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CIVIL EVIDENCE

by

Linda L. Addison*

DURING the Survey period, the Texas appellate courts handed down numerous decisions construing various rules of civil evidence. The cases of greatest significance arose in the following substantive areas: (1) Article I—General Provisions; (2) Article II—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. Additionally, many amendments to the Texas Rules of Civil Evidence¹ became effective during the Survey period.²

I. ARTICLE I—GENERAL PROVISIONS

Texas Rule of Civil Evidence 103(a)(1) provides that error may not be predicated on a ruling admitting evidence in the absence of a timely objection or motion to strike.³ During the Survey period, two courts held that, in the absence of a timely objection, any complaint to evidence admitted was waived on appeal.⁴

The 1988 Amendment to Texas Rule of Civil Evidence 103(a)(1) clarifies that an objection made out of the jury's presence is deemed to apply when the evidence objected to is admitted before the jury.⁵ The 1988 Amendment to rule 103(a)(2) provides that error may not be based upon a ruling excluding evidence unless the substance of the evidence was made known to the

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1. Effective January 1, 1988, the Texas Rules of Evidence were renamed the Texas Rules of Civil Evidence. TEX. R. CIV. EVID. 101(a).

2. On November 10, 1986, the Texas Supreme Court ordered the amendment of TEX. R. CIV. EVID. 101, 202, 204, 509, 510, 601, 611-614, 801, 803, 804, 902, and 1007, effective January 1, 1988. Order Adopting and Amending Texas Rules of Civil Evidence, 50 TEX. B.J. 1051-55 (1987). On July 15, 1987, the Texas Supreme Court promulgated further changes to rules 103, 601, 612-614, and 706, also to become effective on January 1, 1988. Order Adopting and Amending Texas Rules of Civil Evidence, 50 TEX. B.J. 1056-58 (1987). To the extent the Orders differed, the 1987 Order superseded the 1986 Order. *Id.* at 1051. These changes are hereinafter referred to as the "1988 Amendment[s]".

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

4. *Firestone Tire & Rubber Co. v. Battle*, 745 S.W.2d 909, 912-13 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Davis v. Stallones*, 750 S.W.2d 235, 238 (Tex. App.—Houston [1st Dist.] 1987, no writ).

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

court by offer.⁶ No longer is error preserved if the substance of the excluded evidence is apparent from the context.⁷ In *Fischer v. Dallas Federal Savings & Loan Association*⁸ the Fifth Circuit recently followed a similar line of reasoning in excluding evidence under the Federal Rules of Evidence. Accordingly, where excluded evidence was not specifically offered to the court, the Fifth Circuit found error was waived under Federal Rule of Evidence 103(a)(2).⁹

II. ARTICLE II—JUDICIAL NOTICE

Article II of the Texas Rules of Civil Evidence governs judicial notice. During the Survey period courts affirmed taking judicial notice of a court's own record in the same case or in a case involving the same subject matter.¹⁰ Another court found judicial notice of court records from another case to be an improper subject for judicial notice.¹¹ Also during the Survey period, the Texas Supreme Court held that judicial notice was proper where the party opposing the request for judicial notice failed to request a hearing on the propriety of judicial notice of findings of fact and conclusions of law in another case.¹²

Other Texas courts have addressed the issue of judicial notice recently. In a jury trial, where the parties failed to present evidence to support a finding of attorney's fees, the court held it was improper to take judicial notice of usual and customary attorney's fees.¹³ Yet, another court found proper judicial notice of the fact that a jury is more likely to render a judgment against a defendant where insurance is involved.¹⁴

To be the proper subject of judicial notice, a fact must not be subject to reasonable dispute because "it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."¹⁵ In *Fred S. James & Co. v. West Texas Compresses, Inc.*¹⁶ a workers' compensation insurer was not entitled to judicial notice that the

6. *Id.* 103(a)(2).

7. *Id.*

8. *Fischer v. Dallas Fed. Sav. & Loan Ass'n*, 835 F.2d 567 (5th Cir. 1988).

9. *Id.* at 569.

10. *Izaguirre v. Texas Employers' Ins. Ass'n*, 749 S.W.2d 550, 552 (Tex. App.—Corpus Christi 1988, writ denied); *McCurry v. Aetna Casualty & Sur. Co.*, 742 S.W.2d 863, 867 (Tex. App.—Corpus Christi 1987, writ denied); *Fajkus v. First Nat'l Bank*, 735 S.W.2d 882, 887 (Tex. App.—Austin 1987, writ denied).

11. *4 Acres of Real Property v. State*, 740 S.W.2d 494, 496 (Tex. App.—Beaumont 1987, no writ).

12. *Texas Real Estate Comm'n v. Nagle*, 32 Tex. Sup. Ct. J. 20, 21 (Oct. 12, 1988); *see also id.* at 22 (Ray, J., dissenting) (suggests that the use of such findings and conclusions is circumscribed by the doctrines of *res judicata* and collateral estoppel, and that they are not evidence themselves).

13. *Hall Constr. Co. v. Texas Indus., Inc.*, 748 S.W.2d 533, 538 (Tex. App.—Dallas 1988, no writ).

14. *Medina v. El Paso Mach. & Steel Works, Inc.*, 740 S.W.2d 99, 101 (Tex. App.—El Paso 1987, no writ).

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

16. 741 S.W.2d 571, 573 (Tex. App.—Eastland 1987, no writ).

experience modifier level for the defendant for the insurance policy term was 1.33. The level of the experience modifier was a contested fact issue at trial and was not a fact generally known within the territorial jurisdiction of the court, thus making it inappropriate for judicial notice.¹⁷ The court further held that a certificate from the State Board of Insurance did not qualify as a source whose accuracy could not reasonably be questioned such as to support a motion for judicial notice.¹⁸

In *Drake v. Holstead*¹⁹ the trial court erred in failing to take judicial notice of the distance that a car moving at 40 miles per hour would travel in 3.6 seconds. The court recognized the propriety of judicial notice regarding facts generally known within the territorial jurisdiction.²⁰ Thus, because the party seeking judicial notice supplied the court with the necessary information, the court held judicial notice to be mandatory under Texas Rule of Civil Evidence 201(d).²¹

Texas Rule of Civil Evidence 202 provides that a court may judicially notice the law of other states.²² A party who requests judicial notice of the law of another state must furnish the court with sufficient information to enable the court to comply with the request.²³ In *Ewing v. Ewing*²⁴ the court held that appellant's introduction of a California judgment and the trial judge's agreement to take judicial notice of the judgment was not a sufficient request under Texas Rule of Civil Evidence 202 to require the court to take judicial notice of California law. Because the request did not furnish the judge with sufficient information to enable him to comply with the request properly, the court was correct in presuming California law to be the same as Texas law.²⁵

The 1988 Amendments to Rules 202 and 204 make judicial notice upon the motion of a party mandatory, rather than leaving it to the court's discretion.²⁶ This assumes, of course, that the requirements of the rules are met.

III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence concerns presumptions. Because the Texas Rules of Civil Evidence lack a corresponding article III, Texas common law continues to govern the law of presumptions. The following recent cases have further developed the law of presumptions and burden of proof.

*In re Estate of Glover*²⁷ demonstrates that although the failure to produce

17. *Id.* at 573.

18. *Id.*

19. 757 S.W.2d 909, 910-11 (Tex. App.—Beaumont 1988, no writ).

20. *Id.* at 910-11.

21. *Id.*

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

23. *Id.*

24. 739 S.W.2d 470, 472 (Tex. App.—Corpus Christi 1987, no writ).

25. *Id.* at 472.

