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EVIDENCE

by

Linda Leuchter Addison*

DURING this survey period the appellate courts of Texas handed down numerous decisions construing various rules of evidence. The cases of greatest significance lie in the following substantive areas: (1) the hearsay rule and its exceptions; (2) expert opinion evidence; (3) parol evidence; (4) judicial notice; (5) impeachment; (6) privileges; (7) *res ipsa loquitur*; (8) admissibility; and (9) the dead man's statute. The codified Texas Rules of Evidence will become effective on September 1, 1983, subject to their approval by the state legislature.¹ Although the promulgation of the rules by the Texas Supreme Court, their approval by the legislature, and their effective date are all beyond the scope of this survey period, the reader should be aware that the proposed rules both codify existing Texas case law regarding evidence, and effect substantive changes in certain long standing Texas rules of evidence.

I. THE HEARSAY RULE AND ITS EXCEPTIONS

A. Identifying Hearsay

Whether a record or statement offered to prove its truth is hearsay is often difficult to determine.² "When a document is offered in evidence which contains a written assertion by some one not a witness," it is inadmissible under the hearsay rule.³ In *Imperial Insurance Co. v. National Homes Acceptance Corp.*⁴ the appellant argued that the trial court had erred in admitting into evidence a repair estimate prepared by the plaintiff's damage appraiser. The appellant contended that the repair estimate was hearsay because the underlying records were not available to him. The appraiser testified that he had prepared the repair estimate from field notes he had taken when he inspected the property in question and admitted that he had destroyed the field notes two years later in accordance with

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1. See Order Regarding New Rules of Evidence, 641 S.W.2d XXXV (Tex. Ct. Rules 1982) [hereinafter cited as New Rules].

2. The proposed Texas rule of evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." New Rules, *supra* note 1, 641 S.W.2d at LI. The hearsay rule and its exceptions are defined in rules 801 through 806 of the court's proposed rules. *Id.* at LVI-LXI.

3. 1A R. RAY, TEXAS PRACTICE, LAW OF EVIDENCE § 790 (3d ed. 1980).

4. 626 S.W.2d 327 (Tex. Ct. App.—Tyler 1981, writ ref'd n.r.e.).

office procedures. The appraiser, however, had submitted his repair estimate to the appellant three times before destroying his notes. The court, therefore, found no error in the admission of the repair estimate, holding that the appellant had had sufficient opportunity to examine the records before their destruction.⁵ The court explained that documentary hearsay is a written assertion by someone not a witness.⁶ In *Imperial Insurance* the appraiser was a witness, and the hearsay rule was thus inapplicable to the repair estimate.⁷

The hearsay rule is also inapplicable to out-of-court statements offered for a reason other than to prove the truth of the statement.⁸ For example, in *Silva v. State*⁹ the Corpus Christi court of appeals ruled that neither checks nor a bank signature card were hearsay.¹⁰ In *Silva* checks were introduced into evidence not to attest to the truth of any statements made on the checks, but to show that they had been deposited in a particular account with a particular bank.¹¹ Similarly, proponents introduced the signature card to compare handwriting on the card with the signature of the defendant's wife.¹²

Under the hearsay rule a court will admit extrajudicial utterances for the limited purpose of proving the making of the statement.¹³ An example of such an exception is *Western Co. of North America v. Grider*.¹⁴ The plaintiff in *Grider* sued Western Company to recover damages for personal injuries he sustained when one of the company's employees struck him with a high-pressure hose being used to flush out a gas well. The Fort Worth court of appeals found reversible error in the trial court's excluding testimony of the well's operator, who was an agent and employee of the well owner.¹⁵ The excluded testimony would have established that the operator told Western Company's employees that a "stalk" was unnecessary.¹⁶ The plaintiff contended at trial that a stalk would have prevented his accident. The court reasoned that the statement was relevant in the determination of whether Western Company's employees acted negligently upon hearing the statement, irrespective of its veracity.¹⁷ In so holding, the court followed the "information acted on" rule enunciated by the Texas Supreme

5. *Id.* at 331.

6. *Id.*

7. *Id.*

8. 1A R. RAY, *supra* note 3, § 781, at 2.

9. 635 S.W.2d 775 (Tex. Ct. App.—Corpus Christi 1982, writ ref'd).

10. *Id.* at 777.

11. *Id.*

12. *Id.*

13. *See, e.g.*, *O'Connor v. National Motor Club of Texas, Inc.*, 385 S.W.2d 558, 561 (Tex. Civ. App.—Houston 1964, no writ); *American Gen. Ins. Co. v. Coleman*, 297 S.W.2d 333, 340 (Tex. Civ. App.—Beaumont 1956), *rev'd on other grounds*, 157 Tex. 377, 303 S.W.2d 370 (1957).

14. 626 S.W.2d 923 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.).

15. *Id.* at 926.

16. *Id.* at 925. A stalk is a rigid tube inserted at the end of the discharge hose into the sludge pit. The stalk prevents the hose from moving and injuring persons when sudden bursts of pressure occur.

17. *Id.* at 926.

Court in *McAfee v. Travis Gas Corp.*¹⁸

Once evidence that would be hearsay if offered to prove its truth is admitted for a different limited purpose, counsel may not argue the truth of the statements contained therein.¹⁹ In *Girard v. State*²⁰ state's counsel successfully admitted into evidence a suspect's out-of-court statements made on the telephone to a witness. Counsel represented to the court that the statements were offered solely for the purpose of proving that the telephone call had been made. In closing argument, however, he maintained that the out-of-court statements to the witness rebutted the argument that the state's witness was lying. Reversing the conviction, the court of criminal appeals reasoned that such argument presented unadmitted hearsay to the jury, and in a closely contested case, error in permitting such argument could not be called harmless.²¹

B. Business Records

The legislature has carved out statutory exceptions to the hearsay rule for purposes of admitting business and other records.²² The court relied on one of these legislative exceptions in *In re G.B.B., a Child*.²³ In that case the juvenile court transferred a minor to criminal court to stand trial as an adult on the offense of aggravated robbery. The defendant appealed from the juvenile court's determination, claiming that the certification investigation was hearsay and that the court should not have admitted it. The court of appeals held that when the court clerk testified that she received a report from the Probation Department pursuant to the court's order for a certification investigation, no further predicate was necessary to admit the report into evidence.²⁴ The court reasoned that, although certification investigation reports are ordinarily hearsay, they are admissible at juvenile transfer hearings as exceptions to the hearsay rule under the Texas Family Code.²⁵

The best known exception to the hearsay rule, and the most commonly used in Texas is article 3737e, the statutory exception for business

18. 137 Tex. 314, 320, 153 S.W.2d 442, 448 (1941). In *McAfee* the Texas Supreme Court found reversible error in the exclusion of McAfee's statements to Joe Woods regarding the existence and location of certain gas leaks. McAfee went with Woods to the leaky pipeline. He was showing the leaks to Woods when Woods ignited the match that caused the explosion made the basis of the suit. The defendant pleaded McAfee's contributory negligence in knowingly going to a place of danger. Such a charge raised the issue of whether McAfee, under the circumstances, acted as a reasonably prudent person would have acted in pointing out the leaks in the pipeline to Woods. In such a case the information on which McAfee acted at the time, regardless of its veracity, was admissible as original and material evidence with regard to the question of contributory negligence.

19. See *Girard v. State*, 631 S.W.2d 162 (Tex. Crim. App. 1982).

20. *Id.*

21. *Id.* at 165.

22. See, e.g., TEX. REV. CIV. STAT. ANN. art. 3731b, § 4 (Vernon Supp. 1982-1983) (photographic or photostatic copies of business and official records); *id.* art. 3737e, § 1 (record made in the regular course of business); New Rules, *supra* note 1, 641 S.W.2d at LVIII (exception to the hearsay rule for "records of regularly conducted activities").

