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## Civil Evidence

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# CIVIL EVIDENCE

by

Linda L. Addison\*

**D**URING 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.

## I. ARTICLE I—GENERAL PROVISIONS

Texas Rule of Civil Evidence 103(a)(2) provides that error may not be predicated upon a ruling excluding evidence unless the substance of the evidence was made known to the court by offer.<sup>1</sup> Rule 103(b) requires the offering party to make the offer of proof as soon as practicable, but before the reading of the court's charge to the jury.<sup>2</sup> During the Survey period, a party that failed to make an offer of proof or bill of exception did not preserve its error.<sup>3</sup> The Amarillo court of appeals explained that even assuming arguendo the party had requested the court to admit the evidence in a timely manner, and the party did not object to the court's failure to rule prior to the reading of the charge to the jury. Consequently, the party neither obtained a timely ruling on the offer nor timely objected to the court's failure to rule.<sup>4</sup>

Error may not be predicated upon a ruling admitting evidence in the absence of a timely objection or motion to strike.<sup>5</sup> Where a party failed to object to an expert's testimony on the grounds that the articles on which the expert relied were published after plaintiff's exposure to an herbicide, and therefore, could not form the basis of liability for inadequate warnings, the party waived any error in the admission of this testimony.<sup>6</sup>

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1. Tex. R. Civ. Evid. 103(a)(2).

2. *Id.* 103(b).

3. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 274-75 (Tex. App.—Amarillo 1988, writ denied).

4. *Id.* at 275.

5. Fed. R. Evid. 103(a)(1); Tex. R. Civ. Evid. 103(a)(1).

6. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1432-33 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 328, 100 L.Ed. 2d. 318 (1990).

Texas Rule of Civil Evidence 105 provides that when evidence is admissible as to one party or for one purpose, the court, upon request, shall restrict the evidence to its proper scope, and instruct the jury accordingly.<sup>7</sup> During the Survey period, one court held that when evidence offered for two purposes is admissible for one purpose, but not the other, the exclusion of such evidence is not error where the proponent of the evidence does not limit its offer for the admissible purpose only.<sup>8</sup>

## II. ARTICLE II—JUDICIAL NOTICE

Article II of the Texas Rules of Civil Evidence governs judicial notice. During the Survey period, courts affirmed the taking of judicial notice of a trial court's own record in the same case.<sup>9</sup> In *Birde v. Holbrook*, an appellate court also properly took judicial notice of its own records.<sup>10</sup>

In *Texas Real Estate Commission v. Nagle*<sup>11</sup> the Texas Supreme Court wrote that although a court may take judicial notice of its own records and judgments, the use to which records and judgments may be put are circumscribed by the doctrines of res judicata and collateral estoppel.<sup>12</sup> A trial court properly took judicial notice of previous proceedings between the parties in the same county, where the proceedings were closely related to the case before the court.<sup>13</sup> One court took judicial notice of the usual and customary attorney's fees necessary for prosecution of an appeal.<sup>14</sup> Where the unsworn statement of plaintiffs' attorney represented the only evidence supporting an award of attorneys' fees, the supreme court presumed the trial court to have taken judicial notice of the usual and customary attorneys' fees and of the contents of the case file in awarding fees in that amount.<sup>15</sup>

In a usury action, the trial court correctly took judicial notice of interest rate ceilings issued by the Consumer Credit Commission.<sup>16</sup> Pursuant to Federal Rule of Evidence 201(c), a federal district court took judicial notice that certain portions of the Army field manuals constitute suitable standards for sanitary measures at proposed gatherings of a large number of people in a national forest.<sup>17</sup>

Texas Rule of Civil Evidence 202 provides that a court may judicially

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7. Tex. R. Civ. Evid. 105.

8. *Worldwide Anesthesia Assocs. v. Bryan Anesthesia, Inc.*, 765 S.W.2d 445, 449 (Tex. App.—Houston [14th Dist.] 1988, no writ).

9. *Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied); *Bethel v. Norman Furniture Co.*, 756 S.W.2d 6, 9 (Tex. App.—Houston [1st Dist.] 1988, no writ).

10. 775 S.W.2d 411, 412 (Tex. App.—Ft. Worth 1989, writ denied).

11. 767 S.W.2d 691 (Tex. 1989).

12. *Id.* at 694.

13. *Goad v. Goad*, 768 S.W.2d 356, 359 (Tex. App.—Texarkana 1989, writ denied), *cert. denied* 110 S.Ct. 722 (1990).

14. *Bethel*, 756 S.W.2d at 9.

15. *Bloom v. Bloom*, 767 S.W.2d 463, 471-72 (Tex. App.—San Antonio 1989, writ denied).

16. *Fisher v. Westinghouse Credit Corp.*, 760 S.W.2d 802, 806 (Tex. App.—Dallas 1988, no writ).

17. *U.S. v. Rainbow Family*, 695 F.Supp. 314, 330 (E.D. Tex. 1988) (referring to Field Hygiene and Sanitation, Army Training Circular, and Field Sanitation Team Training).

notice the law of other states.<sup>18</sup> 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.<sup>19</sup> Where the wife in a divorce action requested the trial court to take judicial notice of the common law, public statutes and court decisions of the state of New Mexico, the San Antonio appeals court held that this broad, general request failed to apprise the trial court of the particular laws relied upon and to provide sufficient information to enable the court properly to comply with the request.<sup>20</sup> In the absence of proof of the law of a foreign jurisdiction, the foreign jurisdiction's law is presumed to be the same as Texas law.<sup>21</sup> Where neither party offered proof of Pennsylvania law or requested the trial court to take judicial notice of the law of Pennsylvania at a hearing in a child custody and support case, the state where the parties had been divorced, the Corpus Christi appeals court presumed Pennsylvania law to be the same as Texas law in the absence of proof to the contrary.<sup>22</sup>

During the Survey period, the Texas Supreme Court considered Texas Rule of Civil Evidence 202 in *Daugherty v. Southern Pacific Transportation Company*.<sup>23</sup> The issue in *Daugherty* concerned whether the trial court erred in failing to take judicial notice of OSHA regulations because the Daughertys had not pleaded the regulations in question.<sup>24</sup> The Texas Supreme Court agreed with the Daughertys that a party does not need to plead a statute or regulation of another jurisdiction before a court can take judicial notice.<sup>25</sup> The Texas Supreme Court disagreed, however, with the Daughertys' contention that courts automatically take judicial notice of federal law, explaining that Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability and to furnish all parties notice.<sup>26</sup> Since the Daughertys attempted to establish that the OSHA regulations applied, and had presented and explained the regulations to the jury several times during the trial, the Texas Supreme Court held that the trial court should have admitted the OSHA regulations under Texas Rule of Civil Evidence 202.<sup>27</sup> The supreme court disagreed with the court of appeals' unpublished opinion that refusal to take judicial notice of the OSHA regulations was harmless error.<sup>28</sup>

Texas Rule of Civil Evidence 204 permits a court to take judicial notice of Texas city and county ordinances, the contents of the Texas Register, and

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18. Tex. R. Civ. Evid. 202.

19. *Id.*

20. *Knops v. Knops*, 763 S.W.2d 864, 867 (Tex. App.—San Antonio 1988, no writ).

21. *Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex. 1963); *Ewing v. Ewing*, 739 S.W.2d 470, 472 (Tex. App.—Corpus Christi 1987, no writ).

22. *Creavin v. Moloney*, 773 S.W.2d 698, 702 (Tex. App.—Corpus Christi 1989, writ denied).

23. 772 S.W.2d 81, 83 (Tex. 1989).

24. *Id.* at 82.

25. *Id.* at 83.

26. *Id.*, citing Tex. R. Civ. Evid. 202.

27. *Id.* at 83.

