court to take judicial notice of the "constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States."²⁶ The federal rules lack a comparable provision. In *Kucel v. Walter E. Heller & Co.*,²⁷ however, the Fifth Circuit held that federal courts must take judicial notice of the laws of other states.

III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence concerns presumptions. Because the Texas Rules of Evidence lack a corresponding article III, Texas common law continues to govern the law of presumptions. One court of appeals held that absent evidence of an appraisal district's use of a correct address on a notice of reappraisal, no presumption of delivery to the taxpayer arises.²⁸ Another court of appeals, however, held that a court clerk's

18. See *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 688 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987); *cf.* TEX. R. CRIM. EVID. 107 (entitled "Rule of Optional Completeness").

19. TEX. R. EVID. 106.

20. 720 S.W.2d 685, 688 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987).

21. *Pitts v. State*, 734 S.W.2d 117, 118 (Tex. App.—Waco, 1987, no pet.); *Kay v. Sandler*, 718 S.W.2d 872, 873-74 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

22. *City of Dallas v. Moreau*, 718 S.W.2d 776, 781 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

23. *Ex parte Parrott*, 723 S.W.2d 342, 345 (Tex. App.—Fort Worth 1987, no writ).

24. *City of Dallas v. Moreau*, 718 S.W.2d 776, 781 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

25. *Petitt v. Laware*, 715 S.W.2d 688, 691 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

26. TEX. R. EVID. 202.

27. 813 F.2d 67, 74 (5th Cir. 1987).

28. *Uvalde County Appraisal Dist. v. F.T. Kincaid Estate*, 720 S.W.2d 678, 680-81 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

testimony that she personally prepared docket notices and properly addressed them to a law firm and description of the district clerk's office's customary mailing procedure raised a presumption that the law firm received the notices.²⁹ During the Survey period the Texas Supreme Court wrote that Texas Rule of Civil Procedure 21(a) establishes a presumption that an addressee receives a notice of trial setting if properly addressed and mailed with prepaid postage.³⁰ The court, however, added that the presumption is not evidence, and "it vanishes when opposing evidence is introduced that the letter was not received."³¹

IV. ARTICLE IV—RELEVANCY AND ITS LIMITS

Article IV of the Texas Rules of Evidence specifically governs relevancy and its limits. All relevant evidence is admissible, except as otherwise provided by constitution, by statute, or by other rules.³² Evidence that is not relevant is not admissible.³³

Several cases during the Survey period considered the relevancy of certain evidence. Evidence of the price realized on the sale of nearby property was held relevant to establish the value of condemned property.³⁴ Another court held that evidence of the price a husband received from the sale of community-owned insurance agencies two years after a divorce was relevant in his former wife's suit to set aside a property settlement on the grounds of fraud.³⁵ The Houston court of appeals found that letters from a steel buyer's attorney to a seller allegedly admitting the disputed debt were improperly excluded as irrelevant in an action on an account, because the court could draw an inference from the attorney's letters that the account existed.³⁶ Citing neither a rule of evidence nor any case law to support its holding, the court of appeals in *Federal Savings & Loan Insurance Corp. v. Kennedy*³⁷ held that the exclusion of certain immaterial evidence, even though relevant, was harmless error, if error at all.

Texas Rule of Evidence 403 allows the exclusion of relevant evidence on special grounds such as unfair prejudice or confusion or if the evidence is merely cumulative. During the Survey period one court excluded prejudicial records about a joint venturer's independent construction project involving the collapse of a trench causing deaths and leading to indictments.³⁸ An-

29. *Jimmy Swaggart Ministries v. City of Arlington*, 718 S.W.2d 83, 86 (Tex. App.—Fort Worth 1986, no writ).

30. *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987).

31. *Id.*

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

33. TEX. R. EVID. 402.

34. *State v. Taylor*, 721 S.W.2d 541, 550 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

35. *Rathmell v. Morrison*, 732 S.W.2d 6, 19 (Tex. App.—Houston [14th Dist.] 1987, no writ).

36. *Peregrine Metals Group, Inc. v. Leervig*, 734 S.W.2d 121, 123 (Tex. App.—Houston [1st Dist.] 1987, no writ).

37. 732 S.W.2d 1, 5 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

38. *Lovelace v. Sabine Consol., Inc.*, 733 S.W.2d 648, 654 (Tex. App.—Houston [14th Dist.] 1987, no writ).

other court excluded evidence that a child at the center of an abduction case was the plaintiff's adoptive, rather than natural, son.³⁹ The Fifth Circuit used Federal Rule of Evidence 403, which is identical to Texas Rule of Evidence 403, to exclude the testimony of an expert who based his opinion on unreliable information.⁴⁰

With certain narrow exceptions, character is not admissible to prove conduct on a particular occasion.⁴¹ A court held that evidence concerning a joint venturer's independent construction project was inadmissible to show his propensity towards negligence.⁴² Another court held that evidence showing that a tenant lied in an unrelated matter was inadmissible in the tenant's personal injury action against an apartment complex and management company.⁴³ Evidence of other wrongs or acts is not admissible proof of a person's character to show that he acted in conformity with the other acts.⁴⁴ In an insurer's action for a declaration that it was not liable to its insured due to arson, the court held that the insured's past insurance claims were admissible to show motive, opportunity, and intent.⁴⁵

Texas Rule of Evidence 407 excludes evidence of subsequent remedial measures, except when offered for a purpose other than merely proving the subsequent remedial measures. In an insured's action on a group long-term disability policy, a court admitted evidence of a different policy issued by the insurer to a different insured for the purpose of impeaching the insurer's position that the policy language was ambiguous.⁴⁶ In a negligence action to recover for the death of a flagman, an oil well owner's subsequent remedial measures were admitted to prove he controlled the well and to prove the feasibility of certain precautionary measures.⁴⁷

Texas Rule of Evidence 408 excludes evidence of compromise and offers to compromise when offered to prove liability or the invalidity of a claim or its amount. The rule does not, however, require the exclusion of compromise evidence offered for other purposes.⁴⁸ For example, a court admitted evidence of settlement negotiations on the question of whether a plaintiff failed to mitigate damages.⁴⁹ The Corpus Christi court of appeals admitted evidence of settlement negotiations, not to show liability, but to prove alleged misrepresentations.⁵⁰ Another court admitted a dealer's letter to a

39. *Silcott v. Oglesby*, 721 S.W.2d 290, 294 (Tex. 1986).

40. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422-24 (5th Cir. 1987).

41. TEX. R. EVID. 404.

42. *Lovelace v. Sabine Consol., Inc.*, 733 S.W.2d 648, 654 (Tex. App.—Houston [14th Dist.] 1987, no writ).

43. *Nix v. H.R. Management Co.*, 733 S.W.2d 573, 576 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

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

45. *Standard Fire Ins. Co. v. Mitchell*, 666 F. Supp. 950, 954 (E.D. Tex. 1987).