26. See comment to 1988 Amendment, TEX. R. CIV. EVID. 204.

27. 744 S.W.2d 197, 200 (Tex. App.—Amarillo 1987, writ denied).

a will gives rise to the presumption that the will was revoked, this presumption can be overcome by a preponderance of evidence. In *Glover* there was evidence that the testatrix had repeatedly expressed a desire that her property go to a certain hospital.²⁸ The opponent of the will, whose son was the beneficiary under an alleged later will, had access to the testatrix's residence and would have benefitted substantially if the earlier will were not in existence.²⁹ The *Glover* court held such evidence sufficient to support a jury finding that the former will, under which the hospital was sole beneficiary, was not revoked by the testatrix prior to her death.³⁰

The Texas Supreme Court recently considered the burden of proof required of a mother who seeks to revoke the presumption of legitimacy of her own child born in wedlock in *In re S.C.V.*³¹ In *S.C.V.* a wife brought a paternity action against a man who was not her husband and sought to introduce evidence of her husband's blood type to show that her husband was not the biological father of her child.³² The jury found that the defendant was the natural father of the child despite the trial court's exclusion of the blood type evidence.³³ The court of appeals found no statutory authority under chapter 13 of the Texas Family Code³⁴ to allow a blood test to rebut the presumption of legitimacy and reversed, holding that the defendant was not the father of the child.³⁵ The Texas Supreme Court reversed the court of appeals and remanded, explaining that blood tests are generally admissible because they are potentially the best evidence for establishing nonpaternity.³⁶

IV. ARTICLE IV—RELEVANCY AND ITS LIMITS

Article IV of the Texas Rules of Civil Evidence governs relevancy and its limits. All relevant evidence is admissible, except as otherwise provided by constitution, by statute, or by other rules.³⁷ Evidence that is not relevant is not admissible.³⁸

Several cases decided during the Survey period considered the relevance of certain evidence. In an eminent domain proceeding, a property owner was not entitled to an order compelling the state to produce appraisals relating to land not comparable to his property, because the court held such information was neither relevant under rule 401, nor admissible under rule 402.³⁹ By contrast, the court admitted as relevant evidence of comparable sales of

28. *Id.* at 201-02.

29. *Id.*

30. *Id.*

31. 750 S.W.2d 762 (Tex. 1988).

32. *Id.* at 763.

33. *Id.*

34. See TEX. FAM. CODE ANN. § 13.06 (Vernon 1975).

35. 750 S.W.2d at 764.

36. *Id.* at 765.

37. TEX. R. CIV. EVID. 402. For the definition of relevance, see *id.* 401.

38. *Id.* 402.

39. *State v. Bentley*, 752 S.W.2d 602, 607 (Tex. App.—Tyler 1988, no writ).

land outside the area at issue in a condemnation proceeding,⁴⁰ because the unique nature and location of the condemned land suggested that perfect comparables would be difficult to find.⁴¹ In another condemnation proceeding a deed of trust and a warranty deed transferring interest in the subject property were held not relevant to the issue of whether the transferor owned an interest in the property.⁴² Yet, evidence of an out-of-court experiment was held properly admitted where there was evidence of a substantial similarity between the conditions existing at the time of the experiment and those surrounding the event giving rise to the litigation.⁴³

Texas Rule of Civil Evidence 403 allows the exclusion of relevant evidence on special grounds such as unfair prejudice, confusion of the issues, or if the evidence is merely cumulative.⁴⁴ The exclusion of evidence under rule 403 is discretionary.⁴⁵ In *Firestone Tire & Rubber Co. v. Battle*,⁴⁶ a products-liability case, appellant complained that the trial court abused its discretion in admitting the testimony of a witness who had been previously injured in another centrifugal-force tire explosion. Finding no abuse of discretion, the appellate court affirmed the trial court decision, holding that the relevancy of such evidence was not substantially outweighed by the risk of unfair prejudice and confusion.⁴⁷ The testimony was relevant (1) to determine whether such an explosion would be preceded by a loud noise and vibration, (2) to evaluate the magnitude of the risk of hazard, and (3) to determine whether the manufacturer was guilty of conscious indifference in its failure to issue warnings.⁴⁸

The trial court's discretion in excluding evidence was again questioned in *Ahlschlager v. Remington Arms Co.*⁴⁹ In *Ahlschlager* the court found that the trial court did not abuse its discretion in excluding evidence of examination reports of the rifle model at issue, where the trial of the case had lasted for weeks and where witness after witness had testified about the model and about the manufacturer's refusal to recall it.⁵⁰ Similarly in *Mother & Unborn Baby Care of North Texas, Inc. v. State*,⁵¹ a suit by the state against an antiabortion group, the appellate court affirmed the exclusion of a film strip and slide show that were shown at the clinic operated by the antiabortion group. The appellate court agreed with the trial court that the unfair prejudice outweighed the probative value of the films, and that the introduction of the films would turn the trial into a debate on abortion issues, thus leading

40. *State v. Knapp*, 740 S.W.2d 809, 816 (Tex. App.—El Paso 1987, writ granted).

41. *Id.* at 816.

42. *Society of Mary's Stars, Inc. v. State*, 748 S.W.2d 320, 323-24 (Tex. App.—Fort Worth 1988, writ denied).

43. *Garza v. Cole*, 753 S.W.2d 245, 247-48 (Tex. App.—Houston [14th Dist.] 1988, writ ref'd n.r.e.).

44. TEX. R. CIV. EVID. 403.

45. "Although relevant, evidence *may* be excluded if . . ." *Id.* (emphasis added).

46. 745 S.W.2d 909 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

47. *Id.* at 912.

48. *Id.*

49. 750 S.W.2d 832 (Tex. App.—Houston [14th Dist.] 1988, writ granted).

50. *Id.* at 836.

51. 749 S.W.2d 533, 544 (Tex. App.—Fort Worth 1988, writ denied).

the jury away from the issues properly before the court.⁵²

Although the court's discretion under rule 403 is broad, exclusion of relevant evidence is occasionally held to be reversible error. In *Bohmfolk v. Linwood*⁵³ the holder of a check brought an action against the maker for payment of the check upon which the maker had stopped payment. The trial court excluded a banker's deposition testimony that the holder of the check had telephoned him at the bank, told him that he had won the check in a crap game, and asked if the check was any good.⁵⁴ The appellate court held the exclusion to be reversible error even though the payee had testified that he had lost the check by gambling.⁵⁵ The court explained that the banker's excluded testimony would have added considerable weight to the maker's case, and would have increased the maker's chances of prevailing upon the disputed issue of whether the check was endorsed to the holder as part of a gambling transaction.⁵⁶

With a few exceptions, character is not admissible to prove conduct on a particular occasion.⁵⁷ For example, Texas Rule of Civil Evidence 404(b) excludes from evidence "other wrongs or acts" intended to prove the character of a person and show that he acted in conformity with those acts.⁵⁸ Such evidence may be admissible for other purposes, however, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁵⁹

Some courts persist in discussing "other acts" evidence under the maxim "*res inter alios acta*."⁶⁰ Distinguished commentators have argued that this term should be abandoned.⁶¹ During the Survey period, one court admitted, under the intent exception to the doctrine of *res inter alios acta*, evidence of transactions by one of the parties with other persons.⁶² Another court held that the doctrine of *res inter alios acta* did not prohibit evidence of an insurer's denials of other claims around the same time as its denial of the insured's claim on the same basis, because denial of other claims was so connected with the transaction at issue that they could all be part of the same system, scheme, or design of the insurer.⁶³

Federal Rule of Evidence 404 is substantially similar to Texas Rule of Civil Evidence 404. Twice during the Survey period the Fifth Circuit, citing Federal Rule of Evidence 404, affirmed the admission of other acts as evi-

52. *Id.* at 544.

53. 742 S.W.2d 518 (Tex. App.—Dallas 1987, writ granted).

54. *Id.* at 520.

55. *Id.* at 521-22.

56. *Id.* at 522.

57. TEX. R. CIV. EVID. 404.

58. *Id.* 404(b).

59. *Id.*

60. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5170, at 113-14 (1978).

61. *Id.* at 114.

62. *Texas Cookie Co. v. Hendricks & Peralta*, 747 S.W.2d 873, 881 (Tex. App.—Corpus Christi 1988, writ denied).