23. 638 S.W.2d 162 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

24. *Id.* at 163.

25. *Id.*; see TEX. FAM. CODE ANN. § 54.02 (Vernon 1975).

records.²⁶ During the survey period two Texas courts reviewed the propriety of excluding from evidence certain documents that did not satisfy the requirements of article 3737e. Both courts concluded that in order to take advantage of the hearsay exception for business records the party offering the evidence must prove each of the essential elements set out in the statute.²⁷

In *Texas Employer's Insurance Association v. Saucedo*²⁸ the San Antonio court of appeals affirmed the trial court's exclusion of a physician's letter to a representative of the defendant insurance carrier.²⁹ The court reasoned that the letter, which discussed the extent of the plaintiff's disability, was clearly not a routine entry the physician made in the regular course of his business.³⁰ The court decided the letter was an attempt to convey an opinion that an outside interested source had elicited.³¹ Accordingly, the court held that the letter did not meet the routine entry requirement of section 1(b) of article 3737e.³² Furthermore, article 3737e requires the record to be made "at or near the time of the act, event, or condition."³³ The San Antonio court found that the doctor's letter to the defendant failed this test because the physician sent the letter approximately four months after last examining the plaintiff.³⁴ Even if the letter had complied with the statutory predicates of article 3737e, the court found that the letter was inadmissible as an "expert conjecture" that did not rest on demonstrative medical facts and about which there could be a genuine dispute among doctors.³⁵ The court explained that because article 3737e deprives the opponent of the right to cross-examine, the exception to the hearsay rule is

26. TEX. REV. CIV. STAT. ANN. art. 3737e, § 1 (Vernon Supp. 1982-1983) provides: A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

- (a) It was made in the regular course of business;
- (b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;
- (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

27. See *Texas Employer's Ins. Ass'n v. Saucedo*, 636 S.W.2d 494 (Tex. Ct. App.—San Antonio 1982, no writ); *Haney v. Duncan Dev. Inc.*, 626 S.W.2d 61 (Tex. Civ. App.—Beaumont 1981), *rev'd*, 634 S.W.2d 811 (Tex. 1982).

28. 636 S.W.2d 494 (Tex. Ct. App.—San Antonio 1982, no writ).

29. *Id.* at 500.

30. *Id.* at 499.

31. *Id.* Admission into evidence of a similar letter was held reversible error by another Texas court during the survey period in *Associated Indem. Corp. v. Dixon*, 632 S.W.2d 833 (Tex. Ct. App.—Dallas 1982, no writ).

32. 636 S.W.2d at 499.

33. TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(b) (Vernon Supp. 1982-1983).

34. 636 S.W.2d at 499.

35. *Id.* The court cited *Loper v. Andrews*, 404 S.W.2d 300, 302 (Tex. 1966). Another case during the survey period excluded, as "expert conjectures" under *Loper*, findings in a physician's records that the appellant had recovered from his illness, had been discharged from the doctor's care, was capable of doing the same work as before his injury, and had suffered no permanent disability. *Liberty Mutual Fire Ins. Co. v. Lynch*, 624 S.W.2d 698, 701 (Tex. Ct. App.—El Paso 1982, no writ).

justified only if the diagnosis or other information rests on reasonable medical certainty.³⁶ An opinion based upon conjecture, speculation, and expert medical opinion will not justify the waiver of the valuable right of cross-examination, particularly when records are genuinely in dispute.³⁷

In order for a record to escape the hearsay rule under article 3737e the record must be made by a person with personal knowledge of the facts he records.³⁸ Whether plaintiffs' invoices met this qualification was the issue in *Haney v. Duncan Development, Inc.*³⁹ In this contract action the plaintiffs' accountant attempted to testify to the cost of constructing the buildings by offering into evidence invoices submitted by subcontractors. The accountant was unable to identify who prepared the invoices or to state whether the invoices' author had personal knowledge of the work performed. The Beaumont court of appeals had that the accountant was unable to lay the necessary predicate under article 3737e to admit into evidence the records that would have formed the basis of his testimony.⁴⁰ The Texas Supreme Court reversed this ruling, finding that an on-site supervisor who had personal knowledge of the activities at its construction site could reliably confirm the accuracy of the submitted invoices.⁴¹ The supreme court held that in light of this "qualifying testimony" the invoices became part of the plaintiffs' record of its subcontractors' activity and charges and qualified for admission into evidence under article 3737.⁴²

C. Statements as to Pedigree and Family History

One of the oldest exceptions to the hearsay rule admits into evidence, under certain conditions, statements concerning family history, such as the date and place of marriages, births, and deaths of family members, and other facts relating to descent and family relationships.⁴³ Declarations of the person whose family situation is at issue are admissible, as are declarations made by other close family members.⁴⁴ Some courts admit such statements by nonfamily members with close relationships to the family.⁴⁵

36. 636 S.W.2d at 499.

37. *Id.*; *Reed v. Aetna Cas. & Sur. Co.*, 535 S.W.2d 377 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

38. TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(b) (Vernon Supp. 1982-1983).

39. 626 S.W.2d 61 (Tex. Civ. App.—Beaumont 1981), *rev'd*, 634 S.W.2d 811 (Tex. 1982).

40. 626 S.W.2d at 65.

41. 634 S.W.2d at 813.

42. *Id.* at 813-14.

43. 1A R. RAY, *supra* note 3, § 1341, at 508-09; *see also* New Rules, *supra* note 1, 641 S.W.2d at LX (rule 803(19) allows admissions of evidence of "reputation concerning personal and family history"); *id.*, at LXI (rule 804(b)(3) allows a "statement of personal or family history"); *id.* at LIX (rules 803(12) and 803(13) codify exceptions to the hearsay rule for marriage, baptismal, and similar certificates, and for family records).

44. 1A R. RAY, *supra* note 3, § 1343, at 511-12.

45. *See* *Lewis v. Bergess*, 54 S.W. 609 (Tex. Civ. App. 1899, no writ) (admit declarations of a friend who accompanied deceased to the Mexican War that deceased served in the army and died there unmarried). Although there is no unanimity of thought of how close the relationship must be, old servants, family physicians, and intimate friends have been allowed to testify under this exception. *See* 1A R. RAY, *supra* note 3, § 1343, at 511-12.

These statements are admissible, however, only when the proponent shows that the declarant is unavailable.⁴⁶ Two Texas courts considered this exception during this survey period, and their rulings illustrate the circumstances under which courts will admit declarations of pedigree and family history.

In *Pouncy v. Garner*⁴⁷ the appellee claimed she was the intestate's heir. To prove her allegation she elicited testimony regarding a certain marriage to show that her ancestor was the intestate's aunt. The Tyler court of appeals determined that the testimony fell within the family history exception to the hearsay rule.⁴⁸ The trial court in *Lopez v. Texas Department of Human Resources*⁴⁹ sustained a hearsay objection to a question asking a witness if he knew who was the father of a certain child. The Corpus Christi court of appeals affirmed the ruling because the defendant failed to show that the declarant was dead or otherwise unavailable.⁵⁰ The court further reasoned that sustaining the objection was especially correct in view of the fact that the same testimony was elicited from the defendant on direct examination.⁵¹

D. Admissions of Party-Opponents

A distinction exists between two frequently confused exceptions to the hearsay rule: the "declarations against interest" exception and the "admissions of parties" exception.⁵² Admissions of party-opponents are admissible into evidence without satisfying any of the requirements for declarations against interest.⁵³ Such admissions do not need to be against the interest of the party when made, and the party making the admission need not be, and rarely will be, unavailable.⁵⁴ Finally, the rule does not require the party making the admission to have personal knowledge of the fact admitted.⁵⁵ In *CF & I Steel Corp. v. Pete Sublett & Co.*⁵⁶ the court reversed the trial court's decision to admit into evidence a statement by a representative of the defendant manufacturer.⁵⁷ The appeals court ruled that in the absence of a showing that the representative had the authority to make the communication on the specific subject, the statement was not

46. *Wolf v. Wilhelm*, 146 S.W. 216, 218 (Tex. Civ. App.—San Antonio 1912, error ref'd).