46. *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1400-01 (5th Cir. 1986).

47. *Exxon Corp. v. Roberts*, 724 S.W.2d 863, 869 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

48. *Id.*

49. *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1103 (5th Cir. 1987).

50. *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 537 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986).

manufacturer making certain demands on the manufacturer because the letter was less an offer of compromise and more in the nature of an ultimatum.⁵¹

A settlement agreement in which a plaintiff agrees to pay one of several defendants a part of any judgment recovered from nonsettling defendants is called a Mary Carter agreement.⁵² Whether an agreement is a Mary Carter agreement is sometimes at issue, as in *Turner v. Monsanto Co.*⁵³ In *Turner* the court held that the settling indemnitor did not obtain a direct financial interest in the plaintiff's recovery, and evidence of the agreement was not admissible.⁵⁴ Similarly, the Corpus Christi court of appeals excluded evidence of a Mary Carter agreement when the agreement would not show bias or prejudice on the part of the owner of an oncoming vehicle nor show the interest of a witness or party.⁵⁵

V. ARTICLE V—PRIVILEGES

Article V of the Texas Rules of Evidence governs privileges. No person has a privilege to refuse to disclose any matter⁵⁶ unless the rules of evidence recognize the privilege⁵⁷ or a statute⁵⁸ or constitution⁵⁹ grants the privilege.

A person or entity making a report required by law has a privilege to refuse to disclose the report if the law requiring the report creates a privilege.⁶⁰ Texas Rule of Evidence 502 requires Texas courts to honor a foreign jurisdiction's privilege when that jurisdiction forbids the reporting of certain information.⁶¹ The Texas Supreme Court, however, ruled that, absent evidence of a privilege, a privilege will not be recognized.⁶²

Texas Rule of Evidence 503 codifies the common law lawyer-client privilege. The lawyer-client privilege protects both an attorney's statements and advice and a client's communications.⁶³ A court held that the attorney-client privilege protected documents in the National Collegiate Athletic Association's recruiting violation files, containing information communicated for

51. *Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 857 (Tex. App.—Fort Worth 1986, no writ).

52. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857-58 (Tex. 1977).

53. 717 S.W.2d 378, 380 (Tex. App.—Houston [14th Dist.] 1986, no writ).

54. *Id.*

55. *Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68, 70 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

56. TEX. R. EVID. 501(2).

57. *See* TEX. R. EVID. 502-510.

58. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1988), *repealed by* TEX. R. EVID. 509-510 (eff. September 1, 1983) as to civil actions *and* TEX. R. CRIM. EVID. 509-510 (eff. September 1, 1986) as to criminal cases (confidential communications between physician and patient relating to professional services rendered by physician privileged).

59. *See, e.g.*, U.S. CONST. amend. V; TEX. CONST. art. I, § 10.

60. TEX. R. EVID. 502.

61. *Cf. Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) (recognizing existence of privilege of "ongoing criminal investigation").

62. *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987).

63. *Harrell v. Atlantic Ref. Co.*, 339 S.W.2d 548, 554 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.).

the purpose of obtaining legal advice, from disclosure⁶⁴ under the Texas Open Records Act.⁶⁵ Another court used the attorney-client privilege to protect communications between an attorney and a client after an alleged fraud, because one purpose of the privilege is to facilitate discussion of possible legal defenses.⁶⁶

According to the Fifth Circuit, communications between an attorney and a government witness were not privileged when the witness's untruthful statements to the attorney supported false statements made under oath before a grand jury.⁶⁷ The Corpus Christi Court of Appeals held that a letter from a party's attorney to the trial judge was not privileged, since the court could not discover a basis for the privilege in any constitution, statutes, or rules.⁶⁸

Texas Rule of Evidence 509 details the physician-patient privilege. A patient is a person consulting a physician for medical care.⁶⁹ In *Tarrant County Hospital District v. Hughes*⁷⁰ a discovering party asked the hospital to produce the names of donors supplying the blood used in transfusions received by a patient who contracted Acquired Immune Deficiency Syndrome. The court held that because nothing in the record indicated that a physician saw or treated the donors when they donated blood, the physician-patient privilege did not apply to the discovery request.⁷¹ Texas Rule of Evidence 509(d)(7) creates an exception to the physician-patient privilege for involuntary civil commitment proceedings. In *Dudley v. Texas*⁷² the court held that the physician-patient privilege did not protect communications between a physician and a patient after the patient's involuntary detention when the physician informed the patient that the communications were not confidential.

Several cases decided during the Survey period considered the Fifth Amendment privilege against self-incrimination. In *In re Grand Jury Proceedings*⁷³ the Fifth Circuit held that an individual does not enjoy a Fifth Amendment privilege protecting the records of a collective entity. The court explained that the custodian of corporate records cannot invoke the Fifth Amendment, irrespective of how small the corporation is.⁷⁴ In *Smith v. Smith*⁷⁵ a court of appeals held that witnesses, who asserted their Fifth

64. *Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1076, 1087 (W.D. Tex. 1986).

65. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp. 1988).

66. *Synair Corp. v. American Indus. Tire, Inc.*, 645 F. Supp. 1080, 1084 (S.D. Tex. 1986).

67. *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986), cert. denied, 95 L.Ed.2d 843, 107 S.Ct. 2187 (1987).

68. *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 540 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), cert. denied, 475 U.S. 1016 (1986).

69. TEX. R. EVID. 509(a)(1).

70. 734 S.W.2d 675 (Tex. App.—Fort Worth 1987, no writ).

71. *Id.* at 677.

72. 730 S.W.2d 51, 54 (Tex. App.—Houston [14th Dist.] 1987, no writ).

73. 814 F.2d 190, 192 (5th Cir.), cert. granted sub nom., *Braswell v. United States*, 98 L.Ed.2d 28, 108 S.Ct. 64 (1987).

74. *Id.* (citing *Bellis v. United States*, 417 U.S. 85, 88 (1974)).

75. 720 S.W.2d 586, 594-95 (Tex. App.—Houston [1st Dist.] 1986, no writ).

