

COMPREHENSIVE GUIDE TO EVIDENCE

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CHAPTER ____

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COMPREHENSIVE GUIDE TO EVIDENCE.

I. SCOPE OF ARTICLE.

While no article of this length can fully address the nuances of evidence law, this paper endeavors to give an overview of evidence law, focusing, where possible, on recent cases and newer kinds of evidence. Issues of hearsay and authentication, especially for electronic evidence, are a primary focus of this paper.

II. RELEVANCE.

A. Definition.

“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.¹

B. Application.

If there is some logical connection either directly or by inference between the evidence and a fact to be proved, the evidence is relevant.² In practice, this is a test of logic and common sense. There are no degrees of relevancy—a piece of evidence either is or is not relevant. All relevant evidence is admissible unless it is shown that the evidence should be excluded for some other reason.³

C. Effect of Pleadings on Issue of Relevancy.

In order to be relevant, a fact must be *of consequence to the determination of the action*. Therefore, it is key to connect the evidence to a specific legal issue in the pleadings.

D. Exclusion of Relevant Evidence

In deciding whether to exclude relevant evidence, a court must weigh the probative value of the evidence against its potential for unfair prejudice or confusion and must examine the necessity and probative effect of the evidence.⁴ Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial.⁵ Because the guiding principle in a suit affecting the parent-child relationship is the best interest of the child, the exclusion of evidence under Rule 403 should be done sparingly.⁶

1. Danger of Unfair Prejudice.

Prejudice as applied under this section refers to emotional, irrational or other similar improper ground on which to base a decision.⁷ For example, relevant photographic evidence is admissible unless it is merely calculated to arouse sympathy, prejudice or passion where the photographs do not serve to illustrate disputed issues or aid in understanding the case.⁸

2. Danger of Confusion of the Issues/Misleading Jury.

If the evidence may create a side issue that will unduly distract the jury from the main issue, the court may exclude it.⁹

3. Undue Delay.

If admission of evidence may create undue delay outweighing the probative value of the evidence, the court may exclude it.¹⁰

4. Needless Presentation of Cumulative Evidence.

If the evidence offered is merely cumulative of other evidence already admitted, the court may exclude it.¹¹ However, visual evidence is generally not cumulative of testimony on the same subject, because it has significant probative value apart from testimonial evidence.¹²

III. 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.¹³ (See “Non-Assertive Statement,” below, for a discussion of whether testimony is even a “statement” at all.) The “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.¹⁴ Hearsay is inadmissible unless otherwise permitted by the rules or by statute.¹⁵ Put more simply, any out-of-court statement, whether by the witness or another person, is hearsay and is inadmissible to support the truth of a claim, unless permitted by another rule. However, otherwise inadmissible hearsay admitted

¹ Tex. R. Evid. 401.

² *PPC Transp. v. Metcalf*, 254 S.W.3d 636, 642 (Tex.App.—Tyler 2008, no pet.)

³ Tex. R. Evid. 402.

⁴ *Goodson v. Castellanos*, 214 S.W.3d 741, 754 (Tex.App.—Austin 2007, pet. denied).

⁵ *In re KY*, 273 S.W.3d 703, 710 (Tex.App.—Houston [14th Dist.] 2008, no pet.)

⁶ *Goodson v. Castellanos*, 214 S.W.3d 741, 754 (Tex.App.—Austin 2007, pet. denied).

⁷ *Roberts v. Dallas Ry. & Terminal*, 276 S.W.2d 575, 577-578 (Tex.App.—El Paso 1953, writ ref’d n.r.e.).

⁸ *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998).

⁹ *Charter Med. Corp. v. Miller*, 605 S.W.2d 943, 953 (Tex.Civ. App. - Dallas 1980, writ ref’d n.r.e.).

¹⁰ *Missouri K & T Ry. v. Bailey*, 115 S.W. 601, 607-608 (Tex.Civ.App.—1908, writ ref’d n.r.e.).

¹¹ *Railroad Comm’n. v. Shell*, 369 S.W.2d 363 (Tex.Civ.App.—Austin 1963), aff’d, 380 S.W.2d 556 (Tex. 1964).

¹² *In re KY*, 273 S.W.3d 703, 710 (Tex.App.—Houston [14th Dist.] 2008, no pet.)

¹³ Tex. R. Evid. 801(d).

¹⁴ Tex. R. Evid. 801(c).

¹⁵ Tex. R. Evid. 802; see Tex. R. Evid. 801(e), 803, 804.

without objection should not be denied probative value merely because it is hearsay.¹⁶ If it can be shown that a statement is non-hearsay or that it falls within a hearsay exception, the statement can be admissible as probative evidence.¹⁷

A. Hearsay Within Hearsay.

Hearsay within hearsay is admissible only if each offered portion fits a rule or exception.¹⁸ Trial advocates commonly face this problem regarding statements contained within business and medical records. Like all hearsay, however, if an opponent does not object to hearsay-within-hearsay, the testimony is probative evidence.¹⁹

B. Exceptions to the Hearsay Rule – Availability of Declarant Immaterial

The twenty-four hearsay exceptions listed in Texas Rule 803 may be roughly categorized into (1) unreflective statements, (2) reliable documents, and (3) reputation evidence. The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy.²⁰ However, all hearsay exceptions require a showing of trustworthiness.²¹

1. Present Sense Impression.

A statement describing or explaining an event made *while* the declarant was perceiving the event or *immediately* thereafter.²² Unlike the excited-utterance exception, the rationale for this exception stems from the statement's contemporaneity, not its spontaneity.²³ The present sense impression exception to the hearsay rule is based upon the premise that the contemporaneity of the event and the declaration ensures reliability of the statement. The rationale underlying the present sense impression is that: (1) the statement is safe from any error of the defect of memory of the declarant because of its contemporaneous nature, (2) there is little or no time for a calculated misstatement, and (3) the statement will usually be made to another (the witness who reports it) who would have an equal opportunity to observe and therefore check a misstatement.²⁴ The

*Fischer*²⁵ case states the following: The rule is predicated on the notion that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. It is instinctive, rather than deliberate. If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule. Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-it-through statements enter the picture, the present sense impression exception no longer allows their admission. Thinking about it destroys the unreflective nature required of a present sense impression.

2. Excited Utterance.

A statement relating to a startling event or condition made while the declarant was under stress or excitement caused by event or condition.²⁶ The excited-utterance exception is broader than the present-sense-impression exception.²⁷ While a present-sense-impression statement must be made while the declarant was perceiving the event or condition, or immediately thereafter, under the excited-utterance exception, the startling event may trigger a spontaneous statement that relates to a much earlier incident.²⁸ The *Goodman*²⁹ case states the following: For the excited-utterance exception to apply, three conditions must be met: (1) the statement must be a product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous and unreflecting, (2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent, and (3) the statement must relate to the circumstances of the occurrence preceding it. The critical factor in determining when a statement is an excited utterance under Rule 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. The time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement.

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

¹⁶ Tex. R. Evid. 802.

¹⁷ See, *Miranda v. State*, 813 S.W.2d 724, 735 (Tex.App.—San Antonio 1991, pet ref'd).

¹⁸ Tex. R. Evid. 805.

¹⁹ *General Motors Corp. v. Harper*, 61 S.W.3d 118, 125-126 (Tex.App.—Eastland 2001, no pet.) (Court properly admitted entire document even though it contained hearsay within hearsay because opponent failed to specifically object to inadmissible hearsay portion).

²⁰ *Fischer v. State*, 252 S.W.3d 375, 379 (Tex.Crim.App. 2008).

²¹ *Robinson v. Harkins & Co.*, 711 S.W.2d 619, 621 (Tex.1986).

²² Tex. R. Evid. 803(1) (emph. added).

²³ *Rabbani v. State*, 847 S.W.2d 555, 560 (Tex.Crim.App. 1992).

²⁴ *Id.*

²⁵ *Fischer v. State*, 252 S.W.3d 375, 381 (Tex.Crim.App. 2008).

²⁶ Tex. R. Evid. 803(2).

²⁷ *McCarty v. State*, 257 S.W.3d 238, 240 (Tex.Crim.App. 2008).

²⁸ *Id.*

²⁹ *Goodman v. State*, 302 S.W.3d 462, 472 (Tex.App.—Texarkana 2009, pet. ref'd).

memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.³⁰ Texas courts have held that the type of statement contemplated by this rule includes a statement that on its face expresses or exemplifies the declarant's state of mind—such as fear, hate, love, and pain.³¹ For example, a person's statement regarding her emotional response to a particular person qualifies as a statement of then-existing state of emotion under Rule 803(3).³² However, a statement is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed.³³ One federal court offers the following explanation of Rule 803(3)'s "exception to the exception": Case law makes it clear that a witness may testify to a declarant saying "I am scared," but not "I am scared because the defendant threatened me." The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase "because the defendant threatened me" is expressly outside the state-of-mind exception because the explanation for the fear expresses a belief different from the state of mind of being afraid.³⁴

4. Statements for Purposes of Medical Diagnosis or Treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.³⁵ The *Taylor*³⁶ case provides a thorough discussion of this exception, and key points are as follows:

The rationale behind this exception focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says. Further, it is reasonable that a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription. A two-part test flows naturally from this dual rationale: first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the witness to rely on the information for purposes of diagnosis or treatment.

It is not required that the witness be a physician or have medical qualifications. Out-of-court statements to

psychologists, therapists, licensed professional counselors, social workers, hospital attendants, ambulance drivers, or even members of the family might be included under Rule 803(4). The essential "qualification" expressed in the rule is that the declarant believe that the information he conveys will ultimately be utilized in diagnosis or treatment of a condition from which the declarant is suffering, so that his selfish motive for truthfulness can be trusted. That the witness may be a medical professional, or somehow associated with a medical professional, is no more than a circumstance tending to demonstrate that the declarant's purpose was in fact to obtain medical help for himself. A declarant's statement made to a non-medical professional under circumstances that show he expects or hopes it will be relayed to a medical professional as pertinent to the declarant's diagnosis or treatment would be admissible under the rule, even though the direct recipient of the statement is not a medical professional.

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.³⁷ For a statement to be admissible under Rule 803(5): (1) the witness must have had firsthand knowledge of the event, (2) the statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum.³⁸ To meet the fourth element, the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters accurately or to check them for accuracy. At the extreme, it is even sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time.³⁹

³⁰ Tex. R. Evid. 803(3).

³¹ *Garcia v. State*, 246 S.W.3d 121, 132 (Tex.App.—San Antonio 2007, pet. ref'd).

³² *Id.*

³³ Tex. R. Evid. 803(3).

³⁴ *Delapaz v. State*, 228 S.W.3d 183, 207 (Tex.App.—Dallas 2007, pet. ref'd) (citing *United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005)).

³⁵ Tex. R. Evid. 803(4).

³⁶ See generally, *Taylor v. State*, 268 S.W.3d 571 (Tex.Crim.App. 2008).

³⁷ Tex. R. Evid. 803(5).

³⁸ *Johnson v. State*, 967 S.W.2d 410, 416 (Tex.Crim.App. 1998).

³⁹ *Id.*

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.⁴⁰ For example, if a spouse keeps financial records as part of a regularly organized activity, the records can be admitted under this exception with the spouse as the sponsoring witness, without a business records affidavit. Courts have admitted check registers, medical bills and receipts, and cancelled checks in this way.⁴¹ The predicate for admissibility under the business records exception is established if the party offering the evidence establishes that the records were generated pursuant to a course of regularly conducted business activity and that the records were created by or from information transmitted by a person with knowledge, at or near the time of the event.⁴² Business records that have been created by one entity, but which have become another entity's primary record of the underlying transaction may be admissible pursuant to Rule 803(6).⁴³ Although Rule 803(6) does not require the predicate witness to be the record's creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared.⁴⁴ In order for a compilation of records to be admitted, there must be a showing that the authenticating witness or another person compiling the records had personal knowledge of the accuracy of the statements in the documents.⁴⁵

7. Absence of Entry in Records.

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 Tex. R. Evid. 803(6), to prove the

⁴⁰ Tex. R. Evid. 803(6).

⁴¹ See *Sabatino v. Curtiss Nat'l Bank*, 415 F.2d 632, 634 (5th Cir. 1969); *In re M.M.S. and I.M.S.*, 256 S.W.3d 470, 477 (Tex.App.—Dallas 2008, no pet.); *Strahan v. Strahan*, 2003 WL 22723432 *8 (Tex.App.—Houston [1st Dist.] 2003) (memo op.).

⁴² *Martinez v. Midland Credit Management, Inc.*, 250 S.W.3d 481, 485 (Tex.App.—El Paso 2008, no pet.).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *In re EAK*, 192 SW3d 133, 143 (Tex.App.—Houston [14th Dist.] 2006, no pet.).

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.⁴⁶ For example, testimony about what is not documented in medical records is admissible under Rule 803(7).⁴⁷ It is first necessary to show that records were kept in accordance with Rule 803(6) before introducing testimony under 803(7) that records are missing.⁴⁸

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, 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.⁴⁹ The *Cole*⁵⁰ case states: A number of courts have drawn a distinction for purposes of Rule 803(8)(B) between law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation. Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation. In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter, such records are, like other public documents, inherently reliable.

In contrast, adversarial, investigative, or third-party statements do not fall under this exception. Classic examples would be witness statements in police reports or statements by third parties in CPS caseworker narratives. Such statements, even if contained within a public report, would be hearsay-within-hearsay and only admissible if another hearsay exception were applicable. However, delinquent-tax

⁴⁶ Tex. R. Evid. 803(7).

⁴⁷ *Azle Manor, Inc. v. Vaden*, No. 2-08-115-CV, 2008 WL 4831408 (Tex.App.—Fort Worth Nov.6, 2008, no pet.) (mem.op.).

⁴⁸ *Coleman v. United Sav. Assoc. of Texas*, 846 S.W.2d 128, 131 (Tex.App.—Fort Worth 1993, no writ).

⁴⁹ Tex. R. Evid. 803(8).

⁵⁰ See generally, *Cole v. State*, 839 S.W.2d 798 (Tex.Crim.App. 1990).

records may be admitted even if they are prepared solely for the purpose of litigation, as long as they are properly authenticated, so a certified tax statement can be a public record under the terms of Rule 803(8).⁵¹

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.⁵² There is only one Texas case interpreting this exception. The contents of a record of vital statistics are not automatically admissible pursuant to Rule 803(9) if it is alleged that the record contains hearsay statements.⁵³ Even though a document is admissible pursuant to a hearsay exception, further objections to hearsay contained within the document must be examined separately.

10. Absence of Public Record or Entry.

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report statement, or data compilation, or entry.⁵⁴ The best evidence rule cannot be an objection to testimony about the absence of a record because it does not apply to testimony that written records have been examined and found not to contain a certain matter.⁵⁵ Further, a nonexistent document or document entry, by definition, cannot be authenticated; it does not exist, and no authentication is required.⁵⁶

11. Records of Religious Organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.⁵⁷

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.⁵⁸

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.⁵⁹

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.⁶⁰ Hearsay exceptions 14 and 15 under Rule 803 must be construed to relate to recitals or statements made in deeds, leases, mortgages and other such documents affecting an interest in property and not to affidavits of heirship which more properly fall within the hearsay exception stated under Rule 804(b)(3).⁶¹

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.⁶² This rule is similar to 803(14) but relates to statements in unrecorded documents affecting an interest in property. A sworn inventory filed in a divorce proceeding is admissible under this exception.⁶³

16. Statements in Ancient Documents.

Statements in a document in existence twenty years or more the authenticity of which is established.⁶⁴ Although all hearsay exceptions require a showing of trustworthiness, the justification for the exception is in part circumstantial indicia of trustworthiness.⁶⁵ Fraud and forgery are unlikely to be perpetrated so patiently, to bear fruit so many years after a document's

⁵¹ *F-Star Socorro, LP v. City of El Paso*, 281 S.W.3d 103, 106 (Tex.App.—El Paso 2008, no pet.).

⁵² Tex. R. Evid. 803(9).

⁵³ *Tex. Workers' Comp. Comm'n v. Wausau Underwriters Ins.*, 127 S.W.3d 50, 61 (Tex.App.—Houston [1st Dist.] 2003, pet. denied).

⁵⁴ Tex. R. Evid. 803(10).

⁵⁵ *Mega Child Care, Inc. v. Texas Dep't of Protective and Regulatory Servs.*, 29 S.W.3d 303, 311-12 (Tex.App.—Houston [14th Dist.] 2000, no pet.).

⁵⁶ *Id.*

⁵⁷ Tex. R. Evid. 803(11).

⁵⁸ Tex. R. Evid. 803(12).

⁵⁹ Tex. R. Evid. 803(13).

⁶⁰ Tex. R. Evid. 803(14).

⁶¹ *Compton v. WWV Enterprises*, 679 S.W.2d 668, 671 (Tex.App.—Eastland 1984, no writ).

⁶² Tex. R. Evid. 803(15).

⁶³ *Guidry v. State*, 9 S.W.3d 133, 146-47 (Tex.Crim.App. 1999), cert. denied, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000).

⁶⁴ Tex. R. Evid. 803(16).

⁶⁵ *Walton v. Watchtower Bible and Tract Society of Pennsylvania*, No. 10-05-00190-CV (Tex.App.—Waco 2007) (memo. op.).

creation.⁶⁶ Fair appearance and proper location, therefore, are sufficient additional circumstances to justify admissibility of an ancient document.⁶⁷ Grounds for excluding evidence include that the document was: (1) not produced in admissible form, (2) unreliable, (3) found and produced under suspicious circumstances, or (4) not found where it should have been found.⁶⁸

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.⁶⁹ Where it is proven that publications of market prices or statistical compilations are generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged, such publications are admissible for the truth of the matter published.⁷⁰ For a discussion of the difference between this exception and the learned treatise exception, see below.

18. Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.⁷¹ The market report exception is different from the learned treatise exception in significant ways, as discussed in the *Kahanek*⁷² case: A market report or commercial publication is received for the truth of the matter asserted, which permits the jury to take the document into the jury room. A learned treatise, on the other hand, is admissible only in conjunction with an expert's testimony and may not be taken into the jury room. The market report exception is for information that is readily ascertainable and about which there can be no real dispute. The exception relates to objective facts furnished under a business duty to transmit. Texas's acceptance of these criteria can be seen in the examples for the common-law hearsay exception—growth charts of turkeys, daily stock price quote sheets, newspaper publication of the market prices of chickens, a baseball guide admitted to show the beginning and ending dates of the baseball season, and a travel guide admitted to show railroad timetables. On

the other hand, the compilation of drug information embodied by the Physicians' Desk Reference goes beyond objective information to items on which learned professionals could disagree in good faith. This publication is more closely analogous to safety codes, which are complex and technical bodies of work containing the opinions of experts which could be subject to revision. The PDR is better classified as a learned treatise rather than a compilation of market material.

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,⁷³ or other similar fact of personal or family history.⁷³ Hearsay exceptions 803(19) and (20) arise from necessity and are founded on the general reliability of statements by family members about family affairs when the statements by deceased persons regarding family history were made at a time when no pecuniary interest or other biased reason for the statements were present.⁷⁴ For example, certain witnesses may provide hearsay evidence regarding a person's age. In order to give such evidence, the witness must be a close family associate who is familiar with the family history.⁷⁵

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.⁷⁶ However, proposed testimony related to an individual's family assertion of an easement without any indication of the community's interest in or knowledge of the family's claim to access the property or any indication of a general reputation within the community of his right of access is not admissible.⁷⁷

21. Reputation as to Character.

Reputation of a person's character among associates or in the community.⁷⁸ Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay rule. A character witness is not required to reside or work in the same "community" as the one about whom the testimony is

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Aguillera v. Kenedy Mem'l Found.*, 162 S.W.3d 689, 695 (Tex.App.—Corpus Christi 2005, pet. denied).

⁶⁹ Tex. R. Evid. 803(17).

⁷⁰ *Patel v. Kuciamba*, 82 S.W.3d 589, 594 (Tex.App.—Corpus Christi 2002, pet. denied).

⁷¹ Tex. R. Evid. 803(18).

⁷² *Kahanek v. Rogers*, 12 S.W.3d 501, 504 (Tex.App.—San Antonio 1999, no writ).

⁷³ Tex. R. Evid. 803(19).

⁷⁴ *Akers v. Stevenson*, 54 S.W.3d 880, 885 (Tex.App.—Beaumont 2001, pet. denied).

⁷⁵ *Jones v. State*, 950 S.W.2d 386, 388 (Tex.App.—Fort Worth 1997, pet. ref'd, untimely filed).

⁷⁶ Tex. R. Evid. 803(20).

⁷⁷ *Roberts v. Allison*, 836 S.W.2d 185, 190-91 (Tex.App.—Tyler 1992, writ denied).

⁷⁸ Tex. R. Evid. 803(21).

related.⁷⁹ For example, the testimony of a person who knew defendant's reputation in Dallas was admissible even though they did not know reputation in Richardson where defendant lived.⁸⁰

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.⁸¹ Under the *McCormick*⁸² case, a person may even be prevented from explaining the circumstances of his previous conviction: Where (i) the issue at stake is identical to that in the criminal case, (ii) the issue had been actually litigated, and (iii) determination of the issue was a critical and necessary part of the prior judgment, the judgment is established by offensive collateral estoppel and is within the hearsay exception of 803(22). When the requirements are satisfied, a party is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict. A trial court does not err in refusing to permit a party to explain the circumstances of his criminal conviction. To allow a party to present evidence of inadequate representation by counsel, for example, would impugn the validity of the judgment and be impermissible under the doctrine of collateral estoppel.