47. 626 S.W.2d 337 (Tex. Ct. App.—Tyler 1981, writ ref'd n.r.e.).

48. *Id.* at 340.

49. 631 S.W.2d 251 (Tex. Ct. App.—Corpus Christi 1982, no writ).

50. *Id.* at 252. For a discussion of this requirement, see *Bowden v. Caldron*, 554 S.W.2d 25, 28 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

51. 631 S.W.2d at 252.

52. See 1A R. RAY, *supra* note 3, § 1122, at 270-73; see also *New Rules*, *supra* note 1, 641 S.W.2d at LVI (rule 801(e)(2) defines admissions of party-opponents); *id.* (rule 803(24) defines statements against interest).

53. See 1A R. RAY, *supra* note 3, § 1122, at 270-73.

54. *Id.*

55. *Id.*

56. 623 S.W.2d 709 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

57. *Id.* at 716.

admissible as an admission of a party-opponent.⁵⁸ An example of an admission of a party-opponent is the statement the appellant in *Grimes v. Jalco, Inc.*⁵⁹ made to the Industrial Accident Board. In that case the Houston [1st District] appeals court held that the appellant's statement in the hearing that he was the defendant's employee was a party admission and, therefore, a proper subject for impeachment on cross-examination.⁶⁰ Noting that the statement was also an admission against interest, the court held that this admission against interest by a party-opponent was not a judicial admission, and therefore, was not conclusive.⁶¹

E. Judicial Admissions

A fact judicially admitted does not require evidence and establishes as a matter of law the fact admitted, precluding a trial court from finding any contrary facts.⁶² Thus, in *Concrete Construction Supply, Inc. v. M.F.C., Inc.*⁶³ the Dallas court of appeals found the counsel's stipulation that a certain sum was due and owing established that fact as a matter of law.⁶⁴

The exception to the hearsay rule for admissions allows admissions by the party's agent. An attorney, as his client's agent, has authority to enter into stipulations and agreements respecting evidence to be offered at trial.⁶⁵ Although a client may restrict the authority of his attorney to act, a federal district court in Texas indicated that at the time issues regarding evidentiary stipulations arise, the client must advise the other parties and the court of such special limitations on the usual attorney-client relationship.⁶⁶ In *United States v. Texas* the state attempted to withdraw evidentiary stipulations to which the state's Assistant Attorney General had agreed.⁶⁷ The court refused to allow the withdrawal because it found that the state's counsel had made and filed the stipulation with the court more than nineteen months earlier, had later reaffirmed the stipulation in open court, and wanted to withdraw the agreement only because the state regretted its tactical decision.⁶⁸ The court reasoned that evidentiary stipulations may be withdrawn only upon a showing that manifest injustice would otherwise result.⁶⁹ As the litigation process proceeds, a party seeking to alter or withdraw stipulations necessarily encounters a greater bur-

58. *Id.*

59. 630 S.W.2d 282 (Tex. Ct. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

60. *Id.* at 284; see *Guzman v. Aetna Cas. & Sur. Co.*, 564 S.W.2d 116, 119 (Tex. Civ. App.—Beaumont 1978, no writ).

61. 630 S.W.2d at 284.

62. 1A R. RAY, *supra* note 3, § 1147, at 299-300. The Texas Supreme Court established five requirements for judicial admissions in *Griffin v. Superior Ins. Co.*, 161 Tex. 195, 201, 338 S.W.2d 415, 419 (1960). This opinion, as well as the strong dissent by four justices, contains a comprehensive discussion of the nuances involved in judicial admissions.

63. 636 S.W.2d 475 (Tex. Ct. App.—Dallas 1982, no writ).

64. *Id.* at 477-78.

65. *Laird v. Air Carrier Engine Serv.*, 263 F.2d 948 (5th Cir. 1959).

66. *United States v. Texas*, 523 F. Supp. 703, 712 (E.D. Tex. 1981).

67. *Id.* at 709.

68. *Id.* at 714.

69. *Id.* at 713.

den in order to protect the integrity of the process.⁷⁰ The court held that if a party does not protest an agreement made by his attorney within a reasonable amount of time, the client may be found to have constructively ratified the agreement.⁷¹

In another case involving the scope of judicial admissions, the Beaumont court of appeals refused to hold that the defendant's introduction of the plaintiff's interrogatory answer was a judicial admission.⁷² In *Williams v. 3 Beall Bros. 3 Inc.* the plaintiff contended that the introduction by the defendant of the plaintiff's interrogatories, in which the plaintiff described her medical expenses, waived the plaintiff's burden to prove such expenses. The court reasoned that a statement made for the purpose of giving testimony is not a judicial admission.⁷³

F. Excited Utterances

Another well-recognized exception to the hearsay rule is the exception for statements made while in the grip of violent emotion, excitement, or pain. The rationale for this exception is that a person in an excited condition loses his capacity for the reflection necessary to fabricate a falsehood.⁷⁴ Thus, in *King v. State*⁷⁵ the court held a rape victim's complaint, also referred to as outcry, to be admissible in the state's case in chief as direct evidence of that complaint.⁷⁶ Furthermore, the court held that outcry is admissible without regard to its spontaneity.⁷⁷ The Houston [14th District] court of appeals in *Lewis v. State*⁷⁸ held that a defendant's confession made while he was in police custody was an excited utterance because he was in a highly emotional state when he made the statement.⁷⁹

The Dallas appeals court explained the proper predicate for the excited utterance exception in *Haney Electric v. Hurst*.⁸⁰ The trial court excluded testimony as to the statement of the driver of a fourth vehicle allegedly involved in a multi-vehicle accident.⁸¹ The supreme court has held that to prove a statement is an excited utterance the proponent of the evidence must establish the exciting event by independent proof.⁸² The plaintiffs in

70. *Id.*; see *Downs v. American Employers Ins. Co.*, 423 F.2d 1160, 1164-65 (5th Cir. 1970).

71. 523 F. Supp. at 713.

72. *Williams v. 3 Beall Bros. 3 Inc.*, 628 S.W.2d 531 (Tex. Ct. App.—Beaumont 1982, writ ref'd n.r.e.).

73. *Id.* at 532.

74. See *Johnson v. State*, 110 Tex. Crim. 250, 251, 8 S.W.2d 127, 128 (1928); see also *New Rules*, *supra* note 1, 641 S.W.2d at LVII (rule 803(2) codifies the admissibility of excited utterances).

75. 631 S.W.2d 486 (Tex. Crim. App. 1982).

76. *Id.* at 491.

77. *Id.*; see also *Ortega v. State*, 462 S.W.2d 296, 307 (Tex. Crim. App. 1970); 1A R. RAY, *supra* note 3, § 927, at 187.

78. 630 S.W.2d 285 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

79. *Id.* at 288.

80. 624 S.W.2d 602 (Tex. Civ. App.—Dallas 1981, writ dism'd).

81. *Id.* at 605-06.

82. *Truck Ins. Exch. v. Michling*, 364 S.W.2d 172, 173-75 (Tex. 1963).