Amendment privilege in their deposition and who failed to keep the assertion of the privilege from the jury by making a motion in limine, could not seek to exclude the deposition testimony. The court also affirmed the trial court's decision not to give the parties' requested instruction relating to assertion of their Fifth Amendment rights, since there was no evidence that the failure to give the instruction caused an improper verdict.⁷⁶

VI. ARTICLE VI—WITNESSES

Texas courts have deemed the Texas dead man's statute⁷⁷ repealed in civil actions by adoption of the Texas Rules of Evidence. Texas Rule of Evidence 601(b), which applies only to uncorroborated oral statements in actions by or against executors, administrators, or guardians, replaced the dead man's statute. The Texas Supreme Court reviewed only one case involving the dead man's statute during the Survey period, *In re Estate of Watson*,⁷⁸ and decided the case under the now repealed article 3716. In *Watson* the supreme court held that letters offered to show the affection between the testatrix and the proponent of the will were not precluded by article 3716, which deals only with a witness's capacity to testify on a particular matter.⁷⁹

In *Sawyer v. Lancaster*⁸⁰ the court of appeals held that a decedent's oral statement concerning his wishes for the division of his estate and bank account were inadmissible without corroboration under Texas Rule of Evidence 601(b). In *Tuttle v. Simpson*⁸¹ the court of appeals held that Rule 601(b) applied to testimony about a testator's oral statements accompanying his gestures which allegedly pointed out a boundary. The *Tuttle* court explained that without the admission of the oral statements accompanying the testator's gestures the gesturing would have been meaningless.⁸² The court held that the dead man's statute did not bar the testator's son's testimony because the son and the testator's widow were not adverse on the issue of the location of twenty acres devised to a third party.⁸³ Texas Rule of Evidence 602 provides that a witness may not testify to a matter unless he has personal knowledge, except as provided in Rule 703 governing opinion testimony by expert witnesses. In *Penwell v. Barrett*⁸⁴ the court held it was proper to exclude testimony offered in violation of Rule 703's first-hand knowledge requirement.

A judge presiding at a trial may not testify as a witness in that trial.⁸⁵ In

76. *Id.* at 595.

77. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926), *repealed by* TEX. R. EVID. (eff. Sept. 1, 1983) and TEX. R. CRIM. EVID. (eff. Sept. 1, 1986).

78. 720 S.W.2d 806, 806 (Tex. 1986).

79. *Id.* at 807.

80. 719 S.W.2d 346, 350 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

81. 735 S.W.2d 539, 542 (Tex. App.—Texarkana 1987, no writ).

82. *Id.*

83. *Id.* at 542-43.

84. 724 S.W.2d 902, 906-07 (Tex. App.—San Antonio 1987, no writ).

85. FED. R. EVID. 604; TEX. R. EVID. 605.

*Jones v. Benefit Trust Life Insurance Co.*⁸⁶ the Fifth Circuit held that the district court did not abuse its discretion in refusing to admit evidence of its original order denying the insured's motion for summary judgment.⁸⁷

Texas Rule of Evidence 608(b) provides that specific instances of a witness's conduct are not admissible for the purpose of attacking or supporting the witness's credibility, except for the use of prior criminal convictions as provided by Rule 609. Several cases during the Survey period excluded evidence of specific instances of conduct. Evidence concerning a joint venturer's solo construction project involving a collapsed trench that caused deaths and resulted in indictments was inadmissible to impeach the venturer's honesty or credibility in an action against the joint venture.⁸⁸ The San Antonio court of appeals held that evidence that a tenant lied in an unrelated matter was not admissible in the tenant's action against an apartment complex and management company.⁸⁹ In another case the San Antonio court ruled that testimony by a former business partner concerning a defendant's unspecified falsehoods was properly excluded under Rule 608(b).⁹⁰

Texas rules authorize courts to admit evidence of prior felony convictions.⁹¹ The circumstances under which a court may admit evidence of a conviction, however, are narrowly circumscribed. In *Juan A. v. Dallas County Child Welfare*⁹² the court held that the "pendency of an appeal renders evidence of a conviction inadmissible."

Texas Rule of Evidence 611, governing writings used to refresh a person's memory, provides that if a writing is used to refresh a witness's memory an adverse party may review the writing at the hearing.⁹³ In *Portland Savings & Loan Association v. Bernstein*⁹⁴ the court of appeals held that the trial court has the discretion to require production of documents a witness used to refresh his memory before his testimony.⁹⁵

Texas Rule of Evidence 612 governs the use of prior statements to impeach or support a witness's testimony.⁹⁶ In *Jacobini v. Hall*⁹⁷ evidence of

86. 800 F.2d 1397, 1400 (5th Cir. 1986).

87. *Id.* The court stated there was no authority or rationale for a pre-trial ruling being relevant to a fact issue. Thus, absent statutory authority to the contrary, Rule 605 appeared to govern. *Id.*

88. *Lovlace v. Sabine Consol., Inc.*, 733 S.W.2d 648, 654 (Tex. App.—Houston [14th Dist.] 1987, no writ).

89. *Nix v. H.R. Management Co.*, 733 S.W.2d 573, 576 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

90. *Penwell v. Barrett*, 724 S.W.2d 902, 906 (Tex. App.—San Antonio 1987, no writ).

91. TEX. R. EVID. 609; TEX. R. EVID. 803(22).

92. 726 S.W.2d 241, 245 (Tex. App.—Dallas 1987, no writ) (citing TEX. R. EVID. 609(e)).

93. TEX. R. EVID. 611. Effective January 1, 1988, this rule was renumbered as 612.

94. 716 S.W.2d 532, 541 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986).

95. *Id.* The appellate court gave no explanation for its holding, but the trial court had quashed subpoenas seeking the documents as prohibited by state law. *Id.* at 540-51. Additionally, the appellate court found testimony of the refreshed witness cumulative of other testimony and thus lack of document production harmless. *Id.* at 541.

96. TEX. R. EVID. 612. Effective January 1, 1988 this rule was renumbered as 613.

97. 719 S.W.2d 396, 402 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

prior claims against the defendant alleging negligent entrustment of vehicles was admissible to impeach the defendant's inconsistent testimony that he had not previously been accused of negligent entrustment. Another court held that prior inconsistent statements in superceded pleadings were admissible to impeach a party's testimony.⁹⁸ In another case the hostile dissolution of the witness's business relationship was held properly admitted to show bias against the alleged purchaser of real property.⁹⁹ The court also held that the specific allegations made in the witness's dissolution lawsuit were irrelevant to the issues in the present case.¹⁰⁰

VII. ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

A. Lay Opinion

Texas rules permit lay witnesses to offer rationally based opinions to help clarify facts or misunderstandings.¹⁰¹ The rules have greatly liberalized the admission of lay witnesses' opinion testimony. Texas law has always been liberal in allowing an owner of property to offer his opinion of the property's value.¹⁰² A property owner can give opinion testimony even though he would not qualify as an expert regarding the value of the same property if it were owned by another person.¹⁰³ During the Survey period, two courts allowed automobile buyers to testify as to actual values in establishing damages in breach of warranty actions even though the buyers did not state that they knew market value and did not give the basis for their opinions.¹⁰⁴ Another court held that even if the owner is not asked whether he is familiar with the market value of his property, his opinion testimony is sufficient if it refers to market value.¹⁰⁵

A lay witness's mere conclusions, however, are not competent evidence.¹⁰⁶ The *Texaco, Inc. v. Pennzoil Co.*¹⁰⁷ case took the admission of lay opinions to new lengths by allowing Pennzoil's president to give his opinions concerning the meaning of someone else's notes from a meeting he did not attend. The Houston Court of Appeals held that Pennzoil's president's opinion testimony did not constitute improper conclusory testimony that a binding con-

98. *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 665 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

99. *Penwell v. Barrett*, 724 S.W.2d 902, 907 (Tex. App.—San Antonio 1987, no writ).