28. *Id.*

the rules of agencies published in the Administrative Code.<sup>29</sup> In an action against a city to recover for the death of a bicyclist who was killed when he turned his bicycle to avoid running into a hole on the road's shoulder and was struck by a tractor trailer rig, the court of appeals, without mentioning rule 204, took notice of a city ordinance.<sup>30</sup> The ordinance approved a maintenance agreement executed by the city and the state that set forth responsibility of each for maintaining roads and shoulders.<sup>31</sup>

### III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence addresses 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.

The court in *John Deere Co. v. May*<sup>32</sup> held that a party's failure to produce evidence within its control or failure to call its own officers, employees or field representative raised a presumption or inference that such evidence and testimony, if produced, would have been unfavorable on the findings challenged on appeal.<sup>33</sup> The Waco court of appeals, therefore, held that the negligent and proximate cause findings challenged on appeal were supported by legally sufficient evidence, especially the inferences arising from the failure to produce evidence and call witnesses within the defendant's control.<sup>34</sup>

In *Southwestern Life Insurance Co. v. Green*<sup>35</sup> a widow sued to recover benefits allegedly due to her as beneficiary under her deceased husband's life insurance policy. The insurer testified that the insurance company never received the widow's demand letter. The widow failed to testify that she correctly addressed the envelope, placed the letter inside, placed a stamp on the envelope and then put the letter in a mail deposit facility. After the insurer's testimony of nonreceipt of the letter, the widow was never recalled as a witness to prove up the mailing. Accordingly, the El Paso court of appeals held that no presumption existed that the letter had been sent to the insurance company.<sup>36</sup>

During the Survey period, the Texarkana court of appeals held that the presumptions ordinarily made in support of proper service do not apply when a direct attack is made on a default judgment.<sup>37</sup> The court explained that the record in such a case must show strict compliance with the rules of

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29. Tex. R. Civ. Evid. 204.

30. *Martinez v. City of San Antonio*, 768 S.W.2d 911, 915 (Tex. App.—San Antonio 1989, no writ).

31. *Id.*

32. 773 S.W.2d 369 (Tex. App.—Waco 1989, writ denied).

33. *Id.* at 377.

34. *Id.*

35. 768 S.W.2d 445 (Tex. App.—El Paso 1989, writ denied).

36. *Id.* at 448.

37. *Gibraltar Sav. Ass'n v. Kilpatrick*, 770 S.W.2d 14, 16 (Tex. App.—Texarkana 1989, writ denied).

civil procedure respecting service of process.<sup>38</sup>

#### 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, statute, or other rules.<sup>39</sup> Evidence that is not relevant is not admissible.<sup>40</sup> In a personal injury action, a trial judge did not abuse his discretion in refusing to admit evidence that the sales of plaintiff's restaurant supply company declined after her automobile accident, where the plaintiff failed to establish a correlation between the decline in sales and the foot injury she suffered in the automobile accident.<sup>41</sup> Such a correlation was necessary to prove the relevancy of the declining sales figures.

A nursery owner's testimony concerning the value of trees cut down by an electric cooperative on the landowner's property was relevant in a landowner's suit to recover the intrinsic value of the trees in *Lamar County Electric Cooperative Association v. Bryant*.<sup>42</sup> Although the cooperative contended that the nursery owner's testimony was irrelevant, the evidence was offered in response to the testimony of a cooperative witness that the trees were worthless and could not have any intrinsic value. The court of appeals reasoned that under Rule 401, evidence is relevant if it has a tendency to make the existence of any material fact more or less probable than it would have been without the evidence.<sup>43</sup> Thus, the court held the nursery owner's testimony constituted both relevant and admissible evidence.<sup>44</sup>

In a case involving constructive fraud in the formation of a corporation, evidence that the sole shareholder of a corporation had used funds from one of his corporations to pay personal family medical expenses was admissible where the shareholder had opened the door for such testimony by claiming that he did not commingle funds from his various corporations.<sup>45</sup> The Houston court of appeals explained that any error in the admission of the evidence was not reversible because it was invited.<sup>46</sup>

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.<sup>47</sup> The exclusion under Rule 403 is discretionary.<sup>48</sup> During the Survey period, the Dallas court of appeals held that a photograph of the deceased's face, though unpleasant to view, was not so

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38. *Id.*

39. Tex. R. Civ. Evid. 402. For the definition of relevance, see *id.* 401.

40. *Id.* 402.

41. *Russell v. Hankerson*, 771 S.W.2d 650, 654 (Tex. App.—Corpus Christi 1989, writ denied).

42. 770 S.W.2d 921, 923 (Tex. App.—Texarkana 1989, no writ).

43. *Id.*

44. *Id.*

45. *Klein v. Sporting Goods Inc.*, 772 S.W.2d 173, 179 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

46. *Id.* at 179.

47. Tex. R. Civ. Evid. 403.

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

gruesome as to shock the jury or cause unfair prejudice in a wrongful death action.<sup>49</sup> The Corpus Christi court of appeals held that the probative value of evidence that a workers' compensation claimant was terminated because he had previously threatened a coemployee with a shotgun, rather than because of his work-related injury, outweighed any prejudicial effect.<sup>50</sup>

In an action by a national accounting firm to recover reimbursement fees, merger acquisition costs and other damages allegedly resulting from a breach of a partnership agreement, a trial court did not abuse its discretion in excluding from evidence approximately two hundred (200) letters from the accounting firm's clients authorizing the firm to release files to the newly formed company.<sup>51</sup> The San Antonio court of appeals explained that letters could create a side issue that would unduly distract a jury from the real issue, and that the letters were cumulative of testimony admitted at trial.<sup>52</sup> Interpreting Federal Rule of Evidence 403, the Fifth Circuit held that evidence concerning the efforts of a staff anesthesiologist to persuade a hospital to adopt twenty-four hour anesthesia services, was relevant to claims of negligence by the hospital in not providing such twenty-four hour service.<sup>53</sup> The Fifth Circuit reasoned that the evidence could not be excluded on the ground that it would have unduly distracted and confused the jury where plaintiffs alleged that the failure to provide the twenty-four hour anesthesia services caused their daughter to be deprived of oxygen and suffer brain damage after the mother suffered a ruptured uterus.<sup>54</sup>

With few exceptions, character is not admissible to prove conduct on a particular occasion.<sup>55</sup> The Texas Supreme Court recently considered Rule 404(a) in *State Bar of Texas v. Evans*.<sup>56</sup> *Evans* involved an attorney disciplinary proceeding where an attorney, accused of conduct involving moral turpitude, offered the testimony of his secretary and his bookkeeper that he was honest and that neither witness knew of anything the attorney had done to be unfair or to cheat the complainant or other clients. The issue on appeal concerned whether testimony elicited on cross-examination that the attorney customarily charged more hours for work than he had actually performed was admissible as rebuttal of character testimony.<sup>57</sup> The court of appeals rejected the State Bar's argument that Evans had opened the door to the rebuttal character testimony it offered.<sup>58</sup> The court of appeals concluded that the testimony concerning Evans' overbilling of clients was not admissi-

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49. *Edwards Transfer Co. v. Brown*, 764 S.W.2d 249, 251 (Tex. App.—Dallas 1987, no writ).

50. *Gonzalez v. Texas Employers Ins. Ass'n*, 772 S.W.2d 145, 149 (Tex. App.—Corpus Christi 1989, no writ).

51. *Peat Marwick Main v. Haass*, 775 S.W.2d 698, 705-06 (Tex. App.—San Antonio 1989, no writ).

52. *Id.* at 705.

53. *Herrington v. Hiller*, 883 F.2d 411, 414-15 (5th Cir. 1989).

54. *Id.*

55. Tex. R. Civ. Evid. 404.

56. 774 S.W.2d 656, 657-58 (Tex. 1989) (reversing 768 S.W.2d 326 (Tex. App.—El Paso 1989)).

57. *Id.* at 657.