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.⁸³

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.⁸⁴ However, only those specific statements that were actually against penal interest are admissible, not the entire conversation.⁸⁵ Self-inculpatory statements and "blame-sharing" or neutral collateral statements are admissible but self-exculpatory statements that shift blame to another must be excluded.⁸⁶

C. Statements in Social Media, Texts, Email, etc.

Evidence obtained from email, text messaging, or social networking sites, such as Facebook, MySpace, or Twitter, is often relevant in family law cases. The evidence may be non-hearsay to the extent that it is an admission by a party-opponent, but there may be times where statements by others are relevant. Of the hearsay exceptions previously discussed, 803(1)-(3) can be especially useful in admitting these types of evidence. Those are the exceptions for present sense impression, excited utterance, and then-existing condition. Electronic communication is particularly prone to candid statements of the declarant's state of mind, feelings, emotions, and motives.⁸⁷ Further, they are often sent while events are unfolding. The logic of the existing exceptions can be applied to admit even new forms of communication.

D. Exceptions to the Hearsay Rule – Declarant Unavailable.

1. "Unavailability" Defined.

"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.⁸⁸

In other words, unavailability of a witness means the witness is dead, has become insane, is physically unable to testify, is beyond the jurisdiction of the court, is unable to be found after a diligent search, or has

⁷⁹ *Siverand v. State*, 89 S.W.3d 216, 221 (Tex.App.—Corpus Christi 2002, no pet.).

⁸⁰ *Jordan v. State*, 163 Tex.Crim. 287, 290 S.W.2d 666, 667 (1956).

⁸¹ Tex. R. Evid. 803(22).

⁸² *McCormick v. Texas Commerce Bank Nat'l Ass'n*, 751 S.W.2d 887, 889-90 (Tex.App.—Houston [14th Dist.] 1988, writ denied), cert. denied, 491 U.S. 910, 109 S.Ct. 3199, 105 L.Ed.2d 706 (1989).

⁸³ Tex. R. Evid. 803(23).

⁸⁴ Tex. R. Evid. 803(24).

⁸⁵ *Walter v. State*, 267 S.W.3d 883, 886, 894 (Tex.Crim.App. 2008).

⁸⁶ *Id.*

⁸⁷ *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 570 (D.Md. 2007) (memo. op.).

⁸⁸ Tex. R. Evid. 804(a)(1)-(5).

been kept away from the trial by the adverse party.⁸⁹ The party offering a statement under a hearsay exception must prove the unavailability of the declarant.⁹⁰ The *Fuller*⁹¹ case discusses situations that do not count as unavailability: A witness being uncooperative, refusing to attend trial, or being beyond the subpoena power of the court do not make the witness unavailable. A deposition of the witness in the present action could be taken in his home state. Additionally, a showing that the witness has been ill does not necessarily mean that his physical ailment continues and presently prevents him from attending trial or from giving his deposition.

2. 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.⁹² The *Escamilla*⁹³ case discusses the proper introduction of former testimony: A trial court may generally take judicial notice of its own records in a case involving the same subject matter between the same or practically the same parties. However, testimony from a previous trial cannot be considered by the trial judge at a subsequent trial unless it is admitted into evidence at the subsequent proceeding. In order for testimony at a prior hearing or trial to be considered at a subsequent proceeding, the transcript of such testimony must be properly authenticated and entered into evidence.

Practice Note: Do not confuse Tex. R. Evid. 804(b)(1) with 801(e)(3). 801(e)(3) states that all depositions taken in the same proceeding are non-hearsay, whether the declarant is available or not. *Hall*⁹⁴ explains the distinction: It may seem incongruous that Texas would allow the admission of deposition testimony without regard to the availability of the witness and exclude former testimony where the witness is available. Distinguished writers have said that there is no distinction between the two. There is, indeed, no distinction so far as the lack of personal observation of the witness by the trier of fact. There is a difference to the adversary in his preparation for trial and in his meeting the adverse testimony. The contesting attorney is not so likely to have ready reference to transcribed testimony given at a former trial as he is to have available a copy of a deposition. There may be no written transcription of the former

testimony; the rule has not required its proof to be by a method of that reliability. Furthermore, the deposition rules now require that the witness supplement his testimony if, after the giving of the deposition, he discovers that he has testified incorrectly or that the facts have changed. In the taking of a deposition the attention of a witness may be called to this duty to supplement, and further obligation of this nature may be placed upon the witness by agreement of the parties. No such duty may be imposed with respect to testimony at a former trial.

3. Dying Declaration.

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.⁹⁵ The *Gardner*⁹⁶ case discusses this exception: Under Texas common law, the proponent of a dying declaration was required to establish that it was made (1) when the declarant was conscious of approaching death and had no hope of recovery, (2) voluntarily, (3) without persuasion or influence from leading questions, and (4) when the declarant was of sound mind. This predicate could be established by either direct or circumstantial evidence, and it was not essential that the declarant actually say that he was conscious of impending death or without hope of recovery. Each case depends upon its particular circumstances, but sometimes the declarant's conduct and the nature of his wounds would suffice. Under the modern-day Rule 804(b)(2), the common-law requirement that there was no hope of recovery was abrogated, and the focus turned more to the severity of the injuries than the declarant's explicit words indicating knowledge of imminent death. All that the rule requires is sufficient evidence, direct or circumstantial, that demonstrates that the declarant must have realized that he was at death's door at the time that he spoke. It is both (1) the solemnity of the occasion—the speaker peering over the abyss into the eternal—which substitutes for the witness oath, and (2) the necessity principle—since the witness had died, there was a necessity for taking his only available trustworthy statements—that provide the underpinning for the doctrine. As with the admission of all evidence, the trial judge has great discretion in deciding whether a statement qualifies as a dying declaration.

4. Statement of Personal or Family History.

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 a statement concerning the foregoing matters, and death also, of

⁸⁹ *Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975).

⁹⁰ *Id.*

⁹¹ *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914, 921 (Tex.App.—Beaumont 1998, no writ).

⁹² Tex. R. Evid. 804(b)(1).

⁹³ *Escamilla v. Estate of Escamilla*, 921 S.W.2d 723, 726 (Tex.App.—Corpus Christi 1996, writ denied)

⁹⁴ *Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975).

⁹⁵ Tex. R. Evid. 804(b)(2).

⁹⁶ *Gardner v. State*, No. 13-08-00431-CR (Tex.Crim.App. 2009) (memo. op.).

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.⁹⁷ This rule is similar to 803(19), which allows *reputation* testimony regarding personal or family history. The rule rests on the assumption that the type of declarant specified by the rule will not make a statement, such as a date of a marriage or the existence of a ceremony, unless it is trustworthy.⁹⁸ Rule 804(b)(3) does not apply where the matter asserted by the declarant involves non-trustworthy "facts," such as state of mind.⁹⁹

IV. STATEMENTS THAT ARE NOT HEARSAY.

Evidence constitutes hearsay only if it is (1) an assertive statement (2) by an out-of-court declarant (3) offered to prove the truth of the assertion.¹⁰⁰ A non-statement or a statement *not* offered to prove the truth of the matter asserted are not hearsay. Further, certain types of statements are defined as non-hearsay by statute or by the rules of evidence.

A. Non-Assertive Statement

A "statement" includes verbal or non-verbal assertions, for example pointing, nodding, or a headshake.¹⁰¹ However, a purely contextual out-of-court statement that is nothing more than a question is not hearsay.¹⁰² Imperative sentences giving orders, exclamatory sentences, and interrogatory sentences posing questions usually fall outside the hearsay definition; if these sentences are relevant at all, it is usually relevant simply that the sentences were uttered.¹⁰³ The predicate for offering non-assertive statements as non-hearsay usually includes the following evidence:

- (1) where and when the statement was made;
- (2) who was present;
- (3) the tenor of the statement;
- (4) that the tenor of the statement is non-assertive; and
- (5) that the non-assertive statement is logically relevant to the material facts of consequence in the case.¹⁰⁴

B. Computer Generated "Statements."

"Cases involving electronic evidence often raise the issue of whether electronic writings constitute

'statements' under Rule 801(a). Where the writings are non-assertive, or not made by a 'person,' courts have held that they do not constitute hearsay, as they are not 'statements.'"¹⁰⁵

1. Federal Law

While there may be authentication issues relating to computer-generated text or computer-processed data, several federal cases have held that such information is not hearsay:

United States v. Khorozian, 333 F.3d 498, 506 (3d Cir.2003) ("[N]either the header nor the text of the fax was hearsay. As to the header, '[u]nder FRE 801(a), a statement is something uttered by "a person," so nothing "said" by a machine is hearsay"');

Safavian, 435 F.Supp.2d at 44 (holding that portions of e-mail communications that make imperative statements instructing defendant what to do, or asking questions are nonassertive verbal conduct that does not fit within the definition of hearsay);

Telewizja Polska USA, 2004 WL 2367740 (finding that images and text posted on website offered to show what the website looked like on a particular day were not "statements" and therefore fell outside the reach of the hearsay rule);

Perfect 10, 213 F.Supp.2d at 1155 (finding that images and text taken from website of defendant not hearsay, "to the extent these images and text are being introduced to show the images and text found on the websites, they are not statements at all—and thus fall outside the ambit of the hearsay rule.");

United States v. Rollins, rev'd on other grounds 2004 WL 26780, at *9 (A.F.Ct.Crim.App. Dec.24, 2003)("Computer generated records are not hearsay: the role that the hearsay rule plays in limiting the fact finder's consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system itself, relative to its proper functioning and accuracy.");

State v. Dunn, 7 S.W.3d 427, 432 (Mo.Ct.App.2000) ("Because records of this type [computer generated telephone records] are not the counterpart of a statement by a human declarant, which should ideally be tested by cross-examination of that declarant, they should not be treated as hearsay, but rather their admissibility should be determined

⁹⁷ Tex. R. Evid. 804(b)(3).

⁹⁸ *Henderson v. State*, 77 S.W.3d 321, 326 (Tex.App.—Fort Worth 2002, no pet.).

⁹⁹ *Id.*

¹⁰⁰ Edward J. Imwinkelreid, *Evidentiary Foundations*, 7th ed., §10.01, p. 407 (2008).

¹⁰¹ Tex. R. Evid. 801(a).

¹⁰² *Fischer v. State*, 207 S.W.3d 846, 850 n.5 (Tex.App.—Houston [14th Dist.] 2006, aff'd on other grounds 252 S.W.3d 375 (Tex.Crim.App. 2008)).

¹⁰³ Edward J. Imwinkelreid, *Evidentiary Foundations*, 7th ed., §10.02[2][a], p. 409 (2008).

¹⁰⁴ *Id.*

¹⁰⁵ *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 564-65 (D.Md. 2007) (memo. op.).

on the reliability and accuracy of the process involved.”);

State v. Hall, 976 S.W.2d 121, 147 (Tenn.1998) (reviewing the admissibility of computer generated records and holding “[t]he role that the hearsay rule plays in limiting the fact finder’s consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.”).

2. Metadata

Metadata is the computer-generated data about a file, including date, time, past saves, edit information, etc. It would likely be considered a non-statement under the above logic, and therefore non-hearsay. It remains important to properly satisfy authentication requirements. A higher authentication standard may apply, since it is computer-processed data, rather than merely computer-stored data.

However, since metadata is normally hidden and usually not intended to be reviewed, several states have issued ethics opinions concluding that it is unethical to mine inadvertently-produced metadata.¹⁰⁶ A few ethics opinions have held that mining metadata is not unethical.¹⁰⁷ Texas does not yet have an ethics opinion directly on point.

C. Statement not Offered for its Truth

Even if a statement is assertive, the statement is not hearsay unless the proponent offers the statement to prove the truth of the assertion.¹⁰⁸ When arguing that a statement is not being offered for its truth, an attorney is arguing that the fact of the statement is relevant; and that the truth of the facts in the statement is irrelevant.¹⁰⁹ Testimony is hearsay when its probative force depends in whole or in part on the credibility or competency of some person other than the person by whom it is sought of be produced.¹¹⁰ For example, a declarant’s credibility is an issue with statements offered for their truth, and an opponent needs to cross-examine the out-of-court declarant to test the evidence. In contrast, if a proponent is not offering a statement

for its truth, the opponent does not need to have the declarant available for cross-examination.¹¹¹

1. State of Mind

Rule 803(3) provides an exception to the hearsay rule for statements regarding one’s then-existing state of mind, emotion, sensation, or physical condition. Normally, statements admitted under this exception are spontaneous remarks about pain or some other sensation, made by the declarant while the sensation, not readily observable by a third party, is being experienced.¹¹² For statements that do not properly fit under the 803(3) exception, authority exists providing that communications made or received by a person will often be relevant, not as evidence that the facts are as stated in the communication, but instead as tending to show the knowledge or belief of the person who communicated or received the statement.¹¹³ Moreover, where the question is whether a party has acted prudently, wisely or in good faith, information on which he acted is original and material evidence and not hearsay.¹¹⁴ For example, in *Chandler*,¹¹⁵ when a party testified that a Mexican judge told her she was divorced, the statement was not offered to prove that she was in fact divorced. Rather, it was offered to show that she believed she was divorced. Moreover, the probative force of the statement does not depend on the competency or credibility of the Mexican judge. Therefore, it is not hearsay.

2. Impeachment by Prior Inconsistent Statement.

Any witness may be impeached by showing that on a prior occasion he made a material statement inconsistent with his trial testimony. Such a statement can be taken from many sources, including prior testimony, affidavits, discovery responses, or pleadings. The purpose of impeachment evidence is to attack the credibility of a witness, not to show the truth of the matter asserted. Impeachment evidence is generally hearsay and does not have probative value.¹¹⁶

¹¹¹ Edward J. Imwinkelreid, *Evidentiary Foundations*, 7th ed., §10.01, p. 407 (2008).

¹¹² *Rosendorf v. Blackmon*, 800 S.W.2d 377 (Tex.App.—Corpus Christi 1990, orig. proceeding); *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex.App.—San Antonio 1990, writ denied).

¹¹³ *Thrailkill v. Montgomery Ward*, 670 S.W.2d 382, 386 (Tex.App.—Houston [1st Dist.] 1984, writ refd n.r.e.); *Burleson v. Finley*, 581 S.W.2d 304, 309 (Tex.App.—Austin 1979, writ refd n.r.e.); *See also, Posner v. Dallas County Child Welfare*, 784 S.W.2d 585, 587 (Tex.App.—Eastland 1990, writ denied); *Security Ins. Co. v. Nasser*, 755 S.W.2d 186, 193-94 (Tex.App.—Houston [14th Dist.] 1988, no writ).

¹¹⁴ *Duke v. Power Electric and Hardware Company*, 674 S.W.2d 400, 404 (Tex.App.—Corpus Christi 1984, no writ); *Globe Discount City v. Landry*, 590 S.W.2d 813, 815 (Tex.App.—Waco 1979, writ ref’d n.r.e.).

¹¹⁵ *Chandler v. Chandler*, 842 S.W.2d 829, 831 (Tex.App.—El Paso 1992, writ denied).

¹¹⁶ *Lewis v. Merrill*, 295 S.W.2d 920, 932 (Tex.Civ.App. 1956).

¹⁰⁶ NY. Comm. On Prof’l Ethics, Op. 749 (1002); Prof’l Ethics of the Fla. Bar, Op. 06-2 (2006); Ala. State Bar office of the Gen. Counsel, Op. No. 2007-02 (2007); D.C. Bar, Op. 341.

¹⁰⁷ Md. State Bar Ass’n, Comm. on Ethics, Op. 2007-092 (2006); ABA Formal Op. 06-442.

¹⁰⁸ Edward J. Imwinkelreid, *Evidentiary Foundations*, 7th ed., §10.02[3][a], p. 415 (2008).

¹⁰⁹ *Id.*

¹¹⁰ *Texarkana Mack Sales, Inc. v. Flemister*, 741 S.W.2d 558, 562 (Tex.App.—Texarkana 1987, no writ).

3. Operative Facts.

If the mere making of an out-of-court statement—regardless of its truthfulness—has legal significance, then evidence that the statement was made is not hearsay because it is not offered to prove the truth of the matter asserted.¹¹⁷ This is most obvious when the words proven constitute a necessary part of the cause of action or defense, or as is sometimes said, are operative facts, or part of the ultimate issue.¹¹⁸ Operative facts are admissible as evidence to prove the making of an utterance or a statement and not to establish the truth of the contents of such a statement.¹¹⁹ For example, a statement would be an operative fact if the mere making of the statement were the basis of a fraud claim. Another example is words or writings that constitute offer, acceptance, or terms of a contract.¹²⁰

D. Extrajudicial Admissions.

Extrajudicial admissions are exceptions to the hearsay rule generally based on the notion of estoppel as it applies to prior and often contradictory statements. The *Regal*¹²¹ case discusses the statements as follows: A statement in an affidavit may not amount to a judicial admission. A statement may not be deliberate, clear and unequivocal enough to constitute a judicial admission. In such cases, a statement may be considered an extra-judicial admission. Such an admission is not conclusive but is merely evidence to be given such weight as the trier of facts may see fit to accord it.

E. Prior Statements.

Certain prior statements by witnesses are defined by the rules as non-hearsay. In order for a prior statement by the witness to be admissible as probative evidence, the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.¹²² The three types of prior statements defined as non-hearsay are:

1. Prior Inconsistent Statement.

A statement that is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or deposition.¹²³ Since the rule refers to "a deposition" and is not limited to depositions in the same proceeding, any prior deposition testimony by the witness may be used.

Practice Note: Any deposition testimony by the witness is non-hearsay, whether or not it is from the same proceeding. Compare to "Depositions," below.

Practice Note: Although any prior deposition testimony is non-hearsay, prior testimony at a trial or hearing *not* in the same proceeding is governed by Rule 804(b)(1), and is admissible only if the declarant is unavailable. See "Former Testimony," above.

2. Prior Consistent Statement to Rebut.

A statement that is 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.¹²⁴ Bolstering a witness by attempting to introduce prior consistent statements is generally not permitted; under Tex. R. Evid. 613, prior consistent testimony is inadmissible. However, while a witness's prior consistent statements would normally be inadmissible hearsay, Rule 801 defines prior consistent statements offered to rebut charges of fabrication or improper influence or motive as non-hearsay. If even an implied charge is made against a witness, then prior consistent statements by the testifying witness are not hearsay, and are therefore admissible as substantive evidence to rebut the charges. However, a prior consistent statement would only be relevant evidence to rebut a charge of fabrication if the statement was made before the motive to fabricate arose.¹²⁵

3. Statement of Identification.

A prior statement of identification of a person made after perceiving the person.¹²⁶

F. Admissions by a 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.¹²⁷

1. Admissions in Discovery Responses or Pleadings.

Statements in discovery responses or pleadings from the present or other proceedings may be used to impeach a witness's credibility. If they are admissions by a party, they may also be admissible as substantive evidence. The allegations and statements made by the party's authorized attorney are that party's statements. Even pleadings of a party in other causes of action

¹¹⁷ *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 782 (Tex.App.—Dallas 2005, no pet. h.).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902, 906 (Tex.Civ.App.—Eastland 1978, writ ref'd n.r.e.).

¹²¹ *Regal Constr. Co. v. Hansel*, 596 S.W.2d 150, 154 (Tex.Civ.App.—Houston [1st Dist.] 1979, writ ref'd nre).

¹²² Tex. R. Evid. 801(e)(1).

¹²³ Tex. R. Evid. 801(e)(1)(A).

¹²⁴ Tex. R. Evid. 801(e)(1)(B).

¹²⁵ *Walker v. Lorehn*, 355 S.W.2d 71, 75 (Tex.Civ.App.—Houston 1962, writ ref'd nre.).

¹²⁶ Tex. R. Evid. 801(e)(1)(C).

¹²⁷ Tex. R. Evid. 801(e)(2).

which contain statements inconsistent with that same party's present position are receivable and admissible as admissions.¹²⁸ The pleadings are admissible even if the superseded pleading is not verified or file-marked.¹²⁹

2. Electronic Evidence.

The exemption for admissions by a party-opponent is extremely useful in overcoming a hearsay objection to texts, emails, Facebook wall posts, etc. The *Massimo*¹³⁰ case has a description of the authentication of a party's emails as well as a discussion of whether the emails meet the hearsay exemption for admission by party opponent or the hearsay exception for a statement against interest. A recent Texas family case held that statements by a party on his MySpace page were non-hearsay as admissions by a party-opponent.¹³¹

G. Depositions.

A deposition taken in the same proceeding. Unavailability of deponent is not a requirement for admissibility.¹³² Since the rule defines all depositions taken in the same proceeding as non-hearsay, the testimony used to impeach a witness does not have to come from that witness's deposition.

Practice Note: Any deposition testimony from the same proceeding is non-hearsay, whether or not it is from that witness. Compare to "Prior Inconsistent Statement," above.

Practice Note: This rule means only that deposition testimony is *non-hearsay*. The deposition testimony may still be objectionable under other rules of evidence, such as relevance, etc. Remember, during a deposition, a majority of objections and evidentiary issues are deferred to final trial.

H. Judicial Admissions.

A judicial admission is an assertion of fact, not pleaded in the alternative, in the live pleadings of a party.¹³³ A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact.¹³⁴ The most common examples of judicial admissions are factual statements made in live pleadings, confession of judgment and evidence of a guilty plea in a criminal case. Unanswered requests for admissions are automatically deemed admitted, unless the court on motion permits

their withdrawal or amendment.¹³⁵ An admission once admitted, deemed or otherwise, is a judicial admission, and a party may not then introduce testimony to controvert it.¹³⁶ A sworn inventory filed in a divorce case constitutes a judicial admission.¹³⁷ A party alleging a material and substantial change in order to support his motion to modify cannot then deny that a material and substantial change has occurred for the purposes of the opposing party's motion to modify because the moving party judicially admitted the change in his motion.¹³⁸

Practice Note: While abandoned or superseded pleadings may be admissible as a party admission or declaration against interest, they do not qualify as a judicial admission.¹³⁹

V. AUTHENTICATION & IDENTIFICATION.

The requirement of authentication or identification is a condition precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.¹⁴⁰ Unless the evidence sought to be admitted is self-authenticating under Tex. R. Evid. 902, extrinsic evidence must be adduced prior to its admission. Rule 901(b) contains a non-exclusive list of illustrations of authentication that comply with the rule. A frequently-cited federal case, *Lorraine v. Markel Am. Insur. Co.*, has become an authority on the application of the rules of evidence to electronically-stored information (ESI).¹⁴¹ This section quotes extensively from the case, including selections relevant to authenticating ESI:

A. Electronically Stored Information (ESI).

A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. This is not a particularly high barrier to overcome. For example, in *United States v. Safavian*, the court analyzed the admissibility of e-mail, noting, the question for the court under Rule 901 is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.