63. *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 815 (Tex. App.—Corpus Christi 1988, no writ).

dence. In *Moorhead v. Mitsubishi Aircraft International, Inc.*⁶⁴ the Fifth Circuit found no reversible error in the admission of a pilot's training records from his flight school refresher course, and of the course instructor's testimony that the pilot scored low marks in handling emergency situations during a flight simulator test. Although the evidence was not admissible to prove that the pilot acted in conformity with this past conduct on the afternoon of the crash at issue, the Fifth Circuit explained that the evidence was admissible to rebut evidence of the pilot's past good conduct as a pilot although his estate had not put the subject in issue.⁶⁵ In *United States v. Lowenberg*⁶⁶ the Fifth Circuit affirmed the admission of testimony that one of the appellants had ordered one of the other appellants to beat up a nude modeling studio's manager who was allegedly holding back profits. The Fifth Circuit explained that the evidence was relevant to the contested issue of whether the appellants were involved in the daily management of the studios, were frequent visitors there, and therefore, knew that the studios were actually houses of prostitution.⁶⁷

Texas Rule of Civil Evidence 407 excludes evidence of subsequent remedial measures except when offered for a purpose other than merely proving the subsequent remedial measures.⁶⁸ In *Federal Pacific Electric Co. v. Woodend*,⁶⁹ a products liability case, appellant argued that the trial court erred in admitting a switch similar to the switch at issue, but of a much later design that differed in three material ways. Appellant argued that the switch contained post-manufacturing design changes in violation of Texas Rule of Civil Evidence 407.⁷⁰ Appellant also contended that the exhibit was not admissible because the admissibility exception to rule 407 regarding evidence in products liability cases based on strict liability only applies to design defects.⁷¹ Finding no authority for such a narrow construction of rule 407, the court overruled this point of error and held that the defective manufacture pleading was sufficient to establish this as a products liability case.⁷²

Texas Rule of Civil Evidence 408 excludes evidence of compromise and offers to compromise when offered to prove liability or the invalidity of a claim or its amount.⁷³ The rule does not, however, require exclusion of compromise evidence offered for other purposes.⁷⁴ In *Adams v. Petrade International, Inc.*,⁷⁵ for example, evidence relating to settlement discussions was admitted not to prove the merits of the underlying transaction, but in support of Petrade's claim to enforce the settlement agreement itself. The court

64. 828 F.2d 278, 287 (5th Cir. 1987).

65. *Id.* at 287. The Fifth Circuit also explained that the trial court's findings would have been no different had the contested evidence been excluded. *Id.*

66. 853 F.2d 295, 300 (5th Cir. 1988).

67. *Id.* at 300.

68. TEX. R. CIV. EVID. 407.

69. 735 S.W.2d 887 (Tex. App.—Fort Worth 1987, no writ).

70. *Id.* at 891.

71. *Id.* at 892.

72. *Id.*

73. TEX. R. CIV. EVID. 408.

74. *Id.*

75. 754 S.W.2d 696 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

explained that evidence of settlement negotiations was relevant and material to prove whether a settlement agreement had been reached, and was admissible in Petrade's suit to enforce the settlement agreement.⁷⁶ In *Beutel v. Paul*⁷⁷ an offer of compromise and settlement was held improperly admitted. The appellate court explained, however, that such error is usually curable by an instruction from the trial court to disregard the improper evidence.⁷⁸ Because appellant did not request such an instruction, but instead simply moved for a mistrial, the court found no reversible error.⁷⁹

Texas Rule of Civil Evidence 411 provides that evidence of liability insurance is not admissible regarding the issue of the insured's negligence or other wrongful acts.⁸⁰ In *Jilani v. Jilani*⁸¹ the court refused to consider the probable existence of liability insurance to determine whether the parental immunity doctrine precluded an unemancipated minor's claim against a parent for negligent operation of a motor vehicle. Thus, the court complied with the constraints of rule 411 and refused to consider evidence of insurance in determining liability. Rule 411 does not require exclusion of evidence of insurance against liability when offered for other purposes such as proof of agency, ownership, control, or bias or prejudice of a witness.⁸² In *Davis v. Stallones*,⁸³ which involved a wrongful death action arising out of a helicopter crash, testimony about the insurers' control of the wreckage was admissible where the issue of control of the wreckage was disputed.

V. ARTICLE V—PRIVILEGES

Article V of the Texas Rules of Civil Evidence governs privileges. No person has a privilege to refuse to disclose any matter⁸⁴ unless the rules of evidence recognize the privilege,⁸⁵ or a statute⁸⁶ or constitution⁸⁷ grants the privilege. Some of the specific privileges provided for in the Texas Rules of Civil Evidence include: (1) lawyer-client privilege;⁸⁸ (2) husband-wife communication privilege;⁸⁹ (3) communications to clergymen,⁹⁰ (4) trade secrets;⁹¹ and (5) physician-patient privilege.⁹²

76. *Id.* at 722.

77. 741 S.W.2d 510 (Tex. App.—Houston [14th Dist.] 1987, no writ).

78. *Id.* at 513.

79. *Id.* at 514.

80. TEX. R. CIV. EVID. 411.

81. 747 S.W.2d 504 (Tex. App.—Amarillo 1988), *rev'd on other grounds*, 32 Tex. Sup. Ct. J. 136 (Dec. 14, 1988).

82. TEX. R. CIV. EVID. 411.

83. 750 S.W.2d 235, 238 (Tex. App.—Houston [1st Dist.] 1987, no writ).

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

85. *See id.* 502-510.

86. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5561h, *repealed by* TEX. R. CIV. EVID. 509-510 as to civil cases *and* TEX. R. CRIM. EVID. 509-510 as to criminal cases (confidential communications between physician and patient relating to professional services rendered by a physician privileged).

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

88. TEX. R. CIV. EVID. 503.

89. *Id.* 504.

90. *Id.* 505.

91. *Id.* 507.

During the Survey period several courts considered what a party must do to assert and protect a privilege. In *Barnes v. Whittington*,⁹³ the Texas Supreme Court held that the party asserting a privilege against discovery has the burden of providing evidence to support the privilege by showing that the documents in question qualify for the privilege as a matter of law. The court in *Barnes* considered whether certain documents were covered by the privilege for hospital committee records and proceedings.⁹⁴ In the absence of any additional evidence, aside from the documents themselves, the Texas Supreme Court held that the documents in issue were not privileged.⁹⁵ The Fort Worth court of appeals also considered a party's burden in asserting a privilege and held that the trial court abused its discretion in failing to allow the parties to present evidence to support their claims that records and proceedings of hospital committees were privileged.⁹⁶

Texas Rule of Civil 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.⁹⁷ In *Southwest Inns, Ltd. v. General Electric Co.*⁹⁸ the court held that documents prepared by lawyers after the filing of a lawsuit were privileged under both Texas Rule of Civil Evidence 503 and Texas Rule of Civil Procedure 166b(3)(d), the work product privilege. In a more recent case involving a divorce proceeding, the active client files of a law firm were protected under rule 503 against an attempt to obtain and use the files to prove the value of the attorney-husband's interest in the firm.⁹⁹

In the absence of evidence proving the attorney-client privilege, documents at issue were held not privileged in *Eckermann v. Williams*.¹⁰⁰ In *Texas Utilities Electric Co. v. Marshall*,¹⁰¹ a mandamus proceeding, the Dallas court of appeals held that the trial court abused its discretion in failing to conduct an *in camera* inspection before ordering production of documents that were claimed to be covered by the attorney-client privilege. The court also found that the trial court abused its discretion in basing its order on a so-called "public interest" exception to the attorney-client privilege, which the trial court had no authority to create.¹⁰²

There is no lawyer-client privilege if the services of the lawyer were obtained to enable someone to knowingly commit or plan to commit a crime or fraud.¹⁰³ During the Survey period the Fifth Circuit held that a party chal-

92. *Id.* 509.

93. 751 S.W.2d 493, 494 (Tex. 1988).

