Proposed New Rule 706 of Texas Rules of Evidence:

RULE 706. APPOINTMENT OF AN EXPERT TO ADVISE THE COURT ON ADMISSIBILITY OF SCIENTIFIC OPINIONS IN EXTRAORDINARY CIRCUMSTANCES

(a) *Authority to Appoint.* If, after hearing a motion to determine admissibility under Rule 702 of expert witness opinions challenging the scientific principals or scientific methodologies upon which the proffered opinions are based, the Court finds that it is unable to decide on its own the admissibility of such testimony, the Court on its own motion may appoint a qualified expert to advise the Court as specified in this Rule.

(b) *The Appointment.* The Court, prior to appointment, shall find that the Advisory Expert has the scientific knowledge to be qualified to perform the duties specified in this Rule. The written order appointing the Advisory Expert shall state the duties of the expert and the factors to be considered in evaluating the reliability of scientific principals and methodologies. No person may be appointed as an Advisory Expert until that person has agreed in writing to act.

(c) *Limited Role of the Advisory Expert.* The limited role of the Advisory Expert is to furnish written advice to the Court as to whether the particular scientific principals or the particular scientific methodologies, or both, relied upon by a party's scientific expert satisfy the reliability requirement of Rule 702. The Advisory Expert shall not express any opinion or evaluation regarding the validity, accuracy, or credibility of the opinions of a party's proffered expert witness.

(d) *Cross-Examination of the Advisory Expert.* After filing of the Advisory Expert report, the Court upon request of any party shall permit cross-examination of the Advisory Expert regarding any matter contained in or relevant to the report of the Advisory Expert. The cross-examination may not take place in the presence of the jury in the proceeding.

(e) *Supporting and Opposing Evidence by the Parties.* Within a reasonable time after receipt of the report of the Advisory Expert and before ruling upon the admissibility of the expert opinion proffered by a party, the Court shall provide each party with reasonable opportunity to present a response to the report of the Advisory Expert.

(f) *Disclosures Prohibited.* The Advisory Expert's report is inadmissible at trial. No information relating to any aspect of the use by the Court of such Advisory Expert shall be conveyed to any jury or juror nor may the Advisory Expert testify at trial.

(g) *Compensation of the Advisory Expert.* The Advisory Expert shall be awarded reasonable compensation to be fixed by Order of Court. The compensation is payable solely from public funds allocated for the administration of the Court in which the cause is pending. In no event shall the compensation of the Advisory Expert be taxed as court costs. In civil cases, each party shall pay the expense of its examination of the Advisory Expert pursuant to subdivision (d).

(h) *Record on Appeal.* The entire statement of facts and transcript relating to the appointment and use of the Advisory Expert shall be contained in the record on appeal but only for the purposes of reviewing the Court's use of such expert and the Court's ruling on the admissibility of the proffered expert testimony.

NOTES AND COMMENTS

The purpose of this rule is to allow a trial court to appoint an advisory expert to assist it solely in its gatekeeping function under Rule 702. The rule is to be used only in extraordinary circumstances involving complex scientific principals and methodologies. For a list of the factors to be considered by the Advisory Expert, see the draft Comments to Rule 702.

RULE 706. ~~COURT-APPOINTED~~ EXPERTS APPOINTED TO ASSIST THE COURT

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why an expert witnesses should not be appointed to assist the court in [performing its gate-keeping function with respect to expert testimony/ruling on a Rule 702 objection]*, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint an expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk~~, or at a conference in which the parties shall have opportunity to participate~~. A witness so appointed shall advise the parties and the court of the witness' findings in writing~~, if any;~~ tThe witness' deposition may not be taken by any party~~; and~~ nor may any party have any contact or communication with the witness except to the extent allowed herein, nor may the witness be called to testify at trial or any hearing by the court or any party. ~~The witness shall be subject to cross-examination by each party, including a party calling the witness.~~

(b) Compensation. An e~~E~~xpert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may ~~allow~~ authorize in the exercise of its discretion. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment and Findings. ~~In the exercise of its discretion, the court may authorize disclosure to the jury of t~~The fact that the court appointed the expert witness and the witness' findings shall not be disclosed to a jury in that or any other litigation. The witness' findings shall not be a part of the record for any purpose other than review of a court's order [in performing its gate-keeping function with respect to expert testimony/on a Rule 702 objection].**

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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* Alternate ways of describing a *Robinson v. duPont* hearing.

** Alternate ways of describing a *Robinson v. duPont* hearing.

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J. HOKE PEACOCK II
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GARY NEALE REGER
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HOLLIS HORTON
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WILL E. ORGAIN (1882-1965)
MAJOR T. BELL (1897-1969)

May 7, 1997

FEDERAL EXPRESS

Mr. Luther H. Soules III
Soules & Wallace
Frost Bank Tower, 15th Floor
100 W. Houston, Suite 1500
San Antonio, TX 78205-1457

Dear Luke:

I am enclosing herein Disposition Chart for the Third Supplemental Agenda, along with Chart Showing Action Taken at Meeting of March 7-8, 1997.

Sincerely,

Gilbert I. Low

GIL:cc

Enclosures

CHART SHOWING ACTION TAKEN
BY SUPREME COURT ADVISORY COMMITTEE
AT MEETING OF MARCH 7-8, 1997

RULE NO.	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
609(d) - CIV & CRIM	Approve recommendation of Evidence Subcommittee and added words pointed out in redline version so juvenile's prior adjudications and dispositions can be used to impeach juvenile only in subsequent proceedings in which juvenile is a party
702 - CIV & CRIM	No action taken because matter is being studied by Family Law Council as well as State Bar Evidence Committee
503	Discussion of history of matter before SCAC - no change made in prior vote of SCAC
902	Voted to make no change
902 (New)	Voted to make no change because of Section 18.001 and Section 18.002 of Civil Practice & Remedies Code

RULE 609(d) OF THE RULES OF PROCEDURE
(BOTH CIVIL AND CRIMINAL)
REDLINE VERSION

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

RULE 609(d) OF THE RULES OF PROCEDURE
(BOTH CIVIL AND CRIMINAL)

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

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TEXAS RULES OF CIVIL EVIDENCE
(AGENDA MAY 16-17, 1997)

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
MISC. TRCE	3RD0520	By: Justice Nathan L. Hecht *Court appointed experts to assist court in Dupont v. Robinson matters	Rule attached as drawn by SCAC Evidence Committee. State Bar Evidence Subcommittee recommendated no rule be adopted. State Bar Evidence Committee (full) voted 9 to 6 to table. New rule to be Rule 706 and presently 706 (in civil cases) to become 707.	This has been requested by many trial judges
MISC. TRCE	3RD0521-531	By: Doris Stella Ramirez * Rule limiting compensation paid to expert witnesses	Full Supreme Court Advisory Committee voted against this. No new rule.	

MISC. TRCE	3RD0532-545	By: Robert M. Martin, Jr. * Recommendation for rule following Federal Evidence Rule 706	Same recommendation as first item recommended by Justice Hecht	
503	3RD0546	By: Paul Gold *Attorney-client privilege - National Tank	SCAC previously voted to make no change and at the March 7, 1997 meeting it was again voted to make no change	
509	3RD0547-554	By: Chairman Luke Soules *Physician-patient privilege as to dentist	On November 15, 1996, SCAC voted to make no change	
702	3RD0555	By: Michael T. Gallagher *Rule and procedure with regard to Dupont v. Robinson matters	SCAC voted to take no action because this matter is being studied by the Family Law Council, as well as by the State Bar Evidence Committee	
702	3RD0556-579	By: Richard Orsinger, Mark Sales, J., Lindsey Short, Jr.	Same as above request by Gallagher	
1009	3RD0580-590	By: Chairman Luke Soules	Rule approved on November 15, 1996, as attached hereto	

1009	3RD0591-601	By: Chairman Luke Soules	Same as above by Chairman Luke Soules	
706 (New) Change 706 (audit in civil cases) to 707		Referred by SCAC at March meeting - Determine whether the court can appoint experts to help the court only for Robinson hearing or to help the court generally or to be called as a witness. Consider patterning after Federal Rule 706 (Court Appointed Experts)	Rule should allow appointment of expert to assist the court in Daubert and Robinson hearings - rule attached *Note: State Bar Evidence Subcommittee voted to adopt no rule on this. Full State Bar Committee voted 9 to 6 to table this	Many trial judges are asking for this help and it would be of great assistance to the court
705 - CIV & CRIM		Referred by SCAC at March meeting - Whether Civil Rule 705 should read like Criminal Rule 705 of Texas	Civil Rule 705 should be exactly the same as Criminal Rule 705 *Note: Attached is modified version of criminal rule which was recommended by State Bar Evidence Committee	Allows balancing by the trial judge and is more constructive than the Federal Rule or the existing Civil State Rule

106 and 107		Referred by State Bar Evidence Committee	Leave rules the same but in comment to Rule 106 reference to "Tex. Code Crim. Proc. Art. 38.24" should be changed to "Rule 107" *Copy attached	1986 Art. 38.24 became Criminal Rule 107
202 and 204		Referred by State Bar Evidence Committee	Provide for mandatory judicial notice upon motion of a party if other requirements of rules are satisfied *Copy attached	Consistency with regard to judicial notice
410		Referred by State Bar Evidence Committee	Last sentence beginning with "However" should be new paragraph	Last sentence should apply to entire rule rather than just (4)
504		Referred by State Bar Evidence Committee - provide for same exceptions as contained in Section 38.10 of Code of Criminal Procedure	Take no action	We have already voted on this and the action is consistent with recommendation of State Bar Evidence Committee
509 and 510		Referred by State Bar Evidence Committee - housekeeping changes *Copy of recommended change is attached	Make these housekeeping changes	To cite correct authorities

513(d)		Referred by State Bar Evidence Committee	Paragraph (d) should apply to both civil and criminal cases *Proposed amendment attached	Current trend is to allow such instructions in civil cases
802		Referred by State Bar Evidence Committee - whether to make hearsay "no evidence" as in federal court	Make no change *Full State Bar Evidence Committee voted 18 to 0 to make no change *Copy of rule attached	Omitting last sentence in 802 would indicate return to previous civil case view that inadmissible hearsay without objection had no probative value
702		Referred by State Bar Evidence Committee	Supreme Court Advisory Committee took no action on this awaiting further study as indicated in prior reports *Copy of proposal of State Bar Evidence Committee attached	Waiting on further studies by Family Law Council

RULE 706. EXPERTS APPOINTED TO ASSIST THE COURT

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why an expert witness should not be appointed to assist the court in [performing its gate-keeping function with respect to expert testimony/ruling on a Rule 702 objection]*, and may request the parties to submit nominations. The court may appoint an expert witness agreed upon by the parties, and may appoint an expert witness of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk. A witness so appointed shall advise the parties and the court of the witness' findings in writing. The witness' deposition may not be taken by any party nor may any party have any contact or communication with the witness except to the extent allowed herein, nor may the witness be called to testify at trial or any hearing by the court or any party.

(b) **Compensation.** An expert witness so appointed is entitled to reasonable compensation in whatever sum the court may authorize in the exercise of its discretion. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of Appointment and Findings.** The fact that the court appointed the expert witness and the witness' findings shall not be disclosed to a jury in that or any other litigation. The witness' findings shall not be a part of the record for any purpose other than review of a court's order [in performing its gate-keeping function with respect to expert testimony/on a Rule 702 objection].**

(d) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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* Alternate ways of describing a Robinson v. duPont hearing.
** Alternate ways of describing a Robinson v. duPont hearing.

RULE 706. ~~COURT APPOINTED~~ EXPERTS APPOINTED TO ASSIST THE COURT

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** Alternate ways of describing a *Robinson v. duPont* hearing.

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendment

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

Rule 706. Court Appointed Experts

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat.1938; Mar. 2, 1987, eff. Oct. 1, 1987.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir.1962); *Danville Tobacco Assn. v. Bryant-Buckner Associates*, Inc., 333 F.2d 202 (4th Cir.1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore § 563, 9 *id.* § 2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§ 730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, § 215(d); Burns Indiana Stats.1956, § 9–1702; Wisconsin Stats.Annot.1958, § 957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Note to Subdivision (a). Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

FINAL REDRAFT

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 further 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 then 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.

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 shall, upon request, 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 expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(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 the 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: This rule does not preclude a party in any case from conducting a voir dire examination into the qualifications of an expert or into the bases of the expert's opinion under Rule 703. This rule does not preclude the application of Rule 403.[1]

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[1]The prior Criminal Evidence Rule comment provided, "This rule does not preclude a party from conducting a voir dire examination into the qualifications of an expert."

receive no more than "nominal punishment." Fuller v. State (App. 3 Dist.1991) 819 S.W.2d 254, review refused.

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 his reasons therefore 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, subject to subparagraphs (b) through (d).

(b) **Voir dire.** Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, 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 expert does not have a sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(d) **Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment—1986

This rule does not preclude a party from conducting a voir dire examination into the qualifications of an expert.

Library References

Tex.Prac., Texas Rules of Evidence: Civil and Criminal, § 705.1 et seq.

Notes of Decisions

1. Test results

Report prepared by chemists in medical examiner's crime lab was inadmissible under hearsay rule excluding public records setting forth matters observed by law enforcement personnel; chemists were not available to testify, and medical examiner's crime lab functioned primarily as adjunct to investigative and evi-

embraces an ultimate issue to be decided by the trier of fact.

Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361, 365 (Tex.1987). "Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." An expert may testify that conduct constituted "negligence" and "gross negligence," and that certain acts were "proximate causes" of the plaintiff's injuries.

Louder v. De Leon, 754 S.W.2d 148, 148-49 (Tex.1988). "Recently in *Birchfield*, we adhered to the plain language of [TRCE 704] to hold that the testimony by the expert in that case on proximate cause was admissible. In so doing, we put to rest the difficult and confusing disputes over whether or not an expert opinion concerns an ultimate fact. [¶] Jurors ... may accept or reject an expert's view."

Puente v. A.S.I. Signs, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied). TRCE 704 does not permit "an expert to give an opinion or state a legal conclusion regarding a question of law. Such questions are not 'an ultimate issue to be decided by the trier of fact.' Questions on duty are for the court. [¶] If the plaintiff seeks to establish that a duty exists, this may be accomplished through expert testimony; however, the expert must articulate the underlying factual basis of the conclusion that a duty exists."

History of TRCE 704: Adopted eff. Sept. 1, 1983 by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 704.

TRCE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give his 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.

First Southwest Lloyds Ins. Co. v. MacDowell, 769 S.W.2d 954, 958 (Tex.App.—Texarkana 1989, writ denied). "[T]he use of the permissive word *may* in indicating that the expert 'may in any event disclose ... the underlying facts or data' does not indicate an absolute right of the expert to disclose all of the facts and underlying data under all circumstances. We conclude that the better judicial position is to not allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies."

See TRCP 172.

History of TRCE 705: Amended eff. Nov. 1, 1984 by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii): Added "disclose on direct examination, or" and "on cross-examination" to last sentence. Adopted eff. Sept. 1, 1983 by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 705.

TRCE 706. AUDIT

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas 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.

Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex.App.—Houston [14th Dist.] 1987, writ denied). "The audit report before this court contains no such affidavit as is required by [TRCP] 172.... Further, 6 days before trial Sabine filed an objection to the audit. Therefore, the trial court did not err in admitting evidence that contradicted and supplemented the auditor's report."

History of TRCE 706: Adopted eff. Jan. 1, 1983 by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xcvii): To conform to TRCP 172. Source: New rule.

ARTICLE VIII. HEARSAY

TRCE 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 him 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

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The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co. v. Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling v. L. H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedure § 60–456(d); New Jersey Evidence Rule 56(3).

HISTORICAL NOTES

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

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The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners' on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data * * *."

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Note to Subdivision (b). Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§ 730–731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Note to Subdivision (c). Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Note to Subdivision (d). Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

1987 Amendment

The amendments are technical. No substantive change is intended.

ARTICLE VIII. HEARSAY

ADVISORY COMMITTEE NOTES
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Introductory Note; The Hearsay Problem. The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L.Rev. 177 (1948), Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination—A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa. L.Rev. 484, 485 (1937), Selected Writings, *supra*, 756, 757; Weinstein, Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo–American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 495–496, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A.J. 580 (1961), quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo–American system. 5 Wigmore § 1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination." Compare the treatment of declarations of available declarants in Rule 801(d)(1) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no quid pro quo in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass.Gen.L.1932, c. 233, § 65, and in the English act of 1938, St.1938, c. 28, Evidence. Both are limited to civil

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 required through discovery or by the court. 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 disclosing the underlying facts or data, a party against whom the opinion is offered shall, ~~in a criminal case, or may, in a civil case~~ upon request, 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 expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.~~

~~(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 the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.~~

Notes and Comments

This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert or into the basis of the expert's opinion under Rule 703. This rules does not preclude the application of Rule 403, nor does this Rule preclude the application of Rule 105.[10]

[10]The Prior Criminal Evidence Rules comment provided "This rule does not preclude a party from conducting a *voir dire* examination into the qualifications of an expert."

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.

Notes and Comments

This rule is the federal rule with one modification. Under the federal rule, a party may require an opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party, rather than the opponent, to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the party's own case. Cf. Tex. R. Evid. 107. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirements. See also Tex. R. Evid. 611(a).

(b) 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 there of 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.

Notes and Comments

This rule is the federal rule with one modification. Under the federal rule, a party may require an opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party, rather than the opponent, to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the party's own case. *Cf.* ~~Tex. Code Crim. Proc. art. 38.24.~~ Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirements. *See also* Tex. R. Evid. 611(a).

Tex. R. Evid 107,

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

This rule is the former Rule 107, Tex. R. Crim. Evid., except that the example regarding "when a letter is read" has been relocated so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is not so limited because it accurately reflects the common law rule of optional completeness in civil cases.

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.

Notes and Comments

This rule is not intended to alter the requirements of Sections 2002.022 and 2002.054 of the Texas Government Code.

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, ~~upon motion of a party in a criminal case may;~~ or upon the motion of a party ~~in a civil case~~ 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 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.

Notes and Comments

This rule is not intended to alter the requirements of Sections 2002.022 and 2002.054 of the Texas Government Code.

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 ~~in a criminal case or upon the motion of a party in a civil case,~~ 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.]

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 which was later withdrawn;

(2) in civil cases, a plea of nolo contendere, and in criminal cases, a plea of nolo contendere which 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 which was later withdrawn or a plea of nolo contendere, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of nolo contendere which was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or a plea of nolo contendere or which 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.[7]

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[7]The SBOT Evidence Committee has included this sentence as part of paragraph (4). It is not part of paragraph (4) in the current rules and arguably applies to paragraphs (1), (2), (3) and (4). If included as part of paragraph (4), I think it clearly only applies to paragraph (4). The SBOT Evidence Committee debated the matter and was of the opinion that the sentence was never intended to apply to paragraphs (1) through (3), but was supposed to apply only to paragraph (4).

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, negativing 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 which was later withdrawn;

(2) in civil cases, a plea of *nolo contendere,* and in criminal cases, a plea of *nolo contendere* which 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 which was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere* which was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or a plea of *nolo contendere* or which 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.[7]

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:

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[7]The SBOT Evidence Committee has included this sentence as part of paragraph (4). It is not part of paragraph (4) in the current rules and arguably applies to paragraphs (1), (2), (3) and (4). If included as part of paragraph (4), I think it clearly only applies to paragraph (4). The SBOT Evidence Committee debated the matter and was of the opinion that the sentence was never intended to apply to paragraphs (1) through (3), but was supposed to apply only to paragraph (4).

MEMORANDUM

TO: Administration of Rules of Evidence Committee

FROM: Ken Lewis

DATE: March 19, 1997

RE: Clean-up Revisions of Rules 509 and 510

1. The following changes need to be made to TRE 509:

(d)(7)(A) needs to now read: "the Texas Mental Health Code (Health & Safety Code §571.001 et seq., Vernon's Texas Civil Statutes);"

(d)(7)(B) needs to now read: "Persons with Mental Retardation Act (Heath & Safety Code §591.001 et seq., Vernon's Texas Civil Statutes);"

(d)(7)(C) needs to be stricken because Article 5561c has been repealed without replacement;

(d)(7)(D) needs to be renumbered as (d)(7)(C) and to now read: "Health & Safety Code §463.001 et seq. (Vernon's Texas Civil Statutes)."

(d)(8) needs to be changed by replacing all language after the phrase "as defined in" with "Health & Safety Code §§242.002-242.004 and §242.181 (Vernon's Texas Civil Statutes)."

(e)(1) needs to be changed by replacing all language referring to statutory authority with: "Texas Mental Health Code §571.001 et seq. (Vernon's Texas Civil Statutes); Persons with Mental Retardation Act (Health & Safety Code §591.001 et seq. (Vernon's Texas Civil Statutes); Health & Safety Code §463.001 et seq. (Vernon's Texas Civil Statutes); Chapter 5, Texas Probate Code; and Chapter 107, Family Code;" with the rest of rule after the statutory references continuing as is.

2. The following changes need to be made to TRE 510:

The statutory reference in (b)(4) needs to be changed to read: "Health & Safety Code §611.001 et seq. (Vernon's Texas Civil Statutes).

The statutory reference in (d)(7) needs to be changed to read: "Health & Safety Code §611.001 et seq. (Vernon's Texas Civil Statutes)"

EXHIBIT

8

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

(d) Jury Instruction. Except as provided in Rule 504(b)(2)(B) in criminal cases and in paragraph (c) of this Rule in civil cases, 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.

Criminal Rule. [1982 Liaison Committee proposal, referred to in *Federal Rules-Proposed Texas Rule Overlay: Part IV*, 45 Tex. B. J. 1049, 1051 (1982)]. We could not find any source identifying why the Texas Supreme Court eliminated this provision.

The only reported case we could find discussing this omission from the Civil Rule was **Smith v. Smith**, 720 S. W. 2d 586 (Tex. App.--Houston[1st Dist.] 1986, no writ). The court held that the trial court's refusal to give a jury instruction stating that no inference may be drawn from the assertion of the Fifth Amendment privilege did not constitute reversible error. The court noted that the Texas Rule of Civil Evidence 513 had omitted the "instruction as of right" provision from the model rule, 512. The court went on to say that the trial court has considerable discretion for deciding when certain instructions are necessary and proper and the appellants in that case had not shown an abuse of discretion. Id, at 595.[5]

In light of all the foregoing, your subcommittee recommends that Unified Rule of Evidence 513 (d) be amended to read as follows:

> (d) **Jury Instruction.** Except as provided in Rule 504 (b) (2) (B) in criminal cases and in paragraph (c) of this Rule in civil cases, 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.