100. *Id.*

101. TEX. R. EVID. 701.

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

103. *Id.*

104. *Mercedes Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 848-50 (Tex. App.—Fort Worth 1986, no writ); *Powell-Buick-Pontiac GMC, Inc. v. Bowers*, 718 S.W.2d 12, 15 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

105. *Guaranty County Mut. Ins. Co. v. Williams*, 732 S.W.2d 57, 60 (Tex. App.—Amarillo 1987, no writ).

106. *Nicholson v. Memorial Hosp. System*, 722 S.W.2d 746, 751 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

107. 729 S.W.2d 768, 838 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

tract had been reached.¹⁰⁸

B. Competency of Expert

Texas Rule of Evidence 702 provides that an expert witness may testify if specialized knowledge will help the trier of fact in understanding evidence or determining a fact in an issue. During the Survey period one court held that a witness with little formal education but with nine years of experience in building and repairing swimming pools was qualified as an expert to testify on the cause of damage to a swimming pool.¹⁰⁹ Another court held extensive experience and schooling in aeronautics qualified a witness as an expert in the field of aeronautical engineering.¹¹⁰ Yet another court held an accounting expert had specialized knowledge to interpret the term "cost" as used in an accounting provision.¹¹¹

For a doctor to testify about a particular field of medicine, courts only require the doctor to possess knowledge and skills not possessed by people generally.¹¹² The Houston Court of Appeals allowed a board-certified anesthesiologist with a subspecialty in acute and chronic pain control to testify in the field of urology because the testimony assisted the trier of fact in understanding a plaintiff's arachnoiditis.¹¹³ Another court, however, held that an economist's testimony estimating the value of the loss of affection and companionship between a deceased son and his mother, based upon the hourly average income of a psychiatrist, was not admissible in a mother's wrongful death and survival action.¹¹⁴ The court reasoned that the average hourly income of a psychiatrist was not relevant to the ultimate issue for the jury's determination.¹¹⁵ In another case, an unlicensed real estate appraiser with ten years of experience in making appraisals qualified as an expert to appraise condemned property.¹¹⁶

C. Subject of Expert Testimony

1. Similar Transactions

Courts during the Survey period held that the amount realized on a sale of nearby property was admissible to establish the value of the property at issue.¹¹⁷ Also, a court admitted an appraiser's testimony on land value even

108. *Id.*

109. *Petrolia Ins. Co. v. Everett*, 719 S.W.2d 639, 641 (Tex. App.—El Paso 1986, no writ).

110. *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 354 (5th Cir. 1985).

111. *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 281-82 (5th Cir.), *cert. denied*, 98 L.Ed.2d 107, 108 S. Ct. 152 (1987).

112. *Hardware Mut. Casualty Co. v. Wesbrooks*, 511 S.W.2d 406, 409 (Tex. Civ. App.—Amarillo 1974, no writ).

113. *Burlington N. R.R. v. Harvey*, 717 S.W.2d 371, 378 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

114. *Seale v. Winn Exploration Co.*, 732 S.W.2d 667, 669 (Tex. App.—Corpus Christi 1987, no writ).

115. *Id.*

116. *State v. Taylor*, 721 S.W.2d 541, 551 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

117. *United States v. 24.48 Acres of Land*, 812 F.2d 216, 218 (5th Cir. 1987); *State v. Taylor*, 721 S.W.2d 541, 550 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

though the appraiser based his estimate on a value-in-use theory rather than a market value theory.¹¹⁸ A court of appeals held that an expert appraiser's failure to rely on the value of comparable rental property affected the weight and credibility of his testimony and not the admissibility of the estimate.¹¹⁹

2. *Testimony of Medical Experts*

The trier of fact usually determines the issue of causation, even when expert testimony demonstrates probable causation.¹²⁰ The patient bears the burden of proof in a medical malpractice case.¹²¹ The patient must prove that the physician undertook treatment a reasonable and prudent doctor would not have undertaken under the same or similar circumstances.¹²² One case during the Survey period held that testimony regarding mere medical possibilities failed to establish a causal connection between an injury and the alleged negligence.¹²³ In a similar case, a court affirmed the exclusion of testimony referring to a mere medical possibility rather than a reasonable medical probability.¹²⁴ The El Paso court of appeals upheld the admission of a physician's testimony as to the extent of work-related injuries, even though the physician never treated the injured worker, since the physician based his testimony on the worker's history, notes from a physical examination, and X-ray findings.¹²⁵ A court of appeals also held that a psychiatrist's testimony concerning a personal injury plaintiff's psychological problems stemming from former incestuous relationships was admissible even though it was not foreseeable that the automobile accident in question would cause depression over those relationships.¹²⁶

D. *Bases of Opinion Testimony*

The facts forming the bases of expert opinion or inference must be the type of facts reasonably relied on by experts in the same field.¹²⁷ Whether other experts in the field customarily rely on information is a matter for the trial court's preliminary determination pursuant to Texas Rule of Evidence 104(a).¹²⁸ When an opinion is based upon facts or data customarily relied

118. *State v. Kinsloe*, 716 S.W.2d 699, 704-05 (Tex. App.—Corpus Christi 1986, no writ).

119. *Hunt County Tax Appraisal Dist. v. Rubbermaid Inc.*, 719 S.W.2d 215, 222 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

120. *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 707 (Tex. 1970) (doctor testified as to possible causes for separation of sutures).

121. *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977).

122. *Id.*

123. *Duff v. Yelin*, 721 S.W.2d 365, 370 (Tex. App.—Houston [1st Dist.] 1986, writ granted).

124. *Tsai v. Wells*, 725 S.W.2d 271, 274 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

125. *Northwestern Nat'l Ins. Co. v. Garcia*, 729 S.W.2d 321, 325 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).

126. *Padget v. Gray*, 727 S.W.2d 706, 711 (Tex. App.—Amarillo 1987, no writ).