58. 768 S.W.2d 326 (Tex. App.—El Paso), *rev'd*, 774 S.W.2d 656 (Tex. 1989).

ble as rebuttal character testimony under Rule 404(a)(1).<sup>59</sup> The rule permits evidence of a pertinent character trait when offered by a person accused of conduct involving moral turpitude, or when offered by the accusing party to rebut the same.<sup>60</sup> Although the court of appeals concluded that Rule 404(a)(1) did not apply, the Texas Supreme Court disagreed.<sup>61</sup> Explaining that the rule under which Evans was charged made him a party accused of conduct involving moral turpitude, the supreme court held that he was allowed to offer evidence of a pertinent trait of his character, and once he did, the State Bar was then allowed to offer rebuttal testimony under Rule 404(a)(1).<sup>62</sup>

Texas Rule of Civil Evidence 404(b) excludes evidence of other wrongs or acts to prove the character of a person in order to show that he acted in conformity therewith.<sup>63</sup> During the Survey period, the Texarkana court of appeals excluded evidence of a prior fire at the insureds' rental property in another city where no wrongdoing by the insureds regarding that fire was established.<sup>64</sup> Evidence of a defendant's extraneous extramarital affairs was inadmissible in an alienation of affection action, and its admission held to be reversible error, where the evidence had no probative value and could only serve to inflame the jury's minds and cause them to decide the case on an improper basis.<sup>65</sup>

Texas Rule of Civil Evidence 404(b) does permit evidence of other wrongs or acts for purposes other than proving the character of a person to show that he acted in conformity therewith.<sup>66</sup> For example other acts evidence was admitted to show willfull intent in support of exemplary damages in an action by limited partners against a general partner for breach of fiduciary duty.<sup>67</sup>

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.<sup>68</sup> During the Survey period, the Corpus Christi court of appeals held that evidence of a settlement agreement between medical malpractice plaintiffs and a hospital should not have been admitted in the malpractice action against the physicians.<sup>69</sup> The court found that the agreement did not constitute a "Mary Carter" agreement. Additionally, the court held the attorneys' voir dire references to the non-party hospital did not in-

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59. *Id.* at 658.

60. *Id.*

61. 774 S.W.2d at 658.

62. *Id.*

63. Tex. R. Civ. Evid. 404(b).

64. First S.W. Lloyds Ins. Co. v. MacDowell, 769 S.W.2d 954, 957 (Tex. App.—Texarkana 1989, writ denied).

65. Turner v. PV Int'l Corp., 765 S.W.2d 455, 471-72 (Tex. App.—Dallas 1988, writ denied).

66. Tex. R. Civ. Evid. 404(b).

67. Johnson v. J. Hiram Moore, Ltd., 763 S.W.2d 496, 500-01 (Tex. App.—Austin 1988, writ denied).

68. Tex. R. Civ. Evid. 408.

69. Henry v. Felici, 758 S.W.2d 836, 841-42 (Tex. App.—Corpus Christi 1988, writ denied).



vite or open the door to introduction of evidence concerning the existence of the agreement.<sup>70</sup>

In another decision the Corpus Christi court of appeals held that charts tracking assignments of oil lease interests were inadmissible in an oil consultant's breach of contract action,<sup>71</sup> because the charts were prepared during settlement negotiations and were offered solely for the purpose of proving a defendant's liability. In *Shafer v. Bedard*<sup>72</sup> a wife sought discovery of financial records of partnerships and corporations in which her husband owned an interest in a divorce proceeding. The issue concerned whether the wife's statements in a discovery hearing that certain disputed documents required a protective order were offers to compromise.<sup>73</sup> The court of appeals held that had they been offers to compromise, the wife would have had the right to object to the introduction of evidence of these offers at trial under Rule 408.<sup>74</sup> Because the wife did not object, and in fact presented the offers of compromise to the court herself, the court of appeals held that the wife waived any complaint regarding introduction of the disputed evidence.<sup>75</sup>

Texas Rule of Civil Evidence 410 excludes evidence of pleas, plea discussions and related statements.<sup>76</sup> The rule specifically excludes pleas of *nolo contendere*.<sup>77</sup> In *Turton v. State Bar of Texas*<sup>78</sup> an attorney whose license had been suspended complained on appeal that the trial court admitted a criminal case order reflecting that the attorney had pled *nolo contendere*. In holding the plea admissible, the San Antonio court of appeals explained that the disciplinary action was based entirely upon the criminal case order in which the *nolo contendere* plea was contained.<sup>79</sup> The court also reasoned that suspension is mandatory when probation is given an attorney-defendant as a result of his commission of a serious crime irrespective of whether evidence of a plea of *nolo contendere* existed, and that to sustain the attorney's objection under Rule 410 would vitiate the mandatory suspension provisions of the State Bar Act and Rules.<sup>80</sup> Accordingly, the court held that Rule 410 did not require exclusion of the order in the disciplinary action against the attorney.<sup>81</sup>

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.<sup>82</sup> In *United Cab Company v. Mason*<sup>83</sup> the Houston court of appeals held that questions about whether plaintiffs' physician was ever re-

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70. *Id.*

71. *Hauglum v. Durst*, 769 S.W.2d 646, 654 (Tex. App.—Corpus Christi 1989, no writ).

72. 761 S.W.2d 126 (Tex. App.—Dallas 1988, no writ).

73. *Id.* at 130.

74. *Id.*

75. *Id.*

76. Tex. R. Civ. Evid. 410.

77. *Id.* 410(2).

78. 775 S.W.2d 712 (Tex. App.—San Antonio 1989, no writ).

79. *Id.* at 715.

80. *Id.*

81. *Id.*

82. Tex. R. Civ. Evid. 411.

83. 775 S.W.2d 783 (Tex. App.—Houston [1st Dist.] 1989, no writ).

quested to do an independent medical examination for an insurance company and whether the physician charged a fee to the insurance company was not reasonably calculated to cause, and probably did not cause, improper judgment.<sup>84</sup> The court of appeals explained that injection of insurance into trial is not reversible error per se and that under the facts of this case no reversal was required.<sup>85</sup>

#### 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 matter,<sup>86</sup> unless rules of evidence recognize the privilege,<sup>87</sup> or a statute<sup>88</sup> or constitution<sup>89</sup> grants the privilege. Some of the specific privileges provided for in the Texas Rules of Civil Evidence include: (1) lawyer-client privilege;<sup>90</sup> (2) husband-wife communication privilege;<sup>91</sup> (3) communications to clergymen;<sup>92</sup> (4) trade secrets;<sup>93</sup> and (5) physician-patient privilege.<sup>94</sup>

Texas Rule of Civil Evidence 503 codifies the common law lawyer-client privilege.<sup>95</sup> Not all statements made by a client to an attorney are privileged.<sup>96</sup> The courts have construed the lawyer-client privilege narrowly because it tends to prevent full disclosure of the truth.<sup>97</sup> Before a communication to an attorney will be privileged, the party must show that the communication was confidential and was made for the purpose of facilitating the rendition of professional legal services to the client.<sup>98</sup> The communication may be made between the client and his lawyer or a client's representative and the lawyer.<sup>99</sup>

In *Texas Dep't of Mental Health and Mental Retardation v. Davis*<sup>100</sup> the state did not show that employees of a state school who conducted an investigation of the drowning of a retarded resident of the school were client representatives for purposes of the lawyer-client privilege. The Austin court of

84. *Id.* at 786.

85. *Id.*

86. Tex. R. Civ. Evid. 501(2).

87. *See id.* 502-510.

88. *See* Tex. Rev. Civ. Stat. Ann. art. 5561h, *repealed by* Tex. R. Civ. Evid. 509-510 as to civil cases and Tex. R. Crim. Evid. 509-10 as to criminal cases (confidential communications between physician and patient relating to professional services rendered by a physician privileged).

89. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 10.

90. Tex. R. Civ. Evid. 503.

91. *Id.* 504.

92. *Id.* 505.

93. *Id.* 507.

94. *Id.* 509.

95. Tex. R. Civ. Evid. 503.

96. *Hayes v. Pennock*, 192 S.W.2d 169, 173 (Tex. Civ. App.—Beaumont 1945, writ ref'd n.r.e.).

