Evidence in Texas Courts

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I. INTRODUCTION. This Article considers fundamental principles of evidence law, including judicial notice, relevancy, authentication, hearsay, best evidence, and privileges, judicial admissions and more. The Article then considers rules governing the timing and manner in which evidence is presented in court, such as the remainder of related writings, optional completeness, impeachment, the offensive use doctrine, and depositions. The Article then discusses the methods of preserving appellate complaints regarding the admission and exclusion and sufficiency of the evidence. The Article discusses lay versus expert testimony.

II. THE FUNDAMENTAL PRINCIPLES. One way to learn evidence rules is incrementally over time, watching what your adversaries do and don't do, and how trial judges rule on objections. Another way to learn is to read and re-read the Rules of Evidence in the sequence they are presented in the Rules of Evidence. This Article takes a third approach, by associating related evidence rules and procedures in a sensible manner, and examining them in that context. This approach is unusual, is not unique, but it is more accessible than the other two approaches.

A. JUDICIAL NOTICE. In Texas courts, the trial judge can take "judicial notice" of certain matters which relieves any party from having to "prove" that information through evidence presented to the fact-finder (judge or jury). TRE. 201-203 govern judicial notice. TRE 201 deals with judicial notice of "adjudicative facts." TRE 202 deals with determination of the law of other states of the United States. TRE 203 deals with determination of the law of foreign countries. TRE 201(b) says: "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." TRE 201(c) says that the court may take judicial notice on it own, but must take judicial notice if requested to by a party and the court is supplied with the necessary information. Under TRE 201(d), the court can take judicial notice at any stage of the proceedings. Under TRE 201(e), a party requesting it has a right to be heard. Under TRE 201(f), if the court takes judicial notice in a jury case, the court must instruct the jury to accept the judicially noticed fact as conclusive.

In *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 896 (Tex. App.-- Houston [14th Dist.] 2000, pet. denied) (involving judicial notice of foreign law), the court of appeals said:

> Rule 203 is a hybrid rule by which presentation of the law to the court resembles presentment of evidence, but which the court ultimately decides as a matter of law. *See Ahumada*, 992 S.W.2d at 558; *Gardner v. Best Western Int'l, Inc.*, 929 S.W.2d 474, 483 (Tex. App.--Texarkana 1996, writ denied).

In *Wright v. Wright*, 867 S.W.2d 807, 816-17 n. 6 (Tex. App.--El Paso 1993, writ denied), the court of appeals took judicial notice of fact that San Antonio is 335 miles from Odessa.

B. RELEVANCY. Article IV of the Texas Rules of Evidence is titled "Relevancy and Its Limits." Evidence must be relevant to be admissible. Tex. R. Evid. 402. And "[i]rrelevant evidence is inadmissible." *Id.* But relevant evidence is not always admissible.

1. What Evidence is Relevant? Under TRE 401, evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

2. Not All Relevant Evidence Is Admissible. Generally speaking, relevant evidence can be inadmissible under: (i) the United States or Texas Constitutions; (ii) a statute; (iii) the Rules of Evidence; or (iv) other rules prescribed under statutory authority. TRE 402. There are a number of evidentiary rules that require the exclusion of relevant evidence. These include special rules governing the admissibility of character evidence (TRE 404(a)), evidence of crimes (TRE 404)(b) or other acts (TRE 404)(b); subsequent remedial measures (TRE 407); compromise offers and negotiations (TRE 408), offers to pay medical expenses (TRE 409), certain pleas in criminal cases (TRE 410), and liability insurance coverage (TRE 411), among others. Article V of the Texas Rules of Evidence described privileges; privileged information is not admissible unless the privilege is waived. See TRE 501, Privileges in General. Evidence may be ruled inadmissible because of the failure to produce it in discovery, TRCP 193.6; or as required in a pretrial conference under TRCP 166, *In re Harrison*, 557 S.W.3d 99, 123 (Tex. App.--Houston [14th Dist.] 2018, pet. denied) (exhibits excluded when not exchanged by the deadline); or as a discovery sanction, TRCP 215.3.

3. Exclusion of Relevant Evidence on Special Grounds. Under TRE 403, a court can exclude relevant evidence when "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TRE 403. Evidentiary disputes arise more frequently in the appeals of criminal cases, so there is more evidence law from criminal cases than from civil cases. *See Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 547 (Tex. 2018) (trial court abused its discretion in excluding a video of the

plaintiff in a personal injury case). In a parental termination case involving TRE 403, *In re T.M.*, No. 11-21-00020-CV (Tex. App.–Eastland Sept. 2, 2021, no pet.) (memo. op.), the trial court admitted nude photographs of a parent standing next to her children that were posted on the parent's Instagram account. The appellate court said: "Rule 403 does not affect the admissibility of evidence that is merely prejudicial, but it may affect the admissibility of evidence that is unfairly prejudicial or needlessly cumulative. *See id.* The trial court is required to balance the probative value of the evidence against concerns such as unfair prejudice, and the trial court may exclude evidence under Rule 403 only if a countervailing concern substantially outweighs the evidence's probative value." In *In re Commitment of Cordova*, 618 S.W.3d 904, 921 (Tex. App.–El Paso 2021, no pet.), the court said: "Testimony is not inadmissible on the sole ground that it is 'prejudicial' because, in our adversarial system, most of a proponent's evidence is legitimately intended to wound the opponent; but rather, unfair prejudice is the proper inquiry under Rule 403." Appellate courts have held that trial court must consider the evidence itself in doing a Rule 403 balancing; for videos and sound recordings that means looking at or listening to the evidence. *Diamond Offshore Serv. Ltd. v. Williams*, 542 S.W.3d 539, 545-46 (Tex. 2018) ("as a general rule, a trial court should view video evidence before ruling on admissibility when the contents of the video are at issue"); *Cordova*, 618 S.W.3d at 923.

C. AUTHENTICATION. No physical evidence is admissible unless it has been authenticated. This authentication requirement is met by evidence sufficient to support a finding that the matter in question is what its proponent claims. TRE 901. A proponent is *not* required to show that the evidence is *probably* what the proponent claims. Stated differently, the judge must determine whether a jurors *could* believe that the evidence is authentic. The jurors then decide whether the evidence *is* authentic.

1. Extrinsic vs. Intrinsic vs. Circumstantial Evidence. In *Fleming v. Wilson*, 610 S.W.3d 18, 20 (Tex. 2020), the court of appeals held that a proponent of documentary evidence had to produce *extrinsic* evidence that the documents were authentic. The Supreme Court reversed, saying that a document can be authenticated by extrinsic evidence, but that is not the only way to authenticate. The Court cited TRE 901(b)(4), which said that evidence could, because of its "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," "satisf[y] the [authentication] requirement." *Fleming*, at 21.

Typical forms of authentication are by testimony of a witness with knowledge, lay opinion on genuineness of handwriting, identification of a voice by someone who has heard the speaker speak, etc. TRE 901(b). Emails and text messages can be authenticated by the email name and address, the contents of the email, the fact that the email is responsive to another email, etc.

2. Self-Authenticating Evidence. Some documents are self-authenticating: domestic government documents under seal, or if not under seal then attested to under seal by a public officer that the signer had the capacity and the signature is genuine; foreign public documents which are attested and certified as genuine; certified copies of public records; official publications; newspapers and periodicals; trade inscriptions showing ownership, control or origin; acknowledged documents; commercial paper; and business records accompanied by "business records affidavit." TRE 902 ("Self-Authentication"). Tex. Fam. Code § 160.504(a) provides that a genetic paternity test conducted in accordance with Subchapter F of Chapter 160, if contained in a record signed under penalty of perjury by a designee of the testing laboratory, is self-authenticating.

3. Authentication Through Production in Discovery. TRCP 193.7 provides that documents produced by a party in response to written discovery are automatically authenticated against the producing party for pretrial purposes or trial, unless the producing party makes an objection with 10 days of notice that the document will be used.

4. Authentication of Other Evidence. Authentication of government records is discussed in Section II.I below. Authentication of business records is discussed in Section II.J below. Authentication of audio and video recordings are discussed in Section II.M and II.N below.

5. Authentication Does Not Guarantee Admissibility. It should be noted that merely authenticating a document does not guarantee its admissibility. *See Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (despite the fact that a letter was authenticated, the letter was not admissible because of the hearsay rule).

D. HEARSAY.

1. What is 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." TRE 801(d). By special definition, a "prior statement by witness," "admission of a party-opponent," and "depositions" in the same case are not hearsay. TRE 801(e). A "statement" is (i) an oral or written verbal expression or (ii) nonverbal conduct of a person that is intended to substitute for a verbal expression. TRE 801(a). A "declarant" is a person who makes a statement. TRE 801(b). This may seem simple, but the elements of the hearsay rule require some thought when applied to various situations.

2. Admission of a Party Opponent. An admission by a party-opponent is not hearsay, even if it is an out-of-court statement. TRE 801(e)(2). To be an admission of a party-opponent, the statement must be offered against a party, and it must be (i) the party's own statement, or (ii) a statement made by an agent authorized to speak for the party, or (iii) a statement which the party has ratified, or (iv) a statement by an agent made during the

existence of the relationship and relating to matters within the scope and course of the agency. Statements made by co-conspirators are also included. *Id.* "Any statement, including former testimony, may be admitted under one of the admission-by-party-opponent exclusions, regardless of the witness's availability." *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 506 (Tex. App.--Houston [1st Dist.] 2012, pet. dism'd). The failure of a party to disclose a fact on a prior occasion can also be an admission that the fact did not exist. *See Waldon v. City of Longview*, 855 S.W.2d 875, 878 (Tex. App.--Tyler 1993, no writ) ("If an event is of such salient importance that the declarant would ordinarily have been expected to relate it, the failure of a party to mention the event in a prior statement may constitute an admission that the event did not occur").

3. Statement Against Interest. TRE 802(24) establishes an exception to the hearsay rule for a statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and (B) is supported by corroborating circumstances that clearly indicate its trustworthiness."

4. State of Mind Exception to Hearsay Rule. TRE 803(3) creates an exception to the hearsay rule for statements of the declarant's then existing mental, emotional, or physical condition, except where offered to prove the fact remembered or believed, unless such fact relates to the execution, revocation, identification, or terms of the declarant's will. Under the Rule, the comment must relate to a then-existing state of mind, emotion, sensation, or physical condition, not a prior one. Included would be intent, plan, motive, design, mental feeling, pain, or bodily health. The exception ordinarily does not permit the admission of a statement of memory or belief to prove the fact remembered or believed. Such an offer will, therefore, ordinarily be for a limited purpose.

TRE 803(3) finds frequent use in cases involving children. In *Huber v. Buder*, 434 S.W.2d 177 (Tex. Civ. App.--Fort Worth 1968, writ ref'd n.r.e.), a witness was permitted to relate what three children said about which parent they wanted to live with. *Accord, Melton v. Dallas County Child Welfare Unit*, 602 S.W.2d 119, 121 (Tex. App.--Dallas 1980, no writ), which held that a child's preference on custody fits the state-of-mind exception to the hearsay rule. In *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.--San Antonio 1990, writ denied), out-of-court statements by a girl regarding sexual abuse by her step-father were inadmissible since they related to past external facts or conditions rather than present state of mind. In *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585 (Tex. App.--Eastland 1990, writ denied), an adult was permitted to relate a comment she overheard a child make regarding sexual abuse. In *Baxter v. Texas Dep't. of Human Resources*, 678 S.W.2d 265 (Tex. App.--Austin 1984, no writ), a witness was permitted to relate a child's statements that

he had been beaten and was afraid of more beatings, and further that he had seen his parents' pornographic materials. In *James v. Tex. Dep't Hum. Resources*, 836 S.W.2d 236, 243 (Tex. App.--Texarkana 1992, no writ), statements by the children indicating that they had been sexually abused did not meet the state of mind exception. Similarly, in *Couchman v. State*, 3 S.W.3d 155 (Tex. App.–Fort Worth, 1999, pet. ref'd), statements of a 5-year old girl, that a man had molested her, were inadmissible under the state of mind exception, but were admissible under the TRE 803(2) excited utterance exception. In this case, the excitement causing the utterance was the child's burning sensation when taking a bath after the fact, rather than the alleged incident itself.

See generally Chandler v. Chandler, 842 S.W.2d 829, 831 (Tex. App.--El Paso 1992, writ denied), involving a husband's allegation that the wife had defrauded him into thinking that her prior Mexican marriage had been dissolved by a Mexican divorce. The court said that it was not error to permit the wife to testify that a Mexican judge had pronounced her divorced from her first husband, since the information was offered to show the wife's state of mind--not the truth of the matter stated, and also because 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, and the competency or credibility of the Mexican judge was not in issue. The Court went on to say that the evidence was admissible to show wife's state of mind, as regards whether she defrauded husband about the termination of her prior marriage.

Where evidence is excluded on the ground of hearsay, and the proponent wishes to meet the state of mind exception to the hearsay rule, the proponent must reoffer the evidence for the limited purpose of showing state of mind. Absent such a limited offer, the proponent cannot argue on appeal that it was error to exclude the evidence. *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied).

See generally Lehman v. Corpus Christi Nat. Bank, 668 S.W.2d 687, 689 (Tex. 1987) (witness cannot testify as to the state of mind of another person).

5. Hearsay Within Hearsay. TRE 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. In *Almarez v. Burke*, 827 S.W.2d 80, 82-83 (Tex. App.--Fort Worth 1992, writ denied), the court admitted an excited utterance within an excited utterance. Another example would be medical records, proved up by the hospital's custodian of the records under TRE 803(6). The medical records may meet the business-record exception to the hearsay rule, but hearsay contained in the medical records must meet an exception to the hearsay rule, or that hearsay must be redacted from the records. An example would be medical records containing statements made for purposes of medical diagnosis or treatment: they meet an exception to the hearsay rule under TRE 803(4).

6. Trying to Circumvent the Hearsay Rule. Sometimes lawyers will attempt to circumvent the hearsay rule by offering indirect proof of an out-of-court statement. In *Head v. Texas*, 4 S.W.3d 258 (Tex. Crim. App. 1999), the Court of Criminal Appeals held that the hearsay rule did not preclude a question as to whether certain out-of-court statements were consistent with a statement that had been admitted into evidence. The Court analogized to an earlier decision regarding the offer of subsequent conduct based upon an out-of-court statement. In the earlier case, a witness was asked what he did in response to a statement, and the witness said that he began looking for a black male, with a ski mask. Since the content of the out-of-court statement was an "inescapable inference" from the description of subsequent behavior, admitting the subsequent behavior transgressed the hearsay rule. Applying that rule to the *Head* case, the court determined that the content of the testimony that out-of-court statements were consistent with other evidence received by the jury did not produce an inescapable conclusion about the substance of the out-of-court statements.

7. "In the Presence of a Party" Hearsay Exception. There is a de facto exception to the hearsay rule, sometimes called the "in the presence of the party" rule, that is honored by some trial court judges although it is without legal support. Example: Your opponent is eliciting testimony from a witness, and is about to elicit hearsay. You object. Your opponent rises and says: "Your Honor, this conversation occurred in the presence of counsel's client." The judge overrules your hearsay objection. The ruling is wrong, because there is no such exception to the hearsay rule. The rule is probably an over-extension of the concept of an admission of a party-opponent. A statement of a party which is offered against him is defined not to be hearsay. TRE 801(e)(2). Some cases have said that the failure of a party to disagree when a statement is made in his/her presence can operate as an admission by silence if the ordinary person would be expected to disagree with the statement when made. *See Tucker v. State*, 471 S.W.2d 523, 532-33 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 912 (1989). This is not, however, a general rule that all statements made by others in the presence of a party are excepted from the hearsay rule.

8. Common Law Exceptions to Hearsay Rule. Some courts have recognized "common law" exceptions to the hearsay rule. For example, one common-law exception to the hearsay rule provides that if an individual obtains personal knowledge of facts during his employment, those facts are admissible as an exception to the hearsay rule. *Waite v. BancTexas-Houston, N.A.*, 792 S.W.2d 538, 540 (Tex. App.--Houston [1st Dist.] 1990, no writ); *accord*, *Dickey v. Club Corp. of America*, 12 S.W.3d 172, 176 (Tex. App.–Dallas 2000, pet. denied) ("The fact that Thornbrugh was not employed by the Club at the time . . . does not disqualify his knowledge of the Club's bylaws at that time. During employment, an employee may gain personal knowledge of regulations or procedures that were instituted prior to the time he was hired."); *Boswell v. Farm & Home Sav. Ass'n*, 894 S.W.2d 761, 768 (Tex. App.–Fort Worth 1994, writ denied) ("The fact that Mather was not employed by Farm and Home, at the time the attested events occurred, does not disqualify his testimony providing

he gained knowledge of the facts during his employment.").

When the Texas Rules of Civil Evidence were adopted in 1983, Rule 803 read as follows:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by law. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

Michael Patrick Cash & Jeffrey Wayne Dorrill, *Note*, 37 BAY. L. REV. 277, 277 (1985). On March 1, 1998, TRE 802 was amended to provide that "[h]earsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority." This amendment calls into question whether common law exceptions to the hearsay rule survive the 1998 amendment.

9. Hearsay Exception for Genetic Testing Report. In a suit to establish paternity of a child, Tex. Fam. Code §160.621, Admissibility of Results of Genetic Testing; Expenses, says: "(a) Except as otherwise provided by Subsection (c), a report of a genetic testing expert is admissible as evidence of the truth of the facts asserted in the report." Subsection (c) prohibits the admission of a parentage report except where consented to by both the mother and person who is presumed, acknowledged, or adjudicated to be the father, or by court order.

10. Child Custody Evaluation Reports. The admissibility of what used to be called "social studies" and are now called "child custody evaluation reports" is problematic. Years ago, one court of appeals said simply that "[court-ordered social studies] are generally inadmissible hearsay." *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex. App.--Houston [1st Dist.] 1990, no writ). The issue is more complicated than that nowadays.

TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence." The reference to "disclosure to the court" is somewhat odd, since the court must judge which portions of the report are admissible into evidence and which portions are not, and in the process of doing so the court will by necessity look at all portions of the report. In *Green v. Remling*, 608 S.W.2d 905 608 S.W.2d 905, 907-8 (Tex. 1980), the Supreme Court ruled it was proper for a trial court to consider a social study in an adoption proceeding, even though the social study was not introduced into evidence. The version of the Texas Family Code then in effect, Section 11.12(c), provided that where a social study has been prepared as part of a SAPCR "[t]he report shall be made a part of the record; however, the disclosure of its contents to the jury is subject to the rules of evidence." The Supreme Court concluded that "only those portions of the study which are admissible under the rules of evidence may be disclosed to the jury." *Id.* at 909-910. It thus appears that the Legislature intended for custody

evaluation reports to be admitted into evidence, provided that the Rules of Evidence are applied to the contents of the report.

Turning then to a jury trial, we should consider what rules of evidence apply to the admission of a child custody evaluation report.

Many child custody evaluation reports consist of three parts: (i) the general description of the parties and children; (ii) specific findings and recommendations of the investigator; (iii) selective recitations of what various collateral contacts said to the investigator. A trial court could logically justify letting in category (ii) findings and recommendations, but not (i) or (iii). A trial court could logically justify letting in category (i) and (ii), but not category (iii). What about the admission of category (iii), reports of collateral witnesses?

To begin with, one could ask whether a court-ordered custody valuation report constitutes a public record under TRE 803(8), because it is filed with the court clerk and contain factual findings resulting from a legally authorized investigation. A court-ordered report, filed with the clerk of the court, would seem to fit the description of a public record, making the factual findings contained in the report (but not other parts of the report) admissible under the public record exception to the hearsay rule. TFC § 107.114 seems to push past this issue, suggesting that more than just factual findings in the report can be admitted.

Other parts of the custody evaluation report might be admissible under an exception to the hearsay rule, such as the state-of-mind exception, or statements made for medical diagnosis or treatment, or reputation concerning character, or statements against interest. Or they could be excluded from the hearsay rule as an opposing party's statement under TRE 801(e)(2).

See All Saints Episcopal Hosp. v. M.S., 791 S.W.2d 321, 322 (Tex. App.--Fort Worth 1990) (although report by DHS social worker met the public records hearsay exception of TRE 803(8), parts of report containing third party hearsay was not admissible), *vacated pursuant to settlement*, 801 S.W.2d 528 (Tex. 1991); *Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68, 71 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.) (portions of officer's accident report not admissible since they were hearsay descriptions of the accident by occupants of two vehicles involved in the accident).

Even where hearsay in a child custody evaluation report does not meet an exception to the hearsay rule, the evidence may be admissible under TRE 705(d), if the information constitutes fact or data underlying the expert's opinion and their probative value is not outweighed by their prejudicial effect. See Section V.B.9 below.

The same issues arise in connection with a report by a guardian ad litem, the disclosure of which to the jury is subject to the TRE. TFC § 107.002(h).