The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to

¹²⁸ *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243, 252 (Tex.App.—Corpus Christi 1996, writ denied).

¹²⁹ *Huff v. Harrell*, 941 S.W.2d 230, 239 (Tex.App.—Corpus Christi 1996, writ denied).

¹³⁰ *Massimo v. State*, 144 SW3d 210, 215-17 (Tex.App.—Fort Worth 2004, no pet.).

¹³¹ *In re TT*, 228 SW3d 312, 316-17 (Tex.App.—Houston [14th Dist.] 2007, pet. denied).

¹³² Tex. R. Evid. 801(e)(3).

¹³³ *Holy Cross Church of Christ in God v. Wolf*, 44 S.W.3d 562, 568, 44 Tex. Sup. Ct. J. 604 (Tex. 2001).

¹³⁴ *Id.*

¹³⁵ *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989).

¹³⁶ *Id.*

¹³⁷ *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 373 (Tex.App.—El Paso 1985, writ dismissed).

¹³⁸ *Thompson v. Thompson*, 827 S.W.2d 563, 566 (Tex.App.—Corpus Christi 1992, writ denied).

¹³⁹ *Balaban v. Balaban*, 712 S.W.2d 775, 777 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

¹⁴⁰ Tex. R. Evid. 901.

¹⁴¹ *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md. 2007) (memo. op.).

test the reliability of evidence, subject to later review by an opponent's cross-examination. Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge. Obviously, there is no "one size fits all" approach that can be taken when authenticating electronic evidence, in part because technology changes so rapidly that it is often new to many judges.

For example, in *In re F.P.* the court addressed the authentication required to introduce transcripts of instant message conversations. In rejecting the defendant's challenge to this evidence, it stated: "Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law ... We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity."

Texas Note: One case addressed an online personal ad, and found that it was not necessary for authentication to show that the person placed the ad, only that the exhibit was an authentic copy of the actual online ad.¹⁴² Whether the party placed the ad did not go to the authenticity of the exhibit, but rather to the underlying issues in the case.

B. Stored versus Processed Data

In general, electronic documents or records that are merely *stored* in a computer raise no computer-specific authentication issues.¹⁴³ If a computer *processes* data rather than merely storing it, authentication issues may arise. The need for

authentication and an explanation of the computer's processing will depend on the complexity and novelty of the computer processing. There are many stages in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can also happen when defective software programs are used or stored-data media become corrupted or damaged.

C. Email

There are many ways in which e-mail evidence may be authenticated.¹⁴⁴ One well respected commentator has observed:

"[E]-mail messages may be authenticated by direct or circumstantial evidence. An e-mail message's distinctive characteristics, including its 'contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances' may be sufficient for authentication. Printouts of e-mail messages ordinarily bear the sender's e-mail address, providing circumstantial evidence that the message was transmitted by the person identified in the e-mail address. In responding to an email message, the person receiving the message may transmit the reply using the computer's reply function, which automatically routes the message to the address from which the original message came. Use of the reply function indicates that the reply message was sent to the sender's listed e-mail address. The contents of the e-mail may help show authentication by revealing details known only to the sender and the person receiving the message. However, the sending address in an e-mail message is not conclusive, since e-mail messages can be sent by persons other than the named sender. For example, a person with unauthorized access to a computer can transmit e-mail messages under the computer owner's name. Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness."

Courts also have approved the authentication of e-mail by the above described methods. *See, e.g.:*

Siddiqui, 235 F.3d at 1322-23 (E-mail may be authenticated entirely by circumstantial evidence, including its distinctive characteristics);

Safavian, 435 F.Supp.2d at 40 (recognizing that e-mail may be authenticated by distinctive characteristics 901(b)(4), or by comparison of exemplars with other e-mails that already have been authenticated 901(b)(3));

Rambus, 348 F.Supp.2d 698 (Email that qualifies as business record may be self-authenticating under 902(1));

¹⁴² *Musgrove v. State*, No. 03-09-00163-CR (Tex.App.—Austin 2009) (memo. op.).

¹⁴³ *Lorraine*, 241 F.R.D. at 543 (emph. added).

¹⁴⁴ *Lorraine*, 241 F.R.D. at 554-55.

In re F.P., 878 A.2d at 94 (E-mail may be authenticated by direct or circumstantial evidence).

The most frequent ways to authenticate email evidence are:

- 901(b)(1) (person with personal knowledge),
- 901(b)(3) (expert testimony or comparison with authenticated exemplar),
- 901(b)(4) (distinctive characteristics, including circumstantial evidence),
- 902(7) (trade inscriptions), and
- 902(11) (certified copies of business record).

Texas Note: An email can be authenticated by testimony that the witness was familiar with the sender's e-mail address and that she had received the e-mails in question from him.¹⁴⁵ Another court enumerated several characteristics to consider when determining whether an e-mail has been properly authenticated, including:

- (1) consistency with the e-mail address on another e-mail sent by the defendant;
- (2) the author's awareness through the e-mail of the details of defendant's conduct;
- (3) the e-mail's inclusion of similar requests that the defendant had made by phone during the time period; and
- (4) the e-mail's reference to the author by the defendant's nickname.¹⁴⁶

Texas Note: One Texas case has held that the reply-letter doctrine for authenticating letters applies to email.¹⁴⁷ Under this doctrine, a letter received in the due course of mail purportedly in answer to another letter is prima facie genuine and admissible without further proof of authenticity. A reply letter needs no further authentication because it is unlikely that anyone other than the purported writer would know of and respond to the contents of the earlier letter addressed to him. However, in that case, there was also another valid basis for authenticating the emails.

D. Internet Website Postings.

When determining the admissibility of exhibits containing representations of the contents of website postings of a party, the issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting.¹⁴⁸ See:

United States v. Jackson, 208 F.3d 633, 638 (7th Cir.2000) (excluding evidence of website

postings because proponent failed to show that sponsoring organization actually posted the statements, as opposed to a third party);

St. Luke's, 2006 WL 1320242 (plaintiff failed to authenticate exhibits of defendant's website postings because affidavits used to authenticate the exhibits were factually inaccurate and the author lacked personal knowledge of the website);

Wady, 216 F.Supp.2d 1060.

One commentator has observed "[i]n applying [the authentication standard] to website evidence, there are three questions that must be answered explicitly or implicitly.

- (1) What was actually on the website?
- (2) Does the exhibit or testimony accurately reflect it?
- (3) If so, is it attributable to the owner of the site?"

The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

- the length of time the data was posted on the site;
- whether others report having seen it;
- whether it remains on the website for the court to verify;
- whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations);
- whether the owner of the site has elsewhere published the same data, in whole or in part;
- whether others have published the same data, in whole or in part;
- whether the data has been republished by others who identify the source of the data as the website in question?"

Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation.

The authentication rules most likely to apply, singly or in combination, are:

- 901(b)(1) (witness with personal knowledge)
- 901(b)(3) (expert testimony)
- 901(b)(4) (distinctive characteristics),
- 901(b)(7) (public records),
- 901(b)(9) (system or process capable of producing a reliable result), and
- 902(5) (official publications).

E. Text Messages and Chat Room Content.

Many of the same foundational issues encountered when authenticating website evidence apply with equal force to text messages and internet chat room content; however, the fact that chat room messages are posted by third parties, often using "screen names" means that it cannot be assumed that the content found in chat

¹⁴⁵ *Shea v. State*, 167 S.W.3d 98, 105 (Tex.App.—Waco 2005, pet. ref'd).

¹⁴⁶ *Massimo v. State*, 144 S.W.3d 210, 215 (Tex.App.—Fort Worth 2004, no pet.).

¹⁴⁷ *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex.App.—El Paso 2008, pet. ref'd).

¹⁴⁸ *Lorraine*, 241 F.R.D. at 555-56.

rooms was posted with the knowledge or authority of the website host.¹⁴⁹

One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

- (1) evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);
- (2) evidence that, when a meeting with the person using the screen name was arranged, the individual showed up;
- (3) evidence that the person using the screen name identified himself as the person in the chat room conversation;
- (4) evidence that the individual had in his possession information given to the person using the screen name; or
- (5) evidence from the hard drive of the individual's computer showing use of the same screen name.

Courts also have recognized that exhibits of chat room conversations may be authenticated circumstantially.

For example, in *In re F.P.*,¹⁵⁰ the defendant argued that the testimony of the internet service provider was required, or that of a forensic expert. The court held that circumstantial evidence, such as the use of the defendant's screen name in the text message, the use of the defendant's first name, and the subject matter of the messages all could authenticate the transcripts.

Similarly, in *United States v. Simpson*,¹⁵¹ the court held that there was ample circumstantial evidence to authenticate printouts of the content of chat room discussions between the defendant and an undercover detective, including use of the e-mail name of the defendant, the presence of the defendant's correct address in the messages, and notes seized at the defendant's home containing the address, e-mail address and telephone number given by the undercover officer.

Likewise, in *United States v. Tank*,¹⁵² the court found sufficient circumstantial facts to authenticate chat room conversations, despite the fact that certain portions of the text of the messages in which the defendant had participated had been deleted. There, the court found the testimony regarding the limited nature of the deletions by the member of the chat room club who had made the deletions, circumstantial evidence connecting the defendant to the chat room, including the use of the defendant's screen name in the messages, were sufficient to authenticate the messages.

Based on the foregoing cases, the rules most likely to be used to authenticate chat room and text messages, alone or in combination, appear to be:

- 901(b)(1) (witness with personal knowledge) and
- 901(b)(4) (circumstantial evidence of distinctive characteristics).

Texas Note: While there is not yet much Texas law on the authentication of text messages, one court admitted them as party admissions, although the opinion does not address how they were authenticated.¹⁵³

F. Computer Stored Records and Data.

Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers.¹⁵⁴ As one commentator has observed "[m]any kinds of computer records and computer-generated information are introduced as real evidence or used as litigation aids at trials. They range from computer printouts of stored digital data to complex computer-generated models performing complicated computations. Each may raise different admissibility issues concerning authentication and other foundational requirements."

The least complex admissibility issues are associated with electronically stored records. In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional "hard copy" records. Two cases illustrate the contrast between the more lenient approach to admissibility of computer records and the more demanding one:

In *United States v. Meienberg*,¹⁵⁵ the defendant challenged on appeal the admission into evidence of printouts of computerized records of the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. The Tenth Circuit disagreed, stating: "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility." *See also:*

Kassimu, 2006 WL 1880335 (To authenticate computer records as business records did not require the maker, or even a custodian of the record, only a witness qualified to explain the record keeping system of the organization to confirm that the requirements of Rule 803(6) had been met, and the inability of a witness to attest to the accuracy of the information entered into the computer did not preclude admissibility);

¹⁴⁹ *Lorraine*, 241 F.R.D. at 556.

¹⁵⁰ 878 A.2d at 93-94.

¹⁵¹ 152 F.3d at 1249.

¹⁵² 200 F.3d at 629-31.

¹⁵³ *Lozano v. State*, No. 2-06-379-CR (Tex.App.—Fort Worth 2007) (memo. op.).

¹⁵⁴ *Lorraine*, 241 F.R.D. at 556-59.

¹⁵⁵ 263 F.3d at 1180-81.

Sea-Land Serv., Inc. v. Lozen Int'l, 285 F.3d 808 (9th Cir.2002) (ruling that trial court properly considered electronically generated bill of lading as an exhibit to a summary judgment motion. The only foundation that was required was that the record was produced from the same electronic information that was generated contemporaneously when the parties entered into their contact. The court did not require evidence that the records were reliable or accurate).

In contrast, in the case of *In re Vee Vinhnee*,¹⁵⁶ the bankruptcy appellate panel upheld the trial ruling of a bankruptcy judge excluding electronic business records of the credit card issuer of a Chapter 7 debtor, for failing to authenticate them. The court noted that “it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground.” The court further observed that: “The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created. Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created.” The court reasoned that, for paperless electronic records: “The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity’s policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation.” In order to meet the heightened demands for authenticating electronic business records, the court adopted, with some modification, an eleven-step foundation proposed by Professor Edward Imwinkelried, viewing electronic records as a form of scientific evidence:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.

5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

Although the position taken by the court in *In re Vee Vinhnee* appears to be the most demanding requirement for authenticating computer stored records, other courts also have recognized a need to demonstrate the accuracy of these records. *See, e.g.:*

State v. Dunn, 7 S.W.3d 427, 432 (Mo.Ct.App.2000) (Admissibility of computer-generated records “should be determined on the basis of the reliability and accuracy of the process involved.”);

State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998) (“[T]he admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.”).

As the foregoing cases illustrate, there is a wide disparity between the most lenient positions courts have taken in accepting electronic records as authentic and the most demanding requirements that have been imposed. Further, it would not be surprising to find that, to date, more courts have tended towards the lenient rather than the demanding approach. However, it also is plain that commentators and courts increasingly recognize the special characteristics of electronically stored records, and there appears to be a growing awareness, as expressed in the Manual for Complex Litigation, that courts “should consider the accuracy and reliability of computerized evidence” in ruling on its admissibility. Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although “it may be better to be lucky than good,” as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

The methods of authentication most likely to be appropriate for computerized records are:

¹⁵⁶ 336 B.R. 437.

901(b)(1) (witness with personal knowledge),
901(b)(3) (expert testimony),
901(b)(4) (distinctive characteristics), and
901(b)(9) (system or process capable of producing
a reliable result).

G. Digital Photographs.

Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene.¹⁵⁷ Calling the photographer or offering expert testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be “enhanced.” Digital image enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change.

Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs: Suppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant’s name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an ‘improved’, digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise would never would have seen.

There are three distinct types of digital photographs that should be considered with respect to authentication analysis: original digital images, digitally converted images, and digitally enhanced images.

An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201.

For digitally converted images, authentication requires an explanation of the process by which a film

photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)-the latter rule implicating expert testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify to the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion.

For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which gets into the realm of scientific or technical evidence under Rule 702. Recently, one state court has given particular scrutiny to how this should be done.

In *State v. Swinton*,¹⁵⁸ the defendant was convicted of murder in part based on evidence of computer enhanced images prepared using the Adobe Photoshop software. The images showed a superimposition of the defendants teeth over digital photographs of bite marks taken from the victim’s body. At trial, the state called the forensic odontologist (bite mark expert) to testify that the defendant was the source of the bite marks on the victim. However, the defendant testified that he was not familiar with how the Adobe Photoshop made the overlay photographs, which involved a multi-step process in which a wax mold of the defendant’s teeth was digitally photographed and scanned into the computer to then be superimposed on the photo of the victim. The trial court admitted the exhibits over objection, but the state appellate court reversed, finding that the defendant had not been afforded a chance to challenge the scientific or technical process by which the exhibits had been prepared. The court stated that to authenticate the exhibits would require a sponsoring witness who could testify, adequately and truthfully, as to exactly what the jury was looking at, and the defendant had a right to cross-examine the witness concerning the evidence. Because the witness called by the state to authenticate the exhibits lacked the computer expertise to do so, the defendant was deprived of the right to cross examine him.

Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9):

(1) The witness is an expert in digital photography;

¹⁵⁷ *Lorraine*, 241 F.R.D. at 561-62.

¹⁵⁸ 268 Conn. 781, 847 A.2d 921, 950-52 (2004).

- (2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them;
- (3) the witness testifies that the processes used are valid;
- (4) the witness testifies that there has been adequate research into the specific application of image enhancement technology involved in the case;
- (5) the witness testifies that the software used was developed from the research;
- (6) the witness received a film photograph;
- (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer;
- (8) the witness can identify the trial exhibit as the product of the enhancement process he or she performed.

The author recognized that this is an extensive foundation, and whether it will be adopted by courts in the future remains to be seen. However, it is probable that courts will require authentication of digitally enhanced photographs by adequate testimony that it is the product of a system or process that produces accurate and reliable results under Rule 901(b)(9).

H. Voicemail.

Rule 901(b)(5) provides that a voice recording may be identified by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker. One Texas court has found that a voicemail was not properly authenticated when a witness testified that she recognized the voice as a party's but did not identify the recording or explain the circumstances in which it was made.¹⁵⁹

I. Conclusion on Authenticating ESI.

To prepare properly to address authentication issues associated with electronically generated or stored evidence, a lawyer must identify each category of electronic evidence to be introduced.¹⁶⁰ Then, he or she should determine what courts have required to authenticate this type of evidence, and carefully evaluate the methods of authentication identified in Rules 901 and 902, as well as consider requesting a stipulation from opposing counsel, or filing a request for admission of the genuineness of the evidence. With this analysis in mind, the lawyer then can plan which method or methods of authentication will be most effective, and prepare the necessary formulation, whether through testimony, affidavit, admission or stipulation. The proffering attorney needs to be specific in presenting the authenticating facts and, if

authenticity is challenged, should cite authority to support the method selected.

An attorney could also ask authenticating questions about ESI during a deposition. An attorney could have the deponent log into various sites during the deposition and testify to the contents. In theory, this would be no different than having a deponent produce a diary and go through it.

VI. JUDICIAL NOTICE.

The Texas Rules of Evidence provide a court with the ability to take judicial notice in four areas: (1) adjudicative facts; (2) the law of other states; (3) laws of foreign countries; and (4) Texas city and county ordinances and agency regulations.¹⁶¹

Practice Note: A court may not take judicial notice of testimony from a previous trial or even testimony from a prior temporary orders hearing in the same case.¹⁶² Such prior testimony must be properly offered and admitted into evidence.

Practice Note: A court may not take judicial notice of scientific literature.¹⁶³ If the evidence is an expert treatise or market report, it should be offered under the appropriate hearsay exception, see discussion above.

A. Adjudicative Facts.

An adjudicative fact is any well settled fact, "one which is so well known by all reasonably intelligent people in the community or its existence is so easily determinable with certainty from sources considered reliable, that it would not be good sense to require formal proof."¹⁶⁴ An adjudicative fact must be a fact not subject to reasonable dispute because: (1) it is generally known within the territorial jurisdiction of the trial court or (2) it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.¹⁶⁵ When the above requirements are established it is mandatory that the court take judicial notice.¹⁶⁶ 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.¹⁶⁷ In the absence of prior notification, the request may be made after judicial notice has been taken.¹⁶⁸ The court is mandated to instruct the jury as to

¹⁶¹ Tex. R. Evid. 201-204.

¹⁶² *May v. May*, 829 S.W.2d 373, 376 (Tex.App.—Corpus Christi 1992, no writ); *Traweek v. Larkin*, 708 S.W.2d 942, 946-947 (Tex.App.—Tyler 1986, writ ref. n.r.e.).

¹⁶³ *Glockzin v. State*, 220 SW3d 140, 145-46 (Tex.App.—Waco 2007, pet. ref'd).

¹⁶⁴ Ray, LAW OF EVIDENCE, JUDICIAL NOTICE, sec. 151 (1980); *Harper v. Killion*, 348 S.W.2d 521, 522 (Tex. 1961).

¹⁶⁵ Tex. R. Evid. 201(b).

¹⁶⁶ Tex. R. Evid. 201(d); and see *Hernandez v. Houston Lighting & Power Co.*, 795 S.W.2d 775, 776-777 (Tex.App.—Houston [14th Dist.] 1990, no writ).

¹⁶⁷ Tex. R. Evid. 201(e).

¹⁶⁸ *Id.*

¹⁵⁹ *Miller v. State*, 208 S.W.3d 554, 566 (Tex.App.—Austin 2006, pet. ref'd).

¹⁶⁰ *Lorraine*, 241 F.R.D. at 562.

the conclusiveness of a judicially noticed fact.¹⁶⁹ The party opposing the trial court's action must be given an opportunity to be heard on the issue of propriety of the court's action and make a proper objection to preserve error. The court, on its own volition or at the request of either attorney, can take judicial notice, provided that counsel requesting it state (1) the exact fact to be noticed, (2) the purpose for use of the fact; and (3) the source from which the fact can be verified. Even if the mandatory requirements are not asserted, a court has the discretion to take judicial notice (whether requested or not) at any stage of the proceeding.¹⁷⁰ Indeed, the Court of Appeals can take judicial notice for the first time on appeal.¹⁷¹

B. Law of Other States.

A court may, on its own or upon request, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every jurisdiction of the United States.¹⁷² Judicial notice 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. A party requesting that judicial notice be taken must furnish the court sufficient information. A photocopy is sufficient—no certified copy is required.¹⁷³ The requesting party must give all parties any notice the court deems 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 on the taking of judicial notice. In the absence of prior notification, the request may be made after judicial notice has been taken.

Practice Note: When another state's law is offered for the purpose of determining the legal rights of the parties, Tex. R. Evid. 202 applies. However, when the other state's law is considered only as persuasive to the court's legal reasoning, Tex. R. Evid. 202 need not be followed.¹⁷⁴

C. Law of Foreign Countries.

1. Notice.

A party who intends to request the court to take judicial notice of the law(s) of a foreign country shall give at least 30 days notice prior to trial.¹⁷⁵ The notice can be set forth in his pleadings or other reasonable written notice (e.g. certified registered letter or motion). The proponent shall furnish copies of

materials and sources to be relied upon (e.g. xerox copies of cases, statutes, etc. or place where they may be found).

2. Translation of Foreign Material.

If the materials or sources were originally written in a language other than English, proponent must furnish to adverse party both a copy of the foreign language text and the English translation.¹⁷⁶

3. Other Sources to be Considered by the Court.

The trial court may consider any other material or source, whether submitted or not, including but not limited to affidavits, testimony, briefs and treatises.¹⁷⁷

4. Determination and Review.

The court shall determine the law of the foreign country and that determination is subject to review as a question of law.

D. Texas City and County Ordinances, Administrative Regulations, Etc.

The procedure for taking judicial notice of Texas city and county ordinances and administrative agency regulations is the same as for the Law of Other States as stated above.