97. *See Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (deposition testimony of debtor's former attorney did not contain privileged communications and was thus admissible).

98. Tex. R. Civ. Evid. 503(b).

99. *Id.* 503(b)(1).

100. 775 S.W.2d 467 (Tex. App.—Austin 1989, no writ).

appeals, therefore, refused to issue a mandamus against the judge who held that the documents at issue were not protected by the lawyer-client privilege.<sup>101</sup> Another court held the lawyer-client privilege did not protect witness statements taken by an attorney during his investigation of the insured's potential exposure for gross negligence and punitive damages claims, where no lawsuit was pending and where the attorney, whose only contractual obligation was with the workers' compensation carrier, had no real contact with the insured concerning the conduct of the investigation.<sup>102</sup>

Texas Rule of Civil Evidence 503(b)(3) codifies the common defense privilege.<sup>103</sup> Rule 503(b)(3) privileges confidential communications made for the purpose of facilitating the rendition of professional legal services to the client when such communications are made by the client "or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein . . ."<sup>104</sup> In *Ryals v. Canales*<sup>105</sup> an action for damages arising from an automobile accident, an individual defendant successfully asserted a claim that the joint defense privilege protected his communications with the codefendant automobile manufacturer from discovery. The Dallas court of appeals explained that the manufacturer was, at least in theory, aligned with the individual defendant as a party before the court from the time it filed the plea of intervention.<sup>106</sup>

## VI. ARTICLE VI—WITNESSES

Texas Rule of Civil Evidence 601 governs the competency and incompetency of witnesses.<sup>107</sup> Every person is competent to be a witness except as otherwise provided in the Texas Rules of Civil Evidence.<sup>108</sup> This rule specifically holds insane persons and children who appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated to be incompetent witnesses.<sup>109</sup> In *Handel v. Long Trusts*<sup>110</sup> the Texarkana court of appeals considered whether the settlor of a gas exploration trust, who was 80 years old and had severe deficits in recent memory, was capable of making intelligent observations at the time of the events giving rise to the suit. Concluding that the witness could recall and narrate such events at the time of trial, and was capable of understanding the obligation of the oath, the Texarkana court of appeals held the settlor competent to testify.<sup>111</sup>

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101. *Id.* at 473.

102. *Sterling Drilling Co. v. Spector*, 761 S.W.2d 74, 76 (Tex. App.—San Antonio 1988, no writ).

103. Tex. R. Civ. Evid. 503(b)(3).

104. *Id.*

105. 767 S.W.2d 226, 230 (Tex. App.—Dallas 1989, no writ).

106. *Id.* at 228-29.

107. Tex. R. Civ. Evid. 601.

108. Tex. R. Civ. Evid. 602 provides that a witness may not testify to a matter unless it is shown that he has personal knowledge of the matter.

109. Tex. R. Civ. Evid. 601(a)(1)(2).

110. 757 S.W.2d 848 (Tex. App.—Texarkana 1988, no writ).

111. *Id.* at 851.

Texas Rule of Civil Evidence 602 provides that a witness may not testify to a matter unless he has personal knowledge of the matter.<sup>112</sup> For example, in *Handel v. Long Trusts*, an employee's deposition testimony as to the occurrence at issue was inadmissible because the employee lacked personal knowledge, and the deposition testimony failed to establish the employee as an expert, whose opinions would have been admissible under Texas Rule of Evidence 703 as an exception to Rule 602.<sup>113</sup>

Texas Rule of Civil Evidence 606(b) governs jury misconduct.<sup>114</sup> Upon inquiry into a verdict's validity, a juror may testify regarding only "whether any outside influence was improperly brought to bear upon any juror."<sup>115</sup> A juror's affidavit asserting that the jury had discussed newspaper articles, similarly situated injured persons, and insurance coverage, and that a juror had failed to properly answer voir dire questions, was held not to show outside influence, and thus, could not be considered to show jury misconduct.<sup>116</sup> Another court held jurors' discussions of attorney's fees also could not be considered outside influence requiring a new trial.<sup>117</sup>

Texas Rule of Civil Evidence 607 permits a party to impeach his own witness.<sup>118</sup> Accordingly, where a party claimed on appeal that his opponent had impeached his own witness, the court of appeals held that the party who sponsored the witness was not bound by his testimony and could impeach that witness under Rule 607.<sup>119</sup>

Texas Rule of Civil Evidence 611 governs the mode and order of interrogation and presentation.<sup>120</sup> Rule 611 gives the court reasonable control over the mode and order of interrogating witnesses and presenting the evidence.<sup>121</sup> During the Survey period, the San Antonio Court of Appeals considered the breadth of the trial court's discretion under Rule 611 in *Prezelski v. Christiansen*,<sup>122</sup> a medical malpractice suit against a physician. The court addressed the issue of whether the trial court's permitting defendant to call his expert witness out of order before plaintiff had an opportunity to cross-examine the defendant resulted in a materially unfair trial under the circumstances.<sup>123</sup> In holding that this order of presentation had resulted in a materially unfair trial to the plaintiffs, the court of appeals explained that Rule 611, which gives the trial court reasonable control over the order of witnesses, did not give the trial court unbridled discretion to impose unreasona-

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112. Tex. R. Civ. Evid. 602.

113. 757 S.W.2d 848, 850-51 (Tex. App.—Texarkana 1988, no writ).

114. Tex. R. Civ. Evid. 606(b).

115. *Id.*

116. *King v. Bauer*, 767 S.W.2d 197, 198 (Tex. App.—Corpus Christi 1989, writ denied).

117. *Kirby Forest Indus. v. Kirkland*, 772 S.W.2d 226, 234 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

118. Tex. R. Civ. Evid. 607.

119. *Loyd Electric Co., v. Millett*, 767 S.W.2d 476, 479 (Tex. App.—San Antonio 1989, no writ).

120. Tex. R. Civ. Evid. 611(a).

121. *Id.*

122. 775 S.W.2d 764 (Tex. App.—San Antonio 1989) *rev'd on other grounds*, 782 S.W.2d 842 (Tex. 1990).

123. *Id.* at 766-67.

ble control when the result prevented the plaintiff from exercising her right to present her case fairly.<sup>124</sup>

Texas Rule of Civil Evidence 612 governs writings used to refresh the memory of a witness.<sup>125</sup> Rule 612 permits production of such a writing when it has been used to refresh the memory of a witness.<sup>126</sup> Where the record failed to reflect that the statement at issue had been used to refresh the witness's memory, one court of appeals held that nothing was presented for appellate review.<sup>127</sup>

Texas Rule of Civil Evidence 613 governs prior consistent and inconsistent statements of a witness.<sup>128</sup> The El Paso appeals court held that a prior inconsistent statement which was admitted for impeachment, could only be considered for purposes of impeachment and not as substantive evidence of the truth of the matter stated.<sup>129</sup> Another court admitted a prior consistent statement over objection explaining that such facts as that the document had been prepared several years after the transaction at issue and following changes in insurance regulations, went to the weight and not admissibility of the evidence.<sup>130</sup>

Texas Rule of Civil Evidence 614, commonly referred to as the rule, provides for the exclusion of witnesses from the courtroom so they cannot hear and be influenced by the testimony of other witnesses.<sup>131</sup> Three classes of witnesses are exempt from the operation of the rule, including any person whose presence is essential to the presentation of a party's cause.<sup>132</sup> During the Survey period, one court held that a party's expert witness was entitled to be present during the trial, and implied that it was applying Texas Rule of Civil Evidence 614(3).<sup>133</sup>

## 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 based opinions to help clarify facts or misunderstandings.<sup>134</sup> The rules have greatly liberalized the admission of lay witnesses' opinion testimony.<sup>135</sup> Texas evidence law has always been liberal in allowing an owner of property to offer his opinion of the property's value.<sup>136</sup> A property owner can give

124. *Id.*

125. Tex. R. Civ. Evid. 612.

126. *Id.*

127. *City of San Antonio v. Vela*, 762 S.W.2d 314, 319 (Tex. App.—San Antonio 1988, writ denied).