94. *Id.* at 496 (citing TEX. REV. CIV. STAT. ANN. art. 4447d, § 3 (Vernon Supp. 1988)).

95. *Id.*

96. *Goodspeed v. Street*, 747 S.W.2d 526, 529-30 (Tex. App.—Fort Worth 1988, no writ).

97. TEX. R. CIV. EVID. 503(b).

98. 744 S.W.2d 258, 262-63 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

99. *See Enos v. Baker*, 751 S.W.2d 946, 948-49 (Tex. App.—Houston [14th Dist.] 1988, no writ).

100. 740 S.W.2d 23, 25 (Tex. App.—Austin 1987, no writ).

101. 739 S.W.2d 665, 666-67 (Tex. App.—Dallas 1987, no writ).

102. *Id.*

103. TEX. R. CIV. EVID. 503(d)(1).

lenging the attorney-client privilege under the crime-fraud exception must make an independent prima facie case that the crime has been committed and then demonstrate that the privileged information is related to the alleged crime or fraud.¹⁰⁴

Texas Rule of Civil Evidence 509 details the physician-patient privilege. A patient is a person consulting a physician for medical care.¹⁰⁵ During the Survey period the Texas Supreme Court considered the physician-patient privilege in *Mutter v. Wood*.¹⁰⁶ *Mutter* involved a mandamus proceeding arising out of a medical malpractice case. The trial judge ordered the Mutters to sign an authorization permitting the defendant-hospital's attorney to discuss the medical care and treatment of their deceased son with the treating physicians and health care providers.¹⁰⁷ The authorization did not require the physicians to talk with the hospital's attorney, but removed any claim of privilege the Mutters might have had.¹⁰⁸ The Texas Supreme Court held that the trial court abused its discretion in ordering the Mutters to sign the authorization that waived their physician-patient privilege as to all physicians who provided care or treatment, and in providing no reasonable method to allow the parents to preserve whatever claims of privilege they might have.¹⁰⁹ Similarly, in *McGowan v. O'Neill*¹¹⁰ the court held that the trial court's order requiring a medical-malpractice plaintiff to sign an authorization to release medical records was impermissibly overbroad because it contained an absolute waiver of the plaintiff's right to claim the physician-patient privilege.

Texas Rule of Civil Evidence 510, requiring confidentiality of mental-health information, only governs disclosures of patient-professional communications in judicial or administrative proceedings.¹¹¹ During the Survey period, the Tyler court of appeals considered the relationship between rules 509 and 510 in *In re R.B.*,¹¹² a mental patient's appeal of his commitment to a state hospital for in-patient care. Finding that the patient made a prima facie showing of the existence of the physician-patient privilege, and that the state failed to meet its burden to demonstrate that exceptions to the privilege had been met, the court held that the testimony of medical witnesses was not admissible.¹¹³ The Tyler court explained that the privileges conferred by rules 509 and 510 were indistinguishable regarding communications between a person licensed or authorized to practice medicine and his patient.¹¹⁴

104. *Ward v. Succession of Freeman*, 854 F.2d 780, 790 (5th Cir. 1988).

105. TEX. R. CIV. EVID. 509(a)(1).

106. 744 S.W.2d 600 (Tex. 1988).

107. *Id.* at 600.

108. *Id.*

109. *Id.* at 600-01.

110. 750 S.W.2d 884, 886 (Tex. App.—Houston [14th Dist.] 1988, no writ).

111. "Whether a professional may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1984)." TEX. R. CIV. EVID. 510 comment.

112. 741 S.W.2d 525 (Tex. App.—Tyler 1987, no writ).

113. *Id.* at 528. Nor was an exception to rule 510 found to exist in *Subia v. Texas Dep't of Human Servs.*, 750 S.W.2d 827, 830-31 (Tex. App.—El Paso 1988, no writ).

114. 741 S.W.2d at 527.

Thus, the court found both rules applicable and read together.¹¹⁵

Recent amendments establish exceptions to particular privileges. The 1988 Amendments to rules 509(d)(4) and 510(d)(5), provide, for example, exceptions to the mental health information privilege regarding communications or records relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which a party relies upon the patient's condition as a part of the party's claim or defense.¹¹⁶

Texas Rule of Civil Evidence 513(b) provides that, in jury cases, the court shall conduct proceedings, to the extent practicable, to facilitate the making of claims of privilege without the knowledge of the jury.¹¹⁷ In *In re L.S., P.P., G.S., & M.S.*¹¹⁸ the Amarillo court of appeals considered whether rule 513(b) was violated when a witness invoked his fifth amendment privilege against self-incrimination in front of the jury during questioning. Reasoning that no motion in limine had been made to prevent the witness from invoking the privilege before the jury, and that the witness invoked the privilege only in response to certain questions, the court held that invoking the privilege outside the presence of the jury would have been impractical.¹¹⁹

VI. ARTICLE VI—WITNESSES

The 1988 Amendment altered the requirements for testimony by children. This amendment to Texas Rule of Civil Evidence 601(a)(2) deleted the language that required children to be able to "understand the obligation of an oath" to be competent to testify.¹²⁰ Thus, although other exceptions regarding a child's competency as a witness remain in effect, the fact that he or she may not know what being under oath entails is no longer relevant.¹²¹

Texas courts have deemed the Texas dead man's statute repealed by adoption of the Texas Rules of Civil and Criminal Evidence.¹²² In civil actions, Texas Rule of Civil Evidence 601(b) replaced the dead man's statute, but excludes only uncorroborated testimony regarding oral statements made by the testator, intestate, or ward in actions by or against executors, administrators, or guardians.¹²³ In *Cain v. Whitlock*,¹²⁴ for example, rule 601(b) was held not to apply in a suit seeking an appointment as executrix and determination of heirship. In *Parham v. Wilbon*¹²⁵ a testator's surviving spouse filed application for the probate of a will, which the testator's daughter opposed. At issue was whether oral statements made by the deceased had been corrob-

115. *Id.*

116. TEX. R. CIV. EVID. 509(d)(4) & 510(d)(5).

117. *Id.* 513(b).

118. 748 S.W.2d 571 (Tex. App.—Amarillo 1988, no writ).

119. *Id.* at 575-76.

120. Order Adopting and Amending Texas Rules of Civil Evidence, 50 TEX. B.J. 1056, 1057 (1987).

121. See TEX. R. CIV. EVID. 601(a)(2).

122. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926), repealed by TEX. R. CIV. EVID. 601(b); see also TEX. R. CRIM. EVID. 601.

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

124. 741 S.W.2d 528, 530 (Tex. App.—Houston [14th Dist.] 1987, no writ).

125. 746 S.W.2d 347 (Tex. App.—Fort Worth 1988, writ requested).

orated sufficiently to be admitted pursuant to rule 601(b). In excluding the oral statements made by the deceased, the trial court held that such statements were corroborated only if made by the deceased in the presence of two other people.¹²⁶ Correctly holding that rule 601(b) does not require corroboration by two witnesses, the appellate court found that the trial court erred in excluding statements by the deceased.¹²⁷ Moreover, when rule 601(b) prohibits an interested party from testifying, the 1988 Amendment to rule 601(b) requires the trial court to so instruct the jury.¹²⁸

Texas Rule of Civil Evidence 602 provides that a witness may not testify to a matter unless he has personal knowledge of the matter.¹²⁹ For example, in an adverse possession case, a witness was not permitted to testify because his testimony revealed that he had no personal knowledge of whether the county maintained the property in question, but that he had obtained his knowledge from a telephone conversation with a county employee.¹³⁰

Texas Rule of Civil Evidence 606(a) prohibits a juror from testifying as a witness before the jury in the trial of the case in which he sits as a juror.¹³¹ In *Callejo v. Brazos Electric Power Cooperative, Inc.*,¹³² a condemnation case, the trial court disregarded the jury's finding of post-taking value, and substituted its own finding on which it rendered judgment. The court of appeals reversed, holding that the jury's finding was supported by the evidence.¹³³ The Texas Supreme Court, however, agreed with the trial court, holding that there was no evidence to support the jury's finding on post-taking value.¹³⁴ In reversing the judgment of the court of appeals and affirming the judgment of the trial court, the Texas Supreme Court explained that rule 606(a) prohibits jurors from giving evidence themselves while rule 602 prohibits testimony from a witness unless he is shown to have personal knowledge concerning the subject of the testimony.¹³⁵

Texas Rule of Civil Evidence 606(b) governs jury misconduct. Upon an inquiry into a verdict's validity, a juror may testify regarding only "whether any outside influence was improperly brought to bear upon any juror."¹³⁶ A juror may not testify about any matter occurring during the course of the jury's deliberations, nor about anything bearing upon his or any other juror's mental processes.¹³⁷ During the Survey period several Texas appellate courts considered juror evidence under rule 606(b) in motions for new trial. One court held that a juror's personal, pretrial experience, which involved the defendant doctor but which was unrelated to the litigation and was com-

126. *Id.* at 348.