The foregoing preserves the current exceptions in the present Criminal and Civil Rules--carried forward in the Unified Rules--for Husband-Wife privilege and the self-incrimination privilege. It would make an instruction a matter of right, rather than the court's discretion as held in the *Smith* case, *supra.* Your subcommittee feels that it ought to be a matter of right, upon request. It would remain true that whether to make such a request is a tactical matter for trial counsel and the effectiveness of such an instruction, like any instruction, is subject to debate. It would also remain true that the best time to deal with questions about the invocation of the privilege is at the pre-trial, motion in limine, stage rather than later when the evidence is actually admitted or even later at the stage of the court's charge. However, your subcommittee can determine no valid reason why the instruction, if requested, should be a matter of right in a criminal case but only a matter of the court's discretion in a civil case. This right is available in a number of other jurisdictions and was clearly a part of the proposed Uniform Rules. We can discern no particular reason why the Texas Supreme Court chose to omit it from the Civil Rules upon their adoption in the early '80s.

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[5]Interestingly, the court noted that Rule 513 (a) forbids "comment" on a claim of privilege and seemed to believe that an "instruction" to the jury might be such a forbidden "comment" by the court EXCEPT THAT paragraph (c) allows "comment" on the invocation of the Fifth Amendment privilege in a civil case. Because of our recommendation, your subcommittee has NOT exhaustively researched whether an "instruction" by a court, absent a request from the affected party, is generally held to be an improper "comment" by the court. It is an interesting question but, logically, any request by the affected party should moot the question.

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 a character trait ~~of the person's character~~ 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)(B), 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.** In criminal cases, except as provided in Rule 504(b)(2)(B) 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.

expression and so is a s .ement. The matter asserted is that X ent north because that is implied from the statement, and the probative value of the statement offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

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.

EXHIBIT NUMBER ONE

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.

Notes and Comments

An expert opinion derived from scientific, technical, or other specialized knowledge will not assist the trier of fact to understand the evidence or to determine a fact in issue unless the opinion is relevant to a material issue and is based upon foundation knowledge shown to be, or known to be, reliable. In making the determination of admissibility of an expert opinion, the court, pursuant to Rule 104(a), can obtain guidance by considering each of the following factors whenever that factor is substantially significant in determining whether the opinion is based upon a foundation sufficiently reliable to be of assistance to the trier of fact: (1) general acceptance of the theory and technique by the relevant scientific or technical community;[6] (2) the expert's qualifications;[7] (3) the existence of literature supporting or rejecting the theory or technique; (4) the potential rate of error of the theory or technique; (5) the availability of other experts to test and evaluate the theory and technique, and the making or publishing of tests or evaluations; (6) the clarity with which the theory or technique can be explained in the trial court; (7) non-judicial uses that have been made of the theory or technique; and (8) the experience and skill of the person who applied the theory or technique on the occasion in question.[8]

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6 Editor's temporary footnote: "[S]cientific evidence may be shown reliable even though not yet generally accepted in the relevant scientific community." *Kelly v. State*, 824 S.W.2d 568, 572 (Tex.Cr.App. 1992) (en banc).

7 Editor's temporary footnote: See *United Blood Services v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997) ("The burden of establishing an expert's qualifications is on the offering party.").

8 Editor's temporary footnote: One or two members of the sub-committee believe the list should be limited to those found in *Robinson*. Another member, while agreeing that Rule 702 should not be amended, would prefer not to add a comment but nevertheless accepts this proposed Comment if one is to be added. It seems, however, that any Comment to the Unified Evidence Rules necessarily requires consideration of the factors found in *Kelly* as well as in *Robinson*. The lists of factors in *Kelly* and in *Robinson* are not the same.

The role of the trial court is not to determine the validity or accuracy of the opinions formed by the expert, but to determine admissibility of the opinions.[9] The reliability inquiry necessarily is a flexible one. While there is no definitive or exclusive list of factors to be considered in determining reliability, the above list is particularly pertinent to admissibility of opinions based on natural science. When a court is determining whether there is a sufficiently reliable foundation for an opinion derived from social or political sciences, technical knowledge, or other specialized knowledge, one or more of the listed factors may not be sufficiently significant to be pertinent to admissibility, while extensive personal experience may be particularly significant.

The opinion of an expert offered under Rule 702 must be relevant under Rules 401 and 402, and must be admissible under Rule 403. In addition, the opinion will not be admissible if it will not assist the trier of fact due to its underlying foundation lacking the reliability necessary to avoid misleading the jury and confusing issues.

The trial court's determination of admissibility should be made outside the presence of the jury and should be made at a preliminary hearing well in advance of trial whenever possible. The court's decision on admissibility rests within the discretion[10] of the trial court.

Clearly, the factors listed in the three key cases as being relevant to reliability are not intended to be, and logically cannot be, exclusive.

9 Editor's temporary footnote: See *Robinson*, 923 S.W.2d at 557: "As the Supreme Court noted in *Daubert*, Rule 702 envisions a flexible inquiry focusing solely on the underlying principles and methodology, not on the conclusions they generate."

10 Editor's temporary footnote: See, *e.g.*, *United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997) (reversing, because "the court of appeals improperly substituted its opinion for that of the trial court's"); *America West Airlines, Inc. v. Tope*, 935 S.W.2d 908, 912 (Tex.App.—El Paso 1996) ("Plaintiff's cross-point involves the exclusion of expert testimony, which we review for abuse of discretion. *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 558 (Tex.1995)"); *In Interest of A.V.*, 849 S.W.2d 393, 397 (Tex.App.—Ft. Worth 1993) (involving the novel scientific basis of penile plethysmograph) ("The trial court's decision regarding the qualification of an expert will only be disturbed upon a finding that the court abused its discretion.").

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Attorneys and Counselors

April 24, 1997

Writer's Direct Dial Number
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Other Offices
Austin
Houston

TO: All Members of the State Bar of Texas
Administration of the Rules of Evidence Committee

FROM: Mark K. Sales

RE: Meeting Minutes from April 11, 1997

Attached are the minutes from the April 11, 1997 meeting prepared by Rene Mouledoux. Please call me if you have any questions regarding them.

Also, don't forget about the meeting scheduled in Dallas on May 9 at the Belo in the Strasburger & Price Room, beginning at 10:00 a.m.

cc: Gilbert Low
Luther Soules
Honorable Lee Parsley
Laurie Baxter

THE ADMINISTRATION OF THE RULES OF EVIDENCE COMMITTEE

STATE BAR OF TEXAS

MINUTES OF COMMITTEE MEETING FRIDAY, APRIL 11, 1997

The meeting of the Administration of the Rules of Evidence Committee (AREC) was called to order at 10:00 a.m. by Vice-Chair Rene Mouledoux. 19 members (a quorum) were present. Lee Parsons of the Texas Supreme Court was also present. A list of attendees is attached as Exhibit 1. The Vice-Chair welcomed and referred all members to the Agenda (Exhibit 2) sent to all members in advance of the meeting.

SUPREME COURT UPDATE

Lee Parsons provided an update on the Texas Supreme Court actions regarding the rules of evidence. He reported that the AREC subcommittee reports had been forwarded to the Court for its consideration. A copy of the current working draft of the Supreme Court's unified rules (Exhibit 3) was distributed to all members in attendance. The proposed unified rules will be forwarded soon to the Court of Criminal Appeals for its review. The Supreme Court has set a target date of November 1, 1997 for the effective date for any rule changes. The proposed unified rules will be published in the July edition of the Texas Bar Journal for comment.

AGENDA ITEMS

A. Rules 106 and 107

Cathy Herasimchuk, Subcommittee Chair, presented the report of the subcommittee (Exhibit 4). After a brief discussion, the subcommittee's recommendation was approved by AREC by a vote of 17 "for" and no votes "against."

B. Rules 202 and 204

Rene Mouledoux, Subcommittee Chair, presented the report of the subcommittee (Exhibit 5). After a brief discussion, the subcommittee's recommendation was approved by AREC by a vote of 18 "for" and no votes "against."

C. Rule 410

Professor Guy Wellborn, Subcommittee Chair, presented the report of the subcommittee (Exhibit 6). After a brief discussion, the subcommittee's recommendation was approved by AREC by a vote of 18 "for" and no votes "against."

D. Rule 504

Christia Antolik, subcommittee member, presented the report of the subcommittee (Exhibit 7). After a brief discussion, the subcommittee's recommendation was approved by AREC by a vote of 18 "for" and no votes "against."

E. Rules 509 and 510

Ken Lewis, Subcommittee Chair, presented the report of the subcommittee (Exhibit 8). During the discussion is was determined that current subsection 509(d)(7)(D) should be deleted from the rule since the statutory provision (Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969) referenced in it has been repealed. As revised, the subcommittee recommendation was approved by AREC by a vote of 18 "for" and no votes "against."

F. Rule 513(d)

In the absence of a subcommittee member, the subcommittee report (Exhibit 9) was reviewed by the AREC as a whole. After a brief discussion, the subcommittee's recommendation was approved by AREC by a vote of 18 "for" and no votes "against."

G. Rule 705

Dean John Sutton, Subcommittee member, presented the report of the subcommittee (Exhibit 10). After much discussion, the AREC unanimously approved a revision Rule 705 as reflected in Exhibit 11. One member (Christia Antolik) dissented to the AREC's rejection of the subcommittee's recommended revision to Rule 705(a) relating to disclosure of underlying facts or data required through discovery.

AREC also approved unanimously a recommendation that the Notes and Comments to Rule 705 in the Supreme Court's working draft (Exhibit 3) be revised to delete the phrase "or into the basis of the expert's opinion under Rule 703."

H. Rule 802

Dean John Sutton, Subcommittee Chair, presented the report of the subcommittee (Exhibit 11). After a brief discussion, the subcommittee's recommendation was approved by AREC by a vote of 18 "for" and no votes "against."

I. Rule 702

Dean John Sutton, Subcommittee Chair, presented the report of the subcommittee (Exhibit 12).

Proposed Comment to Rule 702. The AREC unanimously approved the proposed comment ("Exhibit Number One" to Exhibit 12) with three slight revisions:

1. delete the phrase "to understand the evidence or to determine a fact in issue" from line two of paragraph one.

2. change the phrase "one or more" in line six of paragraph two to "some or all."

3. insert the phrase ", in a civil case," immediately before "should be made" in line two of paragraph four.

Proposed New Rule 166d of the Rules of Civil Procedure. No action was taken with respect to this recommendation.

Court Appointed Experts. The subcommittee recommended that courts not be permitted to appoint experts to assist in the admissibility of expert opinions. The AREC voted (9" for" to 6 "against) to table the recommendation to the next AREC meeting to be held in May. Mark Sales, AREC Chair, also asked the subcommittee to draft for consideration at the May AREC meeting a rule by which courts could appoint such experts.

OTHER BUSINESS

Mark Sales, AREC Chair, thanked the subcommittees for their hard work. He indicated that he would schedule the next committee meeting on May 9 or 10 in Dallas to further consider Rule 702.

The meeting concluded at 1:45 p.m.

Minutes taken by Rene J. Mouledoux

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RECOMMENDED REVISION TO RULE 705

(a) [no change]

(b) **Voir Dire.** Prior to the expert giving the expert's opinion disclosing the underlying facts, 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 Rule 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.

tre705.doc

Committee/Section Attendance Record

Committee or Section Administration of Rules of Evidence

Meeting Location Doubletree Guest Suites, 303 W. 15th **Date** 4/11/97

ARTICLE II, Sec. 14 ORGANIZATION OF THE BAR states that the Executive Director shall not approve any requests for reimbursement for travel expenses until the minutes and attendance record of the committee meeting have been forwarded to the Executive Director.

P	A	NAME PLEASE INITIAL BELOW.
		CHRISTIA PARR ANTOLIK
	X	PATRICIA MARIE CANALES
	X	RICHARD J CLARKSON
	X	JAMES E COWLES
X		WILLIAM DAVID DEADERICK W.D.D.
X		WILLIAM EARLE GRIFFEY
		RUSSELL HARDIN JR.
X		JAMES H HARP
	X	GUY NEWELL HARRISON
		CATHLEEN C. HERASIMCHUK
	X	SANDRA PARKER HOFFPAUIR
	X	ROBERT A HUTTASH
		SHERRY LYN JACKSON
		JEFFREY L. JAY
	X	GREGORY G. JONES
	X	RALPH COLE JONES
	X	WILLIAM W. KRUEGER III
X		KENNETH W. LEWIS
X		JACK W LONDON
	X	JUDGE CARLOS G. LOPEZ
	X	SHEREE LYNN MCCALL
	X	M. COLLEEN MCHUGH
		RENE J. MOULEDOUX
	X	DEAN W. FRANK NEWTON
	X	JAMES D. NORVELL
	X	JUDGE STANTON B PEMBERTON
	X	MICHAEL W PERRIN
X		FRANK MICHAEL PRINCE
X		JAMES MICHAEL RICHARDSON
		MARK K. SALES
		RICHARD D. SCHELL
		DAVID W. STARNES
		JOHN F SUTTON JR
		PROF. GUY WELLBORN

Signature

EXHIBIT 1

Committee/Section Attendance Record

Committee or Section Administration of Rules of Evidence

Meeting Location Doubletree Guest Suites, 303 W. 15th Date 4/11/97

ARTICLE II, Sec. 14 ORGANIZATION OF THE BAR states that the Executive Director shall not approve any requests for reimbursement for travel expenses until the minutes and attendance record of the committee meeting have been forwarded to the Executive Director.

P	A	NAME PLEASE INITIAL BELOW.
HRW		H. RONALD WELSH
	X	JAMES JOSHUA ZELESKEY

Signature

HUGHES & LUCE, L.L.P.

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Attorneys and Counselors

April 3, 1997

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Other Offices
Austin
Houston

TO: State Bar of Texas Administration of the Rules of Evidence All Committee Members

FROM: Mark K. Sales

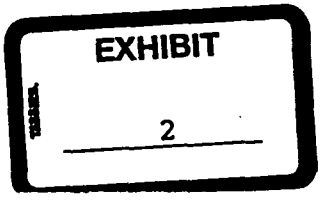
RE: Agenda for the April 11, 1997 Meeting

The Committee will hold its meeting on April 11, 1997, beginning at 10:00 a.m. at the Doubletree Guest Suites, 303 West 15th, Austin, Texas. The agenda for the meeting will be as follows:

1. Report on status of Supreme Court Advisory Committee's consideration of proposed rule changes - Mark Sales.

2. Consideration of recommendations by the subcommittees on the following rules:
   - A. Rules 106 and 107 - Cathy Herasimchuk
   - B. Rules 202 and 204 - Rene Mouledoux
   - C. Rule 410 - Prof. Guy Wellborn
   - D. Rule 504 - Carlos Lopez
   - E. Rules 509 and 510 - Ken Lewis
   - F. Rule 513(d) - Mike Prince
   - G. Rule 705 - William Krueger
   - I. Rule 802 - Dean John Sutton

I am also hopeful to circulate before the meeting a report by the subcommittee (chaired by Dean Sutton) studying changes to Rule 702 and 703 in light of the DuPont v. Robinson decision. If there any other agenda items you would like raised at the meeting, please advise me immediately.



DRAFT - ~~AUGUST 6~~ SEPTEMBER 12, 1996

PROPOSED UNIFIED "TEXAS RULES OF EVIDENCE" COMBINING PREVIOUS CIVIL AND CRIMINAL RULES

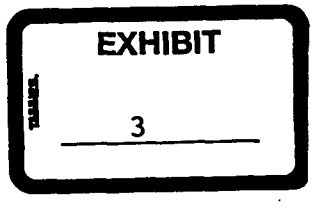


Table of Rules

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ARTICLE VI. WITNESSES

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

ARTICLE VIII. HEARSAY

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

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)[1] in all courts of Texas, except small claims courts.

(c) **Special Rules of Applicability in Criminal Proceedings.** In criminal proceedings:

(1) hierarchical government 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 of England. Where possible, inconsistency is to be removed by reasonable construction.[2]

(2) these rules apply in the following proceedings to the extent matters of evidence are not provided for in the statutes which govern procedure therein or in another court rule prescribed pursuant to statutory authority:[3]

(A) sentencing or punishment assessment by the court or the jury;

(B) probation revocation;

(C) a hearing to proceed to judgment following deferred adjudication of guilt or conditional discharge;

(D) motions to suppress confessions, or to suppress illegally obtained evidence under Texas Code of Criminal Procedure article 38.23;

(E) proceedings conducted pursuant to Texas Code of Criminal Procedure Article 11.07.

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[1]This provision is from TEX. R. CRIM. EVID. 1101(a).

[2]This provision is from TEX. R. CRIM. EVID. 101(c). Does it make more sense for this paragraph to be designated paragraph (c) entitled "Hierarchial Government in Criminal Proceedings" and to renumber current paragraph (c) as (d) "Special Rules of Applicability in Criminal Proceedings" leaving (and renumbering) current subparagraphs (2) through (5) under paragraph (d)?

[3]All of subparagraph (2) is from TEX. R. CRIM. EVID. 1101(d) except that, to follow the convention followed in the remainder of the proposed rules, the first letter in each sentence of the subparagraphs is lower case and the sentence ends with a semicolon.

(3) these rules, except with respect to privileges, do not apply in the following situations:[4]

(A) *preliminary issues of fact.* 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) *grand jury.* Proceedings before grand juries;

(C) *these miscellaneous proceedings.*

(i) application for habeas corpus in extradition, rendition, or interstate detainer proceedings;

(ii) a hearing under Texas 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;

(iii) proceedings regarding bail except hearings to deny, revoke or increase bail;

(iv) a hearing on justification for pretrial detention not involving bail;

(v) issuance of search or arrest warrant; or

(vi) Direct contempt determination.

(4) these rules with respect to privileges apply at all stages of all actions, cases, and proceedings.[5]

(5) evidence in hearings under the Texas Code of Military Justice, article 5788, shall be governed by that Code.[6]

---

[4]All of subparagraph (3) is from TEX. R. CRIM. EVID. 1101(c), except that the same conventions on capitalization and punctuation referenced in fn. 3 are also followed here.

In addition, this is the only instance of paragraph titles at this third level in the proposed rules and of italics being used at this third level. They are left this way because italicized and titled in the prior Criminal Rule 1101(c). Should we recommend deletion of the titles altogether? Deleting the titles is really a matter for the Court of Criminal Appeals.

[5]This provision is from TEX. R. CRIM. EVID. 1101(b).

[6]This provision is from TEX. R. CRIM. EVID. 1101(e).

Notes and Comments

"Criminal proceedings" rather than "criminal cases" is used since that is the terminology in the prior criminal rules of evidence. In subpart (b), "trials before magistrates" comes from prior Criminal Rule 1101b. In the prior criminal rules, both Rule 101 and Rule 1101 dealt with the same thing, viz, the applicability of the rules. Thus, Rule 101(c) has been written to combine them and eliminate Rule 1101. Unlike the prior criminal rules, there is no "Art. XII, Miscellaneous Provisions."

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 additionally in criminal cases 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 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 criminal cases, 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

This rule is not meant to change the harmless error doctrines in Texas civil or criminal cases as specified in the Texas Rules of Appellate Procedure. No substantive change in the law is intended.

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 criminal cases, hearings on the admissibility of confessions shall in all cases 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 when an accused who is a witness in a criminal case 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) 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) 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 there of 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.

Notes and Comments

This rule is the federal rule with one modification. Under the federal rule, a party may require an opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party, rather than the opponent, to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the party's own case. *Cf.* Tex. Code Crim. Proc. art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirements. *See also* Tex. R. Evid. 611(a).

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

This rule is the former Rule 107, Tex. R. Crim. Evid., except that the example regarding "when a letter is read" has been relocated so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is not so limited 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, upon motion of a party in a criminal case may, or upon the motion of a party in a civil case 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.

Notes and Comments

This rule is not intended to alter the requirements of Sections 2002.022 and 2002.054 of the Texas Government Code.

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 in a criminal case or upon the motion of a party in a civil case, 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 conformity therewith on a particular occasion, except:

(1) *Character of Accused in a Criminal Case and of a Party Accused in a Civil Case of Conduct Involving Moral Turpitude.* 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 of Alleged Victim of Assaultive Conduct in a Civil Case.* 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.

(c) **Character Relevant to Punishment in Criminal Cases.** In the penalty phase of a criminal trial, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of ~~his~~ **the accused's** character may be offered by an accused or by the prosecution. Nothing herein limits the provisions of Article 37.071, Code of Criminal Procedure.

RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation or Opinion.** In all cases in which evidence of a person's character or character trait ~~of a person~~ 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 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 ~~of a person~~ 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, negativing 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 which was later withdrawn;

(2) in civil cases, a plea of *nolo contendere,* and in criminal cases, a plea of *nolo contendere* which 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 which was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere* which was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which ~~do~~ **does** not result in a plea of guilty or a plea of *nolo contendere* or which ~~do result~~ **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.[7]

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:

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[7]The SBOT Evidence Committee has included this sentence as part of paragraph (4). It is not part of paragraph (4) in the current rules and arguably applies to paragraphs (1), (2), (3) and (4). If included as part of paragraph (4), I think it clearly only applies to paragraph (4). The SBOT Evidence Committee debated the matter and was of the opinion that the sentence was never intended to apply to paragraphs (1) through (3), but was supposed to apply only to paragraph (4).

(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.

Notes and Comments

Section (e) relating to the admissibility of evidence of promiscuous conduct of a child 14 years old or older has been deleted since the 1994 Texas Penal Code eliminated the former defense of promiscuity of a child.

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 a client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of 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) **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:

(1) between the client or a representative of the client and the **client's** lawyer or a representative of the lawyer,

(2) between the lawyer and the lawyer's representative;

(3) 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 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;

(4) between representatives of the client or between the client and a representative of the client;

(5) among lawyers and their representatives representing the same client; or

(6) 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.

Notes and Comments

This rule contains the language used in both the prior civil and prior criminal rules. Court decisions, both before and after the adoption of the Tex. R. Crim. Evid. in 1986, indicate that the scope of the lawyer-client privilege is the same in civil and criminal cases. *See, e.g., Ballew v. State*, 640 S.W.2d 237 (Tex. Cr. App. 1980) and *Manning v. State*, 766 S.W.2d 551 (Tex. App. -- Dallas 1989), *aff'd.*, 773 S.W.2d 568 (Tex. Crim. App. 1989). To avoid confusion, the vestigial language of the last sentence of the prior Criminal Rule 503(b) is omitted.

This rule governs only the lawyer-client privilege. It does not restrict the scope of the work product doctrine. *See* Tex. R. Civ. P. 166b. The language of former paragraph (d) was deleted because it was deemed unnecessary. This deletion was not intended to change the common law rule that communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer/client relationship.

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) **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.

(b) **General Rules.**

(1) *Confidential Communication 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.

(2) *Privilege Not to Testify in Criminal Cases.* In criminal cases:

(A) 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).

(B) 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.

(c) **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 is presumed. 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.

(d) **Exceptions to the Confidential Communication Privilege.** There is no confidential communication privilege:

(1) *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.

(2) *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.

(3) *Commitment or Similar Proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(4) *Proceeding to Establish Competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions to the Privilege Not to Testify in Criminal Cases.** The privilege of a person's spouse not be called as a witness for the state does not apply:

(1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or

(2) as to matters occurring prior to the marriage.