E. BEST EVIDENCE. The "best evidence rule" provides that ordinarily you must use the original writing, recording or photograph to prove the contents of that writing, recording or photograph. The rule governs (i) the use of copies, and (ii) the use of oral testimony to prove the contents of a writing. TRE 1002. A duplicate may be used unless (1) a question is raised as to the authenticity of the duplicate, or (2) the use of the duplicate under the circumstances would be unfair. TRE 1003. An original is not required if: the original has been lost or destroyed (except by the offering party in bad faith), or the original cannot be obtained, or no original is in Texas, or the opponent, after having been put on notice of the need for the original, does not produce it. Also, the original is not required if the item relates only to collateral matters. TRE 1004.

Public Records. The contents of public records can be proved by a certified copy (see TRE 902), or a copy authenticated by the testimony of any witness who has compared the copy to the original. TRE 1005. Only if neither of these sources is available can other evidence of contents can be given. TRE 1005. However, in a 5-4 decision, the Court of Criminal Appeals held that it was permissible for a trial court to admit a faxed copy of a certified copy of a judgment that was faxed by a county clerk to a district clerk. *Englund v. State*, 946 S.W.2d 64 (Tex. Crim. App. 1997). The faxed copy was treated the same as if it had been a photocopy.

Business Records. Copies of business records can be authenticated by the testimony of the custodian of the records or other qualified witness. See TRE 803(6). Authentication can also be done by affidavit, as provided in TRE 902(10). Computer records have a specific provision: TRE 1001(3) provides that "[i]f data are stored in a computer or similar device, any print-out or other output readable by sight, shown to reflect the data accurately, is an 'original'."

Summaries. The use of a summary would violate the best evidence rule. TRE 1006 is the exception to the best evidence rule that makes summaries admissible. Under TRE 1006, a summary of the contents of voluminous writings, recordings, or photographs, is admissible where those underlying items cannot be conveniently examined in court, and the underlying items are themselves admissible. However, the underlying items, or duplicates of them, must be made available to the opposing party, to examine or copy at a reasonable time and place. The court can order that the underlying items be produced in court. *See Aquamarine Assoc. v. Burton Shipyard, Inc.*, 659 S.W.2d 820 (Tex. 1983). If the underlying records are in evidence, one court held that the court can exclude the summaries as being cumulative. *Parker v. Miller*, 860 S.W.2d 452, 458 (Tex. App.--Houston [1st Dist.] 1993, no writ).

Cases. *See Ford Motor Company v. Auto Supply Company, Inc.*, 661 F.2d 1171, 1176 (8th Cir.1981) (trial court properly admitted into evidence product line profitability analyses made annually and compiled from numerous "spread sheets"); *Rosenberg v. Collins*, 624 F.2d 659,

665 (5th Cir.1980) (trial court properly admitted a summary of the commodity firm's yearly trading activities); *Black Lake Pipe Line Co. v. Union Construction Co., Inc.*, 538 S.W.2d 80, 92 (Tex. 1976) (a proper predicate, as business records, must be laid for the admission of the underlying records used to prepare a summary); *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 800 (Tex. App.–Houston [1 Dist.] 2004, no pet.) (one page summary of eighty-seven pages of supporting data was admissible if it upheld the standards of TRE 1006 and was prepared by a qualified individual); *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 369 (Tex. App.–Fort Worth 1990, no writ) (admission of charts or diagrams which are designed to summarize or emphasize a witness' testimony is a matter which lies within the discretion of the trial court); *Curran v. Unis*, 711 S.W.2d 290, 295 (Tex. App.--Dallas 1986, no writ) (income tax returns are an annual summary of the profitability of the business); *c.f. McAllen State Bank v. Linbeck Construction Corp.*, 695 S.W.2d 10, 16 (Tex.App.-Corpus Christi 1985, writ ref'd n.r.e.) (trial court admitted into evidence two computer printout summary breakdowns, each a summary of underlying labor and material records; the court held that the printouts were entitled to be treated as business records, and not just as summaries of business records).

If the underlying records are government records or business records, they must be properly authenticated before summaries of those records would be admissible. If the underlying records are hearsay, or contain hearsay, then the summary is admissible only if hearsay exceptions are met.

F. PRIVILEGES. Privileges often arise during discovery, but they can also be the basis for excluding information from trial. The proponent has the burden to support the claim of privilege with some evidence. *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex/. 1986) ("It was therefore Builders Square's burden to produce some evidence supporting its claims of privilege"). Once a prima facie case has been established and the contested documents have been tendered to the court, the trial court must conduct an in camera inspection to make the determination. *Ryals v. Canales*, 767 S.W.2d 226, 229 (Tex. App.–Dallas 1989, orig. proceeding) (upon tender of the documents, the duty to conduct an in camera inspection is mandatory). *See Barnes v. Whittington*, 751 S.W.2d 493, 494 (Tex. 1988) (where affidavits did not establish privilege, the court must view documents in camera).

1. Privilege Against Self-Incrimination. U.S. Const. amend. V, says in part: "No person ... shall be compelled in any criminal case to be a witness against himself." In *McCarthy v. Arndstein*, 266 U.S. 34 (1924), the Supreme Court said that the privilege against self-incrimination applies in civil cases.

a. Invoking the Privilege. A witness in a civil proceeding can invoke the self-incrimination privilege. *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972). For non-parties, it must be done

outside the presence of the jury, "to the extent practicable." TRE 513(b). See *In re L.S.*, 748 S.W.2d 571, 575 (Tex. App.--Amarillo 1988, no writ) (where witness testified fully on some questions and only selectively invoked his privilege against self-incrimination, impracticable to isolate invocation of privilege outside presence of jury). A *party* can be required to invoke the privilege *in the presence of the jury*, and opposing counsel *can comment* to the jury and the jury may draw an inference therefrom. TRE 513(c).

To sustain the self-incrimination privilege, the witness must show that the answer is likely to be hazardous, but need not disclose the very information the privilege protects. The witness is not, however, the exclusive judge of his right, and the trial court can determine good faith and justifiability. Court can compel only if it is "perfectly clear" that the witness is mistaken and the testimony cannot possibly have a tendency to incriminate. *Ex parte Butler*, 522 S.W.2d 196 (Tex. 1975).

In a criminal proceeding, the accused cannot be called to testify by the prosecution. In a civil proceeding, a party or witness cannot refuse to take the stand. In a civil proceeding, a litigant may propound questions to the witness, and it is up to the witness to invoke the privilege against self-incrimination as to particular questions. R. RAY, TEXAS LAW OF EVIDENCE § 473 (3d ed. 1980), *McInnis v. State*, 618 S.W.2d 389, 392 (Tex. Civ. App.--Beaumont 1981), *cert. den.*, 456 U.S. 976 (1982). In a *criminal* contempt proceeding, however, the contemnor cannot be forced to take the witness stand. *Ex parte Werblud*, 536 S.W.2d 542, 547 (Tex. 1976). *But see Ex parte Burroughs*, 687 S.W.2d 444, 446 (Tex. App.--Houston [14th Dist.] 1985) (not error to call accused to witness stand in child support contempt proceeding); *c.f. Ex parte Burroughs*, 687 S.W.2d 444 (Tex. App.--Houston [14th Dist.] 1985) (not error to force contemnor in contempt proceeding to give his name, his employment and his office location); *Ex parte Snow*, 677 S.W.2d 147 (Tex. App.--Houston [1st Dist.] 1984) (where prima facie showing of contempt is made independently, error in compelling relator to testify is harmless). The contemnor in a *civil* contempt proceeding is not the focus of a prosecution, and therefore can be called to the witness stand, but he can nevertheless refuse to incriminate himself through his own testimony, under the authority of the Fifth and Fourteenth Amendments of the United States Constitution, and article I, Section 10 of the Texas Constitution. *Ex parte Butler*, 522 S.W.2d 196 (Tex. 1975).

Once having related part of a transaction, a witness cannot thereafter assert the Fifth Amendment in order to prevent disclosure of additional, relevant facts. *Draper v. State*, 596 S.W.2d 855, 857 (Tex. Crim. App. 1980). "If [a witness] voluntarily states a part of the testimony, he waives his right, and cannot afterwards stand on his [Fifth Amendment] privilege." *Id.*, citing *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438 (1951). Each additional question may raise new potential for self-incrimination, and therefore, once the witness invokes the privilege, the court must determine ". . . whether the question present[s] a reasonable danger of further crimination in light of all the circumstances, including any

previous disclosures." Rogers v. United States, 340 U.S. 367, 374, 71 S. Ct. 438, 442 (1951).

b. Striking Pleadings. In the case of *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985), the Supreme Court of Texas held that a party seeking affirmative relief cannot invoke a privilege to preclude the defendant from obtaining information necessary to defend against the claim. That is "using the privilege as a sword, not a shield," and in that situation the trial court can force the party invoking the privilege to either waive the privilege or suffer dismissal of his affirmative claims. In *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993), the Supreme Court articulated a three-pronged test to apply in such situations:

> First, before a waiver may be found the party asserting the privilege must seek affirmative relief. [FN9] Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. [FN10] If any one of these requirements is lacking, the trial court must uphold the privilege. [FN11] [Content of footnotes omitted]

In *Tex. Dept. of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757 (Tex. 1995), the Supreme Court said that "[g]enerally, the exercise of the [Fifth Amendment] privilege should not be penalized." *Id.* at 502. The Court said that in imposing a sanction for refusing to testify based upon the privilege against self-incrimination, the trial court must consider whether sanctions less severe than dismissal of the claim for affirmative relief would be effective to redress the problem. *Id.* at 504-05. Such alternatives would be, for example, to restrict questions to avoid self-incrimination while still permitting discovery. Or to prohibit the plaintiff from introducing evidence on matters where the privilege was invoked. Or to delay the civil proceeding until the outcome of the criminal prosecution.

2. Lawyer-Client Privilege. In the amendments to the Texas Rules of Evidence that became effective on March 1, 1998, the Texas Supreme Court and Court of Criminal Appeals altered the lawyer-client privilege in a significant way. Under former TRE 503(a)(2), a representative of a client was "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Added to that definition of a representative of a client is the following class of persons:

> any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

TRE 503(a)(2)(ii).

3. Physician-Patient Privilege. Confidential communications between a physician and a patient, relating to professional services rendered by the physician, are privileged. TRE 509(b). To be confidential, the communication must not be intended for disclosure to third persons other than those present "to further the interest of the patient in consultation" or persons reasonably necessary for transmission of the message, or persons participating in diagnosis and treatment under the direction of the physician. *Id.* There are various exceptions to the rule, including instances when court or administrative proceedings are brought by the patient against the physician. TRE 509(e)(4) creates an exception to "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." In *Gustafson v. Chambers*, 871 S.W.2d 938, 943 (Tex. App.--Houston [1st Dist.] 1994, no writ), the appellate court held that where the patient alleged that the doctor was unfit to perform surgery due to alcohol and substance abuse, then the *defendant doctor's* own medical records were discoverable, since they were relevant to a claim or defense in the case. In *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), the Supreme Court endorsed this view of the exception to the doctor-patient privilege, saying that "the patient-litigant exception to the privileges applies when a party's condition relates in a significant way to a party's claim or defense." However, the Court stated that "[c]ommunications 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 'central' to it." *Id.* at 842. In other words, before discovery is permitted, it is required "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." *Id.* at 842. See the discussion of *Easter v. McDonald*, in the following section.

The medical records of non-parties were held to be discoverable in the medical malpractice case of *In re Whitley*, 79 S.W.3d 729 (Tex. App.–Corpus Christi 2002, orig. proceeding). The defendant physician claimed that he had conducted a certain type of knee operation successfully numerous times. The appellate court held that the doctor relied upon the other surgeries as part of his defense, and that the medical records of the 200 other patients were relevant, and thus discoverable. All identifying information and other non-relevant information were to be redacted.

The amendment to TRE 509, which became effective on March 1, 1998, eliminated the parent-child relationship suit exception to the physician-patient privilege. However, the Supreme Court appended a new substantive comment to Rule 509, regarding the role of the privilege in suits affecting the parent-child relationship [SAPCRs]. The comment reads:

> Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

This comment has a significant impact on how the relevancy exception is applied to SAPCRs. Note that confidential medical records personal to an expert witness cannot be reached.

4. Mental Health Privilege.

a. TRE 510. Under TRE 510, mental health information is privileged. One exception to the privilege is when the communications and records are "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." TRE 510(d)(5). *See R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994) [discussed in preceding paragraph], in a case involving the similarly-worded exception to the doctor-patient privilege.

In *Easter v. McDonald*, 903 S.W.2d 887 (Tex. App.--Waco 1995, orig. proceeding) (leave denied in Texas Supreme Court), the appellate court permitted a child to obtain mental health records of her step-father in a suit against a psychologist for negligence. The Court of Appeals read *R.K.* to hold that the privilege is overcome where the information relates to factual issues a jury would have to decide in answering jury questions. The Court of Appeals rejected the view that under *R.K.* discovery was permitted only where the privileged information involved the very questions to be submitted to the jury. *Id.* at 890.

New TRE 510, which became effective on March 1, 1998, eliminated the parent-child relationship suit exception to the mental health privilege. However, the Court issued a comment, quoted in the preceding section, saying that the relevancy exception applies in SAPCRs, but that confidential mental health records of expert witnesses cannot be reached. When the trial court is asked to "ensure

that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege," the court and counsel should examine *Jaffee v. Redmond*, 518 U.S. 1 (1996), where the U.S. Supreme Court for the first time recognized a federal common law mental health privilege. The Court described the legitimacy privacy interests protected by the privilege in the following way:

> Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Trammel, 445 U.S. at 51. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, 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. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[9] As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult, if not impossible, for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment.
>
> Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)). By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests. [Footnote omitted.]

Jaffe v. Redmond, 135 L.Ed.2d at 345.

b. Health & Safety Code. In *Abrams v. Jones*, 35 S.W.3d 620, 625-26 (Tex. 2000), the Supreme Court rejected the argument that Texas law gives a "parent totally unfettered access to a child's mental health records irrespective of the child's circumstances or the parent's motivation." *Id.* at 626. The Court held that "a mental health professional is not required to provide access to a child's confidential records if a parent who requests them is not acting 'on behalf of' the child." The professional must believe that the request for the records is being made for the benefit of the child. In particular, the Supreme Court noted that "parents embroiled in a divorce or other suit affecting the parent/child relationship may have motives of their own for seeking the mental health records of the child and may not be acting "on the patient's [child's] behalf." *Id.* at 625. The Supreme Court went on to rule that–even when a parent is acting for the benefit of a child--"a professional may nevertheless deny access to a portion of a child's records if their release would be harmful to the

patient's physical, mental, or emotional health." *Id.* at 625. The parent's recourse is to:

> (i) "select another professional for treatment of the same or related condition, and the professional denying access must allow the newly retained professional to examine and copy the records that have not been released to the patient. Id. § 611.0045(e). The newly retained professional may then decide whether to release the records to the patient"; or
>
> (ii) "petition a district court for appropriate relief. Tex. Health & Safety Code § 611.005(a). A professional who denies access has 'the burden of proving that the denial was proper.'" *Id.* at 625-27.

The same standard applies to an adult trying to obtain his or her own psychological records.

5. Priest-Penitent Privilege. Confidential communication from a person to his/her clergyman in the latter's capacity as a spiritual adviser are privileged. TRE 505. Thus, a minister could withhold the identity and communications by a church member who confessed negligence during a session in which the church member sought counseling and spiritual guidance from the minister. *Simpson v. Tennant*, 871 S.W.2d 301, 305-09 (Tex. App.--Houston [14th Dist.] 1994, no writ). In *Cox v. Miller*, 296 F.3d 89 (2nd Cir. 2002), the Second Circuit Court of Appeals, applying New York law, held that admissions of murders made to other members of Alcoholics Anonymous were not privileged, because in that case they were not made for the purpose of obtaining spiritual guidance. The court did not reach the question of whether AA constituted a protected religion for purposes of the New York statutory privilege.

6. The Offensive Use Doctrine. "'A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action.'" *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985) (quoting *Pavlinko v. Yale-New Haven Hosp.*, 470 A.2d 246, 251 (1984)). In *Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 761 (Tex. 1995), the Supreme Court explained the doctrine in this way:

> The offensive use line of cases are subsets of sanctions cases. Even if a party has a valid reason to avoid discovery, such as an evidentiary or constitutional privilege, that party, when appropriately ordered by the trial court, must elect whether to maintain the privilege or risk suffering a sanction. ... The theory underlying the offensive use line of cases is that a plaintiff who is seeking affirmative relief should not be permitted to maintain the action, and at the same time maintain evidentiary privileges that protect from discovery outcome determinative information not otherwise available to the defendant. This Court, in *Republic Insurance v. Davis*, 856 S.W.2d 158 (Tex.1993), defined three elements necessary to conclude whether an offensive use of an evidentiary privilege is occurring: A. a party must be seeking

affirmative relief; B. the party is using a privilege to protect outcome determinative information; C. the protected information is not otherwise available to the defendant. 856 S.W.2d at 161. These steps identify situations where it would be unfair to allow a party to both seek relief and deny to the defense essential evidence. Once an offensive use is shown, alternative steps follow which define the courses of action a trial court may then take: Upon a finding of offensive use, the plaintiff either 1. waives the privilege or 2. risks sanction from the trial court.

7. Child Abuse Exception. Tex. Fam. Code § 261.202, Privileged Communication, says that "[i]n a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client." This exception was applied to a damage suit for civil conspiracy, negligence, fraud, fraudulent concealment, breach of fiduciary duty, and negligent misrepresentation, in *Doe v. St. Stephen's Episcopal School*, Civil Action No. C-08-299 (U.S. Dist. Ct. S.D. Tex. Corpus Christi Div. June 6, 2009).

G. JUDICIAL ADMISSIONS. A judicial admission is a statement by a party usually found in a pleading or stipulation that rises to the level of formal waiver of proof of the facts stated. *Dobbins v. Coruthers*, 864 S.W.2d 754, 756 (Tex. App.--Houston [1st Dist.] 1993, no writ). A judicial admission relieves the opposing party from having to prove the admitted fact and precludes the party making the admission from introducing contrary evidence. *Clements v. Corbin*, 891 S.W.2d 276 (Tex. App.--Corpus Christi 1994, writ denied).

1. Live Pleadings. Statements in pleadings constitute judicial admissions. *Mendoza v. Fidelity & Guaranty Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). Assertions of fact in live pleadings are formal judicial admissions upon which a summary judgment may be rendered. *Manahan v. Meyer*, 862 S.W.2d 130, 133 (Tex. App.--Houston [1st Dist.] 1993, writ denied). The rule does not apply to statements made "in the alternative." *Manahan v. Meyer*, 862 S.W.2d 130, 133 (Tex. App.--Hous. [1st Dist.] 1993, writ denied).

2. Requested Admissions. *Gonzales v. Surplus Ins. Services*, 863 S.W.2d 96, 99 (Tex. App.--Beaumont 1993, writ denied) ("[Requested a]dmissions, once deemed admitted, are judicial admissions and appellant may not then introduce controverting testimony in any legal proceeding related to the instant action").

3. Inventory and Appraisement in Divorce. A sworn inventory and appraisement filed in divorce case can constitute judicial admission, even when not marked and offered as evidence. *Vannerson v. Vannerson*, 857 S.W.2d 659, 670-71 (Tex.App.--Houston [1st Dist.] 1993, writ denied).; *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.--El Paso 1985, writ dism'd). *Contra*, *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.--Austin 1994, no writ); *Poulter v. Poulter*, 565 S.W.2d 107, 110 (Tex. Civ. App.--Tyler 1978, no

writ); *Bokhoven v. Bokhoven*, 559 S.W.2d 142, 143-44 (Tex. Civ. App.--Tyler 1977, no writ).

4. Opening Argument. In *Vanscot Concrete Co. v. Bailey*, 862 S.W.2d 781, (Tex. App.--Fort Worth 1993, no writ), the court held that certain statements made by opposing counsel during opening argument were not judicial admissions.

5. Party's Testimony. As a general rule, a party's testimony is not considered to be a judicial admission. *Thomas v. Service Lloyds Ins. Co.*, 860 S.W.2d 245, 252 (Tex. App.--Austin 1993) ("Texas generally follows the rule that a party's testimony must be regarded as evidence, not as an admission"), *judgment vacated without reference to merits*, 866 S.W.2d 606 (Tex. 1993). In some instances, however, a party's testimony will operate as a judicial admission. *Hennigan v. I.P. Petroleum Co., Inc.*, 858 S.W.2d 371, 372 (Tex. 1993) ("The requirements for treating a party's testimonial quasi-admission as a conclusive judicial admission include that the statement be "deliberate, clear, and unequivocal" and that "[t]he hypothesis of mere mistake or slip of the tongue must be eliminated").

6. Distinguish From Judicial Estoppel. The doctrine of judicial estoppel provides that when a party to a lawsuit has successfully taken a position under oath in a prior proceeding, he is estopped from taking a contrary position in a subsequent proceeding. *Long v. Knox*, 291 S.W.2d 292 (Tex. 1956). The party can escape the rule upon a showing of inadvertence, mistake, fraud or duress. *Id.*

H. PAROL EVIDENCE. In the absence of fraud, accident, or mistake, extrinsic evidence is inadmissible to vary the terms of a valid written instrument. *Kelley v. Martin*, 714 S.W.2d 303, 305 (Tex. 1986) (re: will); *Knox v. Long*, 257 S.W.2d 289, 296-297 (1953) (re: deed); *Alamo Bank of Texas v. Palacios*, 804 S.W.2d 291, 294 (Tex. App.--Corpus Christi 1991, no writ) (re: promissory note); McClung, *A Primer on the Admissibility of Extrinsic Evidence of Contract Meaning*, 49 TEX.B.J. 703 (1986). *See Gannon v. Baker*, 818 S.W.2d 754 (Tex. 1991) (corporate minutes did not, under these circumstances, constitute a written agreement precluding parol evidence). *Litton v. Hanley*, 823 S.W.2d 428 (Tex. App.--Houston [1st Dist.] 1992, no writ) (judgment from jury trial reversed where trial court improperly admitted parol evidence which contradicted a promissory note).

