



Texas Rules of Evidence with Objections

**Elizabeth Masters Fraley
Gerald Reading Powell
The Honorable Ed Kinkeade**

**Anthony J. Bocchino
David A. Sonenshein**

Texas Rules of Evidence with Objections

Fourth Edition

Texas Rules of Evidence with Objections

Fourth Edition

Updated by

Elizabeth Masters Fraley

Assistant Professor of Law
Baylor Law School

Gerald Reading Powell

Professor of Law
Baylor Law School

The Honorable Ed Kinkeade

United States District Judge
Dallas, Texas

Anthony J. Bocchino

David A. Sonenshein



© 2018 National Institute for Trial Advocacy
eBook © 2018 National Institute for Trial Advocacy

All rights reserved. No part of this work may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or by any information storage or retrieval system without the prior written approval of the National Institute for Trial Advocacy unless such copying is expressly permitted by federal copyright law. Address inquiries to:

Reprint Permission

[National Institute for Trial Advocacy](#)

1685 38th Street, Suite 200

Boulder, CO 80301-2735

Phone: (800) 225-6482

Fax: (720) 890-7069

Email: permissions@nita.org

ISBN 978-1-60156-739-0 (print)

eISBN 978-1-60156-740-6 (Ebook)

FBA1739

Find the print version [here](#).

Library of Congress Cataloging-in-Publication Data

Names: Fraley, Elizabeth Masters, author.

Title: Texas rules of evidence with objections.

Description: Fourth edition / updated by Elizabeth Masters Fraley, Assistant Professor of Law, Baylor Law School [and four others]. | Boulder, CO : National Institute for Trial Advocacy, [2018]

Identifiers: LCCN 2017055015 | ISBN 9781601567390

Subjects: LCSH: Evidence (Law)—Texas. | Objections (Evidence)—Texas.

Classification: LCC KFT1740 .A4 2018 | DDC 347.764/06—dc23

LC record available at <https://lcn.loc.gov/2017055015>

Terms of Use

Your use of this electronic publication (“eBook”) from LexisNexis, a division of RELX Inc., a Massachusetts corporation, or its affiliates, is subject to the following terms and conditions. This eBook is for your personal use only. All access to and use of this eBook is subject to U.S. and international copyright law. All intellectual property rights are reserved to the copyright holder. Redistribution or duplication of this eBook to any other electronic media or a third party is strictly prohibited. Under no circumstances may you redistribute this eBook commercially or post this eBook on an intranet, internet or SharePoint site. Finally, use of this eBook is further subject to the terms and conditions of use which were accepted at the time you completed your purchase of this eBook from the point of purchase.

Hyperlink Key.

In order to distinguish between the links to other sections within LexisNexis™ eBooks and external links to the Internet, we have added color coding to the links.

Following is a color key for the links:

Blue: Links inside the eBook

Green: External links to LexisNexis™ on-line and the Internet

Contents

Ambiguous Questions

Argumentative Questions

Asked and Answered/Cumulative

Assuming Facts Not in Evidence

Authentication of Telephone Conversations and Voices

Authentication of Writings

 Authentication at Trial

Best Evidence Rule

Character Evidence: The Alleged Victim of Assaultive Conduct

Character Evidence: Character of the Accused Party

Character Evidence: Other Wrongs or Acts

Character Evidence: Propensity Rule; Character as an Element of a
 Claim or Defense

Collateral Source Rule

Competence to Testify: Generally

Competence: Dead Man's Rule

Competence: Firsthand Knowledge

Competence: Juror Testimony

Compound (Multifarious) Questions

Compromise and Offers of Compromise

Cross-Examination: Generally

Digital Evidence: Concerns Unique to the Digital Nature of Certain
 Evidence; Authentication of Digital Evidence Generally

Exhibits: Demonstrative

Exhibits: Real Evidence

Exhibits: Writings Generally

Expert Opinion

Form Objection: Generally

Guilty Pleas, Offers of Pleas, and Related Statements

Habit and Routine Practice

Hearsay: Generally

Hearsay: Admissions of a Party Opponent

Hearsay: Attacking and Supporting the Credibility of a Declarant

Hearsay: Depositions

Hearsay Within Hearsay

Hearsay: Nonhearsay Prior Statements of Witnesses

Hearsay Exception: Absence of Entry in Business Records

Hearsay Exception: Absence of Public Record or Entry

Hearsay Exception: Excited Utterance

Hearsay Exception: Family Records

Hearsay Exception: Former Testimony

Hearsay Exception: Judgment as to Personal, Family, or General History, or Boundaries

Hearsay Exception: Judgment of Previous Conviction

Hearsay Exception: Learned Treatises

Hearsay Exception: Market Reports and Commercial Publications

Hearsay Exception: Marriage, Baptismal, and Similar Certificates

Hearsay Exception: Present Sense Impression

Hearsay Exception: Public Records and Reports

Hearsay Exception: Recorded Recollection

Hearsay Exception: Records of Documents Affecting an Interest in Property

Hearsay Exception: Records of Regularly Conducted Activity; Business Records

Hearsay Exception: Records of Religious Organizations

Hearsay Exception: Records of Vital Statistics

Hearsay Exception: Reputation as to Character

Hearsay Exception: Reputation Concerning Boundaries or General History

Hearsay Exception: Reputation Concerning Personal or Family History

Hearsay Exception: Requirement of Unavailability

Hearsay Exception: State of Mind

Hearsay Exception: Statement Against Interest

Hearsay Exception: Statement of Personal or Family History

Hearsay Exception: Statement Under Belief of Impending Death

Hearsay Exception: Statements for Purposes of Medical Diagnosis or Treatment

Hearsay Exception: Statements in Ancient Documents

Hearsay Exception: Statements in Documents Affecting an Interest in Property

Hearsay Exception: Then-Existing Physical Condition

Impeachment: Generally

Impeachment by Bias, Interest, and Improper Motive

Impeachment by Character Evidence: Convictions and Specific Instances of Conduct

Impeachment by Character Evidence: Opinion and Reputation

Impeachment by Contradiction
Impeachment of Perception or Memory
Impeachment by Prior Inconsistent Statements
Insurance Against Liability
Judicial Notice
Lay Opinion Evidence
Leading Questions
Misstating the Testimony
Narratives
Nonresponsive Answers
Objections Generally
Offers of Proof
Payment of Medical and Similar Expenses
Privilege: Clergyman-Penitent Communication
Privilege: Comment on Claim of Privilege
Privilege: Compelled Disclosure
Privilege: Husband-Wife Communication
Privilege: Identity of Informer
Privilege: Lawyer-Client Communication
Privilege: Mental Health Information Communication
Privilege: Offensive Use Waiver
Privilege: Physician-Patient Communication
Privilege: Political Vote
Privilege: Recognized Only as Provided
Privilege: Required Reports
Privilege: Trade Secrets

Privilege: Voluntary Disclosure

Refreshing Present Recollection

Relevance: Generally

Relevance: Conditional Admissibility

Relevance: Exclusion of Relevant Evidence on Special Grounds

Relevance: Limited Admissibility

Relevance: Rule of Optional Completeness

Repetitious Questions

Subsequent Remedial Measures

Appendix A: Texas Rules of Evidence

(Effective June 14, 2016)

Ambiguous Questions

Objection

- *Objection. The question is ambiguous (or vague).*

Response

None recommended.

Cross-Reference to Texas [Rule 611\(a\)](#)

No Texas rule specifically covers forms of questions. The court has discretion to sustain the objection pursuant to [Rule 611\(a\)](#).

Explanation

This objection should only be made when, in the judgment of objecting counsel, the question will mislead the jurors or witness to the detriment of counsel's client. This type of objection seems to encourage a speaking objection about the nature of the defect (*Objection. The question is ambiguous because ...*). The usual effect of such an objection is to make the opponent a better lawyer by forcing a more precise question. If the question seems designed to confuse the jurors, objecting may communicate to the jurors that objecting counsel is concerned with clarity and truth-finding in the trial process.

A judge may well respond to this objection by asking the witness if the witness understands the question. If the witness understands the question, the question will be allowed to stand. Otherwise, questioning counsel will be required to rephrase the question.

Argumentative Questions

Objection

- *Objection. The question is argumentative.*

Response

None recommended.

Cross-Reference to Texas [Rule 611\(a\)](#)

No Texas rule specifically covers forms of questions. The court has discretion to sustain the objection pursuant to [Rule 611](#) (a).

Explanation

This objection applies to questions on both direct and cross-examination. It may be appropriate where counsel attempts, in question form, to summarize the testimony of the witness, comment on the evidence, or draw inferences from the evidence, essentially making an argument to the jurors during the questioning process. This objection may also be proper when the witness has answered the question, but counsel continues to make the same inquiry, usually in louder or more strident tones. An alternative objection may be “asked and answered.”

Deciding whether counsel is arguing with the witness via question is subjective and will depend on the judge’s perception and counsel’s demeanor and prior conduct, and it may vary significantly from court to court. The line between good, aggressive cross-examination and improper argumentative interrogation is a fine one.

Practice Tip

Research your judge by asking other attorneys who have tried cases in that court about the judge’s preferences, patience, and tolerance for argument in questions.

Asked and Answered/Cumulative

Objection

- *Objection. The question seeks testimony that is cumulative.*
- *Objection. The question has been asked and answered.*

Response

- *The witness has not answered the question.*
- *Rather than being cumulative, the witness's testimony corroborates other testimony.*
- *This witness's testimony is additive, not cumulative because (state what makes this particular witness's testimony distinctive or needed for the jurors).*

Cross-Reference to Texas [Rule 403](#)

Explanation

While “asked and answered” is technically not grounds for exclusion, it may have practical juror appeal. Use this objection when a witness is being badgered on a topic on which the witness has already testified. It can also be effectively used to point out that the questioning attorney is wasting the court's and the jurors' time by asking needlessly repetitive questions.

Practice Tip

Adopting a world-weary tone of voice can add to the jury appeal of this objection: “Your Honor, we have heard this same question over and over and over. It has been asked and answered.”

Assuming Facts Not in Evidence

Objection

- *Objection. The question assumes a fact not in evidence. There has been no testimony (or exhibit) that establishes (insert facts that have been assumed).*

Response

- *I will prove that fact in my next question.*
- *That fact has been proved during the earlier testimony of (assert name of witness).*
- *This fact will be proved during the testimony of (assert name of witness).*
- *This fact has been established by exhibit (give the number).*
- *This fact helped form the basis of this expert's opinion.*

Cross-Reference to Texas **Rule 611(c)**

Explanation

This objection should be made when objecting counsel is confident that the witness cannot testify to the assumed fact and that the fact has not been established through an admitted exhibit. If the witness can testify to the assumed fact and questioning counsel knows how to ask the question, the objection may highlight an unfavorable fact or diminish the credibility of the objecting attorney. In addition, the objection may have the unintended effect of making the opponent a better lawyer or providing a firmer foundation for the fact.

Authentication of Telephone Conversations and Voices

General Predicates

Personal Call; Witness Is Person Calling

- *Did you have occasion to call (name of person called)?*
- *When did you make the call?*
- *How did you know what number to call?*
- *Who did you speak with?*
- *How do you know it was (name of person called)?*

Business Call; Witness Is Person Calling

- *Did you have occasion to call (name of business called)?*
- *When did you make the call?*
- *How did you know what number to call?*
- *Who did you speak with?*
- *How do you know it was (name of person speaking)?*
- *Without, at this time, going into what was specifically said, what did the conversation generally concern?*

Personal or Business Call; Witness Is Person Called

- *Did you receive a phone call at (or on) (general time of call)?*
- *Who was it that called you?*
- *How do you know it was (name of person calling)?*

Voice Identification Predicate

- *Do you have an opinion of whose voice it was that you heard at (or on) (general time voice heard)?*
- *What is your opinion?*

- [if needed to establish basis] *And what is that opinion based on?*

Forms of Objections and Responses

Form of Objections

- *Objection. The telephone conversation has not been authenticated because there is no proof of the identity of the person spoken to.*

Form of Response

- *The identity of the participants in the telephone conversation has been established through the testimony of (name of witness), who testified that:*
 - » *he (or she) is familiar with and recognized the voice; or*
 - » *he (or she) called the number listed for (name of participant), and the other party identified himself as (name of participant); or*
 - » *he (or she) called the number listed for (name of participant), and the content of the conversation showed (name of participant) to be the person who answered the call; or*
 - » *he (or she) called the number listed for (insert name of business) and the conversation related to business conducted by (name of business) over the telephone; or*
 - » *[when proved by a qualified expert witness] he (or she) has compared the voice in question with an authentic voice exemplar and his (or her) opinion is that the voice in question is that of (name of purported speaker).*

Cross-Reference to Texas [Rule 901](#)

Explanation

Telephone conversations are usually authenticated through the testimony of one of the participants or another person who has gained familiarity with the voices of the participants and can give an opinion about the identity of the persons speaking. The witness may obtain familiarity either before or after the telephone conversation in question as long as the circumstances of obtaining familiarity are sufficient to meet the quantum of proof required by [Rule 104\(b\)](#).

Telephone or other conversations that have been recorded can be authenticated through expert testimony, which would consist of a comparison of the recorded conversations with a voice exemplar through voice spectrography. Authentication can also come from any person who can demonstrate familiarity with the voice in question. For any recording, the proponent must also establish the authenticity and correctness of the recording, that the testimony on the recording was given voluntarily, and how the recording was preserved (*Wallace v. State*, 782 S.W.2d 854, 857 (Tex. Crim. App. 1989)). This additional predicate can be laid through a witness with personal knowledge or through circumstantial evidence (*Seymour v. Gillespie*, 608 S.W.2d 897, 898 (Tex. 1980)).

Practice Tip

Now that the majority of phone calls involve a cell phone, records of the call (or text) can be readily obtained through subpoena. If a witness cannot recall the details of the call (date, time, number), using cell phone numbers to refresh a witness's recollection may help establish the predicate. Similarly, these records may be used to impeach a witness who denies a call took place or may be used in taking a witness on voir dire to establish the call did not take place as claimed. The records may be used to refresh recollection without being admitted into evidence. If the records need to be admitted, getting a business record affidavit from the custodian may be valuable preparation (see Texas Rule 803(6) and Texas Rule 902(10)).

Authentication of Writings

Pretrial Authentication

Texas Rule of Civil Procedure 193.7 provides for self-authentication of documents produced in response to written discovery for use against the producing party. The self-authentication is triggered not by the party producing the document, but by the party obtaining actual notice that the document will be used at any pretrial proceeding or trial. Once put on actual notice, the producing party has ten days to object to the authenticity of the document or any part thereof. As such, where a writing is produced in discovery and the producing party has actual notice it will be used, no further authentication is needed.

This rule is intended to alleviate the burden on a party receiving documents through discovery from proving the authenticity of those documents when they are used against the party who produced them. However, a party cannot authenticate a document for use in its own favor by merely produced it in response to a discovery request (see *Blanche v. First Nationwide Mort. Corp.*, 74 S.W.3d 444, 451–52 (Tex. App.—Dallas 2002)). In a will contest, for example, a party cannot produce a copy of the will it claims to be the original and use Rule 193.7 to authenticate it.

Authentication at Trial

Where a writing has not been authenticated under Rule 193.7, the following predicates may be needed.

Testimony of a Witness with Knowledge

[After laying predicate of personal knowledge of writing]

- *I hand you what has been marked for identification as Exhibit ____.*
Can you identify it?
- *What is it?*
- *Is Exhibit ____ the original or a copy?*

- [if document is the original] *Is Exhibit ____ in substantially the same condition as when you saw it on (or at) (general time document viewed) (stating the time personal knowledge was acquired)?*
- [if document is a copy] *Is Exhibit ____ a true and correct copy of (stating identity of the original document)?*

Lay Opinion of Handwriting

- *Are you familiar with (person in question's) handwriting?*
- *How are you familiar with it?*
- *When did you become familiar with (person in question's) handwriting?*
- *I hand you what has been marked for identification as Exhibit _____. Do you have an opinion as to who wrote Exhibit _____?*
- *What is your opinion?*
- *What is the basis of your opinion?*

Expert Opinion of Handwriting

After establishing expertise and proving authenticity of exemplar, preferably by stipulation or admission:

- *I hand you what has been marked for identification as Exhibit _____. Have you previously had an opportunity to examine this handwriting exemplar?*
- *I now hand you what has been marked for identification as Exhibit _____. I will ask you to compare Exhibit ____ [exemplar] with Exhibit ____ [questioned document]. Do you have an opinion as to whether these two exhibits were written by the same person?*
- *What is your opinion?*
- *What is the basis of your opinion?*

Or

- *Based on your training and experience, and your comparison of Exhibit ____ and Exhibit _____, do you have an opinion as to who*

wrote Exhibit ____?

- What is your opinion?

Objection

- Objection. This exhibit has not been authenticated; or
- Objection. This exhibit is not authentic.

Responses

- The exhibit was self-authenticated under *Tex. R. Civ. P. 193.7*.
- The instrument has been authenticated by
 - » stipulation; or
 - » the testimony of (name of witness), who has testified that
 - › he (or she) created the writing; or
 - › he (or she) was present at the creation of the writing and testified that it is in substantially the same condition as at the time of its creation; or
 - › he (or she) knows the handwriting because he (or she) saw the author write or sign the instrument; or
 - › he (or she) knows the handwriting from having seen the author write (or sign) his signature at another time; or
 - › he (or she) knows the handwriting by circumstantial evidence that shows (state circumstances); or
 - › he (or she) knows who sent these (name type of digital communication) because of personal knowledge (state knowledge) and recognizes the distinctive characteristics, contents, substance, or patterns of the texts, taken together with other circumstantial evidence (state circumstances and evidence of device's ownership); or
 - › the testimony of (expert witness), who testified that he (or she) has compared the handwriting in question with an authentic handwriting exemplar and that his (or her) opinion is that the handwriting in question is that of (name of purported author).

- *Your Honor, I request that you compare the handwriting in question with an admittedly authentic handwriting exemplar and find that it is the handwriting of (name of purported author).*

Cross-Reference to Texas [Rules 901–903](#)

Explanation

Authentication is a foundational requirement to introduce any writing. In most circumstances, counsel should attempt to prove authenticity pretrial—by Rule 193.7, through stipulation, or through a request for admission. If not done pretrial, counsel can easily prove authentication through the testimony of a witness with knowledge of the authenticity of the writing. It is unusual that a witness who is capable of testifying that a writing is what it purports to be will not be available at trial.

In those situations where a witness with direct knowledge of identity or authorship is not available, authentication can normally be proved by circumstantial evidence. In many business situations, for example, the recipient of a letter will not have ever actually seen his correspondent sign his signature. However, if business has been conducted on the basis of that signature in the past, then that circumstance alone could be sufficient for authentication purposes.

It is important to note that the question of authentication is preliminary and is to be decided by the judge using the standard of proof provided in [Rule 104\(b\)](#). The proponent must merely put on some evidence sufficient to support a finding of authenticity. The judge is not free to make such a finding on conflicting evidence, but rather must admit the writing and let the jurors decide whether it is authentic. For example, when a judge admits a letter purportedly signed by a party as authentic, the jurors are not bound by that determination and may, by their verdict, find that the letter was actually signed by someone else. Finally, because the issue of authenticity is determined under [Rule 104\(b\)](#), the predicate evidence going to the authenticity question must be itself admissible.

While these points regarding authentication apply to digital evidence, see the section regarding digital evidence for

authentication issues unique to digital evidence.

Practice Tip

As soon as a party responds to discovery and produces any document, send a letter notifying the producing party of your intent to use the document at any hearing or at the trial of the matter. The producing party then has only ten days (unless that time is lengthened or shortened by the court) in which to object to the authenticity of the document as a whole or to some part thereof. The objection must state the specific basis for the objection, must be either on the record or in writing, and must have a good faith factual and legal basis. If the objection is only to a portion of a document, the objection does not affect the authenticity of the remainder. In response to an objection, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

Best Evidence Rule

Objection

- *Objection. They are attempting to prove the content of (writing in question) in violation of the Best Evidence Rule as Exhibit ____ is not the original.*

Response

- *The original's absence has been sufficiently accounted for, so secondary evidence is admissible because*
 - » *the original was shown to be lost (or destroyed); or*
 - » *the original cannot be obtained by any available judicial process (or procedure); or*
 - » *no original is located in Texas; or*
 - » *the original is in the possession of (opposing party against whom the contents are offered), and they have failed to produce it though on notice by the pleadings (or otherwise) that the content of the document would be the subject of proof at trial; or*
 - » *the content of the writing is not closely related to a controlling issue and so is collateral.*
- *This exhibit is considered to be an original under the Best Evidence Rule because*
 - » *it is a counterpart intended by (a person executing or issuing the exhibit) to have the same effect as an original; or*
 - » *it is a negative (or print) of an original photograph; or*
 - » *it is a printout from data stored in a computer and has been shown to reflect accurately the data stored.*
- *This exhibit is considered to be an admissible duplicate under the Best Evidence Rule because*

- » *it is a counterpart produced by the same impression (or from the same matrix) as the original; or*
- » *it was produced from a photograph (or by mechanical or electronic re-recording or by chemical reproduction or by other equivalent techniques that accurately reproduce the original) of the original.*

Cross-Reference to Texas [Rules 1001–1009](#)

Explanation

The original document rule, commonly known as the Best Evidence Rule, requires the proponent to offer the original of a document, photograph, or recording into evidence when the proponent seeks to prove its content, unless production of the original is excused under the terms of the rule.

The Best Evidence Rule is only, however, a rule of preference. There are many qualifications to this rule. First, the rule applies only where the proponent seeks to prove the contents of the document. The key phrase is “to prove the contents,” because it is only when one seeks to prove the contents of a document that the best evidence rule applies. Thus, when the document and its contents are only collaterally related to the controlling issues, the best evidence rule does not apply (*Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397 (1944)). Moreover, the collateral issue exception to the best evidence rule has been held applicable when the ownership of property is only collaterally related to the cause of action (*Bains*, 143 Tex.; *Fannin Bank v. Johnson*, 432 S.W.2d 138 (Tex. Civ. App.—Houston [1st Dist.] 1968); *Prudential Ins. Co. of America v. Black*, 572 S.W.2d 379 (Tex. Civ. App.—Houston [14th Dist.] 1978)).

Second, an “original” includes a counterpart intended by the executing persons to have the same effect as the original. Third, a duplicate (for example, a photocopy) is generally considered the equivalent of an original. Fourth, digital media makes it easy to have multiple originals, printed or produced from the same computer or file, as long as the document is an accurate print of the data stored in the computer.

Because the rule is merely a rule of preference, the original need not be produced where the original is lost or destroyed (not at the behest of the proponent of the document); where the original cannot be obtained by judicial process; where no original is located within the state; or where the original is in the control of the opponent and the opponent has been put on notice, by the pleadings or otherwise, that the contents of the document, recording, or photograph would be the subject of proof at trial and the opponent has not released the original.

A deed or other document is not made ineffective by its destruction or loss (*Bennett v. Romos*, 252 S.W.2d 442, 445 (Tex. 1952) (“that the loss or destruction of a valid deed does not reverse or invalidate the transfer of title made by the deed is, of course, well settled.”); *Lott v. Van Zandt*, 107 S.W.2d 761, 765 (Tex. Civ. App.—Amarillo 1937)). Production of the original document is excused when it is established that the document has been lost or destroyed (*Travis Cty. Water Control & Improvement Dist. No. 12 v. McMillen*, 414 S.W.2d 450, 452–53 (Tex. 1966)). Other evidence of the contents of a writing is admissible if the original has been lost or destroyed (Tex. R. Evid. 1004(a)). Loss or destruction of the document is established by proof of search for this document and inability to find it (*McMillen*, 414 S.W.2d at 453).

The proponent of secondary evidence (that is, something other than the original) bears the burden of persuading the trial judge, pursuant to Rule 104, that the prerequisite for excusing nonproduction of the original is met. For example, the proponent can lay a predicate for the loss of the original by offering evidence of a diligent, but unavailing, search for the document (*Gause v. Gause*, 496 S.W.3d 913, 917 (Tex. App.—Austin, 2016, no pet.)).

Character Evidence

The Alleged Victim of Assaultive Conduct

Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

Response

- *This testimony is offered to show the character trait for violence (or peacefulness) of (specifying name of alleged victim of assaultive conduct) pursuant to [Rule 404\(a\)\(2\)](#) on the issue of self-defense.*

Cross-Reference to Texas [Rule 404\(a\)\(2\)](#)

Explanation

In criminal cases, this exception to the propensity rule applies to all types of prosecutions, except those that would be covered by [Rule 412](#) (sexual assault, aggravated sexual assault, attempt to commit sexual assault, or aggravated sexual assault). Most commonly, however, it is invoked when the defendant is charged with assaultive conduct and the defendant alleges self-defense (see, e.g., *Torres v. State*, 117 S.W.3d 891 (Tex. Crim. App. 2003)). In civil cases, [Rule 404\(a\)\(2\)](#) permits a party accused of assaultive conduct, usually the defendant, to offer evidence, by way of opinion or reputation, regarding the victim's violent character.

Rebuttal Evidence

When the defendant puts in issue the character of the victim, the prosecution—or the plaintiff in a civil case—may rebut with contrary evidence of the victim's character (*Reyna v. State*, 99 S.W.3d 344 (Tex. App.—Fort Worth 2003)). Rebuttal evidence must concern the victim's character and not the defendant's. Evidence of the defendant's character for violence used to rebut the inference that

the victim was the first aggressor would be inadmissible under [Rule 404\(a\)](#).

Character Evidence

Character of the Accused Party

Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

Responses

- *This evidence is offered to show the character trait for (specifying pertinent character trait) of (specifying name of party accused of conduct involving moral turpitude) pursuant to [Rule 404\(a\)\(1\)](#).*
- *They have opened the door on character by offering evidence of the pertinent character trait.*

Cross-Reference to Texas [Rule 404\(a\)\(1\)](#)

Explanation

Criminal Cases

[Rule 404\(a\)\(1\)\(A\)](#) allows a defendant in any criminal case to offer character evidence, by reputation or opinion, to show his own good character, but only regarding a character trait pertinent to the case. Thus, the defendant is allowed to show that based on past behavior, he would not have been likely to commit the crime. For example, a defendant accused of driving under the influence might use his reputation as a teetotaler to demonstrate he would not have been drinking and driving. The state is permitted to rebut with character evidence that suggests that the defendant's past actions show he was likely to have committed the crime.

Civil Cases

[Rule 404\(a\)\(1\)\(B\)](#) allows a party charged with conduct involving moral turpitude to oppose the charge with character evidence, by

reputation or opinion witnesses, of the pertinent character trait to show his propensity to not engage in the conduct alleged.

Methods of Proof

A party's offer of character evidence under [Rule 404\(a\)\(1\)](#) is often called "putting character in issue." This is misleading because it might lead a party to believe it is proper under [Rule 405\(b\)](#) to offer character evidence by way of specific instances of conduct. This is not permitted. Only opinion or reputation testimony is admissible under [Rule 404\(a\)\(1\)](#). Rebuttal testimony offered by the opposing party to show a propensity to commit the charged conduct is also limited to opinion or reputation testimony.

Thus, a defendant accused of fraud might call a witness to establish the defendant's reputation or offer an opinion as to the defendant's honesty. The witness could not testify to specific dealings he had with the defendant in which the defendant acted honestly, but could testify on his opinion of the defendant's character for honesty or his reputation for honesty in the community. The plaintiff could then call witnesses to establish a reputation for sharp business practices or to offer the opinion that the defendant was not honest.

Character Evidence

Other Wrongs or Acts

Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

Response

- *This evidence is offered not to show propensity, but rather to prove*
 - » *motive, in that* (specifically explaining how motive is shown); or
 - » *opportunity, in that* (specifically explaining how opportunity is shown); or
 - » *intent, in that* (specifically explaining how intent is shown); or
 - » *preparation, in that* (specifically explaining how preparation is shown); or
 - » *plan, in that* (specifically explaining how plan is shown); or
 - » *knowledge, in that* (specifically explaining how knowledge is shown); or
 - » *identity, in that* (specifically explaining how identity is shown); or
 - » *absence of mistake, in that* (specifically explaining how absence of mistake is shown); or
 - » *absence of accident, in that* (specifically explaining how absence of accident is shown); or
 - » *same transaction contextual evidence*; or
 - » *dangerousness of the instrumentality (or premises), in that* (specifically explaining how dangerousness is shown).

Cross-Reference to Texas [Rules 404](#) and [412](#), and Art. 38.37, Tex. Code Crim. Proc.

Explanation

[Rule 404](#)(b) is not an exception to the general rule forbidding the use of character evidence to show propensity. Rather, [Rule 404](#)(b) merely makes explicit what should be self-evident: evidence not offered to prove propensity is not excluded by the propensity rule. [Rule 404](#)(b) illustrates other purposes for such evidence that would not run afoul of the propensity rule. Admissibility of evidence offered to prove one of these other purposes is actually determined under the ordinary relevance rules—[Rules 401](#), [402](#), and [403](#) (see, e.g., *Huddleston v. United States*, 485 U.S. 681, 682 (1988) (motive, opportunity, knowledge); *Porter v. State*, 623 S.W.2d 374, 376 (Tex. Crim. App. 1981) (motive, intent); *Lane v. State*, 933 S.W.2d 504 (Tex. Crim. App. 1996) (identity); *Powell v. State*, 63 S.W.3d 435 (Tex. Crim. App. 2001) (absence of mistake); *Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000) (same transaction, res gestae)).

Notice in Criminal Cases

The requirement of notice of intent to use such evidence applies only in criminal cases—and only if the defendant timely requests notice before trial. If the defendant properly requests notice and the state desires to offer evidence under [Rule 404](#)(b) in its case-in-chief, then the state must provide notice and the evidence to defendant. A prosecutor's open-file policy does not satisfy the notice requirement. The state need not give notice of rebuttal evidence or same transaction contextual evidence.

Character of the Accused in Sexual Assault Cases

[Rule 412](#) is the Texas version of the rape shield law for victims of sexual assault. Under this rule, evidence of the victim's prior sexual conduct or misconduct is not admissible, other than under the express exceptions of art. 38.37.

Character of the Accused in Sexual Assault Cases

Article 38.37 of the Code of Criminal Procedure makes admissible prior crimes, wrongs, or acts committed by a defendant on a child under seventeen, where the crime involves the same child and the new crime is a sexual offense or an assault type offense. The purpose is to allow the evidence to show the state of mind of the defendant or the prior relationship of the defendant and child.

Character Evidence

Propensity Rule; Character as an Element of a Claim or Defense

Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

Response

- *This evidence is offered not to prove propensity, but rather to show character for (specifying character trait at issue), which is an essential element of our claim (or defense) of (specifying claim or defense).*

Cross-Reference to Texas [Rules 404](#) and [405](#)

Explanation

Propensity Rule

[Rule 404](#) states the general rule that evidence of a person's character is not admissible as proof that such person, whether or not a party, has acted in conformity therewith. Character evidence is generally inadmissible to prove propensity. For example, in a motor vehicle accident case arising where the plaintiff claims that the defendant was speeding and thus negligent, evidence that the defendant is generally a negligent driver or generally speeds is not admissible to prove that he was negligent on the occasion in question. Similarly, evidence that the defendant is a careful driver is inadmissible to show the exercise of care on the occasion in question.

Opinion and Reputation Testimony

Rule 405 provides that character evidence may be proved, where relevant, by way of reputation or opinion evidence—and in more limited circumstances, by specific instances of conduct. A character witness will be allowed to testify about reputation or opinion regarding the pertinent character trait only *after* an appropriate predicate is laid. With respect to reputation evidence, the character witness must testify that he has heard talk among members of the community regarding the person's character trait. When character evidence is offered by way of opinion, the character witness must offer evidence that he knows the person whose character trait is in issue and is familiar with that person's particular character trait.

“Have You Heard” Questions

A character witness who testifies about reputation or opinion may be cross-examined concerning specific instances of conduct by the person about whom character evidence has been given, as long as the conduct is inconsistent with the testimony of the character witness. Cross-examination utilizing specific instances of conduct to impeach the witness testifying about character; it may not, however, be used to attack the character of the witness whose character is in issue. This type of cross-examination of the character witness derives from the theory that either the character witness has incomplete information on which to base the reputation opinion or the character witness has an inappropriate notion of what constitutes good character.

Collateral Source Rule

Objection

- *May I approach the bench, your Honor?* [At the bench] *Objection. The question violates the collateral source rule.*

Response

- *Plaintiff opened the door to collateral source payments by testifying that* (specific testimony opening the door).
- *Collateral source benefits are relevant to impeach the plaintiff's testimony that* (specific testimony inconsistent with receipt of benefits).
- *Evidence of collateral benefits is relevant to attack plaintiff's life care plan (or planner's testimony) on the issue of cost of care (or available free benefits and/or other issues).*

Cross-Reference to Texas [Rules 401](#), [402](#), and [403](#)

Explanation

The collateral source rule excludes evidence that a plaintiff received any form of benefits, from some source other than the defendant, for the injuries that are the subject of the lawsuit. The purpose of the rule is to encourage people to plan for misfortune by acquiring, in advance of any injury, collateral sources for payment of medical expenses or lost income. Also, the rule seeks to prevent unjust enrichment of the wrongdoer because of the injured person's foresight. Examples of collateral sources include accidental injury insurance, disability insurance, worker's compensation insurance, private or government disability insurance, unemployment compensation, sick leave, or similar types of sources.