Notes and Comments

The present rule eliminates the spousal testimonial privilege for prosecutions in which the spouse is the alleged victim of a crime by the spouse. This is intended to be consistent with Article 38.10 of the Code of Criminal Procedure, 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 assist 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 ~~judge~~ 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 (Vernon Supp. 1984).

(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. ~~4526~~ 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);

[8](6) when the disclosure is relevant in any suit affecting the parent-child relationship;

(7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under

(A) the Texas Mental Health Code, TEX. REV. CIV. STAT. art. 5547-1 *et seq.*;

(B) the Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. art. 5547-300;

(C) Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (TEX. REV. CIV. STAT. art. 5561c);

(D) Section 2, Chapter ~~643~~ 543, Acts of the 61st Legislature, Regular Session, 1969 (TEX. REV. CIV. STAT. art. 5561c-1);

(8) 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 Sec. 1, Ch. 684, Acts of the 67th Legislature, Regular Session, 1981 (TEX. REV. CIV. STAT. art. 4442c, Sec. 2).

(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. REV. CIV. STAT. art. 5547-1 *et seq.*); the Mentally Retarded Persons Act of 1977 (TEX. REV. CIV. STAT. art. 5547-300); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (TEX. REV. CIV. STAT. art. 5561c); Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (TEX. REV. CIV. STAT. art. 5561c-1); Chapter 5, Texas Probate Code;

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[8]The Supreme Court Advisory Committee in 1996 recommended deletion of subparagraph (e)(6) from the prior TEX. R. CIV. EVID. 509(e)(6).

and Chapter 11, Family Code; 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

This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. art 4495b, Sec. 5.08. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule.

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).

(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 **administrative or** court 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;

[9](6) ~~when the disclosure is relevant in any suit affecting the parent-child relationship; or~~

~~(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. REV. CIV. STAT. art. 4442c, Sec. 2 (Vernon Supp. 1984).

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. REV. CIV. STAT. art. 5561h (Vernon Supp. 1984).

[9]The Supreme Court Advisory Committee in 1996 recommended deletion of subparagraph (d)(6) from the prior TEX. R. CIV. EVID. 510(d)(6).

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 a **character** trait ~~of the person's character~~ 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)(B), 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.** In criminal cases, except as provided in Rule 504(b)(2)(B) 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.

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.

Notes and Comments

See Rule 183, Texas Rules of Civil Procedure, regarding appointment and compensation of interpreters.

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. 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 course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify in a civil case whether any outside influence was improperly brought to bear upon any juror, and in a criminal case as to any matter relevant to the validity of the verdict or indictment. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

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 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 (10) 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 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

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that the witness' character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. 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

The purpose of the 1988 amendment is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification ordinarily is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the cross-examination of a party by the party's own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

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.

(g) **Applicability.** This rule applies only in criminal cases.

Notes and Comments

This is verbatim from prior Texas Criminal Rule of Evidence 614, except for the title and subparagraph (g) to make clear it only applies to criminal cases.

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

Regarding the 1990 change by the Texas Supreme Court: This amendment conforms this rule of evidence to the civil rules of discovery in utilizing the term "reviewed by the expert." *See also* comment paragraph with Notes and Comments to TEX. R. CIV. PRO. 166b. While terminology is conformed between prior Civil and Criminal Rules 703, there is no change intended in meaning. The language in the prior criminal rule was "made known to" the expert. "Reviewed by" and "made known" to the expert should be interpreted the same in any given fact situation. "Perceived by or made known to" is uniform with the federal rule.

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) **Special Rules in Criminal Cases.**

(1) *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 shall, upon request, 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.

(2) *Admissibility of Opinion.* If the court determines that the expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(3) *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 the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert or into the bases of the expert's opinion under Rule 703. This rule does not preclude the application of Rule 403.[10]

RULE 706. AUDIT IN CIVIL CASES

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas 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.

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[10]The prior Criminal Evidence Rule comment provided "This rule does not preclude a party from conducting a *voir dire* examination into the qualifications of an expert."

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 Article 38.071 of the Texas Code of Criminal Procedure.

(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 Texas Rule of Civil Procedure 207. Unavailability of deponent is not a requirement for admissibility.

Notes and Comments

Comment: The definitions in Rule 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct. These are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration: Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The ~~testimony is to~~ witness is testifying concerning a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: In a rape prosecution to prove that Richard, the defendant was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct was intended by the declarant as a substitute for verbal

expression and so is a statement. The matter asserted is that X went north because that is implied from the statement, and the probative value of the statement offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

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 presented 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.** Statement 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 an 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.

Notes and Comments

Comment on Paragraph (6): This provision rejects the doctrine of *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty."

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 wrong-doing of the proponent of his 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 Texas 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 21a, Texas Rules of Civil Procedure, 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.
(Amended Nov. 10, 1986, eff. Jan. 1, 1988.)

Notes and Comments

Paragraph (10) is based on portions of the affidavit authentication provisions of TEX. REV. CIV. STAT. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-ray, hospital records, or any other kind of regularly kept medical record.

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 ~~LANGUAGES~~ LANGUAGE RECORDS

(a) **Translation, Affidavit, and Filing.** An accurate translation of a foreign language record or set of records or photographically reproduced copies of such records which would otherwise be admissible shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records.

In civil cases, such affidavit, translation, and the record or records in the foreign language ~~translated~~ shall be promptly served upon all parties at least sixty days prior to the day upon which the trial of said cause commences.

In criminal cases, such affidavit, translation, and the record or records in the foreign language shall be 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 thirty days prior to the day upon which trial of said cause commences, and the other parties to said cause shall be given prompt notice by the party filing the foreign language records and their translation.

(b) **Objections.** Any party may object to the accuracy of the translation.

In civil cases, an objection shall be served upon all parties thirty days prior to the commencement of the trial. The objection shall point out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

In criminal cases, an objection shall be filed with the court at least ten days prior to the commencement of trial, pointing out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

(c) **Admissibility and Failure to Object.** In a civil case, if no objection is timely served, or if no conflicting translation has been timely served in accordance with paragraph (a), the court shall admit a translation submitted under paragraph (a) without further need of proof provided that the underlying records are otherwise admissible under the Texas Rules of ~~Civil~~ Evidence. The time limits set forth herein may be varied by order of the court. Failure to serve a conflicting translation in accordance with paragraph (a) or failure to timely and properly object to the accuracy of a translation in accordance with paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation.

In a criminal case, if no objection is timely filed or if an objection is made and the trial judge after notice to all parties and a hearing has determined ~~pursuant to Tex.R.Crim.Evid. 107(a),~~ that the translation is accurate, the court shall admit that translation without further need of proof at trial if the foreign language record is otherwise admissible under the Texas Rules of ~~Criminal~~ Evidence. The time limits set forth herein may be varied by order of the court.

(d) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony of a qualified translator as an expert. In a civil case, the testimony may be either live or by deposition.

(e) **Court Appointment.** The court may when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

(f) **Objections or Conflicting Translations. When there are either conflicting translations filed by more than one party under subparagraph (a) OR objection(s) to another party's translation filed under subparagraph (b), nothing in this rule requires or precludes the automatic admission into evidence of the conflicting translations OR requires that the issue of the correctness of a translation is an issue for the finder of fact rather than the court or for the court rather than the finder of fact.**

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February 27, 1997

Mr. Mark Sales
Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201

RE: Administration of the Rules of Evidence Committee
Subcommittee Report on Rules 106 & 107

Dear Mark:

Our subcommittee on Rules 106 & 107, composed of Dean John Sutton, Professor Guy Wellborn, Mr. Robert Huttash, and myself have concluded that the Proposed Unified Rules 106 & 107 should remain exactly as they are. These rules accurately reflect the Texas common law as well as present law under the Civil and Criminal Rules of Evidence. The rules should remain separate so that practitioners can more easily understand that the rules deal with two separate, though related, concepts. The only recommendation we would make is that, in the Comment to Rule 106, the reference to "Tex. Code Crim. Proc. Art. 38.24" be changed to "Rule 107" since article 38.24 was deleted in 1986 when the criminal rules went into effect. Criminal Rule 107 carried forward the wording and meaning of that article and thus the comment is more appropriately addressed to the rule rather than the former article.

The subcommittee held a telephone conference this morning and agreed that Dean John Sutton's position outlined in his attached letter of February 23, 1997, accurately reflected the thoughts of all of us and the issues that I had posed in my December 10, 1996 letter which is also attached.

We look forward to the next meeting of the full committee on April 11th.

Very Truly Yours,

Cathy Herasimchuk

EXHIBIT
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TEXAS STATE BAR
ADMINISTRATION OF THE RULES OF EVIDENCE COMMITTEE

TRE 202 AND 204 SUBCOMMITTEE REPORT

Subcommittee Members:

Rene Mouledoux - Chair
Sherry Jackson
James Harp

Issue:

Whether, under Rules 202 and 204, the Court should have the duty to take judicial notice on its own, or mandatorily upon the motion of either party, in both civil and criminal matters.

Short Answer:

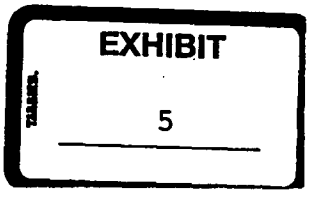
The Subcommittee recommends that Criminal Rules 202 and 204 be amended to mandate judicial notice by the Court upon motion of either party. The difference between the civil and criminal rules seems to be an historic anomaly.

Background:

Rule 202 (both Civil and Criminal) provide for 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." The civil rule and criminal rule are identical except in one material regard: upon motion of party, a civil court is required to ("shall") take judicial notice of such legal matters whereas a criminal court has discretion ("may") in taking judicial notice. The Court would have discretion to take judicial notice on its own motion under either rule.

Similarly, Rule 204 (both Civil and Criminal) provide for 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." Again, a civil court is required to ("shall") take judicial notice of such legal matters whereas a criminal court would have discretion ("may") in taking judicial notice. The Court would have discretion to take judicial notice on its own motion under either rule.

The Subcommittee has attempted to determine the basis for the mandatory/permissive distinction in the civil and criminal versions on the Rules 202 and 204. The Subcommittee has attempted to evaluate whether such a distinction should be maintained especially in light of the move toward uniform rules of evidence for both civil and criminal proceedings.



Findings and Conclusions:

Legislative History

Civil Rule 202 was adopted in 1983 as part of the original Texas Rules of Civil Evidence. As originally adopted, Civil Rule 202 made judicial notice of the laws of other states mandatory. Rule 202 was adopted from Rule 184a of the Texas Rules of Civil Procedure, including that rule's mandatory language. The rule became effective September 1, 1983.

On June 25, 1984, Civil Rule 202 was amended to replace the mandatory language with permissive language. At the same time, Civil Rule 204 was adopted with the same permissive language. Both rules became effective on November 1, 1984. [The rationale for this change could not be determined.]

In 1986, the Texas Criminal Rules of Evidence were promulgated. The Texas Rules of Civil Evidence were used as a drafting guide on those subjects where there was no federal criminal rule of evidence on point. Accordingly, the then "permissive" versions of Texas Civil Rules 202 and 204 were adopted as Texas Criminal Rules 202 and 204 effective September 1, 1986.

November 10, 1986, amendments were adopted to the Texas Rules of Civil Evidence (including Civil Rules 202 and 204) with an effective date of January 1, 1988. Civil Rules 202 and 204 were amended to return to the original mandatory language that exists today. The rationale for the return to the mandatory language was to make Civil Rules 202 and 204 consistent with Civil Rule 201(d) which made judicial notice of facts mandatory upon motion of a party. Houston Law Review, *Texas Rules of Evidence Handbook Supplement* (1987).

There have been no additional amendments to Civil or Criminal Rules 202 and 204.

Other Judicial Notice Rules

Both Civil Rule 201(d) and Criminal Rule 201(d) require the Court to take judicial notice of a fact if requested by a party and supplied with the necessary information.

There is significant distinction between Civil Rule 201 (g) and Criminal Rule 201(g) regarding the judicial notice of adjudicative facts. In a civil case, the Court is required to instruct the jury that it shall accept as conclusive any fact judicially noticed. In a criminal case, the Court is required to instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. [This distinction does not support the civil-criminal distinction in Rules 202 and 204 because a jury is not free to disregard the law as instructed by the Court.]

Other Input

The Subcommittee contacted Dean John Sutton to see if he had any insight on the differences between the civil and criminal rules on judicial notice. Dean Sutton saw no basis for the differences and he would support a uniform mandatory approach to judicial notice on the legal matters covered by Rules 202 and 204.

A few criminal defense attorneys were contacted by Sherry Jackson. Judge Jackson reported that these attorneys would favor mandatory judicial notice under the criminal rules.

Conclusion

The differences between the civil and criminal versions of Rules 202 and 204 appear to be an historical anomaly arising from the 1988 amendments to the civil rules only.

There is a logical inconsistency in the criminal rules on judicial notice. Criminal Rule 201(d) mandates judicial notice of facts - which are the province of the jury - while Criminal Rules 202 and 204 do not require judicial notice of the law - which is the province of the Court. The same inconsistency led to the 1988 amendments to the Civil Rules 202 and 204.

Consistency and uniformity would be served by amending the Criminal Rules 202 and 204 to mandate judicial notice upon motion of a party.

Recommendation:

The Subcommittee recommends that Criminal Rules 202 and 204 be amended to provide mandatory judicial notice upon motion of a party if all other requirements of these rules are satisfied.

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February 18, 1997

Mark K. Sales
Hughes & Luce
1717 Main St. Suite 2800
Dallas, TX 75201-7342

Dear Mark:

I write as chair of a subcommittee of the Administration of the Rules of Evidence Committee, which was asked to address the question whether the last sentence of Rule 410 does, or should, apply only to Section 4 of that rule. William Krueger was also appointed to this subcommittee, and he and I have conferred on the issue.

The answer to the question presented is no; the last sentence of Rule 410 should apply to all sections of the rule. Accordingly, the criminal rule should be amended to conform to the civil and federal rules in the formatting of the last sentence.

I enclose a copy of Section 410.4 of 1 Goode, Wellborn & Sharlot, Guide to the Texas Rules of Evidence: Civil and Criminal (2nd Ed. 1993), which addresses this issue. See particularly footnote 4 and the accompanying text, where the authors (in this instance Professor Goode) indicate that the present form of the criminal rule is the result of a typographical error.

If you have any questions about this matter, please do not hesitate to give me a call; my direct number is (512) 471-1143.

Very truly yours,

Olin G. Wellborn III
William C. Liedtke, Sr. Professor of Law

cc: William W. Krueger III

EXHIBIT
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Background

The State Bar of Texas Committee on the Administration of the Rules of Evidence established a Sub-committee to explore certain issues related to a "unified" Rule of Evidence 504 (hereinafter "the Sub-committee").

Current version of a proposed "unified" Rule 504[1]

Rule 504. Husband-Wife Privilege

(a) **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.

(b) **General Rules.**

(1) *Confidential communication 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.

(2) *Privilege not to testify in criminal cases.* In criminal cases:

(A) 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).

(B) 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.

(c) **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. 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.

(d) **Exceptions to the Confidential Communication Privilege.**

There is no confidential communication privilege:

EXHIBIT

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[1]Previously adopted by this Administration of the Rules of Evidence Committee ("ARE") of the State Bar of Texas and approved by the Supreme Court Advisory Committee ("SAC") in November, 1996. It was forwarded in this form to the Texas Supreme Court as part of the **PROPOSED UNIFIED "TEXAS RULES OF EVIDENCE" COMBINING PREVIOUS CIVIL AND CRIMINAL RULES** on January 24, 1997.

(1) *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.

(2) *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.

(3) *Certain criminal offenses.* In a proceeding in which the accused is charged with a crime against the person of the spouse, any minor child or any member of the household of either spouse.

(4) *Commitment or similar proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(5) *Proceeding to establish competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions.** The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

Issues

A. The Sub-committee was asked to opine whether Rule 504 should contain the same exceptions to "confidential communications" as are found in Section 38.10 of the Code of Criminal Procedure.

B. The Sub-committee was also asked to study whether the exceptions to the privilege contained in Criminal Rule 504(1)(d)(2), regarding crimes against a minor child, should also be applied in civil cases.

Discussion

A. Section 38.10 of the Code of Criminal Procedure (effective Sep. 1, 1995) states that "[t]he privilege of a person's spouse not to be called as a witness for the state does not apply in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse." The change regarding the unavailability of the spousal testimonial privilege in cases involving a crime committed against the person's spouse, has already been incorporated into Section (e) of the "unified" rule above.

The question remains, whether there is any reason not to incorporate all of these same exceptions into the portion of Rule 504 dealing with "confidential communications". An exhaustive review of the rationales for the exceptions to the confidential communication as well as spousal testimonial privileges can be found in S. Goode, O. G. Wellborn III & M.M. Sharlot, Texas Practice,

Guide To The Texas Rules of Evidence: Civil and Criminal, Volume I (hereinafter referred to as "Texas Practice, Vol. I").[2] This sub-committee agrees with the conclusion reached by the learned authors of said treatise: "Thus, it would appear that the marital communication privilege has little to commend it. Considerations of sentiment, however hoary, should not justify the rare and almost haphazard suppression of evidence that, if admitted, might vindicate the interests of the state or third party litigants."[3] In light of the authorities presented above, the Sub-committee was unable to find any logical or justifiable reason that Rule 504 should not contain the same exceptions for confidential communications as are contained in Section 38.10 of the Code of Criminal Procedure, related to spousal testimonial privilege.

B. There likewise does not appear to be any reason that the availability or not of a privilege should hinge on whether the action is a criminal or civil proceeding. The justifications for the exceptions to the confidential communications privilege contained in Criminal Rule 504(1)(d)(2), which rule has since been amended and incorporated into Section 504(d)(3) of the "unified" rule, are set out in detail in Section 504.8 (pages 389-395 and supplement) of Texas Practice, Vol. I. It would seem untenable to argue that these considerations would only be valid in criminal cases, as opposed to civil proceedings.

Conclusions

A. The Sub-committee concludes that Rule 504 should contain the same exceptions for confidential communications as are contained in Section 38.10 of the Code of Criminal Procedure, related to spousal testimonial privilege. Therefore, the Sub-committee proposes the following amendment to Section (d)(3) of "unified" Rule 504:

(3) *Certain ~~criminal~~ offenses.* In a civil or criminal proceeding in which the ~~accused~~ party is ~~charged with~~ accused of conduct which, if proved, would constitute a crime against the person of the spouse, any minor child or any member of the household of either spouse.

B. The Sub-committee is of the opinion that the exceptions to the privilege contained in former Criminal Rule 504(1)(d)(2), regarding crimes against a minor child, should also be applied in civil cases. The Sub-committee believes that the above proposed changes would also effectuate said changes.

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[2] Section 504.3 (pages 365 through 370 and supplement)

[3] Texas Practice, Vol. I, page 370

MEMORANDUM

TO: Administration of Rules of Evidence Committee

FROM: Ken Lewis

DATE: March 19, 1997

RE: Clean-up Revisions of Rules 509 and 510

1. The following changes need to be made to TRE 509:

(d)(7)(A) needs to now read: "the Texas Mental Health Code (Health & Safety Code §571.001 et seq., Vernon's Texas Civil Statutes);"

(d)(7)(B) needs to now read: "Persons with Mental Retardation Act (Heath & Safety Code §591.001 et seq., Vernon's Texas Civil Statutes);"

(d)(7)(C) needs to be stricken because Article 5561c has been repealed without replacement;

(d)(7)(D) needs to be renumbered as (d)(7)(C) and to now read: "Health & Safety Code §463.001 et seq. (Vernon's Texas Civil Statutes)."

(d)(8) needs to be changed by replacing all language after the phrase "as defined in" with "Health & Safety Code §§242.002-242.004 and §242.181 (Vernon's Texas Civil Statutes)."

(e)(1) needs to be changed by replacing all language referring to statutory authority with: "Texas Mental Health Code §571.001 et seq. (Vernon's Texas Civil Statutes); Persons with Mental Retardation Act (Health & Safety Code §591.001 et seq. (Vernon's Texas Civil Statutes); Health & Safety Code §463.001 et seq. (Vernon's Texas Civil Statutes); Chapter 5, Texas Probate Code; and Chapter 107, Family Code;" with the rest of rule after the statutory references continuing as is.

2. The following changes need to be made to TRE 510:

The statutory reference in (b)(4) needs to be changed to read: "Health & Safety Code §611.001 et seq. (Vernon's Texas Civil Statutes).

The statutory reference in (d)(7) needs to be changed to read: "Health & Safety Code §611.001 et seq. (Vernon's Texas Civil Statutes)"

EXHIBIT

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Issue: Whether Texas Rule of Criminal Evidence 513 (d) Making An Instruction on a Claim of Privilege a Matter of Right, Upon Request, Should Also Apply in Civil Cases?

Subcommittee Recommendation: Yes

Subcommittee Membership: The Honorable Carlos G. Lopez, Mike Prince

Discussion:

Current Rule 513 of the Texas Rules of Civil Evidence is as follows:

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

(a) Comment or Inference Not Permitted. The claim of 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. Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present proceeding, of the privilege against self-incrimination.

Current Rule 513 of the Texas Rules of Criminal Evidence provides:

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

(a) Comment or Inference Not Permitted. Except as provided in Rule 504(a), 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) Jury Instruction. 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.

EXHIBIT

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The current version of a proposed "unified" Rule 513[1] reads as follows:

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) (B), 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 the 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. In criminal cases, except as provided in Rule 504 (b) (2) (B) 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.[2]

Of course, there is no comparable Federal Rule of Evidence. However, in the 500 series of Federal Rules that were proposed but not adopted -- and which are still occasionally cited by federal courts as "instructive" even if not "authoritative" on privilege questions to be determined by reference to federal common law, rather than state law, of privilege -- the following was proposed:

SUPREME COURT STANDARD 513-COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

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[1] Previously adopted by this Administration of the Rules of Evidence Committee ("ARE") of the State Bar of Texas and approved by the Supreme Court Advisory Committee ("SAC") in November, 1996. It was forwarded in this form to the Texas Supreme Court as part of the **PROPOSED UNIFIED "TEXAS RULES OF EVIDENCE" COMBINING PREVIOUS CIVIL AND CRIMINAL RULES** on January 24, 1997.

[2] Proposed "unified" Rule 504 on the Husband-Wife Privilege is attached hereto. It is a combination of prior civil and criminal Rules 504. Consistent with the "unification protocol" employed by both the ARE and the SAC, where there appeared to be substantive differences between the prior civil and criminal rules, those differences were maintained in the proposed "unified" rules. For example, current Texas Rule of *Civil* Evidence 504 says nothing about a jury instruction on not drawing an adverse inference from a claim of privilege nor does it say anything about whether a party's failure to call the party's spouse as a witness, where other evidence indicates the spouse could testify to relevant matters, *is a proper subject of comment by counsel.* Both of these are parts of current Texas Rule of Criminal Evidence 504. Our subcommitte report **only addresses the question of the jury instruction.** We feel there is a similar question as to whether a party's failure to call the party's spouse as a witness in a civil case ought to be a proper subject of comment by counsel, but viewed that as beyond our mandate.