127. TEX. R. EVID. 703.

128. *Souris v. Robinson*, 725 S.W.2d 339, 334-42 (Tex. App.—Houston [14th Dist.] 1987, no writ).

on by other experts in the field, an expert's opinion is admissible.¹²⁹ If the data underlying the expert's opinion is not data reasonably relied on by others in the field, an expert's opinion will be excluded.¹³⁰ An expert's opinion need not be generally accepted in the scientific community before it is sufficiently reliable and probative for admission, and even controversial medical testimony can support a jury finding of causation.¹³¹

E. Opinion on Ultimate Issue

On October 28, 1987, the Texas Supreme Court resolved the previously open question of whether an expert witness can opine on mixed questions of law and fact.¹³² In *Birchfield v. Texarkana Memorial Hospital*¹³³ the Texas Supreme Court considered the admissibility of expert testimony indicating that the defendant hospital's conduct constituted negligence, gross negligence, and recklessness and that defendant's acts proximately caused the plaintiffs' minor daughter's blindness. The supreme court wrote:

Contrary to the holding of the court of appeals, such testimony is admissible. Tex. R. Evid. 704. Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts.¹³⁴

*Hendricks v. Todora*¹³⁵ was a summary judgment case in which the Texas Supreme Court had granted a writ of error to consider whether an engineer's affidavit raised an issue of fact as to foreseeability. The Dallas court of appeals held that the engineer's affidavit embraced legal questions on which expert opinion was not competent.¹³⁶ In his affidavit, the engineer opined that a parking lot was unreasonably dangerous and that a drunk driver's crashing through a restaurant's glass wall could have been reasonably anticipated.¹³⁷ The Texas Supreme Court initially granted a writ of error in *Hendricks* on the same day it granted writ in *Birchfield*.¹³⁸ Six weeks later, however, the court withdrew the grant.¹³⁹ The Texas Supreme Court ultimately refused the application for writ of error, finding no reversible error.¹⁴⁰

129. *Lipsev v. Texas Dep't of Health*, 727 S.W.2d 61, 72 (Tex. App.—Austin 1987, writ ref'd n.r.e.); *Moore v. Polish Power, Inc.*, 720 S.W.2d 183, 192 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

130. *Viterbo v. Dow Chem. Co.*, 646 F. Supp. 1420, 1424 (E.D. Tex. 1986), *aff'd*, 826 F.2d 420 (5th Cir. 1987).

131. *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987), *cert. denied*, 99 L.Ed.2d 705 (1988).

132. See Addison, *Rule 704 Update: Mixed Questions of Law and Fact*, 50 TEX. B.J. 637 (1987); Addison, *Rule 704 and the Law: Not A Matter of Opinion*, 50 TEX. B.J. 383 (1987).

133. 31 Tex. S. Ct. J. 36 (Oct. 28, 1987).

134. *Id.* at 37.

135. 722 S.W.2d 458 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

136. *Id.* at 465.

137. *Id.*

138. 30 Tex. S. Ct. J. 345, 346 (Apr. 8, 1987).

139. 30 Tex. S. Ct. J. 436 (May 20, 1987).

140. *Id.*

F. *Effect of Opinion Testimony*

Although opinion testimony does not establish material facts as a matter of law,¹⁴¹ an expert witness's uncontradicted testimony must be taken as true as to the facts it establishes.¹⁴² As a general rule, however, an expert's inferences, even when uncontroverted, are not conclusive on the trier of fact.¹⁴³ The expert's inference is conclusive, however, if the subject is one for experts or skilled witnesses alone, and upon which a jury or court cannot form correct opinions based upon other evidence and their own experiences and knowledge.¹⁴⁴ For example, the Texas Supreme Court held the issue of the reasonable cost of house repairs is not for determination by experts or skilled witnesses alone.¹⁴⁵ When expert testimony establishes the use of sub-standard building materials and procedures violating the building codes, it is proper to impute knowledge of industry standards to a person in the business of building houses.¹⁴⁶

VIII. ARTICLE VIII—HEARSAY

A. *Identifying Hearsay*

Whether a record or statement offered to prove its truth constitutes hearsay is often difficult to determine.¹⁴⁷ "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."¹⁴⁸ One court decided that letters concerning a physician's findings on examination and evaluation of a patient were hearsay.¹⁴⁹ Another court ruled that invoices for reinstalling and rewiring air conditioning units removed by the lessee were hearsay absent testimony that the lessor paid the amount shown on the invoices.¹⁵⁰ Car repair estimates, made out of court by a third party and offered to prove the basis of the insured's opinion as to cash value were hearsay.¹⁵¹ The estimates were still admissible, however, to show the insured's compliance with the policy requirement to furnish proof of loss.¹⁵²

141. *Blackmon v. Piggly Wiggly Corp.*, 485 S.W.2d 381, 384 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).

142. *McGuffin v. Terrell*, 732 S.W.2d 425, 428 (Tex. App.—Fort Worth 1987, no writ).

143. *Coxson v. Atlanta Life Ins. Co.*, 142 Tex. 544, 548-49, 179 S.W.2d 943, 945 (1944).

144. *Coxson*, 142 Tex. at 548-49, 179 S.W.2d at 945.

145. *McGailliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986).

146. *March v. Thiery*, 729 S.W.2d 889, 894 (Tex. App.—Corpus Christi 1987, no writ).

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

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

149. *Northwestern Nat'l Ins. Co. v. Garcia*, 729 S.W.2d 321, 325 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).

150. *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 661-62 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

151. *Guaranty County Mut. Ins. Co. v. Williams*, 732 S.W.2d 57, 59 (Tex. App.—Amarillo 1987, no writ).

152. *Id.*

In *McCarty v. First State Bank & Trust Co.*,¹⁵³ an action to determine whether a bank account was a survivorship account, an affidavit signed by a depositor and two witnesses stating that the depositor wished to place money she received from sale of minerals in joint accounts was inadmissible hearsay. In *Butler v. Hide-A-Way Lake Club, Inc.*¹⁵⁴ the court held that statements in summary judgment affidavits concerning factors a board of directors considered in relocating an airstrip were not hearsay. The court concluded that the party offered the affidavits to establish the good faith of the directors rather than the truth of the matters asserted in the affidavits.¹⁵⁵

B. Statements That Are Not Hearsay

Texas Rule of Evidence 801(e) excludes prior statements by a witness,¹⁵⁶ admissions by party-opponents,¹⁵⁷ and depositions from the definition of hearsay.¹⁵⁸

1. Admission By Party Opponent

a. *Judicial Admissions*—A judicially admitted fact does not require supporting evidence, and the judicial admission establishes the fact as a matter of law, thereby precluding the fact finder from making any contrary findings.¹⁵⁹ A judicial admission is actually a substitute for evidence.¹⁶⁰ 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.¹⁶¹

Several courts considered judicial admissions during the Survey period. The Dallas court of appeals had that an employee's admission that he had resigned was a judicial admission precluding a finding of wrongful discharge.¹⁶² Another court determined that a party's stipulation that he signed a promissory note as a guarantor was a judicial admission sufficient to establish the guaranty.¹⁶³ The stipulation was an admission despite the party's claim that the guaranty was unenforceable due to a violation of the statute of frauds.¹⁶⁴ The Austin court of appeals found that a bankruptcy trustee's testimony that the trustee claimed a right of occupation of leased premises at least equal to any right of control of the owner was a judicial

153. 723 S.W.2d 792, 795 (Tex. App.—Texarkana 1987), *rev'd on other grounds*, 730 S.W.2d 656 (Tex. 1987).