127. *Id.* at 350.

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

129. *Id.* 602.

130. *Barstow v. State*, 742 S.W.2d 495, 502-03 (Tex. App.—Austin 1987, writ denied).

131. TEX. R. CIV. EVID. 606(a).

132. 755 S.W.2d 73 (Tex. 1988).

133. 745 S.W.2d 70 (Tex. App.—Dallas), *rev'd*, 755 S.W.2d 73 (Tex. 1988).

134. 755 S.W.2d at 75.

135. *Id.*

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

137. *Id.*

municated to the other jurors during deliberations, was not an outside influence under rule 606(b).¹³⁸ Another court held that, in a motion for new trial, the court could not consider juror affidavits that did not allege or prove the existence of any outside influence, but which merely attempted to impeach the verdict by impermissibly probing the minds of jurors.¹³⁹ Where a juror affidavit or testimony failed to show evidence of outside influence, the jury's discussion of the existence of insurance from which plaintiffs could recover did not entitle plaintiffs in a products liability action to a new trial.¹⁴⁰ Additionally, in *Golden v. First City National Bank*¹⁴¹ the Dallas court of appeals held that the trial court's supplemental, verdict-urging instruction did not represent "improper outside influence" within the meaning of the exception to rule 606(b).

Texas Rule of Civil Evidence 607 permits a party to impeach his own witness. Recently, however, a Texas court of appeals case limited this rule.¹⁴² In *Truco Properties, Inc. v. Charlton* the court held that a party may not call a witness solely for the purpose of later impeachment by use of otherwise inadmissible hearsay.¹⁴³

The 1988 Amendments also resulted in the addition or alteration of several other rules. Texas Rule of Civil Evidence 610 is a new rule that was added in the 1988 Amendments. Rule 610 forecloses inquiry into the religious beliefs or opinions of a witness to impair or enhance his credibility.¹⁴⁴ The insertion of this rule caused a renumbering of former rules 610 through 613. The 1988 Amendment to rule 611(c), formerly rule 610(c), permits leading questions on direct examination where leading questions are necessary to develop the testimony of a witness.¹⁴⁵ Texas Rule of Civil Evidence 614, formerly rule 613, requires the court, upon request of a party, to exclude nonparty witnesses so that they cannot hear the testimony of other witnesses. The 1988 Amendment to rule 614 permits a party's spouse to remain in the courtroom during the trial.¹⁴⁶

VII. ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

A. *Opinion Testimony by Lay Witnesses*

The Texas Rules of Civil Evidence permit lay witnesses to offer rationally

138. *Fillinger v. Fuller*, 746 S.W.2d 506, 509 (Tex. App.—Texarkana 1988, no writ).

139. *H. E. Butt Grocery Store Co. v. Paez*, 742 S.W.2d 824, 826 (Tex. App.—Corpus Christi 1987, writ denied).

140. *Moon v. Firestone Tire & Rubber Co.*, 742 S.W.2d 792, 793 (Tex. App.—Houston [14th Dist.] 1987, writ denied); see also *Blackmon v. Mixson*, 755 S.W.2d 179, 183 (Tex. App.—Dallas 1988, no writ) (discussion of liability insurance among jurors during deliberations held not to amount to outside influence).

141. 751 S.W.2d 639, 644 (Tex. App.—Dallas 1988, no writ).

142. *Truco Properties, Inc. v. Charlton*, 749 S.W.2d 893 (Tex. App.—Texarkana 1988, writ denied).

143. *Id.* at 896.

144. TEX. R. CIV. EVID. 610.

145. *Id.* 611(c); see *id.* 611 (c) and comment to 1988 Amendment.

146. *Id.* 614.

based opinions to help clarify facts or misunderstandings.¹⁴⁷ The rules have greatly liberalized the admission of lay witnesses' opinion testimony. Texas law of evidence has always liberally allowed an owner of property to offer his opinion of the property's value.¹⁴⁸ A property owner can give opinion testimony even though he would not qualify as an expert regarding the value of the same property if another person owned the property.¹⁴⁹ During the Survey period one Texas court recognized the admissibility of lay testimony by allowing a landowner to give his opinion of the market value of his own property in a condemnation case.¹⁵⁰ Another recent case held that when a witness gives testimony that he is acquainted with the market value of his property, he is prima facie qualified to testify as an expert concerning that value.¹⁵¹ However, a mobile home owner's testimony regarding the replacement cost of the mobile home does not amount to evidence of the market value of his home.¹⁵²

B. Testimony by Experts

1. Competency of Expert

Texas Rule of Civil Evidence 702 permits expert opinion testimony from a witness "qualified as an expert by knowledge, skill, experience, training, or education."¹⁵³ Texas Rule of Civil Evidence 104(a) provides that preliminary questions regarding qualification of a witness shall be determined by the court.¹⁵⁴ In *Vogelsang v. Reece Import Autos, Inc.*¹⁵⁵ the Dallas court of appeals explained that the trial court only makes the threshold finding of whether a witness possesses minimal qualifications. Thereafter, it is the jury's province to determine the adequacy of the witnesses' qualifications and the credibility of the testimony.¹⁵⁶

2. Subject of Expert Testimony

Courts during the Survey period admitted and excluded expert opinion on a wide variety of subjects. One court admitted medical testimony to prove the reasonableness of charges and the necessity of treatment.¹⁵⁷ Another court admitted the testimony of a treating psychiatrist, which indicated that

147. *Id.* 701.

148. See, e.g., *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 competent to testify as to car's value).

149. *Id.*

150. *State v. Knapp*, 740 S.W.2d 809, 817-18 (Tex. App.—El Paso 1987, writ granted).

151. *Linder v. Valero Transmission Co.*, 736 S.W.2d 807, 811 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

152. *Blackmon v. Mixson*, 755 S.W.2d 179, 182 (Tex. App.—Dallas 1988, no writ).

153. TEX. R. CIV. EVID. 702.

154. *Id.* 104(a).

155. 745 S.W.2d 47 (Tex. App.—Dallas 1987, no writ).

156. *Id.* at 49.