VII. DEMONSTRATIVE EVIDENCE.

There is often confusion about demonstrative evidence. Demonstrative evidence is used as an aid to the court in presenting information, but it is not admitted into evidence, and it cannot be taken back into the jury room along with the admitted evidence. Common examples of demonstrative evidence are PowerPoint slide shows, lists or drawings on a tablet, or other visual aids. An attorney can use courtroom demonstratives without authenticating or admitting them into evidence. For example, demonstrative evidence may be used during voir dire.¹⁷⁸ However, while a court has the discretion to permit counsel the use of visual aids, including charts, to assist in summarizing the evidence, the court also has the power to exclude such visual aids.¹⁷⁹

If a demonstrative does meet the requirements for admissibility, an attorney may offer it into evidence. One court allowed the admission of a golf club into evidence that was alleged to be similar to one used in a crime.¹⁸⁰ Demonstrative evidence that summarizes or even emphasizes the testimony is admissible if the underlying testimony has been admitted, or is

¹⁶⁹ Tex. R. Evid. 201(g).

¹⁷⁰ Tex. R. Evid. 201(b) and (f).

¹⁷¹ *City of Dallas v. Moreau*, 718 S.W.2d 776, 780 (Tex.App.—Corpus Christi 1986, writ ref'd n.r.e.).

¹⁷² Tex. R. Evid. 202.

¹⁷³ *Cal Growers, Inc. v. Palmer Warehouse and Transfer Co., Inc.*, 687 S.W.2d 384, 386 (Tex.App.—Houston [14th Dist.] 1985, no writ).

¹⁷⁴ *See, Ewing v. Ewing*, 739 S.W.2d 470, 472 (Tex.App.—Corpus Christi 1987, no writ).

¹⁷⁵ Tex. R. Evid. 203.

¹⁷⁶ *Ossorio v. Leon*, 705 S.W.2d 219, 221-222 (Tex.App.—San Antonio 1985, no writ).

¹⁷⁷ *Id.*

¹⁷⁸ *See Hanson v. State*, No. 07-07-0138-CR (Tex.App.—Amarillo Oct. 9, 2008, no pet.) (memo. op.).

¹⁷⁹ *See Hartin v. State*, No. 09-07-00547-CR (Tex.App.—Beaumont Apr. 22, 2009, no pet.) (memo. op.).

¹⁸⁰ *See Lynch v. State*, No. 07-06-0104-CR (Tex.App.—Amarillo May 23, 2007, no pet.) (memo. op.).

subsequently admitted into evidence.¹⁸¹ Admission of charts and diagrams which summarize a witness' testimony is within the discretion of the court.¹⁸² Even if exhibits contain excerpts from witness' testimony and are admitted, the trial court must permit them to be taken into the jury room.¹⁸³

VIII. BEST EVIDENCE RULE.

The Best Evidence Rule states that, to prove the content of a writing, recording, or photograph, the *original* writing, recording, or photograph is required except as otherwise provided.¹⁸⁴ The purpose of the best evidence rule is to produce the best obtainable evidence, and if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused.¹⁸⁵

A. When Is Original Not Required?

The rule does not normally require the use of the singular, originally-created source document. For example, a duplicate is admissible to the same extent as an original unless the party opposing the evidence raises a question as to the authenticity of the original or shows that it would be unfair to admit the duplicate in lieu of the original.¹⁸⁶ The Rules also list several potentially far-reaching exceptions to the rule. If any of the exceptions apply, then other evidence, such as witness testimony, can be used to prove the contents of a document.

- (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.
- (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure.
- (3) Original Outside the State. No original is located in Texas. The best evidence rule does not apply to originals located outside Texas.¹⁸⁷
- (4) Original in Possession of Opponent. If an original was under the control of a party, the party was put on notice that the content would be a subject of proof, and the party does not produce the original.

¹⁸¹ *North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 130 (Tex.App.—Beaumont 2001, pet. denied).

¹⁸² *Speier v. Webster College*, 616 S.W.2d 617, 618 (Tex. 1981); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342 (Tex. 1998).

¹⁸³ *Houston Lighting & Power Co. v. Klein I.S.D.*, 739 S.W.2d 508, 519 (Tex.App.—Houston [14th Dist.] 1987, no writ).

¹⁸⁴ Tex. R. Evid. 1002 (emph. added).

¹⁸⁵ *Jurek v. Couch-Jurek*, 296 S.W.3d 864, 871 (Tex.App.—El Paso 2009, no pet.).

¹⁸⁶ Tex. R. Evid. 1003.

¹⁸⁷ *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam).

- (5) Collateral Matters. The writing, recording or photograph is not closely related to a controlling issue.

Practice Note: The *Jurek*¹⁸⁸ case shows how far-reaching the exceptions to the best evidence rule can be: At trial, no premarital agreement between the parties could be produced, and husband denied ever having signed one. However, wife claimed, and the trial court found, that prior to their marriage, the parties did enter into a premarital agreement that was identical to a premarital agreement between wife's sister and her second husband. Wife's sister's premarital agreement was used as evidence at the divorce trial to prove the contents of the parties' premarital agreement.

Practice Note: Even if an exception to the Best Evidence Rule applies, the Statute of Frauds may still require a writing in some circumstances.

B. Electronic Data.

Under Tex. R. Evid. 1001(c), 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. An Indiana court, for example, found that internet chat room communications that a party cut and pasted into a word processing document were still originals.¹⁸⁹ In the predicate for introducing a computer printout, asking whether the exhibit reflects the data accurately may help to overcome an objection under the Best Evidence Rule.

C. Summaries.

Contents of voluminous writings, recordings, etc., if otherwise admissible, can be presented in chart or summary form if it is not convenient to examine the records in court.¹⁹⁰ The rule requires that the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. A proper predicate for introducing summaries includes demonstrating that the underlying records were voluminous, were made available to the opposing party for inspection and use in cross examination, and were admissible under the Texas Business Records Act.¹⁹¹ In *Aquamarine*, the Texas Supreme Court held a summary to be inadmissible hearsay because the underlying business records upon which it was based were never shown to be admissible.

¹⁸⁸ *Jurek v. Couch-Jurek*, 296 S.W.3d 864, 871 (Tex.App.—El Paso 2009, no pet.).

¹⁸⁹ *Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002).

¹⁹⁰ Tex. R. Evid. 1006.

¹⁹¹ *Aquamarine Associates v. Burton Shipyard, Inc.*, 659 S.W.2d 820, 821 (Tex. 1983); *Black Lake Pipe Line Co. v. Union Construction Co.*, 538 S.W.2d 80, 92 (Tex. 1976); *see also Xonu Intercontinental Industries v. Stauffer Chemical Co.*, 587 S.W.2d 757, 760 (Tex.Civ.App.—Corpus Christi 1979, no writ).

D. Function of Court and Jury.

Most issues under the Best Evidence Rule are resolved by the court, pursuant to its role as gatekeeper of evidence. However, if a jury is acting as the factfinder, then certain issues are expressly reserved for the jury, including: whether the asserted writing ever existed; whether another writing, recording, or photograph produced at the trial is the original; or whether other evidence of contents correctly reflects the contents.

IX. PAROL EVIDENCE RULE.

The Parol Evidence Rule is not a rule of evidence in the proper sense, but a rule of substantive law. In the absence of fraud, mistake or accident, the parol evidence rule prohibits the contradiction of final written expressions by evidence of prior or contemporaneous agreements.¹⁹² Put succinctly, an alleged oral agreement is not admissible if it is inconsistent with a written agreement. The ability to understand and apply the parol evidence rule is extremely important, especially in marital agreement and inter-spousal transaction cases.

A. Effects of the Parol Evidence Rule.

1. Merger and Bar.

When the negotiations between the parties have apparently been integrated into a written document, the law prohibits parol evidence, in that it will be presumed that any other intentions were rejected by the parties.¹⁹³

2. Omitted Intentions Disregarded.

When one intention of parties is reflected in a writing, but other expressions suggest that another agreement was intended, the court will disregard the unwritten intentions, when in the court's opinion they would have normally been included in the writing.

B. Applicability of Parole Evidence Rule.

1. Generally.

Absent fraud, mistake, or accident, the parol evidence rule only applies when parol evidence is offered to vary the terms of a complete written document. Parol evidence is admissible to prove other agreements when the written document is not intended as a complete, all-inclusive embodiment of the terms of the agreement.¹⁹⁴

2. Judicial and Official Records.

Judicial and official records are protected by the parol evidence rule. Evidence tending to add, subtract, or

alter the terms of the official records will not be admissible.¹⁹⁵

3. Privies and Parties.

The parol evidence rule will apply to the parties and only those third parties which are so closely affiliated with the transaction as to not be considered strangers. The rule does not apply to true third-party strangers to the transaction and parol evidence can be admitted.¹⁹⁶

C. When Parol Evidence is Admissible.

1. Want or Failure of Consideration.

Parol evidence is admissible to show want or failure of consideration.¹⁹⁷ As long as the evidence offered does not alter the amount of consideration stated in the written agreement, but only whether it was paid or received there is no evidentiary obstacle.

2. Collateral Agreement.

Parol evidence does not affect a purely collateral contract, independent of and not inconsistent with the written agreement.¹⁹⁸

3. Incomplete Instrument.

Extrinsic evidence is always admissible to clarify the terms of a writing which is incomplete, even though no fraud, accident, or mistake is shown.¹⁹⁹

4. Fraud, Duress and Misrepresentation.

"Parol evidence is always competent to show the nonexistence of a contract."²⁰⁰ By the very nature of the action, parol evidence is always admissible, if properly pleaded, to set aside the writing on the basis of fraud, duress, or misrepresentation.

5. Ambiguity.

An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. Only where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument. Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered.²⁰¹

¹⁹² *Stavert Properties, Inc. v. RepublicBank of Northern Hills*, 696 S.W.2d 278, 280 (Tex.App.—San Antonio 1985, writ ref'd n.r.e.).

¹⁹³ *Smith v. Smith*, 794 S.W.2d 823, 827-828 (Tex.App.—Dallas 1990, no writ).

¹⁹⁴ *Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683, 688 (Tex.App.—Houston [1st Dist.] 1984, no writ).

¹⁹⁵ *Kennell v. Kennell*, 743 S.W.2d 299, 301-302 (Tex.App.—Houston [14th Dist.] 1987, no writ).

¹⁹⁶ *Hernandez v. Alta Verde Industries, Inc.*, 666 S.W.2d 499, 502 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.).

¹⁹⁷ *DeLuca v. Munzel*, 673 S.W.2d 373, 376 (Tex.App.—Houston [1st. Dist.] 1984, writ ref'd n.r.e.).

¹⁹⁸ *Evers v. Arnold*, 210 S.W.2d 270, 271 (Tex.Civ.App.—Austin 1948, no writ).

¹⁹⁹ *Bob Robertson, Inc. v. Webster*, 679 S.W.2d at 688.

²⁰⁰ *Bill Shannon, Inc. v. San Clemente*, 724 S.W.2d 941, 943 (Tex.App.—San Antonio 1987, no writ).

²⁰¹ *David J. Sacks, PC v. Haden*, 266 S.W.3d 447, 450-51 (Tex. 2008).

D. Parol Evidence and Interpersonal Transactions.

Relevant exceptions to the parol evidence rule have evolved, allowing parol evidence relating to certain husband-wife transactions and depository-depositor signature cards.

1. When Parol Evidence is Admissible to Establish Character of Property.

The admission of parol evidence can be critical in proving that property is separate property. When a conveyance of any property, evidenced by a writing, contains no significant recital, parol evidence is usually admissible. A significant recital would be one which states in the writing that the conveyance is made to a spouse, "as his/her separate property" or it states that the consideration was paid from the separate funds of a spouse.

a) Third Party Grantor.

Parol evidence is admissible to prove or rebut character of property when the conveyance is from a third party grantor to one or both spouses.²⁰² If the normal community property presumption is rebutted and it is shown separate funds were used as consideration of the transfer, a resulting trust arises in favor of the spouse whose separate funds were utilized.²⁰³

b) Spouse as Grantor.

A presumption exists that a conveyance from one spouse to another is intended as gift to grantee spouse.²⁰⁴ However, the true intent of the grantor is always the controlling factor. Parol evidence is admissible to rebut the gift presumption.²⁰⁵

c) Spouse Furnishes Separate Property Consideration.

The same presumption of gift to grantee spouse arises when the grantor spouse uses his/her separate property to acquire assets and title is taken in grantee spouse's name or both names.²⁰⁶ Parol evidence is admissible to rebut the gift presumption.²⁰⁷

2. When Parol Evidence is Not Admissible to Establish Character of Property.

When a written document conveying title contains a significant recital, parol evidence is customarily not admissible to vary the terms or intent of the writing.²⁰⁸

a) Spouse as Grantor.

The heirs of a husband who conveyed property to wife with a significant recital, were precluded from introducing parol evidence which would render the deed ineffective.²⁰⁹

b) Spouse Joins in Conveyance.

When Husband joined in conveyance to Wife, which contained a significant recital, when he was under no obligation to do so, he was estopped from introducing parol evidence absent a showing of fraud, duress or mistake.²¹⁰

c) Spouse Signs Executory Contract.

When a spouse signs a contract for property to be paid for out of her separate funds and title to be taken for her exclusive use and benefit, parol evidence is inadmissible to alter the nature of the property. Even though husband was not a party to the deed, the writing was complete in and of itself.²¹¹

d) Spouse Signs Promissory Note or Deed of Trust.

Parol evidence was not admissible where husband signed note and deed of trust securing purchase of real property properly taken by Wife "as her separate property."²¹²

e) Spouse Participates in Transaction.

Even though a spouse is not a party to a transaction, but participates in any manner, parol evidence will not be admitted to alter character of property.²¹³ A spouse's mere presence when the transaction takes place will preclude parol evidence.²¹⁴

X. WITNESSES.

A. Competency.

As long as the witness was sane at the time of the event that is the subject of the testimony and is sane at the time of his or her testimony, he is competent to testify.²¹⁵ This includes children that possess sufficient intellect to relate transactions with respect to which they are questioned.²¹⁶

B. 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.²¹⁷ If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is

²⁰² *Robles v. Robles*, 965 S.W.2d 605, 612 (Tex.App.—Houston [1st Dist.] 1998, pet. denied).

²⁰³ *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

²⁰⁴ *Roberts v. Roberts*, 999 S.W.2d 424, 431 (Tex.App.—El Paso 1999, no pet) (overruled on other grounds).

²⁰⁵ *Babb v. McGee*, 507 S.W.2d 821, 822 (Tex.Civ.App.—Dallas 1974, writ ref'd n.r.e.). See *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex.App.—Tyler 1993, no writ) (holding that spouse who makes deposit to joint bank account of his or her separate property does not make gift to other spouse).

²⁰⁶ *Cockerham v. Cockerham*, 527 S.W.2d 162, 168-169 (Tex. 1975).

²⁰⁷ *Peterson v. Peterson*, 595 S.W.2d 889, 892-893 (Tex.Civ.App.—Austin 1980, writ dismissed).

²⁰⁸ *Roberts v. Roberts*, 999 S.W.2d at 432, overruled on other grounds.

²⁰⁹ *McKivett v. McKivett*, 70 S.W.2d 694, 695-696 (Tex.Comm'n. App. 1934, opinion adopted).

²¹⁰ *Messer v. Johnson*, 422 S.W.2d 908, 911-912 (Tex. 1968).

²¹¹ *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777, 780 (1952).

²¹² *Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900, 905-906 (1955).

²¹³ *Little v. Linder*, 651 S.W.2d 895, 900 (Tex.App.—Tyler 1983, writ ref'd n.r.e.).

²¹⁴ *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292, 296-297 (1956).

²¹⁵ Tex. R. Evid. 601.

²¹⁶ *Id.*; *Parham v. Wilborn*, 746 S.W.2d 347 (Tex.App.—Fort Worth 1988, no writ).

²¹⁷ Tex. R. Evid. 602.

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.²¹⁸

C. Mode and Order of Interrogation/Presentation.

The court has wide discretion in controlling the ebb and flow of questioning, and is charged with exercising 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.²¹⁹

D. Leading Questions.

Leading questions are ordinarily permissible on cross and also on direct examination to the extent necessary to develop the witness's testimony.²²⁰ When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

E. Writing Used to Refresh Memory.

If a witness's memory fails, a writing may be used to refresh the witness's memory. There is often confusion about the difference between a recorded recollection under the hearsay exception of Rule 803(5) and a writing used to refresh memory under Rule 613. The *Welch*²²¹ case discusses the distinction: A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing a memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded. Where the memorandum, statement or writing is used to refresh the present recollection of the witness and it does, then the memorandum does not become part of the evidence, for *it is not the paper that is evidence*, but the recollection of the witness.²²²

However, 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.²²³

Practice Note: Use of an otherwise privileged writing to refresh a party's memory will constitute a waiver of that privilege.²²⁴

F. The Rule—Exclusion of Witnesses from the Courtroom.

"The Rule" refers to Tex. R. Evid. 614 and Tex. R. Civ. P. 267(a). The *Drilex*²²⁵ case provides a discussion of the Rule: Sequestration minimizes witnesses' tailoring their testimony in response to that of other witnesses and prevents collusion among witnesses testifying for the same side. The expediency of sequestration as a mechanism for preventing and detecting fabrication has been recognized for centuries. English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law. Today, most jurisdictions have expressly provided for witness sequestration by statute or rule. In Texas, sequestration in civil litigation is governed by Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267. These rules provide that, at the request of any party, the witnesses on both sides shall be removed from the courtroom to some place where they cannot hear the testimony delivered by any other witness in the cause. Certain classes of prospective witnesses, however, are exempt from exclusion from the courtroom, including: (1) a party or his or her spouse; (2) an officer or employee of a non-person party who is designated as its representative; or (3) a person whose presence is shown by a party to be essential to the presentation of the cause. When the Rule is invoked, all parties should request the court to exempt any prospective witnesses whose presence is essential to the presentation of the cause. The burden rests with the party seeking to exempt an expert witness from the Rule's exclusion requirement to establish that the witness's presence is essential. Witnesses found to be exempt by the trial court are not "placed under the Rule." Once the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom. Before being excluded, these witnesses must be sworn and admonished that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Thus, witnesses under the Rule generally may not discuss the case with anyone other than the attorneys in the case. Witnesses exempt from exclusion under the Rule need not be sworn or admonished. A violation of the Rule occurs when a nonexempt

²¹⁸ Tex. R. Evid. 701.

²¹⁹ Tex. R. Evid. 611(a).

²²⁰ Tex. R. Evid. 611(c).

²²¹ *Welch v. State*, 576 S.W.2d 638, 641 (Tex.Crim.App. 1979).

²²² *Wood v. State*, 511 S.W.2d 37, 43 (Tex.Crim.App. 1974) (emph. added).

²²³ Tex. R. Evid. 613.

²²⁴ *City of Denison v. Grisham*, 716 S.W. 2d 121, 123 (Tex.App.—Dallas 1986, orig proceeding)

²²⁵ *Drilex Sys., Inc. v. Flores*, 1 SW3d 112, 116 (Tex. 1999).

prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony. When the Rule is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt.

XI. IMPEACHMENT

Tex. R. Evid. 607 permits the impeachment of any witness, including by the party calling the witness.²²⁶ Impeachment evidence is generally hearsay and does not have probative value.²²⁷ Prior inconsistent statements offered to impeach the witness's credibility do not constitute hearsay because they are not offered for the truth of the matter asserted.²²⁸ If the impeachment evidence meets a hearsay exception or exemption, however, it may be admitted as probative evidence.

The *Michael*²²⁹ case gives an excellent summary of the means of impeachment: There are five major forms of impeachment: two are specific, and three are nonspecific. The two specific forms of impeachment are impeachment by prior inconsistent statements and impeachment by another witness. The three nonspecific forms of impeachment are impeachment through bias or motive or interest, impeachment by highlighting testimonial defects, and impeachment by general credibility or lack of truthfulness. Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truth teller, but she is wrong about X), while nonspecific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X).

A. 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).²³⁰

If a proper predicate is not laid, the inconsistent statement may be excluded and further cross-examination on the subject blocked. No confrontation is required, and no opportunity to explain need be given, if the witness being impeached is the opposing party.

B. Impeaching Hearsay Statements

Tex. R. Evid. 806 provides that when a hearsay statement, or a non-hearsay statement defined by Rule 801(e), has been admitted in evidence, the credibility of the out-of-court declarant may be attacked. Evidence of a statement or conduct by the declarant at any time may be offered to impeach the out-of-court declarant. There is no requirement that the declarant be afforded an opportunity to deny or explain. If the credibility of the out-of-court declarant is attacked, it may be supported by any evidence which would be admissible if the declarant had testified as a witness. If the party against whom a hearsay statement has been admitted then calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

XII. CHARACTER EVIDENCE.

While the use of character evidence in civil cases is limited by the rules of evidence, in family law, several important exceptions make the use of character evidence relevant and commonly-used.

A. Specific Conduct.

Evidence about prior instances of conduct used to show that a person acted in conformity on a particular occasion is generally inadmissible.²³¹ However, under 404(b), such evidence may be admissible for other purposes, such as showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Further, evidence of a person's habit or routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit or routine practice.²³²

Although evidence of specific acts is limited, character evidence through testimony of a person's reputation or by testimony in the form of an opinion is admissible.²³³ If reputation or opinion testimony is admitted, evidence of specific instances of conduct is permitted on cross-examination.

²²⁶ *Truco Properties, Inc. v. Charlton*, 749 S.W.2d 893, 896 (Tex.App.—Texarkana 1988, writ denied).

²²⁷ *Lewis v. Merrill*, 295 S.W.2d 920, 923 (Tex.Civ.App. 1956).

²²⁸ *See Flores v. State*, 48 S.W.3d 397, 404 (Tex.App.—Waco 2001, pet. ref'd).

²²⁹ *Michael v. State*, 235 S.W.3d 723, 726 (Tex.Crim.App. 2007).

²³⁰ Tex. R. Evid. 613(a) (emph. added).