Hurst contended that the defendants did not meet this requirement because they did not prove that the collision involved the witness's vehicle. The court disagreed, explaining that the reason for requiring an exciting event is to establish trustworthiness of the utterance.⁸³ The court further stated that the evidence established beyond question the occurrence of an exciting event, irrespective of whether it included a collision with the witness's vehicle.⁸⁴

In *Lambert v. Gearhart-Owen Industries, Inc.*⁸⁵ the court found that an alleged post-accident statement by defendant's employee was inadmissible as an excited utterance.⁸⁶ The court reasoned that the employee was not a witness to the accident, but arrived on the scene after the plaintiff had reported the accident to the defendant.⁸⁷

G. Reputation

Reputation evidence is admissible to prove character when personal character is in controversy.⁸⁸ In *Mixon v. State*⁸⁹ the Dallas court of appeals ruled that the inability of the prosecution's reputation witnesses to identify the defendant in court did not render them unqualified to testify as to the defendant's reputation in the community.⁹⁰ The court reasoned that a witness who knows of an accused's general reputation need not be personally acquainted with him in order to testify as a reputation witness.⁹¹

When a witness testifies to his personal knowledge of someone's character, rather than to that person's reputation in the community, he is not a reputation witness.⁹² In contrast to reputation testimony, testimony based on personal knowledge of someone's character may not be discredited by a question of whether he has heard other rumors of acts inconsistent with that reputation.⁹³ On this issue the same court explained in another case that to allow "have you heard" questions to be asked a witness who is not a reputation witness would prejudice the jury by letting them hear rumors of otherwise inadmissible misconduct by the defendant.⁹⁴

Although one's general reputation in the community is always based upon hearsay, reputation evidence can be based on inadmissible hearsay,

83. 624 S.W.2d at 606.

84. *Id.*

85. 626 S.W.2d 845 (Tex. Ct. App.—Corpus Christi 1981, no writ).

86. *Id.* at 848.

87. *Id.*

88. 1A R. RAY, *supra* note 3, § 1324, at 500-01; *see also* New Rules, *supra* note 1, 641 S.W.2d at XXXIX-XL (admissibility of character evidence, rule 404); *id.* at XL (admissibility of reputation evidence, rule 405(a)); *id.* at LII (admissibility of evidence of character and conduct of witness, rule 608); *id.* at LX (admissibility of reputation as to character, rule 803(21)).

89. 632 S.W.2d 836 (Tex. Ct. App.—Dallas 1982, writ ref'd).

90. *Id.* at 839.

91. *Id.*

92. *Ward v. State*, 591 S.W.2d 810, 814 (Tex. Crim. App. 1979).

93. *Long v. State*, 631 S.W.2d 157, 158 (Tex. Crim. App. 1982).

94. *Penegraph v. State*, 623 S.W.2d 341, 345 (Tex. Crim. App. 1981).

as in *Arnold v. State*.⁹⁵ In *Arnold* the Beaumont court of appeals reversed the trial court's decision to admit a federal parole officer's testimony of the defendant's bad reputation.⁹⁶ The court found such testimony to be hearsay because the testimony rested on written documents not on record, and because the officer admitted that he had based his testimony on written documents of prior legal problems.⁹⁷ The court ruled that whatever appeared in the documents constituted out-of-court statements offered to prove their truth and, thus, were inadmissible.⁹⁸

II. EXPERT OPINION EVIDENCE

A. Admissibility

An expert witness may draw inferences that a jury is not competent to draw from facts in evidence.⁹⁹ To justify the use of expert opinion testimony, the subject of the inference or conclusion must be beyond the knowledge of the typical layman.¹⁰⁰ The witness must also have sufficient skill, knowledge, or experience within the particular field to make it appear that he is qualified to express an opinion.¹⁰¹ The trial courts have tremendous discretion in determining the admissibility of expert opinion testimony, and an appeals court will not disturb the court's decision to admit or exclude expert opinion testimony absent an abuse of discretion.¹⁰²

During this survey period the Corpus Christi court of appeals found that the trial court did not abuse its discretion in excluding expert testimony by licensed attorneys on the issue of representation of conflicting interests.¹⁰³ The Fort Worth court of appeals found a trial court justified in excluding testimony of a drilling company's employees as to the cause of an accident.¹⁰⁴ The employee's only qualifications as experts were that they had worked as roughnecks and drillers on other rigs. Similarly, the Houston [14th District] court of appeals found that a trial court did not abuse its discretion by allowing expert medical testimony in a suit arising from plaintiff's purchase of a cockatoo that died three weeks later.¹⁰⁵ The court found the plaintiff's expert witnesses qualified to testify as experts even though neither was a veterinarian or a pathologist.¹⁰⁶ The court reasoned

95. 636 S.W.2d 790 (Tex. Ct. App.—Beaumont 1982, no writ).

96. *Id.* at 791-92.

97. *Id.*

98. *Id.* at 791.

99. 2 R. RAY, *supra* note 3, § 1400, at 23-27; see New Rules, *supra* note 1, 641 S.W.2d at LV (rules 701-705 govern opinion testimony by expert and lay witnesses).

100. 2 R. RAY, *supra* note 3, § 1400 at 23-27.

101. *Id.*

102. *Id.* § 1401, at 28; see *Wilson v. Scott*, 412 S.W.2d 299, 304 (Tex. 1967).

103. *Dillard v. Broyles*, 633 S.W.2d 636, 643-44 (Tex. Ct. App.—Corpus Christi 1982, writ ref'd n.r.e.).

104. *Hutson v. Search Drilling Co.*, 635 S.W.2d 900, 903 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.).

105. *Bormaster v. Henderson*, 624 S.W.2d 655 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

106. *Id.* at 659.

that both witnesses and microbiologists/parasitologists, and that they had restricted their testimony to the characteristics of microfilariae, the alleged cause of the cockatoo's death.¹⁰⁷ Another appeals court found an abuse of discretion when the trial court excluded the testimony of the plaintiff's expert witness.¹⁰⁸ The witness testified that he had used the width of the plaintiff's shoulder area to calculate the appropriate radiation dosage that the plaintiff should have received. The court ruled that such testimony ought to have been admitted if properly proved because it was within the expertise of plaintiff's expert witness, a physicist.¹⁰⁹

*Texas Industries, Inc. v. Lucas*¹¹⁰ is a significant opinion in which the Houston [14th District] court of appeals found that the trial court had abused its discretion when it allowed expert testimony of an economist whose name had not been disclosed in discovery.¹¹¹ Prior to trial, Texas Industries had directed an interrogatory to the appellee, seeking the identity of any experts he expected to call at trial. The appellee first answered that it would call an economist, but when the appellant requested the expert's identity the appellee responded that no expert would testify. The court found that the parties went to trial with the understanding that no expert would testify. During the trial, the appellee asked for leave to call an economist. The trial court allowed the testimony on the condition that Texas Industries would first have an opportunity to depose the expert. Texas Industries took the expert's deposition the night before he testified in court. Texas Industries asserted that it did not have sufficient time to prepare for cross-examination of the expert and that his testimony, which allegedly influenced the jury's findings with respect to loss of future earning capacity, should not have been admitted. The court of appeals found that allowing the expert to testify absent the showing of a compelling reason for the testimony was an abuse of discretion.¹¹²

B. Basis for Expert Opinion

An expert may not base his opinion testimony¹¹³ solely on hearsay. The statements or report on which the expert bases his opinion must be properly in evidence and must be the type of information on which experts in the same field customarily rely.¹¹⁴ During this survey period the court in *Young v. Members Life Insurance Co.*¹¹⁵ held that an expert may predicate

107. *Id.*

108. *Wynn v. Mid-Cities Clinic*, 628 S.W.2d 809, 812 (Tex. Ct. App.—Texarkana 1981, writ ref'd n.r.e.).

109. *Id.*

110. 634 S.W.2d 748 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

111. *Id.* at 758.

112. *Id.* The approach taken by the court was, in part, a response to the trial court's failure to impose a sanction for lack of compliance with a discovery rule.

113. 2 R. RAY, *supra* note 3, § 1400, at 23-27.

114. *Moore v. Grantham*, 599 S.W.2d 287, 289 (Tex. 1980); *see also* *New Rules, supra* note 1, 641 S.W.2d at LV (rule 703 defines bases of opinion testimony).

