

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97- 5184

APPROVAL OF REVISIONS TO THE TEXAS RULES OF CIVIL EVIDENCE

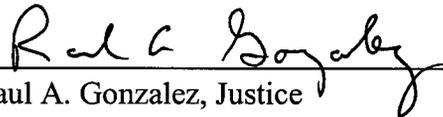
ORDERED that:

1. The Texas Rules of Civil Evidence are amended as follows;
2. These amendments, with any changes made after public comments are received, take effect March 1, 1998;
3. The notes and comments appended to these changes are incomplete, are included only for the convenience of the bench and bar, and are not a part of the rules; and
4. The Clerk is directed to file a copy of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

SIGNED AND ENTERED this 20th day of October, 1997.



Thomas R. Phillips, Chief Justice

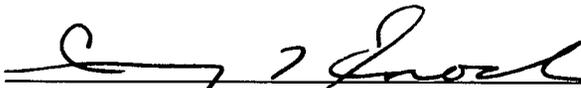


Raul A. Gonzalez, Justice



Nathan L. Hecht, Justice

John Cornyn, Justice



Craig T. Enoch, Justice



Rose Spector, Justice



Priscilla R. Owen, Justice



James A. Baker, Justice



Greg Abbott, Justice

STATEMENT REGARDING ATTORNEY-CLIENT PRIVILEGE

Included in the proposed Texas Rules of Evidence is a change to Rule 503(a)(2) regarding the attorney-client privilege. The Court proposes to expand the privilege from the “control group test” adopted in 1983 by the drafters of the Texas Rules of Civil Evidence, *see National Tank Co. v. Brotherton*, 851 S.W.2d 193, 197-99 (Tex. 1993), to the formulation of the privilege recommended in the Model Code of Evidence. *See* 13A UNIFORM LAWS ANN. 518-20 (1994).

Several years ago, the State Bar of Texas Standing Committee on the Administration of the Rules of Evidence proposed to change the privilege from the “control group test” to a “modified subject matter test” based on *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978). That proposal was as follows:

- (2) A representative of a client other than a legal entity is one having authority either to obtain professional services, or to act on advice rendered pursuant thereto, on behalf of the client. If the client is a legal entity other than a natural person, a representative of the client is:
 - (A) a partner, officer, director, or employee having authority to either obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the entity; or
 - (B) an agent or employee of the entity who has been requested by such partner, officer, director, or such superior employee to communicate with a lawyer on a subject matter within the scope of the employee’s or agent’s duties in connection with securing legal advice by the entity. The term “agent” as used in this Rule does not include an independent contractor.

The Supreme Court Advisory Committee, when presented with the State Bar Committee’s proposal, recommended — in a close vote — that the Court make no change in the privilege. This Court considered the report of the State Bar Committee and the Supreme Court Advisory Committee and asked for further guidance from the State Bar Committee. In light of the Court’s request, an ad hoc subcommittee of the State Bar Committee reviewed the privilege question again. The ad hoc subcommittee recommended that Rule 503(a)(2) provide that a “representative of the client” include:

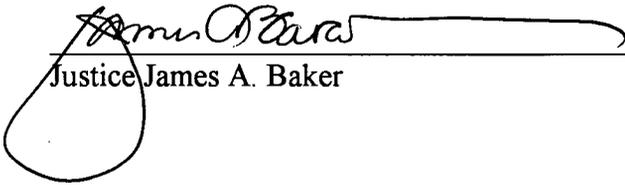
- (a) a member of the control group as defined by current Rule 503(a)(2) and/or
- (b) other employees or agents of the client or organization if:
 - 1) the communication between the employee or agent and the lawyer was made for the purpose of securing legal advice or legal services;
 - 2) the employee or agent making the communication was expressly or

implicitly authorized to do so by the client or a member of its control group so that the client could secure legal advice or legal services;

- 3) the subject matter of the communication was expressly authorized by the client or a member of its control group or was within the scope of the employee's or agent's duties with the organization; and
- 4) the privilege is not waived by a dissemination of the privileged communication beyond those persons who, because of the organization's structure, need to know its contents.