²³¹ *See, Burton v. Kirby*, 775 S.W.2d 834, 837 (Tex.App.—Austin 1989, no writ); *Penwell v. Barrett*, 724 S.W.2d 902, 907 (Tex.App.—San Antonio 1987, no writ).

²³² Tex. R. Evid. 406.

²³³ Tex. R. Evid. 405(a).

Practice Note: In custody cases, evidence of the prior conduct of a parent is regularly presented to show that future behavior is likely to be in conformity. One termination case has drawn a relevant distinction: The evidence regarding the father's prior criminal behavior, convictions, and imprisonment was not offered to prove conduct in conformity or to impeach his credibility as a witness. Instead, it was relevant and probative to whether he engaged in a course of conduct that endangered the child.²³⁴ A modification case held that, while evidence of past misconduct or neglect may not of itself be sufficient to show present unfitness in a suit affecting the parent-child relationship, such evidence is permissible as an inference that a person's future conduct may be measured by her past conduct as related to the same or similar situation.²³⁵ Another modification case held that a parent's prior conduct can give rise to a material and substantial change in circumstances of the child.²³⁶

B. Religious Beliefs.

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.²³⁷ This does not prevent the questioning of the witness regarding church affiliation for purpose of establishing bias or prejudice.²³⁸

C. Rehabilitation by Character Evidence.

The *Michael*²³⁹ case discusses when impeachment by prior inconsistent statement permits rehabilitative evidence of character for truthfulness: Impeaching a witness with a prior inconsistent statement is not necessarily an attack on credibility that would allow rehabilitative evidence of character for truthfulness under Rule of Evidence 608(a). Although rehabilitation may be permitted under 608(a), it is not automatic.

At the outset, every witness is assumed to have a truthful character. If that character is attacked, Rule 608(a) allows the presentation of evidence of that witness's good character. When a witness's credibility has been attacked, the sponsoring party may rehabilitate the witness only in direct response to the attack. The wall attacked at one point may not be fortified at another and distinct point. Generally, a witness's character for truthfulness may be rehabilitated with "good character" witnesses only when the witness's general character for truthfulness has been attacked.

Impeachment by a prior inconsistent statement is normally just an attack on the witness's accuracy, not his character for truthfulness. As Wigmore explained:

The exposure of an error of a witness on one material point by his own self-contradictory statements is a recognized mode of impeachment. It serves as a basis for further inference that he is capable of having made errors on other points. This possibility of other errors, however, is not attributable to any specific defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character. Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause.

There are circumstances, however, where the cross-examiner's intent and method clearly demonstrate that he is not merely attacking the conflict in the witness's testimony between one or more specific facts, but mounting a wholesale attack on the general credibility of the witness. If the inconsistent statement is used to show that the witness is of "dishonest character," then it follows that the opposing party should be allowed to rehabilitate this witness through testimony explaining that witness's character for truthfulness. Alternatively, if this testimony is used to show some other defect, then such evidence should not be allowed.

Prior to the adoption of the Texas Rules of Evidence, case law held that impeachment with prior inconsistent statements was an attack on credibility, allowing character evidence to rehabilitate a witness. In *O'Bryan v. State*, the defendant impeached a State's witness's testimony with his prior sworn testimony concerning dates, times, and descriptions of the defendant's clothing. In rebuttal the State presented evidence of the witness's reputation for truth and veracity. The Court likened impeachment by self-contradiction to an attack on a witness's "veracity character," and held that the testimony was permissible. The Court did not explain, however, why this form of impeachment necessarily impugned a witness's character for truthfulness.

The Federal Rules of Evidence modified the common-law position held by some states, including Texas, that allowed rehabilitation evidence of truthful character when the witness was impeached by self-contradiction. Although the text of Federal Rule 608(a) does not make an explicit delineation between impeachment by self-contradiction and other forms of impeachment, the advisory committee notes state: "Whether evidence in the form of contradiction is an attack upon the character of a witness must depend in part upon the circumstances." Texas Rule 608(a) is identical to Federal Rule 608(a).

Some courts had previously held that rehabilitation should be permitted when the witness is

²³⁴ *In re JTG*, 121 SW3d 117, 133 (Tex.App.--Fort Worth 2003, no pet.).

²³⁵ *Kirby v. Chapman*, 917 S.W.2d 902, 911 (Tex.App.—Fort Worth 1996, no pet.).

²³⁶ *In re ALE*, 279 S.W.3d 424 (Tex. App.--Houston [14th Dist.] 2009, no pet.).

²³⁷ Tex. R. Evid. 610.

²³⁸ Tex. R. Evid. 610.

²³⁹ *Michael v. State*, 235 S.W.3d 723, 725-28 (Tex.Crim.App. 2007).

subject to a “slashing cross-examination.” However, the question should not be whether the cross-examination is “slashing” but whether the overall tone and tenor of the cross-examination implied that the witness is a liar.

It may be quite obvious that a witness’s character for truthfulness has been attacked directly, as by a question such as, “Were you lying then or are you lying now?” or another witness’s testimony that the witness is a liar or is untruthful. When a party uses prior inconsistent statements to impeach someone, the cross-examiner’s intent may not be as clear. There are several reasons why one’s statements may be inconsistent, and most of them do not imply dishonest character.

The question is whether a reasonable juror would believe that a witness’s character for truthfulness has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements).

XIII. EXPERT TESTIMONY AND OPINIONS.

A. Lay Witness Opinion.

Tex. R. Evid. 701 states that any person who possesses some specialized knowledge of a matter in issue and who will assist the trier of fact in understanding the evidence or to determine a fact issue will be able to testify as an expert witness.²⁴⁰ Lay opinions are elicited and given in almost every family law case, and as is often the case in family law, facts and opinions are often intertwined and impossible to separate. There are no Texas cases that resulted in reversal because of the admission or exclusion of a lay opinion.

Practice Note: Unless the proffered lay opinion testimony is damaging the case, it is probably not worth the objection. The practitioner will find that many times such lay opinions present the cross examiner with fodder to neutralize any potential harm.

B. Admission of Expert Testimony.

Tex. R. Evid. 702 predicates the admission of expert testimony on three basic factors:

1. The witness must be qualified in the area of expertise for which the evidence is proffered;
2. The expert’s testimony must be grounded in the scientific, technical, or other specialized knowledge in that particular area of expertise; and
3. The testimony must assist the trier of fact.

C. Qualification of the Expert is Discretionary.

Whether the expert is qualified to testify and render an opinion lies within the discretion of the trial court.²⁴¹

The standard of review for determination of whether an expert is properly qualified is abuse of discretion.²⁴²

D. Basis of Expert Testimony and Opinions.

The proponent of the proffered testimony bears the burden of demonstrating the admissibility of the expert testimony if it is objected to by the other side.²⁴³

1. Hard Science

To overcome the objection the proponent must demonstrate that: (1) the expert is qualified, and (2) that the expert’s testimony is relevant and reliable.²⁴⁴

The non-exclusive list of factors which can be considered in the reliability of scientific evidence are:

- a. the extent to which the theory has been or can be tested;
- b. the extent to which the technique relies upon the subjective interpretation of the expert;
- c. whether the theory has been subjected to peer review and/or publication;
- d. the technique’s potential rate of error;
- e. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
- f. the non-judicial uses which have been made of the theory or technique.²⁴⁵

2. Soft Science

While prior cases dealt primarily with the “hard” sciences, “soft” sciences needed to be addressed as well. In *Nenno*²⁴⁶ a framework was enunciated by which to test the reliability of the fields of science, such as social science or other fields (soft sciences) based upon experience and training as opposed to scientific method. It suggests that the court look at whether:

- a. the field of expertise is a legitimate one;
- b. the subject matter of the expert’s testimony is within the scope of that field; and
- c. the expert’s testimony properly relies upon or utilizes the principles involved in that field.²⁴⁷

One court of appeals has disapproved of applying *Nenno* in civil cases,²⁴⁸ however, others have followed the *Nenno* approach.²⁴⁹

²⁴² *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

²⁴³ *Id.* at 807.

²⁴⁴ *Helena Chemical Co. v. Wilkens*, 47 S.W.3d 486, 499 (Tex. 2001).

²⁴⁵ *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998).

²⁴⁶ *Nenno v. State*, 970 S.W.2d 549, 560 (Tex.Crim.App. 1998), overruled on other grounds by *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex.Crim.App. 1999)

²⁴⁷ *Id.*

²⁴⁸ *Bartosh v. Gulf Health Care Ctr.-Galveston*, 178 S.W.3d 434, 441 n.3 (Tex.App.-Houston [14th Dist.] 2005, no pet.).

²⁴⁹ *Coastal Tankships, USA, Inc. v. Anderson*, 87 S.W.3d 591 (Tex.App.-Houston [1st Dist.] 2002, pet. denied); *Taylor v. Tex. Dep’t of Protective & Regulatory Servs.*, 160 SW3d 641, 650-51 (Tex.App.-Austin 2005, pet. denied); *In*

²⁴⁰ *Sharpe v. Safway Scaffolds Co., Inc.*, 687 S.W.2d 386, 392 (Tex.App.-Houston [14th Dist.] 1985, no writ).

²⁴¹ *Broder v. Heise*, 924 S.W.2d 145, 153 (Tex. 1996).

3. Factors Relied Upon.

The general rule is that, once properly qualified, an expert can base his or her opinion on just about anything remotely relevant to the issue he or she is called to testify about. Tex. R. Evid. 703 permits an expert to rely on the following to base his opinion:

a. Personal Knowledge. This would include such observations as statements made by the parties, testing results, etc.

b. Facts/Data Made Known to the Expert at or Before the Hearing. Many mental health professionals rely and may rely on other evidence presented by others, deposition testimony and reports of other experts.

c. Inadmissible Evidence, if Relied on by Others. The reliance on tests, trade journals, other medical reports, etc. has not created much controversy in regard to expert opinions.²⁵⁰ However, a problem may arise when the expert begins to recount a hearsay conversation he has had with another. Tex. R. Evid. 703 implies that this type of testimony is permissible, but the case law indicates that there are limits. A trial court may permit the expert to state that his or her opinion was based in part on what another had related, but should not permit the expert to disclose what was actually said.²⁵¹ The pre-rules case of *Moore*,²⁵² held that such testimony was limited to show the foundation of the opinion. In *Birchfield*,²⁵³ the Court held that “[o]rdinarily an expert witness should not be permitted to recount a hearsay conversation with a third party, even if that conversation forms part of the basis of his opinion.” However, the *Birchfield* court permitted the testimony to stand based on the theory of invited error on the part of defendant’s counsel.

4. Experts and Custody Cases.

The testimony of mental health experts is often critical to the outcome of a conservatorship proceeding. Courts have placed limits on expert testimony in jury cases. For example, in *Ochs*,²⁵⁴ the court held that a psychologist in a child abuse case was not permitted to testify before a jury as to the propensity of the child complainant to tell the truth regarding the alleged abuse. The court reasoned that such testimony invaded

the province of the jury in regard to judging the credibility of the witness.²⁵⁵ While social workers assigned to custody cases are almost always permitted to testify, the extent of their testimony should also be closely monitored. Analogous to the point in *Birchfield*, social workers should not be able to restate what third parties have said, unless the statement fits one of the hearsay exceptions.²⁵⁶ Social studies are generally inadmissible hearsay before a jury, although the worker is competent to testify as a witness.²⁵⁷ A court should not exclude the testimony of a social worker merely because that witness is not court-appointed.²⁵⁸

Practice Note: In a jury case, counsel should object to such hearsay testimony on the grounds that the testimony is outside the purview of Tex. R. Evid. 703. If the testimony is admitted over objection, a limiting instruction should be requested in the charge in order to preserve error and avoid the invited error trap.²⁵⁹

E. Use of Treatises.

1. Only Through Expert Testimony.

As discussed previously, under hearsay exceptions, treatises may be used only through expert testimony. A proponent cannot have his expert read from the treatise on direct, but can have the treatise qualified as a reliable authority. If the witness is asked to read from it on cross, then clarifying excerpts can subsequently be read on redirect. If admitted, the statements may be read into evidence, but the treatise may not be received as an exhibit.

2. Using a Treatise on Cross-Examination.

The questioning attorney can have the opposing expert acknowledge that the treatise in question is authoritative and relied upon in their particular field. Even if the witness does not commit to such a position, the attorney has established that the treatise is a published work and that the opposing expert is aware

re J.B., 93 S.W.3d 609, 629-31; *In re A.J.L.*, 136 S.W.3d 293, 298 (Tex.App.—Fort Worth 2004, no pet.); *In re G.B.*, No. 07-01-0210-CV, 2003 WL 22327191, at *2, 2003 Tex.App. LEXIS 8737, at *2 (Tex.App.—Amarillo Oct. 10, 2003, no pet.).

²⁵⁰ See, *Noriega v. Mireles*, 925 S.W.2d 261, 264-265 (Tex.App.—Corpus Christi 1996, writ denied).

²⁵¹ *First Southwest Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954, 958 (Tex.App.—Texarkana 1989, writ denied). *In Sosa by and through Grant v. Koshy*, 961 S.W.2d 420, 427 Tex.App.—Houston [1st Dist.] 1997, review denied).

²⁵² *Moore v. Grantham*, 599 S.W.2d 287, 289 (Tex. 1980).
²⁵³ 747 S.W.2d at 365.

²⁵⁴ *Ochs v. Martinez*, 789 S.W.2d 949, 956 (Tex.App.—San Antonio 1990, writ denied)

²⁵⁵ *Id.* at 957.

²⁵⁶ *Rosendorf v. Blackmon*, 800 S.W.2d 377, 380 (Tex.App.—Corpus Christi 1990, no writ); *D.M.B. v. R.L.B.*, 798 S.W.2d 399, 402 (Tex.App.—Amarillo 1990, no writ).

²⁵⁷ *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex.App.—Houston [1st Dist.] 1990, no writ); see also, *Chacon v. Chacon*, 978 S.W.2d 633, 638 (Tex.App.—El Paso 1998, no pet.). Under Tex. Fam. Code §§ 107.054-55, while a social study is made part of the record, it is subject to the rules of evidence in being presented to a jury.

²⁵⁸ See, *Davis v. Davis*, 801 S.W.2d 22, 23 (Tex.App.—Corpus Christi 1990, no writ).

²⁵⁹ See *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 777 S.W.2d 783, 785-787 (Tex.App.—Beaumont 1989, writ denied), cert. granted, judgment vacated on other grounds, 497 U.S. 1020, 110 S.Ct. 3266, 111 L.Ed.2d 776 (U.S. 1990)(Expert opinion as to negligence and causation was admissible even though he had no independent evidence of vital facts).

of it. The proponent's expert can then qualify the writing as authoritative at a later time.²⁶⁰

F. Disclosure of Underlying Facts/Data.

Per Tex. R. Evid. 705, an expert is obligated to disclose all data he has relied on in arriving at his opinion, thus abolishing the need to ask hypothetical questions.²⁶¹

G. Opinion of Law and Fact.

Tex. R. Evid. 704 provides that an expert may state an opinion on a mixed question of law and fact, and case law confines this opinion as to the relevant issues and is based on proper legal concepts.²⁶²

H. Opinion as to Understanding of the Law.

Even though an expert may not be permitted to testify as to his or her understanding of the law, the expert is entitled to apply legal terms in his testimony as to the factual issues.²⁶³ For example, in a divorce case involving tracing of separate funds, summaries of checking account records were held to be admissible even though the testifying CPA made characterizations as to the separate and community nature of the money.²⁶⁴

I. Opinion Evidence Does Not Establish Fact.

The effect of opinion evidence does not establish material facts as a matter of law.²⁶⁵

XIV. PRIVILEGES.

Our rules of privilege stem from the common law notion that certain relationships are so important that they ought to be afforded a degree of protection. Article V of the Texas Rules of Evidence provides a nonexclusive list of privileges recognized in the State of Texas, including lawyer-client, husband-wife, clergy, political vote, trade secrets, identity of informer, physician-patient, and mental health privileges.

A. Attorney-Client Privilege.

The recognition of the attorney-client privilege dates back to common law and is designed to protect confidential communications between attorney and client, which are made for the purpose of facilitating

the rendition of legal services.²⁶⁶ The purpose of the attorney-client privilege is to promote unrestrained communication between attorney and client by eliminating the fear that confidential information will be disclosed by the attorney in any legal proceeding.²⁶⁷ Although not all communications between attorney and client are privileged, those communications which fall within the attorney-client privilege are protected from disclosure.²⁶⁸ The court in *Sanford* noted: "Underlying this privilege is an attorney's need to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."²⁶⁹ Thus, the aspirational purpose of the privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed.²⁷⁰

1. Three-Part Test.

A three-part test must be met before the attorney-client privilege may attach to protect information. First, the communication must be between those individuals included in Rule 503(b) of the Texas Rules of Evidence. Second, the communication sought to be protected must be "confidential."²⁷¹ Third, the communication sought to be protected must be made for the purpose of facilitating the rendition of legal services to the client.²⁷²

a) Individuals Included.

Rule 503(b)(1) of the Texas Rules of Evidence provides protection for communications between the following individuals:

(1) Attorney and Client.

For the purpose of determining the applicability of the attorney-client privilege under Rule 503 of the Texas Rules of Evidence, an individual is considered a "client" of the attorney if he "is rendered professional legal services by a lawyer, or consults a lawyer with a view to obtaining professional legal services from that lawyer."²⁷³ A client may be a person, public officer, or corporation, association, or other organization or entity, and may be either public or private.²⁷⁴ If a professional relationship exists between the attorney and client wherein the attorney provides professional legal services to the client, communications made for the purpose of rendering legal services are protected

²⁶⁰ See *King v. Bauer*, 767 S.W.2d 197, 199-200 (Tex.App.—Corpus Christi 1989, writ denied).

²⁶¹ See *Jordan v. State*, 928 S.W.2d 550, 556, n. 8 (Tex.Crim.App. 1996).

²⁶² *Birchfield*, 747 S.W.2d at 365; *Harvey v. Culpepper*, 801 S.W.2d 596, 601 (Tex.App.—Corpus Christi 1990, no writ).

²⁶³ *Welder v. Welder*, 794 S.W.2d 420, 423 (Tex.App.—Corpus Christi 1990, no writ). See also, *Louder v. DeLeon*, 754 S.W.2d 148, 149 (Tex. 1988); *Metot v. Danielson*, 780 S.W.2d 283, 288 (Tex.App.—Tyler 1989, writ denied); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 777 (Tex.App.—Corpus Christi 2000, review denied).

²⁶⁴ *Welder v. Welder*, 794 S.W.2d 420, 428-429 (Tex.App.—Corpus Christi 1990, no writ).

²⁶⁵ *McGuffin v. Terrill*, 732 S.W.2d 425, 428 (Tex.App.—Fort Worth 1987, no writ).

²⁶⁶ *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

²⁶⁷ *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978).

²⁶⁸ *Sanford v. State*, 21 S.W.3d 337, 342 (Tex.App.—El Paso 2000, no pet.).

²⁶⁹ *Strong v. State*, 773 S.W.2d 543, 547 (Tex.Crim.App. 1989), quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976).

²⁷⁰ *Strong*, 773 S.W.2d at 547. *Sanford*, 21 S.W.3d at 342.

²⁷¹ Tex. R. Evid. 503(a)(5).

²⁷² Tex. R. Evid. 503(b)(1).

²⁷³ Tex. R. Evid. 503(a)(1).

²⁷⁴ Tex. R. Evid. 503(a)(1).

from disclosure by the attorney-client privilege.²⁷⁵ As long as a professional relationship exists in which professional legal services are provided by the lawyer to the client, litigation need not be pending in order for the attorney-client privilege to apply.²⁷⁶ Actual employment of the attorney is not required for the applicability of the attorney-client privilege. Communications between the lawyer and the client during an initial consultation are privileged if the communication takes place in the attorney's capacity of rendering professional legal services and if the communication is related to the client's legal problems.²⁷⁷ The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention.²⁷⁸ All that is required under Texas law is that the parties, explicitly or by their conduct, manifest an intention to create the attorney-client relationship.²⁷⁹ Furthermore, payment of a fee to the attorney is not required to give rise to the attorney-client relationship.²⁸⁰

(2) Representatives of the Attorney.

The protection afforded to communications between the attorney and client is also extended to protect communications with "representatives" of the attorney.²⁸¹ A lawyer's representatives include those employed by the lawyer to assist in the rendition of professional legal services to the client and specifically include accountants who provide services that are reasonably necessary to the lawyer's rendition of professional legal services.²⁸² Communications with legal assistants, secretaries, and investigators also fall within the protection provided by the attorney-client privilege.²⁸³ However, one caveat is that images of underlying facts (e.g., a private investigator's photos) are excepted from work product protection.²⁸⁴ It is also important to note that the attorney's "representative" must be hired by, or at the direction or request of, the attorney. Once the attorney-client relationship exists and the "representative" is hired by or at the direction

of the attorney, the client's direct payment to the representative is immaterial.²⁸⁵

(3) Representatives of the Client.

Communications with a client's representative also fall within the protections provided by the attorney-client privilege.²⁸⁶ An individual is a client's representative for purposes of the attorney-client privilege if that person is authorized to obtain or act upon professional legal services on behalf of the client, or if that person, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.²⁸⁷

b) Confidential Communications Protected.

Only confidential communications are protected from disclosure by the attorney-client privilege.²⁸⁸ Whether a communication is confidential is largely determined by the client's intent. A communication is confidential if the client communicates it to the attorney or his representative and the client does not intend that the information be disclosed to third persons, other than to those in furtherance of the rendition of legal services to the client, or to those reasonably necessary for the transmission of the communication.²⁸⁹ A communication between attorney and client in the presence of a third party who is not the attorney's representative is not confidential, and, therefore, is unprotected by the attorney-client privilege.²⁹⁰

Practice Note: When a client wishes to discuss issues relevant to the representation of the client while a third party is present, the attorney should advise the client that the presence of the third party waives the attorney-client privilege and that the third party's testimony regarding the contents of the discussion may be required or compelled.

(1) Attorney-Client Privilege Protects Entire Contents of Confidential Communication.