(a) Comment or inference not permitted.--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. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of the 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) Jury instruction.--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.

Subdivision (c) is in accordance with the also otherwise identical Uniform Rule 512 in providing for an instruction on behalf of a person against whom an adverse inference may be drawn. It is an entirely different question, and a matter of tactics for trial counsel, whether to ask for such an instruction and whether such an instruction, if asked for and given, is effective in doing anything other than highlighting for the jury the assertion of privilege in question.[3] However, Standard 513 and Uniform Rule 512 would make such an instruction a matter of right upon request.

Apparently, six states (Arkansas, Delaware, Idaho, New Hampshire, South Dakota and Vermont) adopted Uniform Rule 512 verbatim and thus would allow an automatic instruction upon request. Seven others (Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Wisconsin and Alaska) have rules that are substantially the same. Alabama, like Texas opted to allow such an instruction upon request in criminal cases, but makes no mention of it in the civil rule. Maine enacted a similar difference between civil and criminal cases. Hawaii adopted a rule stating that a party is entitled to an instruction and is also entitled to have no instruction given and provides for resolution by the court when there are conflicting requests for instructions. 19 other states or territories did not adopt a rule comparable to Supreme Court Standard 513, although your subcommittee did not determine the extent to which the issue of a requested instruction is dealt within those states.[4]

The authors of the Texas Rules of Evidence Handbook, Houston Law Review (1993) say, in discussing Criminal Rule 513 (c)'s provision for "instruction upon request," that " . . . Although the rule is not as explicit on the civil side, the same rationale applies in civil proceedings and thus entitles a party to such an instruction in a proper case." It appears that when the Civil Rules were first proposed, Rule 513 included a paragraph (c) identical to the paragraph (c) in the present

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[3]In fact, in Judge Lopez's experience in trials and talking to jurors is that such an instruction is almost always ineffective, and has the opposite effect--i.e., highlighting for the jurors a claim of privilege during the trial that otherwise had gone unnoticed--than that which the requesting counsel would have hoped.

[4]Your subcommittee did NOT research each and every states' iteration of Standard 513 or Uniform Rule 512 to make a count of whether the "instruction as of right" language was in them or not, nor check into those states not mentioned one way or the other in *Weinstein's Evidence,* Vol. 2, pp. 513-1 through 513-15 (1996) on this question.

Criminal Rule. [1982 Liaison Committee proposal, referred to in *Federal Rules-Proposed Texas Code Overlay: Part IV,* 45 Tex. B. J. 1049, 1051 (1982)]. We could not find any source identifying why the Texas Supreme Court eliminated this provision.

The only reported case we could find discussing this omission from the Civil Rule was **Smith v. Smith,** 720 S. W. 2d 586 (Tex. App.--Houston[1st Dist.] 1986, no writ). The court held that the trial court's refusal to give a jury instruction stating that no inference may be drawn from the assertion of the Fifth Amendment privilege did not constitute reversible error. The court noted that the Texas Rule of Civil Evidence 513 had omitted the "instruction as of right" provision from the model rule, 512. The court went on to say that the trial court has considerable discretion for deciding when certain instructions are necessary and proper and the appellants in that case had not shown an abuse of discretion. Id, at 595.[5]

In light of all the foregoing, your subcommittee recommends that Unified Rule of Evidence 513 (d) be amended to read as follows:

> (d) **Jury Instruction.** Except as provided in Rule 504 (b) (2) (B) in criminal cases and in paragraph (c) of this Rule in civil cases, 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.

The foregoing preserves the current exceptions in the present Criminal and Civil Rules--carried forward in the Unified Rules--for Husband-Wife privilege and the self-incrimination privilege. It would make an instruction a matter of right, rather than the court's discretion as held in the *Smith* case, *supra.* Your subcommittee feels that it ought to be a matter of right, upon request. It would remain true that whether to make such a request is a tactical matter for trial counsel and the effectiveness of such an instruction, like any instruction, is subject to debate. It would also remain true that the best time to deal with questions about the invocation of the privilege is at the pre-trial, motion in limine, stage rather than later when the evidence is actually admitted or even later at the stage of the court's charge. However, your subcommittee can determine no valid reason why the instruction, if requested, should be a matter of right in a criminal case but only a matter of the court's discretion in a civil case. This right is available in a number of other jurisdictions and was clearly a part of the proposed Uniform Rules. We can discern no particular reason why the Texas Supreme Court chose to omit it from the Civil Rules upon their adoption in the early '80s.

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[5]Interestingly, the court noted that Rule 513 (a) forbids "comment" on a claim of privilege and seemed to believe that an "instruction" to the jury might be such a forbidden "comment" by the court EXCEPT THAT paragraph (c) allows "comment" on the invocation of the Fifth Amendment privilege in a civil case. Because of our recommendation, your subcommittee has NOT exhaustively researched whether an "instruction" by a court, absent a request from the affected party, is generally held to be an improper "comment" by the court. It is an interesting question but, logically, any request by the affected party should moot the question.

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) **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.

(b) **General Rules.**

(1) *Confidential communication 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.

(2) *Privilege not to testify in criminal cases.* In criminal cases:

(A) 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).

(B) 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.

(c) **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. 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.

(d) **Exceptions to the Confidential Communication Privilege.** There is no confidential communication privilege:

(1) *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.

(2) *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.

(3) *Certain criminal offenses.* In a proceeding in which the accused is charged with a crime against the person of the spouse, any minor child or any member of the household of either spouse.

(4) *Commitment or similar proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(5) *Proceeding to Establish Competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions.** The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

Notes and Comments

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

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March 13, 1997

Mark K. Sales, Esq.
Hughes & Luce, L.L.P.
1717 Main Street Suite 2800
Dallas, Texas 75201

Re: State Bar of Texas Rules of Evidence Committee - Rule 705

Mark:

Enclosed please find this subcommittee's proposed changes to Rule 705 of the Texas Rules of Evidence. A number of changes have been made to the initial proposal, which will be discussed in detail below.

Rule 705(a): We have amended this section to reflect that the disclosure of information regarding the underlying facts relied upon by an expert may be required to be revealed via discovery, as well as by Court order. Rule 166b(2)(e)(1) of the Texas Rules of Civil Procedure specifically provides that the information is discoverable, and we do not want Rule 705(a) to be used to try to deny that right.

Rule 705(b): In examining the application of voir dire of experts to a civil case, the committee has determined that the right to voir dire an expert regarding the underlying facts and data should be applied to both civil and criminal cases. The rule, as amended, would require the Court to allow voir dire in criminal or civil cases, **as long as it is requested**. We initially considered giving the Court discretion to deny voir dire in civil cases. In light of *Daubert v. Merrell Dow Pharmaceuticials, Inc.* [509 U.S. 579 (1993)] and related cases, challenges regarding the basis of an expert's opinion are likely to become more common. However, attorneys should be entitled to have the Court make a determination regarding admissibility without the risk of prejudicing the jury. We were unable to justify making the rule mandatory in the criminal context and optional in the civil context.

Rule 705(c): After careful consideration, we have entirely deleted Subsection c of Rule 705, which required that the Court only admit expert opinion testimony if the offering party establishes sufficient underlying facts or data. Rule 401 requires that admitted evidence be "relevant." An expert opinion that does not have a sufficient basis will not tend to make the existence of any consequential matter more or less probable. In addition, Rule 403 does not

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permit the admission of evidence unless its relevance outweighs the prejudicial value. If there is not a sufficient basis for the expert's opinion, then his or her opinion would not be relevant, and/or its relevance would be outweighed by prejudicial value. There is nothing in the former language of Subsection c that is not already covered by Rules 401 and 403.

Rule 705(d): In addition, the committee has decided to entirely delete Subsection d of Rule 705. The first sentence of (d) was a balancing test, which had two differences from the balancing test in Rule 403. There is no logical reason for these differences. The language of (d) talked about a danger that the evidence be "used for a purpose other than as explanation or support for the expert's opinion." This will not be an issue unless it is unfairly prejudicial, confuses the issues or misleads the jury, which are the elements of the balancing test in Rule 403. It does not appear to add another or a different element, thus the language seems to have no real purpose.

The more fundamental difference is the use of the requirement that *the danger outweigh the value*, as opposed to [Rule 403] requiring that it ***substantially*** *outweigh the value*. There would be no reason to change this balancing test for civil cases. The committee was unclear as to why it was necessary for criminal cases. For all other evidence, criminal cases use Rule 403 and the "substantially outweigh" test. There does not appear to be a justification for altering that standard for expert opinions. Thus, the committee concluded that the balancing test for admissibility in either civil or criminal should be the requirement that *the danger substantially outweigh the value*, as already required by Rule 403.

The last sentence in 705(d), has to do with the limiting instruction a court should give the jury if the facts disclosed are not admissible in evidence. The sentence is redundant, and is actually more broad than Rule 105, which governs limiting instructions, since it implies that limiting instructions should be given even if the evidence is otherwise admissible. Rule 105 should be sufficient, and to avoid any confusion, we have added a reference to Rule 105 in the Notes and Comments.

This concludes this committee's findings regarding Rule 705. A draft of the proposed rule is attached for your review.

Very truly yours,

FLETCHER & SPRINGER, L.L.P.

Bill

William W. Krueger III

WWK$^{III}g^{2}$/enclosure

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 required through discovery or by the court. 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 disclosing the underlying facts or data, a party against whom the opinion is offered shall, ~~in a criminal case, or may, in a civil case~~ upon request, 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 expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.~~

~~(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 the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.~~

Notes and Comments

This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert or into the basis of the expert's opinion under Rule 703. This rules does not preclude the application of Rule 403, nor does this Rule preclude the application of Rule 105.[10]

[10]The Prior Criminal Evidence Rules comment provided "This rule does not preclude a party from conducting a *voir dire* examination into the qualifications of an expert."

John F. Sutton, Jr.
Professor of Law
727 E. 26th Street
Austin, Texas 78705

March 7, 1997

Mark K. Sales, Esq.
Hughes & Luce
1717 Main Street, Suite 2800
Dallas, Texas 75201

Re: Evidence Rule 802.

Dear Mark:

> The assignment for this sub-committee, in item 4-f of the agenda, was as follows:
> Whether Rule 802 should be changed to make hearsay[1] "no evidence," as is the case in federal court, and without the need for an objection, as was the civil rule prior to the adoption of the new civil rule in 1983.

The thrust of this agenda item is whether the last sentence of Texas Rule 802 (civil and criminal) should be stricken,[2] so as to return Texas law in civil and criminal cases to the previously discarded rule of civil evidence that the logical probative value of inadmissible hearsay admitted without objection will not be recognized.[3]

Today, in federal courts,[4] in Texas civil trials, and in Texas criminal trials, inadmissible hearsay admitted without objection is entitled to whatever probative force or logical relevance it may

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1 This statement obviously refers only to hearsay evidence that is not admissible as an exception to the hearsay rule, for admissible hearsay evidence is obviously entitled to be considered as probative evidence on the issues to which it is relevant, regardless of whether or not it came in over objection.

2 That sentence reads as follows: "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." That sentence was not needed in Fed.R.Evid. 802 because in federal court inadmissible hearsay admitted without objection has not been denied its logical probative force.

3 In its pre-rule holdings that hearsay evidence admitted without objection was to be given no probative value regardless of its logical relevance on an issue, Texas apparently was a pariah among the states. It is reported that only Georgia adheres to the view that inadmissible hearsay has no probative value; see TEXAS RULES OF EVIDENCE HANDBOOK 952 (2d Ed. 1993).

4 **§ 801.9. Rules 801(a), (b) and (c): Hearsay Admitted Without Objection.** Under rule 103, a party who does not make a timely objection cannot complain of the admission of hearsay. The question remains, however, of the weight and probative value of hearsay so admitted. The almost infinite variety

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have. Omitting the last sentence of 802 would indicate a return to the previous civil case view that inadmissible hearsay admitted without objection has no probative value.

To return to that view would create unnecessary disharmony between federal and Texas evidence law. The present Texas law regarding inadmissible hearsay conforms to federal law and to the views prevailing throughout the country. The present Texas and prevailing views are logically consistent with the requirements of Rule 103(a)(1) regarding the necessity for timely and specific objections in order to preserve error. By not permitting a party to raise on appeal an objection not made in the trial court, Rule 802 provides for a fairer trial than did the prior rule in civil cases.[5]

We recommend that the Texas rule 802 remain unchanged.

Sincerely yours,

John F. Sutton, Jr.
Sub-committee Chair

cc: Richard J. Clarkson, Esq.
801 Laurel Street
Beaumont, Texas 77701-2228

Cathleen C. Herasimchuk, Esq.
1201 Louisiana Street, Suite 3300
Houston, Texas 77002-5609

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which hearsay assumes precludes any answer except that hearsay will be considered and given its natural probative effect." Michael H. Graham, FEDERAL RULES OF EVIDENCE 283 (3d Ed. 1992).

5 For the underlying policies supporting the present Texas rule, see TEXAS RULES OF EVIDENCE HANDBOOK 952 (2d Ed. 1993): "In addition to being unsound in principle, the doctrine [that inadmissible hearsay has no probative value] had pernicious practical consequences. It permitted a party without the burden of proof to deceive a party with the burden of proof into believing that he had adduced sufficient evidence on all necessary elements of his case by deliberately failing to object to hearsay when offered. The party without the burden of proof would then emerge from 'behind the log' on appeal to argue that the verdict or judgment was not supported by evidence."

Substantially in accord is Goode, Wellborn & Sharlot, GUIDE TO TEXAS RULES OF EVIDENCE 120-21 (2d Ed. 1992), §802.1, which adds: "Rule 802 does not accord probative value to hearsay evidence. It merely ensures that if hearsay is admitted by waiver, it will be treated like any other evidence admitted by waiver. That is, whatever rational probative value it may have will not be denied artificially as under prior law."

r702chrm

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April 2, 1997

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Re: (1) "Assignment of subcommittee to review and consider proposed changed to Rule 702 (regarding reliability of expert testimony) as drafted by Buddy Low of the Supreme Court Advisory Committee." (Agenda Nov. 8, 1996 item #5).[1] (2) "review and consider any recommendations regarding the standard for admissibility of non-scientific expert testimony." (3) Use of an "expert" by trial judge in making the judicial decision, pursuant to Rule 104, whether to admit expert scientific evidence.

Dear Mark:

This cover letter gives you the report of the sub-committee assigned the task of considering the three items identified above. Attached to this letter are FIVE exhibits.

Exhibit #1 relates to assignments one and two, identified above. It is our first recommendation regarding Rule 702. We recommend that no change be made in Rule 702 itself but we also recommend that "Notes and Comments" be added to give courts and lawyers more specific guidance than can now be found either in the rule itself or in the decisions in *Kelly*,[2] *Robinson*[3] and the confusing *Daubert*[4]. This recommendation of this sub-committee results in part from the Low

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1 Apparently the evidence committee's earlier proposal for no change in Rule 702 but for the addition of a comment to the rule was rejected by the Supreme Court Advisory Committee (SCAC), which then asked Buddy Low to draft a change in Rule 702, which he did, and our assigned task was to review that draft.

2 *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) (en banc). *Massey v. State*, 933 S.W.2d 141 (Tex. Cr. App. 1996) is a recent case by that court which follows *Kelly* and upholds the trial judge's admission of DNA evidence as not being an abuse of discretion.

3 *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

4 *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. __, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Ninth Circuit's opinion in *Daubert*, 43 F.3d 1331 (1995), after remand by the Supreme Court, is

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draft and in part from the important concern of Judge Gonzalez expressed in his concurring opinion in *S.V. v. R.V.*[5] Because our Rule 702 recommendations relate to the proposed Unified Texas Rules of Evidence, we must consider *Kelly*, the criminal case, as well as *Robinson*, the civil case.

Exhibit #2 is our second recommendation relating to items one and two. This recommendation largely follows the part of Low draft labeled, "Add the Following as the Third Paragraph To TRCE 702." We applaud this method of solving part of the post-*Robinson* problems, but we view that part of the Low proposal as a procedural matter. Therefore, our recommendation is cast as a proposed new Rule 166d to be added to the Texas Rules of Civil Procedure, rather than as part of Evidence Rule 702.

Exhibit #3 is this sub-committee's explanations for its recommendations in Exhibits #1 and #2. It should be referred to while reviewing the sub-committee's recommendations.

Exhibit #4 is a copy of the Low draft as given to this sub-committee. It is included to facilitate comparison of that draft with our proposals in Exhibits #1 and #2.

Lastly, the sub-committee, as requested, has considered the advisability of the use of an "expert" by a trial judge in making a judicial decision, pursuant to Rule 104, whether to admit expert scientific evidence. The sub-committee recommends against the use of an expert in this capacity. **Exhibit #5** is an explanation of our recommendation.

Sincerely yours,

John F. Sutton, Jr.

JFS,JR:bs
encl: one
cc: Sub-Committee Members
☺

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one of dismay and implied sarcasm and summed up, under the heading of "Brave New World," in this sentence: "Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before."

See also Mike McKee, *Science on the Loose*, LEGAL TIMES Mar. 10, 1997, at S42 (courts cannot agree on how much discretion Daubert leaves to the judge).

5 933 S.W. 2d 1, 1996 WL 112206 (Tex. Nov. 15, 1996). "Rather than addressing this problem on a case-by-case basis, the bench and bar would be better served if we dealt with it head-on. I therefore suggest that we refer this matter to the Supreme Court Advisory Committee and the appropriate state bar committees for recommendations concerning a possible rule change by our Court. In the meantime, I suggest that trial courts apply *Robinson* across the board in determining the admissibility of scientific evidence." Gonzalez, J., concurring, 933 S.W.2d at 43.

S.V. v. R.V. involved therapists' opinions regarding recovered memories of childhood sexual abuse.

EXHIBIT NUMBER ONE

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.

Notes and Comments

An expert opinion derived from scientific, technical, or other specialized knowledge will not assist the trier of fact to understand the evidence or to determine a fact in issue unless the opinion is relevant to a material issue and is based upon foundation knowledge shown to be, or known to be, reliable. In making the determination of admissibility of an expert opinion, the court, pursuant to Rule 104(a), can obtain guidance by considering each of the following factors whenever that factor is substantially significant in determining whether the opinion is based upon a foundation sufficiently reliable to be of assistance to the trier of fact: (1) general acceptance of the theory and technique by the relevant scientific or technical community;[6] (2) the expert's qualifications;[7] (3) the existence of literature supporting or rejecting the theory or technique; (4) the potential rate of error of the theory or technique; (5) the availability of other experts to test and evaluate the theory and technique, and the making or publishing of tests or evaluations; (6) the clarity with which the theory or technique can be explained in the trial court; (7) non-judicial uses that have been made of the theory or technique; and (8) the experience and skill of the person who applied the theory or technique on the occasion in question.[8]

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6 Editor's temporary footnote: "[S]cientific evidence may be shown reliable even though not yet generally accepted in the relevant scientific community." *Kelly v. State*, 824 S.W.2d 568, 572 (Tex.Cr.App. 1992) (en banc).

7 Editor's temporary footnote: See *United Blood Services v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997) ("The burden of establishing an expert's qualifications is on the offering party.").

8 Editor's temporary footnote: One or two members of the sub-committee believe the list should be limited to those found in *Robinson*. Another member, while agreeing that Rule 702 should not be amended, would prefer not to add a comment but nevertheless accepts this proposed Comment if one is to be added. It seems, however, that any Comment to the Unified Evidence Rules necessarily requires consideration of the factors found in *Kelly* as well as in *Robinson*. The lists of factors in *Kelly* and in *Robinson* are not the same.

The role of the trial court is not to determine the validity or accuracy of the opinions formed by the expert, but to determine admissibility of the opinions.[9] The reliability inquiry necessarily is a flexible one. While there is no definitive or exclusive list of factors to be considered in determining reliability, the above list is particularly pertinent to admissibility of opinions based on natural science. When a court is determining whether there is a sufficiently reliable foundation for an opinion derived from social or political sciences, technical knowledge, or other specialized knowledge, one or more of the listed factors may not be sufficiently significant to be pertinent to admissibility, while extensive personal experience may be particularly significant.

The opinion of an expert offered under Rule 702 must be relevant under Rules 401 and 402, and must be admissible under Rule 403. In addition, the opinion will not be admissible if it will not assist the trier of fact due to its underlying foundation lacking the reliability necessary to avoid misleading the jury and confusing issues.

The trial court's determination of admissibility should be made outside the presence of the jury and should be made at a preliminary hearing well in advance of trial whenever possible. The court's decision on admissibility rests within the discretion[10] of the trial court.

Clearly, the factors listed in the three key cases as being relevant to reliability are not intended to be, and logically cannot be, exclusive.

9 Editor's temporary footnote: See *Robinson*, 923 S.W.2d at 557: "As the Supreme Court noted in *Daubert*, Rule 702 envisions a flexible inquiry focusing solely on the underlying principles and methodology, not on the conclusions they generate."

10 Editor's temporary footnote: See, *e.g.*, *United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997) (reversing, because "the court of appeals improperly substituted its opinion for that of the trial court's"); *America West Airlines, Inc. v. Tope*, 935 S.W.2d 908, 912 (Tex.App.—El Paso 1996) ("Plaintiff's cross-point involves the exclusion of expert testimony, which we review for abuse of discretion. *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 558 (Tex.1995)"); *In Interest of A.V.*, 849 S.W.2d 393, 397 (Tex.App.—Ft. Worth 1993) (involving the novel scientific basis of penile plethysmograph) ("The trial court's decision regarding the qualification of an expert will only be disturbed upon a finding that the court abused its discretion.").

EXHIBIT NUMBER TWO[11]

(Proposed New Rule 166d)

RULE 166d. MOTION TO SUPPRESS TESTIMONY OF EXPERT WITNESS[12]

1. A party desiring to contest the opinions of a person designated as an expert on the basis that the opinions are not admissible under Rule 702, Texas Rules of Evidence,[13] may do so only upon motion supported by one or more affidavits.[14] The motion and the affidavits must be filed within seven days[15] after movant received the general substance of the proposed expert testimony either through report or through deposition of the expert. The motion shall be heard promptly by the court and the motion will be determined by the court upon examination of only the following:

a. Deposition testimony of the person so designated, or, if deposition is not available, a report of that person;

b. Affidavits timely provided by the moving party;

c. Deposition testimony taken in the case prior to the date the motion was filed; and

d. Affidavits provided by the party proposing the motion.

2. In the event the court rules that the opinions are not admissible, the party proposing to call that witness shall, upon request, be granted a continuance for sixty days[16] after the ruling by the court, and during the sixty day period may designate another person as an expert.

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11 This proposed rule is based heavily on the Low draft. It obviously relates only to civil trials. The sub-committee did not undertake to draft a comparable additional provision in the Code of Criminal Procedure for use in criminal cases where a similar problem may arise.