115. 624 S.W.2d 821 (Tex. Ct. App.—El Paso 1981, no writ).

his opinion testimony upon both personal knowledge and hearsay.¹¹⁶ In *Young* the physician reviewed the deceased's insurance policy application before testifying as an expert witness. The application was an exhibit in evidence. The deceased's medical records and the autopsy report about which the doctor testified were also in evidence. The physician had personal knowledge of the company's criteria for reviewing applications, but because his opinion stemmed from information given him by a company underwriter, it was based in part upon hearsay. The El Paso court of appeals held the doctor's testimony admissible, reasoning that his testimony indicated that he based his opinion upon his medical experience and background, the company's criteria of which he had personal knowledge, the application and policy, both of which were in evidence, and also upon his discussions with the reviewing underwriter.¹¹⁷ The court held that such a combination of personal knowledge, statements in the record, and hearsay constituted a valid predicate for expert testimony.¹¹⁸

C. *Standard of Care*

Two cases during the survey period reiterated the established principle that a defendant physician's own testimony can establish the standard of care applicable to his case. The Texas Supreme Court in *Roark v. Allen*¹¹⁹ opined that the defendant physician can establish the standard of care, and that lay eyewitness testimony can establish a departure from that standard. In *Roark* the father, who was present at his child's birth, testified at trial that he saw one of the defendant physicians apply forceps over the child's shoulders and lock the forceps handles above the child's body. According to the codefendant, the shape of the forceps made it impossible for the forceps blades to fit over the child's head. He testified that forceps "are just not used in that manner." The supreme court interpreted the doctor's testimony to mean that a physician cannot fit the forceps around a child's head in the way forceps are meant to fit.¹²⁰ This testimony, the court concluded was some evidence of the standard of care to be used in delivering a frank breech birth with the aid of forceps.¹²¹ The supreme court further found that the father's description of the birth was some evidence of a breach of that standard.¹²²

The Houston [1st District] court of appeals continued the trend of the last several years in eroding the standard of care distinctions between specialties and between physicians in various geographical areas. In *Garza v. Keillor*¹²³ the court ruled that a Dallas physician can testify to medical standards in Harlingen provided that he shows sufficient familiarity with

116. *Id.* at 823.

117. *Id.*

118. *Id.*

119. 633 S.W.2d 804 (Tex. 1982).

120. *Id.* at 811.

121. *Id.*

122. *Id.*

123. 623 S.W.2d 669 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

such standards.¹²⁴ The *Garza* court further held that the testimony of an internist regarding the infection process is admissible in a medical malpractice suit against orthopedic surgeons.¹²⁵

D. Owner's Opinion as to Value

A property owner can testify as to his opinion of the property's value even though he would not be qualified to testify as an expert to the value of the same property if owned by another person.¹²⁶ In *Tom Benson Chevrolet, Inc. v. Alvarado*¹²⁷ a consumer sued a car dealer for violation of the Deceptive Trade Practices—Consumer Protection Act. The trial court allowed the plaintiff, who bought an automobile, to testify as to her opinion of the automobile's value. Based on the plaintiff's testimony, the jury returned a verdict in her favor. The San Antonio court of appeals explained that the law does not require an owner to testify specifically as to the "reasonable market value" of a car in order to support a jury's finding on property value.¹²⁸ In *Baker v. Baker*,¹²⁹ however, neither the husband nor the wife stated they knew the market value of the diamond. Thus, they failed to meet the standard, which an owner of goods must satisfy, to show they were qualified to testify to the diamond's value.¹³⁰ Accordingly, the Houston [14th District] court of appeals ruled that the jury's answer on the diamond's value was not supported by evidence.¹³¹

E. Cross-Examination of Experts

An expert witness may properly be examined as to his knowledge of treatises, books, scientific journals, and other works and be asked whether he agrees with them.¹³² A cross-examiner, however, may use such publications to impeach the witness only if the witness recognizes them as authoritative.¹³³ In *National Surety Corp. v. Rushing*¹³⁴ the plaintiff's expert witness was a chiropractor who testified that he read chiropractic, but not medical journals. On cross-examination the attorney asked the chiropractor the following question: "Have you ever read an article entitled 'Malpractice is an Inevitable Result of Chiropractic Philosophy, and Tragic?'" The trial court sustained an objection, which was affirmed on appeal. Ac-

124. *Id.* at 671.

125. *Id.*

126. *Classified Parking Sys. v. Kirby*, 507 S.W.2d 586, 588 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Barstow v. Jackson*, 429 S.W.2d 536, 538 (Tex. Civ. App.—San Antonio 1968, no writ); see also *New Rules*, *supra* note 1, 641 S.W.2d at LV (rule 701 defines permissible opinion testimony by lay witnesses).

127. 636 S.W.2d 815 (Tex. Ct. App.—San Antonio 1982, writ ref'd n.r.e.).

128. *Id.* at 823.

129. 624 S.W.2d 796 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

130. *Id.* at 799.

131. *Id.* The *Baker* court ruled that the erroneous assessment of the value of one piece of property was not enough to establish that the property division as a whole was manifestly unjust. *Id.*

132. 2 R. RAY, *supra* note 3, § 1403, at 38.

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

134. 628 S.W.2d 90 (Tex. Ct. App.—Beaumont 1981, no writ).

ording to the Beaumont court of appeals, until the witness had recognized the authority or the author of the treatise, the court could not allow any evidence about the article.¹³⁵

F. Court-Appointed Expert

In *Ross v. Walsh*¹³⁶ an ousted partner in a partnership dissolution suit complained on appeal that the trial court had erred in denying her motion to cross-examine the court-appointed appraiser. She argued that the appraiser's report was hearsay, that the appointment of the appraiser made him the court's expert witness, and that the testimony of this expert was the sole basis for determining the value of the appellee's partnership interest. The Houston [14th District] court of appeals disagreed, pointing out that the appraiser served at the trial court's discretion and that his report was intended solely to aid the court.¹³⁷ The court held that the appraiser was not an expert witness.¹³⁸ The court reasoned that counsel is not privy to a judge's private research, and the appellant would not have demanded the right of cross-examination if the judge, instead of the appraiser, had compiled the report.¹³⁹ On the hearsay argument the *Ross* court stated that the appraiser had prepared his report solely for the use of the court;¹⁴⁰ no one had introduced the report into evidence, therefore, it could not be hearsay.¹⁴¹

G. Reasonable Medical Probability

The trier of fact usually determines the issue of causation even when expert testimony demonstrates probable cause.¹⁴² Expert testimony that an event is a possible cause of the condition is not evidence of reasonable medical probability unless no other causal evidence is produced and the condition more likely than not resulted from the event.¹⁴³ In *Valdez v. Lyman-Roberts Hospital, Inc.*¹⁴⁴ the appellants' expert medical witness testified that proper diagnosis and stabilization of a patient with the decedent's symptoms were essential to the patient's chances of survival. The doctor further testified that, although a ruptured uterus is not a common occurrence, the symptoms incident to it are common. The expert stated that any modern obstetric unit, including small ones, should have the facilities to handle a surgical catastrophe involving a pregnant woman within thirty-five to forty minutes. The trial court found that this testimony was not evidence of causation and granted defendants' motions for an in-

135. *Id.* at 92-93.

136. 629 S.W.2d 823 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

137. *Id.* at 826.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* In reaching this conclusion, the court cited 1A R. RAY, *supra* note 3, § 781, at 2.

142. *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970).

143. *Id.* at 707.