157. *Travelers Ins. Co. v. Brown*, 750 S.W.2d 916, 918 (Tex. App.—Amarillo 1988, writ denied).

a worker's post-traumatic stress syndrome was caused by a series of assaultive incidents involving his team leader, rather than by the worker's early childhood experiences and marital problems.¹⁵⁸ A court also admitted the testimony of a handwriting expert in a case involving an allegedly forged deed of trust.¹⁵⁹

Expert opinion testimony is admissible only if the expert's knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue.¹⁶⁰ Accordingly, the exclusion of an expert economist's testimony was held not to be an abuse of discretion where the plaintiffs had presented numerous witnesses who testified regarding the decedent's special relationship with her family, so as to enable a jury to ascertain the family's nonpecuniary losses without the assistance of an expert witness.¹⁶¹

3. *Testimony of Medical Experts*

The testimony of an expert of the same school of practice as the defendant doctor was admissible to show the defendant's diagnosis or treatment was not negligent and that the diagnosis or treatment did not proximately cause the plaintiff's injuries.¹⁶²

C. *Bases of Opinion Testimony*

Texas Rule of Civil Evidence 703 outlines the proper bases of expert opinion testimony. If experts in the same field as the witness would reasonably rely on certain data, the data can form the basis of the expert's opinion and need not be admissible in evidence.¹⁶³ For example, the testimony of a finance professor, based on his understanding that the employee had received a cost of living raise, was held to be admissible since the testimony was based on the type of hearsay reasonably relied upon by experts in the field.¹⁶⁴ The testimony was admissible despite the lack of supporting evidence that the employee actually had received a cost of living raise.¹⁶⁵ Additionally, expert opinion testimony based solely on statements or reports of third persons that had not been admitted into evidence was admissible in an action arising out of the sale of three helicopters and spare parts.¹⁶⁶ The court considered whether the maintenance inspection sheets were of a type reasonably relied upon by experts in the field.¹⁶⁷ The testimony of a certified public account-

158. *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 611-12 (W.D. Tex. 1988).

159. *1st Coppell Bank v. Smith*, 742 S.W.2d 454, 458-59 (Tex. App.—Dallas 1987, no writ). The court further held that the denial of genuineness of a signature by the purported signatory was not a predicate to expert handwriting testimony. *Id.* at 457-58.

160. TEX. R. CIV. EVID. 702.

161. *Lopez v. City Towing Assocs., Inc.*, 754 S.W.2d 254, 259-60 (Tex. App.—San Antonio 1988, writ requested).

162. *Wales v. Williford*, 745 S.W.2d 455, 459 (Tex. App.—Beaumont 1988, writ denied).

163. TEX. R. CIV. EVID. 703.

164. *General Elec. Co. v. Kunze*, 747 S.W.2d 826, 831-32 (Tex. App.—Waco 1987, writ denied).

165. *Id.* at 831-32.

166. *Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc.*, 740 S.W.2d 873, 876 (Tex. App.—Beaumont 1987, no writ).

167. *Id.* at 876.

ant estimating the value of trust assets on the basis of interest rates and average return on investments was admissible and sufficient evidence to support a damage award in an action against a trustee for breach of fiduciary duties.¹⁶⁸ Opinion testimony of an expert based in part on discussions with appellee's counsel, detailed time sheets supplied by counsel, pleadings in the case, and his own expert knowledge in the field was sufficient to support an award of attorney's fees for the services of purchasers' counsel.¹⁶⁹

D. *Opinion on Ultimate Issue*

During the Survey period the Texas Supreme Court reaffirmed and explained its holding, discussed in last year's Survey,¹⁷⁰ admitting expert opinion testimony on mixed questions of law and fact.¹⁷¹ In *Louder v. De Leon*¹⁷² the Texas Supreme Court disapproved that part of the court of appeals' opinion that conflicted with its opinion in *Birchfield v. Texarkana Memorial Hospital*.¹⁷³ In *Louder* the Texas Supreme Court explained *Birchfield* as standing for the proposition that "expert testimony on proximate cause is admissible as long as it is based on proper legal concepts."¹⁷⁴ The Texas Supreme Court, however, indicated that expert testimony on mixed questions of law and fact is still subject to scrutiny under Texas Rule of Civil Evidence 702 as to whether it helps the trier of fact.¹⁷⁵ Another court during the Survey period held that, in a suit seeking to pierce the corporate veil, testimony which characterized one of the corporate principals as an embezzler was inadmissible conclusory evidence.¹⁷⁶

E. *Disclosure of Facts or Data Underlying Expert Opinion*

Texas Rule of Civil Evidence 705 governs the disclosure of facts or data underlying expert opinion. An expert may give his opinion without prior disclosure of the underlying facts or data.¹⁷⁷ In a worker's compensation case, for example, one court held it proper for the worker's counsel to ask a doctor whether the worker's chest pains related to his fall, and to assume that he fell from a particular truck on a particular date, even though the underlying facts were not yet in evidence.¹⁷⁸ Another court admitted medical testimony regarding a doctor's observations and conclusions of the plaintiff's condition based on X-rays, even though the X-rays were never

168. *McDonough v Williamson*, 742 S.W.2d 737, 739 (Tex. App.—Houston [14th Dist.] 1987, no writ).

169. *Liptak v. Pensabene*, 736 S.W.2d 953, 957 (Tex. App.—Tyler 1987, no writ).

170. Addison, *Evidence, Annual Survey of Texas Law*, 42 Sw. L.J. 501, 513 (1988).

171. *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361 (Tex. 1987).

172. 754 S.W.2d 148 (Tex. 1988).

173. 747 S.W.2d 361 (Tex. 1987).

174. 754 S.W.2d at 149.

175. *Id.*

176. *Gensco, Inc. v. Canco Equip., Inc.*, 737 S.W.2d 345, 348-49 (Tex. App.—Amarillo 1987, no writ).

177. TEX. R. CIV. EVID. 705.

178. *Home Ins. Co. v. Banda*, 736 S.W.2d 812, 815 (Tex. App.—San Antonio 1987, writ denied).

produced or admitted into evidence.¹⁷⁹

F. Effect of Opinion Testimony

In 1987 the Texarkana court of appeals addressed the issue of expert testimony and held that triers of fact are not required to accept the opinion of experts on either side of a controversy; the jury can determine the value of the matter in question to be in the range between the high and low values offered in evidence by experts.¹⁸⁰ In determining causation of an injury allegedly suffered by a worker from the physically abusive behavior of his team leader, another court accepted the medical testimony of a treating psychiatrist, which differed from the testimony of a social worker.¹⁸¹ Although expert testimony may be used to develop evidence of sales when financial records are insufficient, a court was held to have concluded correctly that the testimony introduced was inadequate to establish profits in a copyright infringement case.¹⁸²

G. Auditors' Reports

The 1988 Amendments added Texas Rule of Civil Evidence 706. Rule 706 allows into evidence auditors' reports prepared pursuant to Texas Rule of Civil Procedure 172.¹⁸³ A party may not offer evidence contradicting such a report unless he has filed exceptions to it.¹⁸⁴

VIII. ARTICLE VIII—HEARSAY

A. Identifying Hearsay

Whether a record or statement offered to prove the truth of a matter constitutes hearsay is often difficult to determine.¹⁸⁵ Specifically, 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.¹⁸⁶ The exceptions to this general rule are set forth in rules 803 through 806.

Several courts during the Survey period considered whether proffered evidence was hearsay. In *Morehead v. Morehead*,¹⁸⁷ for example, the Texas Supreme Court, citing Texas Rule of Civil Evidence 802, held that answers to requests for admissions were inadmissible hearsay where the insurance

179. *Trailways, Inc. v. Mendoza*, 745 S.W.2d 63, 66-67 (Tex. App.—San Antonio 1987, no writ).

180. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 890 (Tex. App.—Texarkana 1987, no writ).

181. *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 611-12 (W.D. Tex. 1988).

182. *Estate of Vane v. The Fair, Inc.*, 849 F.2d 186, 190 (5th Cir. 1988).

183. TEX. R. CIV. EVID. 706.

184. *Id.*; see also TEX. R. CIV. P. 172 (exceptions to auditor's report must be filed within 30 days of filing of report).

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

186. *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.