154. 730 S.W.2d 405, 411 (Tex. App.—Eastland 1987, no writ).

155. *Id.*

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

157. TEX. R. EVID. 801(e)(2).

158. TEX. R. EVID. 801(e)(3).

159. 1A R. RAY, TEXAS PRACTICE, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1127 (3d ed. 1980).

160. *Id.*

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

162. *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 179 (Tex. App.—Dallas 1986, no writ).

163. *Menendez v. Texas Commerce Bank*, 730 S.W.2d 14, 15 (Tex. App.—Corpus Christi 1987, no writ).

164. *Id.*

admission.¹⁶⁵ The admission precluded the trustee from asserting that the premise owner was liable for an injury to the trustee as a business visitor.¹⁶⁶

Several courts held that a property owner's admission in his pleadings that he was a holder of the note in dispute and that he received notice of an appraisal order concerning his property were judicial admissions.¹⁶⁷ A mother seeking dissolution of a joint managing conservatorship was not required to introduce evidence that the conservatorship was injurious to her children's welfare since the father, in his pleadings, had admitted that the conservatorship was injurious.¹⁶⁸ The Dallas court of appeals held that a contrary judicial admission in a party's pleadings precluded a claim that deed restrictions applied to a lot by mistake.¹⁶⁹

To be considered a judicial admission, a statement must be deliberate, clear, and unequivocal.¹⁷⁰ In *Hilliard v. Hilliard*¹⁷¹ the court of appeals held that statements made by a wife and her attorney were not judicial admissions because her husband received them in connection with the dissolution of a corporation. The court explained that the declarations against interest might be considered some evidence that the house and lot were not community property, but that the statements were not conclusive judicial admissions.¹⁷²

b. Authorized Statements—Texas Rule of Evidence 801(e)(2)(C) admits, as admissions by party-opponents, statements by a person authorized to make a statement concerning a subject. The Corpus Christi court of appeals held that a statement by a party's lawyer was authorized by the party and, therefore, was not hearsay.¹⁷³

c. Vicarious Admissions—Texas Rule of Evidence 801(e)(2)(D) provides that admissions of agents or employees are admissible if they concern matters within the scope of employment and are made during the employment. In *State v. City of Greenville*¹⁷⁴ a letter from the city's administrative assis-

165. *Prestwood v. Taylor*, 278 S.W.2d 455, 461 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

166. *Id.*

167. *Underhill v. Jefferson County Appraisal Dist.*, 725 S.W.2d 301, 302-03 (Tex. App.—Beaumont 1987, no writ); *Home Sav. Ass'n v. Guerra*, 720 S.W.2d 636, 640 (Tex. App.—San Antonio 1986), *rev'd in part on other grounds*, 733 S.W.2d 134 (Tex. 1987).

168. *Roach v. Roach*, 735 S.W.2d 479, 482-83 (Tex. App.—Houston [1st Dist.] 1987, no writ).

169. *Independent Am. Real Estate, Inc. v. Davis*, 735 S.W.2d 256, 260 (Tex. App.—Dallas 1987, no writ).

170. *Kuehn v. Kuehn*, 594 S.W.2d 158, 160 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

171. 725 S.W.2d 722, 724 (Tex. App.—Dallas 1985, no writ).

172. *Id.*

173. *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 540 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986). The attorney's statement consisted of a letter to the trial court, written at the court's request, identifying certain documents as written by his client. 716 S.W.2d at 540. The appellate court held the attorney's letter was an admission of the client's authorship and sufficient predicate to introduce the documents as evidence. *Id.*

174. 726 S.W.2d 162, 168 (Tex. App.—Dallas 1986, no writ).

tant in the Department of Public Works to the State Bureau of Solid Waste Management was admitted as a vicarious admission. The court reasoned that the assistant was an employee of the city, the assistant accompanied the state official to the site and discussed conditions there, and the letter was written on city stationery, and the admissions were, therefore, chargeable to the city.¹⁷⁵

C. Hearsay Exceptions: Availability of Declarant Immaterial

1. Excited Utterance

Texas Rule of Evidence 803(2) admits into evidence, as exceptions to the hearsay rule, statements concerning a startling event made while under stress caused by the event. In a case involving an automobile accident a court held that an unidentified declarant's statement was not admissible as an excited utterance because the declarant had not witnessed the accident.¹⁷⁶ Moreover, the declarant's statement related to alleged erratic driving before the accident and not to the accident itself.¹⁷⁷

2. Recorded Recollection

A writing regarding a matter about which a witness once had personal knowledge but no longer fully remembers is admissible as an exception to the hearsay rule when the writing was made or adopted by the witness when the matter was fresh in his memory and reflects that knowledge accurately.¹⁷⁸ Oral evidence from a magazine article's author regarding a corporate officer's statement was admissible to impeach the officer as a previously recorded recollection, even though the magazine article itself was not admissible.¹⁷⁹

3. Business Records

Texas Rule of Evidence 803(6) governs the introduction of records of regularly conducted activities, commonly known as business records.¹⁸⁰ Preserving the statutory requirements of repealed article 3737(e),¹⁸¹ Rule 803(6) requires that the records be kept in the course of a regularly conducted business activity, by a person with knowledge of the recorded information, and as a regular practice of the business.¹⁸² If a party offering evidence fails to meet these requirements, the records will be excluded, as occurred in two

175. *Id.*

176. *Hughes Drilling Fluids, Inc. v. Eubanks*, 729 S.W.2d 759, 764 (Tex. App.—Houston [14th Dist.] 1986), *set aside, cause remanded*, 742 S.W.2d 275 (Tex. 1987).

177. 729 S.W.2d at 764.

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

179. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

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

181. TEX. REV. CIV. STAT. ANN. art. 3737(e) (Vernon 1926), *repealed by* TEX. R. EVID. (eff. Sept. 1, 1983) *and* TEX. R. CRIM. EVID. (eff. Sept. 1, 1986).