Although it was not codified when the rules of evidence were adopted, Texas courts continue to follow the common-law collateral source rule (see, e.g., *Taylor v. American Fabritech, Inc.*, [132 S.W.3d 613](#) (Tex. App.—Houston [14th Dist.] 2004)). Under the rules, the

basis for exclusion is the lack of relevance of collateral payments and the danger of unfair prejudice to the plaintiff if the jurors believe that the plaintiff has already been compensated.

Competence to Testify

Generally

Objection

- *Objection. This witness is incompetent to testify because he lacks the ability to* (specifying particular ground).

Response

- *The witness is presumed competent, and there has been no showing of any inability on the part of the witness to perceive, remember, communicate, or appreciate the oath. Any questions regarding the witness's testimonial capacities go to the weight of the evidence rather than the admissibility.*

Cross-Reference to Texas [Rule 601–606](#)

Explanation

“Competent” is the term applied to a person who possesses the abilities to serve as a witness in a trial or hearing. Competence embodies four qualities: perception; recollection; communication; and honesty, especially appreciation of the oath or affirmation. The issue of competency arises most often with child witnesses or witnesses who have a physical or mental deficiency. In these circumstances, either the age or condition of the witness potentially interferes with the requisites of a competent witness.

[Rule 601](#) states that a witness is generally presumed competent to testify. The party challenging the presumption of competence has the burden of proof.

Insane Persons

A person who is insane at the time of his testimony or at the time he perceived the relevant events, suffers from a mental illness, or is mentally retarded may be incompetent to testify; however, these

conditions do not necessarily render him incompetent. To render a witness incompetent, his mental condition must be of the type that interferes with the ability of the witness to perceive, to remember, to be truthful, or to accurately narrate what he knows.

Children

Children may be precluded from testifying because of an incompetency that results from their age or maturity level, although there is no particular age below which a child is per se incompetent. A child is incompetent if she does not have sufficient intellect “to relate transactions with respect to which they are interrogated” (Tex. R. Evid. 601(a)(2)). This test is broad enough to encompass many different testimonial difficulties. The incompetency may flow from the child’s inability to perceive or remember accurately or from her difficulty in understanding the question or formulating an answer. The child may not have the ability to narrate what she knows. A child who does not understand the obligation to testify truthfully would also be incompetent under this rule (*McVay v. State*, No. 01-13-00997-CR, at *6–7, 2014 Tex. App. LEXIS 12329 (Tex. App.—Houston [1st Dist.] Nov. 13, 2014); *Reyna v. State*, 797 S.W.2d 189 (Tex. App.—Corpus Christi 1990) (a four-year-old girl who demonstrated the ability to know the truth from a lie and to understand and answer questions was competent to testify)). The court will determine competency before the child testifies.

Competence

Dead Man's Rule

Objection

- *Objection. Under the Dead Man's Rule, this interested party (or witness) may not testify to uncorroborated oral statements of (name of deceased or incompetent).*

Response

- *The statement is written, not oral, and thus the Dead Man's Rule does not apply.*
- *The Dead Man's Rule does not apply to this lawsuit because this is not an action by (or against) an executor (or administrator or guardian or the heirs or legal representatives of the decedent); or*
- *The Dead Man's Rule does not apply to this lawsuit because, although this is an action by (or against) the heirs (or legal representatives) of the decedent, it is not based in whole (or in part) on such oral statement; or*
- *The Dead Man's Rule does not apply to this witness because he (or she) is neither a party nor a person who would be bound by a judgment in this case; or*
- *The Dead Man's Rule does not apply to nonparty witnesses who have no interest in the lawsuit; or*
- *This witness will testify to an oral statement of (name of deceased or incompetent), which is corroborated by (specifying already admitted corroborating evidence or yet-to-be offered corroborating evidence); or*
- *Any objection under the Dead Man's Rule has been waived because (opposing party) called the witness to testify thereto by*

asking him (or her) (specifying question that waived Dead Man's Rule).

[Request for jury instruction]

- *We request that the jurors be instructed that (name of witness) is not permitted by the law to give evidence relating to any oral statement by the deceased (or ward) unless the oral statement is corroborated (or unless the party or witness is called at the trial by the opposing party).*

Cross-Reference to Texas [Rule 601](#)

Explanation

The Dead Man's Rule is a rule of competency that prohibits a party or interested witness from testifying to uncorroborated oral statements by a deceased or insane person (see, e.g., *Estate of Watson*, 720 S.W.2d 806 (Tex. 1986); *Lewis v. Foster*, 621 S.W.2d 400 (Tex. 1981); *Dyson v. Parker*, No. 10-14-00232-CV, 2015 Tex. App. LEXIS 9044 (Tex. App.—Waco Aug. 27, 2015, no pet.)). The rule protects against an interested person putting words in the mouth of a person who cannot contradict the claimed statement because that person's lips are sealed by death or insanity.

Applicability

The rule does not apply to every lawsuit. Rather, it must be a suit by or against an executor, administrator, or guardian, appearing in the suit in that capacity, and in which judgment may be rendered by or against such a person in that capacity. If a person appears in both an individual and a representative capacity, [Rule 601\(b\)](#) applies to the individual only if the two interests asserted are not severable.

[Rule 601\(b\)](#) also applies to suits by or against the heirs or legal representatives of a decedent if the suit is based, at least in part, on the objected-to oral statement. Since devisees and legatees are not heirs or legal representatives of a decedent, the rule does not apply to cases in which they are parties, unless one of the above mentioned representatives is also a party.

Testimony Excluded

The rule does not bar testimony about transactions with the deceased or incompetent, as the former statute did. Only oral statements by the deceased or incompetent are excluded. The rule does not bar testimony about transactions with the deceased or incompetent as the former statutes did. The rule applies only to oral statements by the deceased or incompetent (see *Adams v. Barry*, 560 S.W.2d 935 (Tex. 1978)). Similarly, written statements by the deceased are not governed by the rule as long as the writing is authentic.

Even a party witness may testify to an oral statement of the deceased or incompetent if the making of the statement is corroborated. Corroboration may come from any witness, interested or not. The statement may be corroborated by either oral testimony or writing. It need not be sufficient to support a verdict standing alone, but it must tend to confirm or support the witness's testimony that the statement was made.

Jury Instruction

A party whose testimony is excluded under this rule is entitled to a jury instruction explaining the operation of the Dead Man's Rule.

Practice Tip

Any party whose testimony is limited by this rule should request a jury instruction explaining the Dead Man's Rule. If you fail to obtain such an instruction, you could affect your party's credibility since the party would not testify to seemingly obvious conversations with the deceased. For example, in a will contest case, the jurors might expect the nurse who got the bulk of the estate to testify that the testator told her that he was going to leave her everything or that he was leaving her his estate because his children had abandoned him. If she does not so testify, the jurors may think the conversation never happened, rather than understand that the rule prohibited her from relating a conversation that did happen.

Competence

Firsthand Knowledge

Objections

[If there is no evidence of how witness knows of the matter inquired about]

- *Objection. There has been no showing that the witness has personal knowledge of* (specifying subject).

[If there is evidence that witness does not have personal knowledge of matter inquired about]

- *Objection. The witness has no personal knowledge of* (specifying subject).
- *Objection. The question calls for speculation. The witness has no personal knowledge as to* (specify subject).

Responses

[If there is no evidence of how witness knows matter inquired about]

- *I will lay the predicate at this time.*

[If there is evidence that witness does have personal knowledge of matter inquired about]

- *We have shown that the witness has personal knowledge because he testified that* (specifying testimony).

[If there is evidence both that witness does and does not have personal knowledge of matter inquired about]

- *The witness has shown that he has firsthand knowledge in that* (specifying basis of knowledge).

- Under [Rule 602](#), we only need to raise a fact issue of personal knowledge.
- The witness has been qualified as an expert and does not need personal knowledge to testify under [Rule 703](#).

Cross-Reference to Texas [Rule 602](#)

Explanation

A prerequisite of admissible testimony is that the witness must possess personal knowledge of the matter about which they will testify (see *Hartin v. State*, No. 09-07-00547-CR, 2009 Tex. App. LEXIS 2765, at *5–6 (Tex. App.—Beaumont Apr. 22, 2009); *Riggs v. Sentry Ins.*, 821 S.W.2d 701 (Tex. App.—Houston [14th Dist.] 1991)). The requirement of firsthand knowledge underlies much of the law of evidence and explains generally the proscriptions against opinion testimony and hearsay. In a sense, lack of personal or firsthand knowledge demonstrates the incompetency of the witness to testify as to particular facts. Generally, the proponent of the witness must lay a predicate on the issue of personal knowledge by offering sufficient evidence to support a finding that the witness has firsthand knowledge of the subject matter of his testimony.

Under [Rule 602](#), the proponent need not convince the court by a preponderance of the evidence that the witness has personal knowledge. Rather, the proponent need only put on sufficient evidence to support a finding of personal knowledge. Any factual dispute about the existence of personal knowledge would then go to the weight, rather than the admissibility, of the evidence.

Competence

Juror Testimony

Cross-Reference to Texas [Rule 606](#)

Explanation

Civil Cases

[Rule 606](#) sharply curtails testimony by jurors in civil cases. Before adoption of this rule, jurors frequently gave testimony in support of jury misconduct claims. Now, the rule makes it virtually impossible to prove jury misconduct. As a general rule, a juror is prohibited from testifying about any occurrences or statements during deliberations (see *Golden Eagle Archery, Inc. v. Jackson*, [24 S.W.3d 362 \(Tex. 2000\)](#)). Similarly, a juror may not testify about the effect of anything on any juror's mind. Jurors may testify about an outside influence brought to bear on the juror. However, the outside influence must originate other than with a juror (see *Ford Motor Co. v. Castillo*, [279 S.W.3d 656, 659 \(Tex. 2009\)](#)). A juror bringing in outside information (internet research, personal observation of the scene of the accident) to influence the jury does not fall under this exception.

For purposes of [Rule 606\(b\)](#), “deliberations” means formal jury deliberations where the jurors weigh the evidence to arrive at a verdict, and it does not mean conversations between jurors during trial breaks or informal discussions among jurors during trial.

Criminal Cases

Juror testimony regarding misconduct is more widely available in criminal cases. The U.S. Supreme Court has crafted a limited constitutional exception to the rule against jurors impeaching their verdict in *Pena-Rodriguez v. Colorado*, [137 S. Ct. 855 \(2017\)](#). Where a juror makes a clear statement indicating that he relied on racial stereotypes or animus to convict a criminal defendant, the [Sixth](#)

Amendment requires that the no-impeachment rule give way to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

It is not yet clear whether this exception will be extended to civil cases. The Court opined that the same tenets behind *Batson* drove its analysis here; if so, the exception to jurors impeaching their own verdict may be applied to civil cases (*Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991)).

Texas allows comparatively more inquiry into juror misconduct in criminal cases. For example, if a juror does outside research and shares that research with his fellow jurors, that may constitute any outside influence and juror testimony may be allowed (*McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012)).

Compound (Multifarious) Questions

Objection

- *Objection. The question is multifarious (or compound).*

Response

- *None is recommended.*

Explanation

The vice of a multifarious question lies in its tendency to cause the jurors to be confused by the testimony. A “yes” answer to a two-part question leaves the jurors (and record) unclear about whether the witness is affirming the first query, the second, or both. The potential for confusion is obvious. Not only are the jurors confused, the appellate record may be unclear as well.

As with many objections to the form of a question, the effect may be to sharpen the question into a clearer and more effective one for the questioner. Because the question is easily rephrased, the objection often gives the appearance that objecting counsel is being hypertechnical. The objection, then, is best made only when the multifarious question is likely to mislead the jurors to the detriment of the objecting party or when failing to clarify creates proof problems.

Compromise and Offers of Compromise

Objection

- *Objection. This is evidence of compromise negotiations offered on liability or damages.*

Response

- *This evidence is admissible because*
 - » *the claim was not in dispute at the time of the compromise discussions; or*
 - » *the evidence is not offered on liability or damages but to show bias (or prejudice or interest or no undue delay or an effort to subvert a criminal investigation).*

Cross-Reference to Texas [Rule 408](#)

Explanation

Compromise or settlement discussions, although discoverable under Tex. R. Civ. P. 194.2, are deemed inadmissible at trial to prove liability to encourage parties to settle disputed claims (*Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361 (Tex. 1987)). Frank settlement discussions often require frank acknowledgment of strengths or weaknesses of each side's position. Disclosure to the fact-finder of such evidence would chill compromise negotiations (*Vinson Minerals, Ltd. v. XTO Energy, Inc.*, 335 S.W.3d 344 (Tex. App.—Fort Worth 2010)).

The rule forbids the admission of negotiations regarding disputed claims only. For example, if one party to an automobile collision leaps from his car and offers the other driver a certain sum to cover the damage, such statements are admissible pursuant to [Rule 408](#) because no one has yet disputed the claim. The term “disputed claim,” however, does not refer only to claims reduced to litigation. A

claim asserted outside of court proceedings or disputed originally as to liability or amount is considered disputed for purposes of the rule.

In addition, statements of fact—and indeed, any statements at all (not merely demands, offers, and counteroffers) made by the parties or their representatives in the course or context of compromise discussions—are inadmissible. Confidentiality of communications regarding settlement in alternative dispute resolution is codified in Tex. Civ. Prac. & Rem. Code Ann. §154.073.

Of course, [Rule 408](#) does not exclude facts that although mentioned in the compromise negotiations, are otherwise discovered (see, e.g., *Certain Underwriters at Lloyd's v. Chi. Bridge & Iron Co.*, 406 S.W.3d 326, 329 (Tex. App.—Beaumont 2013, pet. denied)). More important, the rule does not bar the admission of compromise negotiations or statements made therein where offered for any relevant purpose other than proof of liability or damages. The rule expressly provides that such evidence is admissible to impeach a witness for bias, prejudice, or interest; to deny the opponent's claim of undue delay; or to show an attempt or effort to obstruct a criminal prosecution.

Criminal Cases

[Rule 408](#) does not apply to evidence of plea bargains or plea negotiations conducted in criminal cases. Such evidence is instead governed by [Rule 410](#).

Cross-Examination

Generally

Cross-Reference to Texas Rule 611

Explanation

Leading questions are not only permitted, but expected on cross-examination. However, if the direct examination has been conducted by leading questions under the adverse party or hostile witness rule, then the cross-examiner may be required to refrain from leading.

Texas does not limit cross-examination to the scope of the subject matter of direct examination as do the Federal Rules of Evidence. Cross-examination is wide open, limited only by concepts of relevance. Although no rule specifically addresses recross-examination, a judge has the discretion to limit recross-examination to the scope of the redirect. However, just as redirect is rarely limited to the scope of the cross-examination, so too is recross generally free from restraint. The biggest constraint tends to be exhausting the jurors by asking repetitive questions already covered in earlier examination. At this point, the objection “asked and answered” or a “cumulative” objection under Tex. R. Evid. 403 may be appropriate.

Digital Evidence

Concerns Unique to the Digital Nature of Certain Evidence

Authentication of Digital Evidence Generally

When authenticating digital evidence—such as text messages, social media posts, websites, and emails—the proponent must establish the item’s authenticity with other direct or circumstantial evidence that links it to the purported author. Counsel can do this through witness testimony based on personal knowledge or evidence that demonstrates the message’s distinctive characteristics (Tex. R. Evid. 901(b)(1) and (4); see, e.g., *Butler v. State*, 459 S.W.3d 595, 600–05 (Tex. Crim. App. 2015) (a look at text messages with applications to emails and websites); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (overview of how to apply current rules of evidence to electronic evidence); *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012) (Texas adoption of *Lorraine* reasoning and authenticating social media posts); see also Hon. Paul W. Grimm et al., *Authenticating Digital Evidence*, 69 Baylor L. Rev. 102 (2017) (in-depth explanations and suggestions for authenticating digital evidence utilizing Federal Rules of Evidence)).

Where reasonable indicia of authenticity exists, it is insufficient for an objecting party to merely speculate or argue by pure conjecture that such evidence could have theoretically been falsely generated as conclusive proof of authenticity is not required to satisfy applicable rules of evidence regarding authenticity (*Tienda*, 358 S.W.3d).

Google Earth, Google Maps, and Similar GPS Evidence

Objections

- *The document has not been properly authenticated as accurate.*
- *The document has not been authenticated by an appropriate expert as necessary.*

Responses

- *The Court can take judicial notice of the reliability of the underlying program used to generate the item.*
- *No expert is needed to authenticate the item as the reliability of this software's output does not require expert testimony and may instead be established by a lay witness.*

Explanation

Because this objection to admissibility concerns the accuracy and reliability of the underlying program that generates visual spatial depictions like Google Earth, online maps, and other GPS devices, the response to such objections focuses on demonstrating the accuracy of the automated creation of such artifacts. Although the proponent must adduce evidence of the reliability of the program or code generating the artifacts, she need not prove authentication by admissible expert testimony and can instead demonstrate it by testimony from a programmer of the program or a witness who regularly uses the program and has knowledge of its reliability and accuracy. Such evidence may also be subject to judicial notice as to the reliability and accuracy of the program generating the artifact (*United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015); *United States v. Burroughs*, 810 F.3d 833, 835 n.1 (D.C. Cir. 2016); *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 n.1 (9th Cir. 2012)). In certain instances (for example, where a technical deficiency in the program of a particularly complex or nuanced nature is alleged to have generated false or inaccurate data or artifacts), the court may require expert testimony to properly authenticate the evidence (*United States v. Espinal-Almeida*, 699 F.3d 588, 612–13 (1st Cir. 2012)).

Email Evidence

There are a wide variety of means to authenticate email evidence by both direct and circumstantial evidence. For example, an email message's distinctive characteristic—such as its content, substance, internal patterns, or other readily identifiable features—may be sufficient to properly authenticate the evidence under [Rule 901\(b\)\(4\)](#) or its federal analog (*United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000); *Manuel v. State*, 357 S.W.3d 66 (Tex. App.—Tyler 2011) (citing *Siddiqui* with approval); *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012) (citing *Siddiqui* with approval); *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex. App.—El Paso 2008) (recognizing an email's capacity to be authenticated indirectly under [Rule 901\(b\)\(4\)](#))).

Texas courts allow authentication by testimony that the witness was familiar with the sender's email address and had received the emails in question (*Shea v. State*, 167 S.W.3d 98, 105 (Tex. App.—Waco 2005)). Such a witness with person knowledge would satisfy the authentication requirements of [Rule 901\(b\)\(1\)](#). Federal courts applying similar rules of evidence have held that the testimony of a witness with personal knowledge of the emails was sufficient to admit emails into evidence and that any anomalies or inconsistencies within the emails created a factual question going to the weight and credibility of the evidence for the jurors, but not the admissibility of such evidence (*United States v. White*, 660 F. App'x 779, 783 (11th Cir. 2016); *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (holding that an email identified as originating from the defendant's email address and that automatically included the defendant's address when replying was considered sufficiently authenticated)).

If a party produces an email in discovery, that email is self-authenticated and may be used *against* that party unless the producing party objects as required by Tex. R. Civ. P. 193.7. The self-authentication process of 193.7 will not authenticate the emails for use *by* the producing party.

Emails that are made and kept in the regular source of business may be authenticated under [Rule 902\(10\)](#). Once the requisites of 902(10) are met, the emails are self-authenticating and no further

extrinsic evidence is needed (see *Lindsey v. Kline*, No. 2-03-239-CV, 2004 Tex. App. LEXIS 6941 (Tex. App.—Fort Worth July 29, 2004) (implicitly recognizing an email's capacity to satisfy the conditions of self-authentication); *Rambus, Inc.*, 348 F. Supp. 2d 698 (E.D. Va. 2004) (email that qualifies as business record may be self-authenticating under Federal Rule 902(11)). Under the analogous federal rule, an email may be authenticated under Rule 902(7) if it bears an inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control (*Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007)).

Courts have also taken judicial notice of the authenticity of an email transmission under Rule 201 where the contents of the email message have been independently authenticated elsewhere and where the identity of the author(s) is not in dispute (*Shurnas v. Owen*, No. 2:15-CV-00908-MCE-KJN, 2016 U.S. Dist. LEXIS 18640 at *7 (E.D. Cal. Feb. 16, 2016)).

The reply-letter doctrine for authenticating letters applies to emails and other such digital messages or writings. Under this doctrine, a letter received purportedly in answer to another letter is prima facie genuine. A reply letter needs no further authentication because it is likely that the purported writer would know of and respond to the contents of the earlier letter addressed to himself. As it applies to email, an email may be considered sufficiently authenticated when evidence is adduced that that a person responded to the email that was sent to that person's email address (*Manuel*, 357 S.W.3d; *Varkonyi*, 276 S.W.3d at 35).

Text Messages

Text messages are similar to email messages and may be authenticated using similar means (*Manuel*, 357 S.W.3d). Although Texas has not explicitly applied the reply letter doctrine to text messages, the *Manuel* court recognized that the doctrine has been extended by analogy to types of digital messaging other than emails, citing *People v. Pierre*, 41 A.D.3d 289 (N.Y. App. Div. 2007). The reasoning applies to instant messages as well.

Because digital messages may be authenticated with circumstantial or indirect evidence, the inability or failure to establish the act of authorship and/or transmission with categorical certainty does not preclude admissibility (*Montoya v. State*, No. 05-10-01468-CR (Tex. App.—Dallas Mar. 30, 2012) (memo. op.)). As the threshold necessary to establish authenticity is fairly low, the presence of a message on a phone in the possession of a person may be sufficient to establish its authenticity (*Black v. State*, No. 02-10-00283-CR (Tex. App.—Fort Worth 2012)).

Text message is something of a misnomer when such messages may also include photos or other media, but the method for authenticating the message as a container of such media remains the same (*United States v. Ramirez*, 658 F. App'x 949, 952 (11th Cir. 2016) (admitting photos that were sent by text message because the recipient of the text message testified she received them, an agent testified he was present when the text messages were sent, and the defendant was listed as the owner of the phone number sending the messages)).

Digital Photographs

The three types of digital photographs (original digital photographs, digitally converted images, and digitally enhanced images) present unique evidentiary concerns.

Original digital photographs may be authenticated in the same manner as their film counterparts—that is, by a witness with personal knowledge of the thing(s) depicted who can testify about the fairness and accuracy of the photo's depiction of the thing(s). In the absence of such a witness, an original digital photograph may be authenticated under [Rule 901\(b\)\(9\)](#) by showing a process or system that produces an accurate result (*Reavis v. State*, [84 S.W.3d 716, 719–20 \(Tex. App.—Fort Worth 2002\)](#) (testimony of a bank employee familiar with the operation of the ATM camera and the fact that the time and date were indicated on the evidence were sufficient to authenticate photos taken automatically from an ATM camera)). As with film photographs, the authenticating witness need not know where, when, or by whom the photograph was taken as long as the

witness can testify that the photograph accurately represents what it purports to represent (*Brown v. State*, No. 12-11-00027-CR (Tex. App.—Tyler Sept. 7, 2011) (memo op.)).

Digitally converted images refer to those digital photographs that were derived or created from filmographic photo counterparts. To establish the authenticity of such evidence, a witness must testify about the conversion process, stating that the conversion process was used correctly and that the process produces accurate and reliable images (*Lorraine*, 241 F.R.D.). One may authenticate the resultant image without authenticating the process of conversion itself. A witness familiar with the film photograph's depicted object(s) must testify about the accuracy and reliability of the digitally-converted image as it relates to the depicted object(s). As long as the process resulted in an image that still accurately depicts that which the original purports to depict, the process of getting to the end result is of less significance (*id.*).

Digitally enhanced photographs refer to those photographs whose composition has been digitally altered by some means. To authenticate such photos, one must provide proof, permissible under [Rule 901\(b\)\(9\)](#), that the digital enhancement process produces reliable and accurate results. Such proof necessarily requires scientific or technical evidence from a qualified expert under [Rule 702](#) (*id.*). Because enhanced or altered photographs have an inherently greater risk of unreliability or inaccuracy, the focus of authentication should be on the process by which the alterations or enhancements take place and the reliability and accuracy of the results of the enhancement process.

Websites

Exhibits containing information from a website may be authenticated in the same manner as other writings, and the means of authentication most likely to apply to websites and message hosted thereon are [Rule 901\(b\)\(1\)](#) (witnesses with personal knowledge), [901\(b\)\(3\)](#) (by expert testimony), [901\(b\)\(4\)](#) (by identification of distinctive characteristic), [901\(b\)\(7\)](#) (by use of public

records), 901(b)(9) (as a product of a system or process capable of producing a reliable result), or 902(5) (as an official publication).

To authenticate a website, the proponent need not establish authorship or attribution of the content, only that the exhibit is an authentic copy of the actual posting on the website. The question of attribution goes instead to the underlying issues of the case and not authenticity (*Musgrove v. State*, No. 03-09-00163-CR (Tex. App.—Austin 2009) (memo. op.)). An objection to the truth of the assertions regarding the content of such writings will not suffice to preserve the alleged error of admission of improperly authenticated evidence; rather an objection specific to the authenticity of the offered evidence as accurately reflecting the posted content of the actual website (*In Re J.A.S.*, No. 11-09-00176-CV (Tex. App.—Eastland January 13, 2011) (memo. op.)). Prior versions of the website may be authenticated in a similar way.

Exhibits

Demonstrative

General Predicate

[After demonstrating personal knowledge of the matter depicted or represented]

- *I hand you what has been marked for identification as Exhibit _____. Can you identify it?*
- *What is it?*
- *Is Exhibit _____ a fair and accurate depiction (or representation) of (matter depicted or represented) as of (relevant time or date)?*

[If the exhibit is a diagram from which measurements will be taken or made]

- *Is this exhibit drawn to scale?*
[If not drawn to scale]
- *Does the fact that the exhibit is not drawn to scale make a difference to you in its usefulness?*
- *Would the exhibit assist you in your testimony (or help the jurors understand your testimony) if you had this exhibit available for your use?*
- *We offer Exhibit ____ for demonstrative purposes only.*

Objections

- *Objection. The exhibit has not been properly authenticated because there is no proof that it is a fair and accurate representation of (stating what it is offered to demonstrate).*
- *Objection. The exhibit contains hearsay. Specifically, it contains assertions that (specifying factual assertions). Since the exhibit*

was made out of court, it is hearsay.

- *Objection. The exhibit is not to scale.*
- *Objection. The exhibit is misleading in that it (state why its use would be misleading to the jurors).*

Responses

- *The exhibit has been authenticated by the testimony of (name of witness) that it is a fair and accurate depiction of (matter depicted) as of the relevant date.*
- *We offer Exhibit _____ for demonstrative purposes only and not for the truth of the matter asserted.*

Cross-Reference to Texas Rule 901

Explanation

The use of demonstrative exhibits lies within the sound discretion of the court. Some judges allow their use in opening statement (with prior permission of the court and/or agreement of opposing counsel). Courts adopt a similarly flexible stance on use of demonstratives during closing argument—assuming they were used during trial, admitted into evidence, or the court grants permission to use the demonstrative for the first time as an accurate reflection of what evidence the jurors saw or heard. Demonstrative exhibits, although viewed by the jurors during trial, are not evidence the jurors take into the jury room, and sometimes they may not be fully reflected in the appellate record. Although the court has discretion to do so, many judges will not allow an exhibit into the jury room if it was admitted solely for demonstrative purposes (*Speier v. Webster Coll.*, 616 S.W.2d 617, 617 (Tex. 1981)). The parties may agree to allow demonstrative exhibits to go to the jury room.

A party may use an exhibit initially for demonstrative purposes (i.e., a line drawing of a store where a slip-and-fall accident occurred), have a witness alter or enhance the demonstrative during testimony, and then re-offer the exhibit, with the appropriate predicate, as evidence.

Diagrams and Drawings

A diagram or drawing may be offered whether it is to scale or not. Scale typically matters only if accuracy of the distances or dimensions has specific relevance, is a material disputed fact, and the failure to draw the diagram to scale would mislead the fact-finder. If offered as drawn to scale, the sponsoring witness would need to authenticate the underlying data. If not drawn to scale, the witness should so testify, and the court would admit the exhibit as not to scale.

Models

In any litigation where the physical characteristics of a thing are in issue—such as in product liability cases—a scale model of the thing in question will best help the jurors understand the case. The predicate for admissibility of any model will typically be laid through expert testimony. The expert must testify that the essential physical characteristics of the thing in question are fairly and accurately demonstrated by the model.

Computer Simulations

Computer-generated simulations, based on the testimony of witnesses with firsthand knowledge of an event, can be powerful persuasive tools. They graphically bring the event to life for the jurors. Through computer simulations, jurors can be shown how an operation in a medical negligence case allegedly went wrong or how an alleged hit-and-run driver ran down an innocent pedestrian. The simulation allows the jurors to easily visualize the events in question from the perspective of the proponent, imprinting that version of the facts on their minds.

The predicate for using computer simulations of events in question is essentially the same as outlined above. It may be necessary to show that the program used to generate the computer simulation is an accepted one, that it produces accurate simulations, and that the operator of the computer who created the simulation was competent. Counsel can do this through any witness with knowledge of the program and may not need to be an expert. Similarly, if the simulation is of a procedure known to the witness, establishing the bona fides of the program may be unnecessary. For example, a

surgeon with knowledge could testify that a computer simulation of a gallbladder removal surgery was a fair and accurate depiction of the process and would help the jurors. The simulation would be admissible for demonstrative purposes.

Exhibits

Real Evidence

Predicate

[After establishing personal knowledge of the object at the relevant time]

- *I hand you what has been marked for identification as Exhibit _____. Can you identify it?*
- *What is it?*
- *Is Exhibit _____ in substantially the same condition as it was when you saw it on (or at) (relevant date or time)?*

[Photograph]

- *Is Exhibit _____ a fair and accurate depiction of (matter depicted) as of (relevant date or time)?*

Objection

- *Objection. There has been no showing of authenticity.*

Response

- *I have shown through the testimony of (name of witness) that he (or she) perceived the exhibit at a relevant time, that the exhibit is the one perceived, and that the exhibit is in substantially the same condition as it was at the relevant time.*
- *The witness has established that the photograph fairly and accurately depicts the matter shown.*

Cross-Reference to Texas **Rule 901**

Explanation

The process of admitting real evidence is essentially a process of authentication. Counsel must show that the object is the same

tangible object observed by a witness at a relevant time. If the evidence is not distinctive, it may be necessary to prove the chain of custody of the object to establish its authenticity.

It may also be important, depending on the purpose of the offer, to show that it is in the same or similar condition as it was at the relevant time. If offered to show condition of the object at a relevant time, then a showing of proper chain of custody may be necessary (*Ennis v. State*, 71 S.W.3d 804 (Tex. App.—Texarkana 2002)).

There is no requirement that the witness be the one who took the photograph, printed the photograph, or indeed has ever seen the photograph before. The predicate requires that the photograph fairly and accurately depicts a matter the witness has seen (a person, a place, an item) (*McRoy v. Riverlake Country Club, Inc.*, 426 S.W.2d 299, 305 (Tex. Civ. App.—Dallas 1968)). The same applies as to digital photographs as well.

Exhibits

Writings Generally

Objections

- *Objection. There has been no showing of relevance because (stating specific reason).*
- *Objection. Authenticity has not been shown.*
- *Objection. This exhibit violates the best evidence rule.*
- *Objection. The exhibit is hearsay.*

Response

See sections regarding relevance, authenticity, best evidence, and hearsay.

Cross-Reference to Texas Rule

Relevance is governed by Article IV, authenticity by Article IX, best evidence by Article X, and hearsay by Article VIII.

Explanation

Any time a writing is offered into evidence, four potential areas of objection must be considered: relevance, authentication, best evidence, and hearsay. In addition, because documents can be altered, the judge will normally require testimony that an original document is in the same or similar condition as it was at a relevant time. If a copy of an original is admissible under the Best Evidence Rule, the proponent must prove that it is a true and correct copy. Many documents produced in discovery are self-authenticated against the producing party once they are on notice of intent to use the documents at trial.

Practice Tip

When a portion of the writing is objectionable, the writing may be redacted and re-offered in redacted form if the tendering party cannot overcome the objection. For example, a medical record may show the patient has private health insurance and thus violate the collateral source rule, but the remainder of the record is admissible and helpful. Should the court sustain an objection to a portion of the exhibit, redact and re-offer if you still need the exhibit.