187. 741 S.W.2d 381 (Tex. 1987).

company that answered them was no longer a party to the suit. In a defamation suit, however, the court held that a newspaper article and videotape did not constitute hearsay where they were introduced to prove only that certain statements were made, not to prove the truth of the matter asserted.¹⁸⁸ Another court held that a patient's exhibit containing statements that a doctor had allegedly made to him was hearsay.¹⁸⁹ Furthermore, a court held that a witness' testimony that a particular thing was his "understanding" was hearsay when the understanding was based on the out-of-court statements of a third party.¹⁹⁰

Inadmissible hearsay is not denied probative value merely because it is hearsay.¹⁹¹ In *Miller v. Presswood*¹⁹² hearsay testimony was admitted without objection and the court did not deny it probative value merely because it was hearsay.¹⁹³

B. Statements That Are Not Hearsay

Texas Rule of Civil Evidence 801(e) excludes from the definition of hearsay prior statements by a witness,¹⁹⁴ admissions by party opponents,¹⁹⁵ and depositions.¹⁹⁶

1. Admissions By Party Opponents

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.¹⁹⁷ A judicial admission is actually a substitute for evidence.¹⁹⁸ The Texas Rules of Civil 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.¹⁹⁹

Several courts considered judicial admissions during the Survey period. In *Bohmfolk v. Linwood*²⁰⁰ the Dallas court of appeals held that because the admission of a party proves the truth of the facts submitted, its exclusion was error.²⁰¹ Two Austin courts during the Survey period held that state-

188. *Jauch v. Corley*, 830 F.2d 47, 52 (5th Cir. 1987).

189. *Group Medical & Surgical Serv., Inc. v. Leong*, 750 S.W.2d 791, 797 (Tex. App.—El Paso 1988, writ denied).

190. *Texarkana Mack Sales, Inc. v. Flemister*, 741 S.W.2d 558, 562-63 (Tex. App.—Texarkana 1987, no writ).

191. TEX. R. CIV. EVID. 802.

192. 743 S.W.2d 275 (Tex. App.—Beaumont 1987, no writ).

193. *Id.* at 279.

194. TEX. R. CIV. EVID. 801(e)(1).

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

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

197. 1A R. RAY, TEXAS PRACTICE, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1127 (3d ed. 1980).

198. *Id.*

199. TEX. R. CIV. EVID. 801(e)(2).

200. 742 S.W.2d 518 (Tex. App.—Dallas 1987, no writ).

201. *Id.* at 521-22.

ments in pleadings were not sufficiently unequivocal to constitute judicial admissions because a pleading cannot be deemed a judicial admission unless it is deliberate, clear, and unequivocal.²⁰² A Houston court held that statements and documents made prior to trial could not be accepted as judicial admissions because they were not made during the course of judicial proceedings.²⁰³

Like Texas Rule of Civil Evidence 801(e)(2), Federal Rule of Evidence 801(d)(2) governs party admissions. During the Survey period the Fifth Circuit held that appellate briefs filed by a party in a separate action, to which the person preferring the briefs was not a party, were not admissible as party admissions over a hearsay objection.²⁰⁴ In order for such briefs to be admissible, the court held, "highly unusual circumstances" must exist.²⁰⁵

b. Vicarious Admissions

Texas Rule of Civil 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.²⁰⁶ In *Fojtik v. First National Bank*²⁰⁷ the testimony of a member of a bank's board of directors was admitted under Texas Rule of Civil Evidence 801(e)(2)(D) as a vicarious admission in a borrower's action against the bank.²⁰⁸

Federal Rule of Evidence 801(d)(2)(D) is identical to Texas Rule of Civil Evidence 801(e)(2)(D). During the Survey period the Fifth Circuit held that the vicarious admission rule did not apply to the affidavit of one of the party's former attorneys because vicarious admissions only apply to statements made during the existence of the agency relationship.²⁰⁹ The Fifth Circuit also found that the proffered testimony of an accounting professor, which stated that the university chancellor was upset about an incident involving a professor seeking tenure, was not a vicarious admission where the tenure decision had nothing to do with the accounting professor's scope of agency.²¹⁰

2. Depositions

The 1988 Amendment to Texas Rule of Civil Evidence 801(e)(3) provides that depositions are not hearsay if they were taken in the "same proceeding," as defined in Texas Rule of Civil Procedure 207.²¹¹ The 1988 Amendment also added a sentence making explicit the prior practice that unavailability of

202. *Barstow v. State*, 742 S.W.2d 495, 509 (Tex. App.—Austin 1987, writ denied); *American Casualty Co. v. Conn.*, 741 S.W.2d 536, 539 (Tex. App.—Austin 1987, no writ).

203. *American Baler Co. v. SRS Sys., Inc.*, 748 S.W.2d 243, 247 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

204. *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742, 745-46 (5th Cir. 1988).

205. *Id.* at 746.

206. TEX. R. CIV. EVID. 801(e)(2)(D).

207. 752 S.W.2d 669 (Tex. App.—Corpus Christi 1988, writ requested).

208. *Id.* at 672.

209. *Blanchard v. Peoples Bank*, 844 F.2d 264, 267 (5th Cir. 1988).

210. *Staheli v. University of Mississippi*, 854 F.2d 121, 127 (5th Cir. 1988).

211. TEX. R. CIV. EVID. 801(e)(3).

the deponent is not a requirement for admissibility.²¹²

C. Hearsay Exceptions: Availability of Declarant Immaterial

1. Statements for Purposes of Medical Diagnosis or Treatment

Texas Rule of Civil Evidence 803(4) admits into evidence, as exceptions to the hearsay rule, statements made for purposes of medical diagnosis or treatment and describing medical history or symptoms. For instance, in a case where a mother appealed the termination of her parental rights, one court held that a sexual assault nurse who examined child abuse victims was properly permitted to testify as to statements made by the children identifying the abuser and detailing the nature of the abuse because the cause of the victims' injuries was pertinent to both physical and psychological treatment and diagnosis.²¹³

2. Business Records

Texas Rule of Civil Evidence 803(6) governs the introduction of records of regularly conducted activities, commonly known as business records.²¹⁴ 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.²¹⁵ The 1988 Amendment to rule 803(6) adds the cross-reference that the records may be authenticated by an affidavit that complies with Texas Rule of Civil Evidence 902(10).²¹⁶

In a suit for recovery of attorneys' fees from a former client, the court admitted the attorneys' time sheets and accounts receivable statements under rule 803(6), even though the employees who had no personal knowledge of the information on time sheets, prepared the accounts receivable statements, and even though the employees prepared the accounts receivable sheets some time after the attorney completed the time sheets.²¹⁷ The Fifth Circuit held that receipts regarding a taxpayers' purported cash contributions did not fall within the business records exception to the hearsay rule.²¹⁸ The proffered receipts did not explicitly state in what form the contribution was made and the amount of the contribution was typed into a blank space, possibly allowing unauthorized use or alteration of the form receipt.²¹⁹

D. Hearsay Exceptions: Declarant Unavailable

Texas Rule of Civil Evidence 804 contains exceptions to the hearsay rule

212. *Id.*

213. *In re L.S., P.P., G.S., & M.S.*, 748 S.W.2d 571, 576-77 (Tex. App.—Amarillo 1988, no writ).

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

215. *Id.*

216. *Id.* Rule 902(10) permits the introduction of business records accompanied by an affidavit that conforms to the requirements set forth in that rule. *Id.* 902(10).

217. *Connor v. Wright*, 737 S.W.2d 42, 45 (Tex. App.—San Antonio 1987, no writ).

218. *Ledbetter v. Commissioner*, 837 F.2d 708, 710-11 (5th Cir. 1988).

219. *Id.*

that apply if the declarant is unavailable as a witness.²²⁰ One such exception permits testimony taken in another proceeding, or at another hearing of the same case, if the witness is unavailable.²²¹ Recently, however, a court excluded a witness's testimony from a temporary injunction hearing in the same case despite the former testimony exception because the witness was never served with a subpoena, no one tried to contact the witness, and the witness's deposition was never taken.²²² Depositions taken in another proceeding are admissible as former testimony under rule 804(b)(1), but the 1988 Amendment to the rule deleted reference to depositions taken in the same proceeding,²²³ which are not hearsay under rule 801(e)(3).