If the requirements for the attorney-client privilege are met, the attorney-client privilege will protect the contents of the complete communication.²⁹¹ For example, once the attorney-client privilege protects the disclosure of a particular statement within a document, the entire document is protected from disclosure.²⁹²

²⁷⁵ *In re Ford Motor Co.*, 988 S.W.2d 714, 719 (Tex. 1998).

²⁷⁶ *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996).

²⁷⁷ Tex. R. Evid. 503 (a)(1); *Harlandale Independent School Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex.App.—Austin 2000, pet. denied).

²⁷⁸ *Braun v. Valley Ear, Nose, and Throat Specialists*, 611 S.W.2d 470 (Tex.Civ.App.—Corpus Christi 1980, no writ).

²⁷⁹ *State v. Lemon*, 603 S.W.2d 313 (Tex.Civ.App.—Amarillo 1980, no writ).

²⁸⁰ *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex.App.—Corpus Christi 1991, writ denied).

²⁸¹ Tex. R. Evid. 503(b)(1)(A)&(B).

²⁸² Tex. R. Evid. 503(a)(4)(A)&(B).

²⁸³ Tex. R. Evid. 503(a)(4)(B). *Bearden v. Boone*, 693 S.W.2d 25, 27-28 (Tex.App.—Amarillo, 1985, orig. proceeding).

²⁸⁴ Tex. R. Civ. P. 192.5(c)(4).

²⁸⁵ See e.g., *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 198 (Tex. 1993) (orig. proceeding).

²⁸⁶ Tex. R. Evid. 503(b)(1).

²⁸⁷ Tex. R. Evid. 503(2).

²⁸⁸ Tex. R. Evid. 503(b); *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex.App.—Houston [14th Dist.] 2000, pet. denied).

²⁸⁹ *Ates v. State*, 21 S.W.3d 384, 394 (Tex.App.—Tyler 2000, no pet.).

²⁹⁰ *Ledisco Financial Services, Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex.App.—Texarkana 1976, no writ).

²⁹¹ *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex.App.—Houston [14th Dist.] 1993, orig. proceeding).

²⁹² *In re Valero Energy Corp.*, 973 S.W.2d 453, 457

(Tex.App.—Houston [14th Dist.] 1998, orig. proceeding).

(2) Confidential Information Protected from Eavesdroppers.

Because the attorney-client privilege is defined by the intent of the client, the privilege is not destroyed by an eavesdropper who overhears the confidential communications between attorney and client.²⁹³ Therefore, if a communication which was overheard by a third party was not intended to be heard by or disclosed to a third party, the attorney-client privilege will remain intact.²⁹⁴

(3) Contracts for Representation and Attorney's Fees.

Evidence relating to the retention or employment of an attorney and the attorney's fees paid is not protected by the attorney-client privilege.²⁹⁵ However, one exception exists: evidence showing the retention or employment of an attorney is protected from disclosure if disclosure of the attorney-client relationship would tend to implicate the client in the commission of a crime.²⁹⁶

c) Communications Made for the Purpose of Providing Legal Assistance.

The third requirement for protection of a communication by the attorney-client privilege is that it must have been in the context of providing legal services to the client. Specifically, Rule 503 of the Texas Rules of Evidence provides protection for confidential communications "made for the purpose of facilitating the rendition of professional legal services to the client."²⁹⁷ Although the scope of the attorney-client privilege is broad, a material fact may not be concealed under the attorney-client privilege merely because it is disclosed to an attorney.²⁹⁸ The attorney-client privilege will not apply to protect communications made if the attorney is not acting in his capacity as attorney.²⁹⁹ For example, if an attorney acts as an accountant, the communications between the attorney and client in relation to the accounting services provided are not protected under the attorney-client privilege.³⁰⁰

2. Asserting the Attorney-Client Privilege.

a) Who May Assert the Attorney-Client Privilege?

The attorney-client privilege belongs to the client.³⁰¹ The attorney-client privilege may be claimed or invoked only by the client or the client's representative.³⁰² Specifically, Rule 503(c) of the Texas Rules of Evidence allows "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" to assert the attorney-client privilege on behalf of the client. The client's attorney is presumed under Rule 503(c) to have the authority to invoke the attorney-client privilege; however, the attorney may only do so on behalf of the client.³⁰³ The attorney may not invoke the attorney-client privilege on his own behalf.³⁰⁴ The lawyer's representative also has the authority to claim the attorney-client privilege on behalf of the client.³⁰⁵ In *Bearden*, the court of appeals held that a private investigator, as a representative of the attorney, had the authority to claim the attorney-client privilege on behalf of the client, and, the information he acquired through his investigation was protected from disclosure under the attorney-client privilege.³⁰⁶

b) When Must the Privilege Be Asserted?

The attorney-client privilege must be asserted at the time the response to the question requesting the privileged information is due.

c) Evidence Presented to Support the Assertion of Privilege.

Evidence to support the assertion of the attorney-client privilege may be required. For example, documents are not afforded the protections of the attorney-client privilege without some evidence supporting the assertion of privilege.³⁰⁷ The test for determining whether a communication is confidential looks to the nature of the communication, not the subject matter.³⁰⁸ A party makes a prima facie claim of privilege by

²⁹³ Tex. R. Evid. 503(a)(5); *Ates*, 21 S.W.3d at 394.

²⁹⁴ Tex. R. Evid. 503(a)(5); *see Ates*, 21 S.W.3d 384, 394.

²⁹⁵ *Duval County Ranch Company v. Alamo Lumber Company*, 663 S.W.2d 627, 624 (Tex.App.—Amarillo 1984, writ ref'd n.r.e.).

²⁹⁶ Tex. R. Evid. 503(a)(5) & (b)(1).

²⁹⁷ *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996).

²⁹⁸ *In re Texas Farmers Ins.*, 990 S.W.2d 337, 340 (Tex.App.—Texarkana 1999, orig. proceeding).

²⁹⁹ *Clayton v. Canida*, 223 S.W.2d 264, 266 (Tex.Civ.App.—Texarkana 1949, no writ) (holding that the attorney-client privilege does not apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity, for instance as an accountant, escrow agency, negotiator, or notary public).

³⁰¹ *West v. Solito*, 563 S.W.2d 240, 244 (n.2 (Tex. 1978); *Chance v. Chance*, 911 S.W.2d 40, 63 (Tex.App.—Beaumont 1995, writ denied).

³⁰² Tex. R. Evid. 503(c).

³⁰³ Tex. R. Evid. 503(c).

³⁰⁴ *Cole v. Gabriel*, 822 S.W.2d 296, 296 (Tex.App.—Fort Worth 1991, orig. proceeding); *General Resources Organization, Inc. v. Deadman*, 907 S.W.2d 22, 30 (Tex.App.—San Antonio 1995, writ denied) (stating that attorneys who, along with client, were defendants in action arising from gold scam could not assert attorney-client privilege on their own behalf regarding letters between client and attorney concerning potential buyers for client's alleged gold, including plaintiff).

³⁰⁵ *Bearden v. Boone*, 693 S.W.2d 25, 28 (Tex.App.—Amarillo 1985, orig. proceeding).

³⁰⁶ *Id.* at 28.

³⁰⁷ *Eckermann v. Williams*, 740 S.W.2d 23, 25 (Tex.App.—Austin 1987, no writ).

³⁰⁸ *Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex.App.—Houston [14th Dist.] 1992, no writ).

pleading that a communication is confidential, supported by attorney affidavits and detailed privilege logs, and possibly submitting the documents for in camera review.³⁰⁹ The burden of proof then shifts to the opposing party to refute the claim.³¹⁰

d) Duration of the Attorney-Client Privilege.

The attorney-client privilege continues even after the conclusion of the lawsuit or the employment of the attorney and will protect disclosure of confidential information for as long as the client asserts the privilege.³¹¹ The attorney-client privilege even continues after the death of the client. The privilege may be claimed or waived by the client, the client's guardian or conservator, a deceased client's personal representative, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence.³¹²

3. Exceptions to the Attorney-Client Privilege.

Rule 503(d) of the Texas Rules of Evidence provides the exclusive list of exceptions to the attorney-client privilege. This rule provides that no attorney-client privilege exists in the following circumstances:

- (1) When the attorney's services were sought or obtained in order to enable crime or fraud.
- (2) When the communication is relevant to an issue between parties who assert claims through the same deceased client.
- (3) When a client sues a lawyer for breach of duty by the lawyer to the client.
- (4) When a lawyer acts as attesting witness to a document, no attorney-client privilege exists as to communications relevant to an issue concerning the attested document.
- (5) In litigation where one attorney represents two or more clients, no attorney-client privilege exists as to matters that are of mutual interest between or among the clients.

Additionally, there is no privilege as to any communication concerning the breach of a duty by the lawyer to the client or by the client to the lawyer.³¹³

³⁰⁹ *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 591 (Tex.App.—Dallas 1994, no writ).

³¹⁰ *Id.*

³¹¹ *Bearden v. Boone*, 693 S.W.2d 25, 28 (Tex.App.—Amarillo 1985, orig. proceeding).

³¹² *General Resources Organization, Inc. v. Deadman*, 907 S.W.2d 22, 29-30 (Tex.App.—San Antonio 1995, writ denied).

³¹³ *Tex. R. Evid. 503(d)(3); Judwin Properties, Inc. v. Griggs & Harrison, P.C.*, 981 S.W.2d 868, 870-71 (Tex.App.—Houston [1st Dist.] 1998, pet. denied) per curiam (fee dispute between lawyer and former client); *Joseph v. State*, 3 S.W.3d 627, 637-38 (Tex.App.—Houston [14th Dist.] 1999, no pet.) (party who called former lawyer as witness in his suit against the lawyer for breach of duty waived attorney-client privilege).

4. Attorney-Client Privilege Distinguished from Attorney Work-Product.

Although the attorney-client privilege and the attorney work-product privilege may many times protect the same material, it is important for the practitioner to distinguish one from the other so that each may be properly asserted. The attorney-client privilege protects confidential client communications from disclosure.³¹⁴ The attorney work product privilege protects the material prepared and mental impressions developed in anticipation of litigation.³¹⁵ The attorney work-product privilege acts as a limitation to the scope of discovery. Work product is defined in Rule 192.5(a) of the Texas Rules of Civil Procedure as “material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or a communication made in anticipation of litigation or for trial between a party and the party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.” “Core” work product, which consists of work product of an attorney or an attorney's representative containing the mental impressions, opinions, conclusions, or legal theories of the attorney or attorney's representative, is not discoverable.³¹⁶ Other work product not qualifying as “core” work product is protected from discovery unless the party requesting the discovery shows substantial need for the discovery in the preparations of the case.³¹⁷

5. Ethical Duty of Attorneys not to Disclose Client Confidences.

The ethical duty of the lawyer not to disclose confidences of the client should be distinguished from the attorney-client privilege not to disclose confidential information. An attorney owes the client a professional duty not to disclose client “confidences” and “secrets.”³¹⁸ The ethical duty of the attorney under the Rules of Professional Responsibility is much broader and prohibits the attorney from disclosing any information gained about the client without the client's consent, except under the specific circumstances provided in the rules.

B. Husband-Wife Privileges.

Two privileges arising out of the marital relationship exist. First, a husband and wife have the privilege of refusing to disclose, and to prevent the disclosure of, confidential communications. Second, spouses have the right to refuse to testify against each other in a criminal case.³¹⁹

³¹⁴ *Tex. R. Evid. 503.*

³¹⁵ *Tex. R. Civ. P. 192.5.*

³¹⁶ *Tex. R. Civ. P. 192.5(b)(1).*

³¹⁷ *Tex. R. Civ. P. 192.5(b)(2).*

³¹⁸ *Tex. R. Disciplinary P. 1.05(b).*

³¹⁹ *Tex. R. Evid. 504.*

1. Confidential Communications Privilege.

Communications made privately between spouses during the marriage, which were not intended for disclosure to any third party are protected from disclosure under Tex. R. Evid. 504(a). The marital confidential communications privilege belongs to the communicating spouse and may be asserted by that spouse or by the non-communicating spouse on behalf of the communicating spouse.³²⁰ Statements made during the marriage are protected from disclosure. The protection from disclosure of communications made during the marriage survives the divorce of the spouses or the death of the communicating spouse.³²¹

a) Communications Protected.

The marital communications privilege protects verbal and written communications.³²² A spouse has no privilege to refuse to disclose the actions or conduct of the other spouse.³²³ Communications between spouses in front of third parties are not protected.³²⁴ It should be noted that the confidential communications privilege, in civil cases, permits a spouse to refuse to testify regarding the contents of a confidential communication made between husband and wife during the marriage; however, it may not be asserted by a spouse to avoid being called by the opposing party as a witness.³²⁵

b) Exceptions to the Husband Wife Confidential Communications Privilege.

The exceptions to the husband-wife communications privilege are located in Tex. R. Evid. 504(a)(4). Of particular relevance to the family law practitioner are the exceptions permitting disclosure of confidential marital communications in proceedings between spouses in civil cases and in proceedings in which a spouse is accused of committing a crime against the other spouse, any minor child, or a member of either spouse's household.³²⁶ Certainly such exceptions substantially eliminate the husband-wife confidential communications privilege in family law matters, and, in fact, noted practitioners have commented that the confidential communications privilege has no

application in the area of family law.³²⁷ Statements between spouses relating to the present dispute between them are an additional exception to the husband-wife confidential communications privilege. In *Earthman's Inc. v. Earthman*, the Houston First Court of Appeals ruled that the admission of evidence as to communications between spouses, made prior to the parties' divorce, was permissible to the extent that the communications were relating to the controversy giving rise to the lawsuit between them.³²⁸

2. Privilege Not to Testify in Criminal Proceedings Against Spouse.

The spouse of the accused in a criminal proceeding has a right to refuse to testify as a witness for the state.³²⁹ The privilege belongs to the spouse of the accused only, and may not be asserted by the accused to prevent the other spouse from acting as a witness.³³⁰ One should note that when the Texas Rules of Civil Evidence and Texas Rules of Criminal Evidence were merged and renamed to the Texas Rules of Evidence, the former rule of criminal evidence permitting the accused to prevent his spouse from testifying was eliminated.³³¹ The spouse of the accused may not refuse to testify in proceedings in which the accused is charged with a crime against that spouse, against any minor, or against a member of either spouse's household.³³²

C. Communications to Members of the Clergy.

1. Clergy Privilege is Broad in Scope.

The clergy privilege in Texas is quite broad in scope. Rule 505 of the Texas Rules of Evidence provides no exceptions to the clergy privilege. The privilege protects confidential communications made to a member of the clergy who is acting in his capacity as a member of the clergy.³³³ The privilege is not limited to only penitent communications, but also includes other communications, which were made to the clergy member in his professional capacity as spiritual advisor.³³⁴ If communications to a member of the

³²⁰ Tex. R. Evid. 504(a)(3).

³²¹ Tex. R. Evid. 504(a)(2).

³²² *Freeman v. State*, 786 S.W.2d 56, 59 (Tex.App.—Houston [1st Dist.] 1990, no writ).

³²³ *Freeman*, 786 S.W.2d at 59.

³²⁴ *Bear v. State*, 612 S.W.2d 931, 931-32 (Tex.Crim.App. 1981 no pet.). *Lowe v. State*, 676 S.W.2d 658 (Tex.App.—Houston [1st Dist.] 1984, pet. ref'd) (holding that when a marital communication is made in front of a third party, the marital communication privilege is destroyed).

³²⁵ Tex. R. Evid. 504(a); see also *Marshall v. Ryder System, Inc.*, 928 S.W.2d 190 (Tex.App.—Houston [14th Dist.] 1996, writ denied) (only in criminal cases is there a broad, general privilege protecting a person from being a witness against their spouse).

³²⁶ Tex. R. Evid. 504(a)(4)(B)&(C).

³²⁷ See, Warren Cole, Sally H. Emerson, and Linda B. Thomas, "Evidence: Predicates, Presumptions, and Privileges" p. S-33, *Advanced Family Law Course* 1996.

³²⁸ 526 S.W.2d 192, 206 (Tex.App.—Houston [1st Dist.] 1975, no writ).

³²⁹ Tex. R. Evid. 504(b)(1).

³³⁰ Tex. R. Evid. 504(b)(3); *Benitez v. State*, 5 S.W.3d 915, 918 (Tex.App.—Amarillo 1999, pet. denied).

³³¹ Compare former Tex. R. Crim. Evid. 504 with Tex. R. Evid. 504(b).

³³² Tex. R. Evid. 504(b)(4)(A); *Huddleston v. State*, 997 S.W.2d 319 (Tex.App.—Houston [1st Dist.] 1999, no pet.) (holding that the husband-wife privilege did not apply to prevent defendant's spouse from testifying in prosecution for sexual assault and kidnapping of a minor who was unrelated to the husband and the wife).

³³³ Tex. R. Evid. 505(b).

³³⁴ *Kos v. State*, 15 S.W.3d 633, 639 (Tex.App.—Dallas 2000, pet. ref'd).

clergy are made with a reasonable expectation of confidentiality, the privilege will apply, even if the statements were made in the presence of third parties.³³⁵ Even the identity of one who has communicated with a member of the clergy is privileged.³³⁶ The clergy privilege may be claimed by the person who communicated to the clergy or the clergy member on behalf of the communicant.³³⁷

2. Exception in Cases of Neglect or Abuse of Child.

The Rules of Evidence provide no exceptions to the clergy privilege.³³⁸ However, Tex. Fam. Code § 261.202 means that the clergy privilege will not apply in proceedings regarding the abuse or neglect of a child. Additionally, as required by Tex. Fam. Code § 261.101, members of the clergy have an affirmative duty to report any cause to believe that a child's welfare has been adversely affected by abuse or neglect.

3. Waiver of Privilege in Custody Cases.

In a suit for conservatorship, where the character of the conservators is necessarily at issue, a spouse who communicated confidential information to a member of the clergy waives the privilege by calling the clergy member as a character witness.³³⁹ Therefore, on cross-examination of the clergy member by the other spouse, confidential communications to the clergy member will not be protected from disclosure by the privilege.

D. Physician-Patient Privilege.

In civil proceedings, unless an exception applies, confidential communications between a patient and physician which are not intended to be disclosed to third persons who were not present or participating in the diagnosis and treatment, are privileged from disclosure.³⁴⁰ The privilege serves to encourage full disclosure to facilitate the rendition of professional services by the physician, and to prevent unnecessary disclosure of highly personal information.³⁴¹ The physician-patient privilege is found in the Texas Rules of Evidence and in Texas case law interpreting these rules. At least one reported Texas case has held that medical records fall within the zone of privacy protected by the United States Constitution.³⁴² The physician-patient privilege does not exist under the

Federal Rules of Evidence.³⁴³ The physician-patient privilege is similar to the attorney-client privilege to the extent that the determination of whether the communication is confidential is largely determined by the communicator's intent.³⁴⁴ The physician-patient privilege may be invoked by the patient or the patient's representatives or physician on behalf of the patient.³⁴⁵ However, there are a number of exceptions to the physician-patient privilege, which are contained in Rule 509(e).

Note: Read this privilege together with the hearsay exception for statements for the purpose of medical diagnosis or treatment. It is interesting to consider that the hearsay exception includes statements made to third parties in the hopes that they would assist with diagnosis or treatment, while the privilege does not.

1. Releases

One of the exceptions to the privilege, often relevant in family law proceedings, is the waiver or release of confidential information by the written consent of the patient or representative of the patient.³⁴⁶ The consent must be in writing and signed by the patient or representative of the patient and must be drafted to specify the information or records to be covered by the release, the purpose for the release, and the person to whom the information is to be released.³⁴⁷ There is no requirement that the release cover all the information or records in the physician's file.³⁴⁸ The release should be narrowly drawn to permit release of only the relevant information. The exceptions to the medical and mental health privileges apply when the pleadings sufficiently show (1) the records sought to be discovered are relevant to the condition in issue and (2) the condition is relied upon as part of a party's claim or defense.³⁴⁹

2. Patient-Litigant Exception

The *R.K.*³⁵⁰ case discusses the exception to the physician-patient privilege when the condition is part of a claim or defense.³⁵¹ The patient-litigant exception to the privilege applies when a party's condition relates in a significant way to a party's claim or defense. Communications and records should not be subject to discovery if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an "ultimate" issue for a claim or defense, or if the condition is merely tangential to a claim rather than

³³⁵ *Nicholson v. Whittig*, 832 S.W.2d 681, 686 (Tex.App.—Houston [1st Dist.] 1992, orig. proceeding).

³³⁶ *Simpson v. Tennant*, 871 S.W.2d 301, 309 (Tex.App.—Houston [1st Dist.] 1992, orig. proceeding).

³³⁷ Tex. R. Evid. 505(c).

³³⁸ See Tex. R. Evid. 505.

³³⁹ Tex. R. Evid. 511(2).

³⁴⁰ Tex. R. Evid. 509(a).

³⁴¹ *Ex Parte Abell*, 613 S.W.2d 255, 262 (Tex. 1981).

³⁴² See *In re Xeller, et. al.*, 6 S.W.3d 618, 625 (Tex.App.—Houston 1999, no pet.); *Alpha Life Ins. Co. v. Gayle*, 796 S.W.2d 834, 836 (Tex.App.—Houston [14th Dist.] 1990, no writ).

³⁴³ Fed. R. Ev. 501; *Perkins v. United States*, 877 F.Supp. 330, 332 (E.D. Tex. 1995).

³⁴⁴ Tex. R. Evid. 509(a)(3).

³⁴⁵ Tex. R. Evid. 509(d).

³⁴⁶ Tex. R. Evid. 509(e)&(f).

³⁴⁷ Tex. R. Evid. 509(f)(1).

³⁴⁸ Tex. R. Evid. 509.

³⁴⁹ Tex. R. Evid. 509(e)(4); 510(d)(5); *R.K. v. Ramirez*, 887 S.W.2d 836, 842-43 (Tex. 1994) (orig. proceeding).

³⁵⁰ *R.K. v. Ramirez*, 887 S.W.2d 836, 842-43 (Tex. 1994) (orig. proceeding).

³⁵¹ Tex. R. Evid. 509(e)(4).