I. GOVERNMENT RECORDS. Government records are called "public records and reports" in the TRE. The term "public records and reports" includes "records, reports, statements, or data compilations of public offices or agencies," which set forth "(A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or (C) factual findings resulting from an investigation made pursuant to authority granted by law." TRE 803(8). Another category of government records is records of vital statistics. TRE 803(9).

1. Authenticating Government Records. Recognized methods of authenticating government records include: proof that a public record, report, statement, or data compilation, authorized by law to be recorded and filed, and which was recorded or filed in a public office, is from that office (TRE 901(b)(7)); domestic public documents under seal, which are self-authenticating; domestic public documents not under seal, where a public officer with a seal has certified under seal that the signer has official capacity and that the signature is genuine, which are self-authenticating (TRE 902(2)); foreign public documents accompanied by a final certification, which are self-authenticating (TRE 902(3)); and copies certified as correct by the custodian or other person authorized to make the certification (TRE 902(4)). A copy of a government record can be authenticated by the testimony of any witness who has compared the copy to the original. TRE 1005. In a 5-4 decision, the Court of Criminal Appeals considered the common-law best-evidence rule, holding that it was permissible for a trial court to admit a faxed copy of a certified copy of a judgment that was faxed by a county clerk to a district clerk. *Englund v. State*, 946 S.W.2d 64 (Tex. Crim. App. 1997). In a subsequent case, the Waco Court of Appeals interpreted the *Englund* holding to mean that the best evidence rule was applicable to a party who attempts to use a duplicate or their recollection of a document as a substitute for the original in a circumstance where the language of that document is at issue. *Shugart v. State*, 32 S.W.3d 355, 363 (Tex. App.–Waco 2000, pet. ref'd). The Amarillo Court of Appeals stated the same principle in even broader terms: "[W]hen the only concern is with getting the words or contents of the document before the fact finder, then duplicate of the original serves as well as the original ... as long as no one legitimately questions authenticity or establishes unfairness." *Hood v. State*, 944 S.W.2d 743, 747 (Tex. App.–Amarillo 1997, no pet.).

2. The "Government Record" Hearsay Exception. Government records, if offered for the truth of the matter stated, are hearsay, and would not be admissible unless an exception to the hearsay rule is met. There is an exception to the hearsay rule which applies to government records. TRE 803(8) provides:

> **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 a civil case as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;

> unless the sources of information or other circumstances indicate lack of trustworthiness.

See Cowan v. State, 840 S.W.2d 435 (Tex. Crim. App. 1992) (the requirements for admissibility under "public records and reports" exception to the hearsay rule may be met by circumstantial evidence from the face of the offered document); *Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (letter from assistant U.S. attorney to Podiatry Board was not government record of U.S. Attorney's office, because it was not generated as a document pursuant to the attorney's duties as an assistant U.S. attorney; it was not a record of the State Podiatry Board because is was a third party communication that happened to appear in the records of the Podiatry Board). *Texas v. Williams*, 932 S.W.2d 546 (Tex. App.--Tyler 1995), *writ denied*, 940 S.W.2d 583 (Tex. 1996) (disapproving lower court opinion on other grounds), held that a certified copy of a DPS trooper's accident report was properly admitted under the TRE 803(8) exception to the hearsay rule.

In *Cole v. State*, 839 S.W.2d 798, 806 (Tex. Crim. App. 1990), the Court of Criminal Appeals held that the business record exception to the hearsay rule could not be used by the state to evade the government record preclusion of criminal investigative reports in criminal proceedings. *See Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) ("Even though official public records or certified copies thereof may be admissible in evidence, that does not mean that ex parte statements, hearsay, conclusions and opinions contained therein are admissible"). Even if the government record as a whole meets the government records hearsay exception, hearsay-within-hearsay issues can exist.

3. The "Absence of Public Record or Entry" Hearsay Exception. TRE 803(10) provides:

> 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.

See Harris County v. Allwaste Tank Cleaning, Inc., 808 S.W.2d 149, 152 (Tex. App.--Houston [1st Dist.] 1991, writ dism'd w.o.j.) (affidavit of executive director of Air Control Board stating absence of any permit to operate a facility could not be used as vehicle to introduce the director's interpretation of records that were on file, since that use of the affidavit made it hearsay).

4. 911-Recordings. In *In re Commitment of Cordova*, 618 S.W.3d 904, 921 (Tex. App.–El Paso 2021, no pet.), the court wrote: "[w]hen offered as a supporting framework or to otherwise develop other evidence, '911 tapes are generally admissible, even if not necessary to establish a material fact... ,'" quoting *Yi v. State*, No. 01-05-01147-CR, 2007 WL 2052064, at *4 (Tex. App. — Houston [1st Dist.] July 19, 2007, no pet.) (mem. op., not designated for publication); "s*ee also*, *e.g.*, *Estrada v. State*, 313 S.W.3d 274, 300 (Tex. Crim. App. 2010) (holding 911 recording admissible over a Rule 403 objection, even though it did not establish any material facts, where the recording provided a framework for developing evidence)."

J. BUSINESS RECORDS.

1. Authenticating Business Records. Business records can be authenticated by the testimony of a witness or by affidavit.

a. Proof by Testimony. Proof that the records meet the TRE 803(6) exception can be made by "the testimony of the custodian or other qualified witness." TRE 803(6). *E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 154 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (authenticity established by cross-examination of corporate employee who confirmed that the record was "one of you-all's internal documents at one of these various companies"). *See Sholdra v. Bluebonnet Savings Bank*, 858 S.W.2d 533, 534 (Tex. App.--Fort Worth 1993, writ denied) (records were not admissible where sponsoring witness failed to testify that records were made by persons with personal knowledge); *Texmarc Conveyor Co. v. Arts*, 857 S.W.2d 743, 748-49 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (record was admissible even though sponsoring witness admitted that he was not familiar with every detail of the record). There is no requirement that the custodian of the records be employed by the business at the time the record was made. *Dickey v. Club Corp. of America*, 12 S.W.3d 172, 176 (Tex. App.--Dallas 2000, pet. denied) ("The fact that Thornbrugh was not employed by the Club at the time . . . does not disqualify his knowledge of the Club's bylaws at that time. During employment, an employee may gain personal knowledge of regulations or procedures that were instituted prior to the time he was hired."); *accord*, *Waite v. BancTexas--Houston, N.A.*, 792 S.W.2d 538, 540 (Tex. App.--Houston [1st Dist.] 1990, no writ); *Boswell v. Farm & Home Sav. Ass'n*, 894 S.W.2d 761, 768 (Tex. App.--Fort Worth 1994, writ denied) ("The fact that Mather was not employed by Farm and Home, at the time the attested events occurred, does not disqualify his testimony providing he gained knowledge of the facts during his employment.")

b. Proof by Affidavit. Authentication of a business record can also be made by affidavit of the custodian or other qualified witness, where the terms of TRE 902(10) are met. TRE 902(10)(a) provides:

> **(10) Business Records Accompanied by Affidavit.**

> The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law, and the record and affidavit are served in accordance with subparagraph (A). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with subparagraph (A).
>
> > **(A) Service Requirement.** The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14 days before trial. The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a.
> >
> > **(B) Form of Affidavit.** An affidavit is sufficient if it includes the following language, but this form is not exclusive. The proponent may use an unsworn declaration made under penalty of perjury in place of an affidavit.. . . . [form affidavit omitted]

"[W]hen an ex parte affidavit presents evidence beyond the simple authentication requirements of rule 902, the extraneous portions of the affidavit constitute inadmissible hearsay." *Ortega v. CACH, LLC*, 396 S.W.3d 622, 630 (Tex. App.--Houston [14th Dist.] 2013, no pet.).

2. Hearsay Exception for Business Records. Business records are not excluded by the hearsay rule if they meet the criteria of TRE 803(6). Rule 803(6) creates an exception to the hearsay rule for records of a regularly conducted activity. The exception applies to:

- 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).

However, the exception does not apply when the source of information or the method or circumstances of preparation indicate lack of trustworthiness. TRE 803(6). For purposes of this exception to the hearsay rule, a business includes any and every kind of regular organized activity whether conducted for profit or not.

When business records are admitted under this exception to the hearsay rule, they are admitted for the truth of the matter stated in the records. *Overall v. Southwestern Bell Yellow Pages*, 869 S.W.2d 629, 633 (Tex. App.--Houston [14th Dist.] 1994, no writ). However, if the business records contain hearsay statements, the hearsay within the business records must meet a hearsay exception or they must be redacted.

Business records which are to be offered under a self-authenticating affidavit must be served on each other party to the case at least 14 days prior to the date trial begins. TRE 902(10)(A).

3. Prepared in Anticipation of Litigation. In *Ortega v. CACH, LLC*, 396 S.W.3d 622, 629-30 (Tex. App.--Houston [14th Dist.] 2013, no pet.), the court explained the rationale behind the business record exception to the hearsay rule:

> The theory underlying the business-records exception is that there is a certain probability of trustworthiness of records regularly kept by an organization while engaged in its activities and upon which it relies in the ordinary course of its activities. *Sneed v. State*, 955 S.W.2d 451, 453 (Tex .App.--Houston [14th Dist.] 1997, pet. ref'd) (citing *Coulter v. State*, 494 S.W.2d 876, 884 (Tex. Crim. App. 1973)). Therefore, if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness," even a properly authenticated record may be inadmissible. Tex.R. Evid. 803(6). Lack of trustworthiness is most frequently found when the record was prepared in anticipation of litigation. *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993)[4] ("[W]hen a document is created for a particular use that lies outside the business's usual operations — especially when that use involves litigation — neither of [Federal Rule 803(6)'s] justifications for admission holds.... [W]e adhere to the well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception."); *Freeman v. Am. Motorists Ins. Co.*, 53 S.W.3d 710, 714-15 (Tex. App.--Houston [1st Dist.] 2001, no pet.) (concluding that when the facts indicate that a letter from the plaintiff's doctor to his attorney was written in response to a request from the attorney, it was likely prepared in anticipation of litigation and was thus not admissible as a business record).

4. Records of Second Business Inside First Business. There are circumstances in which the records of one business have been held to be business records of another business. For example, in *Cockrell v. Republic Mtg. Ins. Co.*, 817 S.W.2d 106, 112-13 (Tex. App.--Dallas 1991, no writ), the appellate court said that a document from one business can become a record of another business if the second business determines the accuracy of the information generated by the first business. And in *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252 (Tex. App. -- Houston [1st Dist.] 1992, writ den. the appellate court found invoices from outside vendors to have become business records of the receiving company,

where they became assimilated into company's record-keeping system. *See Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982) (subcontractor's invoices became integral part of builder's records where builder's employees' regular responsibilities required them to verify subcontractors' performance and accuracy of the invoices). In *Harris v. State*, 846 S.W.2d 960, 963 (Tex. App.--Houston [1st Dist.] 1993, pet. ref'd), the manufacturer's certificate of origin from General Motors Corporation, relating to an automobile, was held to be admissible as a business record of the local automobile dealer. However, the principle was not applied in *Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 626 (Tex. App.--Fort Worth 1990, no writ), where the court held that repair bills received by a business for repairs to its equipment were not business records of the business obtaining the repairs. In *National Health Resources Corporation v. TBF Financial, LLC*, No. 05-13-00351-CV (Tex. App.–Dallas March 27, 2014, no pet.), the court said: "[a] document created by one business may become a record of a second business if the second business 'determines the accuracy of the information generated by the first business.'"

K. COMPUTERIZED INFORMATION: AUTHENTICATION, BEST EVIDENCE & HEARSAY.

1. Authentication. When computers were new, one appellate court expressed the view that proof regarding the reliability of the computer equipment in question was a necessary prerequisite to the admission of business records generated by that computer. *Railroad Comm'n v. So. Pacific Co.*, 468 S.W.2d 125, 129 (Tex. Civ. App.--Austin 1971, writ ref'd n.r.e.). Since then, courts have long forgotten any requirement for proving the validity of the computing process as a condition for admitting business records. Courts now agree that computerized business records can be proved up in the same manner as hand-written business records. *See Voss v. Southwestern Bell Tel. Co.*, 610 S.W.2d 537, 538 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.) (computer records admissible if requirements for business records are met). *Accord*, *Longoria v. Greyhound Bus Lines, Inc.*, 699 S.W.2d 298, 302 (Tex. App.--San Antonio 1985, no writ), (computerized business records may be authenticated in the same manner as other business records, and it is not necessary to show that the machine operated properly or that the operator knew what he was doing; at its inception, however, the data itself must be based upon personal knowledge); *Hutchinson v. State*, 642 S.W.2d 537, 538 (Tex. App.--Waco 1982, no writ) (criminal case) (adopting same rule established in civil cases regarding admissibility of computer-generated records). *See Hill v. State*, 644 S.W.2d 849, 853 (Tex. App.--Amarillo 1982, no writ) (telephone company records admissible as business records, even though the information was initially recorded automatically on magnetic tape, rather than by human being).

2. Best Evidence Rule. TRE 1001(3) provides that "[i]f data are stored in a computer or similar device, any print-out or other output readable by sight, shown to reflect the data accurately, is an 'original'." In *Robinson v. State*, No. B14-91-00458-CR (Tex. App.--

Houston [14th Dist.] 1992, pet. ref'd) (not for publication), the Court held that it was proper to permit a witness to testify to the results of a computer search without qualifying as an expert or presenting computer printouts. In this case, the witness said that a computer search on the bank's computer confirmed that an account number on a suspicious check was fictitious. According to the Court, the best evidence rule was not implicated because the witness was merely explaining the process he went through to determine whether an account number was a valid one with his bank. The Court also said that the best evidence rule did not apply because the evidence was offered to show the non-existence of a bank account. The case raises an interesting question. The best evidence rule objection would go to the computer data reflecting the results of the search. Can the witness properly testify to what the computer search indicated, without introducing into evidence a printout of the results, or is such testimony tantamount to oral testimony as to the contents of a writing? Arguably TRE 1001(3)'s provision, that the best evidence rule is met by a print-out or "other output readable by sight," applies to print-out brought to court or output readable by sight in the courtroom.

3. Hearsay. Hearsay is defined as a statement of a *person*. TRE 801(a). A machine is not a person, and therefore computer output is not inherently hearsay. *Stevenson v. State*, 920 S.W.2d 342, 343 (Tex. App.--Dallas 1996, no pet.). However, a computer may issue information that *contains* hearsay. In dealing with computerized records, it is important to distinguish human communications stored on a computer, or human communications processed by a computer, from computer-generated information that reflects the internal operation of the computer. For example, in *Burleson v. State*, 802 S.W.2d 429 (Tex. App.--Fort Worth 1991, pet. ref'd), a prosecution for harmful access to computer, the court held that information displayed by computer, as to how many payroll records were missing, was not hearsay, because it was not an out-of-court statement made by a *person*. Even if it were, said the court, the computer operator, who testified based on what he saw on the computer display, qualified as expert who could rely on the computer's display, even if the display's results were not admissible. The court observed, however, that the information reflected on the computer display was "generated by the computer itself as part of the computer's internal system designed to monitor and describe the status of the system." *Id.* at 439. The court cited two out-of-state cases. In *People v. Holowko*, 109 Ill.2d 187, 93 Ill.Dec. 344, 486 N.E.2d 877, 878-79 (1985), the Illinois Supreme Court held that computerized printouts of phone traces were not hearsay because such printouts did not rely on the assistance, observations, or reports of a human declarant. The print-out was "merely the tangible result of the computer's internal operations." In *State v. Armstead*, 432 So.2d 837, 839-41 (La. 1983), the Louisiana Supreme Court held that computerized records of phone traces were not hearsay, in that they were computer-*generated* rather than computer-*stored* declarations. *Burleson v. State*, 802 S.W.2d at 439 n. 2.

In *May v. State*, 784 S.W.2d 494, 497 (Tex. App.--Dallas 1990, pet. ref'd), the appellate court held that numbers viewed on an intoxilyzer's computer screen were hearsay. *May* in

turn relied upon *Vanderbilt v. State*, 629 S.W.2d 709, 723-24 (Tex. Crim. App. 1981), which held that it was improper for the state's firearm witness, not testifying as an expert, to relate that a computer search of an FBI database rendered a print-out of a list of weapons that could generate the ballistic markings on the bullet in question, and that the gun in question was on that list. The Court of Criminal Appeals cited to an earlier case where it had held it to be error for a witness to repeat in front of the jury information obtained from a computer database. *See Vanderbilt*, 629 S.W.2d at 723. The conclusion reached in *May* was criticized in Schlueter, *Hearsay--When Machines Talk*, 54 TEX. B.J. 1135 (Oct. 1990). It is apparent that in *May* the Dallas Court of Appeals did not distinguish testimonial information contained in a computer information file from computer-generated calculations based on a scientific algorithm, with no component of human communication. This error was rectified in *Stevenson v. State*, 920 S.W.2d 342 (Tex. App.--Dallas 1996, no pet.), which said: "We overrule *May* only as to the language that refers to the intoxilyzer result, itself, as hearsay." *Id.* at 344.

Telephone company bills were admitted under the business record exception in *United States v. Vela*, 673 F.2d 86, 89 (5th Cir. 1982). A hotel's computer records reflecting the time of telephone calls were admitted as business records in *United States v. Linn*, 880 F.2d 209, 216 (9th Cir. 1989).

4. Process or System. If an attack is to be levied on computer-generated information, as opposed to computer-stored human communications, the attack would be an attack on authenticity under TRE 901(b)(9), relating to a process or system, for failure to show that a process or system that was used to produce the result produces an accurate result. In the *Holowko* case referred to above, the Illinois Supreme Court noted that judicial notice of the reliability of computer science might be appropriate in certain situations. The Louisiana Supreme Court, in *Armstead*, also referred to above, likened the computer-generated information to demonstrative evidence of a scientific test or experiment.

When a computer program takes data and processes it to reach a result, there can be serious questions about the validity of the process. If the input is hearsay, then the output is hearsay. If the hearsay input meets an exception to the hearsay rule, then the output should meet the same exception. In some instances, the calculations or processing performed by the computer program will require proof of accuracy. The validity of standardized software, such as a business calculator, are not suspect and should be easy to authenticate. For proprietary software that makes calculations or generates charts or graphs based on non-standardized programming, the validity of the program is definitely in issue. For example, in an electronic spreadsheet, the proponent will need to establish that correct formulas were entered into the spreadsheet. Professor Raymond R. Panko, of the University of Hawaii College of Business Administration, published a paper in 1998 entitled *What We Know About Spreadsheet Errors*. Prof. Panko said: ". . . [A] number of consultants, based on practical experience, have

said that 20% to 40% of all spreadsheets contain errors." Prof. Panko also cites a number of scientific studies of spreadsheet programming that suggest high error rates are common. Prof. Panko goes on to dissect the process of spreadsheet programming to determine areas of likely errors. In specially-designed software, the validity of the programming approach can be a big concern. An example would be a computer-based model used to calculate future lost profits. In such situations, the underlying code should be made available in discovery so that the operation of the program can be checked and the program can be tested.

5. E-Mail and Text Messages. Special problems are presented by email and text messages.

a. Authentication. TRE 901(a) requires, as a condition to admissibility, that the party offering an exhibit produce evidence sufficient to support a finding that the matter in question is what its proponent claims. There can be complications surrounding proof of the authorship of an email message, and the accuracy of the permanent record of the email transmission. Some email software makes it possible to falsely attribute email to another sender. An email produced by the opposing party in discovery can be authenticated for use against that party by giving notice under TRCP 193.7, if the producing party does not object.

b. Best Evidence Rule. A print-out or image of an email message or text stored on a computer (including a cell phone) is considered to be an original for purposes of the best evidence rule, TRE 1001(c), if the print-out is shown to reflect the data accurately.

c. Hearsay. An email or text message is an out-of-court statement, and is potentially hearsay. An email or text message is not hearsay if it is not offered for the matter asserted TRE 801(c), or if it is an admission of a party opponent, TRE 801(e)(2). If the email or text message is hearsay, then the proponent must find an exception to the hearsay rule that applies. In *Vermont Electric Power Co., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F. Supp.2d 441 (D. Vt. 1999), emails between a corporation's employees were admitted as admissions of a party opponent. In *U.S. v. Ferber*, 966 F.Supp. 90, 98 (D. Mass. 1997), the issue was the admissibility of an intra-company email that recounted a telephone conversation. The trial court rejected an argument invoking the business record exception to the hearsay rule, on the ground that the proponent failed to prove that the business had a routine business practice of regularly maintaining copies of emails sent between employees. The court also rejected the email as an excited utterance under FRE 803(2), since it was made several moments after the telephone conversation recounted in the email. *Id.* at 99. However, the court admitted the email as a present sense impression, under FRE 803(1). The business record exception was rejected for an email message in *Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994). Because of this troubling precedent, some authors suggest that companies enact specific internal policies on email retention. *See* Robert L. Paddock, *Utilizing E-Mail as Business Records Under the Texas Rules of Evidence*, 19 REV. OF LITIG. 61, 67 (2000) (citing articles to that effect).