128. Tex. R. Civ. Evid. 613.

129. *Pope v. Stephenson*, 774 S.W.2d 743, 745 (Tex. App.—El Paso 1989, no writ).

130. *Stewart Title Guar. Co. v. Sterling*, 772 S.W.2d 242, 249 (Tex. App.—Houston [14th Dist.] 1989, no writ).

131. Tex. R. Civ. Evid. 614.

132. *Id.* 614(3).

133. *Elbar, Inc. v. Claussen*, 774 S.W.2d 45, 52 (Tex. App.—Dallas 1989, no writ).

134. Tex. R. Civ. Evid. 701.

135. *Id.*

136. *See Classified Parking Sys. v. Kirby*, 507 S.W.2d 586, 588 (Tex. Civ. App.—Houston

opinion testimony even though he would not be qualified as an expert regarding the value of the same property if another person owned the property.<sup>137</sup>

During the Survey period one Texas court admitted the testimony of the employee of a lessor-assignor of equipment leases.<sup>138</sup> The employee testified that he would not have transferred the equipment lease knowing the lessee was bankrupt. In admitting the testimony, the Dallas Court of Appeals explained that the testimony was rationally based upon the witness' perception and was helpful in the determination of a fact in issue, even though the witness was not an expert and as such would not ordinarily be permitted to express opinions or to speculate.<sup>139</sup>

In the absence of direct testimony of a testator's lack of capacity on the day of execution of a will, the testator's mental condition on the day of execution may be determined from lay opinion testimony based upon witnesses' observations of the testator's conduct either prior or subsequent to the execution.<sup>140</sup> The Houston court of appeals during the Survey period admitted such testimony in *Jones v. LaFargue*.<sup>141</sup> The court explained that lay testimony of the testator's incompetency at times other than as the executor of the will can be used to establish incompetency on the day of execution if it is demonstrated that the condition had some probability of being the condition of the testator at the time the will was executed.<sup>142</sup>

Federal Rule of Evidence 702 is identical to Texas Rule of Civil Evidence 701.<sup>143</sup> During the Survey Period, the Fifth Circuit upheld the admission of a coworker's lay opinion that a former employee was discharged and not rehired because of his age in *Hansard v. Pepsi Cola Metropolitan Bottling Company*.<sup>144</sup> The Fifth Circuit explained that such lay testimony was admissible in an age discrimination action, although the coworker may not have had any firsthand knowledge of the events surrounding the former employee's termination.<sup>145</sup> The Fifth Circuit further explained that the determination of whether testimony meets the criteria of Federal Rule of Evidence 701 remains in the discretion of the trial court.<sup>146</sup>

For a property owner to qualify as a witness on damages to property, the owner's testimony must reflect that the owner's statements refer to the market, rather than the intrinsic value of the property.<sup>147</sup> Where a lay witness

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[14th Dist.] 1974, no writ) (owner of car stolen from parking garage competent to testify as to car's value).

137. *Id.*

138. *Chase Commercial Corp. v. Datapoint Corp.*, 774 S.W.2d 359, 368 (Tex. App.—Dallas 1989, no writ).

139. *Id.*

140. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968).

141. 758 S.W.2d 320, 325 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

142. *Id.*

143. Tex. R. Civ. Evid. 701; Fed. R. Evid. 702.

144. 865 F.2d 1461, 1466-67 (5th Cir. 1989), *cert. denied* 110 S.Ct. 129, 107 L.Ed.2d 89 (1990).

145. *Id.*

146. *Id.* at 1467.

147. *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984).

expressed an opinion not on market value but rather on an unaccepted offer to purchase property, his lay testimony as to value was held to be no evidence of value of the property for purpose of calculating damages.<sup>148</sup> In a premises liability action, another court excluded testimony of the premises owner regarding the injured parties' measure of damages.<sup>149</sup> The Corpus Christi appeals court reasoned that the owner's opinion was not reasonably or rationally based upon her perception concerning the amount of money necessary to fairly and adequately compensate the injured parties, her opinion was speculative, and her opinion appeared to be at least partially based on physical pain and suffering allegations experienced by the injured parties.<sup>150</sup> In a DTPA action by the owner of a hairstyling salon against the contractor for failing to perform the contract to remodel the building, an owner was entitled to give her opinion of the amount of the salon's lost profits, where her opinion was based upon personal knowledge of financial data of a similar salon she had previously owned and operated in the same shopping center.<sup>151</sup>

### 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."<sup>152</sup> Texas Rule of Civil Evidence 104(a) provides that preliminary questions regarding qualification of a witness shall be determined by the court.<sup>153</sup> During the Survey period, an experienced surgeon who had written articles about seat belt-type injuries was held qualified to give expert opinion testimony as to whether a child would have sustained abdominal injuries if a seat belt had been resting on the child's pelvic bone rather than on the soft abdominal tissue.<sup>154</sup> The court explained that the surgeon's testimony should not have been excluded merely because he was not a biomechanical engineer.<sup>155</sup> Another court admitted the opinion of an independent marine surveyor as to a shrimp boat's fair market value, even though the surveyor had never seen the shrimp boat at issue, where his testimony was based on hypothetical questions and photographs.<sup>156</sup> A police officer, however, by his position alone, was held not qualified to render an

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148. *Southwestern Bell Tel. Co. v. Wilson*, 768 S.W.2d 755, 762 (Tex. App.—Corpus Christi 1988, writ denied).

149. *Clark v. McFerrin*, 760 S.W.2d 822, 827-28 (Tex. App.—Corpus Christi 1988, writ denied).

150. *Id.*

151. *Peni v. Ludwig*, 766 S.W.2d 298, 303-04 (Tex. App.—Waco 1989, no writ).

152. *Tex. R. Civ. Evid.* 702.

153. *Id.* 104(a).

154. *Guentzel v. Toyota Motor Corp.*, 768 S.W.2d 890, 897 (Tex. App.—San Antonio 1989, writ denied).

155. *Id.*

156. *SPT Fed. Credit Union v. Big H Auto Auction, Inc.*, 761 S.W.2d 800, 802-03 (Tex. App.—Houston [1st Dist.] 1988, no writ).

expert opinion regarding the causes of an accident.<sup>157</sup>

## 2. Subject of Expert Testimony

During the Survey period, one court admitted the testimony of a professor of hotel and restaurant management on the characteristics of a nightclub to explain the meaning of the term nightclub as used in a lease that prohibited the operation of a restaurant as a nightclub.<sup>158</sup> In a suit by homeowners to recover the proceeds allegedly due under a fire policy, expert testimony concerning the different motives for setting fires and methods in which the expert could discern the motives was admissible in *Lundy v. Allstate Insurance Co.*<sup>159</sup> The expert, however, was not allowed to testify as to his opinion regarding the plaintiffs.<sup>160</sup> He also could not testify about how the motives could be ascertained in the actual litigation in which he was testifying.<sup>161</sup>

## 3. Testimony of Medical Experts

In a medical malpractice case a plastic surgeon was held qualified to express expert medical opinions regarding the care for an injured leg rendered by the emergency room physician and by the family physician.<sup>162</sup> The surgeon had been a medical doctor practicing in his specialty, which was the same as the defendant doctor's, for thirty-five years.