IX. ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

Texas Rule of Civil Evidence 901 requires authentication or identification of evidence as a condition precedent to admitting the offered evidence.²²⁴ The authentication requirement is satisfied by evidence that is sufficient to show that the matter in question is what its proponent alleges.²²⁵ Where a document is not properly authenticated, the document will not be admitted into evidence, as illustrated in *Hannum v. General Life & Accident Insurance Co.*²²⁶ In *Hannum* an order of the Commissioner of Insurance placing the insurer under the Commissioner's supervision because of its weak financial condition and a disproportionate number of policyholders' complaints filed against the insurer was held properly excluded because it was not accompanied by proof that the order was genuine and executed by the proper parties.²²⁷ The *Hannum* court found that the document was not self-authenticating under Texas Rule of Civil Evidence 902, nor was it authenticated under rule 901(b)(7), which governs public records or reports.²²⁸

Two courts during the Survey period found documents properly authenticated. A Fort Worth court held that the affidavit of a corporation's attorney stating that an exhibit was an acceptance letter from him in response to the savings and loan's offer to purchase the note at issue sufficiently authenticated the document to allow its admission into evidence in a countersuit for breach of contract to purchase a note.²²⁹ A Dallas court of appeals held that a witness in charge of producing records properly authenticated letters from stockholders to a corporation, even though the witness who produced the records was not the addressee of the letters.²³⁰

220. TEX. R. CIV. EVID. 804. For the definition of unavailability, see *id.* 804(a).

221. *Id.* 804(b)(1).

222. *Victor M. Solis Underground Util. & Paving Co. v. City of Laredo*, 751 S.W.2d 532, 537 (Tex. App.—San Antonio 1988, writ requested).

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

224. *Id.* 901(a).

225. *Id.*

226. 745 S.W.2d 500 (Tex. App.—Corpus Christi 1988, no writ).

227. *Id.* at 502.

228. *Id.*

229. *Western Fed. Sav. & Loan Ass'n v. Atkinson Fin. Corp.*, 747 S.W.2d 456, 464 (Tex. App.—Fort Worth 1988, no writ).

230. *Perry v. Perry Bros., Inc.*, 753 S.W.2d 773, 776-77 (Tex. App.—Dallas 1988, no writ).

Texas Rule of Civil Evidence 902(10)(b) provides for self-authentication of business records accompanied by an affidavit that meets the requirements of the rule.²³¹ The 1988 Amendment to rule 902(10)(b) added the "[m]y commission expires:" line,²³² which the rule inadvertently omitted in the past.

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

Photographs²³³ portraying relevant facts are admissible if identified by a witness as accurately representing the relevant facts.²³⁴ 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.²³⁵ The witness must testify, however, that he knows the scene or object in question and that the photograph accurately reflects the scene.²³⁶

The definition of photographs includes videotapes.²³⁷ In a personal injury action brought against a pedestrian by a motorist, a trial court properly admitted a videotape of an accident scene introduced by the motorist.²³⁸ The court admitted the tape because the video technician's testimony indicated that the video was made on a day with weather conditions similar to those on the day of the accident and that, while filming the video, the technician was traveling in the same direction as the motorist and at approximately the same speed, even though he was not in the same type of vehicle.²³⁹ It was not an abuse of discretion for a court to exclude a videotape that purported to represent what a driver would have seen as she approached a towing cable that had been stretched across the roadway, where the videotape did not show the cable stretched across the street because the camera could not pick it up.²⁴⁰

Photographs are demonstrative evidence, typically used to illustrate a witness's testimony, and usually are not offered to prove the truth of the matter contained in the photograph itself.²⁴¹ In *Jauch v. Corley*²⁴² the court did not

231. TEX. R. CIV. EVID. 902(10)(b).

232. *Id.*

233. "'Photographs' include still photographs, X-ray films, video tapes, and motion pictures." *Id.* 1001(2).

234. See generally 2 R. RAY, *supra* note 197, § 1466 (photograph must be verified by witness before admissible in evidence).

235. *Id.*; see, e.g., *Vardilos v. Reid*, 320 S.W.2d 419, 423 (Tex. Civ. App.—Houston 1959, no writ).

236. See *McRoy v. Riverlake Country Club, Inc.*, 426 S.W.2d 299, 305 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.); 2 R. RAY, *supra* note 197, § 1466.

237. TEX. R. CIV. EVID. 1001(2).

238. *Garza v. Cole*, 753 S.W.2d 245, 247-48 (Tex. App.—Houston [14th Dist.] 1988, writ ref'd n.r.e.).

239. *Id.* at 247-48.

240. *Lopez v. City Towing Assocs., Inc.*, 754 S.W.2d 254, 259-60 (Tex. App.—San Antonio 1988, writ requested).

241. See FED. R. EVID. 1002. Notes of Advisory Committee on Proposed Rules.

242. 830 F.2d 47, 52 (5th Cir. 1987).

consider a newspaper article and a videotape to be hearsay and admitted them in a defamation suit where they were offered only to prove that the statements were made, not to prove the truth of the statements.

Texas Rule of Civil 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.²⁴³ In *Victor M. Solis Underground Utility & Paving Co. v. City of Laredo*,²⁴⁴ for example, the court found a summary of records admissible where underlying business records were admissible, and where a witness testified that the summary was based on data kept in the usual course of a city's regularly conducted activity, and that the underlying data was available for inspection at trial.

The 1988 Amendment to Texas Rule of Civil Evidence 1007 was corrected to read "Testimony or Written Admission [rather than Permission] of Party."²⁴⁵

XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.²⁴⁶ A court may allow extrinsic evidence if it finds a contract to be ambiguous.²⁴⁷ The rule prohibits parol evidence concerning the terms in a contract if the contract is integrated.²⁴⁸ Several courts during the Survey period excluded parol evidence to interpret an unambiguous written contract.²⁴⁹ Two courts admitted parol evidence when the courts found the contracts at issue ambiguous.²⁵⁰

During the Survey period, courts admitted parol evidence to establish a mutual mistake of fact,²⁵¹ and fraud in the inducement.²⁵² Parol evidence was not admitted to supplement a deficient description of real property.²⁵³ Instead the court explained that this was precisely the situation that the stat-

243. TEX. R. CIV. EVID. 1006.

244. 751 S.W.2d 532, 537 (Tex. App.—San Antonio 1988, writ requested).

245. TEX. R. CIV. EVID. 1007.

246. See 2 R. RAY, *supra* note 197, § 1601.

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

248. 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 197, § 1602.

249. *Shank, Irwin, Conant & Williamson v. Durant, Mankoff, Davis, Wolens & Francis*, 748 S.W.2d 494, 499-500 (Tex. App.—Dallas 1988, no writ); *Western Fed. Sav. & Loan Ass'n v. Atkinson Fin. Corp.*, 747 S.W.2d 456, 462 (Tex. App.—Fort Worth 1988, no writ); *Boyett v. Boegner*, 746 S.W.2d 25, 28 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Pape Equip. Co. v. I.C.S., Inc.*, 737 S.W.2d 397, 402 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

250. *Dorchester Gas Producing Co. v. Hagy*, 748 S.W.2d 474, 478 (Tex. App.—Amarillo 1988, writ denied); *Cavalcade Oil Corp. v. Samuel*, 746 S.W.2d 842, 844 (Tex. App.—El Paso 1988, writ denied).

251. *Shenandoah Assocs. v. J & K Properties, Inc.*, 741 S.W.2d 470, 488-89 (Tex. App.—Dallas 1987, writ denied).

252. *Fidelity & Casualty Co. v. Burts Bros., Inc.*, 744 S.W.2d 219, 223 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

253. *James v. Nico Energy Corp.*, 838 F.2d 1365, 1369-70 (5th Cir. 1988).

ute of frauds should address.²⁵⁴ Similarly, the Texas Supreme Court held that the doctrine of merger prevents the admission of any warranties made in prior earnest money contracts that are contradicted in the deed.²⁵⁵ The Supreme Court explained that the merger doctrine operates in the same way as the parol evidence rule.²⁵⁶

254. *Id.* at 1370.

255. *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988).

256. *Id.* at 48.