We have two questions on which we would like for the bench and bar to comment. First, is a change of the privilege under Evidence Rule 503(a)(2) advisable? Second, if a change to Rule 503(a)(2) is advisable, should the Court adopt either of the drafts forwarded by the State Bar Committee or the Court's own proposal?


Justice Rose Spector


Justice James A. Baker

TEXAS RULES OF EVIDENCE
to be effective March 1, 1998

ARTICLE I. GENERAL PROVISIONS

RULE 101. TITLE AND SCOPE

- (a) **Title.** These rules shall be known and cited as the Texas Rules of Evidence.
- (b) **Scope.** Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.
- (c) **Hierarchical Governance in Criminal Proceedings.** Hierarchical governance shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law. Where possible, inconsistency is to be removed by reasonable construction.
- (d) **Special Rules of Applicability in Criminal Proceedings.**
- (1) *Rules not applicable in certain proceedings.* These rules, except with respect to privileges, do not apply in the following situations:
- (A) the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104;
- (B) proceedings before grand juries;
- (C) proceedings in an application for habeas corpus in extradition, rendition, or interstate detainer;
- (D) a hearing under Code of Criminal Procedure article 46.02, by the court out of the presence of a jury, to determine whether there is sufficient evidence of incompetency to require a jury determination of the question of incompetency;

- (E) proceedings regarding bail except hearings to deny, revoke or increase bail;
- (F) a hearing on justification for pretrial detention not involving bail;
- (G) proceedings for the issuance of a search or arrest warrant; or
- (H) proceedings in a direct contempt determination.
- (2) *Applicability of privileges.* These rules with respect to privileges apply at all stages of all actions, cases, and proceedings.
- (3) *Military justice hearings.* Evidence in hearings under the Texas Code of Military Justice, TEX. GOV'T CODE §432.001-432.195, shall be governed by that Code.

Notes and Comments

Comment to 1997 change: "Criminal proceedings" rather than "criminal cases" is used since that was the terminology used in the prior Rules of Criminal Evidence. In subpart (b), the reference to "trials before magistrates" comes from prior Criminal Rule 1101(a). In the prior Criminal Rules, both Rule 101 and Rule 1101 dealt with the same thing — the applicability of the rules. Thus, Rules 101(c) and (d) have been written to incorporate the provisions of former Criminal Rule 1101 and that rule is omitted.

RULE 102. PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

RULE 103. RULINGS ON EVIDENCE

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) **Record of Offer and Ruling.** The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Fundamental Error in Criminal Cases.** In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Notes and Comments

Comment to 1997 change. The exception to the requirement of an offer of proof for matters that were apparent from the context within which questions were asked, found in paragraph (a)(2), is now applicable to civil as well as criminal cases.

RULE 104. PRELIMINARY QUESTIONS

(a) **Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its

determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of Jury.** In a criminal case, a hearing on the admissibility of a confession shall be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or in a criminal case when an accused is a witness and so requests.

(d) **Testimony by Accused Out of the Hearing of the Jury.** The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

RULE 105. LIMITED ADMISSIBILITY

(a) **Limiting Instruction.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

(b) **Offering Evidence for Limited Purpose.** When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

RULE 107. RULE OF OPTIONAL COMPLETENESS

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

Notes and Comments

Comment to 1997 change: This rule is the former Criminal Rule 107 except that the example regarding "when a letter is read" has been relocated in the rule so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is made applicable to civil cases because it accurately reflects the common law rule of optional completeness in civil cases.

ARTICLE II. JUDICIAL NOTICE**RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS**

- (a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
- (b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) **When Discretionary.** A court may take judicial notice, whether requested or not.
- (d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) **Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
- (g) **Instructing Jury.** In civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In criminal cases, the court shall instruct the jury that it

may, but is not required to, accept as conclusive any fact judicially noticed.