12 Editor's temporary footnote: The Rules of Civil Procedure are inconsistent as to whether subparagraphs are identified by letters ("e") or by numbers ("1"). The majority of the rules seem to use numbers. Thus, numbers are used here.

13 Editor's temporary footnote: This reference is to the proposed Unified Texas Rules of Evidence.

14 Editor's temporary footnote: One member of the sub-committee would add, after "one or more affidavits," this additional proviso, "setting forth with particularity the deficiency in the proposed proof."

15 Editor's temporary footnote: One or two members of the sub-committee suggest we should either leave out the sentence regarding the time for filing the motion or provide for a period longer than seven days.

16 Editor's temporary footnote: One or two members of the sub-committee believe that 60 days is not enough time, and that a longer period, such as 90 days, would be better.

3. In the event the opinions of the person who is designated within the sixty day period as an expert are also held, pursuant to the procedures provided in this Rule, not to be admissible, no additional designation of an expert is permitted and no additional continuance may be granted because of the ruling that the opinions are inadmissible.[17]

4. The ruling by the court on the motion preserves appellate complaint under Rule 52, Texas Rules of Appellate Procedure.

Official Comment to Rule 166d

This rule is deemed to be consistent with Rule 104 (a), Texas Rules of Evidence.

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17 Editor's temporary footnote: One member of the sub-committee suggests that an additional continuance should be permissible if based on "good cause."

EXHIBIT NUMBER THREE

(Explanation of sub-committee's recommendations in Exhibits #1 and #2)

Under the evidence rules prior to *Kelly*[18], *Robinson*[19], and *Daubert*,[20] in order for a qualified "expert" to testify the testimony must be relevant.[21] . Meeting the marginal relevance of Rule 401 was (and is) not enough, for the opinion must be sufficiently probative of a material issue to "assist the trier of fact to understand the evidence or to determine a fact in issue" (Rule 702) and must pass the balancing test of Rule 403.[22] Therefore, a trial judge (then and now) should exclude an opinion that is not sufficiently probative or that tends to confuse the issues before the jury or to mislead the jury in any way. A "hogwash" or baseless opinion has little if any probative value, and to the extent it affects the thinking of jurors at all it likely is misleading. Thus, an unusual opinion by the "I'm-the-only-guy-in-the-state-who-knows-about-this" expert always should have been kept out on the basis of 403 and 702, at least unless all the other experts in his field recognized that he is the guru (or, the old *Frye* test).

The judge has the right and the duty under Rule 104 to rule on admissibility (but not credibility) of evidence,[23] particularly including the admissibility of an expert's opinion. The judge's decision on admissibility is reversed only if her discretion is abused, which in regard to a qualified expert's opinion substantially means whether the decisions—that the opinion would or would not help the jury and would or would not pass 403's balancing test—were not within the bounds of reason.

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18 *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992). See also the more recent case of *Massey v. State*, 933 S.W.2d 141 (Tex.Cr.App. 1996) (DNA tests), following *Kelly*.

19 *E. I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

20 *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. __, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), rejecting the 1923 *Frye* test as being the sole test of admissibility of scientific evidence and, in effect, indicating it is only one of several considerations in a non-exclusive list.

21 *Daubert*, 125 L.Ed. 2d at 481, said "fit" which is described in the opinion as an aspect of relevancy, namely, "whether expert tetimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Thus "fit" undertakes to specify that mere relevance is not enough but the relevance must be sufficient to meet the standard of Rue 702.

22 See *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ("Furthermore, [the opinion's] lack of reliable support may render it more prejudicial than probative, making it inadmissible under Fed.R.Evid. 403."). Also, in excluding polygraph evidence on the basis of rule 403 in *United States v. Posado*, 57 F.3d 428, 435 (5th Cir. 1995), the court said: "While not discussed at length in *Daubert*, the presumption in favor of admissibility established by Rules 401 nd 402, together with *Daubert*'s 'flexible' approach, may well mandate an enhanced role for Rule 403 in the context of the *Daubert* analysis, particularly when the scientific or technical knowledge proffered is novel or controversial."

23 *Robinson et al* talk about the judge's role as a "gatekeeper," but so-called "gatekeeping" is always the judge's role under Rule 104 in passing upon admissibility of evidence.

Daubert, Kelly and *Robinson* were foreseeable reactions to the fact that too many junky "expert" opinions—meaning, opinions of low probative worth that mainly confused the issues and mislead the jurors and that should have been excluded under 403 and 702—were being admitted into evidence. Those three cases did not rewrite, amend, or alter rules 403 and 702. Rather, they were decided under those rules, and those cases undertook to stop the improper admission of junk scientific opinions by putting a judicial gloss on Rules 403 and 702, thereby advising trial courts how to test for relevance and helpfulness (which mainly depends on reliability) in order not to be reversed for abuse of discretion. The courts gave specific examples—and expressly not an exclusive list—of factors to be considered in deciding whether tendered opinions should be admitted under existing rules 403 and 702.[24]

The Low draft demonstrates that two distinct problems now exist since the decisions in *Robinson, Kelly,* and *Daubert.*

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[24] In chronological order of the three main cases, the factors suggested by the courts as being circumstantial evidence of the reliability of the underlying foundation or knowledge for an expert opinion, at least in scientific matters, were as follows:

In *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (en banc) (involving "restriction fragment length polymorphism" and citing 3 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE ¶702[03]): "Factors that could affect a trial court's determination of reliability include, *but are not limited to*, the following: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question."

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. __, 113 S.Ct. 2786, 125 L.Ed. 2d 469, 482-84 (1993) (involving ingestion of Bendectin, an anti-nausea drug): "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate. * * * [W]hether a theory or technique . . . can be (and has been) tested. * * * [W]hether the theory or technique has been subjected to peer review and publication. * * * Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error . * * * Finally, 'general acceptance' can yet have a bearing on the inquiry. * * * The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. * * * The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."

In *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (involving the fungicide Benlate 50 DF): "There are many factors that a trial court may consider . . .[which] include, but are not limited to: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relied upon the subjective interpretation of the expert, 3 WEINSTEIN & BERGER, *supra*, p. 702[03]; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique."

A 1996 case involving polygraphs listed three other factors. See *Meyers v. Arcudi*, 947 F.Supp. 581, 585 (D.Conn. 1996) ("Additional factors considered in the Second Circuit include: (1) whether the technique is subject to abuse; (2) whether it is analogous to scientific techniques and results held to be admissible; and (3) whether 'fail-safe' characteristics are present.").

Obviously, the factors relevant to reliability of expert opinions is infinite.

First, the main problem is how to apply the directives of those cases in varying circumstances ranging from hard science through the soft social sciences[25] and use of technical knowledge and down to the reformed burglar's expert identification of burglary tools,[26] the border patrol agent testifying to the smell of marijuana,[27] or the FBI agent's expert explanation of the jargon of drug dealers.[28] While any expert opinion should be relevant to a material issue and should be based on reliable knowledge, the factors listed in the three key cases obviously are unsuitable in many situations to test the reliability of the proposed expert testimony, particularly when the expert opinion is necessarily based on relevant experience of the witness[29] rather than on scientific or technical knowledge. Also, in some factual situations, there will be factors not indicated in the three decisions that will constitute pertinent circumstantial evidence of reliability.

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25 *United States v. Rouse*, 100 F.3d 560, 567-68 (8th Cir. 1996), a sexual abuse case, held that the trial court applied *Daubert* incorrectly to exclude the opinions of a clinical psychologist regarding the suggestibility of the techniques employed in the case. The court said, "Here, we deal with a social science in which the research, theories and opinions cannot have the exactness of hard science methodologies such as blood tests, DNA, spectrographic evidence or chemical exposures with which *Daubert* dealt. As observed in a recent article, *Daubert* principles may not fully apply to certain social science evidence."

Compare the elaborate discussion in *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996), holding that the trial court should have permitted a psychologist to testify about advertising campaign messages, and indicating that *Daubert* applies to social science in the sense that reliability is safeguarded by a showing that the witness met the standards of intellectual rigor that are demanded in the professional work of the witness.

It seems apparent that the *Daubert, et al*, requirements of relevance and reliability should apply to all expert opinions, but that not all of the various factors listed in those opinions as circumstantial evidence of reliability will be relevant to reliability in some situations, such as when the opinion involves a social science. *Daubert, et al*, should not, and surely do not, require consideration of any listed factors that are not logically relevant to reliability in a particular situation.

26 In *State v. Briner*, 198 Neb. 766, 255 N.W.2d 422 (1977), a five-times convicted, retired burglar was properly permitted to testify as an expert that the tools found in defendant's possession were suitable for breaking and entering. It would be extremely difficult, as well as unproductive, to apply the *Daubert, et al*, factors to that kind of personalized, specialized expert knowledge.

27 *United States v. Arrasmith*, 557 F.2d 1093 (5th Cir. 1977). Not much has been written about the odor of marijuana.

28 In *United States v. Barletta*, 565 F.2d 985 (8th Cir. 1977) a FBI agent was permitted to testify as an expert in interpreting "the peculiar argot of bookmakers".) See also *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997) permitting an agent's expert testimony that drug traffickers would not entrust large quantities of drugs to unknowing transporters.

29 "It is not appropriate to invoke the *Daubert* test in cases where expert testimony is based solely on experience or training, as opposed to a methodology or technique. Indeed, it would be impossible to do so. Expert opinion based on personal experience cannot always be evaluated on the basis of 'rate of error,' 'peer review' or 'general acceptance' in the relevant scientific community. Yet such opinions may be as valuable to the trier of facts as those opinions that can be readily gauged in such terms." *Liriano v. Hobart Corp.*, 949 F.Supp. 171, 177 (S.D.N.Y. 1996).

The second problem, resulting from that great uncertainty as to whether any tendered expert will be permitted to testify, is that of affording a litigant a reasonable opportunity to secure another expect if a proposed expert's opinions have been held to be inadmissible under 403 and 702. This determination should take place well before trial.

Low's draft undertakes to solve those two problems by amendments to Rule 702. The sub-committee believes that the first problem[30] cannot well be solved by amending 702 in a way that codifies and hardens the pertinent admissibility tests as suggested by the three cases. The tests of relevance and reliability must be more flexible, in order to permit logical decisions in each case as well as to leave the high courts sufficient freedom to modify the criteria as experience will require. The sub-committee suggests, therefore, that Rule 702 NOT be amended but that a Comment is needed to give more guidance to courts and lawyers than can be found in those three court opinions. The flexibility is particularly important in order to adjust the listed tests of reliability in a way to reasonably accommodate social science, technical and other expert opinions. The recommended Comment appears in Exhibit #1.

As stated above, a Comment is recommended mainly because trial courts and lawyers need more guidance than can be found in those three opinions. As experience in federal as well as state courts has shown, difficulties and uncertainties are encountered when trying to follow and apply those difficult opinions. The major difficulty is that it is not clear whether the enunciated guidelines apply or should apply only to "hard" scientific evidence rather than also to social science, technical and other specialized knowledge. Application of the guidelines from those three key cases is a formidable task in non-scientific matters, and even in regard to scientific knowledge because "scientific" evidence may range from rocket-science or biochemistry through psycholinguistics to water-well witching—a great range indeed. Also, one practical difficulty is that the opinions give little guidance for distinguishing the requisite "reliability" of the underlying foundation from the "reliability" (truth or falsity) of the expert's opinion, the later being a matter clearly not within the jurisdiction of the judge who passes only upon admissibility.

In determining what are appropriate tests for the required reliability of all expert testimony, one realizes that there necessarily must be more flexibility than a bare reading of the factors listed in the three cases might suggest if one had in mind only rare theories or methodologies in "hard science" situations.[31] The needed flexibility may involve three approaches. First, each of the six or seven

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30 A brief discussion of the second problem appears toward the end of this memorandum.

31 "If an engineering expert can demonstrate that his proposed design has been tested, peer reviewed, or is generally accepted, then so much the better. On the other hand, this does not mean that engineering testimony on alternative designs should be excluded automatically if it cannot withstand a strict analysis under *Daubert*. *The inquiry is case specific*. It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions." *Tassin v. Sears, Roebuck & Co.*, 946 F.Supp. 1241, 1247 (M.D.La. 1996) (emphasis added).

See also Edward J. Imwinkelried, *The Case Against Evidentiary Admissibility Standards That attempt to "Freeze" the State of a Scientific Technique*, 67 U.Colo. L.Rev. 887 (1996).

Note that *United States v. Hicks*, 103 F.3d 837 (9th Cir. 1996) seems to stress flexibility.

suggested tests (or factors) should be considered by a trial court to the extent that each one is substantially significant in determining the probative value of the particular tendered opinion. Second, the standardized use of a reliable machine by an experienced expert should be sufficient for routinely performed and well-known scientific tests[32] (e.g., X-rays, electrocardiograms, bone-scans) without necessity for the party offering the evidence to demonstrate anew the applicability of the various listed criteria. Third, the non-scientific, non-technical "specialized knowledge" of the burglar, the FBI agent, and the like[33] usually should be admitted without regard to any of those suggested criteria upon a showing that the person in fact does possess specialized, relevant, helpful knowledge regarding the matter being testified about. To place the six/seven tests in the rule would, to say the least, unduly limit use of opinions based on technical knowledge as well as opinions based on "other specialized knowledge" and would result in exclusion of reliable opinion evidence that should be admitted.

The proposed Comment to Rule 702 is intended to indicate that the circumstantial tests for reliability, as enunciated by the Courts in *Daubert*, *Kelly* and *Robinson*, are flexible and non-exclusive and do not necessarily apply in the same way in situations involving natural science, social science, technical knowledge, or other specialized knowledge.

As to the second problem indicated by the Low draft, the sub-committee believes that the problem lends itself to a solution by a rule, but that the matter is almost exclusively a matter of procedure rather than a matter regarding the admissibility *vel non* of evidence. If the suggested provision regarding motions for time to secure a new witness, etc., were added to Rule 702, it would be an anomaly or curiosity. That suggested provision does, however, address an important problem now existing because of the uncertainties now encountered since the promulgation of *Daubert, Kelly* and *Robinson*. Therefore, the sub-committee suggests that a rule of civil procedure be adopted, very much along the line of the Low draft. The recommended rule appears in Exhibit #2.

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32 See *Knapp v. Northwestern University.*, 942 F.Supp. 1191, 1197 (N.D. Ill. 1996), where the court held medical testimony was admissible where the "physicians have decades of personal professional experience with heart problems of the sort in this case and not a single scientific study squarely on point to back up their judgments." The approach in this case is not likely to result in admission of opinions based on unreliable knowledge or information.

Indeed, the validity of some medical or scientific theories are so well known that the court can take judicial notice. *Emerson v. State*, 880 S.W.2d 759, 764 (Tex.Cr.App. 1994); *cf. Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996), relying on *The Merck Manual of Diagnosis and Therapy* (1987 ed) and taking judicial notice regarding untreated Graves' disease.

33 Query: is the proper way to saddle and bridle a green-broke two-year old horse "technical" knowledge or "specialized" knowledge? Or, how to hitch a team of mules to a wagon? The difference between a "single-tree" and a "double-tree"? Would the testimony, as an expert, of a knowledgeable rancher, farmer or cowboy be of assistance to a Dallas or Houston jury? The point is that the ambiguities resulting from *Daubert, et al*, involve much more than distinguishing hard sciences from social sciences while applying Rule 702. Courts must be permitted to develop—and no doubt will develop—more flexibility in testing for admissibility than the three cases might be viewed as presently indicating, and inflexibility should not be incorporated into Rule 702. Therefore, the suggested Comment indicates a requisite degree of flexibility.

EXHIBIT NUMBER FOUR[34]

Rule 702 - CIV and CRIM

RULE 702. TESTIMONY OF 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. However, such testimony must be relevant and based upon a reliable foundation. The trial court shall make the threshold determination of admissibility, considering the following factors, as well as other factors relevant thereto, focusing on the underlying principles and methodology: (1) The extent to which the theory has been or can be tested; (2) The extent to which the technique relies upon the subjective interpretation of the expert; (3) Whether the theory has been subjected to peer review and/or publication; (4) The techniques potential rate of error; (5) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; (6) The non-judicial uses which have been made of the theory or technique.

After determining that the testimony is relevant and reliable, the court must then determine whether to exclude the testimony considering the following factors, as well as other factors relevant thereto: (1) Whether the probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or potential for misleading the jury; (2) Considerations of undue delay; (3) Needless presentation of cumulative evidence.

The decision whether to admit this evidence rests within the discretion of the trial court. Review will be governed by the abuse of discretion standard.

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34 The heading ("Rule 702 - Civ and Crim") used in the Low draft, and the suggestion of an addition of a "Third Paragraph to TRCE 702," seems to be a proposal that the first part (which actually has three paragraphs) be an amendment to the proposed Unified Rules of Evidence (or to both the Civil and Criminal Rules), and that the suggested additional "Third Paragraph" be added only to Rule 702 of the Civil Evidence Rules.

ADD THE FOLLOWING AS THE THIRD PARAGRAPH TO TRCE 702:

A party desiring to contest the opinions of a person designated as an expert on the above grounds may do so only upon motion supported by affidavit. The motion and the affidavit must be filed within seven days after receiving the general substance of the proposed expert testimony either through report or through deposition of the expert. Said motion shall be heard without delay. The motion will be determined by the court upon examination of only the following:

1. Deposition testimony of the person so designated or if deposition is not available then a report of such person;
2. Affidavits of the moving party;
3. Deposition testimony taken in the case as of the date the motion is filed; and
4. Affidavits provided by the party proposing the motion.

If the court sustains the motion, the party proposing to call such witness shall have the option of an automatic continuance for sixty days within which the designate another person as an expert, or to proceed to trial. If such person designated within the sixty days is also disqualified, no further designation shall be permitted. The court's ruling on the motion shall preserve appellate complaint under Texas Rules Appellate Procedure, Rule 52.

EXHIBIT NUMBER FIVE

The sub-committee recommends against the use of an "expert" by a trial judge in making the judicial decision whether to an expert's opinion regarding scientific evidence. An "expert" is not needed to enable a judge to decide whether the underlying foundation is reliable, and use of an advisory expert could be harmful.

Under Rule 104(a), it is the judge's duty is to pass upon admissibility of evidence, including the admissibility of an expert's opinion under Rule 702 regarding "scientific, technical or other specialized knowledge." That judicial duty includes determining whether the opinion will "assist the trier of fact to understand the evidence or determine a fact in issue," a decision reviewed under the abuse of discretion standard.

In determining admissibility of any expert opinion, the issues are whether: (1) the expert is qualified; (2) the proffered opinion is sufficiently probative[35] of a material issue to assist the jury to determine a fact in issue; and (3) the probative value of the opinion is substantially outweighed by dangers such as confusion of issues or misleading the jury.[36] The gloss placed on these issues by *Kelly* and *Robinson*, et al, is that a decision by the trial judge to admit the scientific opinion will be an abuse of discretion unless the judge preliminarily determines that the *foundation* for the scientific opinion is "reliable" and that the opinion is "fit." The judge is cautioned NOT to confuse these issues with whether the expert's scientific opinion itself is reliable or credible, for that issue is solely for the jury.

In determining the reliability of the foundation for the scientific opinion, the judge is to consider each of these factors, among others, to the extent each is relevant to reliability of the particular opinion: (1) Does the underlying scientific foundation have empirical testability? (2) Has the theory or scientific technique been published or otherwise subjected to peer review? (3) What is the known or potential rate of error involved in the theory or technique? (4) Has the underlying scientific theory or technique been generally accepted in the pertinent scientific community?[37] (5) Can the technique or theory be explained in court with appropriate clarity? (6) Have non-judicial uses been made of the theory or technique? These factors constitute circumstantial evidence of the reliability of the underlying foundation, but in particular situations other factors also may be relevant to reliability.

The party offering the expert's opinion has the burden of persuading the judge of its admissibility. Admission of the expert scientific opinion will be an abuse of discretion unless the

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35 Some courts say the opinion must "fit," which is only an unusual way to say the opinion must be sufficiently relevant to a material issue to meet the "helpfulness" requirements of Rule 702.

36 Rule 403. *Robinson* recognizes that even though the proffered opinion is found reliable, it may be excluded upon application of Rule 403's balancing test. 923 S.W.2d at 557.

37 This part of the list of factors to be considered in passing upon reliability comes from *Daubert*; see *Everett v. Georgia-Pacific Corp.*, 949 F.Supp. 856 (S.D. Ga. 1996). The other factors come from Texas cases. Since the proposed Unified Texas Rules of Evidence cover both civil and criminal trials, the approach in *Kelly* as well as in *Robinson* must be considered.

reliability of the foundation is shown by persuasive evidence of these and other relevant factors—by documentary, affidavits[38] or testimony of other experts on those factors, etc. Unless a judge is mislead into passing on the validity of the opinion itself rather than solely on the reliability of the underlying scientific foundation, a judge should be able to decide whether the proffered opinion is based on a reliable scientific foundation. A judge need not be a rocket-scientist[39] to be able to decide whether the proponent has offered sufficient evidence of peer review, publication, general acceptance, non-judicial use, etc., to support a finding of reliability.

On the other hand, use of an advisory "expert" can be harmful. First, the expert, trained in scientific and not judicial matters, is quite likely to have great difficulty in ignoring whether or not the opinion itself seems credible while passing solely on the reliability of the scientific foundation. Second, use of an expert as a practical matter will result in the decision turning more on the discretion of the expert rather than on the discretion of the judge. Third, the kinds of factors listed by the courts to be considered in determining reliability of the scientific foundation are, for the most part, factors that are outside the realm of science and instead are factors a judge is better trained to decide. Fourth, while the appointment of an independent expert has the ring of impartiality, nevertheless each human has his or her own preconceived notions and it is virtually impossible to appoint a truly unbiased expert; thus, the very appointment itself is likely to weigh unfairly the scales in favor of one party and against another.

Texas has previously considered—and viewed negatively—the propriety of judicially appointed experts. Federal Rule of Evidence 706 contains elaborate provisions for the appointment and compensation of court appointed experts. No equivalent provision is included in either the Texas Rules of Civil Evidence or the Texas Rules of Criminal Evidence.[40]

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38 Under Rule 104(a), a judge in determining admissibility of evidence is not bound by rules of evidence other than those relating to privilege.

39 "I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposed on them either the obligation or the authority to become amateur scientists in order to perform that role." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, ___, 125 L.Ed.2d 469, 487 (Rehnquist, C.J., concurring).

"{A} judge does not have to be trained in science to evaluate the reliability of a theory or technique. * * * Judges are capable of understanding and evaluating scientific reliability." *Robinson*, 923 S.W.2d at 557.

"[T]here is nothing in *Daubert* to suggest that judges become scientific experts, much less evaluators of the persuasiveness of an expert's conclusion." *Ambrosini v. LaBarraque*, 101 F.3d 129, 134 (D.C. Cir. 1996).