### C. Bases of Opinion Testimony

Texas Rule of Civil Evidence 703 outlines the proper bases of expert opinion testimony.<sup>163</sup> If experts in the same field as the witness would reasonably rely on certain data, the data can form the bases of the expert's opinion and need not be admissible in evidence.<sup>164</sup> If the bases of an expert's opinion are of a type reasonably relied upon by experts in the particular field, the facts or data need not be admissible in evidence.<sup>165</sup> In *Seaside Industries v. Cooper*,<sup>166</sup> the court held that an expert's opinion as to the net worth of a judgment debtor company was admissible in an action against the debtor's president to recover for constructive fraud.<sup>167</sup> The court explained that assuming, arguendo, that the business records on which the expert's opinion was based were inadmissible hearsay, nevertheless, Rule 703 provides that

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157. *Pyle v. Southern Pac. Transp. Co.*, 774 S.W.2d 693, 695 (Tex. App.—Houston [1st Dist.] 1989, writ denied). Because the police officer's testimony was held to be cumulative, the Court of Appeals held that it was not reversibly harmful. *Id.* at 695-96.

158. *Hellenic Inv. Inc. v. Kroger Co.*, 766 S.W.2d 861, 865-66 (Tex. App.—Houston [1st Dist.] 1989, no writ).

159. 774 S.W.2d 352, 357-58 (Tex. App.—Beaumont 1989, no writ).

160. *Id.* at 357.

161. *Id.*

162. *Poindexter v. Foster*, 772 S.W.2d 205, 207-08 (Tex. App.—Beaumont 1989, writ denied).

163. Tex. R. Civ. Evid. 703.

164. *Id.*

165. *Id.*

166. 766 S.W.2d 566 (Tex. App.—Dallas 1989, no writ).

167. *Id.* at 571.



an expert's opinion need not be based upon admissible evidence.<sup>168</sup>

Texas Rule of Civil Evidence 703 is identical to Federal Rule of Evidence 703.<sup>169</sup> During the Survey period, the Fifth Circuit affirmed the admission of the testimony of a toxicologist who had relied on certain studies in forming his opinion.<sup>170</sup> Rejecting the appellant's challenge that the expert's theory of causation was specious, the Fifth Circuit explained that an expert's opinion need not be generally accepted in the scientific community to be reliable and probative enough to support a jury finding.<sup>171</sup>

#### D. Disclosure of Facts or Data Underlying Expert Opinion

Texas Rule of Civil Evidence 705 governs the disclosure of facts or data underlying expert opinion.<sup>172</sup> An expert may give his opinion without prior disclosure of the underlying facts or data.<sup>173</sup> In *Liquid Energy Corp. v. Trans-Pan Gathering, Inc.*<sup>174</sup> a party who was qualified as an expert witness on petroleum engineering was allowed to give expert opinion on lost profits without disclosing underlying data.<sup>175</sup> In affirming the admission of the testimony, the Amarillo court of appeals explained the opponent of the evidence was entitled to disclosure of the supporting data upon which the expert witness' testimony was based on cross-examination, but that lack of data to support the expert witness' testimony affects the weight of the testimony and not its admissibility.<sup>176</sup>

Texas Rule of Civil Evidence 705 provides that the expert may disclose on direct examination the facts or data underlying his opinion.<sup>177</sup> The issue in *First Southwest Lloyds Insurance Company v. MacDowell*,<sup>178</sup> concerned whether an expert was entitled to state in detail all the information that contributed to the formation of his opinion.<sup>179</sup> In affirming the exclusion of an eyewitness' statement to the fire marshal, even though it formed a part of the basis of the fire marshal's opinion that the fire was incendiary, the Texarkana court of appeals explained that the use of the permissive word "may" in Rule 705 indicates that the expert does not have an absolute right to disclose the facts and data underlying his opinions.<sup>180</sup> The court explained that the better position is to not allow affirmative admission of otherwise inadmissible matters that happen to underly the data upon which the expert

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168. *Id.*

169. Tex. R. Civ. Evid. 703; Fed. R. Evid. 703.

170. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1433 (5th Cir. 1989), *cert. denied* 110 S.Ct. 328 107 L.Ed.2d 318 (1990).

171. *Id.*

172. Tex. R. Civ. Evid. 705.

173. *Id.*

174. 758 S.W.2d 627 (Tex. App.—Amarillo), *vacated*, 762 S.W.2d 759 (Tex. App.—Amarillo 1988, no writ).

175. *Id.* at 637-39.

176. *Id.*

177. Tex. R. Civ. Evid. 705.

178. 769 S.W.2d 954 (Tex. App.—Texarkana 1989, writ denied).

179. *Id.* at 957-58.

180. *Id.*

relies.<sup>181</sup>

### *E. Effect of Opinion Testimony*

Triers of fact are not required to accept the opinion of experts on either side of a controversy.<sup>182</sup> The Corpus Christi court of appeals held that a trial court acted within its discretion as a fact finder in accepting the expert testimony that an airplane engine was subjected to excessive metal stress, despite contrary testimony.<sup>183</sup>

## 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.<sup>184</sup> 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.<sup>185</sup> Several courts during the Survey period considered whether proffered evidence was hearsay. In *Durbin v. Hardin*,<sup>186</sup> a police officer's testimony as to what a Spanish-speaking declarant said to him through an interpreter was inadmissible hearsay. That words were uttered is sometimes the very fact sought to be established. Such testimony is admissible because the mere utterance of the words has legal significance, and may constitute part of the cause of action or defense, and as such are operative facts, as occurred in *Williams v. Jennings*.<sup>187</sup>

### *B. Statements That Are Not Hearsay*

Texas Rule of Civil Evidence 801(e) excludes from the definition of hearsay prior statements by a witness,<sup>188</sup> admissions by a party opponent,<sup>189</sup> and depositions.<sup>190</sup>

#### *1. Admissions by Party Opponents*

##### *a. Judicial Admissions*

A judicially admitted fact does not require supporting evidence and the

181. *Id.*

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

183. *Chemical Express Carriers, Inc. v. French*, 759 S.W.2d 683, 690 (Tex. App.—Corpus Christi 1988, writ denied).

184. 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.

185. *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.

186. 775 S.W.2d 798, 801 (Tex. App.—Dallas 1989, writ denied).

187. 755 S.W.2d 874, 885 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

188. Tex. R. Civ. Evid. 801(e)(1).

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

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

judicial admission establishes the fact as a matter of law, thereby precluding the fact finder from making any contrary findings.<sup>191</sup> A judicial admission is actually a substitute for evidence.<sup>192</sup> The Texas Rules of Civil Evidence, while not specifically distinguishing judicial admissions from other admissions, treats judicial admissions, not as exceptions to the hearsay rule, but rather as statements that are not hearsay.<sup>193</sup> One court during the Survey period held that once made or deemed by the court, judicial admissions may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits.<sup>194</sup>

Several courts considered judicial admissions during the Survey period. In *City of Austin v. Miller*<sup>195</sup> the Austin court of appeals held that although testimonial declarations by a party do not ordinarily constitute judicial admissions, they did in *Miller*, because the testimonial declarations were well within the witness' competence, his peculiar experience, knowledge, training, and official responsibilities.<sup>196</sup> A statement by a crane repair company that repairs were completed in or about July was not inconsistent with the finding that repairs were completed on June 20, and therefore did not constitute a judicial admission because it was not contradictory of a prior statement.<sup>197</sup> Nor did a lawyer's remarks to the court, which dispensed with the requirement for submission of an issue to the jury regarding the amount of actual tort damages before exemplary damages could be awarded for alleged tortious interference, constitute either a judicial admission or a stipulation.<sup>198</sup>

#### 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 period.<sup>199</sup> Where a party failed to establish that the proffered deposition testimony of an employee concerned a matter within the scope of the employee's employment, the testimony was held not admissible as an admission of a party opponent.<sup>200</sup> Like Texas Rule of Civil Evidence 801(e)(2), Federal Rule of Evidence 801(d)(2) governs party admissions.<sup>201</sup> During the Survey period, one

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191. 1A R. Ray, *Texas Law of Evidence Civil and Criminal* § 1127 (Texas Practice 3rd ed. 1980).