Articles. *See* Robert L. Paddock, *Utilizing E-Mail as Business Records Under the Texas Rules of Evidence*, 19 REV. OF LITIG. 61 (2000); Andrew Jablon, *"GodMail": Authentication and Admissibility of Electronic Mail in Federal Courts*, 34 AM. CRIM. L. REV. 1387 (1997); Thomas, *Legal Responses to Commercial Transactions Employing Novel Communications Media*, 90 MICH. L. REV. 1145 (1992); Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence*, 80 NW. U.L. REV. 956 (1986).

L. AUDIO RECORDINGS. The old rule regarding the admissibility of audio recordings of conversations was stated in *Boarder to Boarder Trucking, Inc. v. Mondi, Inc.*, 831 S.W.2d 495, 497 (Tex. App.--Corpus Christi 1992, no writ):

> Tape recordings are a fair representation of a transaction, conversation, or occurrence. Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex. 1980). A fair representation may be shown by these seven elements: 1) a showing that the recording device was capable of taking testimony, 2) a showing that the operator of the device was competent, 3) establishment of the authenticity of the correctness of the recording, 4) a showing that changes, additions, or deletions have not been made, 5) a showing of the manner of the preservation of the recording, 6) identification of the speakers, and 7) a showing that the testimony elicited was voluntarily made without any kind of inducement. Id. Some of these elements may be inferred and need not be shown in detail. Id.

Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex.1980); *In re TLH*, 630 S.W.2d 441, 447 (Tex. App.--Corpus Christi 1982, writ dism'd). "Some of these elements may be inferred and need not be shown in detail. For example, if a person hears and records a conversation or hears a conversation and a recording of the conversation, testified the recording is a fair representation, it can be inferred the recording device was capable of taking testimony and the operator was competent. The voluntary nature of the conversation may be inferred from the facts and circumstances of each case." *Seymour*, at 898. *See Hinote v. Local 4-23*, 777 S.W.2d 134, 146-47 (Tex. App.--Houston [14th Dist.] 1989, writ denied) (tape recording admitted).

The Court of Criminal Appeals has applied the general methods of authentication set out in the Texas Rules of Evidence, such as distinctive characteristics, voice identification, call to phone number assigned to a particular person or business, corroborated by surrounding circumstances; process or system; etc. *Stapleton v. State*, 868 S.W.2d 781, 786 (Tex. Crim. App. 1994) (although police department tape recording was properly authenticated by TEX. R. CRIM. EVID. 901(a), the tape recording did not meet the business record exception to the hearsay rule because no one associated with police department had personal knowledge about things said on the tape). *See Narvaiz v. State*, 840 S.W.2d 415, 431 (Tex. Crim. App. 1992)

(police department tape of 911 call admitted based on testimony police dispatcher who took the call); *Allen v. State*, 849 S.W.2d 838, 842 (Tex. App.--Houston [1st Dist.] 1993, pet. ref'd) (unnecessary to identify background voices as condition to admitting tape); *Leos v. State*, 883 S.W.2d 209 (Tex. Crim. App. 1994) (error to admit tape recording where some of the voices on the tape were not identified); *Brooks v. State*, 833 S.W.2d 302, 305 (Tex. App.—Fort Worth 1992, no pet.) (duplicate copy of tape recording of 911 call was properly authenticated, even though it was electronically enhanced to remove tape hiss). Using a modern approach to authentication, the Court of Criminal Appeals ruled a videotape inadmissible in *Kephart v. State*, 875 S.W.2d 319 (Tex. Crim. App. 1994).

Under the rule of the *Stapleton* case, the ordinary methods of authentication apply. *See* Schlueter, *Authentication: Audio and Videotapes Revisited*, 57 TEX. B.J. 981 (1994).

One case held that, when an audio recording is admitted, it is error to admit written transcripts of the recording. However, the error was found harmless because the information was cumulative. *In re Thoma*, 873 S.W.2d 477, 487-88 (Tex. Rev. Trib. 1994) (judicial disciplinary proceeding). Anyone who has played an audio recording of a conversation to a judge or jury without a transcript may question the wisdom and practicality of this decision.

Note that there can still be a hearsay problem, even when audio recording has been authenticated.

M. VIDEO RECORDINGS. In *Fowler v. State*, 544 SW 3d 844, 848 (Tex. Crim. App. 2018), the Court posed the question: "May the proponent of a video sufficiently prove its authenticity without the testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device?" The Court answered: "Our answer to this question is — yes, it is possible." The Court went on to say:

> [E]ven though the most common way to authenticate a video is through the testimony of a witness with personal knowledge who observed the scene, that is not the only way. Evidence can also be authenticated by "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."

The Court went on to say that video recordings without sound are treated as photographs, and "are properly authenticated when it can be proved that the images accurately represent the scene in question and are relevant to a disputed issue." *Id.* at 849.

In *State v. Martinez*, No. 13-20-00169-CR (Tex. App.–Corpus Christi Jan. 20, 2022, no pet.), the court considered a video made by a police officer using his cell phone. The trial court suppressed the video because the officer "selectively" recorded portions of the surveillance

footage rather than recording "the entire thing." *Id.* The appellate court (in a 2-1 decision) said that "there is no rule of evidence or other authority requiring "the entire thing" to be offered into evidence in order for a part of the whole to be admissible.[2] Instead, whether a video recording is 'complete' goes to the weight of the evidence, not its admissibility." *Id.* The dissenting Justice argued that trial judges should have the power to exclude a recording when they think it does not fairly depict the scene in question. *Id.*

N. REMOTE TESTIMONY.

1. COVID19 Measures. The Texas Supreme Court's First Emergency Order Regarding COVID-19 State of Disaster, Misc. Docket No. 20-9042 authorized all courts in Texas to "[a]llow or require anyone involved in any hearing, deposition, or other proceeding of any kind--including but not limited to a party, attorney, witness, or court reporter, but not including a juror--to participate remotely, such as by teleconferencing, videoconferencing, or other means." Additionally, the Supreme Court authorized all courts in Texas to "[c]onsider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means." TRCP 199.1(b) permits the officer taking the deposition (i.e., court reporter) to be located with the witness or with the party noticing the deposition. By the time of the 47th Emergency Order (Jan. 19, 2022), the Supreme Court continued to authorize courts to "allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means ...."

2. Child Witness. Texas Family Code ch. 104 contains several provisions that permit a court to temper or avoid having the child testify in a child abuse proceeding. TFC § 104.002 permits the court to admit a prerecorded oral statement of a child 12 or younger, who is alleged to be abused, if: (i) no attorney for a party was present; (ii) the recording shows both sight and sound; (iii) the equipment was capable and the operator competent, and the recording is accurate and not altered; (iv) there are no leading questions; (v) each recorded voice is identified; (vi) the interviewer appears in court and is subject to cross-examination; and (vii) each party can examine the recording before it is offered into evidence. TFC § 104.003(a) permits a court, upon motion of party, to cause the testimony of a child (no age specified) to be taken outside the courtroom later to be played to the factfinder and the parties. Under TFC § 104.003(b), only the parties' attorneys, an attorney ad litem, or other persons "whose presence would contribute to the welfare and well-being of the child," and equipment operators, can attend the taping session.

TFC § 104.003(c) says that only the attorneys for the parties can question the child. It is not clear if this excludes the attorney ad litem. TFC § 104.003(d) says that the equipment operators must be hidden and the child kept unaware that recording is occurring. TFC

§ 104.003(e) requires the court to ensure that (i) the recording is both visual and aural and is recorded; (ii) that the recoding equipment was capable and the operator competent, and the recording accurate and not altered; (iii) that each recorded voice is identified; and (iv) each party is permitted to examine the recording before it is shown in the courtroom.

TFC § 104.004 permits the court in a suit affecting the parent-child relationship to have the testimony of a child 12 years or younger, who has allegedly been abused, presented outside the courtroom while being televised into the courtroom by closed-circuit equipment.

TFC § 104.005(a) says that, if the testimony of the child is provided in the manner described in Chapter 104, the child cannot be compelled to testify. Section 104.005(b) provides that the court can utilize the procedures under Chapter 104 if the child is incapable of testifying in open court due to a medical condition.

O. RESPONSE TO REQUEST FOR PRODUCTION. Ordinarily, documents are hearsay and are inadmissible unless they meet an exception to the hearsay rule. TRE 801. One case held that a party's written response to a request for production "should be treated in the same manner as documents produced in response to the request." *Wal-Mart Stores, Inc. v. Cordo*, 856 S.W.2d 768, 772 (Tex. App.--El Paso 1993, writ denied). In that case, the defendant's response that "the store did not have a safety manual at the time of the incident in question" was properly read to the jury.

III. PRESENTATION OF EVIDENCE DURING TRIAL. The admissibility of evidence can be viewed at different stages of a court proceeding. Additionally, there are evidentiary rules that are triggered by the admission of certain evidence in trial.

A. THE ORDER OF PROCEEDINGS. There are evidentiary aspects to the different phases of a trial. See Tex. R. Civ. P. 265.

1. Voir Dire. In olden times, lawyers would begin trying their case to the venire in voir dire, presenting the evidence and asking panelists how they react to it. That came to a halt with *Hyundai v. Motor Co. v. Vasquez*, 89 S.W.3d 743, 753 (Tex. 2006), where the Supreme Court said it is improper to ask prospective jurors what their verdict would be if certain facts were proved. In *Vasquez*, a child died in a low-impact automobile collision, but she was not wearing a seat belt at the time of the accident. The plaintiffs' attorney asked the venire whether the fact that Amber was not wearing her seatbelt would affect their verdict. The Supreme Court said it is improper to exclude jurors who stated that they would give certain evidence great or little weight. The Court wrote: "When all of the parties to the case engage in such questioning, the effort is aimed at guessing the verdict, not at seating a fair jury." *Id.* at 752. Nowadays lawyers are attempting to ferret out potential jurors' biases and prejudices by referring to abstract concepts or analogies and not to the facts of the case.

2. Opening Argument. TRCP 265(a) provides that "The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court." In *Ranger Insurance Co. v. Rogers*, 530 S.W.2d 162 (Tex. App.–Austin 1975, writ ref'd n.r.e.), the court said:

> Rule 265(a) does not afford counsel the right to detail to the jury the evidence which he intends to offer, nor to read or describe in detail the documents he proposes to offer. The practice of detailing the expected testimony in the opening statement places matters before the jury without the trial court having had an opportunity to determine the admissibility of such matters. See Abbots Civil Jury Trials, §§ 96 and 97 (5th ed. 1935). We are of the further opinion that such a practice sometimes has the effect of misleading or confusing the jurors as between the expectations of counsel and evidence actually admitted. The proper limitation of the opening statement is a matter necessarily resting in the discretion of the trial court subject to review for abuse of discretion. 1 Thompson on Trials, § 266 (2nd ed. 1912). ... The opening statements of counsel for appellees and appellant were in violation of Rule 265(a). The district court should not have tolerated counsel for either party to have detailed the evidence which he expected to introduce, and the court's failure to limit counsel was erroneous.

Id. at 170. This persepctive has not been widely accepted in later cases. Statements made during opening argument can "open the door" to admitting otherwise inadmissible evidence. *See Bass v. State*, 270 S.W.3d 557 (Tex. Crim. App. 2008) (criminal defense opening statement may open the door to the admission of extraneous-offense evidence to rebut defensive theories presented in that opening statement).

3. The Evidence Phase. Under TRCP 265(b), after opening arguments "[t]he party upon whom rests the burden of proof on the whole case shall then introduce his evidence." Then, under TRCP(c) & (d) the adverse party can give an opening argument unless she already did so, followed by the presentation of her evidence. Under TRCP 265(f), the parties present rebutting testimony.

TRE 614 requires the court, sua sponte or at any party's request, to order witnesses to be excluded from the courtroom and instructed not to discuss their or other witnesses' testimony. This rule of exclusion appeared as long ago as the third Century A.D., and the story of Susannah in the Book of Daniel attests to the common sense of the rule. (Tex. Code Crim. Proc. art. 36.03 gives the court discretion to exempt from the rule a close relative of a victim unless the court determines that the testimony of the witness would be materially affected if the witness hears other testimony at the trial.) The rule exempts parties, a

designated representative of an entity, and a person whose presence a party shows to be essential to presenting the party's claim or defense (typically an expert).

4. Parties Resting. When a party rests, the opposing party can move for a directed verdict (in a non-jury trial it would be a motion for judgment) where the case, or some issue in the case, can be resolved as a matter of law without the need of a fact finding. *Vance v. My Apartment Steak House, Etc.*, 677 S.W.2d 480, 483 (Tex. 1984) ("A defendant is entitled to a directed verdict only when reasonable minds could reach but one conclusion under the available evidence"); *Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303 (Tex. 1988) ("The appellate standard of reviewing the propriety of granting a motion for directed verdict in a jury trial applies equally to the granting of a motion for judgment in a trial to the court"). If denied, this motion preserves a legal sufficiency of the evidence challenge on appeal. If the defendant moves for a directed verdict when the plaintiff rests, and the motion is denied, and the defendant puts on evidence, the motion for directed verdict must be renewed when the defendant rests or it is waived. If the plaintiff puts on rebuttal evidence, the motion must be renewed when the plaintiff rests its case.

5. Jury Charge. The jury charge consists of definitions, instructions, and questions. You can preserve a legal sufficiency of the evidence challenge by objecting to definitions, instructions and questions that are related to an issue as to which no evidence has been presented. That error may have already been preserved by a motion for directed verdict, and can be preserved later by motion for judgment nov, and even by motion for new trial (which would get you a remand and not a rendition of judgment). But it is the best practice to have your legal sufficiency challenge ruled on at the jury charge stage.

6. Closing Argument. TRCP 269(e) provides: "Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel...." "The purpose of closing argument is to facilitate the jury in properly analyzing the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence." *Milton v. State*, 572 SW 3d 234, 239 (Tex. Crim. App. 2019). Closing arguments that are based on the evidence and inferences from the evidence are proper, and some hyperbole is allowed. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 837 (Tex. 1979) ("[h]yperbole has long been one of the figurative techniques of oral advocacy"). "The injection of new and inflammatory matters into the case through argument has in exceptional instances been regarded as incurable by an instruction." *Id.* at 840. "Attorneys must confine their arguments to the evidence and the argument of opposing counsel." *Whirlpool Corporation v. Camacho*, 251 S.W.3d 88 (Tex. App.–Corpus Christi 2008), *rev'd on other grounds*, 298 S.W.3d 631 (2009). "We have previously held that a party can make a brief reference to non-record facts in order to make an analogy." *Milton v. State*, 572 S.W.3d 234,

243 (Tex. Crim. App. 2019). Where one party's lawyer goes outside the evidence, it is proper to object. Oftentimes, however, one party's lawyer going outside the evidence is taken as an invitation for the other party's lawyer to go outside the evidence. In either event, the jury may hear "evidence" in closing argument that is at the far extreme of an inference from the evidence or even goes beyond inferences from the evidence.

7. Attacking the Verdict. A challenge to the legal sufficiency of the evidence is preserved through a (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue or (5) a motion for new trial. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985). A challenge to the factual sufficiency of the evidence is preserved by waiting until judgment is signed and filing a motion for new trial. Tex. R. Civ. P. 324(b); *Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991).

B. DIRECT AND CROSS EXAMINATION. On direct examination, the lawyer is free to ask any question, not subject to a motion in limine, that will elicit relevant information. Lay witnesses can testify only to things that are rationally based on the witness's perception (i.e., personal knowledge). TRE 701. See Section V.A below. So with a lay witness it is necessary to "lay the foundation" by showing personal knowledge, and upon the failure to do so opposing counsel can object to "no showing of personal knowledge" or "failure to lay a proper predicate." An expert witness, in contrast, can testify to an opinion without first disclosing the underlying facts or data, unless otherwise ordered by the court. TRE 705(a). While Federal Rule of Evidence 611 confines cross-examination to the subject matter of the direct examination and matters affecting the witness's credibility, TRCP 611 says that "[a] witness may be cross-examined on any relevant matter, including credibility." Thus it is said that we have "wide open" cross examination in Texas. *Felder v. State*, 848 SW 2d 85, 99 (Tex. Crim. App. 1992) ("In Texas, the scope of cross-examination is wide open").

C. WITNESS REFRESHING MEMORY. A witness is permitted to refresh his or her memory by looking at notes or prior writings. However, under TRE 612, if a witness uses a writing to refresh his memory for purposes of testifying, the opposing party may be able to see that writing. If the witness uses the writing to refresh memory *while testifying*, "an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony." TRE 612(b). The Rule seems to apply even when the portions of the writing would otherwise be inadmissible. If the witness uses the writing to refresh his memory before testifying, the other party can see the writing if the trial court decides that justice requires it. *See City of Dennison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.--Dallas 1986, no writ). If the writing contains unrelated matter, the court must review the document in camera and delete any unrelated portion. TRE 612(b). If a party fails to produce the document as ordered, in a civil case the court "may issue any appropriate order."

D. "OPENING THE DOOR" TO INADMISSIBLE EVIDENCE. "[O]therwise inadmissible evidence may be admitted if the party against whom the evidence is offered 'opens the door.' But, the party offering the evidence may not 'stray beyond the scope of the invitation.'" *Schutz v. State*, 957 SW 2d 52, 71 (Tex. Crim. App. 1997) (quoting *Bush v. State*, 773 S.W.2d 297, 301 (Tex. Crim. App. 1989). In *Southwestern Elec. Power Co. v. Burlington Northern Railroad Co.*, 966 S.W.2d 467 (Tex. 1998), the Court said: "SWEPCO 'opened the door' regarding the relationship between the financial condition of the parties and whether there had been a gross inequity under the contracts. 'A party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he, himself, introduced the same evidence or evidence of a similar character.'" In *Gabriel v. Lovewell*, 164 S.W.3d 835, 842-43 (Tex. App.--Texarkana 2005, no pet.), the court wrote:

> "Opening the door" or inviting testimony that would otherwise pertain to an inadmissible subject matter does not mean that such testimony is necessarily invited into evidence in any form, including hearsay.[3] However, where such testimony pertains to the same subject matter and is directly contrary to earlier testimony, it is admissible, including hearsay.[4] In the instant case, Lovewell's testimony pertained to the same subject matter as did Howton's testimony and was directly contrary to Howton's testimony.[5] This evidence was clearly admissible for the limited purpose of impeaching Howton's earlier testimony. The trial court properly admitted it over the Gabriels' hearsay objection.

E. REMAINDER OF RELATED WRITINGS OR RECORDED STATEMENTS. TRE 106 provides:

> If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions

It is important to recognize that Rule 106 may make inadmissible evidence admissible. "[Rule 107] allows the admission of otherwise inadmissible evidence to fully and fairly explain a matter broached by the adverse party.... [T]he omitted portion of the statement must be on the same subject and must be necessary to make the admitted portion fully understood." *In re C.C.*, 476 S.W.3d 632, 635 (Tex. App.--Amarillo 2015, no pet.).

The inability of a party to introduce the remainder of the writing cannot use that inability to exclude a recorded statement. *Lomax v. State*, 16 S.W.3d 448, 450 (Tex. App.--Waco 2000, no pet.)

F. THE RULE OF OPTIONAL COMPLETENESS. Under TRE 107, when a party introduces into evidence of "an act, declaration, conversation, writing, or recorded statement," the Rule of Optional Completeness permits an adverse party to "inquire into any other part on the same subject," or to "introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent." *Azar Nut Co. v. Caille*, 720 S.W.2d 685 (Tex. App.--El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987), applied the Rule to a letter written in response to another letter which was admitted into evidence. TRE 107 specifically applies the Rule to depositions. Justice Nathan Hecht, in Hecht, *Common Evidence Problems*, STATE BAR OF TEXAS ADVANCED EVIDENCE AND DISCOVERY COURSE pp. DD 4-6 (1990), suggested that the rule does not apply to ordinary oral testimony.

G. DEPOSITIONS. TRCP 203.6(b) provides that "[a]ll or part of a deposition may be used for any purpose in the same proceeding in which it was taken." TRCP 203.6(c) says: "Depositions taken in different proceedings may be used as permitted by the Rules of Evidence."

1. Remote Depositions. The Texas Supreme Court's First Emergency Order Regarding COVID-19 State of Disaster, Misc. Docket No. 20-9042 authorized all courts in Texas to "[a]llow or require anyone involved in any hearing, deposition, or other proceeding of any kind--including but not limited to a party, attorney, witness, or court reporter, but not including a juror--to participate remotely, such as by teleconferencing, videoconferencing, or other means." Additionally, the Supreme Court authorized all courts in Texas to "[c]onsider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means." TRCP 199.1(b) permits the officer taking the deposition (i.e., court reporter) to be located with the witness or with the party noticing the deposition. In its 47th Emergency Order (Jan. 19, 2022), the Supreme Court carried forward this authorization.