40 An authoritative text points out that while there are special statutory provisions for appointment of experts in specific situations, Texas law views the trial judge as more of a neutral referee than a participant in the lawsuit. The drawbacks to appointed experts there are stated: "The litigants themselves frequently oppose having the court appoint experts because it takes control of the lawsuit away from the parties and places it in the hands of the trial judge. Second, such experts may 'acquire an aura of infallibility to which they are not entitled' because they may not be truly neutral and unbiased. Third, as assistants to the judge, experts represent a shift toward an inquisitorial system of justice rather than an adversarial system in which competing viewpoints and advocacy interrogation operate to bring forward the critical facts. Texas, with its great emphasis on the adversarial system and the passivity of its judges, decided not to create a special

evidentiary provision for the court appointment of such experts." TEXAS RULES OF EVIDENCE HANDBOOK 893 (2d ed. 1993).

5/5/97
4543 EC1
cc: LHS
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May 2, 1997

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TO: All Members of the State Bar of Texas Administration of the Rules of Evidence

FROM: Mark K. Sales MKS

RE: Rules 103(a)(2) and 706

Enclosed are the subcommittee reports of Cathy Herasimchuk regarding Rule 103(a)(2) and of John Sutton regarding a new proposed Rule 706. We will take these reports up at our meeting on May 9.

If you have any questions, please do not hesitate to contact me.

Enclosure

cc: Lee Parsley
Luther Soules✓
Gilbert Low
(all w/encl.)

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April 12, 1997

Mr. Mark K. Sales
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Dallas, Texas 75201

RE: Proposed Unified Rule 103(a)(2) concerning an offer of proof

Dear Mark:

You asked me to address the civil-criminal difference in proposed Rule 103(a)(2) concerning the necessity of making an offer of proof to preserve error in the trial court's exclusion of evidence. I do not know why there should be any difference in the rule, but apparently the Texas Supreme Court does because it changed the rule in 1988 to create this difference.

The proposed Rule 103(a)(2) currently reads:

> *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, in criminal cases, was apparent from the context within which questions were asked.

Thus, in criminal cases, no offer of proof is necessary to preserve error if the substance of the evidence was apparent from the context within which questions were asked. In civil cases, however, the proponent of the excluded evidence must always make an offer of proof, even when the answers were apparent from the context. The question is whether the rule should read:

> *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.

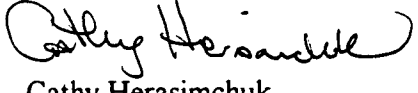
This version is exactly the same as the federal rule 103(a)(2). This version is also exactly the same as the original wording in Texas Civil Rule 103(a)(2). See Wallace & Herasimchuk, Article I: General Provisions, **Texas Rules of Evidence Handbook** 148 (2d ed. 1993). In 1988, the Texas Supreme Court amended this rule to eliminate the final phrase "or was apparent from the

context within which questions were asked." **Id.** at 148; see *Order Adopting and Amending Texas Rules of Civil Evidence*, 50 **Tex. B. J.** 1056, 1056-57 (1987). This deletion was a significant modification and changed existing Texas civil law. See **Life Ins. Co. v. Brister**, 722 S.W.2d 764, 776 (Tex. App. — Fort Worth 1986, no writ)(refusing to require a showing of the expected answer and requiring only that the substance of the evidence was apparent from the context within which questions were asked); **Foster v. Bailey**, 691 S.W.2d 801, 803 (Tex. App. — Houston [1st Dist.] 1985, no writ)(appellant was not required to make a bill of exceptions under Civil Rule 103 because the right to cross-examine an adverse party should not depend upon a showing that the cross-examination will be successful"); see generally **Steven S. Goode et al., Texas Rules of Evidence: Civil and Criminal** § 103.3 (1988)(noting 1988 change from prior common law and civil rule practice).

I have been unable to find any explanation for why the Supreme Court amended Rule 103 in 1988. The old rule worked well for both civil and criminal cases since the language obviating the need for an offer of proof applied mainly to questions on cross-examination in which the questioner cannot be expected to know the witness' answer.

I recommend that, unless the Supreme Court has a specific problem in mind, Civil Rule 103(a)(2) be returned to its original version, which would align it once more with the wording in the correlative Criminal Rule and Federal Rule.

Sincerely,



Cathy Herasimchuk

John F. Sutton, Jr.
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April 30, 1997

Mark K. Sales, Esq.
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Dallas, Texas 75201

Re: Proposed new Rule 706.

Dear Mark:

The "Rules 702-706 Sub-committee" encloses a draft for a new Rule 706 regulating appointment of experts to assist the court in ruling on admissibility of expert scientific evidence.

This sub-committee still ***opposes*** having a new rule 706 authorizing a trial judge to appoint an expert for that purpose—a view previously expressed in Exhibit #5 to our April 2nd report. But if there is to be such a rule, we urge the adoption of the version attached hereto in Exhibit #1.

The sub-committee firmly believes a Rule 706 should contain the detailed, specificity found in the enclosed Rule 706. Unless the rule is sufficiently detailed to give lawyers, trial judges, and appointed experts clear directions, chaos can be expected. Without such detailed guidance, the use of an appointed advisory expert likely will result in failure to follow the dictates of *Kelly, Robinson* and subsequent decisions. Likewise, clear specificity is necessary to guard against an advisory expert improperly opining as to the validity or *credibility of the opinions* of a party's proffered expert, even though the sole issue on which the advisory expert can assist the court relates to *admissibility* under Rule 104(a) of the opinions of the expert proffered by a party, for the law is clear that the validity or credibility of the expert opinion proffered by a party's expert is an issue solely for the jury and not for the judge or an appointed expert assisting with admissibility.

Sincerely yours,

John F. Sutton, Jr.
Chair, Rules 702-706 Sub-Committee

JFS,JR:bs
encl: Exhibit #1

[P S. For super-abundant, overweening information regarding *Daubert* and Bendectin, see Michael D. Green, BENDECTIN AND BIRTH DEFECTS (U.Penna. Press 1996)]

EXHIBIT #1

Rule 706. APPOINTMENT OF AN EXPERT TO ADVISE THE COURT ON ADMISSIBILITY OF SCIENTIFIC OPINIONS

(a) *Authority to Appoint.* When a court learns that a party in a civil or criminal case will offer or proposes to offer into evidence an expert witness' opinions based to a significant degree upon scientific principles or scientific methodology, the court may appoint a qualified expert to advise the court as specified in this rule.[1]

(b) *The Appointment.* The court may request the parties to submit nominations and may appoint either a qualified Advisory Expert agreed upon by the parties or a qualified Advisory Expert of its own selection. The court, prior to appointment, shall find that the Advisory Expert has the requisite scientific knowledge to be qualified to perform the duties specified in this Rule. The order appointing the Advisory Expert shall be in writing and shall state the duties of the Advisory Expert and the limitations upon the authority of the Advisory Expert. The order shall give an outline of the factors generally to be considered in evaluating the reliability of scientific principles and methodologies. The order shall be filed with the clerk of the court and copies delivered to the Advisory Expert and to each party. No person may be appointed as an Advisory Expert until that person has agreed in writing to act.

(c) *Role of the Appointed Advisory Expert.* The general duty of the Advisory Expert is to furnish written advice to the court as to whether the particular scientific principles and the particular scientific methodologies relied upon by a party's scientific expert are, in the opinion of the Advisory Expert, sufficiently reliable to assist the trier of fact to understand the proffered expert's evidence or to determine a fact in issue. The Advisory Expert shall not express any opinion or evaluation regarding the validity, accuracy or credibility of the opinions of a party's proffered expert witness.

(d) *Report and Opinions of the Appointed Advisory Expert.* The Advisory Expert shall proceed after appointment with reasonable diligence to make a written report to the court and shall furnish to the clerk sufficient copies of the report for distribution to all parties. The report shall contain: (1) the Advisory Expert's opinions or detailed evaluations of the extent to which each of the factors or elements listed in the court's written order indicates reliability *vel non* of the scientific principles or scientific methodology upon which the proffered opinions of the party's expert witness are based to a significant degree; and (2) the Advisory Expert's opinions or detailed evaluations

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1 Editor's temporary footnote: One member of the sub-committee believes the authority to appoint should exist only if the court finds it is unable to decide admissibility of tendered expert testimony. That viewpoint suggests that (a) should read as follows:

(a) *Authority to Appoint.* After learning that a party in a civil or criminal case will offer or proposes to offer into evidence an expert witness' opinions based to a significant degree upon scientific principles or scientific methodology, a court, upon finding that it is unable to decide the admissibility of such testimony without assistance, may appoint a qualified expert to advise the court as specified in this rule.

regarding the extent to which any factor, deemed by the Advisory Expert to be particularly relevant to reliability but not listed in the court's written statement, indicates reliability *vel non* of the scientific principles or scientific methodology upon which the proffered opinions of the party's expert witness are based to a significant degree. The report may not include any opinion or evaluation by the Advisory Expert regarding the validity, accuracy or credibility of the opinions of the expert witness proffered by a party; and a report containing such impermissible opinion or evaluation shall be completely disregarded and given no effect by the court.

(e) *Cross-Examination of the Appointed Advisory Expert.* After the filing of the Advisory Expert's report, the court upon the request of any party in a civil case and upon the request of the prosecution in a criminal case may, and upon the request of the defendant in a criminal case shall, permit cross-examination of the Advisory Expert regarding any matter contained in or relevant to the report of the Advisory Expert. The cross-examination may not take place in the presence of the jury in the proceeding.[2]

(f) *Supporting and Opposing Evidence by the Parties.* Within a reasonable time after receipt of the report of the Advisory Expert and before ruling upon the admissibility of the expert opinion proffered by a party, the court shall provide each party with reasonable opportunity to present testimony, documents, and other relevant evidence relating to the reliability of the scientific principles and the scientific methodology upon which the proffered opinions of the party's expert witness are based to a significant degree.

(g) *Rulings by the Court.* The ruling by the court pursuant to Rule 104(a) on the admissibility under Rule 702 of the proffered expert opinions of a party's witness shall be contained in a written order and shall include findings of fact supporting the court's conclusion that the proffered opinion is, or is not, based upon scientific principles and scientific methodology sufficiently reliable to assist the trier of fact to understand the evidence or to determine a fact in issue, within the meaning of Rule 702.

(h) *Disclosures Prohibited.* No information relating to any aspect of the use by the court of an appointed Advisory Expert shall be conveyed by the court, court personnel, a party, or a party's lawyer to any jury or juror.

(i) *Compensation of the Appointed Advisory Expert.* The Advisory Expert shall be awarded reasonable compensation to be fixed by order of the court. The compensation is payable from any funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions, the compensation shall be paid by

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[2] Editor's temporary footnote: It has been suggested that a sentence something like the following be added at the end of "(e)": "The court, upon motion of any party, may permit the Advisory Expert to be deposed prior to trial at a reasonable time and place."

the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.[3]

(j) *Record on Appeal.* All orders of the court pertaining to the appointment, duties, and compensation of the Advisory Expert, the Advisory Expert's report, and all rulings on the admissibility of the proffered evidence to which the Advisory Expert's report relates, shall be contained in the record on appeal, but only for the purposes of reviewing the court's use of an Advisory Expert and the court's decision to admit or exclude the proffered opinions of the party's expert witness. It shall be a sufficient compliance with Rule 51(b), Texas Rules of Appellate Procedure, for a party to simply designate "all papers on record relating to the use of an appointed Advisory Expert to assist the court." The statement of facts on appeal, if timely requested in compliance with Rule 53, Texas Rules of Appellate Procedure, shall contain the cross-examination, if any, of the Advisory Expert, but only for the purposes of reviewing the court's use of an Advisory Expert and the court's decision to admit or exclude the proffered opinions of the party's expert witness.

NOTES AND COMMENTS

Except when a social science or political science discipline is involved, the written order of the court that appoints the Advisory Expert and that contains the outline of factors generally relevant to the reliability of scientific principles and methodologies normally should list the following factors unless some or all of these factors appear to the court not to be significantly related to reliability: (1) general acceptance of the theory and technique by the relevant scientific or technical community; (2) the existence of literature supporting or rejecting the principle or methodology; (3) the potential rate of error of the principle or methodology; (4) the availability of other experts to test and evaluate the principle or methodology, and the making or publishing of tests or evaluations; (5) the clarity with which the principle or methodology can be explained in the trial court; and (6) non-judicial uses that have been made of the principle or methodology. This list, of course, is not and cannot be a definitive or exclusive list of factors relevant to determining reliability of scientific principles and methodologies involved in natural sciences, and the Advisory Expert may consider other factors relevant to reliability.

When the opinion of a party's expert witness is based to a significant degree upon principles of a social science or political science discipline or upon methodology of a social science or political science discipline, some or all of the above listed factors may not be sufficiently significant to be pertinent to reliability. In that situation, the court's written order normally should not list any factor

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3 Editor's temporary footnote: Some members of the sub-committee objected to this provision—which was taken largely from the draft by the SCAC's subcommittee on evidence—regarding methods for compensating the Advisory Expert.

One member's rather pointed and telling comment was to the effect that it is disingenuous "to tax one of the parties, or both of them, for the Court's admitted incapacity to make a judicial decision." Another member suggested that the proposed (i) be changed so as to provide that the compensation will be paid by the party who tendered the questionable expert.

The following, derived from one member's comments, is suggested as a possible alternative to (i): "*Compensation of the Appointed Advisory Expert.* The Advisory Expert shall be awarded reasonable compensation to be fixed by order of the court. The compensation is payable from public funds allocated for the administration of the court in which the cause is pending, and shall not be taxed as court costs."

that is not logically relevant to reliability but properly could suggest that helpful advice of the Advisory Expert will include a statement and evaluation of the intellectual standards normally prevailing in the particular social science or political science discipline.

In all situations, the written order of the court should stress to the Advisory Expert that it is not permissible to consider or opine regarding the validity, accuracy or credibility of the opinions of the party's expert witness.

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rule-906.doc

Rule 6. Time

(c) Use of United States Postal Service. If any document is sent to the proper clerk by United States Postal Service first-class, express, registered or certified mail in an envelope properly addressed and stamped and is deposited in the mail on or before the last day for filing the document, it shall be filed by the clerk and be deemed timely filed if it is received by the clerk not more than ten days after the filing deadline. Though it may consider other proof, the court will accept the following as conclusive proof of the date of mailing: (1) a legible postmark affixed by the United States Postal Service; (2) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or (3) a certificate of mailing by the United States Postal Service.

[Current Rule: Tex. R. Civ. P. 5].
[Original Source: Federal Rule 6].
[Official Comments]:

Changes to Rule 5:

Change: The second clause in the Federal rule requires a showing that the failure to act "was the result of excusable neglect." Also, specific reference is made in this rule to the time limitations relating to motions for new trial and for rehearings, and to appeals and writs of error, while in the Federal Rule the cross reference to such subjects is by Rule number.
Change by amendment effective March 1, 1950. The first proviso was added at the end of the rule.
Change by amendment effective January 1, 1971. The language of the first proviso has been changed to eliminate the requirement that the date of mailing be shown by a postmark on the envelope and an additional proviso has been added to make a legible postmark conclusive as to the date of mailing.
Change by amendment effective February 1, 1973. The words "affixed by the United States Postal Service" have been inserted in the final proviso.
Change by amendment effective January 1, 1976. A legible postmark shall be prima facie, not conclusive, evidence of date of mailing.
Change by amendment effective September 1, 1986. Amended to delete any reference to appellate procedure. The phrase "or motions for rehearing or the period for taking an appeal or writ of error from the trial court to any

higher court or the period of application for writ of error in the Supreme Court" and the phrase "motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error" have been deleted.

Change by amendment effective September 1, 1990. To make the last date for mailing under Rule 5 coincide with the last date for filing.

Rule 10. Service and Filing of Pleadings, Motions and Other Papers.

(a) Filing and Serving Pleadings and Motions. Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.

After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

[Current Rule: Tex. R. Civ. P. 21].
[Original Source: Art. 2291].
[Official Comments]:

Change by amendment effective January 1, 1978. The phrase, "if it relates to a pending suit." was deleted from the end of the first sentence. The phrase, "If the motion does not related to a pending suit," was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981. The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

Change by amendment effective September 1, 1990. To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73.

(b) **Methods of Service.**

(1) In General. Except as otherwise provided in these rules, every notice required by these rules, every pleading, plea, motion or other form of request required to be served under subdivision (a), other than pleadings or other papers served with citation, may be served by:

(A) delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record as the case may be, either in person or by agent;

(B) by courier receipted delivery;

(C) by certified or registered mail, to the party's last known address;

(D) by facsimile to the recipients current telecopier number; or

(E) by such other manner as the court in its discretion may direct.

(2) When Complete. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by facsimile, three days shall be added to the prescribed period.

(3) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service.

(4) Extension of Time. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and, upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(5) Cumulative. The provisions of this section relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

[Current Rule: Tex. R. Civ. P. 21a].
[Original Source: New Rule effective December 31, 1947].
[Official Comments]:

Change by amendment effective January 1, 1971. The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.
Change by amendment effective February 1, 1973. The words "Postal Service" have been substituted for "Post Office Department" and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.
Change by amendment effective January 1, 1978. The phrase "not relating to a pending suit" in the next to last sentence, is deleted.
Change by amendment effective January 1, 1981. The next to last sentence from the end of the former rule requiring three-day notice is deleted because Rule 21 is concurrently amended to require that notice.
Change by amendment effective April 1, 1984. This rule consolidates Rules 21a and 21b.
Change by amendment effective September 1, 1990. To allow for

service by current delivery means and technologies.

(c) Sanctions. If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with this Rules, the court may in its discretion, after notice and hearing, impose an appropriate sanction available under Rules ____ (current Rule 215-2b).

[Current Rule: Tex. R. Civ. P. 21b].
[Original Source: New rule effective September 1, 19901.
[Official Comments]:

Repealed provisions of Rule 73-to the extent they are to remain operative-are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties].

Rule 27. Third-Party Practice.

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff or to the plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than ninety (90) days after the appearance day of the third-party plaintiff, as a defending party. But if a new plaintiff is added by amendment or intervention, the third-party plaintiff need not obtain leave to make the service of a third-party complaint if it is filed not later than (30) days after the appearance day of the third-party plaintiff, as a defending party, for responding to the amended pleadings or the intervention. Otherwise, the third-plaintiff must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant shall make any defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and any counterclaims against the third party plaintiff and cross-claims against other third-party defendants as provided in Rule ____ (currently Rule 97). The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses and any counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to the third-party defendant or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

Rule ____. Default Judgment

(a) When Available. At any time after a defendant is required to answer, appear, or otherwise defend as provided by these rules, but fails to do so, the plaintiff may take judgment by default; provided that the citation with the officer's return has been on file with the clerk for the length of time required by Rule ____ (currently Rule 107). No default judgment may be rendered against a defendant in a removed action remanded from federal court if the defendant filed an answer in federal court during removal.

[Current Rule: Tex. R. Civ. P. 237a, 239].
[Original Source: Art. 2154, with minor textual changes; Federal Rule 55].
[Official Comments]:

Rule 237a, Change by amendment effective April 1, 1984. Minor change.

Rule 237a, Change by amendment effective September 1, 1990. To expressly provide, consistent with existing law, that a default judgment cannot be taken in a case remanded from federal court if an answer was filed in federal court during removal.

Rule 239, Change: "In term time" added.
Rule 239, Change by amendment effective September 1, 1962. Final clause beginning with the words "and provided that" added.

(b) Interlocutory Judgment. An interlocutory judgment by default may be rendered as follows:

(1) As to a defendant's liability pending a determination of unliquidated damages; or,

(2) As to a certain defendant in an action who is in default under subdivision (a) in a case having more than one defendants in the action, not all of whom are in default.

[Current Rule: Tex. R. Civ. P. 240.
[Original Source: Art. 2155, with textural change].

(c) Damages.

(1) Liquidated Demands. Damages must be assessed by the court against a defendant if the claim is liquidated and proved by a written instrument,unless the defendant demands and is entitled to a trial by jury.

(2) Unliquidated Demands. If the claim is unliquidated or not proved by a written instrument, unless the defendant is entitled to and demands a jury trial, the plaintiff must present evidence as to damages caused by the event sued upon on the record or by affidavits of

competent witnesses based on personal knowledge of the facts stated in the affidavits. Notice of a hearing as to damages must be given to a defendant who has either answered or appeared as provided for in these rules.

[Current Rule: Tex. R. Civ. P. 241, 243].
[Original Source: Art. 2157, unchanged].
[Official Comments]:

Change by amendment of March 31, 1941. The original rule has been amended by striking out the word "claim" and substituting in lieu thereof the words "cause of action."

(d) Notice of the Judgment. At or immediately prior to the time an interlocutory or final default judgment is rendered, the plaintiff must certify to the clerk in writing the last known mailing address of the defendant, which shall be filed among the papers in the action. The clerk must use this address to comply with the notice requirement of Rule _____ (currently Rule 306a(3)).

[Current Rule: Tex. R. Civ. P. 239a].
[Original Source: New Rule effective January 1, 1967].

(e) After Service by Publication. Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court must appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, must be filed with the papers of the cause as a part of the record thereof. The court must allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

[Current Rule: Tex. R. Civ. P. 244].
[Original Source: Art. 2158, with minor textual change.

(f) Setting Aside Default Judgment. The court may set aside an interlocutory or final default judgment for good cause at any time before the court's plenary power expires under Rule ____ (currently Rule 329b (d) and (e)). A final default judgment also may be set aside in accordance with Rule ___ (currently Rule 320).

[Current Rule: Tex. R. Civ. P. 330].
[Original Source: Federal Rule 55(c)].

HON. SCOTT BRISTER
234th District Court
May 14, 1997

TO: Rules Committee

RE: Draft Rule 174 on Separate & Bifurcated Trials

As reported at our last meeting, the attached proposals appearing in the agenda materials set forth several options for amending Texas Rule of Civil Procedure 174. At the bottom of this page, I have drafted an amendment to Ruled 174 that would accomplish the following changes discussed at our last meeting:

1. Adopt "efficiency and economy" as bases for bifurcation or separate trial. There did not seem to be much objection to this at our last meeting.

2. Distinguish between bifurcation and separate trial to reduce confusion.

3. Add the last phrase regarding "without unfairness to the parties" and barring separate trial of liability and damages. The phrase comes directly from TRCP 320 and TRAP 81.

I have not addressed the "prerequisite issues" question. I doubt we can draft a rule delineating when bifurcation or separate trial is or isn't allowed without a very long list that can't be exhastive. The current rule is broad enough to allow bifurcation or separate trial on the issues where we have done so in the past, and changing it might suggest an extension to other areas where it would make little sense.

TRCP 174. Consolidation; Separate Trials

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate or Bifurcated Trials.** The court in furtherance of convenience, ~~or~~ to avoid prejudice, or to promote efficiency and economy, may order a separate trial before different jurires or a bifurcated trial before a single jury of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, provided that such claims or issues are clearly separable without unfairness to the parties. A separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Current FRCP 42(b). Separate Trials

(b) **Separate Trials**. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Court Rules Committee Draft Rule 174(b). Separate Trials

(b) **Separate Trials**. The court, in furtherance of convenience, to avoid prejudice or to promote efficiency and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue including liability and damages issues, or any issues that may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. When two or more separate issues are to be tried to a jury, the Court where practicable shall allow the same jury to try both issues.