Expert Opinion

Objections

- *Objection. The witness is not qualified to give opinions concerning (specifying the relevant field of expertise).*
- *Objection. This opinion is beyond the expertise in which the witness has been qualified.*
- *Objection. This opinion will not be helpful to the jury in determining or understanding any fact in issue because (specifying reasons, e.g., this issue is within the common understanding of laymen, and the jurors are competent to decide the question on its own).*
- *Objection. The question calls for a legal conclusion.*
- *Objection. The question calls for a conclusion on a mixed question of law and fact and uses an improper legal standard because (specifying any legal term that has not properly been defined).*
- *Objection. The question calls for an opinion that is unreliable because:*
 - » *it assumes facts that are contrary to the undisputed testimony in this case in that (explaining factual basis of opinion and testimony in the case); and*
 - » *this opinion is inadmissible under Rule 705(c) because the factual basis is insufficient for the opinion; and*
 - » *there is too great an analytical gap between the facts on which the opinion is based on the opinion itself [consider adding the Rule 403 objection, below, at this point].*
- *Objection. The question calls for an opinion that is unreliable:*
 - » *it is not based on valid principles of this field of expertise in that (explaining unreliability of methodology); and*
 - » *this testimony is inadmissible under Rule 702 because it does not constitute scientific, technical, or specialized knowledge and*

would not help the jury determine a fact in issue; and

» *the opinion sought is based on a methodology that is not (scientifically) valid because*

› *it is not subject to testing for validity; or*

› *it relies on the subjective interpretation of the expert; or*

› *it has not been published and was not subject to peer review by other experts in the field; or*

› *it has an unacceptable rate of error; or*

› *it is not a methodology generally accepted as valid by experts in this field; or*

› *its uses are exclusively judicial uses, and it was developed solely for purposes of this litigation.*

• *Objection. This opinion is inadmissible under [Rule 403](#). It has low probative value because (specifying reason probative value is low). This low probative value is substantially outweighed not only by the danger that the jurors will overvalue the opinion because it comes from a qualified expert and thereby be confused and misled, but also by the danger of unfair prejudice because (specifying nature of prejudice).*

• *Objection. This opinion is based on underlying facts that are inadmissible because (specifying underlying facts and grounds of inadmissibility, e.g., hearsay). We object to the opinion because there has been no predicate that such facts are reasonably relied on by experts in the field, as required by [Rule 703](#). In particular:*

» *there is no showing that experts in this field customarily rely on this type of facts or data; or*

» *there is no showing that reliance on these facts or data is reasonable. Specifically, it is unreasonable to rely on unreliable facts, and the underlying facts or data relied on here are unreliable because (specifying reason for unreliability).*

• *Objection. Though an expert's opinion may be based on inadmissible facts, we object, under [Rule 705\(d\)](#), to the disclosure*

of those inadmissible facts to the jurors. These underlying facts are inadmissible because (specifying underlying facts and grounds of inadmissibility, e.g., hearsay). Such facts are also inadmissible to show the expert's basis, under [Rule 705\(d\)](#), because the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support. Additionally, these facts are unfairly prejudicial because (specifying nature of prejudice).

Responses

- *We have shown that the witness is qualified as an expert in (field) through his (or her) knowledge (or skill or experience or training or education).*
- *Counsel waived any objection to qualifications by failing to raise the objection in a timely manner.*
- *We have shown that the area of expertise in which the witness is qualified is one that will help the jurors determine (fact or conclusion in issue).*
- *We have qualified the expert in the area of (field), and his (or her) opinion is within that area.*

[To objection to mixed question of law and fact]

- *An opinion on a mixed question of law and fact is proper. This question goes to the issue of (identify the issue), and I will be happy to define the term (identify the term) for the witness. [To the witness] In answering this question concerning (issue), assume that _____ (identify the term), under the law of the State of Texas, means _____ (define the term). Using those definitions, (ask question).*

[To objection to insufficiency of basis]

- *The basis of this expert's opinion is (specifying basis). Any objection to the basis goes to the weight and not the admissibility of the opinion.*

[To objection to disclosure of otherwise inadmissible basis]

- *This testimony has high probative value because it shows, in part, what this expert based the opinion on. We have a great need for this testimony because the jurors will not give the opinion the weight it deserves if they believe that it is insufficiently based. The jurors have a right to hear why this expert reached this conclusion. Furthermore, if the court is concerned about prejudice or confusion, then an instruction would eliminate that concern.*

Request for Limiting Instruction

If the court overrules an objection to the expert disclosing an inadmissible basis for his opinion, request the court to instruct the jurors that they are to consider the inadmissible basis not for the truth of the evidence, but as something the expert relied on in forming his opinion.

Cross-Reference to Texas [Rule 702–706](#)

Explanation

Timing

Many objections to expert qualifications, reliability of opinions, and analytical gap do not take place at the time of trial. Once an objection is made, the proponent of the expert has the burden to establish for the court that the expert is qualified, the opinion is reliable, etc. Courts (and wise trial counsel) are loathe to have lengthy evidentiary hearings while keeping the jurors waiting, so many such expert objections are heard pretrial via motions to strike or other preliminary hearings. While this timing is preferable and promotes judicial economy, the unreliability of an expert's opinion may not become apparent until trial or even later. An objection needs to be timely, but an objection even following cross-examination may not be too late (*General Motors Corp. v. Iracheta*, [161 S.W.3d 462](#) (Tex. 2005)).

This does not mean, however, that one never objects to expert testimony or qualifications at trial. An expert who strays beyond her area of expertise, who offers an opinion for which there is no factual basis, or strays into unreliable opinions deserves an objection at the time of the testimony.

Qualifications

There are no rigid requirements under the Texas rules for the qualifications of most experts. The rules do require, however, that the trial judge be persuaded that the purported expert has knowledge or training in an area of specialized knowledge that is beyond the abilities of the ordinary juror. The expert may be qualified because of education, training, professional experience, and/or knowledge gained in some other way. Sufficiency of qualifications is a fact question for the court under [Rule 104\(a\)](#).

There are some statutory requirements for expert qualification. For example, Tex. Civ. Prac. & Rem. Code § 74.403 governs qualifications for experts offering opinions in healthcare liability claims. Not only are there specific statutory requirements for qualifications, the statute also requires any objections to qualifications to be made within twenty-one days of receipt of the expert's report or taking of his deposition or the objection is waived (Tex. Civ. Prac. & Rem. Code § 74.403(d)).

An expert must be qualified with regard to each opinion the expert is called on to provide. That is, there must be a fit between the expert's qualifications and the specific opinion sought (see, e.g., *Gammill v. Jack Williams Chevrolet, Inc.*, [972 S.W.2d 713, 719 \(Tex. 1998\)](#)). An expert in any given case may be qualified to give some opinions, but not others. A medical doctor, for example, is not qualified to opine in every field and specialty of medicine just because he or she has a medical degree, although there may be substantial overlap between fields. The doctor must have specific qualifications—by knowledge, skill, experience, training, or education—for each opinion sought (*Broders v. Heise*, [924 S.W.2d 148, 151 \(Tex. 1996\)](#)).

Basis of the Opinion

Establishing the basis of an opinion before offering the opinion is not required by [Rule 705](#). An expert will be permitted to testify about her opinion regardless of whether she first testifies—or indeed ever testifies—about the basis, supporting information, or data from which she reached that opinion, unless required to do so by the judge

(*Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380 (Tex. 2008)). The opponent may, under Rule 705(b), take the expert on voir dire examination to determine whether the underlying facts or data adequately constitute the basis of the opinion.

The foundational data on which the expert relies must be reliable; otherwise, any opinion drawn from unreliable data is likewise unreliable (*Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706 (Tex. 1997)).

Otherwise Inadmissible Evidence as Basis

Pursuant to Rule 703, an expert may rely on otherwise inadmissible evidence to reach an opinion as long as such evidence is reasonably relied on by experts in that particular field to form opinions on that subject. Whether experts in the field reasonably rely on such facts or data is a fact question for the court under Rule 104(a). The court may, under that rule, consider even inadmissible evidence—such as articles, textbooks, affidavits, as well as the expert’s own testimony—to determine whether experts in the field reasonably rely on such materials.

If the expert testifies about the basis for her opinion and the evidence would otherwise be inadmissible, the court may allow an expert to testify about the inadmissible basis or exclude it under a Rule 403 analysis (see, e.g., *First Southwest Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954 (Tex. App.—Texarkana 1989)).

Scientific Opinions in Civil Cases—The Robinson Test

Rule 702 imposes a reliability standard—the *Robinson* test—on expert opinions. The reliability standard is derived from the helpfulness requirement of Rule 702, together with its reference to “knowledge.” An opinion is not helpful knowledge unless it is based on a reliable theory and technique; an opinion based on unreliable methodology is “junk.” This standard is similar to the *Daubert* test in federal court (see *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)).

The trial judge should consider the following nonexclusive list of factors when determining the reliability of scientific opinion evidence:

- 1) the extent to which the theory has been or can be tested;
- 2) the extent to which the technique relies on 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 nonjudicial uses that have been made of the theory or technique.

Once the opponent objects, the burden lies with the proponent to prove reliability (see *E. I. Du Pont De Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995)). By determining whether to allow or exclude the opinion, the judge serves as the gatekeeper.

The *Robinson* factors do not apply solely to hard sciences or epidemiologically based opinions; the reliability standards of Rule 702 apply to soft sciences and, indeed, may potentially apply to any expert opinion. In fields such as the social sciences, more appropriate factors for the court to consider may be the expert's education, training and experience. "It would be an odd rule of evidence that insisted that some expert opinions be reliable but no others. All expert testimony should be shown to be reliable before it is admitted" (*Gammill*, 972 S.W.2d). Factors to consider include whether the field of expertise is a legitimate one, the subject matter of the expert's testimony is within the scope of that field, and the expert's testimony properly relies on the principles involved in that field of study (*Taylor v. TDPRS*, 160 S.W.3d 641, 650 (Tex. App.—Austin 2005)).

Scientific Opinions in Criminal Cases—The Kelly Test

In criminal cases, the court, on request, must hold a hearing outside the presence of the jurors. At that hearing, the proponent of

the expert's opinion must show by a clear and convincing standard that the evidence is relevant and reliable in helping the jurors reach an accurate result. The *Kelly* test sets out three requirements for meeting the clear and convincing standard:

- 1) the scientific theory must be valid;
- 2) the technique used must also be valid; and
- 3) the technique must have been properly applied in this case.

See *Kelly v. Texas*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Kelly takes and expands the *Robinson* factors in determining reliability to include:

- 1) the extent that the theory and the technique are accepted in the scientific community;
- 2) the qualification of the expert;
- 3) the scientific literature supporting or attacking the theory or technique;
- 4) the technique's potential rate of error;
- 5) the availability of other experts to evaluate the techniques;
- 6) the clarity with which evidence can be presented; and
- 7) the experience and skill of the person that applied the technique.

When the evidence is shown to be reliable and relevant, the court admits the testimony unless it finds that its probative value is outweighed by its prejudicial effect, the evidence might confuse the issues or mislead the jurors, the evidence may simply delay the trial, or the evidence is cumulative.

The Analytical Gap

The Texas Supreme Court recognized that because conclusions and the methodologies that produce them are not distinct from one another, expert testimony may not have too large an “analytical gap” between the methods used and the conclusions reached—otherwise, the expert's testimony risks irrelevance (*GE v. Joiner*, 522

U.S. 136 (1997)). The Texas Supreme Court has used this “analytical gap” test to preclude “non-scientific” testimony where the analysis on which the testimony is based fails to show how the observations support the conclusions (*Gammill*, 972 S.W.2d). Even where the methodology used is accepted as reliable and the underlying facts and data are accurate, expert opinions may still be unreliable and therefore inadmissible because the analytic gap between the opinion proffered and the factors employed in making such a determination is too great (*Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004)). In such cases, the *Robinson* factors play a smaller role in the reliability inquiry.

Mixed Questions of Law and Fact; Pure Questions of Law

Under Rule 704, a court will permit an expert to form an opinion for the trier of fact that embraces an ultimate issue to be decided by the fact-finder in the case. However, the opinion must be based on proper legal concepts—that is, the question must embrace the same legal standards that the trier of fact will use to determine the fact question. Otherwise, the expert may apply her own notions of concepts, like negligence and proximate cause. Thus, when the opinion question is asked, the legal terms should be defined as they will be in the charge (see *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987)). Moreover, an expert opinion based on an improper legal standard is inherently unreliable (*Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805 (Tex. 2002)).

Practice Tip

It is a rare event for trial to be the first time an objection is made on *Daubert*, *Robinson*, *Gammill*, or other reliability grounds. These objections usually require an evidentiary hearing, and to have such a hearing in the middle of a jury trial, with jurors waiting for hours or days, is a strategically bad call. With this in mind, many judges and jury-conscious trial lawyers include a deadline in the court’s scheduling order for raising any challenges to the qualifications of experts and objections to experts on reliability or other grounds, often at or near the end of the discovery period. This ensures that all

parties not only have adequate information to make their challenges, but also the evidence to support their experts' opinions.

Remember as well that the proponent of the evidence, not the objecting party, bears the burden of proof and will need evidence rather than mere argument to meet its burden.

And be sure to understand the difference between qualifications (the expert lacks the education, training, or experience to offer an opinion on the subject) and reliability (the expert is qualified, but even a NASA scientist cannot opine that the moon is made of green cheese) (*Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995)).

Have an expert checklist:

- 1) Is the expert qualified?
- 2) Is the methodology sound?
- 3) Is the foundational data reliable?
- 4) If reliable, does the expert draw conclusions using flawed methodology?
- 5) Is the expert relying on studies, and if so, are the opinions and inference drawn therefrom reliable?
- 6) What evidence do I need to prove my position?

Form Objection

Generally

Cross-Reference to Texas [Rule 611](#)

Explanation

Objections to the form of a question usually are employed to control opposing counsel. That is, they can be used to require opposing counsel to proceed in question and answer form, asking one clear question at a time, with answers on direct coming from the witness rather than counsel. Form objections have no utility in either excluding evidence totally or preserving error for appeal.

The ruling on a form objection is purely a matter of judicial discretion. The court has authority to exercise its discretion to control the mode of interrogating witnesses under [Rule 611\(a\)](#).

Practice Tip

[Texas Rule of Civil Procedure 199.5\(e\)](#) limits objections to questions in a deposition to the form of the question or to a leading question. Objecting to the form of an improper question at a deposition is mandatory or the objection is waived at the time of trial. Similarly, the rule does not permit the objecting party to state the basis of the objection during the deposition, but on request, the objecting party must give a “clear and concise explanation of an objection or the objection is waived.” A poorly phrased or incomplete basis may waive the objection.

Guilty Pleas, Offers of Pleas, and Related Statements

Objection

- *Objection. This evidence is inadmissible as a withdrawn guilty plea (or nolo contendere plea or withdrawn nolo contendere plea or statement made as part of a plea hearing or statement made as part of a plea negotiation).*

Responses

- *This evidence is admissible because it is not being offered against the defendant who made the plea, (specifying name of criminal defendant), but rather against (specifying party against whom offered).*
- *This evidence is admissible, under the exception to [Rule 410](#), because (specifying name of opposing party) opened the door to statements made in the plea (or hearing or negotiations) when testimony was offered that (specifying testimony offered by opponent). The offered evidence should be admitted because in fairness it should be considered contemporaneously with the previously admitted evidence.*

Cross-Reference to Texas [Rule 410](#)

Explanation

This rule is an analogue to [Rule 408](#) (Compromise and Offers to Compromise), applicable to the criminal settlement process. Evidence of the plea and statements connected therewith are inadmissible against the defendant who made the plea or who was a participant in the negotiations. Such evidence may be admissible, however, against someone other than the pleading defendant. [Rule 410\(3\)](#) does not protect only a defendant's plea itself from being admitted at a trial following the withdrawal of the plea, but it does protect the statements made in the course of plea proceedings

(*Bowie v. State*, 2003 Tex. App. LEXIS 1811 (Tex. App.—Dallas Feb. 28 2003), affirmed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004)).

In criminal cases, a plea of *nolo contendere* is the equivalent of a guilty plea and is admissible to the extent a guilty plea would be admissible. A withdrawn plea of *nolo contendere* is considered the same as a withdrawn guilty plea for admissibility purposes.

Habit and Routine Practice

Objection

[After habit response to initial relevance objection]

- *I object. This evidence is irrelevant because it is such an isolated occurrence that it is insufficient to constitute a habit or routine practice. There has been no showing of the frequency of the situation and the regularity of the response required to constitute a habit under [Rule 406](#).*

Response

- *This evidence is relevant because it shows a consistent habit or routine practice that raises a permissible inference that (name of party or organization) likely acted in this case according to the habit or routine practice.*

Cross-Reference to Texas [Rule 406](#)

Explanation

To be admissible, habit evidence must be “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)). In other words, the response must be the same specific one to the same set of facts (*Waldon v. City of Longview*, 855 S.W.2d 875, 879–80 (Tex. App.—Tyler 1993)). One to two examples is insufficient to demonstrate a habit (*Felix v. Gonzalez*, 87 S.W.3d 574, 579 (Tex. App.—San Antonio 2002)); *McClure v. Landis*, 959 S.W.2d 679, 681 (Tex. App.—Austin 1997); *Ortiz v. Glusman*, 334 S.W.3d 812 (Tex. App.—El Paso 2011)).

By its nature, habit or routine practice testimony is circumstantial proof that certain conduct—or an act consistent therewith—occurred (see, e.g., *Pursley v. Dretke*, 114 F. App'x 630, 633 (5th Cir. 2004)). Habit or routine practice evidence is only necessary in the absence of direct evidence of such conduct or act. However, in situations

where the direct evidence is impeachable, the habit or routine practice can have substantial tactical value. [Rule 406](#) represents a departure from the common law in two respects. First, [Rule 406](#) allows habit and routine practice evidence even where there is firsthand or direct evidence of the event in question. Second, habit and routine practice evidence is admissible without corroborating evidence. Habit may be established by opinion testimony of evidence of specific instances of conduct.

Practice Tip

Setting the parameters for the “set of facts” and the “same response” can be critical to admissibility of habit evidence. Whether the set of facts/situation is defined broadly or narrowly to establish a consistent response will depend on the nature of the claims and the nature of the available evidence of a habit.

Hearsay

Generally

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*
- *Objection. The question calls for conduct hearsay because* (explaining why conduct was intended by declarant as a substitute for verbal expression).

Response

- *The statement is not hearsay because it is not being offered for the truth of the matter asserted, but rather to show that the statement was made. The making of the statement is relevant*
 - » *because it is an operative fact or verbal act; or*
 - » *because it has independent legal significance to prove the existence of a contract (or a misrepresentation or that a defamatory statement was made or some other issue); or*
 - » *to show the knowledge (or state of mind) of* (person who heard the statement and whose knowledge or state of mind is somehow relevant in the case); or
 - » *to show notice to* (person or party whose conduct is in issue) *of* (existence of an event or condition); or
 - » *to show the information acted on by* (person whose conduct, knowing the information contained in statement, is somehow relevant in the case); or
 - » *to show a prior inconsistent statement made by this witness.*

Cross-Reference to Texas **Rule 801**

Explanation

Hearsay is an out-of-court statement, written or oral, that is offered to prove the truth of the matter asserted by the declarant of the statement (see *Mosley v. State*, 141 S.W.3d 816 (Tex. App.—Texarkana 2004)). An out-of-court statement offered for any relevant purpose other than the truth of the matter asserted is not hearsay. Thus, when the mere fact that an out-of-court statement was made is relevant, independent of whether the statement is true, the statement is not hearsay. Hearsay can include conduct such as hand gestures, if intended as a statement. A finger pointing in accusation of a crime can be conduct hearsay if intended to prove the truth of the matter asserted.

Practice Tip

Understand the differences between hearsay, nonhearsay, and hearsay statements that fall within an exception to the hearsay rule. When preparing for trial, consider any out-of-court statement that you may need as evidence and analyze how to gain admissibility. For documents, look for hearsay within hearsay.

Hearsay

Admissions of a Party Opponent

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The statement is not hearsay, because*
 - » *the statement was made by a party opponent; or*
 - » *though the statement was made by (declarant), it was adopted by the party opponent as his (or her) own and so is a vicarious admission of the party opponent; or*
 - » *the statement was made by an agent authorized to speak on behalf of a party opponent and so is a vicarious admission of the party opponent; or*
 - » *the statement was made by an agent (or servant) of the party opponent, concerning a matter within the scope of the declarant's agency or employment, and was made during the existence of the declarant's agency or employment, and so is a vicarious admission of the party; or*
 - » *the statement was made by a coconspirator of the party opponent, during the course of the conspiracy, and in furtherance of the conspiracy, and so is a vicarious admission of the party opponent.*

Cross-Reference to Texas **Rule 801(e)(2)**

Explanation

Statements falling under the hearsay exclusion provided by **Rule 801(e)(2)** are no longer referred to as “admissions” in the title to the

subdivision. The term “admissions” is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it “admitted” nothing and was not against the party’s interest when made. The term “admissions” also raises confusion when compared with the [Rule 803\(24\)](#) exception for declarations against interest. No change in application of the exclusion is intended.

Party admissions are statements made by a party that are offered by the opponent. The simplest form of admission is a statement made by the opposing party in either her individual or representative capacity. [Rule 801\(e\)\(2\)](#) further provides for a number of vicarious nonhearsay statements, previously known as admissions. These are statements of a declarant other than the party opponent that are attributed to the party opponent because of the party’s adoption of the statement or some relationship between the party opponent and the declarant. Employees, attorneys, experts—all can make finding statements for a party opponent (*Bay Area Healthcare Group, Ltd. v. McShane*, [239 S.W.3d 231 \(Tex. 2007\)](#) (statements made in superseded pleadings are admissible as party-opponent statements and are not hearsay)). The term admissions may be a slight misnomer in that any statement that fits within the confines of the rule will be admissible—the party opponent need not “admit” anything in the traditional sense of the word. Any statement by a party-opponent is admissible against that party (*Quick v. Plastic Solutions*, [270 S.W.3d 173 \(Tex. App.—El Paso 2008\)](#)).

It is important to note that in a criminal case, the victim is not a party opponent and the victim’s admission is not binding on the State (see, e.g., *Willover v. State*, [70 S.W.3d 841 \(Tex. Crim. App. 2002\)](#)).

Practice Tip

To avoid a hearsay objection being sustained, when the admission is by an agent, servant, or employee, lay a predicate showing the nature and existence of the relationship between the declarant and the party-opponent, the fact that the admission was made during the existence of the relationship, and the fact that it was within the scope

of the relationship (*Trencor, Inc. v. Cornech Machine Co.*, 115 S.W.3d 145 Tex. App.—Fort Worth 2003)).

Hearsay

Attacking and Supporting the Credibility of a Declarant

Objection

- *Objection. The question seeks to attack the credibility of a person who has not appeared as a witness.*

Response

- *This impeachment of an out-of-court declarant is permissible, under [Rule 806](#), to the same extent available for a testifying witness.*

Cross-Reference to Texas [Rule 806](#)

Explanation

In most instances in which a hearsay statement is admitted, the credibility of the declarant may be attacked. This is because once the statement is admitted, the declarant is considered a witness to the matters asserted out of court. The opponent may impeach the credibility of the absent declarant to the same extent that one could impeach a live witness. The rule contains no requirement that the declarant have been given an opportunity to deny or explain, and all of the usual impeachment methods are available, including affidavits and prior statements (see *Leal v. State*, 614 S.W.2d 835 (Tex. Crim. App. 1981); *Anthony Pools, Inc. v. Charles & David, Inc.*, 797 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1990)).

Hearsay

Depositions

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The statement is not hearsay because*
 - » *it was made in a deposition taken in this cause; or*
 - » *it was made in a deposition taken in the same proceeding within the meaning of [Rule 801](#)(e)(3) of the Rules of Evidence and [Rule 203.6](#)(b) of the Rules of Civil Procedure. The deposition was taken in a cause involving the same subject matter and was between the same parties or their representatives or successors.*

Cross-Reference to Texas [Rule 801](#); Texas Rules of Procedure 203.6

Explanation

Unlike in federal court, depositions are not treated as hearsay in Texas.

Same Proceeding

Any deposition taken in the same proceeding may be used at trial or hearing by any party, for any relevant purpose, against any party who was either present or represented at the deposition, or who had notice of it, or who substituted for such a party. The “same proceeding” as defined in Tex. R. Civ. P. [Rule 203.6](#)(b) includes a proceeding in a different court, but involving the same parties (including their representatives and successors in interest) and the same subject matter. Therefore, not only are depositions considered

nonhearsay if taken in the cause on trial, but also depositions are not hearsay if taken in any other cause involving the same subject matter and the same parties, their representatives, or successors. While a deposition taken in federal court would constitute inadmissible hearsay in that court, it is nonhearsay and admissible in a Texas state court involving the “same proceeding.”

Other Proceeding

If the deposition does not qualify under [Rule 203.6\(b\)](#) as being taken in the same proceeding, then it is considered hearsay. The proponent must then seek admission under any other theory available under the hearsay rules.

Hearsay Within Hearsay

Objections

- *Objection. The question calls for hearsay within hearsay as to what (second declarant) stated that (first declarant) said.*
- *Objection. The answer is hearsay within hearsay as to what (second declarant) stated that (first declarant) said.*

Response

- *Both statements are admissible because each either comes within a hearsay exception or is nonhearsay. Specifically, (explaining theory of admissibility as to each statement).*

Cross-Reference to Texas [Rule 805](#)

Explanation

This is the multiple hearsay rule. The rule often applies to writings that contain attributed statements (see *Garcia v. State*, [126 S.W.3d 921 \(Tex. Crim. App. 2004\)](#)). To secure admission of the statement within the statement, the proponent must account for both out-of-court statements with either a hearsay exception or an argument that the out-of-court statement is not hearsay at all.

Hearsay

Nonhearsay Prior Statements of Witnesses

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Responses

- *The statement is not hearsay, pursuant to [Rule 801\(e\)\(1\)\(A\)](#), because it is inconsistent with the witness's trial testimony and was given under oath at an earlier proceeding (or in a deposition).*
- *The statement is not hearsay, pursuant to [Rule 801\(e\)\(1\)\(B\)](#), because it is consistent with the witness's trial testimony and is offered to rebut an express (or implied) charge of recent fabrication (or improper influence or motive).*
- *The statement is not hearsay, pursuant to [Rule 801\(e\)\(1\)\(C\)](#), because it is a statement by the testifying witness of identification of a person made after perceiving such person.*
- *The statement is not hearsay, pursuant to [Rule 801\(e\)\(1\)\(D\)](#), because it is taken and offered in accordance with article 38.071 of the Code of Criminal Procedure.*

Cross-Reference to Texas [Rule 801\(e\)\(1\)](#)

Explanation

The Texas rules define as nonhearsay prior statements by a witness in the four categories contained in [Rules 801\(e\)\(1\)\(A\)–\(D\)](#). Such statements are admitted for the truth of the matter asserted. Each category of 801(e)(1) statements requires the declarant to be present, testifying in court, and available for cross-examination. The declarant need not actually be on the stand at the time the prior

statement is offered; if the declarant has already testified, but has not yet been excused, he would be subject to cross-examination concerning the statement if recalled to the stand. The prior statement could therefore be proved by another witness (see, e.g., *Tome v. United States*, 513 U.S. 150 (1995); *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011)).

Hearsay Exception

Absence of Entry in Business Records

Predicate Questions

If Records Are Offered

Authentication Questions

- *I hand you what has been marked for identification as Exhibit _____. Can you identify it?*
- *What is it?*

Business Records Questions

- *Were the records contained in Exhibit _____ made by or from information transmitted by a person with knowledge of the events (or conditions recorded)?*
- *Were these records made at or near the time of the events (or conditions recorded)?*
- *Were these records made in the regular course of your business?*
- *Were these records kept in the regular course of your business?*

Absence of Records Questions

- *If (event, act, or condition in question) had occurred, would it have been recorded in the documents contained in Exhibit _____?*
- *Did you make a diligent search for records of _____?*
- *Did you find any record of _____?*

If No Records Are Offered

Business Records Questions

- *Is it in the regular course of your business to make records of (event, act, or condition in question)?*

- *Is it in the regular course of your business to keep such records?*
- *Are such records made by or from information transmitted by a person with knowledge of the events (or conditions recorded)?*
- *Are such records made at or near the time of the events (or conditions recorded)?*

Absence of Records Questions

- *Did you make a diligent search for records of _____?*
- *Did you find any record of _____?*

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The absence of an entry in this record is admissible to show the nonoccurrence of an event pursuant to [Rule 803\(7\)](#).*

Cross-Reference to Texas [Rules 803](#) and [902](#)

Explanation

The absence of any entry concerning an event that would ordinarily be recorded in a business record may be offered to show that such event never occurred. The reliability of the absence of such entry lies in the notion that prudent, conscientious businesses regularly keep records of events that actually occur.

Such evidence is normally coupled with direct testimony from a witness with knowledge of the nonoccurrence of the event, but it may be independently sufficient evidence to support a verdict on the issue of the nonoccurrence of the event.

Practice Tip

When obtaining a business records affidavit from the custodian of records, include a blank for a page count. The custodian must then certify to the number of pages that comprise the entirety of the business's records. Having certified that there are only x pages of

records and that these are all the records, it will be easier to establish the absence of a record at trial.

Hearsay Exception

Absence of Public Record or Entry

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *Evidence of a diligent, but unavailing search of the records of the public agency (or office) is admissible pursuant to the hearsay exception contained in [Rule 803\(10\)](#).*

Cross-Reference to Texas [Rule 803\(10\)](#)

Explanation

As with [Rule 803\(7\)](#), this rule provides a hearsay exception for evidence of the absence of a record or record entry. The proof that the rule contemplates is evidence of a diligent, but unavailing search of the records or record-keeping system of a public office or agency that regularly maintains such records.

Practice Tip

As with business records, when obtaining an affidavit from the custodian of public records, include a blank for a page count. The custodian must then certify the number of pages that comprise the entirety of the records. Having certified that there are only x pages of records and that these are all the records, it will be easier to establish the absence of a record at trial.

Hearsay Exception

Excited Utterance

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the excited utterance exception, [Rule 803\(2\)](#).*

Cross-Reference to Texas [Rule 803\(2\)](#)

Explanation

Excited utterances gain their reliability from the connection between the making of the statement and the startling event. Thus, to qualify as an excited utterance, the event that gives rise to the statement relating to it must be sufficiently startling so as to remove the likelihood of self-serving reflection before the statement was made (see *Volkswagen of America, Inc. v. Ramirez*, [159 S.W.3d 897 \(Tex. 2004\)](#)).

Timing of the Statement

Unlike present sense impressions, an excited utterance need not be contemporaneous with the pertinent event. Texas cases have held a statement to be admissible under this exception even though there was a passage of many minutes or even hours between the event and the statement (see, e.g., *City of Dallas v. Donovan*, [768 S.W.2d 905 \(Tex. App.—Dallas 1989\)](#)). The critical element is not time, but whether the declarant was still acting under the stress of the exciting or startling event when the statement was made.

Practice Tip

Establish the nature of the startling event and the declarant's emotion reaction to it as a foundational question or questions. Demonstrate that the effect of the event still pervaded the witness's mind if significant time elapsed between the event and the statement. When a statement fails to meet the criteria for an excited utterance (perhaps because the event was not sufficiently startling), it may in some cases be admissible under the present sense impression exception.

Hearsay Exception

Family Records

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the family record exception pursuant to [Rule 803\(13\)](#).*

Cross-Reference to Texas [Rule 803\(13\)](#)

Explanation

This rule creates a hearsay exception for facts relating to family or personal history that are found in a variety of writings, ranging from Bibles to tombstones.

The reliability of these writings stems from the fact that an entry in such a document or item would not be made erroneously without family or personal protest. There is no requirement of contemporaneity of entry for family records. However, like any other writing, family records must be authenticated. Because the writing or entry is only reliable if generally accepted by the family or person to whom it refers, the proponent's offer of evidence of family acceptance or lack of protest regarding the writing or inscription would be persuasively important. However, such testimony is not a required predicate for admissibility. The rule does away with the common-law requirements that the declarant be unavailable, be a family member, have no motive to fabricate, and have made the statement *ante litem motam* (before the lawsuit began).

Practice Tip

Making the Bible, a photograph of the tombstone, or the family tree document available to the jurors adds texture, depth, and credibility to the evidence under the exception.

Hearsay Exception

Former Testimony

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the former testimony exception pursuant to [Rule 804\(b\)\(1\)](#).*

Cross-Reference to Texas [Rule 804\(b\)\(1\)](#); [Tex. Rule of Civil Procedure 203.6](#)

Explanation

This exception draws its reliability from the general lack of hearsay dangers at the time the statement was made. The former testimony, now an out-of-court statement, was made under oath, and the person against whom it is now offered—or someone in a similar position in a civil case—had the opportunity to examine and confront the witness with a similar motive (see *Jones v. State*, [843 S.W.2d 487 \(Tex. Crim. App. 1992\)](#)). When offering the prior testimony for an unavailable witness, the proponent must establish that the witness is unavailable (dead, insane, or physically unable to testify). An uncooperative witness is not per se unavailable (*Fuller-Austin Insulation Co. v. Bilder*, [960 S.W.2d 914 \(Tex. App.—Beaumont 1998, pet. granted, judgm't vacated w.r.m.\)](#); see also *Unavailable Witnesses*)).

Practice Tip

To enhance your ability to use prior testimony, have robust evidence of how and why the witness is unavailable. If the witness is

sane and alive, but merely uncooperative, show evidence of your diligent efforts to obtain the witness's testimony.

Hearsay Exception

Judgment as to Personal, Family, or General History, or Boundaries

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible as a judgment as to personal, family, or general history, or boundaries pursuant to [Rule 803\(23\)](#).*

Cross-Reference to Texas [Rule 803\(23\)](#)

Explanation

This exception provides a means to prove a fact that was essential to an earlier judgment as to personal, family, or general history, or as to boundaries. This rule must be read in conjunction with [Rules 803\(19\)](#) and [803\(20\)](#), because [Rule 803\(23\)](#) only allows a judgment that proves facts that would be provable by reputation evidence.

Hearsay Exception

Judgment of Previous Conviction

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a judgment of previous conviction pursuant to [Rule 803\(22\)](#).*

Cross-Reference to Texas [Rule 803\(22\)](#)

Explanation

Civil Cases

The exception allows prior felony convictions to be admitted for the truth of facts essential to the judgment of conviction. Such conviction is admissible for its truth in a second case only against the person convicted in a first case. A no-contest plea may not be admitted under this exception.