2. Rule of Optional Completeness (Depositions). Under TRE 107, the Rule of Optional Completeness applies to a deposition.

3. Using Deposition from Another Case. TRE 804(b)(1) (Exceptions to the Rule Against Hearsay–When the Declarant is Unavailable as a Witness; the Exceptions), creates an exception to the hearsay rule for the testimony of a witness given at a prior hearing in the same or another case, or testimony given in a deposition taken in another case, if the party against whom the testimony is now offered, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In *Keene Corp. v. Rogers*, 863 S.W.2d 168, 176-77 (Tex. App.--Texarkana 1993, no writ), a party offered a deposition of an expert witness taken in 1983, in a case against the same corporate defendant, regarding when the witness informed the corporation

about the dangers to workers of products containing asbestos. The tender was rejected, because there was no showing that the witness was "unavailable." The Court remarked that "[I]n Texas, unavailability of a witness means that the witness is dead, has become insane, is physically unable to testify, is beyond the jurisdiction of the court, or that the whereabouts of the witness is unknown and that a diligent search has been made to find the witness, or that the witness has been kept away from the trial by the adverse party." *Id.* at 177. *See Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975). In the instant case, counsel only made the unsworn assertion that the witness was aged and no longer appearing live in court cases.

4. Editing and Mixing Video Depositions. In editing a video deposition for playing at trial, what is the propriety of switching around questions and answers so that they flow in a different sequence from the original sequence? There has been some disagreement over that point. In *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App.--Texarkana 1992, no writ), an issue arose as to whether a party could rearrange a videotaped deposition, and play it in its new sequence to the jury. Chief Justice Cornelius authored an opinion saying that "[a] party, as a matter of trial strategy, is entitled to present his evidence in the order he believes constitutes the most effective presentation of his case, provided that it does not convey a *distinctly false* impression." *Id.* at 866. [Emphasis added.] The Chief Justice wrote, however, that it would not be proper to introduce a partial answer to a single question, or to mismatch questions and answers. *Id.* at 866, n. 1. However, the trial court had the power to order the entire deposition into evidence, under the rule of optional completeness, TRE 106. *Id.* Justice Bleil concurred in the holding, while nonetheless saying that the Chief Justice's opinion was "ill advised and overly broad." *Id.* at 868 (Bleil, J., concurring). He contested the view that a party has an absolute right to present evidence in any order he wanted, so long as a false impression was not created. Justice Bleil believed that the trial court has great leeway in directing the order of trial proceedings and that refusal to permit a party to play to the jury a rearranged video deposition should not be reversible error. Justice Grant concurred separately, agreeing with the trial court's stated concern that the opposing party's right for the jury to hear the cross-examination and re-cross relating to the direct examination and re-direct would be difficult to sort out if the order of the direct and re-direct were altered. *Id.* at 868. In *Gunn v. McCoy*, 554 S.W.3d 645, 667 (Tex. 2018), the Supreme Court considered the trial court's exclusion of a deposition of an expert with that was edited to delete his qualifications. The Supreme Court said:

> Litigants in Texas are afforded a broad right to make strategic decisions when introducing evidence at trial, and they are entitled to present experts in a manner of their choosing, so long as it is consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence. *E.g., Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App. -- Texarkana 1991, writ denied) ("A party, as a matter of trial strategy, is entitled to present his evidence in the order he believes constitutes the most effective presentation of his case, provided that it does not convey a distinctly false

impression."). Our rules make deposition testimony admissible without regard to the party's availability to appear live. TEX. R. CIV. P. 203.6(b) ("All or part of a deposition may be used for any purpose in the same proceeding in which it was taken."); TEX. R. EVID. 801(e)(3) (indicating that a deponent's statement is not hearsay and "[t]he deponent's unavailability as a witness is not a requirement for admissibility"). Texas Rule of Civil Procedure 203.6 allows any part of a deposition to be presented in evidence, and no rule requires that the deposition be entered in its entirety. TEX. R. CIV. P. 203.6(b). On the contrary, the rule of optional completeness offers the adverse party a remedy if their sole objection to the deposition testimony is its completeness. TEX. R. EVID. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part ... that in fairness ought to be considered at the same time. `Writing or recorded statement' includes depositions."); Jones, 820 S.W.2d at 866. OGA's attorney indicated at the time of the objection that Dr. Schilling's qualifications were contained in the proffered video cuts, and considering the deposition transcript, we see no reason to doubt that representation. Moreover, Dr. Schilling's qualifications were established in Dr. Gunn and OGA's offer of proof, referencing page and line numbers of the same deposition testimony they sought to present by video. Accordingly, we hold that the trial court abused its discretion in excluding Dr. Schilling's testimony.

H. DEMONSTRATIVE AIDS. Demonstrative aids are charts, and diagrams, and slides, and PowerPoint slides used by lawyers and witnesses in the courtroom to explain testimony to the judge or jury.

1. Duty to Produce in Advance of Trial. When a party has requested the production of all documents relating to the case, a question arises as to whether the opposing party is required to produce charts and diagrams, to be used as demonstrative aids, 30 days in advance of trial. The Author could find no published cases addressing the question. However, TRCP 192.3(b) specifically says that graphs and charts are discoverable.

2. Admissibility of Demonstrative Aids. "The admission of charts or diagrams which are designed to summarize or emphasize a witness's testimony is a matter which lies within the sound discretion of the trial court." *Schenck v. Ebby Halliday Real Estate*, 803 S.W.2d 361, 369 (Tex. App.--Fort Worth 1990, no writ). "In a complex case, trial courts have the discretion to allow the use of charts to aid the jury. *Speier v. Webster College*, 616 S.W.2d 617, 618-19 (Tex. 1981). Furthermore, charts merely summarizing previously admitted evidence are rarely, if ever, the source of reversible error." *Southwestern Bell Tel. v. Vollmer*, 805 S.W.2d 825, 832 (Tex. App.--Corpus Christi 1991, writ denied). *See Hugh Wood Ford, Inc. v. Galloway*, 830 S.W.2d 296, 298 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (not error to admit list of expenses plaintiffs incurred as a result of defendant's alleged

wrongdoing; list was not summary of voluminous writings, and plaintiffs testified to the same information).

3. Lawyer's Notes on Flip Chart. Can a lawyer stand up in the courtroom and write on a flip chart his/her short-hand summary of what the witness says? For example, a five minute answer is written down as "Lost Profits = $250,000.". Trial courts routinely permit this. The other lawyer can object that the lawyer is using his own words and not the witness's words if the written comments are too slanted. The court can permit the chart to be marked as an exhibit and to go with the jury into the jury room. *See Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981).

4. Revealing Pre-Prepared Aids to the Witness. An issue arises as to whether pre-prepared demonstrative aids, such as bullet charts or graphs or PowerPoint slides, can be displayed to the jury while the witness is testifying but before the witness has authenticated all items, or before the witness has testified to all items. For example, assume the lawyer has a listing of eight points which he/she wants to make with the witness. Each point is listed separately, preceded by a bullet. Can the questioning lawyer put the entire chart up before the jury when he/she starts into the examination, or does he/she have to cover items with white tape and lift the tape off, item-by-item?

When a jury reads something, it is receiving it into evidence. Where the chart or diagram reflects extrinsic evidence, showing the chart or diagram to the jury before it has been marked and admitted into evidence is like passing out copies to the jury before the exhibit is marked and admitted. Strictly speaking, the jury should not read documentary evidence before it is marked and admitted. And if the document is not admitted, the jury should never read it.

Where the chart represents a *short-hand rendition* of the witness's testimony, and if a witness is going to provide testimony on all the points by the end of the examination, it would be harmless error, if error at all, for the trial court to permit the aid to be shown to the jury in advance of the testimony. However, a *leading question* objection might be proper if the witness can see the chart and is guided in his or her testimony by what's written on the chart.

Many lawyers include in a motion in limine a prohibition against showing a demonstartive aid to the jury without prior permission of the Court.

Trial lawyers need to remember that the appellate record will not reflect that the jury is seeing demonstrative evidence, unless that fact is announced in the presence of the court reporter who rights it down in his or her notes.

5. Demonstrative Aids During Argument. An issue can arise from the use of

demonstrative aids in closing argument. In *Milton v. State*, 572 S.W.3d 234, 240-41 (Tex. Crim. App. 2019), the Court of Criminal Appeals wrote:

> This prohibition against arguing outside the record is equally present when evaluating the use of demonstrative aids to assist in argument. It is certainly proper to demonstrate evidence before the jury to clarify it for the jury.[23] In this way, demonstrative aids can be "offered to illustrate or explain the testimony of witnesses."[24] However, demonstrations and demonstrative aids "do not have independent probative value for determining the substantive issues in the case"; instead, they are relevant in theory "only because of the assistance they give to the trier in understanding other real, testimonial and documentary evidence."[25] While demonstrative aids may be admitted into evidence with a proper predicate,[26] they need not always be admitted into evidence to be shown to the jury.[27] But, as with jury argument, a demonstrative aid must not be overly inflammatory.[28] Though we have not explicitly said so before, we agree with courts of appeals that trial courts have discretion to permit the use of demonstrative aids and charts during argument.[29] Consequently, we review the decision to allow the use of demonstrative aids during argument, as well as the propriety of the argument itself, under an abuse of discretion standard.

I. IMPEACHMENT.

1. Impeachment by Prior Inconsistent Statement. The rule for impeaching a witness with a prior inconsistent statement is TRE 613:

- When examining a witness about a prior oral or written prior inconsistent statement, the examiner must: tell the witness (i) the contents of the statement and (ii) the time and place of the statement and (iii) the person to whom it was made and (iv) must give the witness an opportunity to explain or deny the prior inconsistent statement.

- It is *not* necessary to show the prior inconsistent statement to the witness, but upon request the examiner must show the statement to opposing counsel.

- if witness unequivocally admits having made the statement, extrinsic evidence of the statement cannot be admitted.

If the prior inconsistent statement is that of the opposing party, then TRE 613 does not apply. TRE 613(a)(5) expressly states that it does not apply to admissions of a party opponent. So you don't have to follow this procedure with an admission of a party opponent.

See U.S. v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994), *cert. denied*, 514 U.S. 1113, 115 S.

Ct. 1969 (1995) (where witness testified differently from a prior statement, the prior inconsistent statement was admissible as *substantive evidence*, despite the fact that it is hearsay); *Chance v. Chance*, 911 S.W.2d 40, 54 (Tex. App.--Beaumont 1995, writ denied) (where witness made 16 denials of prior statements, it was proper to play a recording of the conversation for rebuttal and impeachment purposes).

2. Impeachment by Prior Deposition Testimony. When using a witness's prior deposition to impeach that witness, there is a potential conflict between TRE 613 (setting out the procedure for impeaching a witness with a prior inconsistent statement) and TRCP 203.6(b), which says "[a]ll or part of a deposition may be used for any purpose in the same proceeding in which it was taken."

The case of *Pope v. Stephenson*, 774 S.W.2d 743, 745 (Tex. App.--El Paso 1989), *writ denied per curiam*, 787 S.W.2d 953 (Tex. 1990), says that a prior inconsistent statement in a deposition can be considered only for the purpose of impeachment, and not as substantive evidence of the truth of the matter asserted. This statement of the law, if correct, would not apply to a deposition of an opposing party, since TRE 613(a)(5) specifically provides that its procedures for impeachment do not apply to admissions by a party-opponent.

3. Impeachment by Prior Convictions.

a. Prior Notice. TRE 609(f) provides that evidence of a conviction is not admissible if after timely written request the proponent fails to give the adverse party sufficient advance written notice of intent to use such evidence as will give the adverse party fair opportunity to contest the use of such evidence.

b. Only Felony and Misdemeanor of Moral Turpitude. TRE 609(a) says only felonies and crimes of moral turpitude are admissible. TRE 803(22) speaks only of proving up felonies.

c. Remoteness. A conviction is not admissible if the conviction or last incarceration was more than 10 years ago, unless the court determines in the interests of justice that the probative value of the conviction substantially outweighs its prejudicial effect. TRE 609(b); *Reviea v. Marine Drilling Co.*, 800 S.W.2d 252 (Tex. App.--Corpus Christi 1990, writ denied).

d. Probation. Satisfactory completion of probation makes the conviction inadmissible, if there are no later convictions for felonies or crimes of moral turpitude. *Jackson v. Granite State Ins. Co.*, 685 S.W.2d 16, 18 (Tex. 1985).

e. Juvenile Adjudications. Juvenile adjudications are not admissible unless the witness

is a party in a Juvenile Justice Proceeding or the U.S. or Texas Constitution requires that it be admitted. TRE 609(d).

f. Appeal. Pendency of an appeal of a conviction renders the conviction inadmissible, TRE 609(e).

g. Manner of Proof. A party can prove a prior conviction only by admission of the witness or by public record. TRE 609(a)(3).

4. Requesting a Limiting Instruction. Evidence that is not otherwise admissible may be admitted for impeachment purposes, but it does not constitute substantive evidence if admitted only for impeachment purposes. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000). Where evidence is admitted for a limited purpose and the opposing party fails to request a limiting instruction to the jury, the evidence may be considered for all purposes. TRE 105(a) & (b); *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

5. Calling a Witness Solely to Later Impeach That Witness. Any witness can be impeached with a prior inconsistent statement. TRE 607 & 613. A party can impeach his own witness. TRE 607. However, a party cannot call a witness solely for the purpose of later impeachment using otherwise inadmissible hearsay. *Qualicare of East Texas, Inc. v. Runnels*, 863 S.W.2d 220, 224 (Tex. App.--Eastland 1993, no writ); *Truco Properties, Inc. v. Charlton*, 749 S.W.2d 893, 896 (Tex. App.--Texarkana 1988, writ den'd).

IV. PRESERVING ERROR. "Error is preserved with regard to a ruling that admits evidence if the opponent of the evidence makes a timely, specific objection and obtains a ruling." *Service Corp. International v. Guerra*, 348 S.W.3d 221, 234 (Tex. 2011).

A. GENERAL REQUIREMENT. The general requirement that complaints on appeal be preserved in the trial court is set out at TRAP 33. The rule requires that the record must show that the complainant made a timely request, objection, or motion to the trial court (i) that stated the grounds with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and (ii) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and (iii) the trial court ruled on the request, objection, or motion, either expressly or implicitly, or refused to rule and the complaining party objected to the refusal. An exception is recognized for the overruling of a motion for new trial by operation of law "unless taking evidence was necessary to properly present the complaint in the trial court." Error is not preserved for appellate review where a party fails to present a timely request, objection or motion, state the specific grounds therefor, and obtain a ruling. *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991); *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--

Corpus Christi 1990, no writ).

B. STEPS TO PRESERVING ERROR.

1. Valid Complaint.

a. To be valid, specific grounds for the objection must be stated or must be apparent from the context of the objection. *Miller v. Kendall*, 804 S.W.2d 933 (Tex. App.--Houston [1st Dist.] 1990, no writ); *Olson v. Harris County*, 807 S.W.2d 594 (Tex. App.--Houston [1st Dist.] 1990, writ denied); *McCormick v. Texas Commerce Bank Nat. Ass'n.*, 751 S.W.2d 887 (Tex. App.--Houston [14th Dist.] 1988, writ denied), *cert. denied*, 491 U.S. 910; *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170 (Tex. App.--Waco 1987, writ denied). Where the correct ground of exclusion was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977).

b. The complaint raised on appeal must be the same as that presented to the trial court. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135 (Tex. App.--Dallas 1992), *agreed motion to dismiss and vacate granted*, 843 S.W.2d 486 (1993).

c. Global objections, profuse objections, or those overly general or spurious in nature, preserve no error for review. A "blanket objection" fails to identify the parts of a document that are inadmissible. *Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981) ("'A general objection to a unit of evidence as a whole, ... which does not point out specifically the portion objected to, is properly overruled if any part of it is admissible'"), quoting *Brown & Root, Inc. v. Haddad*, 180 S.W.2d 339, 341 (Tex. 1944).

d. An objection is sufficiently specific if it allows the trial court to make an informed ruling and the other party to remedy the defect if he can. *Lassiter v. Shavor*, 824 S.W.2d 667 (Tex. App.--Dallas 1992, no writ).

2. Timely Asserted.

a. Failure to object as soon as preliminary hearing evolved into bench trial of merits of case waived error. *Lemons v. EMW Mfg, Co.*, 747 S.W.2d 372, 373 (Tex. 1988).

b. To argue on appeal that the trial court did not follow the law, the complaining party must have presented the legal argument in the trial court. *Hardeman v. Judge*, 931 S.W.2d 716, 720 (Tex. App.--Fort Worth 1996, writ denied) (failure to argue in trial court applicability of Probate Code § 821 precluded arguing that point on appeal). Objections to trial court's actions creating a constructive trust, and awarding attorney's fees, raised for first time on

appeal, were too late. *Murphy v. Canion*, 797 S.W.2d 944 (Tex. App.--Houston [14th Dist.] 1990, no writ). *See also Mark Products U.S.. Inc. v. Interfirst Bank Houston, N.A.*, 737 S.W.2d 389 (Tex. App.--Houston [14th Dist.] 1987, writ denied) (motion to compel answers to deposition questions waived by failing to request continuance of summary judgment hearing).

c. An objection to evidence previously admitted without objection is too late. *Port Terminal R.R. Assn. v. Richardson*, 808 S.W.2d 501 (Tex. App.--Houston [14th Dist.] 1991, writ denied).

d. But a "one question delay" in making objection, to avoid calling attention to plaintiff's reference to insurance and thereby aggravating the harm, was held to be acceptable. *Beall v. Ditmore*, 867 S.W.2d 791, 796 (Tex. App.--El Paso 1993, writ denied) ("[I]t is clear from a simple reading of Texas law, that objections, in order to be considered timely, must be . . . interposed at such a point in the proceedings so as to enable the trial court the opportunity to cure the error alleged, if any. 'Timeliness' defies definition and generally the question of what is timely or otherwise must be left to the sound discretion of the trial judge, but such objection need not be immediate.").

e. And the trial judge can show mercy. In *Keene Corp. v. Rogers*, 863 S.W.2d 168, 178 (Tex. App.--Texarkana 1993, no writ), the trial court admitted an exhibit, but then permitted a party to make an objection to the exhibit, and the objection was treated by the appellate court as timely.

f. Object each time the evidence is offered. *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ).

g. It is possible to object too early. *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991) (objection to entirety of expert's testimony at outset did not preserve error where trial court asked counsel to reurge later).

3. Secure Ruling. An objection must be overruled in order for it to preserve error for review. *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App.--Corpus Christi 1973, writ dism'd); *Webb v. Mitchell*, 371 S.W.2d 754 (Tex. Civ. App.--Houston 1963, no writ).

4. Let the Record Reflect.

a. The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. TEX. R. APP. P. 33.1(a). *Petitt v. Laware*, 715

S.W.2d 688 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

b. Without a written motion, response, or order, or a statement of facts containing oral argument or objection, the appellate court must presume that the trial court's judgment or ruling was correct and that it was supported by the omitted portions of the record. *Christiansen v. Prezelski*, 782 S.W.2d 842 (Tex. 1990). *See also J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App.--Dallas 1990, no writ).

c. Ordinarily an oral ruling by the trial court, that is reflected in the reporter's record, preserves appellate complaint. However, in *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.--Corpus Christi 1989, no writ), and in *Pierce v. Gillespie*, 761 S.W.2d 390, 396 (Tex. App.--Corpus Christi 1988, no writ), the appellate court declined to review the trial court's oral denial of a motion for instructed verdict, because that action was not reflected in a written order or in the judgment. This anomaly was cured by TRAP 33.1(c), which provides: "Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal. The two Corpus Christi cases are no longer applicable.

5. Offer of Proof of Excluded Evidence. If the trial court excludes tendered evidence, the party who wishes to complain on appeal about the exclusion must make an offer of proof, so that the statement of facts reflects the evidence that was excluded. TRE 103(a)(2). The offering party must make its offer of proof outside the presence of the jury, as soon as practical, but in any event *before the court's charge is read to the jury*. TRE 103(b). The trial court can add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The offer can be in the form of counsel summarizing the proposed evidence in a concise statement, but at the request of a party the offer must be in question and answer form. TRE 103(b). No further offer need be made. *Mosley v. Employer Cas. Co.*, 873 S.W.2d 715, 718 (Tex. App.--Dallas 1993, writ granted) (in order to complain on appeal about the refusal to admit evidence, the proponent must make an offer of proof or bill of exceptions to give the appellate court something to review); *Palmer v Miller Brewing Co.*, 852 S.W.2d 57, 63 (Tex. App.--Fort Worth 1993, writ denied) (party complaining that trial court would not permit a party to pose a particular question on cross-examination failed to preserve error, because the proponent did not elicit from the witness, on bill of exception, what his answer to the question would have been).