RULE 202. DETERMINATION OF LAW OF OTHER STATES

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

RULE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, AND THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of

the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally.** Evidence of a person's character or character trait is not admissible for the

purpose of proving action in conformity therewith on a particular occasion, except:

- (1) *Character of accused.* Evidence of a pertinent character trait offered:
 - (A) by an accused in a criminal case, or by the prosecution to rebut the same, or
 - (B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;
 - (2) *Character of victim.* In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;
 - (3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.
- (b) **Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

RULE 405. METHODS OF PROVING CHARACTER

- (a) **Reputation or Opinion.** In all cases in which evidence of a person's character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

- (b) **Specific Instances of Conduct.** In cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

- (a) **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.
- (b) **Notification of Defect.** A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty that was later withdrawn;
- (2) in civil cases, a plea of *nolo contendere*, and in criminal cases, a plea of *nolo contendere* that was later withdrawn;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere* that was later withdrawn; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority that does not result in a plea of guilty or a plea of *nolo contendere* or that results in a plea, later withdrawn, of guilty or *nolo contendere*.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

- (a) **Reputation or Opinion Evidence.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to

commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) **Evidence of Specific Instances.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) **Procedure for Offering Evidence.** If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) **Record Sealed.** The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) **Sexual Conduct of Child as Defense.** This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

RULE 502. REQUIRED REPORTS PRIVILEGED BY STATUTE

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

RULE 503. LAWYER-CLIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

- (2) A "representative of the client" is (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.
- (3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
- (4) A "representative of the lawyer" is:
- (A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or
- (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.
- (5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
- (b) Rules of Privilege.**
- (1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's 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;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.
- (2) *Special rule of privilege in criminal cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.
- (c) Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.
- (d) Exceptions.** There is no privilege under this rule:
- (1) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
- (2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;
- (3) *Breach of duty by a lawyer or client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
- (4) *Document attested by a lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
- (5) *Joint clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.
- RULE 504. HUSBAND-WIFE PRIVILEGES**
- (a) Confidential Communication Privilege.**

- (1) *Definition.* A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.
- (2) *Rule of privilege.* A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.
- (3) *Who may claim the privilege.* The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do so is presumed.
- (4) *Exceptions.* There is no confidential communication privilege:
 - (A) *Furtherance of crime or fraud.* If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.
 - (B) *Proceeding between spouses in civil cases.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.
 - (C) *Crime against spouse or minor child.* In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse.
 - (D) *Commitment or similar proceeding.* In a proceeding to commit either spouse or otherwise place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.
 - (E) *Proceeding to establish competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(b) Privilege not to Testify in Criminal Case.

- (1) *Rule of privilege.* In a criminal case, the spouse of the accused has a privilege not to be called as a

witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 610(b).

- (2) *Failure to call as witness.* Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.
- (3) *Who may claim the privilege.* The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.
- (4) *Exceptions.* The privilege of a person's spouse not to be called as a witness for the state does not apply:
 - (A) *Certain criminal proceedings.* In any proceeding in which the person is charged with a crime against the person's spouse, a member of the household of either spouse, or any minor.
 - (B) *Matters occurring prior to marriage.* As to matters occurring prior to the marriage.

Notes and Comments

Comment to 1997 change: The rule eliminates the spousal testimonial privilege for prosecutions in which the testifying spouse is the alleged victim of a crime by the accused. This is intended to be consistent with Code of Criminal Procedure article 38.10, effective September 1, 1995.

RULE 505. COMMUNICATIONS TO MEMBERS OF THE CLERGY

(a) Definitions. As used in this rule:

- (1) A "member of the clergy" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.
- (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

- (b) General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member

of the clergy in the member's professional character as spiritual adviser.