If the conviction is still on appeal, then it is not admissible under this exception.

Criminal Cases

In criminal cases, evidence of any prior conviction that proves an element in the present case is admissible regardless of the plea, if it is a prior conviction of the accused in the present case. The purpose of the rule is to allow collateral estoppel of some fact proven in the prior case and necessary to prove the present case. If the conviction is of someone other than the accused, the exception does not apply. If the third party's conviction is an element of the new case, then this rule would still be applicable, as in the case of committing an offense

by dealing with a felon. Proof of the conviction of that felon would fall under this rule.

Practice Tip

This exception may be of particular value in civil cases in which there has been an ancillary criminal case. For example, a prior conviction in a DUI/manslaughter case may be of value in a Dram Shop Act, although the conviction may not be used against the bar owner.

Hearsay Exception

Learned Treatises

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible under the learned treatise exception pursuant to [Rule 803\(18\)](#).*

Cross-Reference to Texas [Rule 803\(18\)](#)

Explanation

Under the learned treatise exception to the hearsay rule, a court may admit passages, excerpts, or—on occasion—the entire contents of a book, article, or other writing on a subject ordinarily the subject of expert testimony. While this exception has traditionally applied to pamphlets or periodicals, some Texas courts have expanded its application as treatises and many journals or technical bulletins are produced in digital in addition to or rather than paper form (see, e.g., *Loven v. State*, [831 S.W.2d 387, 397 \(Tex. App.—Amarillo 1992\)](#) (video-recordings can qualify as learned treatises for purposes of the learned treatise exception to the hearsay rule)).

The learned treatise, or parts thereof, are only to be admitted when used to cross-examine an expert witness or when an expert witness has relied on a learned treatise in the direct examination. Significantly, the treatise may be admitted for its substantive truth, whether offered during direct or cross.

Practice Tip

The treatise itself may not go to the jury room, a fact that can create memory problems or disputes among the jurors about the

contents. Most judges, however, allow the admitted portions of a learned treatise to be displayed to the jurors rather than merely read to them. Thus, displaying the “learned” portion of the treatise to the jurors via ELMO, projector, or other enlargement device may allow note-taking jurors to capture the pertinent information and thus have the treatise in the jury room.

Hearsay Exception

Market Reports and Commercial Publications

Objection

- *Objection. The document is an out-of-court statement and is therefore hearsay.*

Response

- *This statement is admissible as a market report (or commercial publication) pursuant to [Rule 803\(17\)](#).*

Cross-Reference to Texas [Rule 803\(17\)](#)

Explanation

Market reports or quotations and commercial publications—including commercial newspapers, actuarial papers, and the like—are admissible against a hearsay objection. They gain their reliability from the general reliance placed on them by the entities that use them. As a result, the person or entity that creates such documents for use in a business or profession has an incentive to make the documents reliable and accurate. In addition, any inaccuracies are likely to be corrected. The predicate of use and reliance may be proved by a person with knowledge of the particular occupation, including an expert.

Hearsay Exception

Marriage, Baptismal, and Similar Certificates

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is hearsay.*

Response

- *This statement is admissible as a marriage (or baptismal or similar certificate) pursuant to [Rule 803\(12\)](#).*

Cross-Reference to Texas [Rule 803\(12\)](#)

Explanation

This hearsay exception admits the facts relating to religious ceremonies, like marriages or baptisms, as long as the entrant is authorized by law or religious practice to perform such ceremony and the record is made contemporaneously with or reasonably soon after the occurrence of the ceremony.

These records are considered to be reliable because of the solemnity of the occasion, the entrant's legal authorization, and the contemporaneity of the entry with the fact or ceremony recorded.

Practice Tip

As with family bibles and other nostalgic materials, having the actual certificate present in the courtroom adds interests and authenticity to the testimony.

Hearsay Exception

Present Sense Impression

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Responses

- *This statement is admissible under the present sense impression exception, [Rule 803\(1\)](#).*

Cross-Reference to Texas [Rule 803\(1\)](#)

Explanation

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter ([Rule 803\(1\)](#)). The rationale for the exception stems from the statement's contemporaneity (*Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 1992)). Present sense impressions gain their reliability from the fact that the out-of-court statement was made virtually contemporaneously with the occurrence of the event described or explained (see *Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008)). The substantial contemporaneity of the event and the statement negate the likelihood of deliberation or conscious misrepresentation. Another potential credibility defect, lapse of memory, is likewise minimized by the short time period between the perception and statement. Without probative evidence that establishes the amount of time between the event and the statement, the statement will not fall within this exception (*1.70 Acres v. State*, 935 S.W.2d 480, 489 (Tex. App.—Beaumont 1996); *Daniels v. Yancey*, 175 S.W.3d 889 (Tex. App.—Texarkana 2005)).

Hearsay Exception

Public Records and Reports

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*
[In a criminal case]
- *Objection. The report is not admissible against a criminal defendant.*

Response

- *The statement is admissible under the hearsay exception for public records and reports.*

Cross-Reference to Texas **Rule 803(8)**

Explanation

Nature of Records

Public records or reports gain their reliability from the public duty or the duty imposed by law on the maker to observe and record the kinds of events contained in such public records or reports (see *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988)). In addition, the maker of the record or report will have no interest in reporting or recording information favoring one side over another. There are three types of matters that are admissible under the public records exception:

- 1) records or reports that disclose the activities of the public agency;
- 2) observations made pursuant to legal duty and that the public official has a legal requirement to record; or

- 3) factual findings (including conclusions and opinions derived therefrom) that result from an investigation made pursuant to law.

There is no requirement that the public record be sworn, and such records are commonly created, filed, and admitted in an unsworn format in civil cases (*Texas DPS v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) (“a report is no less admissible in a civil case merely because it is unsworn ...”). Within public records, however, you may frequently find statements by witnesses or others that do not constitute the “factual finding” excused from hearsay as a public record. For example, statements by witnesses frequently appear in police reports, and they do not necessarily qualify as public records and may be hearsay within a document that meets a hearsay exception (*Corrales v. TDFPS*, 155 S.W.3d 478 (Tex. App.—El Paso 2004)).

Practice Tip

Be alert for hearsay within hearsay in public documents or records—if you find one, establish a hearsay exception or be prepared to argue that the matter is not offered for the truth of the matter asserted. If the maker of the public record is also tendered as an expert, the otherwise inadmissible witness statement within a public record may become a basis for the expert’s opinion (see Experts generally).

Hearsay Exception

Recorded Recollection

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the past recollection recorded exception.*

Cross-Reference to Texas **Rule 803(5)**

Explanation

A past recollection recorded statement is an out-of-court memorandum or writing that records a matter about which the declarant once had knowledge, but now, as a witness, lacks sufficient recollection to testify completely about the matter (see *Phea v. State*, 767 S.W.2d 263 (Tex. App.—Amarillo 1989)).

Predicate Elements

The predicate for past recollection recorded is the following:

- 1) the witness must have a failure of recollection while on the witness stand;
- 2) the witness must authenticate a memorandum;
- 3) the memorandum must contain facts of which the witness testifies he once had personal knowledge;
- 4) the memorandum must have been created or adopted by the witness at a time when the matter was fresh in the witness's memory; and

- 5) the memorandum must accurately reflect the witness's knowledge.

Practice Tip

Sometimes referred to as a document to refresh recollection, this hearsay exception to help a witness you have called, but who seems to have an unfortunate lapse in memory or who, due to nerves or other understandable human conditions, simply cannot remember an important fact or series of facts. Similarly, refreshing recollection may be a strategically advantageous way to help an adverse witness who, because they are a sympathetic witness, you would prefer not to impeach for fear that the jurors will perceive impeachment as picking on the witness.

Hearsay Exception

Records of Documents Affecting an Interest in Property

Objections

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible as a record of a document affecting an interest in property pursuant to [Rule 803\(14\)](#).*

Cross-Reference to Texas [Rule 803\(14\)](#)

Explanation

The record of a document affecting an interest in property is admissible for its truth in regard to the contents of the original recorded document, as well as for the fact of its execution and delivery by the parties to the document. These documents are considered to be reliable because they are records of a type kept by a public office, such as a registry of deeds, pursuant to recording statutes. Affidavits of heirship traditionally do not fall within this hearsay exception, but more properly fall under the [Rule 804\(b\)\(3\)](#) exception (see *Compton v. WWV Enters.*, 679 S.W.2d 668 (Tex. App.—Eastland 1984)).

Hearsay Exception

Records of Regularly Conducted Activity

Business Records

Predicate Questions

Authentication Questions

- *I hand you what has been marked for identification as Exhibit ____.*
- *Can you identify it?*
- *What is it?*

Business Records Questions

- *Were the records contained in Exhibit ____ made by (or from information transmitted by) a person with knowledge of the events (or conditions) recorded?*
- *Were these records made at (or near) the time of the events (or conditions) recorded?*
- *Were these records made in the regular course of your business?*
- *Were these records kept in the regular course of your business?*

Objections

- *Objection. The exhibit is hearsay.*
- *Objection. The exhibit contains hearsay within hearsay, specifically for example (specifying at least one example of a double hearsay statement).*

Response

- *This exhibit is admissible under the business record exception.*

Reply

- *This exhibit does not qualify as a business record, because*
 - » *it was made solely for litigation purposes and therefore was not made in the regular course of business and is not trustworthy; or*
 - » *the sources of information (or method or circumstances of preparation) indicate a lack of trustworthiness; or*
 - » *the record is hearsay within hearsay since it contains statements by (declarant), who was not under a business duty to report to (entity that made record).*

Cross-Reference to Texas **Rules 803(6)** and **902(10)**

Explanation

The business records exception codified in **Rule 803(6)** is one of the most important and most utilized exceptions to the hearsay rule (see *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Garcia v. State*, 126 S.W.3d 921 (Tex. Crim. App. 2004); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995)).

A business record gains its reliability from the regularity of the record-keeping operation that is necessary to transact regularly conducted activity. The exception is premised on the notion that if the record is good enough to rely on for business purposes, then it ought to be reliable enough to be admitted into evidence when issues regarding the business are litigated. Proof of significant record-keeping irregularities may preclude application of this exception, although in most instances, this type of proof will go more to the weight to be given the records than to their admissibility.

The rule applies to the records of any business, institution, association, profession, or occupation. Whether the entity in question has a profit motive for its existence is irrelevant.

Records of other organizations included in the business's records may constitute hearsay within hearsay, and the business records exception will not, as a general rule, remove the hearsay impediment from the second business's records. There are instances, however, where the first business and its custodian's affidavit or testimony can

be sufficient to apply the hearsay exception. “Business records that have been created by one entity, but which have become another entity’s primary record of the underlying transaction may be admissible pursuant to [Rule 803\(6\)](#). In addition, a document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business.” (*Riddle v. Unifund CCR Partners*, [298 S.W.3d 780, 782–83 \(Tex. App.—El Paso 2009\)](#); *Ortega v. CACH, LLC*, [396 S.W.3d 622, 629–30 \(Tex. App.—Houston \[14th Dist.\] 2013, no pet.\)](#)). If the “source of information or the method or circumstances of preparation indicate lack of trustworthiness, even a properly authenticated record may be inadmissible. Lack of trustworthiness is most frequently found when the record was prepared in anticipation of litigation” (*id.* at 630; see also *Freeman v. American Motorists Ins.*, [53 S.W.3d 710, 715 \(Tex. App.—Houston \[1st Dist.\] 2001\)](#)).

[Rule 803\(6\)](#) does not require the predicate witness to be record’s creator or have personal knowledge of the content of the record. The rule does require, however, that the witness have personal knowledge of the manner and methods in which the records were prepared and kept (*Riddle*, [298 S.W.3d at 783](#)).

Emails as Business Records

While these rules regarding the business records hearsay exception are all applicable to emails qualifying as business records, emails do have special conditions.

A party seeking to introduce an email made by an employee about a business matter under the hearsay exception under [Rule 803\(6\)](#) must show that the employer imposed a business duty to make and maintain such a record. Emails qualify under this exception only if it is the business duty of an employee to make and maintain emails as part of his job duties and if the employee routinely sent or received and maintained the emails (see *DirecTV, Inc. v. Murray*, [307 F. Supp. 2d 764, 772–73 \(D. S.C. 2004\)](#) (finding that sales records contained in emails were admissible under the business records hearsay exception when the sales orders were regularly received by email and the emails were retained as records of each order); *New York v.*

Microsoft Corp., No. CIV A. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, 2002 WL 649951, at *2 (D. D.C. Apr. 12, 2002) (declining to admit emails under the business records hearsay exception because there was a “complete lack of information regarding the practice of composition and maintenance of” the emails); *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997) (holding that “in order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type,” and finding that emails submitted by the government did not fall under the business records exception because “while it may have been [an employee’s] routine business practice to make such records, there was no sufficient evidence that [the employer] required such records to be maintained.”); *but see Pierre v. RBC Liberty Life Ins.*, Civil Action No. 05-1042-C, 2007 U.S. Dist. LEXIS 50949, 2007 WL 2071829, at *2 (M.D. La. June 12, 2007)).

Practice Tip

Because the foundation for business records may be established by affidavit or testimony, obtaining a business records affidavit may be a time- and money-saving approach, especially if the custodian will not otherwise be needed to testify. Business record affidavits must generally be filed at least fourteen days before trial (or twenty-days before the hearing if they are to be used as summary judgment evidence). If, however, no affidavit is available, keep the predicate to prove the exception for business records handy—or better yet, memorize it.

Hearsay Exception

Records of Religious Organizations

Objection

- *Objection. The record is an out-of-court statement offered for its truth and is hearsay.*

Response

- *This statement is admissible as a record of a religious organization pursuant to [Rule 803\(11\)](#).*

Cross-Reference to Texas [Rule 803\(11\)](#)

Explanation

This exception for regularly kept records of personal or family history gains its reliability from the fact that such events are ordinarily contemporaneously recorded by a religious functionary or clergyman with no motive to falsify a record on which persons ordinarily rely.

Though bearing some superficial similarity to business records under [Rule 803\(6\)](#), there is no requirement that the entry be contemporaneous to the event recorded or that the person entering the record have personal knowledge or a source with personal knowledge.

Practice Tip

Records that would fit within the 803(12) exception may also fit the 803(11) exception. Because 803(11) has broader application, it is a useful backup should the court sustain a hearsay objection and find the evidence does not fit within the 803(12) exception.

Hearsay Exception

Records of Vital Statistics

Objection

- *Objection. The record is an out-of-court statement offered for its truth and is hearsay.*

Response

- *The statement is admissible pursuant to [Rule 803\(9\)](#) as a record of vital statistics.*

Cross-Reference to Texas [Rule 803\(9\)](#)

Explanation

Records of vital statistics gain their reliability from the circumstances of their making. Ordinarily, the information contained in such records is provided by doctors or other persons who have no interest in the outcome of any future litigation. Furthermore, they are recorded by public officials who have an official duty to receive, record, and maintain such records.

Hearsay Exception

Reputation as to Character

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as reputation as to character pursuant to [Rule 803\(21\)](#).*

Cross-Reference to Texas [Rule 803\(21\)](#)

Explanation

Reputation is a collection of hearsay. It must be reported by a witness on the stand who has had occasion to overhear discussion of the person's character, either among such person's associates or among people in the community. Reputation is distinguished from opinion on the question of character because opinion raises no hearsay problems, but merely refers to a notion formed by the witness from personal experience.

Hearsay Exception

Reputation Concerning Boundaries or General History

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of reputation concerning boundaries (or general history) pursuant to [Rule 803\(20\)](#).*

Cross-Reference to Texas [Rule 803\(20\)](#)

Explanation

Reputation concerning boundaries or general history, although a collection of hearsay statements, is admissible under this exception as long as 1) the reputation arose before the controversy involved in the trial and 2) the witness is familiar with the reputation, having heard it discussed in the relevant community. The reliability is presumed because a fact has been the subject of “prolonged observation and discussion of certain matters of general interest by a whole community [which] will sift possible errors and bring the result down ... in a fairly trustworthy form ...” (*Roberts v. Allison*, 836 S.W.2d 185, 191 (Tex. App.—Tyler 1992)).

Hearsay Exception

Reputation Concerning Personal or Family History

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of reputation concerning personal (or family history) pursuant to [Rule 803\(19\)](#).*

Cross-Reference to Texas [Rule 803\(19\)](#)

Explanation

Reputation concerning personal or family history is admissible against a hearsay objection as long as it is generally accepted among the family, associates, or community where the reputation is known. The witness who testifies about the reputation must be familiar with that reputation, which is shown by 1) the witness being a member of the relevant family, community, or group of associates, and 2) the witness's familiarity with the reputation, having either heard it discussed or taken part in such discussions.

Hearsay Exception

Requirement of Unavailability

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The declarant is unavailable because he (or she)*
 - » *was exempted from testifying concerning the subject of the statement by ruling of the court on the ground of privilege; or*
 - » *persists in refusing to testify concerning the subject of the statement, despite a court order to do so; or*
 - » *testified to a lack of memory on the subject of the statement; or*
 - » *is unable to testify at the hearing because of death (or illness); or*
 - » *is absent from the hearing, and we have been unable to procure his (or her) attendance through process or other means.*

Cross-Reference to Texas [Rule 804](#)

Explanation

[Rule 804](#)(b) exceptions require the declarant's unavailability. The types of unavailability listed in [Rule 804](#)(a) are not the exclusive circumstances of unavailability. While [Rule 804](#)(a) lists circumstances that per se amount to unavailability, the rule does not preclude any other legitimate showing of unavailability that the trial judge determines acceptable pursuant to [Rule 804](#).

Unavailability pursuant to [Rule 804](#)(a) is a necessary predicate for [Rule 804](#)(b) exceptions to the hearsay rule to apply. Unavailability of

the declarant alone does not constitute a hearsay exception—the requirements of the exception must be met.

If the proponent relies on the fifth type of unavailability—absence from the hearing—the predicate must include proof that the proponent could not compel the declarant to attend the hearing, nor could the declarant be deposed (“attendance or testimony”). An uncooperative or difficult witness who still could have been deposed—even if not within the court’s subpoena range for trial—may not be an unavailable witness. (*In Re Marriage of Moon*, No. 07-03-0144-CV, 2004 Tex. App. LEXIS 3805, n.1 (Tex. App.—Amarillo April 29, 2004) (no abuse of discretion in sustaining hearsay objection where proponent failed to affirmatively prove witness was unavailable: “There was no evidence at the hearing that Melinda was unable to attend because of a snowstorm as Donald asserts on appeal.”); *Owens-Corning Fiberglass Corp. v. Wasiak*, 917 S.W.2d 883 (Tex. App.—Austin 1996, consolidated with and affirmed by *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1988) (Owens-Corning failed to demonstrate affirmatively its own executive was unavailable by arguing he lived in California and vacationed extensively in Europe)).

Moreover, the proponent of the hearsay must demonstrate the efforts taken to obtain the testimony. Mere requests to take the deposition, without actually noticing the deposition or filing a motion to compel the deposition may not constitute the witness’s being unavailable (*id.* at 888 (“although [the witness] may have been beyond the subpoena power of the court, [the proponent] did not establish that it was unable to take his deposition or otherwise procure his testimony” before his vacation.); *Otero-Miranda v. State*, 746 S.W.2d 352 (Tex. App.—Amarillo 1988) (hearsay objection properly sustained when only evidence of efforts to procure the testimony was an unserved subpoena); *Reyes v. State*, 845 S.W.2d 328 (Tex. App.—El Paso 1992)).

Hearsay Exception

State of Mind

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay*

Responses

- *This statement is admissible under the state of mind exception.*
- *Even though the statement looks backward in time, it is permissible because it relates to the execution (or revocation or identification or terms of the declarant's will).*

Objecting Party's Reply

- *The state of mind exception is not applicable because*
 - » *the statement looks backward in time and so is not a then-existing state of mind; or*
 - » *the declarant's state of mind is not relevant; or*
 - » *the statement does not go to the declarant's state of mind.*
- *Even if admissible under the state of mind exception, the statement is admissible only to prove that (declarant) believed (fact stated by declarant) and not to prove that (fact stated by declarant) is true.*

[If statement admitted over this objection]
- *We request that the jurors be instructed that they may consider this statement only as proof that (declarant) believed (fact stated by declarant), but not that (fact stated by declarant) is true.*

Cross-Reference to Texas **Rule 803**

Explanation

Statements of then-existing mental or emotional condition gain their reliability from the fact that the statement was made contemporaneously with the state of mind, sensation, or condition that the declarant described. It is critical to note that only statements regarding a present (at the time of the making of the statement) mental or emotional condition fit within the exception (see *Shepard v. United States*, 290 U.S. 96 (1933)). A statement regarding a past condition will not be admissible, because there is no substantial guarantee of reliability—that is, the time between the existence of the condition of mind and the statement allows the declarant time to reflect and fabricate. This hearsay exception is based on the premise that there can be no better evidence of the state of mind of a declarant than the declarant's own statement while experiencing the condition.

Hearsay Exception

Statement Against Interest

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement against interest pursuant to [Rule 803\(24\)](#).*

Cross-Reference to Texas [Rule 803\(24\)](#)

Explanation

Civil Cases

A statement against interest is an out-of-court declaration that was so contrary to the interest of the declarant when made that he would not have made the statement unless it was true (see *Robinson v. Harkins & Co.*, 711 S.W.2d 619 (Tex. 1986)). For example, statements that would subject the declarant to criminal or civil liability may be statements against interest (*Green v. Reyes*, 836 S.W.2d 203 (Tex. App.—Houston [14th Dist.] 1992)). The potential consequence provides reliability and justifies this hearsay exception. Unlike the corresponding federal rule, unavailability of the declarant is not required.

The key to this exception is whether a reasonable person would make such a statement if it was untrue. The circumstances surrounding the making of the statement usually determine its admissibility.

Some statements, however, can be self-serving in one respect, but contrary to the speaker's interest in another. The court will have to

evaluate the primary purpose of the statement and whether it is ultimately trustworthy (*State v. Arnold*, 778 S.W.2d 68 (Tex. 1989)).

Criminal Cases

This exception is often confused with a simple admission by a defendant. An admission by a criminal defendant is not hearsay, does not fall under this exception, and thus requires no corroboration. This rule covers a statement by someone other than the accused that admits to some crime and implicates the defendant in doing so. Before that statement is admissible against the accused, 1) the declarant must implicate himself as well as the accused; 2) there must be a high degree of independent corroboration; and 3) the statement must not be offered in a joint trial of the declarant and accused (see *Cofield v. State*, 891 S.W.2d 952 (Tex. Crim. App. 1994)).

Hearsay Exception

Statement of Personal or Family History

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of personal (or family) history pursuant to [Rule 804\(b\)\(3\)](#).*

Cross-Reference to Texas [Rule 804\(b\)\(3\)](#)

Explanation

This exception pertains to statements regarding the declarant's own family line: birth, adoption, marriage, divorce, legitimacy, etc., and gains its reliability from the declarant's likely reliance on such information throughout the course of the declarant's life. For many such statements, it would be impossible for the declarant to have personal knowledge. As such, the requirement that a declarant have personal knowledge, which ordinarily must be apparent from the circumstances of the making of a declarant's admissible hearsay statement, is explicitly dispensed with pursuant to [Rule 804\(b\)\(3\)](#).

Hearsay Exception

Statement Under Belief of Impending Death

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the dying declaration exception pursuant to [Rule 804\(b\)\(2\)](#).*

Cross-Reference to Texas [Rule 804\(b\)\(2\)](#)

Explanation

A statement made under belief of impending death gains its reliability from the notion that a declarant, who in good faith believes that he is about to die, would not fabricate either the cause of death or the circumstances that caused the declarant's condition. The rule does not require a declarant to die for the statement to be admitted under belief of impending death (see *Burks v. State*, 876 S.W.2d 877 (Tex. Crim. App. 1994)). The guarantee of reliability is found in the declarant's reasonable belief that he is about to die. Unavailability must, of course, be proved, but the proof may consist of any of the five categories in [Rule 804\(a\)](#) and not just subdivision (4) relating to death.

Practice Tip

For a statement to be admissible, the proponent of the evidence may need to lay a predicate about the declarant's belief about his impending death, either through acts or statements of the declarant or statements made to the declarant that affected his mindset (i.e., a physician's statement that she believes the end is close). Laying this

predicate, however, may compound the hearsay problem if you need to use other out of court statements to establish foundation.

Hearsay Exception

Statements for Purposes of Medical Diagnosis or Treatment

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement for purposes of medical diagnosis (or treatment) pursuant to [Rule 803\(4\)](#).*

Objecting Party's Reply

- *This exception is not applicable because the statement is not pathologically germane, that is, reasonably pertinent to diagnosis (or treatment).*
- *This exception is not applicable because the statement was made by the doctor (or nurse or paramedic or other) rather than to him (or her).*

Cross-Reference to Texas [Rule 803\(4\)](#)

Explanation

Statements made for purposes of medical diagnosis or treatment gain their reliability from the notion that one who is seeking medical treatment has a strong interest in being truthful to a person in the position to render or obtain medical assistance. This would include, of course, statements to any medical professional, as long as the patient sought the diagnosis or treatment (see *In the Interest of L.S., P.P., G.S., and M.S.*, 748 S.W.2d 571 (Tex. App.—Amarillo 1988)). The test usually applied to statements under this exception looks at whether the statement 1) was made for purposes of diagnosis and

treatment and the declarant knows that it is; and 2) the statement is actually pertinent to the diagnosis or treatment. This second factor is sometimes referred to as being pathologically germane.

Pathologically Germane Statements

Statements about causation or the external source of the physical condition mentioned in the out-of-court statement will only be admissible if pathologically germane—that is, pertinent to the medical diagnosis or treatment. If the statement is not related to what a doctor needs to know for proper diagnosis or treatment, then the declarant lacks the incentive to be truthful (see *Taylor v. State*, 268 S.W.3d 571 (Tex. Crim. App. 2008) (trial court erred in admitting counselor’s testimony because the state, as proponent of the evidence, did not demonstrate the statement identifying defendant as the perpetrator of her sexual assault satisfied the requirement of being pathologically germane)).

Practice Tip

Statements made to physicians performing independent medical examinations or hired by an injured party’s counsel for litigation purposes (rather than a treating physician) do not have the same indicia of reliability. Such physicians frequently concede they are not the patient’s physician and did not intend to establish a physician-patient relationship. As such, attempts by the injured party to bootstrap otherwise inadmissible hearsay from such an examination should not be allowed. If such statements are helpful to the other party, they may be used as admissions against interest or admissions by a party opponent.

Hearsay Exception

Statements in Ancient Documents

Objection

- *Objection. This statement is contained in an out-of-court writing offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible under the ancient document exception pursuant to [Rule 803\(16\)](#).*

Cross-Reference to Texas [Rules 803\(16\)](#) and [901\(b\)\(8\)](#)

Explanation

Statements contained in ancient documents gain their reliability from the notion that a document created twenty or more years prior to its being offered during litigation is unlikely to be created at a time when there was any motive to falsify the document, at least for purposes of the current litigation. The predicate for authenticating an ancient document requires that

- 1) the condition of the document creates no suspicion regarding its authenticity;
- 2) the document has been kept in a place where it likely would be kept if it were authentic; and
- 3) it has indeed been in existence for at least twenty years at the time of its offer.

Hearsay Exception

Statements in Documents Affecting an Interest in Property

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible pursuant to [Rule 803\(15\)](#) as a statement in a document affecting an interest in property.*

Cross-Reference to Texas [Rule 803\(15\)](#)

Explanation

Statements contained in a document—whether or not recorded—that create, relate to, or affect an interest in property are admissible, provided two requirements are met: 1) the factual statement contained in the document must relate or be relevant to the purpose of the document; and 2) the document would only be admissible as long as dealings with the property after the time that the document was created have not been inconsistent with the truth of the statement or the purport of the document offered (*Tri-Steel Structures, Inc. v. Baptist Found.*, 166 S.W.3d 443 (Tex. App.—Fort Worth 2005)).

Hearsay Exception

Then-Existing Physical Condition

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of a then-existing physical condition pursuant to [Rule 803\(3\)](#).*

Objecting Party's Reply

- *The state of physical condition exception is not applicable because*
 - » *the statement looks backward in time and so is not a then-existing physical condition; or*
 - » *the declarant's physical condition is not relevant.*

Cross-Reference to Texas [Rule 803\(3\)](#)

Explanation

Statements admitted under this exception relating to then-existing physical conditions are usually spontaneous remarks about pain or some other sensation that are made by the declarant while the sensation, not readily observable by a third party, is being experienced (*James v. Texas Dept. of Human Services*, 836 S.W.2d 236, 243 (Tex. App.—Texarkana 1992); see also *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.—San Antonio 1990, writ denied)). “The exception does not extend to statements of past external facts or conditions.” (*James*, 836 S.W.2d at 243; see also *Ochs*, 789 S.W.2d at 959; see also *Power v. Kelley*, 70 S.W.3d 137, 141 (Tex. App.—San Antonio 2001)).

A statement of a then-existing physical condition gains its reliability from the fact that the statement was made contemporaneously with the physical condition described by the declarant. It is critical to note that only statements regarding present (at the time of the making of the statement) physical conditions come within the exception. A statement regarding a past condition will not be admissible, because there is no substantial guarantee of reliability—that is, the time between when the bodily condition happened and when the declarant made the statement allows the declarant time to reflect and fabricate.

Statements that qualify for admissibility pursuant to [Rule 803\(3\)](#) need not be made to a physician and need not be made for purposes of obtaining medical diagnosis or treatment (see *Shepard v. United States*, [290 U.S. 96 \(1933\)](#)).

Practice Tip

There may be overlap between a present sense impression and statements made for purposes of medical care. [Rule 803\(4\)](#) excepts statements made for the purposes of medical diagnosis or treatment from the hearsay rule (see [Rule 803\(4\)](#)). If the present sense impression is made in connection with seeking health care, 803(4) may provide an alternative route to admissibility. Similarly, if the court finds the statement was not made in connection with diagnosis or treatment, it may be prudent to offer the statement as a present sense impression.

Impeachment

Generally

Objections

[When an impeaching party attempts to impeach the witness with an otherwise inadmissible hearsay statement]

- *Objection. The question calls for hearsay.*
- *Objection. Counsel called this witness for the primary purpose of impeaching him with an otherwise inadmissible hearsay statement. We object under [Rule 403](#). The probative value is very low. The proponent does not actually need the evidence—they created their own need for the impeachment by calling the witness to testify. This low probative value is substantially outweighed by the danger that the jurors will be confused and misled to take the statement for the truth of the matter asserted, despite a limiting instruction.*

Response

[To an objection that the witness was called for the primary purpose of impeachment with otherwise inadmissible hearsay]

- *This witness was not called for the primary purpose of impeachment. He was called to testify concerning (specifying non-impeachment purposes). Since he may properly testify to these matters, we may impeach him on other matters that he will testify about, and we are entitled to impeach our own witness under [Rule 607](#).*

Cross-Reference to Texas [Rules 607](#) and [403](#)

Explanation

Some Texas courts, as well as the U.S. Court of Appeals for the Fifth Circuit, have held that a party may not call a witness for the sole or primary purpose of impeaching that witness with what would be

otherwise inadmissible evidence. The analysis used to determine the primary or sole purpose of a witness is sometimes called the *Hughes* analysis (see *Hughes v. State*, 4 S.W.3d 1, 4 (Tex. Crim. App. 1999)). For example, suppose a witness made a statement to the investigating officer that the defendant's light was red, but then gave a witness statement to the insurance adjuster that the light was yellow. The plaintiff could not call the witness at trial solely to ask the color of the light, get an adverse answer, and then impeach with the witness statement as the statement would be inadmissible hearsay unless offered for the limited purpose of impeachment. Since Rule 607 does not expressly contain any such limitation on impeachment, the objection is best made under Rule 403. That is, probative value is low since the evidence is offered only for the limited purpose of impeachment, and the proponent herself created the need for the impeachment by calling the witness in the first place. On the other hand, there is a danger that the jurors may be confused or misled and take the evidence for its forbidden hearsay purpose, even though there is a limiting instruction. Of course, if the impeaching party can show other legitimate purposes for calling the witness, then that party will probably be allowed also to impeach under Rule 607.

Impeachment by Bias, Interest, and Improper Motive

Objections

[To a question posed on cross-examination]

- *Objection. This is irrelevant because* (stating specific reasons testimony is irrelevant).
- *Objection. Counsel has not laid a proper predicate. The witness has not been advised of the circumstances supporting the claim of bias* (or interest or improper motive).