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

cases decided during the Survey period.¹⁸³ Because the requirements of Rule 803(6) were met, a well operator's invoices to a part owner of a working interest in a well were admissible as business records in the operator's suit for the owner's share of expenses incurred in drilling the well.¹⁸⁴ Also, the Corpus Christi Court of Appeals held that a credit memo from plaintiff to defendant was admissible under the business records exception absent an objection asserting the lack of proper predicate.¹⁸⁵

4. *Public Records and Reports*

Texas Rule of Evidence 803(8) lists as exceptions to the hearsay rule records and reports of public offices setting forth their activities, matters they have a legal duty to report, or factual findings resulting from legal investigations. Unlike Texas Rule of Evidence 803(6), Texas Rule of Evidence 803(8) does not impose a requirement that the preparer of a document have personal knowledge of the facts in the report. In *Clement v. Texas Department of Public Safety*¹⁸⁶ the court of appeals held that an affidavit by a police officer was admissible even though the affiant did not have personal knowledge of the facts. The court found the affidavit admissible as a record kept by the custodian of public records.¹⁸⁷

5. *Judgment of Previous Conviction*

Texas Rule of Evidence 803(22), which permits the introduction of judgments of previous convictions into evidence if the requirements of Rule 803(22) and Texas Rule of Evidence 609 are met, precludes parties from introducing evidence of convictions if an appeal is pending.¹⁸⁸ In *Juan A. v. Dallas County Child Welfare*¹⁸⁹ the court of appeals held that, unless the requirements of both Rule 803(22) and Rule 609 are met, evidence of a conviction will be excluded.¹⁹⁰

D. *Hearsay Exceptions: Declarant Unavailable*

Texas Rule of Evidence 804 contains exceptions to the hearsay rule that apply if the declarant is unavailable as a witness.¹⁹¹ One such exception

183. *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1400 (5th Cir. 1986); *Powell-Buick-Pontiac GMC, Inc. v. Bowers*, 718 S.W.2d 12, 14 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

184. *Texon Energy Corp. v. Dow Chem. Co.*, 733 S.W.2d 328, 330 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

185. *Donnelley Mktg. v. Lionel Sosa, Inc.*, 716 S.W.2d 598, 604 (Tex. App.—Corpus Christi 1986, no writ).

186. 726 S.W.2d 579, 581 (Tex. App.—Fort Worth 1986, no writ).

187. *Id.*

188. TEX. R. EVID. 803(22); TEX. R. EVID. 609(e).

189. 726 S.W.2d 241, 245 (Tex. App.—Dallas 1987, no writ).

190. *Id.* The State claimed the evidence of prior conviction should be admitted, despite the pendency of appeal, because of the nature of the charge, injury to a child 14 years of age or younger, and the nature of the case at bar, the involuntary termination of a parent-child relationship. The appellate court held the conviction inadmissible so long as an appeal was pending. *Id.*

191. TEX. R. EVID. 804. For the definition of unavailability, see TEX. R. EVID. 804(a).

permits the use of testimony from depositions taken in different proceedings.¹⁹² During the Survey period the court in *Smith v. Smith*¹⁹³ admitted a party's deposition given in a prior case.¹⁹⁴ The decision in *Smith* is probably erroneous, as not only was the party available, but the party was actually present during part of the trial.

IX. ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

Texas Rule of Evidence 901 requires authentication or identification of evidence as a condition precedent to admitting the offered evidence. The authentication requirement is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."¹⁹⁵ In *In re Estate of Watson*¹⁹⁶ a party stipulated that certain letters were from the decedent and, therefore, the court could rule on the letters' admissibility. The party also noted that he planned to require authentication if the trial court found the letters admissible. The Texas Supreme Court held that the stipulating party could not prevent proper authentication.¹⁹⁷

Texas Rule of Evidence 901(b) gives examples of authentication or identification conforming with the requirements of Rule 901(a). Rule 901(b)(1) provides that a document may be authenticated by the testimony of a witness with knowledge.¹⁹⁸ In *In the Matter of Bobby Boggs, Inc.*¹⁹⁹ the Fifth Circuit interpreted Texas Rule of Evidence 901(b) as establishing *prima facie* authentication of a defunct insurer's files and held that the affidavit of the defunct insurer's receiver, which stated that he had personal knowledge of the file, amounted to testimony by a knowledgeable witness.²⁰⁰ Texas Rule of Evidence 901(b)(4) provides for authentication by distinctive characteristics. In *State v. City of Greenville*²⁰¹ the Dallas Court of Appeals held that the fact a letter from a city's administrative assistant was written on city stationery was sufficient to authenticate the letter.

Texas Rule of Evidence 902 provides that certain documents are self-au-

192. TEX. R. EVID. 804(b)(1).

193. 720 S.W.2d 586, 599-600 (Tex. App.—Houston [1st Dist.] 1986, no writ).

194. *Id.* The court held the deposition would be admissible under any of three rationales. The deposition might be an admission by a party-opponent under Rule 801(e)(2). 720 S.W.2d at 599. The deposition might be admissible as former testimony under Rule 804(b)(1). 720 S.W.2d at 599 (also citing Rule 804(a)(1) relating to witness unavailable on ground of privilege). Or the deposition might be considered not hearsay under Rule 801(e)(3). 720 S.W.2d at 599. At the time of consideration of *Smith*, Rule 801(e)(3) provided any deposition "taken and offered in accordance with the Texas rules of Civil Procedure" was not hearsay. An amendment effective January 1, 1988, provides the deposition must be in the same proceeding. See H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 341-15 (1988).

195. TEX. R. EVID. 901(a).

196. 720 S.W.2d 806 (Tex. 1986).

197. *Id.* at 808. Counsel claimed the stipulation was only for the purpose of obtaining a ruling on admissibility under the dead man's statute, TEX. R. EVID. 601(b); but the Supreme Court said the stipulation in the record waived any subsequent requirement of authentication. 720 S.W.2d at 807-08.

198. TEX. R. EVID. 901(b)(1).

199. 819 F.2d 574 (5th Cir. 1987).

200. *Id.* at 581.

201. 726 S.W.2d 162, 168 (Tex. App.—Dallas 1986, no writ).

thenticating. During the Survey period a court of appeals held that passports are self-authenticating and refused to require extrinsic evidence of authenticity as a condition precedent to admissibility.²⁰² Texas Rule of Evidence 902(10)(a) allows admission of self-authenticating business records accompanied by an affidavit.²⁰³ Two cases during the Survey period admitted documents as business records because they were accompanied by affidavits complying with the rule.²⁰⁴

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

Article X of the Texas Rules of Evidence governs the admission of contents of writings, recordings, and photographs. Photographs²⁰⁵ portraying relevant facts are admissible if identified by a witness as accurately representing the relevant facts.²⁰⁶ The authenticating witness does not have to be the photographer, need not have been present at the photograph's taking and does not need to have any knowledge regarding photography.²⁰⁷ The witness must testify, however, that he knows the scene or object in question and that the photograph accurately reflects the scene.²⁰⁸ A change in the scene or object photographed does not preclude the photograph's admission if a witness explains the change and the photograph will help the jury understand the conditions at the relevant time.²⁰⁹ Also, the length of time between the incident in question and the taking of the photograph does not preclude admission if the photograph is identified as an accurate depiction of conditions at the relevant time.²¹⁰

Three cases during the Survey period considered these questions. The Texas Supreme Court held that a witness who had viewed a body at the murder scene was competent to authenticate photographs of the body taken at the morgue even though the witness did not view the body at the morgue.²¹¹ Photographs depicting the inside of a trailer in which the plaintiff driver was injured were held properly admitted, even though the photo-

202. *Smith v. Smith*, 720 S.W.2d 586, 602 (Tex. App.—Houston [1st Dist.] 1986, no writ).