6. Offer for Limited Purpose. Limited admissibility is covered in TRE 105. The rule arises when evidence is admissible for some purposes but not others, or admissible against some parties but not all parties. Where evidence is admissible for some purposes, but not generally, and the offer of the evidence is made generally, without limitation as to its use, the trial court should exclude the evidence. If the offer is made generally, opposing counsel

should object to its admissibility on appropriate grounds. If the objection is sustained, the proponent should re-offer the evidence "for a limited purpose." If accepted by the trial court for a limited purpose in a jury trial, the opponent should move the court for a limiting instruction, whereby the court would instruct the jury that it can consider that evidence only for a limited purpose, and no other. *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) ("Where tendered evidence should be considered for only one purpose, it is the opponent's burden to secure a limiting instruction"); *see Rankin v. State*, 974 S.W.2d 707, 712 (Tex. Crim. App. 1998) (waiting until jury charge stage to instruct jury is too late; court should instruct jury at the time the evidence is received). In a jury trial, if the opposing party does not seek such a limiting instruction, the evidence is received for all purposes, even if it was offered only for a limited purpose. *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994); *Cigna Ins. Co. v. Evans*, 847 S.W.2d 417, 421 (Tex. App.--Texarkana 1993, no writ) (where document was read into evidence without a limiting instruction, it was in evidence for all purposes); *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied) (party could not complain that excluded evidence met state-of-mind exception to hearsay rule when the party made only a general offer of the evidence, and not an offer for the limited purpose of showing state-of-mind). *See Texas Commerce Bank v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 76 (Tex. App.--Corpus Christi 1993, writ denied) (evidence admitted for the limited purpose of punitive damages could not be used on appeal to support the verdict on actual damages).

Using hearsay as an example, the sequence is as follows:

(i) Proponent offers hearsay for all purposes.

(ii) Opponent objects based on hearsay; objection is sustained.

(iii) Proponent reoffers the hearsay for limited purpose.

(iv) Opponent renews hearsay objection.

(v) Court overrules hearsay objection.

(vi) Opponent requests limiting instruction.

7. Multiple Party Lawsuits. Evidentiary objections can get complicated when there are multiple parties in a trial.

a. Make Your Own Objections. Each litigant must preserve error for himself or herself. One party cannot rely upon an objection asserted by another party as a basis for preserving error. *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481, 482 (Tex. Civ. App.--Houston [1st

Dist.] 1979, writ dism'd). *But see Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.--Corpus Christi 1990, no writ) (trial court may in its discretion rule that one defendant's objection preserved error for all defendants).

b. Make Your Own Offer of Proof. Each party must rely upon his own bill of exceptions, and cannot rely upon the bill of exceptions of another party. *Howard v. Phillips*, 728 S.W.2d 448, 451 (Tex. App.--Fort Worth 1987, no writ). One party can, however, establish in the record that he or she adopts another party's bill, thereby preserving error.

c. Evidence Admitted Against Some But Not all Parties. TRE 105, "Limited Admissibility," indicates that when evidence is admissible as to one party but not admissible as to another party, the court on proper request shall restrict the evidence to its proper scope and instruct the jury accordingly. In the absence of such a limitation, no party can complain on appeal about the lack of limitation.

d. Practical Difficulties. It is relatively easy for a lawyer to object to exhibits which are not relevant as to his/ her client, or that might be an admission of one party opponent but not of the lawyer's client. But how does the lawyer handle testimony that is inadmissible as to his/her client? Can you have a running objection to segments of, or all of, a witness's testimony, or is it necessary to constantly object and request a limiting instruction? Do you object during the opposing lawyer's closing argument, whenever he/she refers to evidence that was not admitted as to your client? How do you avoid trying the court's patience, and appearing to be obstructive in front of the jury?

C. MOTION IN LIMINE VS. RULING OUTSIDE PRESENCE OF JURY.

1. The Motion in Limine. Appellate cases have made it clear that the denial of a motion in limine is not itself reversible error. *See Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963). There the Supreme Court said:

> If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal....

Id. at 335. Nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ) (after motion in limine was sustained as to certain evidence, counsel conducted the balance of his examination of the witness without ever eliciting the excluded evidence; error was therefore waived); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ) (fact that motion in limine was sustained, and proponent offered exhibit on informal bill of exceptions,

did not preserve error, since it was incumbent upon the proponent to tender the evidence offered in the bill and secure a ruling on its admission).

If a motion in limine is granted and the evidence is nonetheless offered, or argument of counsel made, in violation of the order in limine, an objection to the offending evidence or argument is prerequisite to raising a complaint on appeal at the violation of the order. If the objection is sustained, then the aggrieved party should move that the jury be instructed to disregard the improper evidence or argument. If the instruction is denied, complaint can be premised on the denial. If the instruction is granted, it will cure harm, except for incurable argument, such as an appeal to racial prejudice. In criminal cases, the aggrieved party who timely objects and receives a curative instruction, but who is still not satisfied, must push further and secure an adverse ruling on a motion for a mistrial, in order to preserve appellate complaint. Immediately pushing for a mistrial should not be necessary in a civil proceeding, for the following reason. If the harm is curable, then by necessity a curative instruction will cure the harm. If the harm is incurable, then an instruction will not cure the harm, and the only relief is a new trial. However, a new trial is not necessary if the aggrieved party wins. Judicial economy suggests that the aggrieved party should be able to raise incurable error after the results of the trial are known, rather than having civil litigants moving for mistrial in a case that they otherwise might have won. TRCP 324(b)(5) specifically permits incurable jury argument to be raised by motion for new trial, even if it was not objected to at the time the argument was made. *See generally In re W.G.W.*, 812 S.W.2d 409, 416 (Tex. App.--Houston [1st Dist.] 1991, no writ) (insinuation that cervical cancer was caused by immoral conduct was incurable error). Counsel's violation of a motion in limine exposes the lawyer to a contempt citation.

2. Ruling Outside Presence of Jury. TRE 103(b) provides that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." If the objection is made in connection with presenting a motion in limine, does Rule 103(b) obviate the need to object in the presence of the jury?

This question was considered in *Rawlings v. State*, 874 S.W.2d 740, 742-43 (Tex. App.--Fort Worth 1994, no pet.). In determining whether counsel's objection was a motion in limine or an objection outside the presence of a jury, the appellate court disregarded the label used by counsel and the trial judge, and looked instead to the substance of the objection or motion. The court made the following observations:

> [A] motion in limine characteristically includes: (1) an objection to a general category of evidence; and (2) a request for an instruction that the proponent of that evidence approach the bench for a hearing on its admissibility before offering it.

> Conspicuously absent from a motion in limine is a request for a ruling on the actual admissibility of specific evidence.
>
> In contrast, Rule 52(b) seems to require both specific objections and a ruling on the admissibility of contested evidence. In fact, we question whether Rule 52(b) comes into play until specific evidence is actually offered for admission. Rule 52(b) only provides that complaints about the admission of evidence are preserved when the court hears objections to offered evidence and rules that such evidence shall be admitted.

The court concluded that in that case the request was a motion in limine that did not preserve error.

See K-Mart No. 4195 v. Judge, 515 S.W.2d 148, 152 (Tex. Civ. App.--Beaumont 1974, writ dism'd) (even if trial objection was seen as incorporating objections set out in motion in limine, still the objection was a general objection). Restating the objection made outside the presence of the jury was held not to be necessary in *Klekar v. Southern Pacific Transp. Co.*, 874 S.W.2d 818, 824-25 (Tex. App.--Houston [1st Dist.] 1994, no writ).

D. REPEATED OFFER OF INADMISSIBLE EVIDENCE. The case of *Marling v. Maillard*, 826 S.W.2d 735, 739 (Tex. App.--Houston [14th Dist.] 1992, no writ), stands for the proposition that where evidence is admitted over objection, and the proponent later offers the same evidence again, the opponent must renew the original objection or the right to complain about the erroneous admission of the original testimony is waived. *Accord*, *Badger v. Symon*, 661 S.W.2d 164-65 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.) (and cases cited therein); *see also Commercial Union Ins. v. La Villa Sch. D.*, 779 S.W.2d 102, 109-110 (Tex. App.--Corpus Christi 1989, no writ) (party cannot complain on appeal of improper admission of evidence where that party has introduced evidence of a similar character). The Texas Supreme Court has said that where evidence is admitted over objection once in a trial, and the same evidence is later admitted without objection in the trial, that the admission of the evidence the second time renders harmless any error in the first admission of the evidence. *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984). To quote the Court:

> The general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.

Accord, *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004) (reiterating rule of *Richardson v. Green*). On the other hand, Texas courts have held that in some circumstances, a party is not required to constantly repeat an objection. One such circumstance is when the objection would be futile because the court has just overruled a valid objection to the same testimony. *Graham v. State*, 710 S.W.2d 588, 591 (Tex. Crim. App. 1986); *D.L.N. v. State*, 590 S.W.2d 820, 823 (Tex. Civ. App.--Dallas 1979, no writ).

In *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App.--Corpus Christi 1994, writ denied), the court of appeals noted the two opposing lines of authority and said:

> We conclude that the determination of whether a prior objection is sufficient to cover a subsequent offer of similar evidence depends upon a case-by-case analysis, based on such considerations as the proximity of the objection to the subsequent testimony, which party has solicited the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony has been elicited from the same witness, whether a running objection was requested or granted, and any other circumstances which might suggest why the objection should not have to be reurged.

E. RUNNING OBJECTIONS. A "running objection" is a request to the court to permit a party to object to a line of questioning without the necessity of objecting to each individual question. Customarily this requires counsel obtaining permission from the court to have a "running objection" to all testimony from a particular witness on a particular subject.

The utility of a running objection has been recognized by the Texas Court of Criminal Appeals. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) ("This Court has held on prior occasions that a continuing or running objection has properly preserved error"). In *Sattiewhite v. State*, 786 S.W.2d 271, 283-84 n. 4 (Tex. Crim. App. 1989), the Court stated:

> In promulgating these rules [Rules of Appellate Procedure and specifically Rule 52(a)], we took no "pot shots" at running objections because in certain situations they have a legitimate function. A running objection, in some instances, will actually promote the orderly progression of the trial. When an attorney has an objection to a line of testimony from a witness, it is often disruptive for the trial judge to force him to make the same objection after each question of opposing counsel just so that the attorney can receive the same ruling from the trial judge to preserve error. As long as Rule 52 is satisfied, that is, as long as the running objection constituted a timely objection, stating the specific grounds for the ruling, the movement desired the court to make (if the specific grounds were not apparent from the context of the running objection) then the error should be deemed preserved by an appellate court.

"Running objections are an exception to the general rule that a party must continue to object and get a ruling for each individual instance of inadmissible testimony.... Such an objection should "not encompass too broad a reach of subject matter over too broad a time or different witnesses." *In the Interest of A.P. and I.P.*, 42 S.W.3d 248, 260 (Tex. App.--Waco 2001, no pet.). In *In the Interest of ADK*, No. 06-19-00019-CV (Tex. App.–Texarkana June 26, 2019, pet. denied) (mem. op.), the court held that a running objection to testimony about children's out-of-court statements about their father directing them to fight did not apply to the children's out-of-court statements on other subjects.

Some courts have held that, in jury trials, running objections apply only to similar testimony by the same witness. *Commerce, Crowdus & Canton v. DKS Const.*, 776 S.W.2d 615 (Tex. App.--Dallas

1989, no writ); *Leaird's Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690 (Tex. App.--Waco 2000, pet. denied); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied). The extent to which a running objection covers testimony of subsequent witnesses depends on several factors: (1) the nature and similarity of the subsequent testimony to the prior testimony; (2) the proximity of the objection to the subsequent testimony; (3) whether the subsequent testimony is from a different witness; (4) whether a running objection was requested and granted, and (5) any other circumstances which might suggest why the objections should not have to be reurged. *Correa v. General Motors Corp*., 948 S.W.2d 515, 518-19 (Tex.App.--Corpus Christi 1997, no writ). The Texas Supreme Court made the following comment on a running objection in a jury trial:

> Because Volkswagen's initial objection to the evidence complied with Texas Rule of Appellate Procedure 33.1(a) and its requested running objection clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, recognition of the running objection for more than one witness was appropriate.

Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2005).

The effect of running objections in a non-jury trial was considered In *Commerce, Crowdus & Canton, Ltd. v. DKS Const., Inc.*, 776 S.W.2d 615, 620-21 (Tex. App.--Dallas 1989, no writ):

> In considering the effectiveness of a running objection, it is widely considered that a party making a proper objection to the introduction of testimony of a witness, which objection is overruled, may assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objection. See Bunnett/Smallwood & Co. v. Helton Oil Co., 577 S.W.2d 291, 295 (Tex. Civ. App.--Amarillo 1979, no writ); Crispi v. Emmott, 337 S.W.2d 314, 318 (Tex. Civ. App.--Houston 1960, no writ). Some courts, though, have held that a running objection is primarily limited to those instances where the similar evidence is elicited from the same witness. See City of Fort Worth v. Holland, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied); City of Houston v. Riggins, 568 S.W.2d 188, 190 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). In these cases, however, the trial was to the jury. In our case, the trial was to the court. We hold that a running objection is an effective objection to all evidence sought to be excluded where trial is to the court and an objection is clearly made to the judge. Therefore, appellant's running objection to any evidence admitted for the purpose of proving alter-ego was an effective objection, and the issue was not tried by consent.

It is necessary that the request and granting of a running objection be reflected in the reporter's record. *See Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.--Houston [14th Dist.] 1989, writ denied). It is important that the basis for the running objection be clear. *See Anderson Development Co., Inc. v. Producers Grain Corp.*, 558 S.W.2d 924, 927 (Tex. Civ. App.--Eastland 1977, writ ref'd n.r.e.) ("'The same objection on that question' and a 'running objection' are general objections where several objections have been made").

V. LAY VS. EXPERT TESTIMONY. Testimony can be divided into three categories: factual testimony, lay opinions, or expert testimony. The U.S Court of Appeals for the Seventh Circuit commented that "[t]he difference between an expert witness and an ordinary witness is that the former is allowed to offer an opinion, while the latter is confined to testifying from personal knowledge." *United States v. Williams*, 81 F.3d 1434, 1442 (7th Cir. 1996). Actually, this description off, in several ways.

Any competent witness, lay or expert, can testify to facts that are based on personal knowledge. A lay witness can also testify to lay opinions, when they are rationally based on the witness's perception. An expert can testify to expert opinions based on personal knowledge or based on information s/he has reviewed or been made aware of. Another distinction is that, upon objection, a lay witness must establish that his/her testimony is based on personal knowledge before giving the testimony, but an expert can testify to an expert opinion without first disclosing the underlying facts or data. Finally, an expert can testify to opinions based on expertise, which may be given great weight by the factfinder who lacks such expertise.

Rather that distinguishing a lay witness from an expert witness, it is more helpful to distinguish between lay testimony and expert testimony. John F. Sutton, Jr., former Dean of the University of Texas School of Law (who taught the author of this Article the Law of Evidence in 1973), made the following observations in his 1993 article on the Texas Rules of Evidence, which at the time were identical to the FRE. Dean Sutton highlighted the very point of the preceding paragraph:

> A witness who is qualified as an expert may testify in three different ways: he may testify to his personal knowledge of the facts in issue, in which case he testifies to opinions under Rule 701; he may provide the factfinder with general back-ground information regarding the theory and principles relative to his field of expertise; and he may evaluate specific data and facts in issue in light of his experience in a particular specialized field, in which case he testifies to opinions under Rule 702. A witness with specialized training or experience is not limited to giving opinion testimony as a Rule 702 "expert." If his opinion rests on firsthand knowledge--that is, if it is rationally based on his own perceptions--then testimony under Rule 701 is also permissible. The greater his experiential capacity, the more likely his opinions will "help" the trier of fact under Rule 701, and the greater the likelihood that his testimony will "assist" the jury under Rule 702. For example, the plaintiff in *Teen-Ed, Inc. v. Kimball International, Inc.*, [620 F.2d 399 (3d Cir. 1980)], offered his tax accountant's testimony regarding lost profits. The trial court, proceeding under the erroneous assumption that only an expert could offer opinion testimony, excluded the evidence because the plaintiff had not designated the accountant as an expert before trial. The Third Circuit reversed, stressing that the

> proffered opinion was predicated entirely on the witness' firsthand knowledge of Teen-Ed's books. He was thus eligible under Rule 701 to give an opinion on lost profits based upon the inferences drawn from his knowledge of Teen-Ed's books. The court held that the accountant's potential qualifications as an expert did not prevent him from testifying within the narrower confines of Rule 701.
>
> To the extent that the defendant in *Teen-Ed* was able to cross-examine and rebut the accountant's opinion adequately, the decision is sound. In *Teen-Ed*, the fact that the accountant was a participant in the events to which he testified and not an expert hired to testify tends to excuse the trial court's failure to distinguish between lay and expert witnesses. An arbitrary and artificial distinction between lay and expert witnesses should not prompt exclusion of relevant, helpful information from witnesses with adequate experiential qualifications. [Footnotes omitted]

Sutton, John F., Jr., *Article VII: Opinions And Expert Testimony*, 30 HOUS. L. REV. 797, 819-20 (1993).

A. LAY TESTIMONY.

1. Factual Descriptions. A lay witness (non-expert) can testify to facts based upon personal knowledge. TRE 602, Lack of Personal Knowledge, provides:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Note that a predicate must be laid to show that the witness is testifying based on personal knowledge. Lawyers frequently do not "lay the foundation" of personal knowledge for their witnesses, and many times the opposing attorney fails to object. If the proper predicate is not laid in soliciting testimony, the opposing party should object: "Your Honor I object that there is no showing of personal knowledge." Or the opponent can object and ask the court's permission to take the witness on "voir dire" to verify whether the witness is about to testify based on personal knowledge.

It should be noted that an expert may give factual testimony if relating matters personally observed that do not require expertise.

2. Lay Opinion. A lay witness (non-expert) can testify only to facts based upon personal knowledge. TRE 701, Opinion Testimony by Lay Witnesses, provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception; and
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

It should be noted that an expert may testify to lay opinions if relating matters personally observed that do not require expertise.

B. EXPERT TESTIMONY. In 1954, Charles T. McCormick, a native of Dallas and professor (and dean) at the University of Texas School of Law, published his HANDBOOK OF THE LAW OF EVIDENCE, which said:

> An observer is qualified to testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both.

Section 13.

The echo of Professor McCormick's voice can be heard in TRE 702:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

The thrust of TRE 702 can be reduced to (i) qualifications and (ii) helpfulness.

1. Qualifications. Under TRE 702, a person may testify as an expert only if s/he has knowledge, skill, experience, training or education that would help the trier of fact in understanding the evidence or deciding an issue in the case. *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996). The party offering the testimony bears the burden to prove that the witness is qualified under Rule 702. *Id*. The decision of whether an expert witness is qualified to testify is within the trial court's discretion, and will be reversed on appeal only if the ruling is an abuse of discretion, meaning that the trial court acted without reference to any guiding rules or principles. *Id*.

Courts sometimes evaluate the first prong, of adequate knowledge, skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally. *Id*. at 153. *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"). However, a general level of knowledge or skill does not suffice. TRE 702 requires that the witness's expertise go to the very matter on which the expert is to give an opinion. *Broders v. Heise*, 924 S.W.2d at 153, citing *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1112-1113 (5th Cir.), *cert. denied*, 503 U.S. 912 (1992). The expert must have knowledge, skill, experience, training, or education regarding the specific issue before the court that would qualify the expert to give an opinion that helps the jury. *Broders v. Heise*, 924 S.W.2d at 153. Stated differently, the offering party must demonstrate that the witness possesses "special knowledge as to the very matter on which he proposes to given an opinion." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). *See United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997); Linda Addison, *Recent Developments in Qualifications of Expert Witnesses*, 61 TEX. B.J. 41 (Jan. 1998) [Westlaw cite: 61 TXBJ 41]. In *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2003), the Supreme Court considered the qualifications of an expert who had a Ph.D. in plant physiology, and worked in the field on the physiology of plants, malnutrition, the way the environment affects plants. The Supreme Court held the witness to be qualified, against a challenge that he was not a plant pathologist.

2. Helping the Trier of Fact. TRE 702 requires that the expert's testimony "help the trier of fact to understand the evidence or to determine a fact in issue." When an issue is beyond jurors' common understanding, expert testimony is even required. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006). There are some issues where the jury is capable of making its own determination, without the assistance of expert testimony. In those instances, expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony"). In *Assiter v. State*, 58 S.W.3d 743, 751 (Tex. App.–Amarillo 2000, no pet.), the court wrote:

> Two themes are prevalent within the language of the rule allowing the use of expert testimony. First, the jury must not be qualified to intelligently and to the best possible degree determine the particular issue without benefit of the expert witness's specialized knowledge. Second, the use of expert testimony must be limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror. *See Duckett*, 797 S.W.2d at 914. When the jury is equally competent to form an opinion about the ultimate fact issues as is the expert, or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) (per curiam).

In *Lawson v. Trowbridge*, 153 F.3d 368, 378–80 (7th Cir. 1998), the court wrote:

> A trial court "is not compelled to exclude [an] expert just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension." *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996). "All you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury." *Williams*, 81 F.3d at 1441 (7th Cir. 1996).