[To a question impeaching based on prior statements of witness]

- *Objection. Counsel has not laid the proper predicate because the witness has not been advised of where, when, and to whom the statements were made.*
- *Objection. Counsel has not laid the proper predicate because the witness has not been advised of the content of the statements.*

[To a question impeaching using extrinsic evidence (not a prior statement of the witness)]

- *Objection. This testimony is irrelevant because the witness has not yet testified, and so his* (or her) *credibility is not in issue.*
- *Objection. Counsel has not laid the proper predicate for use of extrinsic evidence to impeach because the witness was not confronted with the alleged bias* (or interest or improper motive) *on cross-examination.*
- *Objection. Extrinsic evidence is inadmissible to impeach because the witness was confronted with the alleged bias* (or interest or improper motive) *and unequivocally admitted its existence.*
- *Objection. Extrinsic evidence should not be admitted to impeach because the alleged bias* (or interest or improper motive) *is a collateral matter.*

[If bias or interest based on prior statements of witness]

- *Objection. Counsel has not laid the proper predicate for use of extrinsic evidence to impeach because the witness was not advised of where, when, and to whom the statements were made.*
- *Objection. Counsel has not laid the proper predicate for use of extrinsic evidence to impeach because the witness was not advised of the content of the statements.*

Responses

[To an objection posed to cross-examination]

- *I am attempting to show that the witness has a bias (or an interest in the outcome of the case or an improper motive for testifying) because (stating specific basis).*

[To an objection posed to extrinsic evidence, where the witness with the alleged bias, interest, or improper motive has not already testified]

- *The witness will probably testify since he (or she) has been listed by my opponent, and I offer this evidence conditionally to avoid recalling the witness presently on the stand at a later time.*

[To an objection posed to extrinsic evidence where the witness with the alleged bias, interest, or improper motive has already testified]

- *I confronted this witness with his (or her) bias (or interest or improper motive) during cross-examination when I asked him (or her), and he (or she) has not unequivocally admitted it.*

Cross-Reference to Texas [Rule 613](#)

Explanation

There is no rule that specifically deals with bias, interest, or improper motive. These are traditional types of impeachment that fall within the general impeachment provision of [Rule 607](#) (see *Davis v. Alaska*, 415 U.S. 308, 316–18 (1974)).

Bias

A witness can be biased for as many reasons as there are for one person to be associated with another (*Jacquet v. State*, No. 02-15-00377-CR, 2017 Tex. App. LEXIS 938, *10 (Tex. App.—Fort Worth Feb. 2, 2017)). A witness may have bias toward a party because of partiality or against a party because of some animus or ill will.

Rehabilitation

A party may rehabilitate a witness who has been impeached for alleged bias, interest, or improper motive or influence in a variety of ways. The proponent of the witness may show that an alleged bias, interest, or improper motive or influence does not, in fact, exist (*Bee v. State*, 974 S.W.2d 184, 189 (Tex. App.—San Antonio 1998)). Or the proponent of the witness may show that the witness would not be influenced to the point of perjury by any such relationship with the party.

Impeachment by Character Evidence

Convictions and Specific Instances of Conduct

Objections

- *Objection. The conviction is neither for a felony nor for a crime involving moral turpitude.*
- *Objection. The probative value of the evidence on the issue of credibility does not outweigh its prejudicial effect. Specifically, probative value is low because*
 - » *the crime does not involve moral turpitude; or*
 - » *although the crime involves moral turpitude, it is not very probative of untruthfulness because it does not involve any element of untruthfulness; or*
 - » *the conviction, though less than ten years old, is still remote and there have been no intervening convictions for a felony (or a crime involving moral turpitude); or*
 - » *credibility of this witness is not an important issue in this case because (specifying reasons). In addition, prejudice is high because (specifically describing nature of prejudice, including any similarity between conduct involved in conviction and alleged conduct at issue in lawsuit).*
- *Objection. This conviction is stale and inadmissible under [Rule 609\(b\)](#) because the date of the conviction (or the date of the witness's release from confinement) occurred more than ten years ago and the probative value of the conviction on the issue of credibility does not substantially outweigh its prejudicial effect. Specifically, probative value is low because*
 - » *the crime does not involve moral turpitude; or*

- » *although the crime involves moral turpitude, it is not very probative of untruthfulness because it does not involve any element of untruthfulness; or*
 - » *the conviction is remote (and there have been no intervening convictions for a felony or a crime involving moral turpitude); or*
 - » *credibility of this witness is not an important issue in this case because (specifying reasons); or*
 - » *prejudice is high because (specifically describing nature of prejudice, including any similarity between conduct involved in conviction and alleged conduct at issue in lawsuit).*
 - *Objection. This conviction is inadmissible under [Rule 609\(c\)](#), because*
 - » *the witness has been pardoned (or has had the conviction annulled or has been given a certificate of rehabilitation) based on a finding of rehabilitation, and there has been no subsequent conviction for a felony or a crime involving moral turpitude; or*
 - » *the witness has lived out his (or her) probation and has not subsequently been convicted of a felony (or a crime involving moral turpitude); or*
 - » *the witness has been pardoned (or has had the conviction annulled) based on a finding of innocence.*
 - *Objection. The conviction is a juvenile adjudication, which is inadmissible under [Rule 609\(d\)](#).*
 - *Objection. The conviction is not final, because it is currently on appeal to the _____ court and is therefore inadmissible under [Rule 609\(e\)](#).*
 - *Objection. We have not received timely advance written notice of opponent's intent to use this conviction, despite our timely request for notice, and therefore it is inadmissible under [Rule 609\(f\)](#).*
- [To prior bad act evidence]
- *Objection. Specific instances of conduct are inadmissible to impeach under [Rule 608\(b\)](#).*

Responses

- *The witness was convicted of the felony offense of _____ (or the offense of _____, a crime involving moral turpitude).*

[To an objection that probative value does not outweigh prejudicial effect]

- *The probative value of the conviction on the issue of credibility outweighs the prejudicial effect because*
 - » *the offense is a felony; or*
 - » *the offense involves moral turpitude; or*
 - » *the offense was a premeditated and deliberate violation of the law, highly probative that the witness will likely disregard the oath; or*
 - » *the offense is not remote since it has only been (stating months/years) since the date of the conviction (or the witness's release from confinement); or*
 - » *there has been a subsequent conviction for the offense of a felony (or a crime involving moral turpitude), and therefore any remoteness does not lower probative value; or*
 - » *credibility of this witness is important because (explaining importance of witness's credibility).*

[If witness is a party]

- *The prejudice to the opposing party is minimal because the crime that is the subject of the conviction is dissimilar to the conduct at issue in this case.*

[If witness is not a party]

- *The prejudice to the opposing party is minimal because the witness who was convicted is not a party.*

[To an objection that the conviction is stale]

- *The probative value of the conviction on the issue of credibility substantially outweighs the prejudice to the opposing party*

because

- » *there has been a subsequent conviction for the offense of a felony (or a crime involving moral turpitude), and therefore remoteness does not lower probative value; or*
- » *the offense is a felony; or*
- » *the offense involves moral turpitude; or*
- » *the offense was a premeditated and deliberate violation of the law, highly probative that the witness will likely disregard the oath; or*
- » *the credibility of this witness is important because (explaining importance of witness's credibility).*

[To an objection to a prior bad act]

- *This conduct of the witness is not offered to attack the witness's character for truthfulness, but rather to*
 - » *show bias; or*
 - » *show interest; or*
 - » *show improper motive or influence; or*
 - » *show a prior inconsistent statement; or*
 - » *contradict the witness's direct examination testimony that (fact to which witness testified that is inconsistent with prior bad act).*

Cross-Reference to Texas [Rules 608](#) and [609](#)

Explanation

[Rule 609](#)(a) allows impeachment of a witness by showing conviction of a felony or a crime involving moral turpitude, regardless of punishment (see *Compton v. Jay*, [389 S.W.2d 639 \(Tex. 1965\)](#)). The conviction is generally proved by testimony of the impeached witness or by documentary proof of the conviction. A judgment of conviction or a pen packet (certified public record from the prison) will suffice. Such proof must, of course, be authenticated. A certification under [Rule 902](#)(4) is the usual method of proof. If the

witness does not admit the conviction, then proof must be made that the person convicted of the crime is the witness. This proof may be made by fingerprint comparison by an expert, photographs, or by the testimony of a witness with knowledge. In determining the admissibility of this evidence, the court will weigh its probative value against its prejudicial effect (see *Guerra v. State*, No. 01-15-00650-CR, 2016 Tex. App. LEXIS 11527, *30 (Tex. App.—Houston [1st Dist.] Oct. 25, 2016)).

Moral Turpitude

Which offenses involve moral turpitude is an important, but uncertain matter. The rules do not define moral turpitude, and case law does not provide a satisfactory definition (see, e.g., *Hutson v. State*, 843 S.W.2d 106, 107 (Tex. App.—Texarkana 1992); *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759 (Tex. 1995); *Jacquet v. State*, No. 02-15-00377-CR, 2017 Tex. App. LEXIS 938 (App.—Fort Worth Feb. 2, 2017)). Whether a crime is one of moral turpitude is a question of law for the court (*Brown v. Tex. Dept. of Ins.*, 34 S.W.3d 683 (Tex. App.—Austin 2000)). Therefore, before a conviction may be used for impeachment, the court must determine whether it is one of moral turpitude. Crimes involving moral turpitude are those that involve dishonesty, fraud, deceit, misrepresentation, and deliberate violence (see *Duncan*, 898 S. W. 2d at 761). However, not all crimes involving dishonesty and deceit are necessarily crimes of moral turpitude. This fact makes it difficult to discern any logical and definitive line of demarcation between crimes that do involve moral turpitude and crimes that do not.

Practice Tip

If you wish to impeach regarding a conviction for a crime involving moral turpitude or if you believe the opposing attorney may try to impeach with such a crime, consider seeking a ruling from the court—either via motion in limine or otherwise—before attempting to present such evidence to the jurors. Improperly impeaching with a conviction that does not involve moral turpitude may result in a mistrial. Once evidence of a conviction is before the jurors, instructions to disregard are less than effective.

Impeachment by Character Evidence

Opinion and Reputation

Objections

- *Objection. Counsel has failed to lay the proper predicate that the character witness has sufficient knowledge of the witness's character to give an opinion.*
- *Objection. Counsel has failed to lay the proper predicate that the character witness has sufficient knowledge of the witness's reputation to give an opinion concerning the nature of that reputation.*

[In the guilt phase of a criminal trial]

- *Objection. Counsel has failed to lay the proper predicate that the character witness was familiar with the reputation before the day of the offense.*
- *Objection. Counsel has failed to lay the proper predicate that the character witness was familiar with the underlying facts or information on which the opinion is based before the day of the offense.*

[To rehabilitative character testimony]

- *Objection. Counsel is bolstering the credibility of a witness whose character for truthfulness has not been attacked.*

Responses

- *A sufficient predicate has been laid to demonstrate the character witness's familiarity with the witness's character for truthfulness (or the witness's reputation for truthfulness in the community) because (explaining basis of knowledge).*

[To objection to rehabilitation]

- *The witness's character for truthfulness has been attacked because counsel attempted to impeach him (or her) by opinion testimony (or reputation testimony or conviction of a crime or proof of improper motive or influence or prior inconsistent statement) when the witness was cross-examined about (explaining specifically the nature of the attack).*

Cross-Reference to Texas [Rules 404](#), [405](#), and [608](#)

Explanation

A witness's credibility may be attacked by an extrinsic offer concerning the witness's character for truthfulness—that is, by the testimony of a character witness. The testimony of a character witness is limited in a number of ways. First, the character witness may testify only about the character trait for truthfulness or untruthfulness of the principal witness (the witness being impeached). Second, the character witness is limited to testimony about her opinion of the principal witness's character for truthfulness or untruthfulness or testimony about the witness's reputation for truthfulness or untruthfulness. The character witness may not testify to specific instances of conduct that form the basis of the opinion or reputation testimony. Third, in the guilt phase of a criminal trial, the state must prove as a preliminary fact that the character witness had knowledge of the defendant's character before crime in question was committed.

Bolstering

Introducing evidence for the sole purpose of enhancing the witness's credibility or veracity when it has not yet been attacked is known as bolstering, and this evidence will generally be inadmissible (*Michael v. State*, 235 S.W.3d 723, 724 (Tex. Crim. App. 2007); *Caceres v. State*, No. 14-15-00446-CR, 2016 Tex. App. LEXIS 6775, *14–15 (App.—Houston [14th Dist.] June 28, 2016)).

Impeachment by Contradiction

Objection

- *Objection. This is impeachment by extrinsic evidence on a collateral matter because it concerns* (explaining with specificity why the matter is collateral).

Responses

- *The witness testified on direct examination that* (specify testimony being impeached). *This testimony is offered to impeach that testimony by contradiction.*
- *This is not impeachment on a collateral matter because we would be entitled to prove* (the contradicting fact) *anyway because* (explaining the relevance of the fact independent of the contradiction).

Cross-Reference to Texas [Rule 607](#), [401](#), [402](#), and [403](#)

Explanation

There are no rules specifically concerning impeachment by contradiction. This is a traditional method of impeachment that falls within the general impeachment provision of [Rule 607](#) (see, e.g., *Winegarner v. State*, 235 S.W.3d 787, 789 (Tex. Crim. App. 2007)).

The question of relevance of the contradictory evidence would be decided under [Rules 401](#) and [402](#). Whether the matter is collateral is essentially an application of [Rule 403](#)—a collateral matter has low probative value and will necessarily cause undue delay (see, e.g., *Christie v. Brewer*, 374 S.W.2d 908, 914 (Tex. Civ. App.—Austin 1964); *Keene Corp. v. Gardner*, 837 S.W.2d 224, 230 (Tex. App.—Dallas 1992)).

A witness may be impeached by disproving a fact the witness swore to before. For example, if the witness testified that the defendant entered the intersection from the turn lane, she would be impeached by testimony that there was no turn lane at the

intersection. The contradictory proof is made by extrinsic evidence, including exhibits.

Impeachment of Perception or Memory

Objection

- *Objection. This is irrelevant because* (specifying why matter is irrelevant).

Responses

- *The question calls for an answer that will show the witness's inability to perceive. It is relevant to impeach the witness.*
- *The question calls for an answer that will show the witness's inability to remember the events about which he (or she) has testified. It is relevant to impeach the witness.*

Cross-Reference to Texas [Rule 607](#)

Explanation

No rule deals specifically with impeachment based on faulty perception or memory. This traditional method of impeachment is governed by the relevance rules as well as the general impeachment provision of [Rule 607](#) (*Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Harris v. New York*, 401 U.S. 222, 225–226 (1971)).

Impeachment on the basis of faulty perception often occurs in cases that involve physical activity of the parties. Perception includes the ability to see, hear, smell, or feel something in question. Impeachment by showing faulty perception typically involves showing distraction on the part of the witness, physical impairment to perception, a state of excitement on the part of the witness that interferes with an ability to perceive, an obstruction to vision, or an impediment to hearing. The defense attorney in the movie *My Cousin Vinny* famously impeaches a witness based on her faulty vision; thick glasses; dirty window screens; and tall, thick hedge.

Impeachment by Prior Inconsistent Statements

Objections

[If offered without limitation]

- *Objection. The question calls for a hearsay statement.*

[If offered for the purpose of impeachment]

- *Objection. The statement is not inconsistent with the witness's testimony and therefore is irrelevant to impeach.*

[If admitted for the purpose of impeachment]

- *We request that the jurors be instructed that it may not consider the statement for the truth of any fact stated, but only to determine the credibility of the witness.*

[For failure to lay predicate as to a nonparty witness]

- *Objection. Counsel has not laid the proper predicate because the witness has not been advised of where, when, and to whom the statement was made.*
- *Objection. Counsel has not laid the proper predicate because the witness has not been advised of the content of the statement.*

[For impeachment by extrinsic evidence]

- *Objection. This is impeachment by extrinsic evidence on a collateral matter because it concerns (explaining with specificity why the matter is collateral).*
- *Objection. Extrinsic evidence is inadmissible to impeach because the witness was confronted with the statement and unequivocally admitted making it.*

Responses

[To a relevance objection]

- *This statement is admissible to impeach. The witness testified on direct examination that (specifying testimony being impeached), which is expressly inconsistent with this prior statement.*

[To a hearsay objection]

- *This statement is not hearsay because*
 - » *under Rule 801(e)(1)(A), it is a prior statement of the witness given under oath, subject to the penalty of perjury at a trial (or hearing or other proceeding) and is inconsistent with the witness's trial testimony; or*
 - » *under Rule 801(e)(2), it is an admission of a party opponent; or*
 - » *under Rule 801(e)(3), it was made in a deposition.*
- *This statement is admissible under the hearsay exception for (stating specific exception).*
- *This statement is admissible to impeach and so is not hearsay. The witness testified on direct examination that (specifying testimony being impeached), which is expressly inconsistent with this prior statement.*

[If court sustains hearsay objection]

- *We offer this statement for the limited purpose of impeaching the witness with a prior inconsistent statement.*

[To claimed lack of inconsistency]

- *This prior statement is inconsistent with the trial testimony because*
 - » *it omits a material detail that the trial testimony now includes; or*
 - » *a prior statement of lack of memory is inconsistent with present recollection; or*
 - » *the witness is obviously feigning present lack of memory.*

[To predicate objection]

- *This prior inconsistent statement is an admission of a party opponent and therefore, under Rule 613(a), the predicate of time, place, person, and content is not required.*

- *We are not required to show the witness his written statement prior to impeaching him under [Rule 613\(a\)](#).*

[For impeachment by extrinsic evidence of a prior inconsistent statement]

- *The witness did not unequivocally admit making the prior inconsistent statement during cross-examination.*
- *This prior inconsistent statement is an admission of a party opponent, and therefore, under [Rule 613\(a\)](#), the predicate of time, place, person, and content is not required.*
- *This is not impeachment on a collateral matter because we would be entitled to prove (the fact contained in the statement) anyway because (explaining the relevance of the fact independent of the inconsistency).*

Cross-Reference to Texas [Rules 105, 613, 801, and 802](#)

Explanation

Interplay with Hearsay Rule

Unless it falls under one of the exclusions of [Rule 801\(e\)](#) or an exception to the hearsay rule, a prior statement is not admissible for its truth (*Ex parte Bratcher*, No. AP-76,994, [2013 Tex. Crim. App. Unpub. LEXIS 762](#), *47–48 (Tex. Crim. App., June 26, 2013)). The statement would be admitted only for the fact that it was made and for the limited purpose of impeachment. If objecting party requests, it is entitled, under [Rule 105](#), to a limiting instruction. If admitted under an exclusion or an exception, the statement is admitted for its truth, making a limiting instruction inappropriate.

Predicate for Impeachment

For any witness who is not subject to the party opponent rule, Texas requires a rigid predicate for impeachment by prior inconsistent statement. The witness must be told the contents of the statement—the time, place, and the person to whom it was made—and must be given an opportunity to explain or deny the statement (*Ellingsworth v. State*, [487 S.W.2d 108, 112 \(Tex. Crim. App. 1972\)](#); also see *Johns v. State*, [626 S.W.2d 920, 922 \(Tex. App.—Fort](#)

Worth 1982) (impeachment predicate eliminates the need for a bill of exception); *Downen v. Tex. Gulf Shrimp Co.*, 846 S.W.2d 506 (Tex. App.—Corpus Christi 1993)).

Rehabilitation after Impeachment

Once a witness has been impeached by prior inconsistent statement, the other party is entitled to rehabilitate the impeached witness by admission of a prior consistent statement offered for that purpose. Again, this statement would not be admissible to prove the truth of the matter asserted (see [Rule 806](#) and 801(e)(1)(B); *Bee v. State*, 974 S.W.2d 184, 191 (Tex. App.—San Antonio 1998); *Lozano v. State*, 359 S.W.3d 790, 819–820 (Tex. App.—Fort Worth 2012)).

Insurance Against Liability

Objection

- *May I approach the bench, your Honor? [At the bench.] Objection. The proponent is offering evidence of liability insurance on the issue of negligence (or wrongful conduct in violation of [Rule 411](#)).*

Responses

- *This evidence of liability insurance is not offered on the issue of negligence, but to show agency (or ownership or control or bias or prejudice of the witness).*
- *This evidence of liability insurance is not offered on the issue of negligence, but rather as net worth evidence to show what amount of punitive damages is sufficient to punish the defendant.*

Cross-Reference to Texas [Rule 411](#)

Explanation

[Rule 411](#) forbids the admission of proof of liability insurance on the issue of negligence or other wrongful conduct. Where evidence of liability insurance is offered for some other purpose, however, the rule does not bar its admission. For example, the rule mentions impeachment for bias as a relevant, nonnegligent purpose. Evidence of liability insurance can also be used to show ownership or control of a business or vehicle, but such evidence is admissible only if agency, ownership, or control is disputed. Other types of insurance do not fall within the ambit of 411. For example, evidence of the cost to purchase an annuity to fund a life care plan is not liability insurance and is not offered on the issue of negligence or other wrongful conduct and may be properly admitted (see *Brownsville Pediatric Associates v. Reyes*, 68 S.W.3d 184 (Tex. App.—Corpus Christi 1982)). References to other types of insurance, however, may be barred by the collateral source rule, even if admissible under [Rule 411](#).

Practice Tip

While liability insurance and evidence of collateral source payments may be barred as evidence, inquiring about the venire panel's experience with insurance products, the insurance industry, claims handling, and tort reform is generally within the realm of permissible voir dire. The court should not deem questioning on these topics as a waiver of the right to object during the evidence phase of the trial.

Judicial Notice

Objection

- *I object to judicial notice of (fact offered by opponent) because it*
 - » *is not generally known in this jurisdiction; or*
 - » *is open to dispute and not capable of ready and certain verification.*

Response

- *Judicial notice of (fact to be noticed) is appropriate because the fact*
 - » *is generally known by people in this jurisdiction, and to require other proof would waste the time of the court; or*
 - » *is capable of ready and certain verification by resort to authoritative sources that have been provided to the court.*

[Request for jury instruction]

- *We request that the jurors be instructed that they must (or may) accept as conclusively proved the fact that (specifying fact noticed).*

Cross-Reference to Texas [Rules 201–204](#)

Explanation

Judicial notice is an effective and time-saving method of proving facts that are generally known in the jurisdiction or are capable of ready and certain verification by reference to authoritative sources. Judicial notice may be taken at any time during a proceeding, including at the appellate level (*Ofc. of Pub. Util. Counsel v. Pub. Util. Comm’n*, 878 S.W.2d 598, 600 (Tex. 1994)). [Rule 201](#) applies only to adjudicative facts—that is, facts that are in issue in the trial of a given case. While the court may take judicial notice of its own files and the fact that a pleading has been filed, it may not take judicial

notice of the truth of the allegations in those record (*Barnard v. Barnard*, 133 S.W.3d 782 (Tex. App.—Fort Worth 2004)).

The first category of facts appropriate for judicial notice are those generally known in the jurisdiction (notorious facts) (see, e.g., *Southwestern Inv. Co. v. Shipley*, 400 S.W.2d 304 (Tex. 1966)). If a fact is generally known sufficient for the court to take judicial notice, there can be no need for an expert to testify about that fact. Expert testimony concerns disputed matters not capable of accurate resolution from outside unquestioned sources (*In Re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005)). As such, either a fact requires expert testimony for the jurors to determine it or it is appropriate for judicial notice, not both. The second category of facts appropriate for judicial notice include those facts capable of ready and certain verification by reference to authoritative sources (see, e.g., *Drake v. Holstead*, 757 S.W.2d 909 (Tex. App.—Beaumont 1988)).

Where the court is provided with authoritative sources that prove the fact, judicial notice is mandatory once requested. The court may judicially notice an appropriate fact on its own motion. A party is entitled to be heard on the propriety of taking judicial notice and the tenor of the matter noticed, but that party must make a timely request to be heard. In the absence of prior notification of the request for judicial notice, the party may be heard after judicial notice is taken.

The effect of judicially noticed facts is twofold: 1) the fact is conclusively established without the proponent needing to put on evidence; and 2) the opposing party is precluded from putting on any evidence to try to disprove the judicially noticed fact. Judicially noticed facts are binding on the jurors in civil cases. If the judge takes judicial notice of a fact in a criminal case, the jurors are not bound by that conclusion. The opposing party should request an instruction to that effect.

Rules 202–04 allow courts to take judicial notice of law, when appropriate. A court may take judicial notice of the law of other states, federal law, the law of other countries, municipal and county ordinances, the contents of the Texas Register, and agency rules

(see *In re Sigmar*, 270 S.W.3d 289, 302 (Tex. App.—Waco 2008, no pet.)). The party requesting such judicial notice must provide the court with authorities on the substance of the law in question. Asking the court to take judicial notice of another state's law does not force a party to elect which state's law applies (*BNSF v. Gunderson*, 235 S.W.3d 287 (Tex. App.—Fort Worth 2007)).

A party may ask the court to take judicial notice of the law of a foreign country under [Rule 203](#). The party who intends to raise an issue concerning the law of a foreign country must give pleading notices as well as reasonable written notice; he must also timely furnish all parties copies of any written materials or sources that he intends to use as proof of the foreign law, both in the foreign language text and with an English translation, at least thirty days before use. The court may consider any material or source such as affidavits, testimony, briefs, and treatises.

Practice Tip

Key to each aspect of judicial notice is for the party making the request to provide sufficient information to enable the court to comply with the request.

Lay Opinion Evidence

Objection

- *Objection. The question calls for a conclusion.*

Response

- *This is admissible as a lay opinion, under [Rule 701](#), because it is rationally based on the perception of the witness and would help the jurors understand his testimony.*

Cross-Reference to Texas [Rules 701](#) and [704](#)

Explanation

Lay opinion is generally allowed where its admission makes the jurors' fact-finding easier and more accurate and where a witness provides an inference to the jurors that takes the place of describing a series of perceptions which, in common experience, add up to a rather ordinary inference or characterization (see *Osborn v. State*, 92 S.W.3d 531 (Tex. Crim. App. 2002)). In these situations, the lay person ordinarily describes her observations in terms of opinion. For example, witnesses will be allowed to testify that they observed a person who appeared happy, sad, nervous, excited, or depressed. Witnesses would be hard-pressed to break down what they observed into the component parts of the observation that led to such a conclusion. They are, however, capable of understanding what was observed. To preclude such testimony would be to deprive the jurors of reliable evidence by operation of a hypertechnical rule.

The line between lay opinion testimony from an expert and expert opinion testimony from a lay witness can be difficult to distinguish. For example, a police officer may be called as an expert, but still offer lay opinion testimony based on his perception of events such as road condition, lighting, etc. A lay witness may have sufficient experience to offer an opinion that provides expert guidance to the jurors. Generally, if the main substance of the witness's testimony is based on education, training, and experience, she will be treated as

an expert. While the jurors might give such opinion testimony greater deference, treating the witness as an expert also means the witness must have been timely designated as an expert and such opinions disclosed in discovery (*King v State*, 129 S.W.3d 680 (Tex. App.—Waco 2004); *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846 (Tex. 2011)).

A unique area in which a lay witness may give expert opinion is the Property Owner Rule (*id.*). Based on the presumption that an owner is familiar with his property and its value, the Property Owner Rule alleviates the requirement that a witness must establish qualifications to express an opinion on land values. Under the rule, an owner's valuation testimony fulfills the same role as expert testimony. The owner must still have a factual basis for the opinion and must state a number to substantiate his diminished value claim (*id.*; *Natural Gas Pipeline Co. v. Justiss*, 397 S.W.3d 150 (Tex. 2012); *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984)).

Leading Questions

Objection

- *Objection. The question is leading.*

Response

Usually no response is recommended. If, however, you want to lead on direct examination, you may need to respond to secure permission to do so.

- *We should be permitted to lead because*
 - » *it is necessary to develop the witness's testimony since the witness is having difficulty testifying because he (or she) is of tender years (or is impaired in giving testimony by reason of old age or is of low intellect); or*
 - » *the witness is hostile (or an adverse party or identified with an adverse party).*

Cross-Reference to Texas **Rule 611(c)**

Explanation

The court may permit leading on direct when it is necessary to develop the witness's testimony. Such situations typically involve a witness's impaired ability to testify because of age, low intellect, or infirmity. On the other end of the spectrum, the court will typically allow leading questions that help explain an expert's technical testimony in terms lay persons can understand. In addition, courts will usually permit leading on preliminary matters dealing with the witness's educational, occupational, or other noncontentious background matters. Leading may also be allowed to make a transition from one subject to another.

Leading is permitted on direct examination where the witness is the adverse party or someone closely aligned with the adverse party, or where the court declares the witness hostile. Typically, hostility

must be demonstrated during trial testimony by evasive answers, chronic nonresponsiveness, or arguments with counsel.

Misstating the Testimony

Objection

- *Objection. Counsel is misstating the testimony. The witness actually testified that* (specify witness's testimony).

Response

- *The witness previously testified to* (specify witness's testimony).

Cross-Reference to Texas Rule 61(a)

Explanation

This objection is sometimes available when the cross-examiner repeats the direct examination testimony of the witness being cross-examined (i.e., "you testified on direct that ...") or refers to the previous testimony of another witness. The objection is designed to prevent counsel from shading the testimony of the witness as previously given.

Narratives

Objection

- *Objection. The question calls for a narrative.*

Response

None is recommended.

Cross-Reference to Texas **Rule 611(a)**

Explanation

The orderly presentation of testimony requires that the examination proceed in question and answer form. Witnesses are not allowed to take the stand and testify about everything they know without the benefit of questions. When a witness testifies in a narrative form, the only available method of excluding objectionable testimony is by moving to strike after the testimony is given. While the motion to strike protects the record, it cannot strike the testimony from the minds of the jurors. In fact, the offending testimony may very well be cemented in the jurors' minds by the making of the motion to strike. This objection seeks to ensure that objecting counsel gets notice of potential objectionable testimony by the question that elicits it.

Nonresponsive Answers

Objection

- *Objection. The answer is nonresponsive. The question asked for (specify the information asked for) and not (specify information given).*

Response

- *Usually it is best not to respond, but rather to ask an additional question calling for the answer objected to.*

Explanation

Questioning counsel has the right to require a witness to respond to legitimate questions. If a witness fails to respond to the question or exceeds the scope of the question, the examiner is allowed to object and make a motion to strike the nonresponsive portion of the question is permissible. Of course, control of the witness is the responsibility of questioning counsel. Tactically, questioning counsel may point out the failure of the witness to respond by repeating the same question, in exactly the same words, until the witness actually responds. This tactic not only elicits a response to the question, but also informs the jurors that the witness is being evasive. The questioner should refrain, however, from repeating the question more than two or three times, as the jurors may become irritated. The evasive answer should be quickly identified as such, and then counsel should ask a different question.

Objections Generally

Objections

- *I object to the question, which calls for _____ (or the witness's answer as to _____), because* (stating specific ground of objection).

[If objection sustained as to prejudicial question or answer heard by the jurors (optional)]

- *We move to strike the question (or answer as to _____).*

[If motion to strike is granted]

- *We request that the jurors be instructed to disregard.*

[If jury instruction is given]

- *We move for a mistrial.*

[Running bill]

- *We request a running bill, or continuing objection, as to any testimony from this witness (or any witness) concerning* (specific subject matter objected to) *on the basis that* (specifying ground of objection).

Response

- *The evidence is admissible because* (specifying theory of admission).

[If jury instruction is given in improper form]

- *We object to the proposed instruction (or given instruction) on the grounds that it is an improper comment on the evidence* (or other grounds).

Cross-Reference to Texas [Rule 103](#) and Texas Rule of Appellate Procedure 33.1, 44.1, 44.2, 44.3, and 44.4

Explanation

The Texas Rules of Evidence require that to seek the exclusion of offered evidence, opposing counsel must object. Thus, the court relies on counsel to call the inadmissibility of offered evidence to its attention and thus give the trial court every opportunity (through sustained objection, motions to strike, jury instructions, and mistrial) to correct the error, if possible. “An objection is sufficient to preserve error for appeal if it allows the trial judge to make an informed ruling and the other party to remedy the defect, if he can” (*McDaniel v. Yarbrough*, 898 S.W.2d 251, 252 (Tex. 1995)). An appellate court will not review the erroneous admission of evidence to which no objection has been made unless in a criminal case the error is found to be fundamental (*Potier v. State*, 68 S.W.3d 657 (Tex. Crim. App. 2002); *Holmes v. State*, 323 S.W.3d 163 (Tex. Crim. App. 2009)).

Objections must be specific, meaning that the complaining party made a specific objection that was sufficient to make the trial court aware of the complaint. All objections must state the specific ground for excluding evidence unless the ground for the objection is obvious (see *Hurtado v. TEIA*, 574 S.W.2d 536 (Tex. 1978) (this requirement is relaxed only when the specific grounds were apparent from the context)). The objection, alone, is not sufficient to preserve error—the objecting party must obtain a ruling on the objection, request or motion (either expressly or implicitly), or if the court refuses to rule, the party must object to the failure to rule.

Harmful Error in Civil Cases

An appellate court will not reverse a judgment “unless a substantial right of the party is affected.” This is the harmful error requirement, also found in Texas Rule of Appellate Procedure 44.1(a)(1), which states that the error is not reversible unless it “probably caused the rendition of an improper judgment....” The erroneous admission of evidence is harmless if the same subject matter was otherwise admitted into evidence without objection, if the error was cured by instruction, or if the evidence probably did not affect the outcome of the case (see *Reliance Steel v. Sevcik*, 267 S.W.3d 867 (Tex. 2008)).

Timeliness

Objections must be timely, meaning they must be made as soon as the objectionable nature of the question or answer becomes apparent (see *GMC v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005)). Thus, objections to the form of a question must be made at the time of the question. Similarly, when a question put to a witness calls for an inadmissible answer, the objection should be interposed before the answer (*Dinkins v. State*, 894 S.W.2d 330, 334 (Tex. Crim. App. 1995)). However, where the question on its face does not call for inadmissible evidence, but the witness's answer contains an inadmissible matter, then the objection is still considered timely if made immediately after the objectionable answer is given. A sustained objection must then be followed up by a request for a jury instruction and a motion for mistrial.