144. 638 S.W.2d 111 (Tex. Ct. App.—Corpus Christi 1982, no writ).

structed verdict. On appeal the defendants argued that the deceased woman's family bore the burden of proving that proper diagnosis and treatment could have been made at the time in question under the same or similar circumstances. The Corpus Christi court of appeals held that the appellants satisfied this burden by establishing that no doctor had been called to aid the decedent and by the expert's testimony that the decedent could have been alive today had she received proper care and treatment.¹⁴⁵ Viewing the evidence in the light most favorable to the plaintiffs, the court held that the doctor's testimony was sufficient evidence of medical causation, entitling the plaintiffs to have a jury determine whether the decedent could have received proper medical treatment.¹⁴⁶

III. PAROL EVIDENCE

In *Sun Oil Co. v. Madeley*¹⁴⁷ the Texas Supreme Court, construing an oil and gas lease, reiterated the basic Texas parol evidence rule. The parol evidence rule circumscribes the use of extrinsic evidence to interpret a writing. The court may allow extrinsic evidence only if it finds the contract to be ambiguous.¹⁴⁸ The rule also prohibits parol evidence if the writing is intergrated.¹⁴⁹ In *Clause v. Gyorkey*¹⁵⁰ the Fifth Circuit discussed whether a memorandum stating employment terms was an integrated agreement. In that case an Austrian physician brought a civil action for damages against the chief of laboratory services at a hospital and its affiliated college of medicine. The physician alleged that the defendants misrepresented the employment terms that induced him to come to the United States. The United States District Court for the Southern District of Texas granted the defendant's motion for summary judgment and the plaintiff appealed. The Fifth Circuit affirmed the decision.¹⁵¹ The plaintiff offered into evidence a memorandum containing the employment

145. *Id.* at 116.

146. *Id.* at 116-17.

147. 626 S.W.2d 726 (Tex. 1981).

148. *Id.* at 732. Compare *Commercial Union Ins. Co. v. Martinez*, 635 S.W.2d 611 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.) (term "surgery to the back" held unambiguous in the absence of evidence to show mutual mistake), and *Anderson v. Gilliland*, 624 S.W.2d 243 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (testimony of widow, contents of the grantor's will, and closeness of the execution of the deed and the will all held to be inadmissible on the question of grantor's intent in executing a clear and unambiguous quitclaim deed), with *Startex Drilling Co. v. Sohio Petroleum Co.*, 680 F.2d 412 (5th Cir. 1982) (contract for drilling two wells ambiguous with respect to whether footage or day rate payment would be collected by contractor); *Richard Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154 (5th Cir. 1982) (mineral lessee agreed to pay the landowner 1/8 royalty and in another agreement agreed to an additional royalty; agreement held ambiguous as to whether the proportionate reduction clause in the original lease applied to the additional royalty), and *Weber v. French*, 635 S.W.2d 625 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (handwritten notation contained in provision of builder's and mechanic's lien contract ambiguous).

149. Integration is the practice of embodying a transaction in a final written agreement that is intended to incorporate in its terms the entire transaction. See 2 R. RAY, *supra* note 3, § 1602, at 312-14.

150. 674 F.2d 427 (5th Cir. 1982).

151. *Id.* at 436.

terms on which he relied. In a footnote the Fifth Circuit addressed whether this was the entire and complete employment agreement between the parties. The court characterized the writing as an internal administrative memorandum and noted that it was only one of a series of written communications between the parties.¹⁵² Indicating that the one writing could be considered the entire agreement only with difficulty, the court chose to err on the side of caution and considered the plaintiff's employment in light of all the communications between the parties.¹⁵³

In *Schliff v. Exxon Corp.*¹⁵⁴ the Houston [14th District] court of appeals reiterated the exception that parol evidence is admissible to show that the payee on a note fraudulently induced the maker to sign the note.¹⁵⁵ The El Paso court of appeals explained that the parol evidence rule does not apply to agreements the parties make subsequent to the written agreement in question;¹⁵⁶ nor does the parol evidence rule prevent the parties from modifying a written instrument by an oral agreement even if the written agreement provides that it can be modified only by a writing.¹⁵⁷

IV. JUDICIAL NOTICE

During the survey period Texas courts continued to define the parameters of judicial notice.¹⁵⁸ One court held that Texas courts will take judicial notice of public laws.¹⁵⁹ The same appellate court held that a trial court is entitled to take judicial notice of the mounting cost of living in inflationary times in determining whether to modify a divorce decree by increasing monthly child support payments.¹⁶⁰

In most judicial notice cases Texas appellate courts did not question whether a fact was a proper subject for judicial notice, but whether judicial notice had been properly requested of the trial court, and if so, what effect it had on the burden of proof. In *American Insurance Co. v. Reed*¹⁶¹ the plaintiff alleged various violations of the Texas Insurance Board's rules and regulations. The plaintiff introduced none of the rules or regulations into evidence, nor did he ask the trial court to take judicial notice of them. On appeal the plaintiff argued that the trial court could have taken judicial

152. *Id.* at 434 n.5 (emphasis in original).

153. *Id.*

154. 626 S.W.2d 74 (Tex. Ct. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

155. *Id.* at 78.

156. *Mar-Lan Indus., Inc. v. Nelson*, 635 S.W.2d 853, 855 (Tex. Ct. App.—El Paso 1982, no writ).

157. *Id.*

158. The supreme court addressed the scope and subject matter of judicial notice, as well as the manner, time, and discretion of the court in their new evidence rules. See New Rules, *supra* note 1, 641 S.W.2d at XXXVII-XXXVIII.

159. *Lake Country Estates, Inc. v. Toman*, 624 S.W.2d 677, 680 (Tex. Ct. App.—Fort Worth 1981, writ ref'd n.r.e.). The court of appeals stated that since the Texas Water Code was cited in both the plaintiff's petition and defendants' plea in abatement, no additional evidence was required to bring it to the court's attention. *Id.* at 680.

160. *Smallwood v. Smallwood*, 625 S.W.2d 75, 77 (Tex. Ct. App.—Fort Worth 1981, no writ).

161. 626 S.W.2d 898 (Tex. Ct. App.—Eastland 1981, no writ).

notice of the regulations because they were cited in a Texas Supreme Court opinion. The Eastland court of appeals held that a trial court cannot take judicial notice of regulations that are pleaded, but not introduced into evidence.¹⁶² Similarly, in *Galvan v. United States Fire Insurance Co.*¹⁶³ the plaintiff failed to request the trial court to take judicial notice of the trial evidence in making its ruling on his inability to pay any appeal costs. He argued on appeal, however, that the trial court was entitled to take judicial notice of such evidence. Finding this to be an improper use of judicial notice, the Amarillo court of appeals ruled that a trial court should not resort to judicial notice to assist a plaintiff in discharging a burden he did not meet, particularly when the Texas Rules of Civil Procedure commit the trial court to determine plaintiff's financial ability initially.¹⁶⁴

In *Folsom Investments, Inc. v. Troutz*¹⁶⁵ the plaintiff timely requested and received judicial notice of standard mortality tables. The plaintiff, however, offered no evidence of the potential value of the deceased child's services until he reached his majority, nor of the expenses he would have incurred in raising the child. The Fort Worth court of appeals held that the mortality tables alone were insufficient to support an award for pecuniary loss resulting from the death of a child.¹⁶⁶

V. IMPEACHMENT

In *Haney Electric Co. v. Hurst*¹⁶⁷ the trial court excluded defense witnesses who would have given causation testimony. The basis of the court's ruling was that the testimony would have been inconsistent with the opinion of the defendants' expert. Finding the exclusion to be reversible error, the court of appeals explained that the resolution of conflicts and inconsistencies in the testimony of a witness or between witnesses is within the province of the jury.¹⁶⁸ Furthermore, the court held that a party is not bound by the testimony of his own witnesses and may introduce and rely on contrary testimony.¹⁶⁹ In a similar case the trial court allowed the plaintiff-appellant to contradict orally a document that he had previously offered into evidence. The exhibit, a memorandum authored by the defendant bank's loan officer, stated that the plaintiff had suggested transferring his personal debt to a corporation. At trial the plaintiff testified, over defendant's objection, that the loan officer had suggested the transfer. The

162. *Id.* at 903. Rule 201(d) of the proposed Texas evidence rules provides that judicial notice is mandatory if requested by a party and if the court is supplied with the "necessary information." New Rules, *supra* note 1, 641 S.W.2d at XXXVIII (emphasis added).