192. *Id.*

193. Tex. R. Civ. Evid. 801(e)(2).

194. *Crowley v. Coles*, 760 S.W.2d 347, 349 (Tex. App.—Houston [1st Dist.] 1988, no writ); *see also* *Collision Center Paint & Body, Inc. v. Campbell*, 773 S.W.2d 354, 356 (Tex. App.—Dallas 1989, no writ)(lienholder waived right to rely on deemed admissions as conclusive proof by failing to object to admission of controverting evidence).

195. 767 S.W.2d 284 (Tex. App.—Austin 1989, writ denied).

196. *Id.* at 287.

197. *Cranetex, Inc. v. Precision Crane & Rigging*, 760 S.W.2d 298, 304 (Tex. App.—Texarkana 1988, writ denied).

198. *Transcontinental Gas Pipeline Corp. v. American Nat'l Petroleum Co.*, 763 S.W.2d 809, 820-21 (Tex. App.—Texarkana 1988, writ granted).

199. Tex. R. Civ. Evid. 801(e)(2)(D).

200. *Handel v. Long Trusts*, 757 S.W.2d 848, 851 (Tex. App.—Texarkana 1988, no writ).

201. Fed. R. Evid. 801(d)(2); Tex. R. Civ. Evid. 801(e)(2).

federal court held that statements attributed to the defendant or his employees in the plaintiff's summary judgment affidavits were not hearsay because they were admissions of a party opponent under Federal Rule of Evidence 801(d)(2).<sup>202</sup>

### C. *The Hearsay Rule*

Texas Rule of Civil Evidence 802 provides that "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."<sup>203</sup> Citing Rule 802, the San Antonio court of appeals held that a psychiatrist's opinion, supported by his review of medical records in an interview with a patient, was sufficient to support the renewal of an involuntary commitment, even though the psychiatrist had no personal knowledge of recent overt dangerous acts or continuing pattern of behavior tending to confirm the likelihood of serious harm.<sup>204</sup>

### D. *Hearsay Exceptions: Availability of Declarant Immaterial*

#### 1. *Excited Utterances*

Texas Rule of Civil Evidence 803(2) admits excited utterances into evidence as an exception to the hearsay rule.<sup>205</sup> During the Survey period, the Dallas court of appeals held that an excited utterance may describe an incident remote in time from the startling event, as long as the statement is made while the declarant is still in a state of excitement.<sup>206</sup> Because a statement that is simply a narrative of past acts or events does not qualify as an excited utterance regardless of how soon after the event it is made, an eyewitness's statement to a fire marshal was not admissible as an excited utterance because it constituted a narrative account given after the eye witness had returned to the fire scene.<sup>207</sup>

#### 2. *Business Records*

Texas Rule of Civil Evidence 803(6) governs the introduction of records of regularly conducted activities, commonly known as business records.<sup>208</sup> 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.<sup>209</sup> Live witness testimony is not required to demonstrate the document is a business record.<sup>210</sup> Documentary evidence, affidavits, party admissions, and other materials will suffice.<sup>211</sup> During the Survey period, the affidavit of the chief forensic toxi-

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202. *FTC v. Hughes*, 710 F.Supp. 1520, 1522 (N.D. Tex. 1989).

203. *Tex. R. Civ. Evid.* 802.

204. *Lopez v. State*, 775 S.W.2d 857, 859-60 (Tex. App.—San Antonio 1989, no writ).

205. *Tex. R. Civ. Evid.* 803(2).

206. *City of Dallas v. Donovan*, 768 S.W.2d 905, 908 (Tex. App.—Dallas 1989, no writ).

207. *MacDowell*, 769 S.W.2d at 958-59.

208. *Tex. R. Civ. Evid.* 803(6).

209. *Id.*

210. *Hughes*, 710 F.Supp. at 1523.

211. *Id.*

cologist who analyzed a blood sample for alcohol concentration was sufficient to self-authenticate the blood alcohol report as a business record.<sup>212</sup> The self-authentication was allowed even though the affidavit did not state the forensic toxicologist was custodian of the records, did not state that the blood sample was drawn by the county medical examiner, and did not attest to the accuracy or trustworthiness of the underlying report.<sup>213</sup>

The foundation for admitting business records is set forth in Rule 803(6), and once the requisites of that rule are met, the document at issue will be admitted as a business record.<sup>214</sup> Letters written by an insured's physician and numerous claim progress reports that were sent from his office reflecting his diagnosis of the insured were held properly excluded where the evidence did not reflect that the proper predicate was laid to establish the exhibits as business records under Rule 803(6).<sup>215</sup> Similarly, a business document was held properly excluded in a personal injury case where no proper foundation was laid.<sup>216</sup> During the Survey period, one court permitted a witness without personal knowledge to testify from the business records of which she was custodian.<sup>217</sup>

### 3. *Statements in Ancient Documents*

Texas Rule of Civil Evidence 803 admits into evidence as exceptions to the hearsay rule statements in ancient documents.<sup>218</sup> The rule defines an ancient document as one that is "in existence twenty (20) years or more the authenticity of which is established."<sup>219</sup> During the Survey period, the Tyler court of appeals held that a will that was twenty-three years old at the time of trial and was properly authenticated was admissible under the ancient documents exception to the hearsay rule.<sup>220</sup>

### 4. *Learned Treatises*

Within certain narrowly circumscribed circumstances articulated in Texas Rule of Civil Evidence 803(18), statements from learned treatises may be read into evidence as exceptions to the hearsay rule, but may not be received as exhibits.<sup>221</sup> In *King v. Bauer*<sup>222</sup> a medical malpractice case, a textbook on radiotherapy, published two years after the treatment alleged to have caused

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212. *March v. Victoria Lloyds Ins. Co.*, 773 S.W.2d 785, 788-89 (Tex. App.—Ft. Worth 1989, no writ).

213. *Id.*

214. *See Seaside Indus.*, 766 S.W.2d at 570-71 (financial statements and tax returns admitted as business records).

215. *Security Southwest Life Ins. Co. v. Gomez*, 768 S.W.2d 505, 510-11 (Tex. App.—El Paso 1989, no writ).

216. *National Bugmobiles, Inc. v. Jobi Properties*, 773 S.W.2d 616, 618-20 (Tex. App.—Corpus Christi 1989, writ denied).

217. *Goff v. Southmost Sav. & Loan Ass'n*, 758 S.W.2d 822, 826 (Tex. App.—Corpus Christi 1988, writ denied).

218. Tex. R. Civ. Evid. 803(16).

219. *Id.*

220. *Kamel v. Kamel*, 760 S.W.2d 677, 678 (Tex. App.—Tyler 1988, writ denied).

221. Tex. R. Civ. Evid. 803(18).

222. 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied).

plaintiff's injuries, was admitted under Texas Rule of Civil Evidence 803(18).<sup>223</sup> That the edition was not published until two years after the treatment at issue did not disqualify the evidence.<sup>224</sup>

### 5. *Catchall Hearsay Exception*

Federal Rule of Evidence 803(24), commonly known as the catchall hearsay exception, admits as exceptions to the hearsay rule, subject to certain restrictions, statements not specifically covered by the other twenty-three exceptions, but having equivalent circumstantial guarantees of trustworthiness.<sup>225</sup> The Texas Rules of Civil Evidence do not contain an equivalent catchall exception.