TADC, TMA, AIA, TCJL, TCC, etc. Draft Rule 174(b).

(b) **Separate Trials**. In all cases, including actions in which personal injury is alleged, the court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or such issue as may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court may allow the same jury to try both issues.

State Bar Committee on the Administration of Justice Draft Rule 174(b).

(b) **Separate Trials**. In all cases, including actions in which personal injury is alleged, the court in furtherance of convenience or to avoid prejudice or when separate trials will promote efficiency and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or any issues that may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court shall allow the same jury to try both issues, unless the parties, by written agreement, specify otherwise.

HON. SCOTT BRISTER
234th District Court
May 14, 1997

TO: Rules Committee

RE: Draft Rule on Motions in Limine

Pursuant to our discussion at the last meeting, I have drafted a rule on Motions in Limine. While several other states have a rule on motions in limine, none do much more than state when they must be filed. My recollection is that the issues to be addressed were as follows:

1. Discourage boilerplate motions.
2. Encourage Robinson v. duPont matters to be included.
3. Make no change regarding unappealability of rulings in limine.

As to the latter item, I have included in brackets a suggestion that if the court wants to make a limine ruling part of the record and appealable without further tenders or objections, it can do so by entering a pretrial order pursuant to Rule 166.

Rule ___. Motions in Limine.

1. Motion. Motions in limine shall be in writing and shall be filed at such time as the court directs prior to trial or pretrial conference. The court in its discretion may grant leave for a late filing or an oral motion in limine.

2. Scope. The motion shall state with specificity the anticipated evidence, including testimony by experts or other witnesses, that must be submitted for ruling by the court outside the presence of the jury prior to any mention thereof before the jury. The motion need only address matters where considerations of efficiency or prejudice justify a ruling prior to rather than during trial. The motion shall not include requests to abide by standard rules of procedure or decorum, hypothetical requests unrelated to the anticipated evidence in the case, or matters that may be addressed without prejudice or delay by objection during trial. The court may strike any motion not in conformity with this rule and require that it be refiled.

3. Ruling. The court may grant or deny all or any part of the motion, or may postpone ruling on any part thereof until trial. If the court grants or postpones any part of the motion, the court shall sign an order requiring counsel to instruct associate counsel, clients, witnesses, and any other persons under their control to refrain from mentioning the designated matters in any question, answer, or comment during the trial until otherwise instructed.

4. Review. The grant or denial of a motion in limine is an interim ruling only, and does not constitute grounds for alleging error on appeal. Evidence allowed or excluded by an order in limine must be objected to or tendered at trial to preserve error in any ruling thereon. [However, nothing in this rule shall affect the appealability of any evidentiary ruling by the court pursuant to Rule 166.]

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TRCP 296 - 331

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
297 & 298	3RD0263-284	The opinion of *Grossnickle v. Grossnickle*, 927 S.W.2d 687, 695 (Tex. App.--Texarkana 1996, n.w.h.) indicates that Rule 298 should be changed to allow the ten day period of time in which to request additional or amended findings of fact to commence on the day the original findings and conclusions are either mailed or received rather than when the original findings and conclusions are "filed" as Rule 298 now states. By: Chair Luke Soules	None.	The proposed amendment to Rule 298 partially solves the problem by extending the time from 10 days to 20 days in which to request additional or amended findings and conclusions. This additional time ameliorates the problem of findings and conclusions signed but not immediately mailed. No other deadline is triggered by mailing of receipt. Since counsel must keep track of the deadlines, maintaining all deadlines from the date of "filing" appears to be sounder than changing this one internal deadline that could extend at length or destroy the other deadlines.

300	3RD0284.1	Texas needs a rule of civil procedure that requires a trial court to render a decision within 30 days after taking a matter "under advisement." By: Hugh Harrell	None.	While requiring a trial judge to exercise discretion within 30 days sounds like a worthy idea and would be efficient, such a rule on a practical level could never be enforced. Friendly reminders and persuasion, which need no rule, are about all that has ever worked on a practical level. In short, it is a good idea with no solution.
329b	3RD0285-286	The Court Rules Subcommittee of the State Bar considered whether current Rule 329b should be amended to permit appealing the granting of a motion for new trial. While that subcommittee rejected such action, the subcommittee's consideration nevertheless represents a suggestion for SCAC. By: Patrick Hazel, Subcommittee Chair	None.	Since few motions for new trial are granted, there is little reason for amending the rule. Of the few motions that are granted, only a small percentage could be considered an "abuse." Subjecting the correct exercise of discretion to an appeal appears to be an unnecessary evil to correct the limited times a trial court grants a motion without a reason or an invalid reason. The rejection by the Bar subcommittee appears sound.

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TRCP 216 - 295

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
216-236	3RD0227-254	Enclosing copy of new jury rules adopted by Supreme Court of Arizona to review for possible changes to Texas procedure. By: Richard R. Orsinger	No change.	Judge Cornyn's task force is working on the jury related rules.
223	3RD0255	Proposed dropping the provision in Rule 223 regarding a jury shuffle. By: Judge Scott Brister	No change.	Already discussed and rejected by the Committee.
226a, 269 and 286	3RD0256-259	Proposed adopting rules permitting jurors in civil cases to submit written questions and to take notes. Also proposing giving the trial court the power to permit lawyers to reargue the case if the jury is deadlocked. By: Richard Orsinger	No change.	Judge Cornyn's task force is working on the jury related rules.

226 & 281	3RD0259.1 - 259.8	Court Rules Committee's proposed changes.	No change.	Judge Cornyn's task force is working on the jury related rules.
271-279	3RD0260-262	Commenting on the proposed revisions to the Charge Rules. By: Prof. Louis S. Muldrow	No change.	Already addressed by the Committee.

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TRCP 523 - 734

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
528	3RD0287-28	Court Rules Committee proposed rule change.	Recommend the changes proposed by the Court Rules Committee	To prevent defendants, in order to escape due process, from presenting these affidavits at trial time repeatedly.
539	3RD0290-297	Court Rules Committee proposed rule change.	None	This amendment was approved at the November 23, 1996 meeting.

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TRCP 1 - 14

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
1	3RD0114-116	Proposed changing all references to rule number to "TRCP", "TRAP", and "TRCvE" By: Justice Michol M. O'Connor	Refer to Bryan Garner.	
3a	3RD0117-121	Proposed changing the rule to allow justices of the peace to seek Supreme Court approval for local rules. By: Judge Tom Lawrence	No change.	
4	3RD0121.1-121.3	Conflict between Rule 4 and the Code Construction Act. By: Chairman Luke Soules	No change.	This has already been taken care of by amendments to the rules.

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TEXAS RULES OF APPELLATE PROCEDURE

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
General Comments	3RD0298-307	Comments regarding the proposed changes to the rule on petition for review and the requirement that intermediate appellate courts conduct hearings before granting mandamus relief. By: Katherine L. Butler on behalf of Houston Bar Association	None.	Already taken care of in appellate rules sent to the Court.
Misc.	3RD308-314	Forwarded caselaw wherein Justice Grant suggested that the procedure for reviewing summary judgment appeals be specifically set forth so that all parties would know what to expect on appeal. By: Chairman Luke Soules	None	Already taken care of in appellate rules sent to the Supreme Court

1(a)	3RD0315-317	Forwarding caselaw regarding appealing a judgment of small claims court directly to the court of appeals. By: Chairman Luke Soules	None	Already taken care of in appellate rules sent to the Supreme Court
4, 74(a) & 91	3RD0318-319	Voicing concern over the requirement that all papers are to be served on all parties to the trial court's judgment. By: Chief Justice and Justices of the Ninth Court of Appeals	None	Already taken care of in appellate rules sent to the Supreme Court
18	3RD0320-322	Voicing concern over the proposed amendment to Rule 18(c) that places the financial burden of replacing lost or misplaced records upon the individual clerk instead of the court as an institution. By: Chief Justice Bob Thomas	None	Already taken care of in appellate rules sent to the Supreme Court. See Appellate Rule 12.3

18c	3RD0323-333	Voicing concern over the proposed amendment to Rule 18(c) that places the financial burden of replacing lost or misplaced records upon the individual clerk instead of the court as an institution. By: Chief Justices and Clerks of the various Courts of Appeals	None	Already taken care of in appellate rules sent to the Supreme Court. See Appellate Rule 12.3
40 & 41	3RD0334-338	Forwarding caselaw regarding time for notifying the court reporter of the filing of an affidavit disclosing lack of financial resources. By: Chairman Luke Soules	None.	Taken care of in TRAP 20.1(i)
53	3RD0338.1 - 338.4	Forwarding caselaw wherein the court of appeals urged the Supreme Court of Texas to adopt rules providing for the preparation of the statement of facts in appeals from hearings that were recorded by means of audiotape. By: Chairman Luke Soules	None	Already taken care of in appellate rules sent to the Supreme Court

53(h)	3RD339-341	Forwarded caselaw regarding the fact there are no official rules requiring a witness index. By: Chairman Luke Soules	None	Already taken care of in appellate rules sent to the Supreme Court
54	3RD0342-345	Caselaw regarding the responsibility of the officials to see that the record is filed if they have been paid or if arrangements to pay them have been made By: Chairman Luke Soules	None	Already taken care of in appellate rules sent to the Supreme Court
55	3RD0346-347	Complaining about the administrative appeal rule. By: Charles A. Spain, Jr.	None	Already taken care of in appellate rules sent to the Supreme Court
57	3RD0348-359	Proposed an alternative to proposed TRAP 57 regarding how the docketing statement would be handled. By: Margie Thompson (Clerk 1st Court of Appeals), Mary Jane Smart (Clerk 14th Court of Appeals), Beverly Kaufmann (Harris County Clerk, and Charles Bacarisse (Harris County District Clerk)	Already done.	See New TRAP 32.1

84	3RD0360-365	Committee on Court Rules proposed changes to TRAP 84.	Already done	See New TRAP 45
84	3RD0366-374	Caselaw regarding TRAP 84. By: Chairman Luke Soules	Already done	See New TRAP 45
120 & 121	3RD0374-383	Commenting his group felt that intermediate appellate courts should have the option to grant mandamus without oral argument. By: Chief Justice Paul Murphy and Kathleen Walsh Beirne	None	Already taken care of in appellate rules sent to the Supreme Court. See TRAP 52.7
121	3RD0384-389	Supporting amending Rule 121 to allow the option of granting mandamus relief without oral argument. Chief Justices Linda Thomas, John Cayce, Bob Thomas, Ronald Walker and Alice-Oliver Parrot	None	Already taken care of in appellate rules sent to the Supreme Court. See TRAP 52.7
121(a)(2)(B)	3RD0390-392	Court Rules Committee's proposed changes to TRAP 121.	None	Already taken care of in appellate rules sent to the Supreme Court. See TRAP 52.1

130, 132, 134	3RD0393-396	Commenting on problems with the proposed appellate rule changes. By: Mike Prince	None	No action requested.
130-136	3RD0397-401	Providing an alternate to the Court's proposal to adopt a petition for review practice similar to the certiorari system employed by the U.S. Supreme Court. By: Pamela Stanton Baron	None	Proposal was considered and rejected.
130-136	3RD0402-403	Supporting Pam Baron's alternative proposal. By: Charles Lord	None	Ms. Baron's proposal was considered and rejected.
130-136	3RD0404-406	Supporting Pam Baron's alternative proposal. By: Douglas Alexander	None	Ms. Baron's proposal was considered and rejected.
130-136	3RD0407-409	Supporting Pam Baron's alternative proposal and providing his additional proposal. By: Jimmy Vaught	None	Ms. Baron's proposal was considered and rejected.
130-136	3RD0410-414	Comments regarding the proposed petition for review rules. By: Clarence A. Guittard	None	Already taken care of in appellate rules sent to the Supreme Court

130-136	3RD0415-503	These are responses to Justice Phillips' inquiry to Supreme Courts of other states regarding their procedure for appealing to their highest court.	None	No action requested.
130-136	3RD0504-509	Commenting on the proposed petition for review rules. By: Fulbright & Jaworski, Houston Bar Assocation Appellate Practice Section, Appellate Practice and Advocacy Section of the State Bar of Texas and David M. Gunn	None	No action requested.
130-136	3RD0510-511	Supporting Pam Baron's alternative proposal to petition for review rule. By: Robert T. Cain, Jr.	None	No action requested.
180(a)(6)	3RD0512-513	Comments to proposed changes to the rule. By: Charles A. Spain, Jr.	None	No action requested.
182(b)	3RD0514-519	Court Rules Committee's proposed changes to TRAP 182(b)	None	Already taken care of in appellate rules sent to the Supreme Court. See TRAP 65

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA

TRCP 166 - 209

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
166a	3RD0173-182	Proposed changes to Rule 166a submitted by the Court Rules Committee	None	Issue resolved by proposed Rule 166a submitted to the Supreme Court
166a	3RD0183-184	Proposed amending the rule to provide that a summary judgment may be affirmed on any grounds in the motion, even if the trial court's order states a different ground and changing the burden as per the federal practice. By: Judge Scott Brister	None	Issue resolved by proposed Rule 166a submitted to the Supreme Court
166a	3RD0185-187	Comments regarding proposed Rule 166a By: Dean J. Schaner	None	Issue resolved by proposed Rule 166a submitted to the Supreme Court
166a	3RD0187.1 - 187.2	Comments regarding proposed Rule 166a By: Fred Davis	None	Issue resolved by proposed Rule 166a submitted to the Supreme Court

166a	3RD0187.3	Comments regarding proposed Rule 166a By: Rob H. Holt	None	Issue resolved by proposed Rule 166a submitted to the Supreme Court
166b	3RD0188-190	Commenting that discovery responses should have to be specify what precise objections it is relying upon and the court should have to specifically state in its ruling as to each discrete objection By: Paul Gold	None	This is taken care in the proposed discovery rules.
167	3RD0191-202	By: Court Rules Committee		
167	3RD0203-205	By: Bob Gwinn		
168	3RD0206-297	Proposed amending the rule to require a diskette be served with discovery requests. By: Richard E. Tulk	None	See proposed discovery rules.
168	3RD0208-211	By: Steven Amis		

173	3RD0212-213	Subcommittee Chair's proposed changes. By: Patrick Hazel, Subcommittee Chair	None	This was not the final work product of the Court Rules Committee. No action necessary unless submitted in final from the Court Rules Committee.
177b	3RD0214-215	Subcommittee Chair's proposed changes. By: Patrick Hazel, Subcommittee Chair	None	This was not the final work product of the Court Rules Committee. No action necessary unless submitted in final from the Court Rules Committee.
181	3RD0216-217	Subcommittee Chair's proposed changes. By: Patrick Hazel, Subcommittee Chair	None	This was not the final work product of the Court Rules Committee. No action necessary unless submitted in final from the Court Rules Committee.
New Rule 182	3RD0218-220	Proposed a new rule regarding handling of firearms in the court room. By: Kevin R. Madison	None	Not necessary.

200	3RD0221-226	Amend rule to address who pays the cost of an expert witnesses deposition. By: Court Rules Committee	Approve recommendation.	To cut down on the cost of litigation. The amendment is fair to both sides.

DISPOSITION CHART
FOR THE THIRD SUPPLEMENTAL AGENDA
May 16 - 17, 1997

TRCP 15 - 165a

RULE NO.	PAGE NO.	CHANGE SUGGESTED / BY	RECOMMENDED ACTION	REASON
17	3RD0122-137	The District Attorney of Tarrant County writes on behalf of the Tarrant County District Clerk saying that the local practice had been to collect the cost of serving process in advance of service. A 4-4-96 AG Opinion DM-382, prohibits this practice. Wants TRCP 17 amended to permit advance collection of the fee. By: Dana Womack, on behalf of Tim Curry, D.A.	No further action necessary. The SCAC has already approved the new Clerk's Rules submitted by this Subcommittee, in which we deleted TRCP 17 and amended TRCP 126 to permit such fees to be collected in advance. This solves the writer's problem. No further action is necessary.	Subcommittee agrees that the clerks should be able to collect the fee for service of process in advance.

18a	3RD0138-141	This proposal is a revamping of the rule governing recusal and disqualification of judges. The SCAC has already adopted and sent to the Supreme Court a revised TRCP 18 that makes the changes decided upon by the SCAC. By: Court Rules Committee	Subcommittee suggests no further action on TRCP 18. The SCAC has already extensively debated and voted on TRCP 18 changes.	The SCAC proposed change, like the Court Rules Committee's proposed rule, does away with the requirement that the motion be filed 10 days before trial or hearing. Subcommittee does not feel it necessary to say that the clerk will forward papers. Sometimes it may be the judge or court coordinator. The Subcommittee sees no need to say the judge can only recuse or not recuse. Also, there is good cause exception to permit the trial court to take other action. The proposed rule provides for an unneeded intermediate step where presiding judge determines whether prima facie allegation has been alleged.

21	3RD0142-143	Proposal to include in TRCP 21 a provision about how to count periods of 3 days or less. By: Patrick Hazel, Subcommittee Chair	Subcommittee recommends that the proposal be rejected.	Subcommittee believes that TRCP 4 applies to and explains TRCP 21, and that there is no need to repeat Rule 4 inside Rule 21.
21a	3RD0144-158	In *Graco Robotics* case, requests for admissions sent on 12-22 were rec'd on 12-28. Deadline for responding was 33 days after date of mailing, not 30 days after requests were received. By: Chairman Luke Soules	Subcommittee recommends no action.	This case correctly applies TRCP 21a. It is the date of mailing that starts the timetable, not the date the item is received. This is a simple rule, and fact the opposing party was tripped up in this case is not the fault of the rule.

71(??)	3RD0159-162	Due to an inadvertent mistake in amending a petition, a party was dropped and limitations ran before the omission was discovered and the party re-included in the petition. By: Paul Purtha	Subcommittee recommends no further action.	SCAC has already adopted a new Rule 40 entitled "Voluntary Dismissals and Nonsuits," in which we include subparagraph (c) "Relation Back," which provides that if a party is inadvertently omitted from an amended pleading, a subsequent pleading that includes that party relates back to the date of the inadvertent omission, thus avoiding the running of limitations. Professor Dorsaneo can explain the exact status of the language of this new rule. This change solves the complaint raised by Paul Purtha.

86	3RD0163-172	Profession Hazel suggests new venue rules. This is a revision of his prior suggestions, containing numerous changes from current practice. By: Prof. Patrick Hazel	Subcommittee recommends that SCAC continue to review the venue rules that have been discussed and have been redrafted by Professor Albright.	The SCAC has decided to take a different tack from Prof. Hazel, which can be explained by Prof. Albright. Also, in conversations with Prof. Albright, Prof. Hazel has already stepped back from some of these proposals.
86, 86a, 87 & 89	3RD0172.1 - 172.14	Proposed venue rules from the Court Rules Committee. By: Court Rules Committee	Subcommittee recommends that SCAC continue to review the venue rules that have been discussed and have been redrafted by Professor Albright.	These proposed changes are specific edits to the existing venue rules. The SCAC has voted to rewrite the venue rules in their entirety. Prof. Albright can comment on the substance of this proposal insofar as it goes beyond mere wording changes to the current venue rules.

145	3RD0172.15 - 172.17	Amend R145 to permit District Clerks to challenge pauper's oath. By: Michael P. Fleming	No further action needed.	The SCAC has already voted to amend TRCP 145 to permit the court clerk to challenge affidavits of indigency. This takes care of the problem raised in this correspondence.

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CC LHS
HHD -
Xcs for all members + LHS Mtg file

May 9, 1997

Mr. Luther Soules
Supreme Court Advisory Committee
Soules & Wallace
15th Floor, Frost Bank Tower
100 West Houston Street
San Antonio, Texas 78205-1457

By Federal Express

Re: Misc. Docket No. 97-9067; Amendments to Tex. R. Civ. P. 166a

Dear Luke:

Enclosed are twenty-one copies of a letter I am sending to Chief Justice Phillips outlining serious concerns I have with the Supreme Court's impending revision of Texas summary judgment procedure. These are for distribution to the Supreme Court Advisory Committee. Thank you for your assistance.

Sincerely,

Joe Jamail

Joseph D. Jamail

:jmg
Attachments

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May 9, 1997

Via Federal Express

Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Misc. Docket No. 97-9067; Amendments to Tex. R. Civ. P. 166a

Dear Mr. Chief Justice:

The Court's Order of April 16, 1997, invites public comment upon the tentative revisions to the current summary judgment procedures established in Tex. R. Civ. P. 166a ("Rule 166a"). I respectfully make the following comments and observations.

SUMMARY

It generally appears that the revisions to Rule 166a are intended to "codify" the "no evidence" summary judgment practice adopted by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Preliminarily, it is noted that the federal rules themselves have no specific verbiage similar to paragraph (i) of the proposed revisions. In summary, I suggest that the revisions to Rule 166a are unnecessary and unwise, procedurally, substantively and as a matter of policy, as your opinion in *Casso v. Brand*, 776 S.W.2d, 551, 555-57 (Tex. 1989), holds.

The history of summary judgment practice has followed distinctly different paths in the federal and state systems. Each is premised upon different philosophies. The essential distinction between the two rests in large measure upon different procedural and substantive contexts. To begin with, it must be remembered that, constitutionally, the federal system, which is administered by life-time Article III appointees, is one of intentional limited jurisdiction. State courts are not. Implanting the federal procedural into our state procedure without the multitude of procedural and decisional safeguards which have developed in the federal system in the last 60 years will jeopardize, constitutionally and otherwise, that judicial open door paradigm which pervades and characterizes the Texas constitutional system.

The Texas Constitution, more than the federal Constitution, gives more deference to juries as the ultimate finders of fact and arbiters of the credibility of evidence. Our state Constitution is more mindful of allowing citizens their day in court. Even a brief historical sketch of federal and state summary judgment practice bears this out.

The new rule has not had appropriate time for public comment from the bench and bar. The end result of the revisions to Rule 166a will not just be a more "defense-oriented" justice system, but a judicial quagmire which will impose upon non-Article III trial judges an onerous spate of new mini-trials filled with prat-falls and unnecessarily over-technical pre-trial litigation shenanigans.

DISCUSSION

I. General Nature of the Changes.

The Rule 166a revisions set forth in the Court's April 16, 1997, Order create a new form of "no evidence" motion for summary judgment patterned on, but surpassing, the federal summary judgment system. The new "no evidence" motion can be made after an undefined "adequate time for discovery" has elapsed, and need not be supported by traditional summary judgment, although such evidence is necessary to refute the new motion.

The Court has rejected certain safeguards recommended by the Supreme Court Advisory Committee, such as attorney fee shifting for meritless motions and full-disclosure certificates by the movants' attorney. The new streamlined summary adjudication process has the very real potential of becoming a draconian railroading device.