203. The affidavit must be by the custodian of the record or other qualified witness. TEX. R. EVID. 902(10)(a) (referring to Rule 803(6)). The specific form of the affidavit is set out in Rule 902(10)(b).

204. *Guaranty County Mut. Ins. Co. v. Williams*, 732 S.W.2d 57, 61 (Tex. App.—Amarillo 1987, no writ); *Payne & Keller Co. v. Word*, 732 S.W.2d 38, 42 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

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

206. See generally 2 R. RAY, *supra* note 159, § 1466 (photograph must be verified by witness before admissible in evidence).

207. See, e.g., *Vardilos v. Reid*, 320 S.W.2d 419, 423 (Tex. Civ. App.—Houston 1959, no writ); 2 R. RAY, *supra* note 159, § 1466.

208. See *McRoy v. River Lake Country Club, Inc.*, 426 S.W.2d 299, 305 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.); 2 R. RAY, *supra* note 159, § 1466.

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

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

211. *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 315 (Tex. 1987).

graphs were taken three years after the accident.²¹² The driver authenticated the photographs and testified that they looked like the inside of the trailer on his last trip except for a new coat of paint. The exclusion of a photograph depicting the improper positioning of patient's arm on a gurney rail was affirmed in a medical malpractice case since the plaintiff failed to show that the photograph accurately portrayed the relevant facts.²¹³

Texas Rule of Evidence 1003 virtually eliminates the best evidence rule. Rule 1003 permits the admission of a duplicate in place of an original unless a party questions the authenticity of the original or if admission of the duplicate in lieu of the original would be unfair.²¹⁴ During the Survey period photomechanical duplicates of surety bonds were held admissible absent evidence indicating that the duplicates did not fairly reproduce the originals.²¹⁵

Texas Rule of Evidence 1006 provides that the contents of voluminous writings, recordings, or photographs, otherwise admissible, may be presented in the form of a chart or other summary for the sake of convenience. In *Hilsher v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*²¹⁶ a summary of interest the defendant owed to the plaintiff was found admissible even though the expert witness whose testimony introduced the summary lacked personal knowledge of the relevant interest rates. The court held that the expert's lack of knowledge did not affect the admissibility of the summary, but only affected the weight and sufficiency of the evidence.²¹⁷

XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.²¹⁸ A court may allow extrinsic evidence if it finds a contract ambiguous.²¹⁹ The rule prohibits parol evidence concerning the terms in a contract if the contract is integrated.²²⁰ Several courts during the Survey period excluded parol evidence to interpret an unambiguous written contract.²²¹ Several courts admitted parol evidence

212. *Moore v. Cotter & Co.*, 726 S.W.2d 237, 241 (Tex. App.—Waco 1987, no writ).

213. *Duff v. Yelin*, 721 S.W.2d 365, 373 (Tex. App.—Houston [1st Dist.] 1986, writ granted).

214. TEX. R. EVID. 1003.

215. *In the Matter of Bobby Boggs, Inc.*, 819 F.2d 574, 582 (5th Cir. 1987).

216. 717 S.W.2d 435, 441-42 (Tex. App.—Houston [14th Dist.] 1986, no writ).

217. *Id.* at 441.

218. *See* 2 R. RAY, *supra* note 159, § 1601.

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

220. Integration is the practice of embodying a transaction into a final written agreement intended to incorporate in its terms the entire transaction. *See* 2 R. RAY, *supra* note 159, § 1602.

221. *Meisler v. Smith*, 814 F.2d 1075, 1079 (5th Cir. 1987); *Universal Resources Corp. v. Panhandle Eastern Pipe Line Co.*, 813 F.2d 77, 80-81 (5th Cir. 1987); *Willow Bend Nat'l Bank v. Commonwealth Mortgage Corp.*, 722 S.W.2d 12, 14 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Bell v. Bell*, 718 S.W.2d 863, 864 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Enserch Exploration, Inc. v. Wimmer*, 718 S.W.2d 308, 310 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.).

when the courts found the contracts at issue ambiguous.²²²

The Texas Supreme Court admitted parol evidence to determine whether an instrument, which on its face appeared to be a deed, was a deed or a mortgage.²²³ Parol evidence also was admitted to show fraud in inducement²²⁴ and to show representations concerning quality and benefits of services alleged to be deceptive trade practices.²²⁵ Parol evidence was not admitted to establish that a lender represented to a guarantor that the guarantor would not be liable on a guaranty, since the guarantor failed to show that the lender engaged in trickery, artifice, or device in obtaining the guaranty.²²⁶

Two parol evidence cases decided during the Survey period are notable for their unique holdings. One court admitted parol evidence to an admittedly unambiguous written contract to explain any doubtful relationship of the writing to the relations of the parties and the subject matter of the contract.²²⁷ Another court admitted parol evidence to show the non-existence of a valid contract when a party alleged that a promissory note was executed to reflect losses for business and tax purposes, but was not intended to create a debt.²²⁸

222. *Texas Commerce Bank N.A. v. National Royalty Corp.*, 799 F.2d 1081, 1083 (5th Cir. 1986); *United Interests, Inc. v. Brewington, Inc.*, 729 S.W.2d 897, 902-03 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Schwartz v. Prairie Producing Co.*, 727 S.W.2d 289, 291-92 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Lassiter v. Rotogravure Comm., Inc.*, 727 S.W.2d 8, 9-10 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

223. *Johnson v. Cherry*, 726 S.W.2d 4, 7 (Tex. 1987).

224. *Kneip v. Unitedbank-Victoria*, 734 S.W.2d 130, 132 (Tex. App.—Corpus Christi 1987, no writ); *FSLIC v. Kennedy*, 732 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

225. *Honeywell Inc. v. Imperial Condominium Ass'n*, 716 S.W.2d 75, 78 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

226. *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 108 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

227. *Lance Roof Inspection Service, Inc. v. Hardin*, 653 F. Supp. 1097, 1102 (S.D. Tex. 1986) (citing *Maxwell v. Lake*, 674 S.W.2d 795, 801 (Tex. App.—Dallas 1984, no writ) and *Texas Utilities Fuel Co. v. First Nat'l Bank*, 615 S.W.2d 309, 312 (Tex. App.—Dallas 1981, no writ)). The court looked at draft copies of the contract to determine if a restrictive covenant should be construed literally. *Id.* at 1103.

228. *Bill Shannon, Inc. v. San Clemente*, 724 S.W.2d 941, 943 (Tex. App.—San Antonio 1987, no writ).