During the Survey period, the Fifth Circuit held that a district court did not abuse its discretion in admitting interrogatory answers as exceptions to the hearsay rule under Federal Rule of Evidence 803(24) in *Calderon v. Presidio Valley Farmers Ass'n*.<sup>226</sup> In *Calderon* an action by farmworkers against a growers' association, the Fifth Circuit held that the trial court's reliance on interrogatory answers was not an abuse of discretion because the farmers had lost or destroyed almost all of the relevant wage records.<sup>227</sup> The Fifth Circuit further explained that the interrogatory answers were admissible under the catchall hearsay exception of Federal Rule of Evidence 803(24).<sup>228</sup>

### E. *Hearsay Within Hearsay*

Texas Rule of Civil Evidence 805 provides that hearsay within hearsay is not excluded "if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."<sup>229</sup> Neither court of appeals that considered statements allegedly constituting hearsay within hearsay during the Survey period admitted these statements. In *First Southwest Lloyds Insurance Co. v. McDowell*<sup>230</sup> the Texarkana court of appeals, in excluding the report of a fire marshal, found that although the report itself was a public record, and therefore met the hearsay exception of Rule 803(8), that parts of the report, including an eyewitness's account to the fire marshal, did not fall within an exception to the hearsay rule.<sup>231</sup> The court explained that multiple hearsay is admissible only if each part of the combined statements fits within an exception to the hearsay rule, citing Texas Rule of Civil Evidence 805.<sup>232</sup> Without citing Rule 805, the El Paso court of appeals held that testimony that a company's attorney made certain statements as to what another person had said about a particular contract was second layer

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223. *Id.* at 199-200.

224. *Id.* at 200.

225. Fed. R. Evid. 803(24).

226. 863 F.2d 384, 391 (5th Cir. 1989) cert. denied 110 S.Ct. 79 (1990).

227. *Id.*

228. *Id.*

229. Tex. R. Civ. Evid. 805.

230. 769 S.W.2d at 959.

231. *Id.*

232. *Id.*

hearsay, and affirmed the exclusion of the statement.<sup>233</sup>

#### 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.<sup>234</sup> The authentication requirement is satisfied by evidence that is sufficient to show that the matter in question is what its proponent alleges.<sup>235</sup> Federal Rule of Evidence 901(a) is identical to Texas Rule of Civil Evidence 901(a).<sup>236</sup> During the Survey period, the district court for the Northern District of Texas held that unsworn statements in summary judgment affidavits were sufficiently authenticated because each affiant had signed his statement under the penalty of perjury.<sup>237</sup>

Texas Rule of Civil Evidence 901(b) illustrates authentication or identification conforming with the requirements of Rule 901.<sup>238</sup> "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"<sup>239</sup> are distinctive characteristics that conform with the requirements of Rule 901. In *City of Corsicana v. Herod*<sup>240</sup> the Waco court of appeals held that an exhibit offered in a condemnation trial had distinctive characteristics that connected it to a design engineer, and thus the exhibit was authenticated under Texas Rule of Civil Evidence 901(b)(4).<sup>241</sup>

Both Texas Rule of Civil Evidence 902(5) and Federal Rule of Evidence 902(5) treat official publications as self-authenticating documents for which no extrinsic evidence of authenticity is required as a condition precedent to admissibility.<sup>242</sup> In *United States v. Rainbow Family*<sup>243</sup> a federal district court treated certain portions of a Army field manual entitled Field Hygiene and Sanitation and Army Training circular and Field Sanitation Team Training as self-authenticating under Federal Rule of Evidence 902(5).<sup>244</sup> Business records accompanied by a properly phrased and executed affidavit are treated as self-authenticating, as illustrated in *Rodriguez v. Ed Hicks Imports*.<sup>245</sup>

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233. *Mid Plains Reeves, Inc. v. Farmland Indus.*, 768 S.W.2d 318, 322 (Tex. App.—El Paso 1989, writ denied).

234. Tex. R. Civ. Evid. 901(a).

235. *Id.*

236. *Id.*; Fed. R. Evid. 901(a).

237. Hughes, 710 F.Supp. 1520, 1522 (N.D. Tex. 1989).

238. Tex. R. Civ. Evid. 901(b).

239. *Id.* 901(b)(4).

240. 768 S.W.2d 805 (Tex. App.—Waco 1989, no writ).

241. *Id.* at 814-15.

242. Fed. R. Evid. 902(5); Tex. R. Civ. Evid. 902(5).

243. 695 F.Supp. 314 (E.D. Tex. 1988).

244. *Id.* at 330.

245. 767 S.W.2d 187, 191 (Tex. App.—Corpus Christi 1989, no writ). See also March, 773 S.W.2d at 788-89. (admitting blood alcohol report as a business record with an affidavit); *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523-24 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (admitting computer printout of account as business record with affidavits).

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

Article X of the Texas Rules of Civil Evidence governs the admission of the contents of writings, recordings, and photographs.<sup>246</sup> Texas Rule of Civil Evidence 1003, virtually eliminated the best evidence rule.<sup>247</sup> Rule 1003 permits the admission of a duplicate to the same extent as an original unless a party raises a question regarding the authenticity of the original or if it would be unfair to admit the duplicate in lieu of the original.<sup>248</sup> In *Rodriguez*, copies of original business records were admissible as summary judgment evidence in the absence of any question as to the authenticity of the original business records or any proof that the use of the copies would be unfair.<sup>249</sup>

Texas Rule of Civil Evidence 1006 provides that the otherwise admissible contents of voluminous writings, recordings, or photographs, which cannot be conveniently examined in court, may be presented in the form of a chart or summary.<sup>250</sup> Federal Rule of Evidence 1006 is identical.<sup>251</sup> In *FTC v. Hughes*<sup>252</sup> a federal district court held a summary judgment affidavit attached to summaries of voluminous documents was admissible in the absence of allegations that the summaries were inaccurate, even though the affiant did not personally read each document.<sup>253</sup>

## XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.<sup>254</sup> A court may allow extrinsic evidence if it finds a contract to be ambiguous.<sup>255</sup> The rule prohibits parol evidence concerning the terms in a contract if the contract is integrated.<sup>256</sup>

Several courts during the Survey period excluded parol evidence to interpret an unambiguous written contract.<sup>257</sup> Although fraud is an exception to the parol evidence rule, one court excluded evidence of fraud where the proponent of extrinsic evidence did not make the required showing of some type

246. Tex. R. Civ. Evid. art. X.

247. *Id.* 1003.

248. *Id.*

249. 767 S.W.2d at 191.

250. Tex. R. Civ. Evid. 1006.

251. Fed. R. Evid. 1006.

252. 710 F.Supp. 1520 (N.D. Tex. 1989).

253. *Id.* at 1523-24.

254. See 2 R. Ray, *supra* note 174, § 1601.

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

256. 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 174, § 1602.

257. *Bayoud v. Shank, Irwin & Conant*, 774 S.W.2d 22, 24 Tex. App.—Dallas 1989, no writ; *Edwards v. Lone Star Gas Co.*, 769 S.W.2d 568, 571 (Tex. App.—Amarillo 1988), rev'd; 33 Tex. Sup. Ct. J. 148 (Jan. 3, 1990); *Ferguson v. DRG/Colony North Ltd.*, 764 S.W.2d 874, 882 (Tex. App.—Austin 1989, writ denied); *Candlelight Hills Civic Ass'n, v. Goodwin*, 763 S.W.2d 474, 477 (Tex. App.—Houston [14th Dist.] 1988, writ denied).



of trickery, artifice, or device.<sup>258</sup> Another court admitted parol evidence to prove that the consideration recited in deeds or other written instruments was not in fact paid.<sup>259</sup>

The Dallas court of appeals held parol evidence admissible for purposes of applying an unambiguous contract to its subject matter, where the meaning of the language used becomes uncertain when applied to the subject matter of the agreement.<sup>260</sup> That court explained, however, that the rule permitting parol evidence for purposes of applying a contract to its subject matter does not operate to provide parties with opportunity to vary or contradict the language used or to vary the agreement expressed in the writing.<sup>261</sup> Instead the rule merely allows the admission of extraneous evidence of existing circumstances to aid the court in applying the language used to the surrounding facts.<sup>262</sup>

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258. *Tripp Village Joint Venture v. MBank Lincoln Centre*, 774 S.W.2d 746, 749 (Tex. App.—Dallas 1989, writ denied).

259. *Evans v. Evans*, 766 S.W.2d 356, 357 (Tex. App.—Texarkana 1989, no writ).

260. *Security Sav. Ass'n v. Clifton*, 755 S.W.2d 925, 930 (Tex. App.—Dallas 1988, no writ).

261. *Id.*

262. *Id.*