163. 629 S.W.2d 209 (Tex. Ct. App.—Amarillo 1982, writ ref'd n.r.e.).

164. *Id.* at 213; see TEX. R. CIV. P. 355.

165. 632 S.W.2d 872 (Tex. Ct. App.—Fort Worth 1982, no writ).

166. *Id.* at 876-77.

167. 624 S.W.2d 602 (Tex. Civ. App.—Dallas 1981, writ dismissed).

168. *Id.* at 609.

169. *Id.* In so holding, the court relied on *Englebrecht v. W.D. Brannan & Sons*, 501 S.W.2d 707, 711 (Tex. Civ. App.—Amarillo 1973, no writ); *Texas Employers' Ins. Ass'n v. Cecil*, 285 S.W.2d 462, 465 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.).

Tyler court of appeals held the admission of such testimony was not error,¹⁷⁰ citing the Texas Supreme Court's ruling in *Gevinson v. Manhattan Construction Co.*¹⁷¹ In *Gevinson* the court wrote that "[i]n analogy to the rule that a party may prove the truth of particular facts in direct contradiction to the testimony of his witness, he may also disprove factual recitals in a document introduced by him."¹⁷²

As a general proposition, extraneous offenses are inadmissible to attack the credibility of witnesses.¹⁷³ In *Holden v. State*¹⁷⁴ the court found that the defendant's statement that he had never been "in trouble" opened the door to cross-examination of an extraneous offense.¹⁷⁵ Similarly, in *Beasley v. State*¹⁷⁶ the court of criminal appeals found that appellant's testimony on direct examination denying that he had "ever done anything like that before" permitted cross-examination regarding other offenses.¹⁷⁷

In an interesting twist to the application of the prior convictions impeachment rule, the court denied the defendant-appellant in *Feist v. State*¹⁷⁸ the right to disclose to the jury that he was a convicted felon and had served time in prison.¹⁷⁹ On appeal the state argued that such evidence is only relevant as impeachment evidence. The Beaumont court of appeals disagreed, holding that the exclusion was error.¹⁸⁰ The court reasoned that:

[e]very lawyer for an accused strives to clothe his client with an air of credibility, one criteria [sic] being complete candor. Knowing that his client is subject to cross-examination as to prior convictions, the witness is in a much better position before the jury if the blight of his character is shown on direct examination.¹⁸¹

The court affirmed the defendant's conviction, however, and held that such error did not amount to reversible error in view of the testimony of three prosecution witnesses who positively identified the defendant as the robber.¹⁸²

VI. PRIVILEGES

Several courts reiterated the vitality and fragility of certain evidentiary

170. *Shook v. Republic Nat'l Bank*, 627 S.W.2d 741, 752 (Tex. Ct. App.—Tyler 1982, writ granted).

171. *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458 (Tex. 1969). The proposed Texas rule of evidence 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him." New Rules, *supra* note 1, 641 S.W.2d at LII.

172. 449 S.W.2d at 466.

173. *Murphy v. State*, 587 S.W.2d 718, 721 (Tex. Crim. App. 1979); *see also* New Rules, *supra* note 1, 641 S.W.2d at XL (rule 404(b) governs evidence of "other wrongs or acts"); *id.* at LII-LIII (rule 609 governs impeachment by evidence of conviction of crime).

174. 628 S.W.2d 166 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ *dism'd*).

175. *Id.* at 167.

176. 634 S.W.2d 320 (Tex. Crim. App. 1982).

177. *Id.* at 322.

178. 631 S.W.2d 769 (Tex. Ct. App.—Beaumont 1982, no writ).

179. *Id.* at 771.

180. *Id.*

181. *Id.* (footnote omitted).

182. *Id.* at 772.

privileges.¹⁸³ In *Eloise Bauer & Associates v. Electronic Realty Associates*¹⁸⁴ the court noted the well-established rule that failure to assert a privilege when a question is asked waives the privilege.¹⁸⁵ In this case the attorney-client privilege apparently would have protected a letter written by Electronic Realty Associates from discovery had it not been voluntarily produced.¹⁸⁶ The Texarkana court of appeals rejected the appellee's argument that the letter had been accidentally produced and that accidental production does not operate as a waiver.¹⁸⁷ The court found it undisputed that the exhibit was voluntarily produced for appellant's inspection and that there was no evidence tending to show that its production was either accidental or inadvertent.¹⁸⁸ Similarly, in *Bendele v. Tri-County Farmer's Co-op*¹⁸⁹ the San Antonio court of appeals restated the principle that a party waives the attorney-client privilege when he complies without objection to a pretrial court order requiring production of privileged matter.¹⁹⁰ Accordingly, the court concluded that the trial court erred in excluding evidence of the seller's credit policy on the basis of its attorney-client privilege, because the seller had waived the privilege.¹⁹¹

The Corpus Christi court of appeals refused to carve out an exception to the statutory patient-psychologist privilege.¹⁹² In a suit brought by the father to modify the original custody order, the father complained on appeal that he had been prohibited from cross-examining the mother's psychologist concerning her sexual attitudes. The court held that it was not error to prohibit such cross-examination because the mother had signed no waiver of the privilege and the statute did not provide for implied waiver in child custody cases.¹⁹³

VII. RES IPSA LOQUITUR

During the survey period several courts considered when and under what circumstances the doctrine of res ipsa loquitur should apply. In *W.B. Harmon v. Sohio Pipeline Co.*¹⁹⁴ the Texas Supreme Court, noting that it

183. For the scope, effect, and waiver of privileges in the supreme court's proposed rules see New Rules, *supra* note 1, 641 S.W.2d at XLI-LI.

184. 621 S.W.2d 200 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.).

185. *Id.* at 204.

186. See New rules, *supra* note 1, 641 S.W.2d at L (rule 511 codifies the waiver of privilege by voluntary disclosure).

187. For this proposition appellee cited *Gass v. Baggerly*, 332 S.W.2d 426, 430 (Tex. Civ. App.—Dallas 1960, no writ).

188. 621 S.W.2d at 204.

189. 635 S.W.2d 459 (Tex. Ct. App.—San Antonio 1982), *rev'd in part on other grounds, aff'd in part*, 26 Tex. Sup. Ct. J. 20 (Oct. 9, 1982).

190. 635 S.W.2d at 464.

191. *Id.*

192. *In re T.L.H.*, 630 S.W.2d 441 (Tex. Ct. App.—Corpus Christi 1982, writ *dism'd*); see TEX. REV. CIV. STAT. ANN. art. 5561h, §§ 2(a), 4 (Vernon Supp. 1982-1983). The new Texas rules of evidence contain both a physician/patient privilege and a privilege for mental health information. New Rules, *supra* note 1, 641 S.W.2d at XLVI-L.

193. *In re T.L.H.*, 630 S.W.2d 441, 445 (Tex. Ct. App.—Corpus Christi 1982, writ *dism'd*).