An objection to an exhibit is usually timely if made when the exhibit is offered into evidence. However, if counsel or a witness attempts to disclose to the jurors the content of any exhibit before it is offered, then the objection should be made when the disclosure is attempted. Occasionally, other rules or statutes may require pretrial objections.

Practice Tip

To be specific, counsel does not need to state a rule number. Indeed, merely stating a rule number may not be sufficient to render an objection specific if there are multiple potential objections that might be asserted under the rule. The better practice is to state the nature of the rule violated with clarity sufficient for the court to understand which rule is being relied on. If there are multiple potential objections, object on the strongest grounds first and obtain a ruling.

Offers of Proof

Forms of the Offer

Narrative Offer of Proof

- *Your Honor, if allowed to answer this question, the witness would testify to the following:* (stating substance of excluded testimony as well as any testimony needed to establish admissibility). *This evidence is admissible because* (stating grounds for the offer, including the relevance of the evidence and the theory of admissibility).

Question and Answer Method (if excluded testimony is short)

Ask each question, get the answer to that question, and then, after each answer, state the following:

- *We offer this question and answer as our first (or second or third, etc.) offer of proof. May the record reflect that* (opposing party) *objected on the basis of* (ground of opponent's objection) *and that each such objection was sustained. This evidence is admissible because* (stating grounds for the offer). *We again request the court to allow its admission. [Get ruling.] That concludes our first (or second or third, etc.) offer.*

Question and Answer Method (if excluded testimony is extensive)

Ask all questions as if before the jurors. At the conclusion of all excluded testimony, state the following:

- *We tender each question and its answer separately and independently. May the record reflect that as to each question and its answer* (opposing party) *objected on the basis of* (ground of opponent's objection), *and that each such objection was sustained. This evidence is admissible because* (stating grounds for the offer). *We again request the court to allow admission of this evidence. [Get ruling.] That concludes our offer.*

Cross-Reference to Texas [Rule 103](#) and Texas Rule of Appellate Procedure 33.1

Explanation

When the court sustains an objection to a question posed to a witness at trial that precludes the witness's answer, appellate review of the trial court's ruling is difficult, if not in some cases impossible, unless the trial record contains the witness's proposed answer. Because the objection was sustained, however, the record would not contain the answer so the appellate court can ascertain if the evidence truly was inadmissible and if admissible, whether the erroneous exclusion was harmful error. The offer of proof supplies the witness's answer for the record. In the absence of the offer of proof, the appellate court may decline to review the trial court's ruling (see *Warner v. State*, [969 S.W.2d 1 \(Tex. Crim. App. 1998\)](#)).

Form of the Offer

The offer of proof can be made in any of three ways, all outside the hearing of the jurors. First, counsel may state in narrative form what the witness's testimony would have been (*Bowman v. Patel*, No. 01-10-00811-CV (Tex. App.—Houston [1st Dist.] 2012, no pet.) (memo op.; 2-16-12)). Second, counsel may submit a prepared, written narrative of the excluded testimony (*id.*). Third, and most commonly used, counsel may question the witness to elicit the answers, as if testifying before the jurors (*Bobbora v. Unitrin Ins.*, [255 S.W.3d 331 \(Tex. App.—Dallas 2008\)](#)). The offer of proof, irrespective of the manner of the offer, must show the nature of the evidence specifically enough that the court of appeals can determine its admissibility (*In re N.R.C.*, [94 S.W.3d 799 \(Tex. App.—Houston \[14th Dist.\] 2002\)](#)).

Some authority suggests that when cross-examination testimony is excluded, the examiner need not show the expected answer, but only that the substance of the evidence was apparent from the context within which the question was asked (*Chance v. Chance*, [911 S.W.2d 40 \(Tex. App.—Beaumont 1995\)](#)). This holding would obviate the need to make an offer of proof, but best practices would still be to make the offer.

Timing of Offer

The offer of proof must be made before the charge is read to the jurors or it will be waived. Motions in limine do not preserve error or serve as an offer of proof; however, a pretrial ruling on admissibility of the evidence can preserve error (*Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004)).

Payment of Medical and Similar Expenses

Objection

- *I object that this evidence is inadmissible as an offer to pay medical (or hospital or repair) expenses.*

Response

- *This statement is admissible because it is not offered on the issue of liability, but rather to show (specifying admissible purpose).*

Cross-Reference to Texas [Rule 409](#)

Explanation

The rule makers have excluded offers to pay medical expenses at trial to provide an incentive for those who believe themselves responsible—or those merely acting out of goodwill—to pay the expenses of victims without court action. When such bills are paid, the incentive to litigate is substantially lessened.

Privilege

Clergyman-Penitent Communication

Objection

- *Objection. The question calls for a communication protected by the clergy-penitent communication privilege.*

Response

- *The privilege is not applicable because*
 - » *the communication was not made in private; or*
 - » *the communication was not intended to be confidential; or*
 - » *the communication was made in the presence of (name of witness to conversation), a person whose presence did not further the purpose of the communication; or*
 - » *the communication was made to (name of the person that communication was made to) in his or (her) role as (identify the capacity in which the individual received the communication), and not in his (or her) role as a spiritual adviser.*

Cross-Reference to Texas **Rule 505**

Explanation

Confidential communications are privileged if they were made to a member of the clergy or someone reasonably believed to be a member of the clergy. A member of the clergy is a functionary of a religious organization, such as a minister or rabbi (*Simpson v. Tennant*, 871 S.W.2d 301, 310 (Tex. App.—Houston [14th Dist.] 1994)).

The communication must be made privately and in confidence to a member of the clergy, who was acting in a professional capacity as a spiritual adviser (see *Nicholson v. Wittig*, 832 S.W.2d 681 (Tex. App.

—Houston [1st Dist.] 1992)). Unlike some other types of privilege, the content of the communication may be of any type; indeed, the rule makes no reference to the content of the communication. Rather, the rule focuses on the counseling opportunity (*id.* at 687). This privilege is subject to statutory exceptions and limitations, including proceedings alleging abuse/neglect of a child (see *Bordman v. State*, 56 S.W.3d 63, 67–8 (Tex. App.—Houston [14th Dist.] 2001); Tex. Fam. Code Ann. § 261.101–102).

Privilege

Comment on Claim of Privilege

Objection

- *May I approach the bench, your Honor? (At the bench) Objection. Counsel has commented on a claim of privilege in violation of Rule 513(a).*

Response

- *Rule 513(c) permits comments on claims of privilege against self-incrimination by a party in the same proceeding.*

Cross-Reference to Texas Rule 513

Explanation

Rule 513(a) plainly expresses the proposition that judge or counsel cannot comment on the invocation of a privilege and that no inferences may be drawn from it, even if it were claimed in a prior proceeding (see *Murray v. Tex. Dept. of Family & Protective Servs.*, 294 S.W.3d 360 (Tex. App.—Austin 2009)). Rule 513(b) requires that in jury cases, claims of privilege should be made and ruled upon, to the extent practicable, without the jurors' knowledge.

Civil Cases

Rule 513(c) provides an important exception to the protections outlined in Rules 513(a) and (b). A claim of the privilege against self-incrimination made by a party in the same civil proceeding may be commented on, adverse inferences may be drawn from it, and the party may be required to invoke it in front of the jurors.

Criminal Cases

In a criminal case, naturally, the privilege against self-incrimination may not be commented on. Either the state or a codefendant in a

criminal case may comment in final argument on the accused's failure to call his spouse as a witness if other facts admitted in the case showed the spouse had knowledge of relevant facts. The ability for the state to comment leaves the defendant to the State arguing or inferring to the jury that if the spouse had anything to say helpful to the defendant, he or she would have so testified.

While the jurors may make inferences about a witness invoking the **Fifth Amendment**, it is subject to the equal inference rule. Thus, when jurors can make two equally consistent inference from an assertion of the **Fifth Amendment**, and neither inference is more probably than the other, the jurors are barred from making either (*In re Moore*, 153 S.W.3d 527, 534 (Tex. App.—Tyler 2004, orig. proceeding)).

Jury Instruction

Except as applied to self-incrimination in civil cases and the spousal testimony rule of 504(b)(2), a party against whom jurors might draw an adverse influence from a claim of privilege is entitled to an instruction that no inference may be drawn from the assertion of the privilege.

Privilege

Compelled Disclosure

Responses

- *The privilege has not been waived by voluntary disclosure because the disclosure was compelled erroneously by court ordering disclosure (or state other reason).*
- *The privilege has not been waived by voluntary disclosure because the disclosure was made without opportunity for (holder of privilege) to claim the privilege.*
- *The privilege has not been waived because the holder invoked the snapback provision of Tex. R. Civ. P. 193.3(d).*

Cross-Reference to Texas [Rule 512](#)

Explanation

A compelled disclosure is not voluntary. If a court erroneously overruled the privilege claim, the disclosure cannot be deemed a waiver by the holder of a privilege. An inadvertent production of privileged information is considered involuntary (Tex. R. Civ. P. 193.3(d); *In re Living Centers*, 175 S.W.3d 253 (Tex. 2005)). Both parties and nonparties may rely on the rule's "snapback" provision after inadvertent production of their own privileged documents (*In re Certain Underwriters*, 294 S.W.3d 891 (Tex. App.—Beaumont 2009, orig. proceeding)).

Practice Tip

To invoke the snapback provision, a party must, within ten days of actually discovering the inadvertent production, amend the discovery response, identify the material/information produced, and state the privilege being asserted. If the response is thus amended, the requesting party must promptly return the specified material and any

copies pending any further ruling by the court denying the privilege. This rule is broader than its evidence correlative, Fed. R. Evid. 511 (Tex. R. Civ. P. 193.3(d), cmt. 4).

Privilege

Husband-Wife Communication

Objections

- *Objection. The question calls for a communication protected by the husband-wife communication privilege.*
- *Objection. (Name of spouse) invokes the husband-wife testimonial privilege and declines to testify for the state.*

Responses

- *The communication privilege is not applicable because*
 - » *the communication was not made in private; or*
 - » *the communication was not intended to be confidential; or*
 - » *the communication was not intended to be confidential since reasonable precautions to protect confidentiality were not taken; or*
 - » *the communication was made to aid commission of a crime or fraud, and so no privilege exists because of the exception contained in [Rule 504\(d\)\(1\)](#); or*
 - » *this is a proceeding brought by (or on behalf of) one spouse against the other spouse, and so no privilege exists because of the exception contained in [Rule 504\(d\)\(2\)\(A\)](#); or*
 - » *this is a proceeding between a surviving spouse and a person who claims through the deceased spouse, and so no privilege exists because of the exception contained in [Rule 504\(d\)\(2\)\(B\)](#); or*
 - » *this is a commitment proceeding (or proceeding to place the spouse's person or property under the control of another because of the mental or physical condition of the spouse), and*

so no privilege exists because of the exception contained in [Rule 504\(d\)\(3\)](#); or

» *this is a proceeding to establish the competency of a spouse, and so no privilege exists because of the exception contained in [Rule 504\(d\)\(4\)](#).*

- *The testimonial privilege is not applicable because*

- » *the defendant's spouse will testify voluntarily; or*

- » *only the spouse of an accused may invoke the privilege—the defendant may not invoke it; or*

- » *the defendant is charged with a crime against (his or her spouse or a member of the household or a minor) and therefore may not invoke the privilege; or*

- » *the matters in question occurred prior to the marriage.*

Cross-Reference to Texas [Rule 504](#)

Explanation

Confidential Communication Privilege

Communications between husband and wife are protected to respect confidences and protect the privacy of the marital relationship. To be privileged, the communication must be made to a spouse during the existence of a valid marriage and invoked by the communicating spouse or someone on his or her behalf. Moreover, the privilege only extends to confidential communications, and not all communications between spouses are intended to be confidential. In civil cases, the marital privilege “is limited to confidential communications between spouses. Only in criminal case is there a broad, general privilege protecting a person from being a witness against his or her spouse” (*Marshall v. Ryder Systems*, 928 S.W.2d 190, 195 (Tex. App.—Houston [14th Dist.] 1996)). The privilege is held by the communicating spouse and continues after the termination of the marriage or the death of the communicating spouse (see *Trammel v. U.S.*, 445 U.S. 40 (1980)).

Testimonial Privilege in Criminal Cases

While the communication privilege applies in both civil and criminal cases, in criminal cases, a testimonial privilege prevents a spouse from being called to testify against an accused (see *Colburn v. State*, 966 S.W.2d 511 (Tex. Crim. App. 1998)). This testimonial privilege applies unless the alleged crime victim is the spouse, a member of either spouse's household, or any minor, in which case the state may compel the spouse's testimony (*Huddleston v. State*, 997 S.W.2d 319, 321 (Tex. App.—Houston [1st Dist.] 1999)).

If the spouse chooses to testify, that spouse will be subject to cross-examination. Either side, but usually the prosecution, may comment in final argument on the failure of the spouse to be called by the accused, if the other facts showed the spouse to have knowledge of relevant facts. Such commentary in closing argument is especially damning, as a spouse could have been a valuable ally if called to testify.

Privilege

Identity of Informer

Objection

- *Objection. The question calls for a matter protected by the privilege for the identity of informers.*

Responses

- *Invocation of this privilege should not be allowed because the identity of the informer (or his interest in the subject matter of the communication) has already been disclosed to those who would have cause to resent the communication.*
- *Invocation of this privilege should not be allowed because the informer has appeared as a witness for the public entity holding the privilege.*
- *Invocation of this privilege should not be allowed because the informer is able to give testimony necessary to a fair determination of a material issue on the merits.*

Cross-Reference to Texas [Rule 508](#)

Explanation

[Rule 508](#) offers state and federal law enforcement agents the opportunity to protect informers who assist them in investigations by granting a privilege to refuse to disclose their identity. [Rule 508\(b\)](#) provides that the privilege may be asserted by an appropriate representative of the public entity to which the information was furnished. The public entity holds this privilege, not the individual whose identity is at issue. The substance of any information given by the informer is not privileged, however, except as it may reveal the identity of the informer (*Shedden v. State*, 268 S.W.3d 717, 730–731 (Tex. App.—Corpus Christi 2008)).

To establish the informant privilege, the State must initially show that the person has provided information to a law enforcement officer who was investigating a possible violation of the law (*State v. Lowry*, 802 S.W.2d 669 (Tex. 1991)).

Testimony on Merits

The rule blocking disclosure stems from the knowledge that most informants rely on “rumor, gossip and street talk of no evidentiary value” (*Warford v. Childers*, 642 S.W.2d 63 (Tex. App.—Amarillo 1982)). When it appears—either from the evidence or from some other showing by a party—that an informer may be able to give testimony about a disputed issue of material fact, the court must determine whether the informer should be required to give such testimony. This assumes that the informant can give eyewitness testimony about the alleged crime or arrest (*id.* at 66–67). In criminal cases, the defendant has the burden to make a believable showing that the informer could give relevant testimony. Once this burden is met, the court must give the public entity invoking the privilege the opportunity to show in camera facts relevant to whether the informer can provide that testimony. Normally, this showing is made with affidavits, but the court can require testimony be taken if necessary. No counsel or parties are allowed to be present at the in camera showing.

Privilege

Lawyer-Client Communication

Objection

- *Objection. The question calls for a confidential communication protected by the lawyer-client privilege.*

Response

- *The privilege is not applicable because*
 - » *the communication was not made for the purpose of facilitating the rendition of professional legal services; or*
 - » *the communication was not intended to be confidential; or*
 - » *the communication was not intended to be confidential since reasonable precautions to protect confidentiality were not taken; or*
 - » *the communication was not between the lawyer and the client or client's representative since (name of alleged client's representative) was not a client's representative; or*
 - » *the legal services were sought or obtained to aid commission of a crime (or fraud); or*
 - » *the communication relates to an issue between claimants through the same deceased client; or*
 - » *the communication relates to an issue of breach of duty between lawyer and client; or*
 - » *the communication relates to an issue concerning an attested document to which the lawyer is an attesting witness; or*
 - » *the communication relates to a matter of common interest between joint clients of the same lawyer.*

Cross-Reference to Texas [Rule 503](#)

Explanation

Confidential Communication

The heart of lawyer-client privilege is the requirement that the communication be confidential (see *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012)). The court must make this factual determination of intent under [Rule 104\(a\)](#). The court will look to the circumstances to determine whether the party intended that the communication not be disclosed to persons outside the relationship (*Teter v. Comm’n for Lawyer Discipline*, 261 S.W.3d 796, 800 (Tex. App.—Dallas 2008); *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759 (Tex. 1995)). An important subsidiary question is whether the party took any precautions to ensure confidentiality.

If it otherwise applies, the privilege extends beyond direct communications between lawyer and client to “representatives” of the lawyer, those employed by the lawyer to assist in rendition of legal services, and accountants whose work is reasonably necessary for the lawyer’s services. Similarly, representatives of the client for purposes of the privilege include those acting in the scope of employment for the client making or receiving a confidential communication.

The communication must be made in connection with obtaining or rendering legal services—the mere fact that one party to the communication is an attorney is not sufficient to invoke the privilege.

The client, the attorney, specified client representatives, and an organization’s representative—as enumerated in [Rule 503\(c\)](#)—may assert the privilege (see *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) (the trustee, not the trust beneficiary, is the client of the trustee’s attorney; beneficiaries, therefore, may not discover communications between the trustee and attorney)). The burden of proof is on the party claiming the privilege. This burden may be met by presenting evidence to the trial court in the form of live testimony, affidavits, depositions, and even by in camera inspection of the documents themselves.

Criminal Cases

Under [Rule 503\(b\)\(2\)](#), not only are communications to facilitate legal representation protected by attorney-client privilege in criminal cases, but also “any other fact” that comes to the lawyer because of the attorney-client relationship.

Exceptions

The privilege will not apply:

- » if the attorney’s services were sought to enable or aid in the commission of a crime or fraud; when parties claim through the same deceased client (*Granada Corp. v. 1st Ct. of Appeals*, [844 S.W.2d 223 \(Tex. 1992\)](#)).
- » to a communication relevant to whether the attorney breached a duty to the client or the client to the attorney (*West v. Solito*, [563 S.W.2d 240, 245–46 \(Tex. 1978\)](#)).
- » to documents to which the attorney served as an attesting witness; or
- » to matters of common interest among clients if the attorney was retained or consulted in common when offered in an action between or among any of the clients (*Marathon Oil Co. v. Moye*, [893 S.W.2d 585, 592–93 \(Tex. App.—Dallas 1994\)](#)).

The party seeking discovery of an otherwise privileged communication bears the burden of proving the exception (*In re Park Cities Bank*, [409 S.W.3d 859 \(Tex. App.—Tyler 2013, orig. proceeding\)](#)).

Privilege

Mental Health Information Communication

Objection

- *Objection. The question calls for a communication protected by the mental health information privilege.*

Response

- *The privilege does not apply because*
 - » *the communication was not made for purposes of diagnosis (or evaluation or treatment of a mental or emotional condition or alcoholism or drug abuse); or*
 - » *the communication was not intended to be confidential; or*
 - » *the communication was not intended to be confidential since reasonable precautions to protect confidentiality were not taken; or*
 - » *this is a proceeding brought by the patient against the professional under the exception of [Rule 510\(d\)\(1\)](#); or*
 - » *the patient has consented to the release of medical information under the exception of [Rule 510\(d\)\(2\)](#); or*
 - » *this is a proceeding brought by the professional against the patient to collect a fee under the exception of [Rule 510\(d\)\(3\)](#); or*
 - » *the communication was made during a court-ordered examination after the patient was advised that such communications would not be privileged, under the exception of [Rule 510\(d\)\(4\)](#); or*
 - » *this is a proceeding in which (party) relies on the physical (or mental or emotional) condition of (name of patient) as a part of a*

claim (or defense) of (specifying claim or defense) under the exception of Rule 510(d)(5); or

» *this is a proceeding regarding abuse or neglect of the resident of an institution under the exception of Rule 510(d)(6).*

Cross-Reference to Texas Rule 510

Explanation

The rule attempts to protect privacy and encourage people to seek treatment, which often requires divulging private matters. When invoked and applied properly, the privilege prohibits disclosure in civil cases of communications to a professional. A consultation by a patient with a professional for the purposes of diagnosis, evaluation, or treatment of a mental or emotional condition protects all communications made during that consultation (see *Jaffee v. Redmond*, 518 U.S. 1 (1996)). The privilege applies regardless of when the professional services were rendered and continues to exist after the patient's death.

Confidential Communications

Because psychotherapy may involve discussion of all aspects of a patient's life, this privilege protects any confidential communication between patient and professional without regard to its substance. A communication is "confidential" under Rule 510(a)(4) if it is not intended to be disclosed to persons other than those present to further the interest of the patient or who are participating in the diagnosis or treatment or to whom it is reasonably necessary to transmit the communication. The presence of nurses or the patient's family members does not destroy the privilege.

Offensive Use Implications

When a mental condition is part of a claim or defense, the privilege may be waived. The determination whether the condition is part of a claim or defense turns on whether the pleadings indicate that the jurors must make a factual determination concerning the condition itself (*R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994); *In re Collins*, 286 S.W.3d 911, 916 (Tex. 2009)).

Merely claiming mental anguish damages may not be sufficient to waive the privilege (*In re Toyota Motor Corp.*, 191 S.W.3d 498 (Tex. App.—Waco 2006, orig. proceeding)). However, claims of severe emotional damages—including post-traumatic stress disorder, claiming depression sufficient to warrant treatment, or other such pleadings—may do so (see *Groves v. Gabriel*, 874 S.W.2d 660 (Tex. 1994); *Ginsberg v. 5th Ct. of Appeals*, 686 S.W.2d 105 (Tex. 1985)).

Privilege

Offensive Use Waiver

Common to all claims of privilege is the concept that the privilege must be claimed in a timely manner or it will be waived. Privileges, likewise, cannot be used as a sword and a shield (commonly known as offensive use of a privilege). Offensive use waives the privilege. The preliminary inquiry is whether the pleadings indicate that the matter on which the privilege has been asserted is “part of a claim or defense” (*R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994)).

For an offensive use waiver, the court will look at the following factors:

- 1) whether the party asserting the privilege must seek affirmative relief;
- 2) whether the privileged information sought is such that if believed by the trier of fact, it would in all probability be outcome determinative of the claim asserted—mere relevance or a contradiction in position is not sufficient to waive the privilege;
- 3) whether disclosure of the confidential communication is the only means by which the aggrieved party may obtain the evidence.

All three factors must be present before the court may find an offensive use waiver (*Republic Ins. v. Davis*, 856 S.W.2d 158 (Tex. 1993); *Krug v. Caltex Petroleum Corp.*, No. 05-96-00779-CV, 1999 Tex. App. LEXIS 6485, at *8–10 (Tex. App.—Dallas Aug. 27, 1999)).

Privilege

Physician-Patient Communication

Objection

- *Objection. The question calls for a communication protected by the physician–patient privilege.*

Response

- *The privilege does not apply because*
 - » *the communication was not made relative to or in connection with the rendition of professional medical services; or*
 - » *the communication was not intended to be confidential; or*
 - » *the communication was not intended to be confidential since reasonable precautions to protect confidentiality were not taken; or*
 - » *this is a proceeding brought by the patient against the physician under the exception of [Rule 509\(e\)\(1\)](#); or*
 - » *the patient has consented to the release of medical information under the exception of [Rule 509\(e\)\(2\)](#); or*
 - » *this is a proceeding brought by the physician against the patient to collect a fee under the exception of [Rule 509\(e\)\(3\)](#); or*
 - » *this is a proceeding in which (party) relies on the physical (or mental or emotional) condition of (name of patient) as a part of a claim (or defense) of (specifying claim or defense) under the exception of [Rule 509\(e\)\(4\)](#); or*
 - » *this is a disciplinary proceeding against the physician (or nurse) under the exception of [Rule 509\(e\)\(5\)](#); or*
 - » *this is a proceeding for involuntary civil commitment (or proceeding for court-ordered treatment or probable cause*

hearing) under the exception of [Rule 509\(e\)\(6\)](#); or

» *this is a proceeding regarding abuse or neglect of the resident of an institution under the exception of [Rule 509\(e\)\(7\)](#).*

Cross-Reference to Texas [Rule 509](#)

Explanation

General Rule of Privilege in Civil Cases

The physician-patient privilege protects confidential communications between a physician and a patient that relate to the professional services that the physician provides (see *In re Collins*, 286 S.W.3d 911 (Tex. 2009)). The physician-patient relationship is contractual and wholly voluntary. It can be created by express or implied agreement. A single examination by medical personnel may create a sufficient relationship to allow the patient to invoke the privilege, even if the patient is unconscious at the time of treatment.

Confidential Communications

A communication is confidential if it is not intended to be divulged to persons other than those who are present to further the interest of the patient, reasonably necessary for the transmission of the communication, or working under the physician's care. As a result, disclosure does not destroy confidentiality when it is to persons such as family members, nurses, or the physician's secretary who transcribes dictation concerning the communication. While [Rule 509](#) applies only to physicians, the Texas Occupations Code provides a statutory privilege extending to other medical professionals including dentists, chiropractors, and podiatrists (see, e.g., Tex. Occ. Code § 201.401–405, Tex. Occ. Code § 202.401–407, Tex. Occ. Code § 258.101–109).

Waiver

There are multiple exceptions to the physician-patient privilege, including a statutory waiver in claims against health care providers made under Tex. Civ. Prac. & Rem. Code chapter 74. The waiver extends not only to the medical records documenting the communication, but also to verbal communications with the treating

doctors. The privilege as to all medical treatment, however, is not waived—to the extent the treating doctors had records or communications that were not relevant to the underlying suit, those remain privileged (*Groves v. Gabriel*, 874 S.W.2d 660 (Tex. 1994); *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988)).

Limited Privilege in Criminal Cases

There is no physician-patient privilege in criminal cases except for communications by voluntary patients to anyone involved in treating or examining them for alcohol or drug abuse. Involuntary treatment or examination is not protected (see *State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016)).

Privilege

Political Vote

Objection

- *Objection. The question calls for a matter protected by the political vote privilege.*

Response

- *The privilege is not applicable because (name of voter) cast his (or her) vote illegally.*

Cross-Reference to Texas **Rule 506**

Explanation

Because the secret ballot is a fundamental civil liberty essential to a democracy, voters are privileged from revealing how they cast their votes. The privilege only applies to legal voters, and a person who votes illegally may be compelled to disclose the candidates for whom the vote was illegally cast (*Sewell v. Chambers*, 209 S.W.2d 363, 367–68 (Tex. Civ. App.—Fort Worth 1948)).

Practice Tip

Some juror questionnaires seek information about party affiliation or votes in recent elections. While the privilege may be asserted only by the legal voter or prospective juror (*Oliphint v. Christy*, 299 S.W.2d 933, 933–39 (Tex. 1957)), the issue should be raised by the attorneys involved in formulating or administering the questionnaire to protect this important liberty.

Privilege

Recognized Only as Provided

Cross-Reference to Texas [Rule 501](#)

Explanation

[Rule 501](#) recognizes that unless there is some Constitutional provision, rule of evidence, statute, or valid court rule that renders the matter privileged, no one may lawfully refuse to disclose relevant evidence. Evidence is presumed discoverable, so the burden of establishing the applicability of a privilege is on the party claiming a privilege—that is, the objecting party (*In re DuPont de Nemours & Co.*, [136 S.W.3d 218, 223 \(Tex. 2004\)](#); *Oyster Creek Fin. Corp v. Richwood Invs.*, [957 S.W.2d 640 \(Tex. App.—Amarillo 1997\)](#)).

When a party invokes a privilege of a foreign country, it asks the court to evaluate the law of a foreign country and thus the judicial notice analysis under [Rule 203](#) must also apply. A party who intends to raise an issue concerning the law of a foreign country must give pleading and reasonable written notice as well as timely furnish all parties copies of any written materials or sources that he intends to use as proof of the foreign law both in the foreign language text and with an English translation. The court may consider any material or source such as affidavits, testimony, briefs, and treatises. The court then must weigh the following factors in deciding whether to recognize the privilege:

1. the important of the discovery request to the litigation;
2. the degree of specificity of the request;
3. whether the information originated in the U.S.;
4. the availability of alternative means of securing the information;
and

5. the extent to which noncompliance with the request would undermine important interest of the U.S. or the extent to which compliance would undermine important interest of the foreign jurisdiction where the information is located.

(*Volkswagen A.G. v. Valdez*, 909 S.W.2d 900 (Tex. 1995)).

Privilege

Required Reports

Objection

- *Objection. The question calls for a matter privileged by statute. Specifically, (explaining nature and applicability of statutory privilege).*

Response

- *The privilege is not applicable because*
- *the reporting party committed perjury in the report, so the privilege does not arise; or*
- *the reporting party made false statements in the report, so the privilege does not arise; or*
- *the reporting party committed fraud in the report, so the privilege does not arise; or*
- *the reporting party failed to follow the law giving rise to the privilege by (insert action); or*
- *other reasons privilege not applicable.*

Cross-Reference to Texas [Rule 502](#)

Explanation

Frequently, individuals or entities are required by law to provide governmental agencies with information that may be damaging if produced in a judicial proceeding. Some may choose to not comply because they know that the information could be used against the reporting party. Thus, to ensure accurate and complete reporting to agencies, many of these laws provide that such information is privileged from disclosure and may not be disclosed by the agency

receiving it. These reporting privileges may be created by Texas statutes or by statutes from other jurisdictions.

Privilege

Trade Secrets

Objection

- *Objection. The question calls for a matter protected by the trade secret privilege.*

Response

- *The privilege is not applicable because its effect would be to conceal fraud; or*
- *The privilege should not bar disclosure because the interests of (holder of trade secret) can be adequately protected by confidentiality measures.*

Cross-Reference to Texas **Rule 507**

Explanation

A trade secret is a formula, pattern, device, or compilation of information that is used in a business and that gives that business a competitive advantage. Disclosing such information can harm the owner of the privilege by allowing competitors a window into the private business operations. Texas courts weigh the business interest of the holder of a trade secret against the need for full information in litigation and find a middle ground where both interests can be served (see *In re Union Pac. R.R. Co.*, 294 S.W.3d 589 (Tex. 2009); *In re M-I LLC*, 505 S.W.3d 569 (Tex. 2016); see also Tex. Civ. Prac. & Rem. Code § 134 (the Texas Uniform Trade Secrets Act)).

An individual has the right to refuse to disclose a trade secret if such withholding will not conceal fraud or otherwise work injustice. The rule specifically authorizes an employee or agent of the owner of the trade secret to claim the privilege as well.

A party seeking trade secret protection pursuant to [Rule 507](#) must show 1) the extent to which the information is known outside of the business; 2) the extent to which it is known by employees and others involved in the business; 3) the extent of the measures taken to guard the secrecy of the information; 4) the value of the information; 5) the amount of effort or money expended in developing the information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others (see *In re Bass*, [113 S.W.3d 735, 740 \(Tex. 2003\)](#) (holding that these six factors do not all require satisfaction and are not exhaustive of all relevant circumstances)).

Privilege

Voluntary Disclosure

Responses

- *The privilege has been waived by voluntary disclosure of a significant part of the privileged matter under Rule 511(1) in that (specifying nature and extent of disclosure); or*
- *The privilege has been waived by consenting to disclosure of a significant part of the privileged matter under Rule 511(1) in that (specifying nature and extent of consent to disclosure); or*
- *The privilege has been waived under Rule 511(2) by calling ____ to testify as a character witness when he (or she) was a person to whom otherwise confidential communications were made.*

Cross-Reference to Texas Rule 511

Explanation

Rule 511 is a general waiver provision that applies to all privileges.

Burden of Proof

Generally, the party claiming a privilege has the burden of establishing the applicability of the privilege. The party seeking disclosure may oppose the privilege on the ground of waiver by voluntary disclosure. In civil cases, once it is proved that there has already been a disclosure of any significant part of the privileged matter, the burden is on the party asserting the privilege to prove that the disclosure did not constitute a waiver (see *In re Christus Spohn Hosp. Kleburg*, 222 S.W.3d 434 (Tex. 2007)). In criminal cases, the burden is on the party seeking the information to prove a waiver.

Implied Waiver

No clear standard establishes what conduct will be held sufficient to imply waiver where there has been no express waiver. Implied waiver may exist as a result of partial disclosure of otherwise privileged matters. Partial disclosure occurs where a holder reveals a significant portion of the privileged communication. Inadvertent disclosure does not necessarily waive a privilege (see *Bailey v. State*, 507 S.W.3d 740 (Tex. Crim. App. 2016)).

Refreshing Present Recollection

Predicate to Refresh Recollection while Testifying

- *Can you presently remember* (factual matter to be refreshed)?
- *Would it refresh your memory if I showed you* (writing or other item used to refresh memory)?

Hand the writing or other item to the witness for examination.

- *Please read* (writing used to refresh memory) *to yourself*.
- *Have you read* (writing used to refresh memory)?
- *Do you now recall* (factual matter to be refreshed)?
- *Tell the jurors* (factual matter to be refreshed).

Objections

- *Objection. This is an attempt to refresh the witness's recollection in the absence of a demonstrated failure of memory.*
- *Objection. The witness is reading from an exhibit that is not in evidence and is hearsay.*

Responses

- *The witness has shown a failure of memory, and I am attempting to refresh his recollection pursuant to [Rule 612](#).*
- *The exhibit used to refresh the witness's recollection is already in evidence.*

Cross-Reference to Texas [Rule 612](#)

Explanation

A forgetful witness's memory may be refreshed by showing the witness an item, usually a writing, that jogs the witness's memory. This process can be helpful if the witness has a mental lapse or gets nervous on the stand, allowing the examiner to prompt the witness by using a document during the examination of the witness. This

process, referred to as refreshing recollection while testifying, may also take place before the witness testifies. If the witness reviews a writing at any time before taking the stand to testify, the attorney need not invoke [Rule 612](#).