II. History of Texas Summary Judgment System Since Implementation in 1950.

As observed in this Court's opinion in *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 675 (Tex. 1979), summary judgments are relatively new to the Texas judicial system. Summary judgment provisions were not made in the first promulgation of the Texas Rules of Civil Procedure in 1940, although the federal courts had implemented summary judgments in 1937. Rule 166a was adopted in 1950 as a way to eliminate delay and expense. Hittner & Liberato, "Summary

Judgments in Texas," 35 S.Tex.L.R. 9, 12 (1994). From the time of adoption to Justice Franklin Spears' opinion in *City of Houston v. Clear Creek Basin Authority*, however, the summary judgment procedure was fraught with problems even in light of the 1978 revisions to Rule 166a. *Id.*

A. Purpose of Summary Judgments Under Current Texas System.

The function of summary judgment is not to deprive a litigant of the right to trial by jury, but to eliminate patently unmeritorious claims and untenable defenses. Rule 166a is not intended to deprive a litigant of a full hearing on the merits of any fact issue. *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). The present basis for a motion for summary judgment is that no genuine issue exists for any material fact and that the movant is entitled to summary judgment as a matter of law. Tex. R. Civ. P. 166a(c); Hittner & Liberato at 13. Summary judgment is limited to the issues expressly placed before the trial court by motion and response. *McConnell v. Southside I.S.D.*, 858 S.W.2d 337, 340-41 (Tex. 1993).

B. Harsh and Unfavored Procedure.

The specificity requirements of Rule 166a are a due process safeguard. *See, Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978). Nevertheless, summary judgment is a harsh remedy that courts should deny unless the movant clearly establishes a right to summary judgment as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 557 (Tex. 1989).

1. Pre-*City of Houston v. Clear Creek Basin Authority*.

After Rule 166a was made effective in 1950, the intended streamlining effect of the summary judgment procedure failed to materialize. Trial courts were reluctant to grant summary judgments, and a vast majority of summary judgments granted were reversed on appeal. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d at 675. A major obstacle to success was the lack of clarity of the procedure. *Id.*

2. Post-1978.

As a result, the Supreme Court revised Rule 166a in 1978, and with its 1979 opinion in *City of Houston v. Clear Creek Basin Authority*, substantially increased the efficacy of Rule 166a while maintaining adequate due process safeguards. Admittedly, however, a number of summary judgments are still reversed on appeal, at least at the intermediate level. Nobles, "Reversals of Civil Judgments by Texas Appellate Courts," Appellate Advocate (Spring 1990); Hittner & Liberato, at 12 n. 6. Yet I respectfully submit that the reversal rate of summary judgments has decreased substantially in this decade, because the number of summary judgments granted has significantly increased in the same period. At the same time, the Supreme Court has provided increasing

guidance as to proper summary judgment practice. *See, e.g., McConnell v. Southside I.S.D., supra; Casso v. Brand, supra.*

III. Purpose of Federal System 1937 through *Celotex*.

Summary judgments were introduced into federal practice in 1937. The purpose of the federal summary judgment rule is to pierce the pleadings and to assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). To accomplish this, summary judgment procedure is designed ideally to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553 (1986). The federal system is designed to further the goal of Fed. R. Civ. P. 1 to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. at 327, 106 S.Ct. at 2555. Such noble ideals do not necessarily translate easily into Texas summary judgment procedure practice, however.

IV. Comparison of Present Texas and Federal Summary Judgment Systems.

The most noticeable distinction between the Texas and federal summary judgment systems is the allocation of the burden of proof elucidated in *Celotex Corp. v. Catrett*. Unlike present-day Texas procedure, federal practice now permits a movant to seek summary disposition of the case if it makes an unchallenged *prima facie* showing that the non-movant can garner no factual support as to one or more essential elements of the non-movant's claim or defense upon which it would carry the burden of proof at trial. 477 U.S. at 2552, 106 S.Ct. at 322-23.

Notably, unlike the proposed revisions to Rule 166a, this "no evidence" form of summary judgment is not specifically written into Fed. R. Civ. P. 56, but it finds expression in the *Celotex Corp v. Catrett* plurality opinion. However, as the concurrence and dissents in *Celotex* underscore, the "no evidence" summary judgment format is not without its due process problems. More important, the *Celotex* plurality, concurring and dissenting opinions together place the role of "no evidence" summary judgment in a more constitutionally palatable context within the whole federal procedural scheme.

Given the significant philosophical, jurisdictional and procedural differences between the federal and Texas court systems, however, the federal concept of a "no evidence" motion for summary judgment does not translate well into Texas procedure. "No evidence" motions for summary judgment are better suited for disposition by Article III judges within the federal procedural framework (especially since the advent of Fed. R. Civ. P. 26 initial disclosures) than elected state court judges faced with heavier dockets and less law clerk and staff attorney support.

A. Different Philosophies.

Your opinion in *Casso v. Brand, supra* (a First Amendment defamation case) underscores the policy and procedural differences between the Texas and federal summary judgment systems. In *Casso*, you observed that in the federal system, summary judgments are not regarded as a disfavored procedural short-cut, as they are in Texas, but are viewed as a way of expediting the disposition of cases:

> Texas law, of course, is different. While the language of our rule is similar, our interpretation of that language is not. We use summary judgments merely "to eliminate patently unmeritorious claims and untenable defenses," *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 n. 5 (Tex.1979), and we never shift the burden of proof to the non-movant unless and until the movant has "establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law." *Id.* at 678.

Casso v. Brand, 776 S.W.2d at 556. As a policy matter, your opinion went further:

> Moreover, we see no overriding policy reasons for modifying our summary judgment standards under the common law. . . . we believe our own procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions. Tex. Const. art. I, § 15, art. V, § 10.

Id. at 556-57. The Court's April 16, 1997, Order reflects an inexplicable wholesale retreat from that pronouncement and your cogent observations.

B. Different Jurisdictional Bases.

Federal courts have no inherent subject matter jurisdiction. They are courts of limited jurisdiction by origin and design. *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986). Texas trial courts, however, are basically courts of general jurisdiction. *See generally*, Tex. Const. art. 5.

The federal presumption against assuming jurisdiction, especially where the dual federal/state judicial system presumes that state courts would otherwise have original general jurisdiction over cases not pre-empted by federal law, coupled with the narrower constitutional guarantee of jury trials in federal court, carry over into the *Celotex* philosophy of expedient disposition of cases without jury trials by Article III judges. On the other hand, the express "open door" guarantee found in the

Texas Constitution (however politically and philosophically distasteful that provision might be to tort reformers) gives greater expression to the general jurisdictional nature of Texas trial courts. Tex. Const. art. I, § 13.

C. Safeguards in Federal Procedural Practice Designed to Prevent "Railroad" Effect.

I do not believe that it can be overemphasized that paragraph (i) of the proposed revisions codifies *Celotex* out of context. In so doing, this Court is unwittingly creating a procedural trap which can be used to "railroad" lawsuits out of the court system. The Court has deleted several safeguards recommended by the Advisory Committee, and has failed to take into account the backdrop of the federal procedural rules and decisional law which serve to prevent such railroading. In fact, it is respectfully suggested that without wholesale revision of the entire Texas Rules of Civil Procedure to mirror the federal rules, paragraph (i) will place due process rights at serious risk.

1. Federal Procedures Require Defendants to Admit or Deny Plaintiffs' Allegations.

Although both federal and Texas courts follow the "notice" pleading rule which dispenses with the need for detailed factual pleading, the federal rules require that a defendant specifically admit or deny each allegation in a petition. Fed. R. Civ. P. 8(b). The general denial under Texas practice stands in stark contrast. The lack of specific admissions or denials, together with the lack of Federal Rule 26 full disclosure requirements as discussed in the next section, present a danger to due process under the proposed "no-evidence" summary judgment procedure.

2. No Fed. R. Civ. P. 26(a) Analogue to Prevent "Railroad" Effect.

One of the most profound reasons that *Celotex* "no evidence" summary judgment motion practice should not be introduced into the Texas Rules of Civil Procedure is the lack of a state analogue to the full disclosure requirements embodied in Fed. R. Civ. P. 26. Litigants in federal court are required to make extensive discovery disclosures at the commencement of the case, without formal discovery requests, with a continuing duty to supplement their initial disclosures. The full-disclosure requirements of the federal discovery rules provide an additional safeguard to the potential "railroad" effect of "no-evidence" summary judgment motions. In this regard, the Court's deletion of the Advisory Committee's full-disclosure certificate requirement is disturbing.

3. Fed. R. Civ. P. 11 More Widely Enforced Than Tex. R. Civ. P. 13.

The Court has chosen to ignore the Advisory Committee's recommendation that specific fee-shifting sanctions be provided in the revisions. Perhaps the Court feels that Tex. R. Civ. P. 13 suffices to prevent frivolous, routine, and harassing meritless "no evidence" summary judgment motions, similar to Fed. R. Civ. P. 11. The reluctance of Texas trial courts to grant (and the lack of

appellate court support of) Rule 13 relief is magnified by the more general practice of Federal courts to enforce their Rule 11.

V. Proposed Revisions Will Create Havoc in the Court System.

Due process considerations aside, the codification of *Celotex* "no evidence" summary judgment motion practice with the added "must grant" requirement will impose substantial burdens upon Texas courts, rather than relieve them of putatively frivolous lawsuits.

A. Intended to Facilitate Trial Courts' Responsibility as "Gatekeepers," Summary Judgments Will Overwhelm Trial Courts.

Adding a new summary judgment tool will undoubtedly increase pre-trial motion practice every bit as much as enhanced "dot the *i* and cross the *t*" discovery has already burdened trial courts. The new "no evidence" motions could well devolve into routinely filed, time-consuming, overly briefed mini-trials. *Cf., Matsushita Elec. Inds. Co. v. Zenith Radio Corp.*, 475 U.S. at 599-600, 106 S.Ct. at 1363 (White, J. dissenting). The perceived need to "do something" in response to present day "tort reform" political sentiment by putting even more "gatekeeper" duties upon trial judges, as was done with expert testimony matters, will surely backfire as the trial courts (and ultimately the appellate courts) are deluged with "gatekeeping" motions.

The rush to substantially alter state summary judgment practice as reflected by the Court's April 16, 1997, Order, reflects to some degree the unarguable need for this Court to retain judicial control over rule-making decisions, as evidenced by similar (but terribly drafted) bills presently pending in the Texas Legislature. *See, e.g.*, H.B. 95. I stand committed, as always, to the belief that the Legislature should leave the promulgation and implementation of procedural rules to the Texas Supreme Court and Court of Criminal Appeals. It is on that premise that I respectfully submit these comments.

1. Routine Motions.

The commentary to the proposed rule contains the proviso that "paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case." I respectfully submit that this commentary lacks sufficient teeth to prevent "no-evidence" summary judgment motions from becoming the norm. The lure for harassment and abuse is plainly too great.

2. Potential for Harassment and Abuse.

In 1941, the "general demurrer" practice was abolished by Rule 90. The introduction of "no evidence" summary judgment motions presents a very real potential for harassment and abuse of the same type general demurrers presented before 1941. *See,* Stayton, "The Scope and Function of Pleading Under the New Federal and Texas Rules: A Comparison," 20 Tex.L.Rev. 16 (1941),

excerpted in General Commentary — 1966, Tex. R. Civ. P. 90 (West 1979). In many respects, the "no evidence" summary judgments resemble a new form of "speaking demurrers" which heretofore were alien to Texas practice. *International Bank of Commerce of Laredo v. City of Laredo*, 608 S.W.2d 267, 270 (Tex. Civ. App. — San Antonio 1980, writ dism'd).

B. Intended to Streamline Justice, a "Railroad" Effect Will Result in an Appellate Explosion.

The proposed additions to Rule 166a, which are intended to streamline justice, will have the opposite effect. Besides increasing the likelihood of creating a "railroad" effect in at the trial level, appellate issues, interlocutory and otherwise, will increase significantly. Even the United States Supreme Court recognized in *Celotex* the potential for railroading. *See, Celotex Corp. v.* 477 U.S. at 326, 106 S.Ct. at 2554.

The "must grant" language contained in paragraph (i) textually strips trial courts of discretion and invites interlocutory appeal. More important, the ambiguity of the phrase "after adequate time for discovery" opens a whole new avenue of appellate points of error. Even the federal courts of appeal have been unable to uniformly decipher this issue. *See, e.g., Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir. 1986); Hittner & Liberato, at 85; Nelken, "One Step Forward, Two Steps Back: Summary judgment After *Celotex*," 40 Hast. L.J. 52 (1988).

1. The Last Sentence of Paragraph (i) Creates a Mandamus Trap-Door.

The Court's deletion of the "appellate review" proscription contained in the Advisory Committee's January 27, 1997, report to the Court will, on top of other problems with the revisions, subject the appellate courts (including the Supreme Court) to a flood of mandamus petitions and additional points of error on traditional appeal. In this regard, the "must grant" language in the final sentence of paragraph (i) of the revisions not only strips the trial courts of any judicial discretion in handling summary judgment motions, but is as clear an invitation to interlocutory mandamus actions as anything I have seen in my legal career. Even the United States Supreme Court's *Celotex* decision did not go this far.

2. Appellate Courts Will Be Faced With Dangerously Incomplete Factual Records on Appeals from "Premature" Dispositions.

Whether appeals are interlocutory (*e.g.*, mandamus actions challenging the refusal to grant a "no evidence" summary judgment under the "must grant" theory) or from final judgments granting "no-evidence" summary judgments, the appellate courts will be increasing faced with incomplete records. Clearly, an unstated purpose of "no-evidence" summary judgments is to pretermit full scale trials. Yet, in the final analysis, it is only on trial before the ultimate fact-finder that complete records can be duly made for the benefit of appeal. It is only at trial that all admissible evidence is subjected to adversarial examination and critical review by the fact-finder, which can engage in

common sense and general experience analysis of the proof, indulge in permissible inferences especially with regards to circumstantial evidence, and judge witnesses' credibility and their answers unfettered (or unaided) by lawyer coaching. Crazy-quilt discovery records lack the completeness of trial records. Summary judgment motions are not designed to allow the trial court to weigh truthfulness, credibility or accurateness.

While the Court has left intact paragraph (g) of Rule 166a which arguably allows the trial court some discretion to grant a continuance for further discovery, the ambiguity of the "adequate time for discovery" language coupled with the "must grant" requirement of paragraph (i) (all of which is not "codified" in the federal rules) seriously impedes the continuance safeguard which is present in Fed. R. Civ. P. 56(f). *See, Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 919-20 (5th Cir. 1992) (stating that "[t]he purpose of Rule 56(f) is to provide non-movants with a much needed tool to keep open the doors of discovery in order to adequately conduct a summary judgment motion"), *cert. denied*, 113 S.Ct. 2340 (1993).

Another critical distinction is that "[a]lthough nothing in Fed. R. Civ. P. 56, governing summary judgment, technically requires a statement of reasons by a trial judge for granting a motion for summary judgment, we have many times emphasized the importance of a detailed discussion by the trial judge." *McIncrow v. Harris County*, 878 F. 2d 835, 836 (5th Cir. 1989). In all but the easiest, most straight-forward case, such trial court memoranda are "not only helpful, but essential." *Laird v. Integrated Resources, Inc.*, 878 F.2d 826, 829 n.3 (5th Cir. 1990).

The completeness and closure to appellate records which detailed written opinions, handed down in conjunction with federal "no evidence" summary judgments, provide will be absent if the Court adopts the *Celotex* rule as proposed. Unlike federal district courts, Texas trial courts rarely, if ever, issue detailed memorandum opinions in conjunction with orders to assist appellate courts. Texas trial dockets are simply too swamped, and trial judges simply under-assisted by court staff (such as law clerks), to permit issuance of federal court-style opinions.

C. Citizens' Rights in Jeopardy.

The *Celotex* "no evidence" summary judgment language which the Court is engrafting upon Rule 166a is not expressly found in Fed. R. Civ. P. 56. Codification of *Celotex* at the state level is being done out of context of both the Federal Rules of Civil Procedure and case law interpreting and applying *Celotex* "no evidence" summary judgment procedures. This sudden transposition of Texas summary judgment practice jeopardizes the rights of litigants in several important respects.

1. Diminution of the Extensive Right to Jury Trials Guaranteed by Texas Constitution (Which Exceed Rights Under the Federal Constitution).

However unintended, the Rule 166a revisions are based upon an unsupportable premise that all lawsuits are presumptively bad, and thus unmeritorious. It goes without saying that the proposed

revisions to Rule 166a are a progeny of the "tort reform" sentiment sweeping this state. But it should equally go without much debate that the institution of a "no evidence" summary judgment tool represents an unprecedented incursion into the jury's domain as ultimate gatekeepers and constitutional fact-finders.

In *Casso v. Brand, supra,* you expressly recognized that current Texas summary judgment practice must give deference to the broad right to jury trials guaranteed by the Texas Constitution. I reiterate the quote from above:

> [W]e believe our own procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions. Tex. Const. art. I, § 15, art. V, § 10.

Id. at 556-57. I respectfully call upon the Court to refrain from instituting a new form of motion practice that values docket control over the right to trial by jury. Will judges, intent on controlling their dockets, use summary judgment as a "catch penny contrivance" to take unwary litigants into its toils and deprive them of a trial? *See,* Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D. 465, 465 (1984).

2. Clogging Courts With A New Procedural "Tool" Will Delay Justice.

As I observed above, paragraph (i) of Rule 166a as proposed will create a new "tool" which lawyers will routinely use with fervor, and impose upon the trial courts new, time-consuming and burdensome gatekeeping duties. It will add "yet another complexity," *Edmundson v. Leedville Concrete Co.*, 500 U.S. 614, 645, 111 S.Ct. 2077, 2096 (1991)(Scalia, J. dissenting)(race-based juror challenges), to the exploding pretrial litigation docket. This new form of motion practice will further clog the court system to the eventual delay of justice.

3. The New Dispositive "Tool" Will Increase Litigation Costs and Require More Expensive Discovery.

The amendments advanced by the Court's April 16 Order are antithetical to the goals publicly stated by the Court for revising discovery rules, *viz.*, to save litigants, plaintiff and defendant, from spending unnecessary time and expense in the judicial system. To date, there has been no empirical (or even anecdotal) evidence that the *Celotex* approach to "no evidence" summary judgments has saved litigants and the judicial system time and money through the noble aim of eliminating particularly frivolous lawsuits. To the contrary, I predict that the introduction of such motion practice in Texas will increase the overall cost of litigation.

As just one example, I refer to Justice White's concurrence in *Celotex,* where he explained, under the present federal "no evidence" summary judgment practice:

> A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; ***but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case.*** It is the defendant's task to negate, if he can, the claimed basis for the suit.

Celotex Corp. v. Catrett, 477 U.S. at 328, 106 S.Ct. at 2555 (White, J., concurring) (emphasis added). This observation would not apply under the Texas proposal which codifies to some extent the *Celotex* holding.

Under the revisions to Rule 166a, the movant need not proffer any summary judgment proof to support its contention that the non-movant cannot adduce admissible evidence as to one or more elements of a claim or defense. Despite the commentary's statement that a plaintiff will not be required to marshal its evidence, the natural result will be that the plaintiff must, in an abundance of caution, bundle its entire case and deposit it on the trial bench soon before trial.[1] Affidavits which would suffice under *Celotex* (as observed by Justice White) may be insufficient under the ambiguous wording of paragraph (i) of the revision to Rule 166a. Rather, non-movants will be required to depose their own witnesses, or at a minimum, engage in lengthy trial deposition cross-examinations at depositions noticed by the opponent. Instead of getting ready for trial, lawyers will be engaging in last-minute "no evidence" summary judgment skirmishes. Trial judges, instead of trying cases, will be presiding over an increased motion docket, all the while faced with reading the new volumes of summary judgment pleadings.

The likelihood increases exponentially that every "person with knowledge of relevant facts" identified in discovery, and every witness identified in pretrial orders, will of necessity be deposed at full "trial depositions," even in minor cases where cost containment considerations would not otherwise warrant depositions of persons who obviously will be called live at trial. The new rule revisions evidence an unfortunate conversion of our profession from trial lawyers to pretrial litigators. Discovery becomes not a search for truth and "putting our cards on the table," but an expensive, drawn-out substitute for trial before a tribunal of judge and jury.

Another example of which you may have already become aware may be found in Issacharoff & Lowenstein, "Second Thoughts About Summary Judgments," 100 Yale L.J. 73 (Oct. 1990), where it is noted that the "no evidence" *Celotex* motion for summary judgement practice has led to a decrease in settlements because of the disproportionate share of the overall expense of discovery and

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[1] Significantly, some federal courts have restricted 11th hour "no evidence" summary judgment motions by local rule. *See, e.g.*, Northern District of Texas Local Rule 5.2(a).

litigation to claimants. I respectfully suggest that this decrease in settlements goes beyond rhetorical allegations that settlements are "forced" like blackmail upon defendants to avoid expensive litigation under the present system, as Texans for Lawsuit Reform are fond of saying. Rather, there is a "point of no return" which claimants reach with regards to litigation costs that discourages pre-trial settlements (which often forego prejudgment interest and other "bumps").

4. The Lack of Safeguards Will Encourage Secreting of Evidence During Discovery Process.

As a practical matter, every party now objects to every meaningful discovery request on the basis that it is putatively over broad and a "fishing expedition." For the most part, these and similar objections are used to delay production of discoverable evidence, notwithstanding this Court's opinion in *Service Lloyds v. Harbison*, 826 S.W.2d 930, 931 (Tex. 1991). Pretrial evasion will intensify, particularly before the filing of "no evidence" summary judgment motions. The Court's removal of the Advisory Committee's safeguards (such as sanctions and full-disclosure certificates) signal, however unintended, an encouragement to discovery evasion by parties most likely to have relevant evidence.

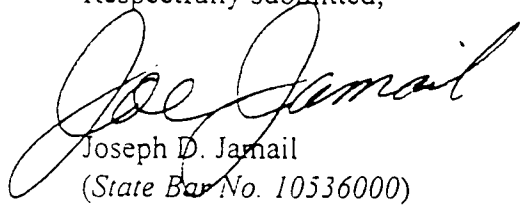
CONCLUSION

Aside from "McDonald's coffee-cup" anecdotes, few lawyers or jurists can summarily define what a "frivolous lawsuit" truly is. Attempts to do so risk running dangerously afoul of the centuries-old domain of juries. While there is strong public and judicial sentiment to stem perceived "frivolous lawsuits," the present attempt to re-make Rule 166a into a new tool is counter-productive, and is counter-intuitive to the "open door" provisions of the Texas Constitution (however politically distasteful that provision might be). Adopting federal summary judgement practice without the context of other federal and judicial rules and restraints will trample Texans' rights.

In conclusion, I respectfully urge the Court to reconsider approval of the proposed changes to Rule 166a for the reasons set forth in your studied opinion in *Casso v. Brand*, and above. I appreciate your consideration of my comments and observations, and I hope that they are received in the spirit intended.

I am providing the Clerk of the Supreme Court with 12 copies of this letter, as well as 21 copies to Mr. Luther Soules for distribution to members of the Supreme Court Advisory Committee.

Respectfully submitted,



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Enclosures (12 copies)

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