194. 623 S.W.2d 314 (Tex. 1981).

does not have jurisdiction to review questions of factual insufficiency of the evidence, stated that it possessed jurisdiction to determine whether the court of appeals applied the proper rules of law.¹⁹⁵ In *Harmon* the plaintiff brought suit against Sohio to recover for damages to plaintiff's land caused by an oil spill. It was undisputed that the oil spill occurred as the result of a gasket failure on a valve of Sohio's pipeline. Sohio did not object to the trial court's inclusion of a *res ipsa loquitur* instruction in the charge to the jury. The jury found for the plaintiff, and the trial court rendered judgment. The court of appeals held that the evidence was factually insufficient to support the jury finding of negligence on the part of Sohio, regardless of the application of *res ipsa loquitur*.¹⁹⁶ The plaintiff argued before the supreme court that, assuming proper application of the *res ipsa loquitur* doctrine, the plaintiff had no need to introduce evidence of specific acts of negligence. The supreme court agreed and held that the court of appeals misapplied the doctrine of *res ipsa loquitur* in arriving at its conclusion.¹⁹⁷

In *Cuellar v. Garcia*¹⁹⁸ the Austin court of appeals agreed with the trial court's refusal to submit a *res ipsa loquitur* instruction. *Cuellar* was a wrongful death and survival action against the driver of a car that crashed into a house, killing a man who had been sitting on the front porch. The court reasoned that *res ipsa loquitur* has no application when, as in *Cuellar*, the evidence conclusively establishes the facts surrounding the accident, leaving no room for inferences.¹⁹⁹

For the doctrine of *res ipsa loquitur* to apply the plaintiff must show that the instrumentality producing the injury was under the defendant's exclusive control or management.²⁰⁰ In *Lambert v. Gearhart-Owen Industries, Inc.*²⁰¹ the court found that such prerequisite to the applicability of the doctrine was not established. In *Lambert* the plaintiff's employee was driving the defendant's truck at the time of the accident. The plaintiff testified that he was not in the truck at the time of the accident and thus had no way of knowing what happened inside the truck. He admitted that the employee's foot could possibly have slipped off the clutch, causing the truck to jump forward. The Corpus Christi court of appeals thus reasoned that the plaintiff had not established the "control" necessary to invoke the doctrine of *res ipsa loquitur*.²⁰²

195. 623 S.W.2d at 314-15; see TEX. CONST. art. V, § 2; TEX. REV. CIV. STAT. ANN. art. 1728 (Vernon 1982-1983).

196. *Sohio Pipeline Co. v. W.B. Harmon*, 613 S.W.2d 577, 581 (Tex. Civ. App.—Tyler 1981).

197. 623 S.W.2d at 316.

198. 621 S.W.2d 646 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

199. *Id.* at 647.

200. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 251 (Tex. 1974).

201. 626 S.W.2d 845 (Tex. Ct. App.—Corpus Christi 1981, no writ).

202. *Id.* at 848.

VIII. ADMISSIBILITY

A. Settlement

The courts have carved out several exceptions to the general rule that evidence of settlement agreements should be excluded from the jury.²⁰³ For example, settlement agreements in which a settling defendant will receive a percentage of the plaintiff's recovery from the other defendants are admissible in Texas courts.²⁰⁴ This exception permits the remaining defendants to discredit the settling defendant because he has a financial stake in the success of the plaintiff's recovery. Evidence of a defendant's offer to settle a dispute may also be admitted as a defense against the imposition of attorney's fees.²⁰⁵

B. Best Evidence

The underlying purpose of the best evidence rule is to secure the most reliable information as to the contents of documents when those terms are disputed.²⁰⁶ In *Hodges v. Peden*²⁰⁷ the Houston [14th District] court of appeals held that when handwritten records are transcribed into a computer that records the information and prepares a computerized bill, the best evidence of that information is the computer printout, because it is an exact transcription of the handwritten records.²⁰⁸ The Corpus Christi court of appeals in *Charles v. State*²⁰⁹ held that the best evidence rule does not apply to a photocopy of a newspaper subscription receipt.²¹⁰ The court reasoned that the defendant offered the photocopy only to show the existence of the receipt and not to prove its contents.²¹¹ The court added that even if the best evidence rule applied, the photocopy was admissible under a statutory exception for photocopies because the record showed no bona fide dispute as to the reproduction's authenticity.²¹²

203. The supreme court's proposed rules codify the common law rule of exclusion of settlement agreements and discussions, but do not require exclusion of settlement when offered for another purpose. New Rules, *supra* note 1, 641 S.W.2d at XL-XLI.

204. *McAllen Kentucky Fried Chicken No. 1 v. Leal*, 627 S.W.2d 480, 484 (Tex. Ct. App.—Corpus Christi 1981, writ ref'd n.r.e.). The court further held that when the appellant elected to bring to the jury the existence of the settlement agreement, appellee was entitled to bring before the jury the entire agreement to explain the complete situation and prevent the jury's being misled by selective portions. *Id.* at 484. For the supreme court's proposed rule of "optional completeness," see New Rules, *supra* note 1, 641 S.W.2d at XXXVII.

205. *Lawrence v. Boles*, 631 S.W.2d 764 (Tex. Ct. App.—Tyler 1981, no writ).

206. The proposed Texas rules codify the best evidence rule. See New Rules, *supra* note 1, 641 S.W.2d at LXVI. Rule 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law." *Id.* See also *id.* at LXVII (rule 1004 defines when originals are not required); *id.* at LXVI (rule 1003 defines when duplicates are admissible).

207. 634 S.W.2d 8 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

208. *Id.* at 11.

209. 626 S.W.2d 868 (Tex. Ct. App.—Corpus Christi 1981, no writ).

210. *Id.* at 870.

211. *Id.*

212. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 3731c (Vernon Supp. 1982-1983).

C. *Past Recollection of Recollection to Refresh Present Recollection*

In *S & S Wholesale Supply, Inc. v. Los Cedros, Inc.*²¹³ the Corpus Christi court of appeals discussed the permissible extent and nature of refreshing one's memory when a witness testifies from independent recollection.²¹⁴ In *Los Cedros* the plaintiff's president testified on direct examination about a meeting with the defendant corporation's vice president that occurred on a stated date at a designated place. On cross-examination the president admitted that he specifically recalled the meeting, but was able to testify about the date only because of a letter he had written that was entered into evidence as an exhibit. The defendant argued on appeal that the president had no independent recollection of the meeting and therefore could not use the letter except for the limited purpose of refreshing his memory or as a document of past recollection recorded. The Corpus Christi court of appeals stated that it was apparent from the testimony that the president had an independent recollection of the meeting, and that the use of the letter was for purposes of refreshing his present recollection.²¹⁵ The court explained that in present recollection refreshed a witness has some recollection of the event or matter in question and, after being allowed to view a memorandum, can speak from memory.²¹⁶ The court further explained that it considered this to be a question that went to the credibility of witnesses rather than an evidentiary question.²¹⁷ The court opined that the testimony elicited on cross-examination as to his memory of the date could only serve to impeach prior admissible testimony.²¹⁸

IX. DEAD MAN'S STATUTE

The dead man's statute²¹⁹ has encountered increasing opposition, and the new Texas Rules of Evidence may soon abrogate it.²²⁰ A Texas court

213. 628 S.W.2d 493 (Tex. Ct. App.—Corpus Christi 1982, writ ref'd).

214. For the supreme court rule governing the use of writings to refresh memory, see New Rules, *supra* note 1, 641 S.W.2d at LIV.

215. 628 S.W.2d at 495.

216. *Id.*; see 1 R. RAY, *supra* note 3, § 541, at 512-13.

217. 628 S.W.2d at 495.

218. *Id.* at 495.

219. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon Supp. 1982-1983).

220. See New Rules, *supra* note 1, 641 S.W.2d at LI. Texas proposed rule of evidence 601(b) provides:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by, the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof.

Id.

discussed the dead man's statute in a trespass to try title action in which the plaintiffs relied on their deceased father's adverse possession for their claim of title under the ten-year statute of limitations.²²¹ The dead man's statute prohibited the plaintiffs from testifying to their observations of their father.²²² Another court observed how easily waiver applies to the dead man's statute.²²³ If a party initiates an inquiry about an adverse witness's transaction with the deceased either in a deposition or in trial, that party waives the statute and the witness may testify completely about the transaction.²²⁴

221. *Bragg v. Wittenben*, 623 S.W.2d 687 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

222. *Id.* at 690.

223. *See Fulmer v. Rider*, 635 S.W.2d 875 (Tex. Ct. App.—Tyler 1982, writ ref'd n.r.e.).

224. *Id.* at 878-79.