- (c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The member of the clergy to whom the communication was made is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

RULE 508. IDENTITY OF INFORMER

- (a) **Rule of Privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.
- (b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.
- (c) **Exceptions.**
 - (1) *Voluntary disclosure; informer a witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

- (2) *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case to which the public entity is a party, or on guilt or innocence in a criminal case, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, the court in a civil case may make any order that justice requires, and in a criminal case shall, on motion of the defendant, and may, on the court's own motion, dismiss the charges as to which the testimony would relate. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

- (3) *Legality of obtaining evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

RULE 509. PHYSICIAN-PATIENT PRIVILEGE

- (a) **Definitions.** As used in this rule:
 - (1) A "patient" means any person who consults or is seen by a physician to receive medical care.

- (2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.
- (3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.
- (b) Limited Privilege in Criminal Proceedings.** There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.
- (c) General Rule of Privilege in Civil Proceedings.** In a civil proceeding:
- (1) Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed.
- (2) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.
- (3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. art. 4590i.
- (d) Who May Claim the Privilege in a Civil Proceeding.** In a civil proceeding:
- (1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.
- (2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.
- (e) Exceptions in a Civil Proceeding.** Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:
- (1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;
- (2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);
- (3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;
- (4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;
- (5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, TEX. REV. CIV. STAT. art. 4495b, or of a registered nurse under or pursuant to TEX. REV. CIV. STAT. arts. 4525, 4527a, 4527b, and 4527c, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);
- (6) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under
- (A) the Texas Mental Health Code, TEX. HEALTH & SAFETY CODE §571.001-571.026;
- (B) the Persons with Mental Retardation Act, TEX. HEALTH & SAFETY CODE §591.001-591.025;
- (7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in TEX. HEALTH & SAFETY CODE §242.002.
- (f) Consent.**
- (1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as

authorized by the Texas Mental Health Code, TEX. HEALTH & SAFETY CODE § 571.001-571.026; the Persons with Mental Retardation Act; TEX. HEALTH & SAFETY CODE §591.001-591.025; Chapter V, Texas Probate Code; and TEX. FAM. CODE §107.011; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

- (A) the information or medical records to be covered by the release;
 - (B) the reasons or purposes for the release; and
 - (C) the person to whom the information is to be released.
- (2) The patient, or other person authorized to consent, has the right to withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.
- (3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

Notes and Comments

Comment to 1997 change: Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. Former paragraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted.

RULE 510. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION IN CIVIL CASES

(a) Definitions. As used in this rule:

- (1) "Professional" means any person:
 - (A) authorized to practice medicine in any state or nation;
 - (B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder;
 - (C) involved in the treatment or examination of drug abusers; or
 - (D) reasonably believed by the patient to be included in any of the preceding categories.

(2) "Patient" means any person who:

- (A) consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or
 - (B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.
- (3) A representative of the patient is:
- (A) any person bearing the written consent of the patient;
 - (B) a parent if the patient is a minor;
 - (C) a guardian if the patient has been adjudicated incompetent to manage the patient's personal affairs; or
 - (D) the patient's personal representative if the patient is deceased.

- (4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

(b) General Rule of Privilege.

- (1) Communication between a patient and a professional is confidential and shall not be disclosed in civil cases.
- (2) Records of the identity, diagnosis, evaluation, or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases.
- (3) Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose in civil cases the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(4) The provisions of this rule apply even if the patient received the services of a professional prior to the enactment of TEX. REV. CIV. STAT. art. 5561h (Vernon Supp. 1984)(now codified as TEX. HEALTH & SAFETY CODE §611.001-611.008).

(6) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution as defined in TEX. HEALTH AND SAFETY CODE §242.002.

(c) Who May Claim the Privilege.

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. Exceptions to the privilege in court or administrative proceedings exist:

(1) when the proceedings are brought by the patient against a professional, including but not limited to malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient waives the right in writing to the privilege of confidentiality of any information, or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

Notes and Comments

This rule only governs disclosures of patient-professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by TEX. HEALTH & SAFETY CODE §611.001-611.008. Former paragraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted.

RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) Comment or Inference Not Permitted. Except as permitted in Rule 504(b)(2), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) Claiming Privilege Without Knowledge of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

- (c) **Claim of Privilege Against Self-Incrimination in Civil Cases.** Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present civil proceeding, of the privilege against self-incrimination.
- (d) **Jury Instruction.** Except as provided in Rule 504(b)(2) and in paragraph (c) of this Rule, upon request any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Notes and Comments

Comment to 1997 change. Subdivision (d) regarding a party's entitlement to a jury instruction about a claim of privilege is made applicable to civil cases.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

- (a) **General Rule.** Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:
- (1) *Insane persons.* Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.
 - (2) *Children.* Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.
- (b) **"Dead Man Rule" in Civil Actions.** In civil 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 at the trial 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. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

RULE 605. COMPETENCY OF JUDGE AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

RULE 606. COMPETENCY OF JUROR AS A WITNESS

- (a) **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
- (b) **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be

precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF A WITNESS

(a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) the evidence may refer only to character for truthfulness or untruthfulness; and
- (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and

circumstances substantially outweighs its prejudicial effect.

(c) **Effect of Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible under this rule if:

- (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;
- (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or
- (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) **Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) **Pendency of Appeal.** Pendency of an appeal renders evidence of a conviction inadmissible.

(f) **Notice.** Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Notes and Comments

Comment to 1997 change: This is prior Rule of Criminal Evidence 615.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

- (a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
- (b) **Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.
- (c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Notes and Comments

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying either

- (1) while testifying;
- (2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or
- (3) before testifying, in criminal cases;

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

RULE 613. PRIOR STATEMENTS OF WITNESSES: IMPEACHMENT AND SUPPORT

- (a) **Examining Witness Concerning Prior Inconsistent Statement.** In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).
- (b) **Examining Witness Concerning Bias or Interest.** In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.
- (c) **Prior Consistent Statements of Witnesses.** A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).

RULE 614. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

- (1) a party who is a natural person or in civil cases the spouse of such natural person;
- (2) an officer or employee of a party in a civil case or a defendant in a criminal case that is not a natural person designated as its representative by its attorney;

- (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or
- (4) the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

RULE 615. PRODUCTION OF STATEMENTS OF WITNESSES IN CRIMINAL CASES

- (a) **Motion for Production.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
- (b) **Production of Entire Statement.** If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.
- (c) **Production of Excised Statement.** If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of appeal.
- (d) **Recess for Examination of Statement.** Upon delivery of the statement to the moving party, the court, upon application of that party, shall recess proceedings in the trial for a reasonable examination of such statement and for preparation for its use in the trial.
- (e) **Sanction for Failure to Produce Statement.** If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.
- (f) **Definition.** As used in this rule, a "statement" of a witness means:

- (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;
- (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
- (3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Notes and Comments

Comment to 1997 change: This is prior Texas Rule of Criminal Evidence 614.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Notes and Comments

Comment to 1997 change: The former Civil Rule referred to facts or data "perceived by or reviewed by" the expert. The former Criminal rule referred to facts or data "perceived by or made known to" the expert. The terminology is now conformed, but no change in meaning is intended.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

- (a) **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
- (b) **Voir dire.** Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
- (c) **Admissibility of opinion.** If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.
- (d) **Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

Comment to 1997 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

RULE 706. AUDIT IN CIVIL CASES

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

- (a) **Statement.** A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.
- (b) **Declarant.** A "declarant" is a person who makes a statement
- (c) **Matter Asserted.** "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.
- (d) **Hearsay.** "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.
- (e) **Statements Which Are Not Hearsay.** A statement is not hearsay if:
 - (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
 - (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;
 - (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;

- (C) one of identification of a person made after perceiving the person; or
 - (D) taken and offered in a criminal case in accordance with Code of Criminal Procedure article 38.071.
- (2) *Admission by party-opponent.* The statement is offered against a party and is:
- (A) the party's own statement in either an individual or representative capacity;
 - (B) a statement of which the party has manifested an adoption or belief in its truth;
 - (C) a statement by a person authorized by the party to make a statement concerning the subject;
 - (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
 - (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.
- (3) *Depositions.* In a civil case, it is a deposition taken in the same proceeding, as same proceeding is defined in Rule of Civil Procedure 207. Unavailability of deponent is not a requirement for admissibility.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.
- (7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