Production of Writing to Opponent

Any document or thing used to refresh recollection while testifying must be made available for the opponent, on request, to use in the opponent's next examination of the witness.

In civil cases, if the witness reviews a writing to refresh recollection before testifying, the trial court has discretion to order (or not) production. In criminal cases, the court has no discretion and must order production, whether the writing is used before or during trial (see *Bynum v. State*, [767 S.W.2d 769 \(Tex. Crim. App. 1989\)](#)).

Practice Tip

While using the document to impeach might be an available strategy, some adverse witnesses are so sympathetic that impeachment feels harsh. Refreshing the witness's recollection may be a better strategic option, demonstrating compassion for the witness while still getting the desired testimony or admission.

Relevance

Generally

Objection

- *Objection. The question calls for an irrelevant answer because* (specifying why the subject is irrelevant).
- *Objection. Relevance.*

Response

- *The evidence is relevant because* (specifying grounds of relevance).

Cross-Reference to Texas [Rules 401](#) and [402](#)

Explanation

Probability Standard

[Rule 401](#) defines relevant evidence as evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence (see *Marathon Corp. v. Pitzner*, [106 S.W.3d 724 \(Tex. 2003\)](#)). In other words, relevancy refers to the logical relationship between the proposed evidence and a fact to be established—that is, a tendency to establish a material proposition. The [Rule 401](#) definition of relevance demonstrates the basic philosophy of the rules, which favors admitting evidence and allowing the fact-finder to determine the weight to be given to that evidence. Significantly, the relevance rules only require that the evidence have some tendency to make the existence of a material fact more or less likely, not that the evidence have the most likely tendency or the best tendency. To be relevant, evidence need not by itself prove or disprove a particular fact—it is sufficient that the evidence provides a small nudge toward proving or disproving some

fact of consequence. A fact of consequence, however, is not any fact. To determine relevancy, “the court will look at the purpose for offering the evidence. There must be some logical connection either directly or by inference between the fact offered and the fact to be proved” (*Rhey v. Redic*, 408 S.W.3d 440, (Tex. App.—El Paso 2013, no pet.)). Testimony that is not reliable, is conclusory, or is speculative is not relevant because it does not tend to make the existence of a material fact more or less probable (see *E. I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Coastal Transp. Co. v. Crown Cent. Petro. Corp.*, 136 S.W.3d 227 (Tex. 2004)).

Relevance

Conditional Admissibility

Objections

- *Objection. The evidence is not relevant because there has been no proof of (specifying preliminary facts).*
- *We move to strike the conditionally admitted evidence of (specify conditionally admitted evidence). Counsel has failed to prove additional facts that are necessary to show the relevance of that conditionally admitted evidence.*

Responses

- *The relevance of this evidence has been shown through the testimony of (name of witness), who testified that (specifying facts testified to).*
- *We will show the relevance of this evidence by proof of (specifying facts to be proved) through the later testimony of (name of witness), and we ask the court to conditionally admit it at this time.*

Cross-Reference to Texas **Rule 104**

Explanation

Rule 104(a)

Many rules of evidence require the proof of a preliminary fact—or the laying of a predicate—as a condition to admissibility of evidence. The most common preliminary fact questions governed by **Rule 104(a)** are hearsay predicates, privilege predicates, impeachment predicates, all competency predicates other than personal knowledge, and opinion rule predicates. The Court's function as a gatekeeper for expert testimony (whether based on challenges to qualifications, reliability, etc.) requires a 104(a) determination (*E.I. du*

Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995)).

The judge is given a great deal of authority in making such preliminary fact-findings. Rule 104(a) specifies the procedures for making those determinations, with the judge making a fact-finding on the preliminary fact, resolving any factual disputes and judging credibility of the proof. The proponent bears the burden of proving the preliminary fact by a preponderance of the evidence. The trial judge may, in making the preliminary fact-finding, consider evidence not otherwise admissible. The only rules of evidence that inhibit the judge in this function are those pertaining to privilege.

Rule 104(b)

The procedural rules are different, however, when the relevance of the evidence depends on proof of the preliminary facts. Such preliminary fact questions are decided under Rule 104(b) rather than Rule 104(a) (*Harrell v. State*, 884 S.W.2d 154, 159–60 (Tex. Crim. App. 1994)).

When determining the admissibility of evidence that depends for its relevance on the proof of other facts, the judge may conditionally admit the proffered evidence subject to later proof of the preliminary facts. This process is sometimes referred to as “connecting up.” If the proponent fails to establish the preliminary facts, the opposing party must move to strike the conditionally admitted evidence (*Fischer v. State*, 268 S.W.3d 552, n.9 (Tex. Crim. App. 2008)).

Rule 104 hearings on preliminary matters shall be conducted out of the jurors’ hearing “when the interests of justice so require,” and in a criminal case, when an accused is a witness and requests the hearing outside the presence of the jurors. When an accused testifies to a preliminary matter in a criminal case, the accused does not then become subject to cross-examination as to other issues in the case. He retains his right to refuse to testify.

Relevance

Exclusion of Relevant Evidence on Special Grounds

Objection

[Outside the hearing of the jurors]

- *Objection. This evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice. Probative value is low because:*
 - » *the evidence is at most probative of a collateral rather than a central issue in the case; or*
 - » *the proponent does not have a strong need for this evidence because (specifying reason evidence is unnecessary); or*
 - » *they have a less prejudicial way to prove (proposition to be proved) because they can prove (specifying alternative means of proof); or*
 - » *(proposition to be proved) is not a disputed issue in the case—we have previously admitted (proposition to be proved) by our pleadings (or answers to request for admissions); or*
 - » *we offer to stipulate (proposition to be proved); or*
 - » *the logical inference from this evidence (proposition to be proved) is very weak because*
 - › *it requires stacking inference upon inference; or*
 - › *a reasonable juror could not infer (proposition to be proved) from this evidence; or*
 - › *the evidence is remote; or*
 - › *the evidence is very dissimilar to the incident in question.*

In addition, the danger of unfair prejudice is high because (specifying nature of prejudice). We object, then, because the danger of unfair prejudice substantially outweighs the very low probative value of this evidence.

[To evidence offered for a limited purpose]

- *Objection. This evidence is inadmissible because its probative value is substantially outweighed by the danger that the jurors will be confused and misled to take the evidence for an inadmissible purpose, (specifying inadmissible purpose). A limiting instruction would not be effective because (explaining why limiting instruction would be ignored or ineffective). This danger of juror confusion substantially outweighs the probative value since the evidence is offered only for the limited purpose of (specify limited purpose for which it is being offered).*

[In the hearing of the jurors]

- *Objection. This evidence is inadmissible because its probative value is substantially outweighed by the cumulative nature of the evidence and the likelihood of undue delay as they needlessly take up the jurors' time with unnecessary evidence. In addition, if (opponent) is allowed to go into this subject, we will have no choice but to bring our own evidence on the point, delaying this trial even further. This unwarranted delay substantially outweighs what little probative value the evidence has.*

Responses

- *Counsel's objection goes to the weight rather than the admissibility of the evidence.*
- *Probative value is high because*
 - » *the evidence is corroborative of an issue central to the case; or*
 - » *the evidence goes to the credibility of (witness), and his (or her) testimony is important in this case; or*
 - » *although this occurrence may be somewhat remote, there have been other intervening occurrences of the same nature that offset the effect of the remoteness. All of these occurrences*

should be seen together by the jurors to get the full probative value of these occurrences; or

» this evidence tends to prove (admissible purpose), which is directly in issue in the case.

- *Any potential for prejudice (or confusion of issues) is easily cured by an instruction.*
- *We agree that this evidence is prejudicial to (party). It's obvious that it very much hurts their case, but [Rule 403](#) only calls for exclusion of unfairly prejudicial evidence. This evidence is not unfairly harmful to them because it does not cause the jurors to decide the case on an improper basis. Rather, this evidence proves (specify purpose), which is a proper issue in the case.*

Cross-Reference to Texas [Rule 403](#)

Explanation

Although evidence may be logically relevant—meaning that it has probative value as defined by [Rule 401](#)—it may still be excluded if its probative value is substantially outweighed by the collateral damage it causes in the trial. [Rule 403](#) calls for the court to balance the probative value and the counter-factors listed in the rule. The balancing test is tilted heavily in favor of the admissibility of logically relevant evidence or evidence with probative value, in that the prejudice must substantially outweigh the probative value to warrant exclusion. [Rule 403](#) balancing is appropriate to all offers of evidence, with the exception of offers under [Rules 609\(a\)](#), [609\(b\)](#), and [705\(d\)](#), which contain their own balancing tests. In addition to evaluating probative value versus prejudicial effect, [Rule 403](#) allows exclusion of evidence where it may confuse the issues, mislead the jurors, or cause undue delay or needless presentation of cumulative evidence (see *In re N.R.C.*, [94 S.W.3d 799 \(Tex. App.—Houston \[14th Dist.\] 2002\)](#))).

Proponent's Need for the Evidence; Effect of Offers to Stipulate

The objecting party has the opportunity under [Rule 403](#) to influence the probative value of the proponent's evidence (see, e.g.,

Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 21 (Tex. 2008) (racially charged memo inadmissible because it had low probative value and high prejudicial effect due to its use); *but see Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (photos admissible because had low probative value and low prejudicial impact)). The mere fact that evidence is prejudicial, however, does not make it inadmissible under Rule 403 (*Bay Area Healthcare v. McShane*, 239 S.W.3d 231 (Tex. 2007)). Relevant criteria for the court to consider in weighing prejudice versus probative value include: the probative value of the evidence; the potential the evidence has to impress the jurors in an irrational, but nevertheless indelible way; the time needed to develop the evidence; and the proponent's need for the evidence to prove a fact of consequences (see *In Re E.A.G.*, 373 S.W.3d 129, 147 (Tex. App.—San Antonio 2012, pet. denied)). For photographs, the court may consider the number offered, their gruesomeness, the level of detail, the size, whether they are black and white or color, and other details under Rule 403 (*In re J.B.C.*, 233 S.W.3d 88 (Tex. App.—Fort Worth 2007); *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998)).

An important component of probative value is the proponent's need for the evidence. If the proponent is able to prove the proposition with other evidence, particularly less prejudicial evidence, then its need for the offered evidence is less. As such, the probative value is correspondingly lower. By admitting or offering to stipulate the proposition to be proved, the objecting party can eliminate or diminish the proponent's need for the evidence, thereby automatically lowering its probative value (*Old Chief v. United States*, 519 U.S. 172 (1997)). Whether the proponent accepts a tendered stipulation does not control admissibility—it is the *availability* of the less prejudicial stipulation, rather than its acceptance, that lowers probative value. The proponent, on the other hand, may argue that the evidence carries its own moral force and impact, which a cold stipulation does not, so there is still a need for the evidence (see, e.g., *United States v. Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979) *vacated on other grounds*, 448 U.S. 902 (1980)). The court does not have the authority to force a party to accept a stipulation but does

have the power to sustain a [Rule 403](#) objection if the party elects not to accept the stipulation.

Relevance

Limited Admissibility

Objections

- *Objection. This testimony is irrelevant to prove (inadmissible purpose) because (specifying grounds of inadmissibility).*
- *Objection. This testimony is irrelevant as to (party against whom inadmissible) because (specifying grounds of inadmissibility).*

[To offer for limited purpose]

- *Objection. This evidence is inadmissible under [Rule 403](#). Probative value is low because it is admissible only for the limited purpose of (specify purpose) against (specify party) only. This low probative value is substantially outweighed by the danger that the jurors will be confused and misled to consider this as evidence of (specifying inadmissible purpose) against (specifying party against whom inadmissible). A limiting instruction would not be effective because (specifying reasons for ineffectiveness). Furthermore, there is a danger of unfair prejudice because (specifying nature of prejudice).*

[If initial objection overruled, or if sustained, but then admitted for limited purpose]

- *I request that the court instruct the jurors that they may not consider this testimony (or exhibit) as any evidence of (inadmissible purpose) against (party against whom inadmissible), but may only consider this evidence on the issue of (admissible purpose) against (party against whom admissible).*

Responses

- *This evidence is relevant and admissible for all purposes because (specifying relevance).*

- *This evidence is relevant and admissible against all parties because (specifying relevance).*

[If objection sustained or court indicates intent to do so]

- *We offer (specifying evidence) for the limited purpose of proving (specifying admissible purpose).*
- *We offer (specifying evidence) only against (specifying party against whom admissible) and not against (specifying party against whom inadmissible).*

[Request for jury instruction/limiting instruction]

- *We request under [Rule 105\(a\)](#) that the jurors be instructed that the evidence is admitted for the limited purpose of (state purpose) and may not be considered for any other purpose.*

Cross-Reference to Texas [Rule 105](#)

Explanation

Limited Purpose Admissibility

[Rule 105](#) recognizes that evidence may be admissible for any number of purposes and allocates to counsel the responsibility to separate the admissible from the inadmissible.

Limited Party Admissibility

In cases involving multiple parties, the issue of limited admissibility arises when evidence is relevant and admissible against one party, but not another. The burden is on the opponent to seek a limitation on the admission of evidence to appropriate parties by requesting a limiting instruction. In a case involving multiple plaintiffs or defendants, each party must make its own objection or join in the other party's objection. An objection on the part of one party is not presumed to have been made on behalf of all the parties.

Limited Issue Admissibility

When the evidence is admitted solely as to a limited issue, the opponent must request the court to instruct the jurors that they may consider the evidence for that limited purpose and for none other.

Preservation of Error

A proper objection under [Rule 105](#) must be specific. The objecting party must clearly state the ground for his objection and specify with particularity what part of the evidence is objectionable. Furthermore, the opponent must seek a limiting instruction by the judge, limiting the evidence's use to its proper admissible purpose or against certain parties only. It is the opponent's burden to request a limiting instruction, and in the absence of such a request, the evidence may be used for all purposes and as to all parties. Any complaint of appeal is waived (*Loftin v. State*, Nos. 13-03-225-CR, 13-03-226-CR, 2004 Tex. App. LEXIS 2651, at *10, (Tex. App.—Corpus Christi Mar. 25, 2004); *Larson v. Cactus Util. Co.*, 730 S.W.2d 640 (Tex. 1987)).

A request for a limiting instruction, to be considered timely, must be made at the time the evidence is admitted. Likewise, the court must give the instruction immediately if it was timely requested. If the court refuses to give the requested instruction, the opposing party should object to the failure to give the instruction as well (*id.*).

Practice Tip

Use care when requesting and crafting a limiting instruction. Poorly crafted instructions do more harm than good and can highlight the negative implications of the evidence. Failing to get any instruction, however, can waive error.

Relevance

Rule of Optional Completeness

Objection

- *At this time, we invoke [Rule 106](#) as to other portions of the writing (or deposition or recording) that are necessary to put in context this writing (or deposition testimony or recorded statement). We request that (context completing statements) be admitted at this time.*
- *Under the Rule of Optional Completeness, we would read (or request the reading of) the following portion....*

Response

- *This writing (or deposition testimony or recorded statement) does not need explanation or context. The other parts are not necessary to a fair understanding of this evidence. If they want it in evidence, they can offer it when they get the witness.*

Cross-Reference to Texas [Rules 106](#) and [107](#)

Explanation

The Rule of Optional Completeness is essentially a rule of fairness, requiring the jurors be given the complete form of a statement or writing when needed for explanation or context and when the failure to do so is misleading. In this way, the rule is also part of the battle for credibility. The rule applies to other writings or recorded statements (not merely the document read from initially) that provide the same complete context in which the offered evidence should be considered. The rule does not require the optional completeness tender to be adjacent to or part of the same statement (*Walters v. State*, [247 S.W.3d 204, 217–18 \(Tex. Crim. App. 2007\)](#))).

Rule 106 applies only to writings or recorded statements, while Rule 107 applies also to acts, declarations, and conversations (*Stewart v. State*, 221 S.W.3d 306, 312 (Tex. App.—Fort Worth 2007)).

The essential difference between Rule 106 and Rule 107 is timing—under Rule 107, as with the common-law rule, a party has to wait until it takes the witness for examination to complete the context. Rule 106 allows this to occur at the time the opponent offers the evidence requiring completion. The advantage of immediate context completion under Rule 106 is that the jurors immediately see when something is taken out of context. Waiting until a later examination is not as effective because the jurors may immediately form an adverse impression that would be difficult to dislodge later (*id.*).

Repetitious Questions

Objection

- *Objection. The question is repetitious.*

Response

- *The witness has not yet answered this particular question.*
- *The question has not been answered during my examination.*
- *This question is just a preface to a new line of questions.*

Cross-Reference “Asked and Answered/Cumulative”

Explanation

For a court to sustain this objection, questioning counsel must have asked a precise question and the witness must have responded in the course of that examination. The objection, therefore, will not lie where, on cross-examination, counsel asks for testimony elicited earlier during direct examination. A court may sustain the objection when on redirect examination a question is asked that was already answered during direct examination. The objection also applies when a witness is recalled to testify. Of course, whether such an objection is sustained is strictly within the discretion of the trial judge.

The objection is now frequently stated as “asked and answered.” This form of the objection is probably improper, since a question is not objectionable just because it has already been asked and answered. Only needlessly cumulative evidence may be excluded under [Rule 403](#). Most judges, however, will sustain the objection only when the testimony sought to be elicited is overly repetitious.

Subsequent Remedial Measures

Objections

- *Objection. This is evidence of a subsequent remedial measure, inadmissible under Rule 407 to prove negligence or culpable conduct.*

[If the subsequent measure is offered for a limited purpose]

- *Objection. We offer to stipulate ownership (or control or feasibility of precautionary measures). Since this issue is not controverted, the subsequent measure is inadmissible under Rule 407, and it is also immaterial.*
- *Objection. In addition to our objection under Rule 407, we object under Rule 403 to admission for the purpose stated by counsel. Probative value is low because it is admissible only for that limited purpose. This low probative value is substantially outweighed by the danger that the jurors will be confused and misled to consider this as evidence of negligence. A limiting instruction would not be effective because (specifying reasons for ineffectiveness). Furthermore, there is a danger of unfair prejudice because (specifying nature of prejudice).*

[If a Rule 407 objection is overruled; or if sustained, but then admitted for limited purpose]

- *I request that the court instruct the jurors that they may not consider this testimony (or exhibit) as any evidence of negligence or culpable conduct, but may only consider this evidence on the issue of (admissible purpose).*

Response

- *This evidence is not offered on the issue of negligence or culpable conduct, but is offered*
 - » *to show ownership of (explaining relevance to show ownership);*
 - or

- » *to show control of* (explaining relevance to show control); or
- » *to show feasibility of precautionary measures in that* (explaining relevance to show feasibility); or
- » *to impeach* (name of witness), *whose testimony was contradicted by subsequent remedial measure.*

Cross-Reference to Texas [Rule 407](#)

Explanation

Evidence of subsequent remedial measures is per se inadmissible only on the issues of negligence or culpable conduct. The rule recognizes the policy interest in remediating dangerous conditions and seeks to remove any evidentiary disincentive to correct defective conditions (*Hathcock v. Hankook Tire Am. Corp.*, [330 S.W.3d 733](#) (Tex. App.—Texarkana 2010)).

Product Liability Cases

Texas [Rule 407](#)(a) was amended by the Legislature in 2003 to conform to the federal rule, removing the provision that allowed evidence of the remediation to prove an unreasonably dangerous product in strict liability cases. Under [Rule 407](#)(b), written notification by a manufacturer to a purchaser of defect in a product may be admissible against the manufacturer if relevant to show existence of a defect on either a strict liability or a negligence theory. The recall notice must, however, come from the manufacturer and must be directed to purchasers rather than distributors or retailers. It is admissible only against the manufacturer.

Limited Admissibility Purposes—Ownership, Control, Feasibility of Precautionary Measures

While [Rule 407](#) excludes remedial measures when offered on an issue of negligence or culpable conduct, the evidence may be admissible on other grounds (*Brazos River Authority v. GE Ionics, Inc.*, [469 F.3d 416](#) (5th Cir. 2006)) (subsequent remedial measures are admissible on some grounds, such as causation, but not on the issue of negligence or culpable conduct)). The rule explicitly allows the offer of a subsequent remedial measure for any other relevant

purpose, including, but not limited to, ownership or control of the repaired property as well as the feasibility of precautionary measures, if controverted (see, e.g., *Blevins v. Pepper-Lawson Constr., L.P.*, No. 01-15-00820-CV, 2016 Tex. App. LEXIS 11137 (App.—Houston [1st Dist.] Oct. 13, 2016); *Exxon Corp. v. Roberts*, 724 S.W.2d 863 (Tex. App.—Texarkana 1986)).

Rule 407 also permits use of a subsequent remedial measure to impeach a witness—usually impeachment by contradiction. The most common impeachment scenarios under this rule arise 1) when a witness makes factual assertions that are inconsistent with the subsequent remedial measures, or 2) when the witness claims that the product or method was the “best” or “safest” that it could be (see, e.g., *Hathcock*, 330 S.W.3d; *Hewitt v. Ryan Marine Servs.*, No. 14-09-00227-CV, 2012 Tex. App. LEXIS 6808, at *15–17 (App.—Houston [14th Dist.] Aug. 16, 2012, no pet.)).

Practice Tip

When evidence of subsequent remedial measures is admitted for a limited purpose, the opponent should request a **Rule 105** limiting instruction.

Texas Rules of Evidence

Texas Rules of Evidence

Effective June 14, 2016

Contents

Rule 101. Title, Scope, and Applicability of the Rules; Definitions

Rule 102. Purpose

Rule 103. Rulings on Evidence

Rule 104. Preliminary Questions

Rule 105. Evidence That Is Not Admissible Against Other Parties or
for Other Purposes

Rule 106. Remainder of or Related Writings or Recorded Statements

Rule 107. Rule of Optional Completeness

Rule 201. Judicial Notice of Adjudicative Facts

Rule 202. Judicial Notice of Other States' Law

Rule 203. Determining Foreign Law

Rule 204. Judicial Notice of Texas Municipal and County
Ordinances, Texas Register Contents, and Published Agency
Rules

Rule 401. Test for Relevant Evidence

Rule 402. General Admissibility of Relevant Evidence

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, or
Other Reasons

Rule 404. Character Evidence; Crimes or Other Acts

Rule 405. Methods of Proving Character

Rule 406. Habit; Routine Practice

Rule 407. Subsequent Remedial Measures; Notification of Defect

Rule 408. Compromise Offers and Negotiations

Rule 409. Offers to Pay Medical and Similar Expenses

Rule 410. Pleas, Plea Discussions, and Related Statements

Rule 411. Liability Insurance

Rule 412. Evidence of Previous Sexual Conduct in Criminal Cases

Rule 501. Privileges in General

Rule 502. Required Reports Privileged By Statute

Rule 503. Lawyer–Client Privilege

Rule 504. Spousal Privileges

Rule 505. Privilege For Communications to a Clergy Member

Rule 506. Political Vote Privilege

Rule 507. Trade Secrets Privilege

Rule 508. Informer’s Identity Privilege

Rule 509. Physician–Patient Privilege

Rule 510. Mental Health Information Privilege in Civil Cases

Rule 511. Waiver by Voluntary Disclosure

Rule 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

Rule 513. Comment On or Inference From a Privilege Claim; Instruction

Rule 601. Competency to Testify in General; “Dead Man’s Rule”

Rule 602. Need for Personal Knowledge

Rule 603. Oath or Affirmation to Testify Truthfully

Rule 604. Interpreter

Rule 605. Judge’s Competency as a Witness

Rule 606. Juror’s Competency as a Witness

Rule 607. Who May Impeach a Witness

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

Rule 609. Impeachment by Evidence of a Criminal Conviction

Rule 610. Religious Beliefs or Opinions

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

Rule 612. Writing Used to Refresh a Witness's Memory

Rule 613. Witness's Prior Statement and Bias or Interest

Rule 614. Excluding Witnesses

Rule 615. Producing a Witness's Statement in Criminal Cases

Rule 701. Opinion Testimony by Lay Witnesses

Rule 702. Testimony by Expert Witnesses

Rule 703. Bases of an Expert's Opinion Testimony

Rule 704. Opinion on an Ultimate Issue

Rule 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

Rule 706. Audit in Civil Cases

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

Rule 802. The Rule Against Hearsay

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

Rule 805. Hearsay Within Hearsay

Rule 806. Attacking and Supporting the Declarant's Credibility

Rule 901. Authenticating or Identifying Evidence

Rule 902. Evidence That Is Self-Authenticating

Rule 903. Subscribing Witness's Testimony

Rule 1001. Definitions That Apply to This Article

Rule 1002. Requirement of the Original

Rule 1003. Admissibility of Duplicates

Rule 1004. Admissibility of Other Evidence of Content

Rule 1005. Copies of Public Records to Prove Content

Rule 1006. Summaries to Prove Content

Rule 1007. Testimony or Statement of a Party to Prove Content

Rule 1008. Functions of the Court and Jury

Rule 1009. Translating a Foreign Language Document

Article I.

General Provisions

Rule 101. Title, Scope, and Applicability of the Rules; Definitions

(a) Title. These rules may be cited as the Texas Rules of Evidence.

(b) Scope. These rules apply to proceedings in Texas courts except as otherwise provided in subdivisions (d)–(f).

(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.

(d) Exception for Constitutional or Statutory Provisions or Other Rules. Despite these rules, a court must admit or exclude evidence if required to do so by the United States or Texas Constitution, a federal or Texas statute, or a rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals. If possible, a court should resolve by reasonable construction any inconsistency between these rules and applicable constitutional or statutory provisions or other rules.

(e) Exceptions. These rules—except for those on privilege—do not apply to:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) grand jury proceedings; and

(3) the following miscellaneous proceedings:

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

(B) an inquiry by the court under Code of Criminal Procedure article 46B.004 to determine whether evidence exists that would support a finding that the defendant may be incompetent to stand trial;

(C) bail proceedings other than hearings to deny, revoke, or increase bail;

(D) hearings on justification for pretrial detention not involving bail;

(E) proceedings to issue a search or arrest warrant; and

(F) direct contempt determination proceedings.

(f) Exception for Justice Court Cases. These rules do not apply to justice court cases except as authorized by [Texas Rule of Civil Procedure 500.3](#).

(g) Exception for Military Justice Hearings. The Texas Code of Military Justice, Tex. Gov't Code §§ 432.001–432.195, governs the admissibility of evidence in hearings held under that Code.

(h) Definitions. In these rules:

(1) “civil case” means a civil action or proceeding;

(2) “criminal case” means a criminal action or proceeding, including an examining trial;

(3) “public office” includes a public agency;

(4) “record” includes a memorandum, report, or data compilation;

(5) a “rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals” means a rule adopted by any of those courts under statutory authority;

(6) “unsworn declaration” means an unsworn declaration made in accordance with [Tex. Civ. Prac. & Rem. Code § 132.001](#); and

(7) a reference to any kind of written material or any other medium includes electronically stored information.

Comment to 2015 Restyling: The reference to “hierarchical governance” in former [Rule 101\(c\)](#) has been deleted as unnecessary. The textual limitation of former [Rule 101\(c\)](#) to criminal cases has been eliminated. Courts in civil cases must also admit or exclude evidence when required to do so by constitutional or statutory provisions or other rules that take precedence over these rules. Likewise, the title to former [Rule 101\(d\)](#) has been changed to more accurately indicate the purpose and scope of the subdivision.

Rule 102. Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection. When the court hears a party’s objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal.

(c) Court’s Statement About the Ruling; Directing an Offer of Proof. The court must allow a party to make an offer of proof outside the jury’s presence as soon as practicable—and before the court reads its charge to the jury. The court may make any statement about the character or form of the evidence, the

objection made, and the ruling. At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.

(d) Preventing the Jury from Hearing Inadmissible Evidence.

To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Fundamental Error in Criminal Cases.

In criminal cases, a court may take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession in a criminal case;

(2) a defendant in a criminal case is a witness and so requests;
or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying outside the jury's hearing on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Evidence That Is Not Admissible Against Other Parties or for Other Purposes

(a) Limiting Admitted Evidence. If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

(b) Preserving a Claim of Error.

(1) Court Admits the Evidence Without Restriction. A party may claim error in a ruling to admit evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—only if the party requests the court to restrict the evidence to its proper scope and instruct the jury accordingly.

(2) Court Excludes the Evidence. A party may claim error in a ruling to exclude evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—only if the party limits its offer to the party against whom or the purpose for which the evidence is admissible.

Rule 106. Remainder of or Related Writings or Recorded Statements

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.

Rule 107. Rule of Optional Completeness

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also 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. "Writing or recorded statement" includes a deposition.

Article II.

Judicial Notice

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. 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.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Rule 202. Judicial Notice of Other States' Law

(a) Scope. This rule governs judicial notice of another state's, territory's, or federal jurisdiction's:

- Constitution;
- public statutes;
- rules;
- regulations;
- ordinances;
- court decisions; and
- common law.

(b) Taking Notice. The court:

- (1) may take judicial notice on its own; or
- (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(c) Notice and Opportunity to Be Heard.

(1) Notice. The court may require a party requesting judicial notice to notify all other parties of the request so they may respond to it.

(2) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Determination and Review. The court—not the jury—must determine the law of another state, territory, or federal jurisdiction. The court's determination must be treated as a ruling on a question of law.

Rule 203. Determining Foreign Law

(a) Raising a Foreign Law Issue. A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) Translations. If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) Materials the Court May Consider; Notice. In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) Determination and Review. The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Rule 204. Judicial Notice of Texas Municipal and County Ordinances, Texas Register Contents, and Published Agency Rules

(a) Scope. This rule governs judicial notice of Texas municipal and county ordinances, the contents of the Texas Register, and agency rules published in the Texas Administrative Code.

(b) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(c) Notice and Opportunity to Be Heard.

(1) **Notice.** The court may require a party requesting judicial notice to notify all other parties of the request so they may

respond to it.

(2) *Opportunity to Be Heard.* On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.

(d) *Determination and Review.* The court—not the jury—must determine municipal and county ordinances, the contents of the Texas Register, and published agency rules. The court's determination must be treated as a ruling on a question of law.

Article III.

Presumptions

[No rules adopted at this time.]

Article IV.

Relevance and Its Limits

Rule 401. Test for Relevant Evidence

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.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or Texas Constitution;
- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons

The court may exclude relevant evidence if 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.

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular

occasion the person acted in accordance with the character or trait.

(2) *Exceptions for an Accused.*

(A) In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a civil case, a party accused of conduct involving moral turpitude may offer evidence of the party's pertinent trait, and if the evidence is admitted, the accusing party may offer evidence to rebut it.

(3) *Exceptions for a Victim.*

(A) In a criminal case, subject to the limitations in [Rule 412](#), a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(C) In a civil case, a party accused of assaultive conduct may offer evidence of the victim's trait of violence to prove self-defense, and if the evidence is admitted, the accusing party may offer evidence of the victim's trait of peacefulness.

(4) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under [Rules 607](#), [608](#), and [609](#).

(5) *Definition of "Victim."* In this rule, "victim" includes an alleged victim.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* 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.

(2) *Permitted Uses; Notice in Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief.

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion.

(1) *In General.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, inquiry may be made into relevant specific instances of the person's conduct.

(2) *Accused's Character in a Criminal Case.* In the guilt stage of a criminal case, a witness may testify to the defendant's character or character trait only if, before the day of the offense, the witness was familiar with the defendant's reputation or the facts or information that form the basis of the witness's opinion.

(b) *By Specific Instances of Conduct.* When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407. Subsequent Remedial Measures; Notification of Defect

(a) Subsequent Remedial Measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

(b) Notification of Defect. A manufacturer's written notification to a purchaser of a defect in one of its products is admissible against the manufacturer to prove the defect.

Comment to 2015 Restyling: [Rule 407](#) previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of [Rules 402](#), [403](#), [801](#), etc.

[Rule 408. Compromise Offers and Negotiations](#)

(a) Prohibited Uses. Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

- (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or statements made during compromise negotiations about the claim.

(b) Permissible Uses. The court may admit this evidence for another purpose, such as proving a party's or witness's bias, prejudice, or interest, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment to 2015 Restyling: [Rule 408](#) previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of [Rules 402, 403, 801](#), etc.

The reference to “liability” has been deleted on the ground that the deletion makes the Rule flow better and easier to read, and because “liability” is covered by the broader term “validity.” Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

Finally, the sentence of the Rule referring to evidence “otherwise discoverable” has been deleted as superfluous. The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

[Rule 409. Offers to Pay Medical and Similar Expenses](#)

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

[Rule 410. Pleas, Plea Discussions, and Related Statements](#)

(a) Prohibited Uses in Civil Cases. In a civil case, evidence of the following is not admissible against the defendant who made

the plea or was a participant in the plea discussions:

- (1) a guilty plea that was later withdrawn;
- (2) a nolo contendere plea;
- (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
- (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Prohibited Uses in Criminal Cases. In a criminal case, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a guilty plea that was later withdrawn;
- (2) a nolo contendere plea that was later withdrawn;
- (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
- (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty or nolo contendere plea or they resulted in a later-withdrawn guilty or nolo contendere plea.