“central” to it. The scope of the exception should be tied in a meaningful way to the legal consequences of the claim or defense. This is accomplished by requiring that the patient’s condition, to be a “part” of a claim or defense, must itself be a fact to which the substantive law assigns significance. For example, an allegation that a testator is incompetent is an allegation of a mental “condition,” and incompetence, if found, is a factual determination to which legal consequences attach: the testator’s will is no longer valid. This approach is consistent with the language of the patient-litigant exception because a party cannot truly be said to “rely” upon a patient’s condition, as a legal matter, unless some consequence flows from the existence or non-existence of the condition.

Even if the trial court is convinced that this first step is satisfied, when reviewing documents submitted in camera, the court must ensure that the production of documents ordered, if any, is no broader than necessary, considering the competing interests at stake. The scope of the exception only permits discovery of records “relevant to an issue of the ... condition of a patient.” Therefore, even if a condition is “part” of a party’s claim or defense, patient records should be revealed only to the extent necessary to provide relevant evidence relating to the condition alleged. Thus, courts reviewing claims of privilege and inspecting records in camera should be sure that the request for records and the records disclosed are closely related in time and scope to the claims made, so as to avoid any unnecessary incursion into private affairs. Even when a document includes some information meeting this standard, any information not meeting this standard remains privileged and must be redacted or otherwise protected.

This approach has several advantages. Most importantly, some protection of a patient’s privacy interest will remain under this test. Although the 1988 amendments substantially broadened the litigation exception, this test prevents the privilege from evaporating as a matter of course simply because a lawsuit has been filed. Rather, access to medical and mental health information will be afforded the non-patient-party only if the patient’s condition itself is a fact that carries legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party.

To summarize, the exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party’s claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Even then, when requested, the trial court must perform an in camera inspection of the documents produced to assure that the proper balancing of interests occurs before production is ordered.

3. HIPAA

The *Collins*³⁵² case discusses the impact of federal HIPAA legislation on the use of medical records at trial: Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. The development of national standards for electronic medical records management was central to the goal of simplification. Envisioning increasing privacy concerns associated with the move toward electronic record-keeping, Congress simultaneously authorized the secretary of the United States Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical records. The privacy rules HHS enacted strike a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. The privacy rules prohibit the disclosure of protected health information except in specified circumstances. A person who discloses protected health information in violation of the privacy rule is subject to a fine of up to \$50,000, and imprisonment of no more than a year, or both. “Health information” means “any information, whether oral or recorded in any form or medium.” With limited exceptions, HIPAA’s privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules. A requirement is “contrary” if it would be impossible for a covered entity to comply with both the state law requirement and the HIPAA privacy rules, or if the requirement would undermine HIPAA’s purposes.

While the rules strongly favor the protection of individual health information, they permit disclosure of health information in a number of circumstances. In a judicial proceeding, protected information may be disclosed in response to a court order. It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. A health care provider receives “satisfactory assurances” when the requestor provides a written statement and documentation demonstrating that the requestor has made a good faith attempt to notify the subject of the request, and the subject has been given an opportunity to object. Alternatively, the requestor may provide satisfactory assurances that reasonable efforts have been made to obtain a qualified protective order limiting the use of the information to the legal proceeding and providing for its return or destruction. Finally, health care information may be disclosed if the patient has executed a valid written authorization. Any disclosure the health care provider makes in reliance on a written authorization must be consistent with its terms.

³⁵² *In re Collins*, 286 SW3d 911, 917-18 (Tex. 2009).

HIPAA does not provide for a private right of action. Any violations may be reported to HHS, who is the only party authorized to investigate and penalize violations.

E. Privilege Relating to Mental Health Information.

Any communication or records between a patient and a professional relating to the identity, diagnosis, evaluation, or treatment of a patient's mental and emotional condition or disorder is privileged and exempt from disclosure in civil proceedings.³⁵³ The purpose behind such a rule is to "encourage the full communication necessary for effective treatment of a patient by a psychotherapist."³⁵⁴ The United States Supreme Court ruled that the mental health privilege is necessary in order to ensure effective psychotherapy, which "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."³⁵⁵

1. SAPCR.

The comment to the current Rule 510 of the Rules of Evidence points out that the omission of the specific exception to the mental-health privilege from the rule does not eliminate the application of the mental-health privilege in a SAPCR. Rather, the comment to Rule 510 suggests that the applicability of the mental-health privilege should be determined under Rule 510(d)(5), (which provides an exception to the privilege when a party relies upon the condition of the patient's mental health as part of the party's claim or defense), and under the requirements set forth by the Texas Supreme Court in *R.K. v. Ramirez*.³⁵⁶ In *R.K.*, the Texas Supreme Court ruled that mental health information of a party to a suit affecting the parent-child relationship is not protected by privilege if the fact finder must make a factual determination concerning the condition itself.³⁵⁷ The Court explained, however, that the exception to the mental-health privilege is not without limit, and held that in applying the exception, the court must balance the need for the information with the privacy interests protected by the privilege.³⁵⁸ A more recent case, *Garza*,³⁵⁹ has applied *R.K.* as follows: Generally, the diagnosis of a patient by a physician and the communications between a patient and physician are privileged. Likewise, with regard to a person's mental health, the diagnosis of the patient and communications between the patient and a mental-health professional are privileged. However, these

privileges are not absolute. An exception to both privileges applies "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." The mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children's best interests. Both parties' medical and mental conditions were relevant to the determination of which party should be named as the conservator. Especially where the trial court did not allow all Mother's medical and mental health records in evidence, but instead took care to exclude references that predated the marriage, there is no abuse of discretion.

2. Court-Ordered Evaluations.

Under Tex. R. Evid. 510(d)(4), communications regarding a patient's mental or emotional health to a mental-health professional appointed by the court to perform an examination are not privileged as long as the patient had been previously informed that the communications would not be privileged.³⁶⁰

3. Disclosure of Child's Mental Health Records to Parent.

Although the Texas Supreme Court case *Abrams v. Jones* does not directly address the issue of the assertion of the mental-health privilege, it deserves discussion due to its support for protecting the mental-health records of a minor from disclosure.³⁶¹ In *Abrams*, when a father joint managing conservator was denied access to the notes taken by the daughter's psychologist during therapy sessions, the father filed suit against the psychologist seeking to compel the release of the psychologist's notes.³⁶² The father, who had been granted a right of access to the psychological records under the parties divorce decree in accordance with Tex. Fam. Code § 153.073 alleged that such a right granted him a greater right of access to mental health records than parents generally have (under Chapter 611 of the Texas Health and Safety Code).³⁶³ Specifically, the father argued that the right of access to mental health records under § 153.073(a)(3) granted to him in the parties' divorce decree permitted him access to all the child's psychological records at all times.³⁶⁴ The Texas Supreme Court ruled that the right of access to psychological records of the child under

³⁵³ Tex. R. Evid. 510(a)&(b).

³⁵⁴ *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985).

³⁵⁵ *Jaffee v. Redmond*, 518 U.S. 1, 10, (1996).

³⁵⁶ , 887 S.W.2d 836 (Tex. 1994). Official Comment to Rule 510, Tex. R. Evid.

³⁵⁷ *R.K. v. Ramirez*, 887 S.W.2d at 843 (Tex. 1994).

³⁵⁸ 887 S.W.2d at 843.

³⁵⁹ *Garza v. Garza*, 217 SW3d 538, 554-55 (Tex.App.-San Antonio 2006, no pet.).

³⁶⁰ *Subia v. Texas Dept. of Human Services*, 750 S.W.2d 827 (Tex.App.—El Paso 1988, no writ) (trial court erred in admitting testimony of court-appointed psychologist when neither the court nor the psychologist informed the mother that the communications between the mother and the psychologist would not be privileged).

³⁶¹ 35 S.W.3d 620 (Tex. 2000).

³⁶² *Abrams*, 35 S.W.3d at 623.

³⁶³ *Abrams*, 35 S.W.3d at 623-24.

³⁶⁴ *Id.*

§153.073(a)(3) provides no greater right of access than is granted to parents who are not divorced, and that §153.073 merely ensures that the right of access of divorced parents appointed as managing conservators is the same as that of non-divorced parents.³⁶⁵ Accordingly, the Court stated that the determination of whether the records should be ordered to be released is governed by Chapter 611 of the Texas Health and Safety Code.³⁶⁶ In *Abrams*, the Texas Supreme Court held that the applicable sections of Chapter 611 of the Health and Safety Code do not provide parents unrestricted access to mental health records of their children.³⁶⁷ The Court recognized that the purpose behind Chapter 611 is to “closely guard a patient’s communications with a mental-health professional.”³⁶⁸ Furthermore, as recognized by the Texas Supreme Court, although many times it is necessary for a parent to have access to the child’s records, unrestrained access to all the child’s mental health records would act as an obstacle to full disclosure by the patient and thereby prevent the goals of therapy from being met.³⁶⁹ In its analysis, the Court discussed the protections afforded to both the child and the parent under Chapter 611, and specifically addressed the fact that the rights of the parent are protected by Chapter 611 of the Health and Safety Code by providing recourse to a parent who is denied access to his child’s mental health records.³⁷⁰ Obviously, the holding by the Texas Supreme Court in *Abrams* may have a significant impact upon the family law practitioner’s ability to obtain access to the psychological records of children the subject of a lawsuit.

4. Alcohol and Drug Rehabilitation Records.

Federal regulations provide that records of alcohol and drug rehabilitation treatment are confidential.³⁷¹ However, the regulations apply to information held by a treatment center, so discovery directed at a patient may still be effective. Further, upon good cause, a court can order the records released, pursuant to specific procedures.

F. Privilege Against Self Incrimination in Civil Cases

The *Speer*³⁷² case gives an excellent summary of the application of the privilege against self-incrimination in civil cases:

³⁶⁵ *Abrams*, 35 S.W.3d at 624.

³⁶⁶ *Abrams*, 35 S.W.3d at 624.

³⁶⁷ 35 S.W.3d at 626.

³⁶⁸ *Abrams*, 35 S.W.3d at 626.

³⁶⁹ *Abrams*, 35 S.W.3d at 626.

³⁷⁰ *Abrams*, 35 S.W.3d at 626. See Tex. Health & Safety

Code §§ 611.0045(e) & 611.005(a).

³⁷¹ See 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records. See also, *In re KCP*, 142 S.W.3d 574 (Tex.App.-Texarkana 2004, no pet.).

³⁷² *In re Speer*, 965 S.W.2d 41, 45-47 (Tex.App.-Fort Worth 1998, orig. proceeding).

1. The Rule

Both the United States Constitution³⁷³ and the Texas Constitution³⁷⁴ guarantee an accused the right not to be compelled to testify or give evidence against himself. A party does not lose this fundamental constitutional right in a civil suit.³⁷⁵ Thus, the privilege against self-incrimination may be asserted in civil cases “wherever the answer might tend to subject to criminal responsibility him who gives it.”³⁷⁶ A party or witness retains his privilege against self-incrimination and he has the right to assert the privilege to avoid civil discovery if he reasonably fears the answers would tend to incriminate him.³⁷⁷ However, the privilege covers only statements or information which may lead to criminal prosecution; information which may lead to civil liability is not protected.³⁷⁸ Non-testimonial communications are not protected by the privilege.³⁷⁹ One invoking the privilege need not show that solely the disclosure of the information sought to be protected will support conviction.³⁸⁰ Rather, if the potentially-incriminating information or documents would provide a link to the incrimination of the one claiming the privilege, the Fifth Amendment privilege will protect the information from disclosure.³⁸¹ Further, there is no requirement that any criminal charges be pending if the threat or hazard of criminal prosecution is “real and appreciable” if the potentially-incriminating evidence were disclosed.³⁸² If the individual asserting the privilege has been granted immunity from, acquitted of, or pardoned of the criminal conduct at issue, the privilege against self-incrimination may not be properly invoked. However, it is important to note that if the acquittal, immunity, or pardon granted is not complete, or if the possible liability exists for a related crime, the privilege will still apply.³⁸³ The privilege

³⁷³ U.S. CONST. amend. V.

³⁷⁴ TEX. CONST. art. I, § 10.

³⁷⁵ See *Maness v. Meyers*, 419 U.S. 449, 464, 95 S.Ct. 584, 594, 42 L.Ed.2d 574, 587 (1975) (Fifth Amendment may be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory); *Texas Dep’t of Public Safety Officers Ass’n v. Denton*, 897 S.W.2d 757, 760 (Tex.1995); *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex.1975).

³⁷⁶ *Denton*, 897 S.W.2d at 760.

³⁷⁷ See *Denton*, 897 S.W.2d at 760; *Butler*, 522 S.W.2d at 197-98; *Meyer v. Tunks*, 360 S.W.2d 518, 521-22 (Tex.1962).

³⁷⁸ *Ex Parte Butler*, 522 S.W.2d 196, 198 (Tex. 1975).

³⁷⁹ *Wiegosz v. Millard*, 679 S.W.2d 163 (Tex.App.—Houston [14th Dist.] 1985, no writ).

³⁸⁰ *Hoffman v. United States*, 341 U.S. 479, 715 S.Ct. 814, 818 (1951).

³⁸¹ *Hoffman*, 715 S.Ct. at 818.

³⁸² *Hoffman*, 751 S.Ct. at 818; *United States v. Doe*, 465 U.S. 605, 614, n.13 (1984); *State v. Boyd*, 2 S.W.3d 752, 755 (Tex.App.—Houston [14th Dist.] 1999), rev’d on other grounds, 38 S.W.3d 155 (Tex.Crim.App. 2001).

³⁸³ *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 1656 (1972).

against self-incrimination provides the right of testimonial silence. In a civil case, it does not allow a witness to refuse to be called as a witness.³⁸⁴

2. The Test

In a civil suit, the witness's decision to invoke the privilege against self-incrimination is not absolute. Instead, the trial court is entitled to determine whether assertion of the privilege appears to be based upon the good faith of the witness and is justifiable under all of the circumstances.³⁸⁵ The inquiry by the court is necessarily limited because the witness need only show that a response is likely to be hazardous to him. The witness cannot be required to disclose the very information which the privilege protects.³⁸⁶ Before the trial court may compel the witness to answer, he must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency' to incriminate."³⁸⁷

Thus, each question for which the privilege is claimed must be studied and the court must forecast whether an answer to the question could tend to incriminate the witness in a crime. In some instances, the ramifications of answering will be apparent; in others, not so apparent. It is the latter situation that presents a difficult problem, because the witness must reveal enough to demonstrate hazard without revealing the very information he or she seeks to conceal.³⁸⁸ When the witness has given the reasons for refusing to answer, the judge must then evaluate those reasons by the high standard of review stated previously.³⁸⁹ It is the trial court's duty to consider the witness's evidence and argument on each individual question and determine whether the privilege against self-incrimination is meritorious.³⁹⁰

3. Assertion and Waiver

The civil privilege is applied differently than in criminal cases. When a criminal defendant voluntarily testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness. In that situation, if a criminal defendant voluntarily states a part of the testimony, he waives his right against self-incrimination and cannot afterwards assert the privilege to suppress other testimony even if that testimony would incriminate him.

³⁸⁴ *McInnis v. State*, 618 S.W.2d 389, 392 (Tex.Civ.App.—Beaumont 1981, writ ref'd n.r.e.), cert. denied, 456 U.S. 976 (1982).

³⁸⁵ *See Butler*, 522 S.W.2d at 198.

³⁸⁶ *See id.* at 198.

³⁸⁷ *Id.* (quoting *Hoffman v. United States*, 341 U.S. 479, 488, 71 S.Ct. 814, 819, 95 L.Ed. 1118, 1125 (1951)).

³⁸⁸ *See Warford v. Beard*, 653 S.W.2d 908, 911 (Tex.App.—Amarillo 1983, no writ).

³⁸⁹ *See id.*

³⁹⁰ *See Burton v. West*, 749 S.W.2d 505, 508 (Tex.App.—Houston [1st Dist.] 1988, no writ).

The same reasoning does not apply in civil cases. Because of the difference between the civil and criminal context, the United States Supreme Court allows juries in civil cases to make negative inferences based upon the assertion of the privilege.³⁹¹ And as previously discussed, the civil witness, unlike the defendant in a criminal case, is not the exclusive arbiter of his right to exercise the privilege.³⁹² Furthermore, the assertion of the privilege against self-incrimination must be raised in response to each specific inquiry or it is waived.³⁹³ Each assertion of the privilege rests on its own circumstances and blanket assertions of the privilege are not allowed.³⁹⁴ Thus, a civil defendant can be forced to choose between asserting his privilege against self-incrimination or losing his civil suit.³⁹⁵

4. Pretrial Privilege

Because the privilege against self-incrimination must be asserted selectively in civil litigation, it follows that selective assertion of the privilege does not result in waiver.³⁹⁶ For example, filing a verified denial does not constitute waiver of a civil defendant's right to subsequently assert the privilege against self-incrimination in response to interrogatories.³⁹⁷ Answering all deposition questions but one does not constitute waiver of a civil defendant's right to assert the privilege.³⁹⁸ Likewise, answering some interrogatories does not result in waiver of the right to assert the privilege against self-incrimination in response to other interrogatories.³⁹⁹ The privilege must be asserted prior to, or at the time the response is due.⁴⁰⁰ Denying requests for admissions also does not result in waiver of the privilege against self-incrimination.⁴⁰¹ Therefore, a party may not assert the privilege against self-incrimination as a reason for refusing to answer requests for admission.⁴⁰²

5. Document Production

The privilege against self-incrimination also applies to documentary evidence: "[T]he seizure of a man's private books and papers to be used in evidence against him' is not 'substantially different from

³⁹¹ *See Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810, 821 (1976). *See also Denton*, 897 S.W.2d at 760; *Gebhardt*, 891 S.W.2d at 331.

³⁹² *See Warford*, 653 S.W.2d at 911.

³⁹³ *See Gebhardt*, 891 S.W.2d at 330.

³⁹⁴ *See id.*

³⁹⁵ *See id.* at 330-31.

³⁹⁶ *See id.* at 330.

³⁹⁷ *See Burton*, 749 S.W.2d at 508.

³⁹⁸ *See Butler*, 522 S.W.2d at 198-99. *See also Warford*, 653 S.W.2d at 910, 912.

³⁹⁹ *Speer*, 965 S.W.2d at 46.

⁴⁰⁰ Tex. R. Civ. P. 193.3; 196.2; and 197.2.

⁴⁰¹ *Id.*

⁴⁰² *See Katin v. City of Lubbock*, 655 S.W.2d 360, 363 (Tex.App.—Amarillo 1983, writ ref'd n.r.e.).

compelling him to be a witness against himself.”⁴⁰³ However, in order to be privileged, the incriminating documents must have a strong personal connection to the witness, i.e., documents “which he himself wrote or which were written under his immediate supervision.”⁴⁰⁴ It follows that documents belonging to or prepared by others are not protected, even if they contain incriminating matters.⁴⁰⁵ The court may order the disputed documents to be produced in camera for an inspection.⁴⁰⁶

G. Privilege Applying to Reports Required by Statute.

Reports required by law to be made are privileged from disclosure if the law requiring the report to be made so provides.⁴⁰⁷ The privilege may be asserted by the person, corporation, association, or other entity making the report or by the recipient of the report.⁴⁰⁸ If the governing law does not require reports to be made, any reports which are made are not privileged.⁴⁰⁹

H. Waiver of Privileges.

Once a privilege is waived, it is waived “for all times and all purposes.”⁴¹⁰ If confidential information is disclosed inadvertently, the party asserting the privilege has the burden of proving that no waiver occurred.⁴¹¹

1. Disclosure to Third Parties.

An individual seeking to avoid disclosure based upon the assertion of a privilege waives such privilege if he or she voluntarily discloses or consents to the disclosure of the privileged information.⁴¹²

2. Waiver by Calling Witness for Character Testimony.

When a party to a suit calls as a character witness a person to whom privileged communications have been made, any privileges arising from the communications relevant to the character of the party are waived.⁴¹³ For example, the communications to clergy privilege is waived if the party who made confidential

communications to a member of the clergy calls the clergy-member as a character witness at trial.⁴¹⁴

3. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

One does not waive his or her claim of privilege by providing disclosure of information or documents under order of the court compelling such disclosure.⁴¹⁵ Additionally, a privilege is not waived by disclosure if the disclosure was made without opportunity for the privilege to be claimed.⁴¹⁶

4. Offensive Use of Privilege Waives Privilege.

A party seeking affirmative relief from the court cannot use a privilege to conceal information which forms the basis of that party’s request for relief.⁴¹⁷ In *Ginsberg*, the Texas Supreme Court held that an offensive use of privilege is impermissible and explained that when a party asserts a claim for affirmative relief, that party cannot restrict access, by the assertion of privilege, to information which would otherwise be pertinent and relevant to that party’s ability to maintain the cause of action.⁴¹⁸ The Court further reasoned that although a party may have an absolute right to assert a privilege, that party may be forced to choose between maintaining the assertion of privilege or maintaining his cause of action.⁴¹⁹

XV. PRESUMPTIONS AND BURDENS.

A presumption is a procedural rule which draws a particular inference as to existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved.⁴²⁰ There is no Texas rule of evidence which deals explicitly with the use or misuse of presumptions.

A. Presumption vs. Inference.

A presumption affects the duty of a party offering further testimony. An inference involves the weighing of evidence already produced.⁴²¹ Inferences are based upon facts which are proved. Presumptions can be based upon inferences, but an inference cannot be based upon another inference.⁴²²

B. Rebuttable Presumptions.

A presumption establishes a fact as proved when the fact from which it may be inferred is proved.⁴²³ The burden of proof remains on the party offering the fact

⁴⁰³ *Warford*, 653 S.W.2d at 912, quoting *Boyd v. United States*, 116 U.S. 616, 633, 6 S.Ct. 524, 534, 29 L.Ed. 746, 752 (1886). See also *Wielgosz v. Millard*, 679 S.W.2d 163, 166-67 (Tex. App.-Houston [14th Dist.] 1984, no writ).

⁴⁰⁴ *Warford*, 653 S.W.2d at 912.

⁴⁰⁵ See *id.*, citing *Fisher v. United States*, 425 U.S. 391, 399, 96 S.Ct. 1569, 1575, 48 L.Ed.2d 39, 49 (1976).

⁴⁰⁶ *Speer*, 965 S.W.2d at 47.

⁴⁰⁷ Tex. R. Evid. 502.

⁴⁰⁸ Tex. R. Evid. 502.

⁴⁰⁹ *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109, 111 (Tex.App.—Fort Worth 1990, no writ).

⁴¹⁰ *Lucas v. Wright*, 370 S.W.2d 924, 927 (Tex.Civ.App.—Beaumont 1963, no writ).

⁴¹¹ *Griffin v. The Honorable R.L. Smith*, 688 S.W.2d 112, 114 (Tex. 1985).

⁴¹² Tex. R. Civ. P. 511(1).

⁴¹³ Tex. R. Evid. 511(2).

⁴¹⁴ *Gonzalez v. State*, 45 S.W.3d 101, 107 (Tex.Crim.App. 2001).

⁴¹⁵ Tex. R. Evid. 512(1).

⁴¹⁶ Tex. R. Evid. 512(2).

⁴¹⁷ *Ginsberg*, 686 S.W.2d 105, 107-8.

⁴¹⁸ *Ginsberg*, 686 S.W.2d at 108.

⁴¹⁹ *Ginsberg*, 686 S.W.2d at 107.

⁴²⁰ *Beck v. Sheppard*, 566 S.W.2d 569, 570-571 (Tex. 1978).

⁴²¹ *Strain v. Martin*, 183 S.W.2d 246, 247 (Tex.Civ.App.—Eastland 1944, no writ).

⁴²² *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 135 (Tex.App.—San Antonio 1985, no writ).

⁴²³ *Lobley v. Gilbert*, 236 S.W.2d 121, 123-124 (Tex. 1951).

that gives rise to the presumption, but in effect, it assumes that he has established the fact, prima facie.⁴²⁴ When the adversely affected party introduces evidence contrary to the existence of the presumed fact, the presumption stops, leaving it to the trier of fact to weigh the bare inference against the evidence to the contrary.⁴²⁵

C. Irrebuttable or Conclusive Presumptions.

There are very few presumptions which are legally conclusive as to the fact(s) stated or proved. Most presumptions, whether based on statute or case law, are rebuttable. The rules of procedure create certain conclusive presumptions, if proper pleading requirements are not followed. TRCP 93 and 185 illustrate this point. The failure to file certain verified pleas pursuant to TRCP 93 will result in a conclusive presumption that certain defensive matters do not exist. Pursuant to TRCP 185 (suit on sworn account), unless the defendant files a verified answer contesting the validity of the claim, it will be conclusively presumed that the claim stated is true. During a marriage, absent very unusual circumstances, there is an irrebuttable presumption that a fiduciary relationship exists between a Husband and Wife.⁴²⁶ (However, in a contested divorce where each spouse is independently represented by counsel, the fiduciary relationship terminates.⁴²⁷) The only other conclusive presumption in the family law area is that dealing with support. It is presumed that both spouses have the duty to financially support each other, as well as any of their minor children.⁴²⁸ With respect to child support, character of property is irrelevant. If no community funds are available for spousal support, separate property of one or both spouses shall be expended.⁴²⁹

D. Purpose of Presumptions.

The reasons and purpose of presumptions are numerous. They include the following:

1. To permit instruction to the jury on the relationship between certain facts;
2. To promote convenience or to bring out the real issues in dispute;
3. To save the court's time by favoring a finding consonant with the balance of probability;
4. To correct an imbalance resulting from one party's greater access to proof concerning the presumed fact;

⁴²⁴ *Page v. Lockley*, 176 S.W.2d 991, 998 (Tex.Civ.App.—Eastland 1943), rev'd on other grounds, 142 Tex. 594, 180 S.W.2d 616 (1944).

⁴²⁵ *Southland Life Ins. Co. v. Greenwade*, 148 Tex. 450, 458, 159 S.W.2d 854, 858 (1942).

⁴²⁶ *Miller v. Miller*, 700 S.W.2d 941, 946-947 (Tex.App.—Dallas 1985, writ ref'd n.r.e.).

⁴²⁷ *Solares v. Solares*, 232 S.W.3d 873, 881 (Tex.App.—Dallas 2007, no pet.).

⁴²⁸ Tex. Fam. Code §2.501.

⁴²⁹ *Trevino v. Trevino*, 555 S.W.2d 792, 802 (Tex.Civ.App.—Corpus Christi 1977, no writ).

5. To avoid an impasse and its consequent unfairness;
6. To serve a social or economic policy that favors a contention by giving such contention the benefit of the presumption; and
7. To provide a shorthand description of the initial assignment of the burdens of persuasion and of going forward with the evidence at issue.⁴³⁰

E. Presumptions - To Instruct or Not to Instruct.

1. Directed Verdicts.

The genuine importance of presumptions is realized only after the party bearing the burden has rested. A true presumption operates to invoke a rule of law that compels the jury to reach a conclusion in absence of evidence to the contrary.⁴³¹ If the party with the burden of producing evidence of a particular fact fails to meet that burden, it is proper for the court to direct a verdict against that party on the issue not proved. The reverse is also true. If the burden has been satisfied and no controverting evidence has been admitted, the producing party can be favored with a directed verdict, since there is no decision for the jury on that issue.⁴³²

2. Jury Instructions.

There is some question as to how the court should instruct the jury regarding presumptions. An instruction which recites verbatim, a presumption, risks reversal on appeal. The complaints range from a comment on the evidence to a misplaced burden of persuasion.⁴³³ Texas does not favor the inclusion of presumptions in the court's charge. It has been held that the effect of a presumption is only to fix the burden of producing evidence and is not something to be weighed along with the evidence.⁴³⁴ This policy obviously does not prohibit the court from properly instructing the jury as to the law, but does discourage the preface to an instruction with words such as "the law presumes."⁴³⁵ To permit the latter would likely lead the jury to infer that the presumption was conclusive.⁴³⁶ If viewed as conclusive, the instruction has actually shifted the burden of persuasion to the wrong party. The point is aptly illustrated in *Sanders*.⁴³⁷ In that case the instruction stated in part, that the plaintiff was "presumed to have exercised

⁴³⁰ Larkin, Article III: Presumptions 20 Hous. L. Rev. 133 (1983).

⁴³¹ *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 756-757 (Tex. 1975) (overruled on other grounds).

⁴³² *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex.Civ.App.—Amarillo 1979, ref'd n.r.e.).

⁴³³ *Hailes v. Gentry*, 520 S.W.2d 555, 558-559 (Tex.Civ.App.—El Paso 1975, no writ).

⁴³⁴ *Velasquez v. Levingston*, 598 S.W.2d 346, 348 (Tex.Civ.App.—Corpus Christi 1980, no writ).

⁴³⁵ McCormick on Evidence §345 (2nd ed. 1972).

⁴³⁶ *Id.*

⁴³⁷ 593 S.W.2d 127.

ordinary care.”⁴³⁸ Although the burden was still on the plaintiff to prove his case, the improper instruction effectively shifted the burden of persuasion to the defendant, who had no such burden. At best, it places upon the defendant a greater burden than that required by law.⁴³⁹

3. Spoliation Presumption

One area where a jury instruction regarding a presumption can be appropriate is in cases of spoliation of evidence. One of the most severe penalties for spoliation is a rebuttable presumption that the evidence was damaging to the spoliating party, combined with a shift in the burden of proof so that the spoliating party must prove the evidence was not damaging. The *Trevino*⁴⁴⁰ case discusses the proper procedure: Deciding whether to submit a spoliation instruction is a legal determination. The trial court should first find that there was a duty to preserve evidence, the spoliating party breached that duty, and the destruction prejudiced the non-spoliating party. The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires.

F. Burden of Proof.

The common meaning of this term among litigators is the amount of evidence required to establish the facts pleaded, as well as a sufficient amount of evidence necessary to convince the trier of fact to find in the offering party's favor. While simplistic in usage, an academic examination reveals that there are two separate and distinct burdens which are dependent upon the other for a valid judgment.

G. Burden of Producing Evidence.

This burden is based on the premise that the proponent must produce satisfactory evidence to the judge of a particular fact to be proved.⁴⁴¹ Absent a presumption of the facts to be proved, if the party with that responsibility does not produce the requisite evidence, the results will be an adverse ruling (i.e. a directed verdict). This burden of producing evidence rests initially on the party who pleads the existence of a

particular fact. When the initial burden to produce evidence has been met, the burden shifts to the opposing party.

H. Burden of Persuasion.

The burden of persuasion comes only after the proponent has met his or her burden of producing evidence sufficient to prove the contested issue. Simply stated it is the task of convincing the trier of fact, after producing satisfactory evidence, that the alleged facts are true. If the advocate is successful in meeting the burden of evidence and in persuading the fact finder the ultimate outcome is a favorable verdict. Unlike the burden of producing evidence, the burden of persuasion seldom shifts from one party to the other. It remains with the party who seeks any affirmative relief.

I. Standard of Proof (Burden of Persuasion).

Though referred to as the burden of proof in practice, a more accurate term would be the standard of proof required in persuading the judge or jury. The standard of proof represents the persuasive boundaries set by the court. In jury cases, the boundaries are affixed in the court's charge.

J. Persuading by a Preponderance of the Evidence.

With few exceptions, this is the most common standard utilized in family law cases. The term “preponderance of the evidence” means the greater weight and degree of credible testimony or evidence introduced and admitted in this case.

K. Persuading by Clear and Convincing Evidence.

The exception to the usual preponderance standard in most family law cases is the burden to persuade by clear and convincing evidence. Less than beyond a reasonable doubt and more than a preponderance, this burden is the measure or degree of proof that will produce in the minds of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.⁴⁴²

Practice Note: The above represent the only applicable standards in family law litigation. The unwritten standard of “Clear and Compelling” is virtually non-existent in family law. Although previously utilized by some courts in “sibling-splitting” cases, this author is unable to find where this standard was ever defined. Upon reading some of the opinions which imposed this standard of proof it appears that the burden fell somewhere between a preponderance of the evidence and clear and convincing.⁴⁴³

⁴³⁸ *Id.* at 129.

⁴³⁹ *Id.*

⁴⁴⁰ *Trevino v. Ortega*, 969 SW2d 950, 960 (Tex. 1998).

⁴⁴¹ 1 Roy R. Ray, *Texas Practice, Law of Evidence* §336 (1972).

⁴⁴² Tex. Fam. Code §101.007.

⁴⁴³ *See In Re De La Pena*, 999 S.W.2d 521, 535 (Tex.App.—El Paso 1999, no pet.); *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex.App.—Houston [1st Dist.] 1988, no writ); and *In the Interest of G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

XVI. OBJECTIONS AND PRESERVATION OF ERROR.

The trial court's ruling which admits or excludes evidence will not be reversed on appeal unless a substantial right of the complaining party is affected.⁴⁴⁴ Accordingly, it is logically imperative that the objecting party make certain that a record of the objection, the ruling, and the evidence excluded or omitted is before the higher court.

A. Right to Object.

Every litigant has a right to object to the introduction of improper evidence, and the attorney has a duty to the client to ensure that only competent evidence is introduced against his client.⁴⁴⁵

B. Time for Objection.

The party opposing the admission of evidence must object at the time the evidence is offered and not after it has been received.⁴⁴⁶ When an objection is sustained as to testimony which has been heard by the jury, a motion to strike should be made to preserve error.⁴⁴⁷

C. Sufficiency of Objection.

To properly preserve error, the objection must be specific enough to enable the trial court to understand the precise question and to make an intelligent ruling affording the offering party the opportunity to remedy the defect if possible.⁴⁴⁸ To preserve an issue for appellate review, a party must make a timely, specific objection and obtain a ruling on that objection.⁴⁴⁹ Additionally, any excluded evidence must be properly preserved for review (an necessity for consideration of whether a party's rights are substantially affected).

D. Running Objections.

Under the proper circumstances a running objection may preserve error, but case law tells us this is a highly risky proposition. The appellate court may consider the proximity of the objection to the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony was elicited from the same witness, whether a running objection was requested and granted, and any other circumstance which might suggest why the objection should not have been urged. A running objection can satisfy the Tex. R. App. P. 33.1(A) requirement of a timely

⁴⁴⁴ Tex. R. Evid. 103(a).

⁴⁴⁵ *TEIA v. Drayton*, 173 S.W.2d 782, 788 (Tex.Civ.App.—Amarillo 1943, writ ref'd w.o.m.).

⁴⁴⁶ *Fort Worth Hotel Ltd. Partnership v. Enserch Corp.*, 977 S.W.2d 746, 756 (Tex.App.—Fort Worth 1998, no writ).

⁴⁴⁷ *Parallax Corp., N.V. v. City of El Paso*, 910 S.W.2d 86, 90 (Tex.App.—El Paso 1995, writ denied).

⁴⁴⁸ *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 736 (Tex.App.—Texarkana 1996, no writ).

⁴⁴⁹ Tex.R.App.P. 33.1(a); *In re M.D.S.*, 1 S.W.3d 190, 202 (Tex.App.—Amarillo 1999, no pet.).

objection.⁴⁵⁰ The party requesting the running objection runs the risk of waiving it if cross examination goes deep into the objectionable information.⁴⁵¹

E. Limited and Conditional Admissibility.

Where evidence is admissible for one purpose and inadmissible for another, it may be admitted for the proper purpose. The court must, upon motion of a party, limit the evidence to its proper purpose, and in the absence of such motion, the right to complain of the improper purpose is waived.⁴⁵² Evidence may also be admitted, conditioned upon the representation of counsel that "it will be connected up at a later time." If it is not connected up at a later time, the opposing party must request the prior testimony be stricken and request an instruction from the court to disregard the unconnected testimony.⁴⁵³

F. Necessity of Obtaining Ruling on Objection.

The objecting party must secure a ruling on objections in order to complain on appeal or else error is waived.⁴⁵⁴ The objecting party is also entitled to an immediate ruling admitting or excluding the evidence.⁴⁵⁵ Even if a ruling is obtained, error cannot be predicated on a ruling admitting or excluding evidence unless a substantial right is affected and the substance of the excluded evidence is made known to the court.⁴⁵⁶

G. Estoppel or Waiver-Similar Evidence.

Error created by the admission of improper evidence is waived when testimony to the same effect has been admitted without objection.⁴⁵⁷

H. Offer of Proof.

If evidence is excluded, the proponent has the burden to make an offer of proof, formerly called a bill of exceptions. Even if exclusion is erroneous, error is not preserved for appellate review unless the offer of proof is made.⁴⁵⁸ The offer of proof is sufficient if it apprizes the court of the substance of the testimony that would

⁴⁵⁰ *See, Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-243 (Tex.App.—Corpus Christi 1994, writ denied).

⁴⁵¹ *Leaird's, Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690-691 (Tex.App.—Waco 2000, pet. denied).

⁴⁵² *M.L. Rendleman v. Clark*, 909 S.W.2d 56, 58 (Tex.App.—Houston [14th Dist.] 1995, writ dismissed).

⁴⁵³ *Galveston H & S.A. Ry. Co. v. Janert*, 107 S.W. 963, 967 (Tex.Civ.App. 1908, writ ref'd).

⁴⁵⁴ *Cusack v. Cusack*, 491 S.W.2d 714, 718 (Tex.Civ.App.—Corpus Christi 1973, writ dismissed).

⁴⁵⁵ *Thomas v. Atlanta Lumber Co.*, 360 S.W.2d 445, 447 (Tex.Civ.App.—Texarkana 1962, no writ).

⁴⁵⁶ *Hood v. Hays County*, 836 S.W.2d 327, 328 (Tex.App.—Austin 1992, no writ).

⁴⁵⁷ *Mollinedo v. Texas Employment Com'n*, 662 S.W.2d 732, 739 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

⁴⁵⁸ *Porter v. Nemir*, 900 S.W.2d 376, 383 (Tex.App.—Austin 1995, no writ).

have been offered and may be presented in the form of a concise statement⁴⁵⁹ or by question and answer.

I. The Contents of a Motion in Limine Alone Does Not Preserve Error.

A pretrial motion in limine does not preserve error. A ruling on a motion in limine merely means that an attorney must approach the judge and ask permission before pursuing the prohibited questions. Regardless of a ruling on motion in limine, an objection should also be made at the time evidence is offered or the error will be deemed waived.⁴⁶⁰

XVII. COMMON OVERSIGHTS

A. The Proponent - Common Oversights.

The party offering evidence has the burden to lay the proper predicate, usually through testimony of the witness, that it is relevant and probative. Most of the time these two elements are inferred from the nature of the offer itself. Assuming this hurdle is cleared the evidence must be offered and a ruling obtained on its admissibility or exclusion.⁴⁶¹

1. Failure to Mark Exhibits.

To alleviate this potential mistake, always pre-mark the exhibits prior to trial. Prepare an exhibit list. Pre-marking exhibits with an accompanying list will place the advocate in esteem with the court reporter and trial judge, and provide the attorney with a relatively clear road map of where she is going.

2. Failure to Refer to the Exhibit Number.

When questioning witnesses, many lawyers will generically refer to an exhibit as “the exhibit” as opposed to the referring to the exhibit by its specific and unique number. You cannot truly appreciate the severity of this mistake until you read the Court’s record and/or findings of fact in an appeal and discover that the record is unclear as to which exhibit was being examined or referred to.

3. Failure to Offer the Evidence.

All trial attorneys have at one time or another been guilty of this faux pas. It occurs after counsel has done a masterful job in laying the predicate and identifying the document. After all the hard work is done then he or she lays the item on the bench never to find its way into the appellate record. This is yet another reason to have an exhibit list with an “offered and admitted” box to check.

4. Failure to Have the Necessary Predicate(s) Available and Ready.

Should a particular piece of evidence have a predicate that counsel does not have committed to memory, he or she should always have it written out or the necessary

authority handy to present to the court. Especially with newer types of electronic evidence, it is necessary to have the specific list of elements ready, along with support.

5. Failure to Have Enough Copies.

Very few moments in a trial are more frustrating than proponent’s counsel, opposing counsel, the judge, parties, and court reporter all trying to look at the only copy of the exhibit. Always have a copy of the exhibit available for all involved.

6. Failure to Obtain a Stipulation or Ruling Prior to Starting Trial.

If at all possible counsel should attempt to secure a stipulation from opposing counsel or obtain a pretrial ruling from the judge prior to the heat of battle. The proponent’s case flows smoothly and the patience of all involved is extended greatly.

7. Failure to Make Offers of Proof.

If a crucial piece of evidence has been excluded by the Judge, the proponent’s job is not over. An offer of the excluded evidence must be made to preserve error.⁴⁶² The offer can be made at the time the ruling is obtained or at any time prior to time the jury is charged or the trial court renders. Offer of proof may be in the form of a concise statement so long as it adequately apprizes the court of the substance of the testimony and adequately preserves complaint.⁴⁶³

8. Failure to Supplement Discovery.

Prior to the close of the discovery period, sit down and review your discovery responses. Are they complete? Have you supplemented to disclose that newly discovered witness? Have you supplemented your document production to include that silver bullet document? If not, you may not be allowed to call the witness or introduce the document.

9. Failure to Obtain a Business Records Affidavit.

If you have requested documents from an entity, send them a Business Records Affidavit to complete and provide to you with the documents you have requested. Then be sure you file the affidavit at least fourteen days prior to the day you plan to use the affidavit in trial or hearing.⁴⁶⁴

10. Failure to Have the Necessary Witness.

If you do not have a business records affidavit, then make sure you have a witness who can prove up the documents. Furthermore, before you put this witness on the stand, go over the “prove up” questions with them. In other words, make sure they know what you need!

⁴⁵⁹ *Ludlow v. Deberry*, 959 S.W.2d 265, 269-270 (Tex.App.—Houston [14th Dist.] 1997, no writ).

⁴⁶⁰ *Hartford Accident and Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335-336 (Tex. 1963).

⁴⁶¹ Tex. R. Evid. 103(b).

⁴⁶² Tex. R. Civ. Ev. 103(a)(2).

⁴⁶³ *Chance v. Chance*, 911 S.W.2d 40, 51 (Tex.App.—Beaumont 1995, writ denied).

⁴⁶⁴ Tex. R. Evid. 902(10)(a).

B. The Opponent - Common Oversights.

Just as the law of physics demonstrates that for every action there is an equal and opposite reaction, counsel for the party opposing the admission of evidence can be guilty of similar human error.

1. Premature Objections.

It is both disruptive and annoying to the fact-finder to listen to a multitude of objections during the course of questioning by the opposing side. Unless the preliminary questioning is really harmful to the case, wait until the offer is actually made prior to stating the objection.

2. Permitting the Witness to Testify from the Exhibit Prior to its Admission.

Until the subject exhibit is admitted into evidence by the court, it is not evidence. One should never permit the tendering witness to testify from the exhibit until it has been admitted. The witness' primary function prior to admission is to identify the exhibit prior to offer.

3. Failure to Request the Witness on Voir Dire.

If it becomes apparent from the preliminary questioning that the witness does not have adequate personal knowledge to qualify the exhibit, counsel should request to take the witness on Voir Dire. Ask concise questions, relevant only to the issues relating to the exhibit. This is not cross-examination.

4. Failure to Timely and Properly Object.

Depending on the subject of the offer, the opponent of the evidence must be prepared to timely and properly object or error will be waived. The objection must be material and specific or waiver will occur. If objecting as to relevancy, state in the objection as to why the offer is irrelevant.

5. Failure to Make Discovery Objections.

This is the opposite of number 8 above. If the opposing party did not produce the document or disclose the witness, you must object when they are called or offered.

XVIII. CONCLUSION

The Rules of Evidence can create technical pitfalls for the unwary, but were designed to be rules of inclusion rather than exclusion. A fundamental understanding of the procedural and evidentiary rules that govern the litigation process is essential to every family law attorney. If you learn the rules well and apply them correctly, The Rules of Evidence can be a powerful ally in the representation of your client.