- (8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
- (A) the activities of the office or agency;
 - (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
 - (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;
- unless the sources of information or other circumstances indicate lack of trustworthiness.
- (9) **Records of Vital Statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
- (10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report statement, or data compilation, or entry.
- (11) **Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
- (13) **Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
- (14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
- (15) **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- (16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.
- (17) **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
- (18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
- (19) **Reputation Concerning Personal or Family History.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.
- (20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.
- (21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.
- (22) **Judgment of Previous Conviction.** In civil cases, evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), judging

a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. In criminal cases, evidence of a judgment, entered after a trial or upon a plea of guilty or nolo contendere, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused. In all cases, the pendency of an appeal renders such evidence inadmissible.

- (23) **Judgment as to Personal, Family, or General History, or Boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.
- (24) **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

- (a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:
- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
 - (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
 - (3) testifies to a lack of memory of the subject matter of the declarant's statement;
 - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

- (b) **Hearsay Exceptions.** The following are not excluded if the declarant is unavailable as a witness:
- (1) *Former testimony.* In civil cases, testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases, testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases the use of depositions is controlled by Chapter 39 of the Code of Criminal Procedure.
 - (2) *Dying declarations.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause, or circumstances of what the declarant believed to be impending death.
 - (3) *Statement of personal or family history.*
 - (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or
 - (B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(e)(2) (C), (D), or (E), or in civil cases a statement defined in Rule 801(e)(3), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to impeach the declarant, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

- (a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
- (b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
- (1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.
 - (2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
 - (3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witness with specimens which have been found by the court to be genuine.
 - (4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
 - (5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under

circumstances connecting it with the alleged speaker.

- (6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:
 - (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or
 - (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
- (8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.
- (9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
- (10) *Methods provided by statute or rule.* Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority.

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
- (2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in the official

capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

- (3) **Foreign Public Documents.** A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.
- (4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.
- (5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.
- (6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.
- (7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- (8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
- (9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
- (10) **Business Records Accompanied by Affidavit.**
- (a) *Records or photocopies; admissibility; affidavit; filing.* Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to commencement of trial in said cause.
- (b) *Form of affidavit.* A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No _____

John Doe (Name of Plaintiff) § IN THE _____
 §
 v. § COURT IN AND FOR
 §
 §
 John Roe (Name of Defendant) § _____ COUNTY,
 § TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19 ____.

Notary Public, State of Texas

Notary's printed name:

My commission expires:

(11) **Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

- (a) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
- (b) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
- (c) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
- (d) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

RULE 1002. REQUIREMENT OF ORIGINALS

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.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (a) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
- (b) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure;
- (c) **Original Outside the State.** No original is located in Texas;
- (d) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (e) **Collateral Matters.** The writing, recording or photograph is not closely related to a controlling issue.

RULE 1005. PUBLIC RECORDS

The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

RULE 1009. TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS

- (a) **Translations.** A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.
- (b) **Objections.** Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.
- (c) **Effect of Failure to Object or Offer Conflicting Translation.** If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.
- (d) **Effect of Objections or Conflicting Translations.** In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.
- (e) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial.

either by live testimony or by deposition testimony of a qualified expert translator.

- (f) **Varying of Time Limits.** The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.
- (g) **Court Appointment.** The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

Notes and Comments

Comment to 1997 change. This is a new rule.



THE SUPREME COURT OF TEXAS

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April 8, 1999

Office of the Secretary
of State
Statutory Filings Division
1019 Brazos Street
Austin, Texas 78701

RE: Order of the Supreme Court of Texas No. 97-9184, Oct. 20,
1997.

Pursuant to the order of the Court, I am forwarding the attached
copy of the referenced order for filing as appropriate.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.