(c) Exception. In a civil case, the court may admit a statement described in paragraph (a)(3) or (4) and in a criminal case, the court may admit a statement described in paragraph (b)(3) or (4), when another statement made during the same plea or plea discussions has been introduced and in fairness the statements ought to be considered together.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for

another purpose, such as proving a witness's bias or prejudice or, if disputed, proving agency, ownership, or control.

Rule 412. Evidence of Previous Sexual Conduct in Criminal Cases

(a) In General. The following evidence is not admissible in a prosecution for sexual assault, aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault:

- (1) reputation or opinion evidence of a victim's past sexual behavior; or
- (2) specific instances of a victim's past sexual behavior.

(b) Exceptions for Specific Instances. Evidence of specific instances of a victim's past sexual behavior is admissible if:

- (1) the court admits the evidence in accordance with subdivisions (c) and (d);
- (2) the evidence:
 - (A) is necessary to rebut or explain scientific or medical evidence offered by the prosecutor;
 - (B) concerns past sexual behavior with the defendant and is offered by the defendant to prove consent;
 - (C) relates to the victim's motive or bias;
 - (D) is admissible under [Rule 609](#); or
 - (E) is constitutionally required to be admitted; and
- (3) the probative value of the evidence outweighs the danger of unfair prejudice.

(c) Procedure for Offering Evidence. Before offering any evidence of the victim's past sexual behavior, the defendant must inform the court outside the jury's presence. The court must then conduct an in camera hearing, recorded by a court reporter, and determine whether the proposed evidence is admissible. The defendant may not refer to any evidence ruled inadmissible

without first requesting and gaining the court's approval outside the jury's presence.

(d) Record Sealed. The court must preserve the record of the in camera hearing, under seal, as part of the record.

(e) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Article V.

Privileges

Rule 501. Privileges in General

Unless a Constitution, a statute, or these or other rules prescribed under statutory authority provide otherwise, no person has a privilege to:

- (a) refuse to be a witness;
- (b) refuse to disclose any matter;
- (c) refuse to produce any object or writing; or
- (d) prevent another from being a witness, disclosing any matter, or producing any object or writing.

Rule 502. Required Reports Privileged By Statute

(a) In General. If a law requiring a return or report to be made so provides:

- (1) a person, corporation, association, or other organization or entity—whether public or private—that makes the required return or report has a privilege to refuse to disclose it and to prevent any other person from disclosing it; and
 - (2) a public officer or agency to whom the return or report must be made has a privilege to refuse to disclose it.
- (b) Exceptions.** This privilege does not apply in an action involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

Rule 503. Lawyer–Client Privilege

(a) Definitions. In this rule:

(1) A “client” is a person, public officer, or corporation, association, or other organization or entity—whether public or private—that:

(A) is rendered professional legal services by a lawyer; or

(B) consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A “client’s representative” is:

(A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or

(B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A “lawyer” is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation.

(4) A “lawyer’s representative” is:

(A) one employed by the lawyer to assist in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer’s rendition of professional legal services.

(5) A communication is “confidential” if not intended to be disclosed to third persons other than those:

(A) to whom disclosure is made to further the rendition of professional legal services to the client; or

(B) reasonably necessary to transmit the communication.

(b) Rules of Privilege.

(1) *General Rule.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;

(D) between the client’s representatives or between the client and the client’s representative; or

(E) among lawyers and their representatives representing the same client.

(2) *Special Rule in a Criminal Case.* In a criminal case, a client has a privilege to prevent a lawyer or lawyer’s representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer’s representative by reason of the attorney–client relationship.

(c) Who May Claim. The privilege may be claimed by:

(1) the client;

(2) the client’s guardian or conservator;

- (3) a deceased client's personal representative; or
- (4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence.

The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) *Furtherance of Crime or Fraud.* If the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

(2) *Claimants Through Same Deceased Client.* If the communication is relevant to an issue between parties claiming through the same deceased client.

(3) *Breach of Duty By a Lawyer or Client.* If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.

(4) *Document Attested By a Lawyer.* If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

(5) *Joint Clients.* If the communication:

(A) is offered in an action between clients who retained or consulted a lawyer in common;

(B) was made by any of the clients to the lawyer; and

(C) is relevant to a matter of common interest between the clients.

Rule 504. Spousal Privileges

(a) Confidential Communication Privilege.

(1) Definition. A communication is “confidential” if a person makes it privately to the person’s spouse and does not intend its disclosure to any other person.

(2) General Rule. A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to the person’s spouse while they were married. This privilege survives termination of the marriage.

(3) Who May Claim. The privilege may be claimed by:

(A) the communicating spouse;

(B) the guardian of a communicating spouse who is incompetent; or

(C) the personal representative of a communicating spouse who is deceased.

The other spouse may claim the privilege on the communicating spouse’s behalf—and is presumed to have authority to do so.

(4) Exceptions. This privilege does not apply:

(A) Furtherance of Crime or Fraud. If the communication is made—wholly or partially—to enable or aid anyone to commit or plan to commit a crime or fraud.

(B) Proceeding Between Spouse and Other Spouse or Claimant Through Deceased Spouse. In a civil proceeding:

(i) brought by or on behalf of one spouse against the other; or

(ii) between a surviving spouse and a person claiming through the deceased spouse.

(C) Crime Against Family, Spouse, Household Member, or Minor Child. In a:

(i) proceeding in which a party is accused of conduct that, if proved, is a crime against the person of the other spouse,

any member of the household of either spouse, or any minor child; or

(ii) criminal proceeding involving a charge of bigamy under Section 25.01 of the Penal Code.

(D) Commitment or Similar Proceeding. In a proceeding to commit either spouse or otherwise to place the spouse or the spouse's property under another's control because of a mental or physical condition.

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

(b) Privilege Not to Testify in a Criminal Case.

(1) General Rule. In a criminal case, an accused's spouse has a privilege not to be called to testify for the state. But this rule neither prohibits a spouse from testifying voluntarily for the state nor gives a spouse a privilege to refuse to be called to testify for the accused.

(2) Failure to Call Spouse. If other evidence indicates that the accused's spouse could testify to relevant matters, an accused's failure to call the spouse to testify is a proper subject of comment by counsel.

(3) Who May Claim. The privilege not to testify may be claimed by the accused's spouse or the spouse's guardian or representative, but not by the accused.

(4) Exceptions. This privilege does not apply:

(A) Certain Criminal Proceedings. In a criminal proceeding in which a spouse is charged with:

(i) a crime against the other spouse, any member of the household of either spouse, or any minor child; or

(ii) bigamy under Section 25.01 of the Penal Code.

(B) Matters That Occurred Before the Marriage. If the spouse is called to testify about matters that occurred before

the marriage.

Comment to 2015 Restyling: Previously, [Rule 504\(b\)\(1\)](#) provided that, “A spouse who testifies on behalf of an accused is subject to cross-examination as provided in [Rule 611\(b\)](#).” That sentence was included in the original version of [Rule 504](#) when the Texas Rules of Criminal Evidence were promulgated in 1986 and changed the rule to a testimonial privilege held by the witness spouse. Until then, a spouse was deemed incompetent to testify against his or her defendant spouse, and when a spouse testified on behalf of a defendant spouse, the state was limited to cross-examining the spouse about matters relating to the spouse’s direct testimony. The quoted sentence from the original Criminal [Rule 504\(b\)](#) was designed to overturn this limitation and allow the state to cross-examine a testifying spouse in the same manner as any other witness. More than twenty-five years later, it is clear that a spouse who testifies either for or against a defendant spouse may be cross-examined in the same manner as any other witness. Therefore, the continued inclusion in the rule of a provision that refers only to the cross-examination of a spouse who testifies on behalf of the accused is more confusing than helpful. Its deletion is designed to clarify the rule and does not change existing law.

[Rule 505. Privilege For Communications to a Clergy Member](#)

(a) Definitions. In this rule:

- (1)** A “clergy member” is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or someone whom a communicant reasonably believes is a clergy member.
- (2)** A “communicant” is a person who consults a clergy member in the clergy member’s professional capacity as a spiritual adviser.
- (3)** A communication is “confidential” if made privately and not intended for further disclosure except to other persons present to further the purpose of the communication.

(b) General Rule. A communicant has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication by the communicant to a clergy member in the clergy member's professional capacity as spiritual adviser.

(c) Who May Claim. The privilege may be claimed by:

- (1) the communicant;
- (2) the communicant's guardian or conservator; or
- (3) a deceased communicant's personal representative.

The clergy member to whom the communication was made may claim the privilege on the communicant's behalf—and is presumed to have authority to do so.

Rule 506. Political Vote Privilege

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

Rule 507. Trade Secrets Privilege

(a) General Rule. A person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice.

(b) Who May Claim. The privilege may be claimed by the person who owns the trade secret or the person's agent or employee.

(c) Protective Measure. If a court orders a person to disclose a trade secret, it must take any protective measure required by the interests of the privilege holder and the parties and to further justice.

Rule 508. Informer's Identity Privilege

(a) General Rule. The United States, a state, or a subdivision of either has a privilege to refuse to disclose a person's identity if:

(1) the person has furnished information to a law enforcement officer or a member of a legislative committee or its staff conducting an investigation of a possible violation of law; and

(2) the information relates to or assists in the investigation.

(b) Who May Claim.

The privilege may be claimed by an appropriate representative of the public entity to which the informer furnished the information. The court in a criminal case must reject the privilege claim if the state objects.

(c) Exceptions.

(1) ***Voluntary Disclosure; Informer a Witness.*** This privilege does not apply if:

(A) the informer's identity or the informer's interest in the communication's subject matter has been disclosed—by a privilege holder or the informer's own action—to a person who would have cause to resent the communication; or

(B) the informer appears as a witness for the public entity.

(2) ***Testimony About the Merits.***

(A) ***Criminal Case.*** In a criminal case, this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. If the court so finds and the public entity elects not to disclose the informer's identity:

(i) on the defendant's motion, the court must dismiss the charges to which the testimony would relate; or

(ii) on its own motion, the court may dismiss the charges to which the testimony would relate.

(B) ***Certain Civil Cases.*** In a civil case in which the public entity is a party, this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of a material issue on the merits. If the court so finds and the public entity elects

not to disclose the informer's identity, the court may make any order that justice requires.

(C) *Procedures.*

(i) If it appears that an informer may be able to give the testimony required to invoke this exception and the public entity claims the privilege, the court must give the public entity an opportunity to show in camera facts relevant to determining whether this exception is met. The showing should ordinarily be made by affidavits, but the court may take testimony if it finds the matter cannot be satisfactorily resolved by affidavits.

(ii) No counsel or party may attend the in camera showing.

(iii) The court must seal and preserve for appeal evidence submitted under this subparagraph (2)(C). The evidence must not otherwise be revealed without the public entity's consent.

(3) *Legality of Obtaining Evidence.*

(A) *Court May Order Disclosure.* The court may order the public entity to disclose an informer's identity if:

(i) information from an informer is relied on to establish the legality of the means by which evidence was obtained; and

(ii) the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible.

(B) *Procedures.*

(i) On the public entity's request, the court must order the disclosure be made in camera.

(ii) No counsel or party may attend the in camera disclosure.

(iii) If the informer's identity is disclosed in camera, the court must seal and preserve for appeal the record of the in camera proceeding. The record of the in camera

proceeding must not otherwise be revealed without the public entity's consent.

Rule 509. Physician–Patient Privilege

(a) Definitions. In this rule:

(1) A “patient” is a person who consults or is seen by a physician for medical care.

(2) A “physician” is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(b) Limited Privilege in a Criminal Case. There is no physician–patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1) to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

(c) General Rule in a Civil Case. In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) Who May Claim in a Civil Case. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(e) Exceptions in a Civil Case. This privilege does not apply:

(1) ***Proceeding Against Physician.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Consent.*** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) ***Action to Collect.*** In an action to collect a claim for medical services rendered to the patient.

(4) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) ***Disciplinary Investigation or Proceeding.*** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, [Tex. Occ. Code § 164.001 et seq.](#), or a registered nurse under [Tex. Occ. Code § 301.451 et seq.](#) But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A) the patient's records would be subject to disclosure under paragraph (e)(1); or

(B) the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) *Involuntary Civil Commitment or Similar Proceeding.* In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability Act).

(7) *Abuse or Neglect of "Institution" Resident.* In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in [Tex. Health & Safety Code § 242.002](#).

(f) Consent For Release of Privileged Information.

(1) Consent for the release of privileged information must be in writing and signed by:

(A) the patient;

(B) a parent or legal guardian if the patient is a minor;

(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

(A) the information or medical records covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

Comment to 2015 Restyling: The physician–patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in [Tex. Rev. Civ. Stat. art. 4495b](#). That statute provided that the privilege applied even if a patient had received a physician’s services before the statute’s enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege’s retroactive application. But deleting this statement from the rule’s text is not intended as a substantive change in the law.

The former rule’s reference to “confidentiality or” and “administrative proceedings” in subdivision (e) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. [Tex. Occ. Code § 159.004](#) sets forth exceptions to a physician’s duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See [Rule 101\(b\)](#). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. [Tex. Gov’t Code § 2001.083](#) provides that “[i]n a contested case, a state agency shall give effect to the rules of

privilege recognized by law.” Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of [Rule 509](#) with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

Rule 510. Mental Health Information Privilege in Civil Cases

(a) Definitions. In this rule:

(1) A “professional” is a person:

- (A)** authorized to practice medicine in any state or nation;
- (B)** licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;
- (C)** involved in the treatment or examination of drug abusers; or
- (D)** who the patient reasonably believes to be a professional under this rule.

(2) A “patient” is a person who:

- (A)** consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or
- (B)** is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A “patient’s representative” is:

- (A)** any person who has the patient’s written consent;
- (B)** the parent of a minor patient;
- (C)** the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or
- (D)** the personal representative of a deceased patient.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those:

(A) present to further the patient’s interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional’s direction, including members of the patient’s family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient’s identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient’s representative acting on the patient’s behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) Who May Claim. The privilege may be claimed by:

(1) the patient; or

(2) the patient’s representative on the patient’s behalf.

The professional may claim the privilege on the patient’s behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) ***Proceeding Against Professional.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) **Written Waiver.** If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) **Action to Collect.** In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) **Communication Made in Court-Ordered Examination.** To a communication the patient made to a professional during a court-ordered examination relating to the Patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) **Party Relies on Patient's Condition.** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) **Abuse or Neglect of "Institution" Resident.** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in [Tex. Health & Safety Code § 242.002](#).

Comment to 2015 Restyling: The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at [Tex. Health & Safety Code § 611.001 et seq.](#)) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this

statement from the rule's text is not intended as a substantive change in the law.

Tex. Health & Safety Code ch. 611 addresses confidentiality rules for communications between a patient and a mental-health professional and for the professional's treatment records. Many of these provisions apply in contexts other than court proceedings. Reconciling the provisions of [Rule 510](#) with the parts of chapter 611 that address a mental-health-information privilege applicable to court proceedings is beyond the scope of the restyling project.

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if:

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

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

(b) Lawyer-Client Privilege and Work Product; Limitations on Waiver. Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.

(1) *Disclosure Made in a Federal or State Proceeding or to a Federal or State Office or Agency; Scope of a Waiver.* When the disclosure is made in a federal proceeding or state proceeding of any state or to a federal office or agency or state office or agency of any state and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness to be considered together.

(2) *Inadvertent Disclosure in State Civil Proceedings.* When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d).

(3) *Controlling Effect of a Court Order.* A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(4) *Controlling Effect of a Party Agreement.* An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

Comment to 2015 Restyling: The amendments to [Rule 511](#) are designed to align Texas law with federal law on waiver of privilege by voluntary disclosure. Subsection (a) sets forth the general rule. Subsection (b) incorporates the provisions of Federal Rule of Evidence 502. Like the federal rule, subsection (b) only addresses disclosure of communications or information covered by the lawyer-client privilege or work-product protection. These amendments do not affect the law governing waiver of other privileges or protections.

Rule 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

A privilege claim is not defeated by a disclosure that was:

(a) compelled erroneously; or

(b) made without opportunity to claim the privilege.

Rule 513. Comment On or Inference From a Privilege Claim; Instruction

(a) Comment or Inference Not Permitted. Except as permitted in [Rule 504\(b\)\(2\)](#), neither the court nor counsel may comment on a privilege claim—whether made in the present proceeding or previously—and the factfinder may not draw an inference from the claim.

(b) Claiming Privilege Without the Jury's Knowledge. To the extent practicable, the court must conduct a jury trial so that the making of a privilege claim is not suggested to the jury by any means.

(c) Claim of Privilege Against Self-Incrimination in a Civil Case. Subdivisions (a) and (b) do not apply to a party's claim, in the present civil case, of the privilege against self-incrimination.

(d) Jury Instruction. When this rule forbids a jury from drawing an inference from a privilege claim, the court must, on request of a party against whom the jury might draw the inference, instruct the jury accordingly.

Article VI.

Witnesses

Rule 601. Competency to Testify in General; “Dead Man’s Rule”

(a) In General. Every person is competent to be a witness unless these rules provide otherwise. The following witnesses are incompetent:

(1) *Insane Persons.* A person who is now insane or was insane at the time of the events about which the person is called to testify.

(2) *Persons Lacking Sufficient Intellect.* A child—or any other person—whom the court examines and finds lacks sufficient intellect to testify concerning the matters in issue.

(b) The “Dead Man’s Rule.”

(1) *Applicability.* The “Dead Man’s Rule” applies only in a civil case:

(A) by or against a party in the party’s capacity as an executor, administrator, or guardian; or

(B) by or against a decedent’s heirs or legal representatives and based in whole or in part on the decedent’s oral statement.

(2) *General Rule.* In cases described in subparagraph (b)(1)(A), a party may not testify against another party about an oral statement by the testator, intestate, or ward. In cases described in subparagraph (b)(1)(B), a party may not testify against another party about an oral statement by the decedent.

(3) *Exceptions.* A party may testify against another party about an oral statement by the testator, intestate, ward, or decedent if:

(A) the party's testimony about the statement is corroborated;
or

(B) the opposing party calls the party to testify at the trial about the statement.

(4) Instructions. If a court excludes evidence under paragraph (b)(2), the court must instruct the jury that the law prohibits a party from testifying about an oral statement by the testator, intestate, ward, or decedent unless the oral statement is corroborated or the opposing party calls the party to testify at the trial about the statement.

Comment to 2015 Restyling: The text of the “Dead Man’s Rule” has been streamlined to clarify its meaning without making any substantive changes. The text of former [Rule 601\(b\)](#) (as well as its statutory predecessor, Vernon’s Ann. Civ. St. art. 3716) prohibits only a “party” from testifying about the dead man’s statements. Despite this, the last sentence of former [Rule 601\(b\)](#) requires the court to instruct the jury when the rule “prohibits an interested party or witness” from testifying. Because the rule prohibits only a “party” from testifying, restyled [Rule 601\(b\)\(4\)](#) references only “a party,” and not “an interested party or witness.” To be sure, courts have indicated that the rule (or its statutory predecessor) may be applicable to a witness who is not nominally a party and inapplicable to a witness who is only nominally a party. See, e.g., *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 809 (1956); *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291, 295 (1944). But these decisions are based on an interpretation of the meaning of “party.” Therefore, limiting the court’s instruction under restyled [Rule 601\(b\)\(4\)](#) to “a party” does not change Texas practice. In addition, restyled [Rule 601\(b\)](#) deletes the sentence in former [Rule 601\(b\)](#) that states “[e]xcept for the foregoing, a witness is not precluded from giving evidence ... because the witness is a party to the action ...” This sentence is surplusage. [Rule 601\(b\)](#) is a rule of exclusion. If the testimony falls outside the rule of exclusion, its admissibility will be determined by other applicable rules of evidence.

[Rule 602. Need for Personal Knowledge](#)

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](#).

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606. Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify:

(A) about whether an outside influence was improperly brought to bear on any juror; or

(B) to rebut a claim that the juror was not qualified to serve.

Rule 607. Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under [Rule 609](#), a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if:

- (1)** the crime was a felony or involved moral turpitude, regardless of punishment;
- (2)** the probative value of the evidence outweighs its prejudicial effect to a party; and
- (3)** it is elicited from the witness or established by public record.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

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

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the conviction, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) the witness is a party in a proceeding conducted under title 3 of the Texas Family Code; or

(2) the United States or Texas Constitution requires that it be admitted.

(e) Pendency of an Appeal. A conviction for which an appeal is pending is not admissible under this rule.

(f) Notice. Evidence of a witness's conviction is not admissible under this rule if, after receiving from the adverse party a timely written request specifying the witness, the proponent of the conviction fails to provide sufficient written notice of intent to use the conviction. Notice is sufficient if it provides a fair opportunity to contest the use of such evidence.

Rule 610. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. A witness may be cross-examined on any relevant matter, including credibility.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying;
- (2) before testifying, in civil cases, if the court decides that justice requires the party to have those options; or
- (3) before testifying, in criminal cases.

(b) Adverse Party's Options; Deleting Unrelated Matter. 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. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered

to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Rule 613. Witness's Prior Statement and Bias or Interest

(a) Witness's Prior Inconsistent Statement.

(1) *Foundation Requirement.* When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:

- (A)** the contents of the statement;
- (B)** the time and place of the statement; and
- (C)** the person to whom the witness made the statement.

(2) *Need Not Show Written Statement.* If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) *Opportunity to Explain or Deny.* A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(4) *Extrinsic Evidence.* Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.

(5) *Opposing Party's Statement.* This subdivision (a) does not apply to an opposing party's statement under [Rule 801\(e\)\(2\)](#).

(b) Witness's Bias or Interest.

(1) *Foundation Requirement.* When examining a witness about the witness's bias or interest, a party must first tell the

witness the circumstances or statements that tend to show the witness's bias or interest. If examining a witness about a statement—whether oral or written—to prove the witness's bias or interest, a party must tell the witness:

- (A) the contents of the statement;
- (B) the time and place of the statement; and
- (C) the person to whom the statement was made.

(2) *Need Not Show Written Statement.* If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) *Opportunity to Explain or Deny.* A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

(4) *Extrinsic Evidence.* Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it.

(c) *Witness's Prior Consistent Statement.* Unless [Rule 801\(e\)\(1\)\(B\)](#) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility.

Comment to 2015 Restyling: The amended rule retains the requirement that a witness be given an opportunity to explain or deny (a) a prior inconsistent statement or (b) the circumstances or a statement showing the witness's bias or interest, but this requirement is not imposed on the examining attorney. A witness may have to wait until redirect examination to explain a prior inconsistent statement or the circumstances or a statement that shows bias. But the impeaching attorney still is not permitted to introduce extrinsic evidence of the witness's prior inconsistent statement or bias unless the witness has first been examined about the statement or bias and has failed to unequivocally admit it. All other changes to the rule are intended to be stylistic only.

Rule 614. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person and, in civil cases, that person's spouse;
- (b) after being designated as the party's representative by its attorney:
 - (1) in a civil case, an officer or employee of a party that is not a natural person; or
 - (2) in a criminal case, a defendant that is not a natural person;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) the victim in a criminal case, unless the court determines that the victim's testimony would be materially affected by hearing other testimony at the trial.

Rule 615. Producing a Witness's Statement in Criminal Cases

(a) Motion to Produce. After a witness other than the defendant testifies on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that:

- (1) is in their possession;
- (2) relates to the subject matter of the witness's testimony; and
- (3) has not previously been produced.

(b) Producing the Entire Statement. If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(c) Producing a Redacted Statement. If the party who called the witness claims that the statement contains information that does

not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any unrelated portions, the court must order delivery of the redacted statement to the moving party. If a party objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

(d) Recess to Examine a Statement. If the court orders production of a witness's statement, the court, on request, must recess the proceedings to allow the moving party time to examine the statement and prepare for its use.

(e) Sanction for Failure to Produce or Deliver a Statement. If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the state disobeys the order, the court must declare a mistrial if justice so requires.

(f) "Statement" Defined. As used in this rule, a witness's "statement" means:

- (1) a written statement that the witness makes and signs, or otherwise adopts or approves;
- (2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or
- (3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

Comment to 2015 Amendment: The Michael Morton Act, codified at Texas Code of Criminal Procedure art. 39.14, affords defendants substantial pre-trial discovery, requiring the state, upon request from the defendant, to produce and permit the defendant to inspect and copy various items, including witness statements. In many instances, therefore, art. 39.14 eliminates the need, after the witness testifies on direct examination, for a defendant to request, and the court to order, production of a witness's statement.

But art. 39.14 does not entirely eliminate the need for in-trial discovery of witness statements. Art. 39.14 does not extend

equivalent discovery rights to the prosecution, and so prosecutors will still need to use [Rule 615](#) to obtain witness statements of defense witnesses. Moreover, some defendants may fail to exercise their discovery rights under art. 39.14 and so may wish to obtain a witness statement under [Rule 615](#). In addition, the Michael Morton Act applies only to the prosecution of offenses committed after December 31, 2013. Defendants on trial for offenses committed before then have no right to pre-trial discovery of the witness statements of prosecution witnesses.

Consequently, [Rule 615\(a\)](#) has been amended to account for the changed pre-trial discovery regime introduced by the Michael Morton Act. If a party's adversary has already produced a witness's statement—whether through formal discovery under art. 39.14 or through more informal means—[Rule 615\(a\)](#) no longer gives a party the right to obtain, after the witness testifies on direct examination, a court order for production of the witness's statement. But if a party's adversary has not already produced a witness's statement, the party may still use [Rule 615\(a\)](#) to request and obtain a court order requiring production of the witness's statement after the witness finishes testifying on direct examination.

Article VII.

Opinions and Expert Testimony

Rule 701. Opinion Testimony by Lay Witnesses

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.

Comment to 2015 Restyling: All references to an “inference” have been deleted because this makes the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2015 Restyling: All references to an “inference” have been deleted because this makes the Rule flow better and

easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

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.

Comment to 2015 Restyling: All references to an “inference” have been deleted because this makes the Rule flow better and easier to read, and because any “inference” is covered by the

broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 706. Audit in Civil Cases

Notwithstanding any other evidence rule, the court must admit an auditor’s verified report prepared under Rule of Civil Procedure 172 and offered by a party. If a party files exceptions to the report, a party may offer evidence supporting the exceptions to contradict the report.

Article VIII.

Hearsay

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. “Statement” means a person’s oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Matter Asserted. “Matter asserted” means:

- (1) any matter a declarant explicitly asserts; and
- (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant’s belief about the matter.

(d) Hearsay. “Hearsay” means 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.

(e) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

- (A)** is inconsistent with the declarant’s testimony and:

(i) when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding—or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

(3) *A Deponent's Statement.* In a civil case, the statement was made in a deposition taken in the same proceeding. "Same proceeding" is defined in Rule of Civil Procedure 203.6(b). The deponent's unavailability as a witness is not a requirement for admissibility.

Comment to 2015 Restyling: Statements falling under the hearsay exclusion provided by [Rule 801\(e\)\(2\)](#) are no longer referred to as "admissions" in the title to the subdivision. The term

“admissions” is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it “admitted” nothing and was not against the party’s interest when made. The term “admissions” also raises confusion in comparison with the [Rule 803\(24\)](#) exception for declarations against interest. No change in application of the exclusion is intended.

The deletion of former [Rule 801\(e\)\(1\)\(D\)](#), which cross-references Code of Criminal Procedure art. 38.071, is not intended as a substantive change. Including this cross-reference made sense when the Texas Rules of Criminal Evidence were first promulgated, but with subsequent changes to the statutory provision, its inclusion is no longer appropriate. The version of article 38.071 that was initially cross-referenced in the Rules of Criminal Evidence required the declarant-victim to be available to testify at the trial. That requirement has since been deleted from the statute, and the statute no longer requires either the availability or testimony of the declarant-victim. Thus, cross-referencing the statute in [Rule 801\(e\)\(1\)](#), which applies only when the declarant testifies at trial about the prior statement, no longer makes sense. Moreover, article 38.071 is but one of a number of statutes that mandate the admission of certain hearsay statements in particular circumstances. See, e.g., Code of Criminal Procedure art. 38.072; Family Code §§ 54.031, 104.002, 104.006. These statutory provisions take precedence over the general rule excluding hearsay, see [Rules 101\(c\)](#) and [802](#), and there is no apparent justification for cross-referencing article 38.071 and not all other such provisions.

[Rule 802. The Rule Against Hearsay](#)

Hearsay is not admissible unless any of the following provides otherwise:

- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its

trustworthiness.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with [Rule 902](#)(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

“Business “as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office’s activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony—or a certification under [Rule 902](#)—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) it is offered in a civil case and:

(i) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(ii) the conviction was for a felony;

(iii) the evidence is admitted to prove any fact essential to the judgment; and

(iv) an appeal of the conviction is not pending; or

(B) it is offered in a criminal case and:

(i) the judgment was entered after a trial or a guilty or nolo contendere plea;

- (ii) the conviction was for a criminal offense;
- (iii) the evidence is admitted to prove any fact essential to the judgment;
- (iv) when offered by the prosecutor for a purpose other than impeachment, the judgment was against the defendant; and
- (v) an appeal of the conviction is not pending.

(23) *Judgments Involving Personal, Family, or General History or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

(24) *Statement Against Interest.* A statement that:

- (A) 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, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) when offered in a civil case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding or in a deposition in a different proceeding; and

(ii) is now offered against a party and the party—or a person with similar interest—had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination.

(B) when offered in a criminal case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding; and

(ii) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or

(iii) was taken in a deposition under—and is now offered in accordance with—chapter 39 of the Code of Criminal Procedure.

(2) *Statement Under the Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement—or a statement described in [Rule 801\(e\)\(2\)\(C\), \(D\), or \(E\)](#), or, in a civil case, a statement described in [Rule 801\(e\)\(3\)](#)—

has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's statement or conduct, offered to impeach the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls

the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Article IX.

Authentication and Identification

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison by an expert witness or the trier of fact with a specimen that the court has found is genuine.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the

number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a statute or other rule prescribed under statutory authority.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed But Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in [Rule 902\(1\)\(A\)](#); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so.

(A) In General. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(B) If Parties Have Reasonable Opportunity to Investigate. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

- (i) order that it be treated as presumptively authentic without final certification; or
- (ii) allow it to be evidenced by an attested summary with or without final certification.

(C) *If a Treaty Abolishes or Displaces the Final Certification Requirement.* If the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces the final certification requirement, the record and attestation must be certified under the terms of the treaty or convention.

(4) *Certified Copies of Public Records.* A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:

- (A) the custodian or another person authorized to make the certification; or
- (B) a certificate that complies with [Rule 902](#)(1), (2), or (3), a statute, or a rule prescribed under statutory authority.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(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.

1. I am the custodian of records [or I am an employee or owner] of _____ and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.
2. Attached are ____ pages of records. These are the original records or exact duplicates of the original records.
3. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. [or It is the regular practice of _____ to make this type of record at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record.]
4. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. [or It is the regular practice of _____ for this type of record to be made by, or from information

transmitted by, persons with knowledge of the matters set forth in them.]

5. The records were kept in the course of regularly conducted business activity. [or It is the regular practice of _____ to keep this type of record in the course of regularly conducted business activity.]

6. It is the regular practice of the business activity to make the records.

(11) *Presumptions Under a Statute or Rule.* A signature, document, or anything else that a statute or rule prescribed under statutory authority declares to be presumptively or prima facie genuine or authentic.

Rule 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Article X.

Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions That Apply to This Article

In this article:

- (a)** A “writing” consists of letters, words, numbers, or their equivalent set down in any form.
- (b)** A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.
- (c)** A “photograph” means a photographic image or its equivalent stored in any form.
- (d)** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout—or other output readable by sight—if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.
- (e)** A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or other law provides otherwise.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.

Rule 1004. Admissibility of Other Evidence of Content

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

- (a) all the originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) an original is not located in Texas;
- (d) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (e) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with [Rule 902\(4\)](#) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under [Rule 1004](#) or [1005](#). But in a jury trial, the jury determines—in accordance with [Rule 104\(b\)](#)—any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

Rule 1009. Translating a Foreign Language Document

(a) *Submitting a Translation.* A translation of a foreign language document is admissible if, at least 45 days before trial, the proponent serves on all parties:

- (1) the translation and the underlying foreign language document; and
- (2) a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate.

(b) *Objection.* When objecting to a translation's accuracy, a party should specifically indicate its inaccuracies and offer an accurate translation. A party must serve the objection on all parties at least 15 days before trial.

(c) *Effect of Failing to Object or Submit a Conflicting Translation.* If the underlying foreign language document is otherwise admissible, the court must admit—and may not allow a party to attack the accuracy of—a translation submitted under subdivision (a) unless the party has:

- (1) submitted a conflicting translation under subdivision (a); or

(2) objected to the translation under subdivision (b).

(d) *Effect of Objecting or Submitting a Conflicting Translation.*

If conflicting translations are submitted under subdivision (a) or an objection is made under subdivision (b), the court must determine whether there is a genuine issue about the accuracy of a material part of the translation. If so, the trier of fact must resolve the issue.

(e) *Qualified Translator May Testify.* Except for subdivision (c), this rule does not preclude a party from offering the testimony of a qualified translator to translate a foreign language document.

(f) *Time Limits.* On a party's motion and for good cause, the court may alter this rule's time limits.

(g) *Court-Appointed Translator.* If necessary, the court may appoint a qualified translator. The reasonable value of the translator's services must be taxed as court costs.