3. Reliability of Expert's Methodology.

a. The Case Law. In the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), the U.S. Supreme Court held that then-existing Federal Rule of Evidence 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. *See Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for novel scientific expert testimony). [FRE 702 was rewritten in 2000 to incorporate *Daubert's* relevancy analysis.] In *Daubert*,[1] the Supreme Court held that "the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, at 592-93. "Scientific knowledge" derives from the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Supreme Court gave a non-exclusive list of factors to consider on the admissibility of expert testimony in the

[1] The attorney who represented Jason Daubert in the U.S. Supreme Court wrote that the correct pronunciation is "Dowburt." Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L. J. 867, 867 (1994).

scientific realm: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. These standards are oriented toward science-based opinions ("hard" science). Chief Justice Rehnquist, joined by Justice Stevens concurred and dissented. Speaking of Part II–B, the requirement of scientific validity, Chief Justice Rehnquist wrote:

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. ... The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante*, at 592-593. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante*, at 593. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the "`criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.'" *Ibid*.
>
> > I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

In his Concurring and Dissenting Opinion, Chief Justice Rehnquist also expressed concern about the difference between scientific expert opinion, to which scientific validity applied, and technical or other specialized knowledge that did not require proof of scientific validity. *Id*. at 600. One writer called this "the boundary problem." Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 VA. L. REV. 1933, 1962-1972 (2001).

The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed factors for the trial court to consider: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made

of the theory or technique. *Robinson*, 923 S.W.2d at 557. *See Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995) (Gonzalez, J., concurring) (applying the *Daubert* analysis to an expert's testing of pigs' feet and rejecting the test results as not being sufficiently scientific); *America West Airline Inc. v. Tope*, 935 S.W.2d 908 (Tex. App.--El Paso 1996, no writ) (somewhat unorthodox methods of mental health worker did not meet the admissibility requirements of *Robinson*). Ordinarily, the burden is on the party offering the evidence to establish the admissibility of such scientific evidence. *Du Pont*, at 557.

In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance requirements of *Robinson* apply to all types of expert testimony. In *Gammill* a unanimous Supreme Court said:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [FN47]
>
> We agree with the Fifth, Sixth, Ninth, and Eleventh Circuits that Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule. Nothing in the language of the rule suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. All expert testimony should be shown to be reliable before it is admitted. [FN48]

Gammill, 972 S.W.2d at 725-26.

After noting that the reliability criteria announced in *Daubert* may not apply to experts in particular fields, the Texas Supreme Court noted that nonetheless there are reliability criteria of some kind that must be applied. The Court said:

> [E]ven if the specific factors set out in *Daubert* for assessing the reliability and relevance of scientific testimony do not fit other expert testimony, the court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its admissibility.

Gammill, 972 S.W.2d at 724.

The Texas Court of Criminal Appeals, which established a reliability requirement even

before the U.S. Supreme Court decided *Daubert* (see *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App.1992)), extended reliability requirements to *all* scientific testimony, not just novel science. *See Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (applying *Kelly*-reliability standards to DWI intoxilyzer). In the case of *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), the Court extended the *Kelly*-reliability standards to mental health experts, but indicated that the *Robinson* list of factors did not apply. Instead, the Court of Criminal Appeals suggested the following factors be applied to fields of study outside of the hard sciences (such as social science or fields relying on experience and training as opposed to the scientific method): (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Nenno*, 970 S.W.2d at 561.

Texas courts in both civil and criminal cases must determine the appropriate criteria of reliability for all experts who testify.

The reliability requirement for expert testimony became a controversial evidentiary issues, nationwide. Virtually every week some court in the USA made a ruling on *Daubert* or *Robinson*-like issues. The Fifth Circuit Court of Appeals issued a lengthy en banc opinion overturning a panel decision and saying that *Daubert* reliability standards applied to a clinical physician. *See Moore v. Ashland Chemical Co., Inc.*, 95-20492 (5th Cir. Aug. 14, 1998) (en banc). In *Kumho Tire Co. v. Carmichael*, 200 U.S. 321 (1999), the U.S. Supreme Court said that the principles of *Daubert* apply to all experts, and where objection is made the court must determine whether the evidence has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id.*

Texas Supreme Court cases on expert witness reliability include:

- *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001)--the Court held that a plant scientist and consultant was qualified and his testimony reliable on the issue of suitability of grain sorghum seed for dry land farming and its susceptibility to charcoal rot disease.

- *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 808 (Tex. 2002)--the Supreme Court rejected the testimony of a real estate appraiser due to flawed methodology when the comparable sales used by the appraiser "were not comparable to the condemned easement as a matter of law."

- *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002)--the Court ruled inadmissible real estate valuation testimony relating to a condemned parcel of land, where the expert

calculated his value based on the condemnation project which, under the project-enhancement rule, is not a value for which a landowner may recover.

- *Rehabilitative Care Systems of America v. Davis*, 73 S.W.3d 233, 234 (Tex. 2002)--the Court issued a short per curiam opinion on denial of petition for review, indicating that expert testimony is required to establish the appropriate standard of care for a claim of negligent-supervision of a physical therapist.

- *Volkswagen of America Inc. v. Ramirez*, 2004 WL 3019227 (Tex. 2004)--the Court ruled that an accident reconstruction expert's testimony constituted no evidence of causation.

- *FFE Transportation Services, Inc. v. Fulgham*, 154 S.W.3d 84 (Tex. 2004), the Court held that the trial court's decision on whether expert testimony is required to establish negligence, is subject to de novo review, not abuse of discretion review.

- *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004)--the Court held that expert testimony was necessary to establish causation in a litigation-related legal malpractice case. The Court also held that a legal malpractice claim raised in an amended pleading did not relate back to the original pleading, for statute of limitation purposes, because the new claim was distinct and different from the previously-alleged claim.

- *Romero v. KPH Consol., Inc.*166 S.W.3d 212 (Tex. 2005)–the Supreme Court held that expert testimony is required to support liability of a hospital for malicious credentialing of a surgeon. The Court also held that the unsupported opinion of a medical expert was legally insufficient to establish that the hospital was consciously indifferent to the risk of harm to the patient.

- *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 418 (Tex. 2020)--rejecting an expert witness's use of the Monte Carlo method to generate damages arising from business disparagement where the expert's model was based on arbitrary assumptions.

In medical malpractice cases, special note must be taken of TCP&RC § 74.401(e), which provides that a pretrial objection to the *qualifications* of an expert witness on medical malpractice must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witnesses' c.v. or of the date of the witness's deposition. The court is supposed to rule on such objections before trial. Is *"qualifications"* as used in the statute different from *reliability* as used in *Robinson* and *Gammill*?

Cases discussing reliability in child-related litigation include:

- *In re J.B.*, 93 S.W.3d 609, 625 (Tex. App.--Waco 2002, pet. denied)--a divided court of appeals reversed a judgment terminating parental rights on the grounds that the psychologist expert who testified to conducting a parental assessment did not meet *Robinson* reliability standards with regard to the testing. The Waco Court of Appeals subsequently adopted the more lenient *Nenno* approach: "[A] fair reading of this Court's more recent pronouncement in S.R. yields a finding that we apply the Nenno factors to evaluate soft-science testimony in civil cases." *In re J.R.*, 501 S.W.3d 738, 747 (Tex. App.--Waco 2016, no pet.).

- *In re G.B.*, No. 07-01-0210-CV, *4 (Tex. App.--Amarillo Oct. 10, 2003, no pet.) (mem. op.)--the trial court was affirmed in letting a licensed professional counselor testify to best interest and the mother's parenting abilities based on "the SASSI, STAXI, the CAP and the Circumplex" tests, which the counselor testified were "widely used and accepted in the field of licensed professional counselors." Not addressed was the validity and reliability of these tests for use in a forensic context, as opposed to their use in a counseling context.

- *In re A.J.L.*, 136 S.W.3d 293, 301 (Tex. App.--Fort Worth 2004, no pet.)--the appellate court affirmed allowing a licensed professional counselor who interacted with the child using puppets in a play-acting scenario to determine that the child felt that he needed to protect his baby sister and that he had been traumatized at home. The expert testified that she had a master's degree in counselor education and that she had attended many seminars on play therapy. The court said:

  > Play therapy uses toys as "therapeutic metaphors" to help children express themselves and their feelings. Iafrate described the types of play therapy that she used. First, she built a safe environment and rapport with the child using the client-centered method. Eventually she switched to the more directive Alderian (sic, Adlerian) method where the therapist is more interactive in helping the child identify important aspects of their environment. She used these techniques in a manner consistent with her training during her fourteen counseling sessions with A.J.L.

  Id. at 299. The expert's defense of the methodology was not scientifically rigorous, and the appellate court's analysis was superficial. A better decision would have resulted if the opponent had used a behavioral scientist (i.e., a psychologist) to explore the reliability and validity studies of this particular methodology.

- *Taylor v. Texas Dept of Protective & Regulatory Servs.*, 160 S.W.3d 641, 650 (Tex. App.--Austin 2005, pet. denied)--the court said that "some cases involve situations that are not susceptible to scientific analysis, and the Robinson factors are not appropriate

and do not strictly govern in those instances." The court used instead the standards established by the Texas Court of Criminal Appeals in Nenno v. State, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998) (in fields other than hard sciences, such as the social sciences, factors like an expert's education, training, and experience are more appropriate factors in testing reliability than the scientific method), overruled on other grounds by State v. Terrazas, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). The Taylor court ruled that a social study prepared by a social worker was admissible under Nenno standards.

A licensed psychologist "may not offer an expert opinion or recommendation relating to the conservatorship of or possession of or access to a child unless the licensee has conducted a child custody evaluation." 22 Tex. Admin. Code § 465.18. So the professional standards for a psychologist conducting a child custody evaluation refer back to the Family Code provisions on child custody determinations.

4. Factual Basis Underlying The Expert's Opinion. Apart from the *Daubert*/*Robinson* analysis of the expert's methodology, court must also serve a gatekeeping function regarding the factual basis for experts' opinions. TRE 705 reads:

> **Rule 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them**
>
> **(a) Stating an Opinion Without Disclosing the Underlying Facts or Data.** Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.
>
> **(b) Voir Dire Examination of an Expert About the Underlying Facts or Data.** Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.
>
> **(c) Admissibility of Opinion.** An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.
>
> **(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury.** If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to

> disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

TRE 705(b) gives the adverse party the right to voir dire an expert out of the hearing of the jury and before the expert testifies about the facts or data underlying his/her opinion. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient factual basis for his/her opinion. And TRE 705(d) establishes a balancing test for the admission of underlying facts or data that are inadmissible other than to support the expert's opinion: the court should exclude the inadmissible underlying information if the danger of misuse outweighs the value as explanation or support for the expert opinion.

5. The "Fit" Between Data, Methodology, and the Legal Issue. *Daubert* contains a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998):

> The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402.

Some courts and commentators call this connection the "fit" between the evidence and the issues involved in the case.

6. Expert Opinions Contained in Medical Records. TRE 803(6) includes, as part of the hearsay exception, "opinions or diagnoses" contained in business records.

Cases

- *Luxton v. State*, 941 S.W.2d 339, 342 (Tex. App.–Fort Worth 1997, no pet.) (TRE 705 does not allow a party to conduct voir dire of an expert whose observations, diagnoses, or opinions are offered as part of a business record).

- *Glenn v. C & G Electric, Inc.*, 977 S.W.2d 686, 689 (Tex. App.–Fort Worth 1998, pet. overruled) (a challenge to business records as being testimony by undisclosed experts did not somehow trigger an automatic metamorphosis of the business records into the testimony of experts who are testifying at trial, thus requiring their disclosure pursuant to interrogatory

requesting identification of each expert witness to testify at trial and each consulting expert).

• *March v. Victoria Lloyds Insurance Company*, 773 S.W.2d 785, 789 (Tex. App.--Fort Worth 1989, writ denied) (blood alcohol content report admissible without analysis under TRE 701-703 because no expert interpretation of the results was needed to understand that it was evidence that there was alcohol in March's bloodstream at the time of the accident).

• *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. App.–Fort Worth 2001, pet. denied) (because the doctor had no information how long the decedent had stayed at nursing home, what conditions he suffered from before he entered nursing home, or the physician's orders while decedent was at the nursing home, there was no evidence upon which doctor testify as to causation; therefore, hospital records and doctor's testimony as to causation were speculative, inflammatory and not admissible).

7. Unsupported Conclusions. "'[I]f no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.' *Id.* This is because the evidentiary value of expert testimony is derived from its basis, not from the mere fact that the expert has said it." *Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 829 (Tex. 2014).

8. Preserving the Complaint. There are several ways to raise objection to the reliability of an expert's methodology.

a. Ruling Outside Presence of Jury. TRE 103(b) provides that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." *Accord*, FRE 103(b).

b. Objection During Trial. It is proper and sufficient to make a *Daubert* objection during trial. However, a court could adopted a local rule or scheduling order in a particular case requiring that *Daubert* objections be raised before trial or they are precluded. However, the specificity of the objection may be a problem.

In *Scherl v. State*, 7 SW3d 650 (Tex. App.–Texarkana 1999, pet. ref'd), the Texas appellate court ruled that TRE 702 is not a sufficiently precise objection to preserve appellate complaint. The said:

> Scherl objected to the intoxilyzer evidence when it was offered at trial on the basis that it was inadmissible under Rule 702, Daubert, Kelly, and Hartman. However, to preserve error an objection to the admission of evidence must state the specific

> grounds for the objection, if the specific grounds are not apparent from the context. Tex.R. Evid. 103(a); Tex.R. App. P. 33.1; Bird v. State, 692 S.W.2d 65, 70 (Tex. Crim. App.1985). An objection to an improper predicate that fails to inform the trial court exactly how the predicate is deficient will not preserve error. Bird, 692 S.W.2d at 70; Mutz v. State, 862 S.W.2d 24, 30 (Tex.App.-Beaumont 1993, pet. ref'd). Rule 702, Daubert, Kelly, and Hartman cover numerous requirements and guidelines for the admission of expert testimony. An objection based on Rule 702 and these cases alone is effectively a general objection to an improper predicate and is by no means specific. [FN3] Scherl's objection, without more specificity, did not adequately inform the trial court of any complaint upon which it might rule. Therefore, we conclude that no specific complaint about the reliability of the evidence was preserved for appellate review.
>
> [FN 3] Based on the objection made, how was the trial judge to know if Scherl was objecting because: (1) the judge failed to conduct a hearing outside the presence of the jury, or (2) the witness was not "qualified as an expert by knowledge, skill, experience, training, or education," or (3) the witness's testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue" and therefore was not relevant, or (4) the witness's testimony was not reliable because (a) the underlying scientific theory is not valid, or (b) the technique applying the theory is not valid, or (c) the technique was not properly applied on the occasion in question? See Texas Rule of Evidence 702, Daubert, Kelly, and Hartman.

However, in *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805 (Tex. 2002), the Supreme Court found the following objection sufficient to preserve a *Daubert* complaint:

> "I'm going to make an objection based upon the failure of this witness's methodology to meet the reliability standards as articulated by the Supreme Court in Gammill versus Jack William [s] Chevrolet as applying to all expert testimony." After voir dire, the trial court overruled the objection. The objection was timely, its basis was clear, and the Authority obtained a ruling. The Authority preserved its complaint for our review.

Although *Scherl* may not reflect the current state of the law on preserving a *Daubert* complaint, litigators are cautioned to consider how detailed they should be in asserting a *Daubert* or *Robinson* objection.

A party objecting based on *Daubert* should also object based on Rule of Evidence 403, arguing that probative value is outweighed by charges or prejudice or confusion. This is an independent basis to exclude the evidence.

c. "No Evidence" Challenge. A party in a Texas civil proceeding can attack the sufficiency of the evidence on appeal, on the ground that the expert testimony admitted into evidence did not meet the necessary standards of reliability and relevance. *Merrill Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). However, this complaint cannot be raised for the first time after trial. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex.), *cert. denied*, 525 U.S. 1017 (1998). *Accord, General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 282 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Harris v. Belue*, 974 S.W.2d 386, 393 (Tex. App.–Tyler 1998, pet. denied) (party, who did not object to admission of expert testimony on *Daubert* grounds until after plaintiff rested and in connection with motion for instructed verdict, waived *Daubert* attack).

9. Expert as Conduit for Hearsay. Lay witnesses can express opinions, but they cannot rely upon hearsay in formulating those opinions. TRE 701. Experts, on the other hand, can rely upon hearsay in formulating opinions, as long as the hearsay is of a type reasonably relied upon by experts in the particular field. TRE 703.

TRE 705(a) provides that an expert "may . . . disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data" on which his/her opinion is based. A question arises as to what extent an expert can relate to the jury hearsay upon which his opinion is based. Both the state and federal rules require a balancing test to resolve this question.

In *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 365 (Tex. 1987), the Supreme Court said that "ordinarily an expert witness should not be permitted to recount hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion." When the evidence does come in, "[t]he expert's hearsay is not evidence of the fact but only bears on his opinion. In a jury trial, the jury must be so instructed." *Lewis v. Southmore Sav. Ass'n*, 480 S.W.2d 180, 187 (Tex. 1972) (plurality opinion).

In *First Southwest Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954, 958 (Tex. App.--Texarkana 1989, writ denied), the court said that "[A] much better argument can be made against the admission on direct examination of unauthenticated underlying data . . . ." In that case, the trial court permitted a fire marshall to tell the jury that his opinion that arson occurred was based partially upon what an eyewitness to the fire told him. The expert was not, however, permitted to say to the jury that the witness said he had seen someone speeding away from the building just after the fire started. The trial court also excluded the fire marshall's report, on the grounds that although it met the government record exception to the hearsay rule, it contained hearsay, to-wit: a recounting of what the eye witness had told the fire marshall.

In *Kramer v. Lewisville Mem. Hosp.*, 831 S.W.2d 46, 49 (Tex. App.--Fort Worth 1992), *aff'd*, 858 S.W.2d 397 (Tex. 1993), the Court said: "While such supporting evidence is not automatically admissible because it *is* supporting data to an expert's opinion, neither is it automatically excludable simply because it is hearsay. The decision whether to admit or exclude evidence is one within the trial court's sound discretion."

In *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669, 674 (Tex. App.--Amarillo 1991, writ denied), the court held that permitting an expert to testify that he relied upon a government report did not make the report admissible. Citing *First Southwest Lloyds Ins. v. MacDowell*, the court said that "the better judicial position is not to allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies."

In *Pyle v. Southern Pacific Transportation Co.*, 774 S.W.2d 693, 695 (Tex. App.--Houston [1st Dist.] 1989, writ dism'd), the appellate court reversed due to the trial court's refusal to permit an expert to relate hearsay regarding prior accidents at a railroad crossing as the basis for his opinion that the crossroad was extra-hazardous.

In *Decker v. Hatfield,* 798 S.W.2d 637, 638 (Tex. App.--Eastland 1990, writ dism'd w.o.j.), it was not error to permit a psychologist to tell the jury that the child said he wanted to live with his mother.

In *New Braunfels Factory Outlet Center v. IHOP Realty Corp.*, 872 S.W.2d 303, 310 (Tex. App.--Austin 1994, no writ), the court held that an expert properly testified from a hearsay magazine article, when that was one of the bases of his opinion.

In *Boswell v. Brazos Elec. Power Coop., Inc.*, 910 S.W.2d 593, 601 (Tex.App.--Fort Worth 1995, writ denied), the court said that although Rules 703 and 705 make underlying evidence relied upon by an expert admissible if of a type reasonably relied upon by experts, the expert does not have the absolute right to disclose all of the facts and underlying data. "The decision whether to admit or exclude evidence is one within the trial court's sound discretion." *Id*. at 602.

TRE 705(d) contains a balancing test for the admission of otherwise inadmissible evidence on connection with an expert's opinion. The rule says that otherwise inadmissible underlying facts or data should not be disclosed to the jury "if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect." If such evidence is admitted, upon timely request the court must instruct the jury on the proper scope of the evidence.

10. Expert Reports. Are the written reports of testifying experts admissible into evidence, to be carried by the jury into the jury room?

a. Reports Are Hearsay. Hearsay is defined as "a statement, that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." TRE 801(d). As such, it appears that reports prepared by experts meet this definition and should be excluded. However, the issue is more complex than this.

b. Treating an Expert Report as a Business Record. The operative language in TRE 803(6) when determining the admissibility of expert reports under the business records exception to the hearsay rule is: "...kept in the course of a regularly conducted business activity, [and] making the record was a regular practice of that activity...." If expert reports are made specifically for litigation, unlike invoices, contracts, records, etc. made in the regular course of business, they do not come within the ambit of TRE 803(6). *See State v. Tomah*, 736 A.2d 1047 (Maine 1999) (forensic report of expert on blood spatter patterns, prepared specifically for trial, was not admissible in murder prosecution under business records exception to hearsay rule); *People v. Huyser*, 561 N.W.2d 481 (Mich. App. 1997) (report generated by prosecution's medical expert was not admissible under business records exception to hearsay rule, where medical expert did not treat child but examined her solely for litigation, and where expert's findings could not be duplicated in subsequent medical examination); *Kundi v. Wayne*, 806 S.W.2d 745 (Mo. App. E.D. 1991) (written reports of evaluations by expert witness were not admissible as business records); *Powell v. International Paper Company*, 1997 WL 137418 (Tex. App. – Beaumont 1997, writ denied) (expert reports prepared specifically for litigation are inadmissible under business records exception to hearsay rule).

c. Treating an Expert Report as a Public Record. TRE 803(8) treats public records as an exception to the hearsay rule. To be a public record, the document must be a record or statement of a public office, setting out the office's activity, or a matter observed while under a legal duty to report, or in a civil case, factual findings from a legally authorized investigation. A custody evaluation, filed with the clerk of the court, could meet the "factual findings" portion of TRE 803(8).

d. Genetic Testing Report. Genetic testing reports to establish paternity are admissible even without the establishment of the business records exception, provided the statutory requirements for testing are met (reasonably relied upon by experts in the field; accredited laboratory, proper ethnic or racial group frequencies). A genetic testing report is self-authenticating if signed under penalty of perjury and in compliance with Subchapter F of Chapter 160 of the Texas Family Code. *See In the Matter of J.A.M.*, 945 S.W.2d 320, 322 (Tex. App.–San Antonio 1997, no pet.); (involving prior law applied to paternity testing) *De La Garza v. Salazar*, 851 S.W.2d 380, 382 (Tex. App.–San Antonio 1993, no writ). (involving prior law applied to paternity testing)

11. Opinions on Legal Questions vs. Fact-Law Questions. Experts cannot testify what the law of the forum state is. The law of sister states and foreign countries is okay, but not law of Texas. *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App.--Dallas 1992, writ denied), was a contract case, involving scope of coverage under an insurance policy. The court of appeals ruled that an expert could not render an opinion on whether a particular event was or was not within the scope of an insurance policy. The court cited an earlier case which held that the question of "whether or not a legal duty exists under a given set of facts and circumstances is a question of law for the court." *See St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 284 (Tex. App.--Corpus Christi 1982, no writ). In *Texas Workers' Compensation Com'n v. Garcia*, 862 S.W.2d 61, 105 (Tex. App.--San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995), the appellate court held that expert testimony of a law professor as to the constitutionality of a statute was not admissible, since it was opinion testimony on a legal issue. However, in *Transport Ins. Co. v. Faircloth*, 861 S.W.2d 926, 938-39 (Tex. App.--Beaumont 1993), *rev'd on other grounds*, 898 S.W.2d 269 (Tex. 1995), the appellate court held that expert testimony of a former Texas Supreme Court justice regarding the proper procedure for settling a personal injury claim of a minor child, and whether it had been followed in this instance, was admissible. And in *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App.--Houston [1st Dist.] 1994, writ denied), a former OSHA compliance officer could testify whether a training regimen did or did not comply with OSHA regs, since that was a mixed fact law question involving the application of OSHA regs to the facts of the case.

In *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.--Corpus Christi 1990, no writ), a divorce case involving tracing of commingled separate and community funds, the appellate court held the trial court properly refused to let Wife's attorney cross-examine Husband's CPA as to the CPA's understanding of the community-money-out-first presumption under the *Sibley* case. However, the court noted a "host of legal problems" raised by the *Birchfield* rule permitting a witness to testify on mixed fact-law questions. Where the "law part" is debatable, one party's right to elicit expert testimony on mixed fact-law questions collides with the opponent's right to cross-examine, all in the context of the trial court's power to restrict cross-examination to avoid jury confusion.

The court, in *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App.--Texarkana 1994, writ dism'd by agr.), explored the distinction between an expert testifying on mixed fact-law questions and pure law questions. The court posited the following definition of a mixed fact-law question:

> [A]n opinion or issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.

Id. at p. 134. Using this standard, it was not error to permit the expert to testify that Mary Carter agreements at issue in the case were against public policy.

In *Holden v. Weidenfeller*, 929 S.W.2d 124 (Tex.App.--San Antonio 1996, writ denied), the trial judge excluded expert testimony from a law school professor, who was Board Certified in Real Estate Law, based upon the pleadings, depositions, and documents on file in the case, as to whether an easement appurtenant, an easement by estoppel or a public dedication existed in the case. The appellate court held that the opinion offered was not one of pure law, but rather of mixed fact-law. However, since the trial was to the court without a jury, it was not an abuse of discretion to exclude the testimony since it was not "helpful to the trier of fact," as required by TRE 702. This is because the trial court, being a legal expert himself, was "perfectly capable of applying the law to the facts and reaching a conclusion without benefit of expert testimony from another attorney." *Id.* at 134.

See Fleming Foods of Texas, Inc. v. Sharp, 951 S.W.2d 278 (Tex. App.--Austin 1997, writ denied) (former Attorney General Waggoner Carr not permitted to testify that changes to the Texas Tax Code were substantive, since statutory construction is a pure question of law); *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56,94 (Tex. App.--Houston [14th Dist.] 2004, n.p.h.) (a former Texas Supreme Court Justice and a law professor were improperly allowed to testify to their views of what the law is).

C. SUMMARY JUDGMENT PROCEEDINGS.

1. Authenticating Evidence in Summary Judgment Proceedings. In reliance upon the case of *Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608 (Tex. App.--Dallas 1988, writ denied), lawyers used to go to extraordinary lengths to authenticate deposition excerpts for use in summary judgment motions or responses. Thankfully, this procedure was repudiated by the Supreme Court in *McConathy v. McConathy*, 869 S.W.2d 341, 341-42 (Tex. 1994), which declared that deposition excerpts submitted as summary judgment evidence do not have to be authenticated. The Supreme Court reasoned that "[a]ll parties have ready access to depositions taken in a cause, and thus deposition excerpts submitted with a motion for summary judgment may be easily verified as to their accuracy. Authentication is not necessary and is not required under the present rules." *Id.* at 342.

NOTE: TRCP 193.7 provides that documents produced by a party in response to written discovery are automatically authenticated as against that party, unless the producing party makes an objection within 10 days of learning of the intended use.

2. Evidentiary Objections in Summary Judgment Proceedings. Evidentiary objections, such as a hearsay objection, or lack of personal knowledge, etc. must be made in the summary judgment response or reply in order to stop the trial court and the appellate court

from relying upon the inadmissible evidence in connection with the summary judgment. *Washington v. McMillan*, 898 S.W.2d 392, 397 (Tex. App.--San Antonio 1995, no writ); *Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 365 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied). The trial court's ruling sustaining an objection to summary judgment evidence must be reduced to writing, filed, and included in the transcript, to be given effect on appeal. *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied). This can be done by having the trial court sign a written order ruling on the objection. Or by including a ruling on the objection in the summary judgment order. Or, if all else fails, you can use a formal bill of exception under new TRAP 33.2. Formal bills must be filed no later than 30 days after the filing party's notice of appeal is filed. Further details can be obtained from: David Hittner & Lynne Liberato's law review article on *Summary Judgments in Texas*, 60 SOUTH TEXAS L. REV. (2019).

3. Conclusory Statements. Conclusory statements presented in an affidavit are not proof of the matter asserted. "A conclusory statement is one that does not provide the underlying facts to support the conclusion and, therefore, is not proper summary-judgment proof." *Rockwall Commons Assocs., Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 512 (Tex. App.--El Paso 2010, no pet.). "Affidavits that state conclusions without providing underlying facts to support those conclusions are not proper summary judgment evidence." *Leonard v. Knight*, 551 S.W.3d 905, 911 (Tex. App.--Houston [14th Dist.] 2015, no pet.).

D. REDACTING INADMISSIBLE PORTIONS OF EXHIBIT. In some instances parts of a document are admissible while parts are not. According to one decision, when the trial court has ruled that a document can be admitted after certain information is redacted, the party offering the exhibit has the duty to be sure that the inadmissible portions are properly redacted. *American Gen. Fire & Cas. Co. v. McInnis Book Store, Inc.*, 860 S.W.2d 484, 487-88 (Tex. App.--Corpus Christi 1993, no writ); *Firo v. State*, 878 S.W.2d 254, 256 (Tex. App.--Corpus Christi 1994, no pet.). However, the complaining party still has the burden to show that permitting the exhibit to go to the jury unredacted was reversible and not harmless error. *Id.* at 488.

E. ADMISSIBILITY OF OFFERS OF SETTLEMENT. Settlement offers are not admissible on the issue of liability or damages. Likewise, conduct or statements made in negotiations is not admissible. TRE 408. The rule does not require exclusion of evidence which can be obtained in another manner, merely because the matter was raised in compromise negotiations. *Id.* The evidence is not excludable where offered for another purpose, such as proving bias or prejudice of a witness, negating a claim of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. *Id.* However, "[t]he exception for bias or prejudice or interest is a narrow one that refers to so-called "Mary Carter" agreements." *Rural Development, Inc. v. Stone*, 700 S.W.2d 661, 668 (Tex. App.--

Corpus Christi 1985, writ ref'd n.r.e.) ("Evidence whether Durham liked or disliked Stone may be a proper subject for consideration by the jury, but that evidence must come from some other source than conduct and statements at a meeting to attempt a settlement"). *See Barrett v. United States Brass Corp.*, 864 S.W.2d 606, 633-34 (Tex. App.--Houston [1st Dist.] 1993), *rev'd on other grounds subnom*, *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996) (defendant's settlement offers not admitted, even though offered as relevant to issue of mental anguish damages, unconscionability and plaintiff's failure to mitigate damages).

F. EVIDENCE OF OTHER INSTANCES. The doctrine of *res inter alios acta* provides that each act or transaction sued on must be established by its own particular facts and circumstances. *State v. Buckner Construction Co.*, 704 S.W.2d 837, 848 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). As stated in *Klorer v. Block*, 717 S.W.2d 754, 763 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.):

> The general rule in Texas is that prior acts or transactions by one of the parties with other persons are irrelevant, immaterial and highly prejudicial and in violation of the rule that res inter alios acts are incompetent evidence, particularly in a civil case. *Texas Farm Bureau Mutual Insurance Company v. Baker*, 596 S.W.2d 639, 642 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.). The doctrine of "res inter alios acta" is based on the principle that each act or transaction sued on should be established by its own particular facts and circumstances, 23 TEX. JUR.2d EVIDENCE § 187 (1961) (see cases cited).

However, an exception to this rule exists: a party's prior acts or transactions with other persons are admissible to show that party's intent where material, if they are so connected with the transaction at issue that they may all be parts of a system, scheme or plan. *See, e.g., Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.--El Paso 2002, pet. denied); *Underwriters Life Ins. Co., v. Cobb*, 746 S.W.2d 810, 815 (Tex. App.--Corpus Christi 1988, no writ). *Texas Farm Bureau Mutual Insurance Co. v. Baker*, 596 S.W.2d 639, 642-43 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.); *Payne v. Hartford Fire Ins. Co.*, 409 S.W.2d 591, 594 (Tex. Civ. App.--Beaumont 1966, writ ref'd n.r.e.); *Texas Osage Co-Operative Royalty Pool, Inc. v. Cruze*, 191 S.W.2d 47, 51 (Tex. Civ. App.--Austin 1945, no writ). In *Service Corp. International v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011), the Supreme Court found that the proponent of such evidence "failed to demonstrate sufficient connection between the events in this case and the alleged actions in other lawsuits to show the other suits were admissible."

TRE 404(b)(1) provides:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the

character.

In *Bushell v. Dean*, 781 S.W. 2d 652, 656 n. 4 (Tex. App.–Austin 1990), *rev'd and remanded*, 803 S.W.2d 711 (Tex. 1991) (per curiam) (evidentiary error was not preserved and was therefore waived; case remanded for appellate court to review other complaints), the Court of Appeals made this comment in a footnote:

> Many Texas opinions rely on the doctrine of res inter alios acta (transactions involving others). That doctrine states that evidence of similar events is not relevant, and therefore not admissible. The doctrine excludes a variety of evidence, most frequently evidence of a transaction between a party and a third person, but also evidence of transactions between third persons. Because the doctrine applies to so many situations, case law has not developed a precise meaning for the Latin term. This imprecision has been interpreted as a lack of substance by noted commentators who have suggested abandoning the term altogether. 22 Wright & Graham, Federal Practice and Procedure § 5170 at 114 (1978).
>
> However, a handful of Texas opinions, including some of those cited, do provide a useful rule: evidence of a similar event can only be admissible when a party to the lawsuit (or his agent, servant, etc.) participated in the similar event.

This particular rule of evidence was discussed by Newell Blakely in *Texas Rules of Evidence Handbook*, 20 HOU. L. REV. 151, 200 (1983), when he said:

> Rule 404(b) embodies the traditional Texas rule, which has been expressed as follows:
>
> > [W]hen it becomes necessary to decide whether or not a particular act was done with intent to defraud or with other evil intent proof of similar acts at or about the same time is admissible as circumstances tending to explain the motive with which the act under investigation was done.[221]

221. *Posey v. Hanson*, 196 S.W. 731, 733 (Tex. Civ. App.--Austin 1917, no writ). See also *Bach v. Hudson*, 596 S.W.2d 673, 677 (Tex. Civ. App.--Corpus Christi 1980, no writ) (mental capacity); *Texas Farm Bureau Mut. Ins. Co. v. Baker*, 596 S.W.2d 639, 643 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.) (intent); *Buhidar v. Abernathy*, 541 S.W.2d 648, 652 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.) (mental capacity); *Payne v. Hartford Fire Ins. Co.*, 409 S.W.2d 591, 594 (Tex. Civ. App.--Beaumont 1966, writ ref'd n.r.e.) (plan); *Bridges v. Bridges*, 404 S.W.2d 48, 51-52 (Tex. Civ. App.--Beaumont 1966, no writ) (knowledge).

The matter was also examined in 2 RAY, TEXAS LAW OF EVIDENCE § 1521-22 (2nd ed. 1980). As to criminal evidence, in Section 1521 Professor Ray says:

> [E]vidence which tends to prove the offense charged or any material fact in connection therewith is admissible regardless of the fact that it also shows the commission of other crimes. In other words, where relevant for any purpose other than to show the defendant's bad character, the admissibility of other offenses is not affected by their criminality. Other crimes may tend to show knowledge, design or intent. When relevant for either purpose they are not to be excluded because inadmissible to prove the accused's character. Of course there is danger, as there always is, where evidence is admissible for one purpose and inadmissible for another, that the evidence will be misused by the jury and the accused found guilty because of his bad character. But this risk is one which must be run, guarded against as best it can be by the judge's charge. The principle of multiple admissibility must control.

Id. at 201-203. As to civil trials, in Section 1522 Professor Ray continued:

> Wherever knowledge, intent or plan are relevant in a civil case the principles discussed in the preceding section apply with equal force. . . .

Id. at 211-212. See also Professor Ray's discussion of "Intention, Plan or Design" in Section 1533, and "Motive or Emotion" in Section 1534.

TRE 406 permits admission of a person's habit, or an organization's routine, to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. "For testimony of the routine practice of an organization to be admissible, it must show a regular response to a repeated specific situation." *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.--El Paso 2002, pet. denied).

Even where the evidence of other acts is relevant, the trial court can still exclude the evidence under TRE 403, where its probative value is substantially outweighed by the danger of unfair prejudice. The Court of Criminal Appeals has developed a 4-part balancing test, regarding the exclusion, under old Tex.R.Crim.Evid. 403, of otherwise admissible evidence of other crimes, wrongs or acts: (1) the opponent must seriously contest the ultimate issue relating to the evidence; (2) the State must have a compelling need to the evidence to establish the ultimate issue; (3) the probative value of the extraneous offense must be compelling; and (4) a jury instruction to consider it for a limited purpose must likely be effective. *Montgomery v. State*, 810 S.W.2d 372, 392-93 (Tex. Crim.App. 1990). The First Court of Appeals adopted this test for civil litigation in *McLellan v. Benson*, 877 S.W.2d 454, 458 (Tex.App.--Houston [1st Dist.] 1994, no writ). However, the Austin Court of Appeals declined to adopt this test for civil litigation, fearing that the stringency of the test--appropriate to criminal litigation--might require the exclusion of highly relevant evidence in many civil cases. *Porter v. Nemir*, 900 S.W.2d 376, 381 n. 6 (Tex. App.--Austin 1995, no writ). *See Schlueter v. Schlueter*, 929 S.W.2d 94, 97 (Tex. App.--Austin 1996, writ granted)

(Rule 403 is an extraordinary remedy that must be used sparingly).

Johnson v. City of Houston, 928 S.W.2d 251 (Tex.App.--Houston [14th Dist.] 1996, no writ) (proper to exclude testimony of former co-worker that he had been fired in retaliation for filing a workers comp. claim; one instance does not rise to level of frequency and regularity necessary to be considered a routine practice under TRE 406); *McLellan v. Benson*, 877 S.W.2d 454, 456-57 (Tex. App.--Houston [1st Dist.] 1994, no writ) (in case involving "date rape," it was not error to admit another instance of date rape on the issue of defendant's intent); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ) (proper to exclude evidence of three prior accidents in previous six years, since that did not constitute a habit under TRE 406). *See also Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 269-270 (Tex. App.--El Paso 1994, writ denied) (other incidents should not be excluded under TRCE 403 just because they are prejudicial; the prejudicial effect must substantially outweigh the relevance of the evidence). *Missouri Pacific R. Co. v. Roberts*, 849 S.W.2d 367 (Tex. App.--Eastland 1993, writ denied) (res inter alios acta subsumed into TRE 401, 402, 403 & 404(b)). *See also Pena v. Neal, Inc.*, 901 S.W.2d 663 (Tex. App.--San Antonio 1995, writ denied) (driver's habit of stopping at convenience store to buy and drink alcohol, and clerk's habit of providing alcohol to driver, was admissible under TRCE 406 to prove that behavior on night of accident was in conformity with the habit); *see generally Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718 (Tex. App.--San Antonio 1995, writ dism'd) (similar accidents at other stores, while not admissible on defendant's knowledge of an unsafe condition, was admissible to establish expert's familiarity with shelving procedures in the industry).

VI. FOREIGN LANGUAGE DOCUMENTS.TRE 1009 governs the admissibility of translations of documents in a foreign language in Texas court proceedings. TRE 1009 provides a method for one party to force adverse parties to object to or agree to translations of foreign language documents in advance of trial. At least 45 days before trial, a proponent may serve on all parties the underlying foreign language document along with a translation. accompanied by a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate. Objections must be made at least 15 days before trial, and when objecting a party should specifically indicate the inaccuracies and offer an accurate translation. At trial, the court must admit the original translation unless the adverse party has objected or submitted a conflicting translation. The court must determine whether there is a genuine issue about the accuracy of a material part of the translation, and if so, the dispute must be resolved by the fact finder. Other than as provided in 1009(c), any party may offer the testimony of a qualified translator. The time limits in TRE 1009 can be varied by the court for good cause. The court can appoint a qualified translator and tax the reasonable value of the translator's services as costs of court. TRE 1009(g).

VII. INTERPRETERS. TRCP 183 authorizes the appointment of interpreters for use during court proceedings.

> Tex. R. Civ. P. 183 Interpreters
>
> The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.
>
> Tex. R. Evid. 604. Interpreters
>
> An interpreter must be qualified and must give an oath or affirmation to make a true translation.

In counties with a population of less than 50,000,[3] "a court may appoint a spoken language interpreter who is not a licensed court interpreter." Tex. Gov't Code § 57.002(c). The interpreter need only be at least 18 years old, not a party to the proceeding, and qualified by the court as an expert. Tex. Gov't Code § 57.002(e). "An attack on the competency of an interpreter is reviewed for an abuse of discretion." *M.M.V. v. Texas Dep't of Family & Protective Servs.*, 455 S.W.3d 186, 190 (Tex. App.--Houston [1st Dist.] 2014, no pet.). *Accord*, *Suday v. Suday*, No. 04-19-00832-CV (Tex. App.–San Antonio Nov. 15, 2020, no pet.) (memo. op.).

If the trial court fails to administer the required oath to the interpreter, an objection must be made at the time or else it is waived. *Lara v. State*, 761 S.W.2d 481 (Tex. App.--Eastland 1988, no pet.).

VIII. RECOVERED MEMORY. Back in the 1990's Courts were sometimes faced with testimony of witnesses about their recollection of events that has been enhanced or "recovered" through hypnosis. In *Borawick v. Shay*, 68 F.3d 597 (2nd Cir. 1995), *cert. denied*, 116 S. Ct. 1869, 134 L.Ed.3d 966 (1996), the court held that it was not error to exclude "recovered memory" testimony of a 38-year old woman regarding her recollection of being sexually abused 30 years before by her aunt and uncle. The court considered the hypnotherapist's lack of qualifications, and failure to keep audiotapes or videotapes that could demonstrate whether the hypnotherapist had been suggestive in his approach. The Court adopted a "totality-of-the-circumstances" approach, as had the Eighth and Fourth Circuit Courts of Appeals. The Texas Supreme Court considered the "recovered memory" technique in connection with the discovery rule, in *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996). In that case, the majority of the Court held that the discovery rule did not apply to allegedly recovered memories of childhood sex abuse, because expert opinions, and the victim's

testimony based upon recovered memory, were not objectively verifiable. Justice Gonzalez concurred, saying that the expert testimony regarding repressed memories did not meet the guidelines for admissibility of scientific expert opinions set out in *DuPont v. Robinson*. Justice Cornyn, in his concurring opinion, agreed with Justice Gonzalez, saying that *Robinson* would result in the exclusion of all uncorroborated repressed memories of childhood sexual abuse. This subject is treated in detail in the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL.