# OBJECTIONS TO EVIDENCE

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**CURRICULUM VITAE OF RICHARD R. ORSINGER**

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**Organizations and Committees:**

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-1997, 1999-2001, 2003-2006) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

**Professional Activities and Honors:**

Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA (1987-to date)
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**Continuing Legal Education and Administration:**

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (2002, 2003)
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Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003, 2004)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94)
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Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

**Books and Journal Articles:**

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce,* 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property,* 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines,* 13 ST. MARY'S L.J. 477 (1982)

**SELECTED CLE SPEECHES AND ARTICLES**

State Bar of Texas' [SBOT] Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003)

SBOT's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003)

SBOT's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!" (1997); The Lawyer as Master of Technology: Communication With Automation (1997); Technology Positioning (1999); Objections Checklist (2000); Evidence from

Soup to Nuts (2000)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003)

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# Objections to Evidence©

by

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**I. SCOPE OF ARTICLE**. This Article discusses admissibility of evidence, proper ways to elicit testimony, meeting predicates for admission of evidence, using demonstrative aids, making evidentiary objections, and preserving the right to complain on appeal about the trial court's evidentiary rulings.

**II. INTRODUCTION**. In this Article, TRCP = Texas Rules of Civil Procedure; TRCE = Texas Rules of Civil Evidence (effective prior to March 1, 1998); TRE = Texas Rules of Evidence (became effective on March 1, 1998); TRAP = Texas Rules of Appellate Procedure (the current TRAPs became effective on September 1, 1997); TCP&RC = Texas Civil Practice & Remedies Code; FRCP = Federal Rules of Civil Procedure; and FRE = the revised Federal Rules of Evidence, effective December 1, 2000.

## III. GENERAL REQUIREMENT TO PRESERVE COMPLAINT

The general requirement that complaints on appeal be preserved in the trial court is set out at TRAP 33.

> **RULE 33. PRESERVATION OF APPELLATE COMPLAINTS**
>
> **33.1 Preservation; How Shown.**
>
> **(a) In general.** As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.
>
> **(b) Ruling by operation of law.** In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.
>
> **(c) Formal exception and separate order not required.** Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

Error is not preserved for appellate review where a party fails to present a timely request, objection or motion, state the specific grounds therefor, and obtain a ruling. *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991); *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ).

## IV. STEPS TO PRESERVATION OF ERROR

### A. VALID COMPLAINT.

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

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

3. Global objections, profuse objections, or those overly general or spurious in nature, preserve no error for review. TRCP 274 (as to objections to jury charge);

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

**B. TIMELY ASSERTED**

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

2. To argue on appeal that the trial court did not follow the law, the complaining party must have presented the legal argument in the trial court. *Hardeman v. Judge*, 931 S.W.2d 716, 720 (Tex. App.--Fort Worth 1996, writ denied) (failure to argue in trial court applicability of Probate Code § 821 precluded arguing that point on appeal). Objections to trial court's actions creating a constructive trust, and awarding attorney's fees, raised for first time on appeal, were too late. *Murphy v. Canion*, 797 S.W.2d 944 (Tex. App.--Houston [14th Dist.] 1990, no writ). *See also Mark Products U.S.. Inc. v. Interfirst Bank Houston, N.A.*, 737 S.W.2d 389 (Tex. App.--Houston [14th Dist.] 1987, writ denied) (motion to compel answers to deposition questions waived by failing to request continuance of summary judgment hearing).

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

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

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

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

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

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

**D. LET THE RECORD REFLECT**

1. The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. TEX. R. APP. P. 33.1(a). *Petitt v. Laware*, 715 S.W.2d 688 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

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

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

**V. OFFER OF PROOF OF EXCLUDED EVIDENCE**. If the trial court excludes tendered evidence, the party who wishes to complain on appeal about the exclusion must make an offer of proof, so that the statement of facts reflects the evidence that was excluded.

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

**VI. AUTHENTICATION REQUIREMENT (GENERALLY)**. No evidence is admissible unless it has been authenticated. This authentication requirement is met by evidence sufficient to support a finding that the matter in question is what its proponent claims. TRE 901. Typical forms of authentication are by testimony of a witness with knowledge, lay opinion on genuiness of handwriting, identification of a voice by someone who has heard the speaker speak, etc. TRE 901(b).

Some documents are self-authenticated: domestic government documents under seal, or if not under seal then attested to under seal by a public officer that the signer had the capacity and the signature is genuine; foreign public documents which are attested and certified as genuine; certified copies of public records; official publications; newspapers and periodicals; trade inscriptions showing ownership, control or origin; acknowledged documents; commercial paper; and business records accompanied by "business records affidavit." TRE 902 ("Self-Authentication").

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

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

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

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

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

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

Cases. *See Ford Motor Company v. Auto Supply Company, Inc.*, 661 F.2d 1171, 1176 (8th Cir.1981) (trial court

properly admitted into evidence product line profitability analyses made annually and compiled from numerous "spread sheets"); *Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir.1980) (trial court properly admitted a summary of the commodity firm's yearly trading activities); *Black Lake Pipe Line Co. v. Union Construction Co., Inc.*, 538 S.W.2d 80, 92 (Tex. 1976) (a proper predicate, as business records, must be laid for the admission of the underlying records used to prepare a summary); *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 800 (Tex. App.–Houston [1 Dist.] 2004, no pet.) (one page summary of eighty-seven pages of supporting data was admissible if it upheld the standards of TRE 1006 and was prepared by a qualified individual); *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 369 (Tex. App.–Fort Worth 1990, no writ) (admission of charts or diagrams which are designed to summarize or emphasize a witness' testimony is a matter which lies within the discretion of the trial court); *Curran v. Unis*, 711 S.W.2d 290, 295 (Tex. App.--Dallas 1986, no writ) (income tax returns are an annual summary of the profitability of the business); *c.f. McAllen State Bank v. Linbeck Construction Corp.*, 695 S.W.2d 10, 16 (Tex.App.-Corpus Christi 1985, writ ref'd n.r.e.) (trial court admitted into evidence two computer printout summary breakdowns, each a summary of underlying labor and material records; the court held that the printouts were entitled to be treated as business records, and not just as summaries of business records).

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

**VIII. THE HEARSAY RULE**. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TRE 801(d). By special definition, a "prior statement by witness," "admission of a party-opponent," and "depositions" in the same case are not hearsay. TRE 801(e). A "statement" is (i) an oral or written verbal expression or (ii) nonverbal conduct of a person that is intended to substitute for a verbal expression. TRE 801(a). A "declarant" is a person who makes a statement. TRE 801(b).

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

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

**X. OFFER FOR LIMITED PURPOSE**. Limited admissibility is covered in TRE 105. The rule arises when evidence is admissible for some purposes but not others, or admissible against some parties but not all parties. Where evidence is admissible for some purposes, but not generally, and the offer of the evidence is made generally, without limitation as to its use, the trial court should exclude the evidence. If the offer is made generally, opposing counsel should object to its admissibility on appropriate grounds. If the objection is sustained, the proponent should re-offer the evidence "for a limited purpose." If accepted by the trial court for a limited purpose, the opponent should move the court for a limiting instruction, whereby the court would instruct the jury that it can consider that evidence only for a limited purpose, and no other. *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) ("Where tendered evidence should be considered for only one purpose, it is the opponent's burden to secure a limiting instruction"); *see Rankin v. State*, 974 S.W.2d 707, 712 (Tex. Crim. App. 1998) (waiting until jury charge stage to instruct jury is too late; court should instruct jury at the time the evidence is received). If the opposing party does not seek such a limiting instruction, the evidence is received for all purposes, even if it was offered only for a limited purpose. *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994); *Cigna Ins. Co. v. Evans*, 847 S.W.2d 417, 421 (Tex. App.--Texarkana 1993, no writ) (where document was read into evidence without a limiting instruction, it was in evidence for all purposes); *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied) (party could not complain that ex-

cluded evidence met state-of-mind exception to hearsay rule when the party made only a general offer of the evidence, and not an offer for the limited purpose of showing state-of-mind). *See Texas Commerce Bank v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 76 (Tex. App.--Corpus Christi 1993, writ denied) (evidence admitted for the limited purpose of punitive damages could not be used on appeal to support the verdict on actual damages).

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

> Proponent offers hearsay for all purposes.
>
> Opponent objects based on hearsay; objection is sustained.
>
> Proponent reoffers the hearsay for limited purpose.
>
> Opponent renews hearsay objection.
>
> Court overrules hearsay objection.
>
> Opponent requests limiting instruction.

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

TRE 803(3) finds frequent use in cases involving children. In *Huber v. Buder*, 434 S.W.2d 177 (Tex. Civ. App.--Fort Worth 1968, writ ref'd n.r.e.), a witness was permitted to relate what three children said about which parent they wanted to live with. *Accord, Melton v. Dallas County Child Welfare Unit*, 602 S.W.2d 119, 121 (Tex. App.--Dallas 1980, no writ), which held that a child's preference on custody fits the state-of-mind exception to the hearsay rule. In *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.--San Antonio 1990, writ denied), out-of-court statements by a girl regarding sexual abuse by her step-father were inadmissible since they related to past external facts or conditions rather than present state of mind. In *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585 (Tex. App.--Eastland 1990, writ denied), an adult was permitted to relate a comment she overheard a child make regarding sexual abuse. In *Baxter v. Texas Dep't. of Human Resources*, 678 S.W.2d 265 (Tex. App.--Austin 1984, no writ), a witness was permitted to relate a child's statements that he had been beaten and was afraid of more beatings, and further that he had seen his parents' pornographic materials. In *James v. Tex. Dep't Hum. Resources*, 836 S.W.2d 236, 243 (Tex. App.--Texarkana 1992, no writ), statements by the children indicating that they had been sexually abused did not meet the state of mind exception. Similarly, in *Couchman v. State*, 3 S.W.3d 155 (Tex. App.–Fort Worth, 1999, pet. ref'd), statements of a 5-year old girl, that a man had molested her, were inadmissible under the state of mind exception, but were admissible under the TRE 803(2) excited utterance exception. In this case, the excitement causing the utterance was the child's burning sensation when taking a bath after the fact, rather than the alleged incident itself.

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

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

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

**XII. ADMISSION OF A PARTY OPPONENT**. An admission by a party-opponent is not hearsay, even if it is an out-of-court statement. TRE 801(e)(2). To be an admission of a party-opponent, the statement must be offered against a party, and it must be (i) the party's own statement, or (ii) a statement made by an agent authorized to speak for the party, or (iii) a statement which the party has ratified, or (iv) a statement by an agent made during the existence of the relationship and relating to matters

within the scope and course of the agency. Statements made by co-conspirators are also included. *Id.* The failure of a party to disclose a fact on a prior occasion can also be an admission that the fact did not exist. *See Waldon v. City of Longview*, 855 S.W.2d 875, 878 (Tex. App.--Tyler 1993, no writ) ("If an event is of such salient importance that the declarant would ordinarily have been expected to relate it, the failure of a party to mention the event in a prior statement may constitute an admission that the event did not occur").

**XIII. "IN THE PRESENCE OF A PARTY" HEARSAY EXCEPTION**. There is a de facto exception to the hearsay rule, sometimes called the "in the presence of the party" rule, that is honored by trial courts although it is without legal support.

Your opponent is eliciting testimony from a witness, and is about to elicit hearsay. You object. Your opponent rises and says: "Your Honor, this conversation occurred in the presence of counsel's client." The judge overrules your hearsay objection. The ruling is wrong, because there is no such exception to the hearsay rule. The rule is probably an over-extension of the concept of an admission of a party-opponent. A statement of a party which is offered against him is defined not to be hearsay. TRE 801(e)(2). Some cases have said that the failure of a party to disagree when a statement is made in his/her presence can operate as an admission by silence if the ordinary person would be expected to disagree with the statement when made. *See Tucker v. State*, 471 S.W.2d 523, 532-33 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 912 (1989). This is not, however, a general rule that all statements made by others in the presence of a party are excepted from the hearsay rule.

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

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

**B. THE "GOVERNMENT RECORD" EXCEPTION TO THE HEARSAY RULE**. Government records, if offered for the truth of the matter stated, are hearsay, and would not be admissible unless an exception to the hearsay rule is met. There is an exception to the hearsay rule which applies to government records. TRE 803(8) provides:

> **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> (A) the activities of the office or agency;
>
> (B) matters observed pursuant to duty imposed by law as to which matters there was a

duty to report excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

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

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

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

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

**C. THE "ABSENCE OF PUBLIC RECORD OR ENTRY" EXCEPTION TO THE HEARSAY RULE**. TRE 803(10) provides:

> To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

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

**XV. BUSINESS RECORDS (HEARSAY EXCEPTION)**.

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

- a memorandum, report, record, or data compilation, in any form
- of acts, events, conditions, opinions, or diagnoses
- made at or near the time
- by, or from information transmitted by, a person with knowledge
- if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation,
- all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10).

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

Proof by Witness. Proof that the records meet the TRE 803(6) exception can be made by "the testimony of the custodian or other qualified witness." TRE 803(6). *E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 154 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (authenticity established by cross-examination of corporate employee who confirmed that the record was "one of you-all's internal documents at one of these various companies"). See *Sholdra v. Bluebonnet Savings Bank*, 858 S.W.2d 533, 534 (Tex. App.--Fort Worth 1993, writ denied) (records not admissible where sponsoring witness failed to testify that records were made by persons with personal knowledge); *Texmarc Conveyor Co. v. Arts*, 857 S.W.2d 743, 748-49 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (record admissible even though

sponsoring witness admitted that he was not familiar with every detail of the record).

Proof by Affidavit. Proof that the records meet the TRE 803(6) exception can also be made by affidavit of the custodian or other qualified witness, where the terms of TRE 902(10) are met. TRE 902(10)(a) provides:

> **(10) Business Records Accompanied by Affidavit.**
>
> (a) *Records or Photocopies; Admissibility; Affidavit; Filing.* Any records or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying.
>
> (b) *Form of Affidavit.* A form for the affidavit of such person as shall make such affidavit as it permitted in paragraph (a) above shall be sufficient if it follows this form, though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice . . . . [form affidavit omitted]

Business records which are to be offered under a self-authenticating affidavit must be filed with the clerk of the court at least 14 days prior to the date trial begins, and prompt notice of filing given to other litigants. The notice must identify the name and employer, if any, of the person making the affidavit. The records must be made available to other counsel for inspection and copying. TRE 902(10)(a).

When business records are admitted under this exception to the hearsay rule, they are admitted for the truth of the matter stated in the records. *Overall v. Southwestern Bell Yellow Pages*, 869 S.W.2d 629, 633 (Tex. App.--Houston [14th Dist.] 1994, no writ). Medical bills and expenses can be proved up through business records affidavit to establish the amount of expenses, but this does not establish that charges were *reasonable* for purpose of recovering them as damages. *Rodriguez-Narrez v. Ridinger*, 19 S.W.3d 531 [Tex. App.–Fort Worth 2000, no writ).

Prepared in Anticipation of Litigation. The Fourth Circuit explained the basis for the business records exception to the hearsay rule, and raised a caution regarding business records prepared for litigation, in *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000):

> Reports and documents prepared in the ordinary course of business are generally presumed to be reliable and trustworthy for two reasons:
>
> "First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records." United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993) (citing United States v. Rich, 580 F.2d 929, 938 (9th Cir. 1978)). The absence of trustworthiness is clear, however, when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating. As Blackburn, 992 F.2d at 670, points out, the Advisory Committee's notes in § 803(6) provide in terms: "[a]bsence of routine raises lack of motivation to be accurate." See also Palmer v. Hoffman, 318 U.S. 109, 114 (1943);[fn3] Scheerer v. Hardee's Food Sys. Inc., 92 F.3d 702, 706-07 (8th Cir. 1996) (stating that a report lacks trustworthiness because it was made with knowledge that incident could result in litigation).
>
> It was undisputed that Underwriters hired Geary to prepare the report specifically for this case. This admission reveals Underwriters's motivation for having the report prepared and precludes it from relying on the business record exception. Underwriters, however, argues that the prohibition against admitting records prepared in

> anticipation of litigation under the business record exception does not apply here because Underwriters, itself, did not prepare the report. Rather, it contracted an outside investigator (Geary) to prepare the report, and Geary regularly prepares and maintains a file of such reports as part of his ordinary course of investigating. We find this argument unpersuasive.

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

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

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

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

**XVI. PROOF OF ATTORNEY'S FEES**. As a general rule, a litigant in Texas courts cannot recover attorney's fees for the lawsuit. However, numerous statutes permit the recovery of attorney's fees. The issue arises as to how to prove up the fees in the lawsuit.

TCP&RC § 38.001 permits the recovery of attorney's fees in suits for services rendered, labor performed, material furnished, freight or express overcharges, lost or damaged freight or express, killed or injured stock, a sworn account, or an oral or written contract. When attorney's fees are sought under this provision, the litigant must be represented by an attorney, must present the claim to the opposing party, and payment must have not been tendered within 30 days after the claim is presented. TCP&RC § 38.002. There is a rebuttable presumption that the usual and customary attorney's fees are reasonable. TCP&RC § 38.003. Where the issue of attorney's fees is tried to the court and not a jury, the court may take judicial notice of the usual and customary fees and the contents of the case file without further evidence. TCP&RC § 38.004. This presumption, and power of judicial notice, are available only when attorney's fees are sought under TCP&RC § 38.001. *See Hasty, Inc. v. Inwood Buckhorn Joint Venture*, 908 S.W.2d 494, 503 (Tex. App.--Dallas 1995, writ denied). Fees sought under other provisions of law must be proved by evidence. *Sheldon Pollack Corp. v. Pioneer Concrete*, 765 S.W.2d 843, 847-48 (Tex. App.--Dallas 1989, writ denied). In *Geochem Tech Corp. v. Verseckes*, 929 S.W.2d 85 (Tex. App.--Eastland 1996, writ requested), appellees sought to recover attorney's fees under the Declaratory Judgments Act (TCP&RC § 37.009). Appellees were represented by several law firms, including Bickel & Brewer. One of the appellees testified that he had received and paid Bickel & Brewer's bill, and was familiar with some of the work done. One of Appellees' other attorneys testified that the hourly rates were reasonable and customary. Appellant objected that the Bickel & Brewer bills were hearsay, and could not be authenticated by the testifying lawyer who was not a member of the firm and had no personal knowledge of the work done by Bickel & Brewer. The appellate court sustained the complaint, noting that the Bickel & Brewer bills were not offered as business records.

**XVII. HEARSAY EXCEPTION FOR PARENTAGE AND GENETIC TESTING REPORTS** TEX. FAM. CODE ANN. § 160.109(b) provides that, in a paternity case, a "verified written report of a parentage testing expert is admissible at the trial as evidence of the truth of the matters it contains." *See State v. Owens*, 893 S.W.2d 728 (Tex. App.--Texarkana 1995) (error to exclude paternity testing results based on hearsay objection), *rev'd and dism'd*, 907 S.W.2d 484 (Tex. 1995). With advances in genetic science and the proliferation of DNA testing, genetic tests have supplanted conventional parentage tests. Section 160.109(b) was amended in 2001 to read "a report of a genetic testing expert is admissible as evidence of the truth of the facts asserted in the report." TEX. FAM. CODE ANN. § 160.621(a) (Vernon, 2004).

**XVIII. RECORDS OF ONE BUSINESS CONTAINED IN RECORDS OF SECOND BUSINESS**. There are circumstances in which the records of one business have been held to be business records of another business. For example, in *Cockrell v. Republic Mtg. Ins. Co.*, 817 S.W.2d 106, 112-13 (Tex. App.--Dallas 1991, no writ), the appellate court said that a document from one business can become a record of another business if the second business determines the accuracy of the information generated by the first business. And in *GT & MC, Inc. v. Texas City Refining, Inc.*, the appellate court found invoices from outside vendors to have become business records of the receiving company, where they became assimilated into company's record-keeping system. *See Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982) (subcontractor's invoices became integral part of builder's records where builder's employees' regular responsibilities required them to verify subcontractors' performance and accuracy of the invoices). In *Harris v. State*, 846 S.W.2d 960, 963 (Tex. App.--Houston [1st Dist.] 1993, pet. ref'd), the manufacturer's certificate of origin from General Motors Corporation, relating to an automobile, was held to be admissible as a business record of the local automobile dealer. However, the principle was not applied in *Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 626 (Tex. App.--Fort Worth 1990, no writ), where the court held that repair bills received by a business for repairs to its equipment were not business records of the business obtaining the repairs.

**XIX. COMPUTERIZED INFORMATION: AUTHENTICATION, BEST EVIDENCE & HEARSAY**

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

Best Evidence Rule. TRE 1001(3) provides that "[i]f data are stored in a computer or similar device, any print-out or other output readable by sight, shown to reflect the data accurately, is an 'original'." In *Robinson v. State*, No. B14-91-00458-CR (Tex. App.--Houston [14th Dist.] 1992, pet. ref'd) (not for publication), the Court held that it was proper to permit a witness to testify to the results of a computer search without qualifying as an expert or presenting computer printouts. In this case, the witness said that a computer search on the bank's computer confirmed that an account number on a suspicious check was fictitious. According to the Court, the best evidence rule was not implicated because the witness was merely explaining the process he went through to determine whether an account number was a valid one with his bank. The Court also said that the best evidence rule did not apply because the evidence was offered to show the non-existence of a bank account. The case raises an interesting question. The best evidence rule objection would go to the computer data reflecting the results of the search. Can the witness properly testify to what the computer search indicated, without introducing into evidence a printout of the results, or is such testimony tantamount to oral testimony as to the contents of a writing? Arguably TRE 1001(3)'s provision, that the best evidence rule is met by a print-out or "other output readable by sight," applies to print-out brought to court or output readable by sight in the courtroom.

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

printouts of phone traces were not hearsay because such printouts did not rely on the assistance, observations, or reports of a human declarant. The print-out was "merely the tangible result of the computer's internal operations." In *State v. Armstead*, 432 So.2d 837, 839-41 (La. 1983), the Louisiana Supreme Court held that computerized records of phone traces were not hearsay, in that they were computer-*generated* rather than computer-*stored* declarations. *Burleson v. State*, 802 S.W.2d at 439 n. 2.

In *May v. State*, 784 S.W.2d 494, 497 (Tex. App.--Dallas 1990, pet. ref'd), the appellate court held that numbers viewed on an intoxilyzer's computer screen were hearsay. *May* in turn relied upon *Vanderbilt v. State*, 629 S.W.2d 709, 723-24 (Tex. Crim. App. 1981), which held that it was improper for the state's firearm witness, not testifying as an expert, to relate that a computer search of an FBI database rendered a print-out of a list of weapons that could generate the ballistic markings on the bullet in question, and that the gun in question was on that list. The Court of Criminal Appeals cited to an earlier case where it had held it to be error for a witness to repeat in front of the jury information obtained from a computer database. *See Vanderbilt*, 629 S.W.2d at 723. The conclusion reached in *May* was criticized in Schlueter, *Hearsay--When Machines Talk*, 54 TEX. B.J. 1135 (Oct. 1990). It is apparent that in *May* the Dallas Court of Appeals did not distinguish testimonial information contained in a computer information file from computer-generated calculations based on a scientific algorithm, with no component of human communication. This error was rectified in *Stevenson v. State*, 920 S.W.2d 342 (Tex. App.--Dallas 1996, no pet.), which said: "We overrule *May* only as to the language that refers to the intoxilyzer result, itself, as hearsay." *Id.* at 344.

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

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

When a computer program takes data and processes it to reach a result, there can be serious questions about the validity of the process. If the input is hearsay, then the output is hearsay. If the hearsay input meets an exception to the hearsay rule, then the output should meet the same exception. In many instances, the calculations or processing performed by the computer program will require proof of accuracy. The validity of standardized software, such as a Texas Instruments business calculator, are not suspect and should be easy to authenticate. For proprietary software that makes calculations or generates charts or graphs based on non-standardized programming, the validity of the program is definitely in issue. For example, in an electronic spreadsheet, the proponent will need to establish that correct formulas were entered into the spreadsheet. Professor Raymond R. Panko, of the University of Hawaii College of Business Administration, published a paper in 1998 entitled *What We Know About Spreadsheet Errors*. Prof. Panko said: ". . . [A] number of consultants, based on practical experience, have said that 20% to 40% of all spreadsheets contain errors." Prof. Panko also cites a number of scientific studies of spreadsheet programming that suggest high error rates are common. Prof. Panko goes on to dissect the process of spreadsheet programming to determine areas of likely errors. In specially-designed software, the validity of the programming approach can be a big concern. An example would be a computer-based model used to calculate future lost profits. In such situations, the underlying code should be made available in discovery so that the operation of the program can be checked and the program can be tested.

E-Mail. Special problems are presented by electronic mail (email).

Authentication. TRE 901(a) requires, as a condition to admissibility, that the party offering an exhibit produce evidence sufficient to support a finding that the matter in question is what its proponent claims. There can be complications surrounding proof of the authorship of an email message, and the accuracy of the permanent record of the email transmission. Some email software makes it possible to falsely attribute email to another sender. An email produced by the opposing party in discovery can be authenticated for use against that party by giving notice under TRCP 173.7, if the producing party does not object.

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

Hearsay. An email message is an out-of-court statement, and is potentially hearsay. An email message is not hearsay if it is not offered for the matter asserted TRE 801(c), or if it is an admission of a party opponent, TRE 801(e)(2). If the email message is hearsay, then the proponent must find an exception to the hearsay rule that applies. In *Vermont Electric Power Co., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F. Supp.2d 441 (D. Vt. 1999), emails between a corporation's employees

were admitted as admissions of a party opponent. In *U.S. v. Ferber*, 966 F.Supp. 90, 98 (D. Mass. 1997), the issue was the admissibility of an intra-company email that recounted a telephone conversation. The trial court rejected an argument invoking the business record exception to the hearsay rule, on the ground that the proponent failed to prove that the business had a routine business practice of regularly maintaining copies of emails sent between employees. The court also rejected the email as an excited utterance under FRE 803(2), since it was made several moments after the telephone conversation recounted in the email. *Id.* at 99. However, the court admitted the email as a present sense impression, under FRE 803(1). The business record exception was rejected for an email message in *Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994). Because of this troubling precedent, some authors suggest that companies enact specific internal policies on email retention. *See* Robert L. Paddock, *Utilizing E-Mail as Business Records Under the Texas Rules of Evidence*, 19 REV. OF LITIG. 61, 67 (2000) (citing articles to that effect).

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

**XX. SOCIAL STUDIES**. Social studies prepared under the Texas Family Code present interesting questions regarding admissibility. The following may be helpful in evaluating the question.

**A. CONTROLLING FAMILY CODE PROVISIONS**. Section 107.051(a) of the Texas Family Code provides that, in a suit affecting the parent-child relationship, the court may order the preparation of a social study. The social study may be made by any person appointed by the court. The study must comply with the rules of the Texas Department of Human Services which relate to minimum standards, guidelines and procedures for social studies, or according to criteria established by the court. The person making the social study must file his or her findings and conclusions with the court. Section 107.054 further provides that, "[t]he report shall be made a part of the record of the suit." Section 107.055(a) provides that "[d]isclosure to the jury of the contents of a report to the court of a social study is subject to the rules of evidence." The Family Code thus expressly authorizes the admission of the social study into evidence before a jury, "subject to the rules of evidence."

**B. SUPREME COURT AUTHORITY**. In the case of *Green v. Remling*, 608 S.W.2d 905 (Tex. 1980), the Supreme Court analyzed in detail the legal basis for the admission of a social study into evidence. In *Green v. Remling*, the Supreme Court made it clear that a trial judge may read and consider the entire contents of a social study without the necessity of marking it as an exhibit and admitting it into evidence. When the disclosure of the social study to the jury is involved, normal rules of evidence apply. The Court said:

> The inclusion of the social study in the "record" makes it unnecessary to formally introduce it in evidence. It is before the court for all purposes, but only those portions of the study which are admissible under the rules of evidence may be disclosed to the jury.

*Id*. at 909-10.

**C. THE RULES OF EVIDENCE**. Section 104.001 of the Texas Family Code provides that "[t]he Texas Rules of Civil Evidence apply as in other civil cases." TEX. FAM. CODE ANN. § 104.001. A court-ordered social study filed with the clerk of the court may fit the definition of "public records and reports," which are an exception to the hearsay rule. Social studies almost invariably are filed with the Clerk of the Court. They may constitute records, reports, statements, or data compilations of the Court, and of the Clerk of the Court. The reports set forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." The reports also consist of "factual findings resulting from an investigation made to the authority granted by law." Thus, the social studies may fall within the exception to the hearsay rule set out in TRE 803(8). This was the holding of *Bingham v. Bingham*, 811 S.W.2d 678, 684 (Tex. App.--Fort Worth 1991, no writ). Additionally, Section 107.055(a) of the Texas Family Code makes it clear that the social study may be disclosed to the jury, subject to the rules of evidence. TEX. FAM. CODE ANN. § 107.055(a).

Additional problems arise with regard to hearsay contained within the social study. Social studies are typically laces with statements made by third parties to the social worker.

Many social study consist of three parts: (i) the general description of the parties and the situation; (ii) specific findings and recommendations of the social worker; (iii) witness-by-witness recitations of what various collateral contacts said to the social worker. A trial court could logically justify admitting category (ii), but not (i) or (iii). A trial court could logically justify letting in category (i) and (ii), but not category (iii). A trial court could logically justify letting in all three categories. In the Author's experience, one trial judge let in all three categories of information on the ground that the expert was disclosing on direct examination the underlying facts or data, as permitted by TRE 705. The court further reasoned that all

parties had had the social study for some time, and that if the recitals in the social study were wrong, the other party could have raised a complaint as to inaccuracy, called the person in question to testify to the contrary of what was in the social study, or taken that person's deposition. *See All Saints Episcopal Hosp. v. M.S.*, 791 S.W.2d 321, 322 (Tex. App.--Fort Worth 1990) (although report by DHS social worker met hearsay exception of TRE 803(8), parts of report containing third party hearsay was not admissible), *vacated pursuant to settlement*, 801 S.W.2d 528 (Tex. 1991); *Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68, 71 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.) (portions of officer's accident report not admissible since they were hearsay descriptions of the accident by occupants of two vehicles involved in the accident).

**D. OTHER AUTHORITIES**. There are other evidentiary rules which could make the contents of a social study admissible into evidence. Under TRE 801(e)(2), an admission by a party-opponent is not hearsay. To a constitute an admission by a party-opponent, the statement need only be offered against a party where the statement is (A) his own statement in either his individual or representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Typically, a social study might contain a number of admissions by parties. These comments are not hearsay if offered by the opposing party. Various statements could also fit hearsay exceptions defined in Rule 803 of the Texas Rules of Evidence. For example, statements in a social study could reflect a then-existing mental, emotional, or physical condition, which is an exception to the hearsay rule under Rule 803(3). If the disclosures constitute reputation concerning personal or family history, they are an exception to the hearsay Rule 803(19). Certain statements could constitute reputation as to character, fitting the exception contained in Rule 803(21). Other comments could constitute statements against interest, an exception under Rule 803(24).

**XXI. AUTHENTICATION OF AUDIOTAPES**. The general rule regarding the admissibility of tape recordings of conversations is stated in *Boarder to Boarder Trucking, Inc. v. Mondi, Inc.*, 831 S.W.2d 495, 497 (Tex. App.--Corpus Christi 1992, no writ):

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

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

The same rule was previously applied in criminal cases. *See Edwards v. State*, 551 S.W.2d 731, 733 (Tex. Crim. App. 1977) (applying 7-step test to tape recordings). However, the Court of Criminal Appeals has abandoned the *Edwards* approach, in favor of the general methods of authentication set out in the Texas Rules of Evidence, such as distinctive characteristics, voice identification, call to phone number assigned to a particular person or business, corroborated by surrounding circumstances; process or system; etc. *Stapleton v. State*, 868 S.W.2d 781, 786 (Tex. Crim. App. 1994) (although police department tape recording was properly authenticated by TEX. R. CRIM. EVID. 901(a), the tape recording did not meet the business record exception to the hearsay rule because no one associated with police department had personal knowledge about things said on the tape). *See Narvaiz v. State*, 840 S.W.2d 415, 431 (Tex. Crim. App. 1992) (police department tape of 911 call admitted based on testimony police dispatcher who took the call); *Allen v. State*, 849 S.W.2d 838, 842 (Tex. App.--Houston [1st Dist.] 1993, pet. ref'd) (unnecessary to identify background voices as condition to admitting tape); *Leos v. State*, 883 S.W.2d 209 (Tex. Crim. App. 1994) (error to admit tape recording where some of the voices on the tape were not identified); *Brooks v. State*, 833 S.W.2d 302, 305 (Tex. App.--Fort Worth 1992, no pet.) (duplicate copy of tape recording of 911 call was properly authenticated, even though it was electronically enhanced to remove tape hiss). Using the more modern approach to authentication, the Court of Criminal Appeals ruled a videotape inadmissible in *Kephart v. State*, 875 S.W.2d 319 (Tex. Crim. App. 1994).

Under the new rule of the *Stapleton* case, the ordinary methods of authentication apply. *See* Schlueter,

*Authentication: Audio and Videotapes Revisited*, 57 TEX. B.J. 981 (1994).

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

Note that there can still be a hearsay problem, even when audiotapes have been authenticated.

**XXII. COMMUNICATIONS ILLEGALLY INTERCEPTED BY PRIVATE PERSONS.**

**A. OVERVIEW OF FEDERAL LAW**. In *U.S. v. Olmstead*, 277 U.S. 438 (1928), the Supreme Court held that the Fourth Amendment protection against search and seizure did not apply to a wiretap installed without physical intrusion into a home or office. Congress thereafter adopted the Communications Act of 1934, which prohibited intercepting communications without the consent of the sender. 47 U.S.C. § 605. In *Katz v. U.S.*, 389 U.S. 347 (1967) ("bug" on exterior of telephone booth), the Supreme Court revised its analysis, and held that the Fourth Amendment applied to areas in which the person had a reasonable expectation of privacy. In 1968, Congress enacted the Federal Wiretap Act, which prohibited the interception of wire communications (i.e., telephone) and oral communications. In 1986, Congress enacted the Electronic Communications Privacy Act (ECPA), which extended the wiretap prohibition to mobile and cellular telephones and to electronic communications (i.e., email). However, capturing the broadcast portion of portable house telephones was not prohibited. In 1994, the ECPA was amended to protect the broadcast portion of portable telephones. After the disaster on September 11, 2001, Congress enacted the USA Patriot Act, which revised the Federal Wiretap Act, the Electronic Communications Privacy Act, and the Foreign Intelligence Surveillance Act. *See* Robert A. Pikowsky, *An Overview of the Law of Electronic Surveillance Post September 11, 2001*, 94 LAW LIBR. J. 601 (2001).

The Fifth Circuit Court of Appeals once described the Federal Wiretap Act as being "famous (if not infamous) for its lack of clarity." *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 462 (5th Cir. 1994).

**B. INTERCEPTED ORAL COMMUNICATIONS**. Both federal and Texas statutes prohibit the electronic interception of a voice communication unless at least one party to the communication knows of and consents to the interception at the time of interception. 18 U.S.C.A. §§ 2510 et seq.; TEX. PEN. CODE § 16.02. Both the federal statute and the Tex. Civ. Prac. & Rem. Code § 123.001 ("Interception of Communication") recognize a cause of action for such illegal behavior, with statutory damages of (i) up to $100 per day for a maximum of $10,000 (federal) or (ii) $10,000 damages per incident (Texas law), plus actual damages in excess of $10,000, etc. The application of the federal and state statutes was exhaustively examined in *Peavy v. WFAA-TV, Inc.*, 221 F.2d 158 (5th Cir. 2000). Among other things, *Peavy* indicates that a client's disclosure of the content of illegally-made tapes to an attorney is prohibited by the statute; an exception is recognized for attorney-client discussions that occur in the context of a suit or prosecution over the tapes in question.

**C. 4TH AMENDMENT EXCLUSIONARY RULE**. An issue arises as to whether an illegally-intercepted communication can be used in a civil court proceeding.
Criminal law provides that *unconstitutionally*-acquired evidence cannot be used by the *government* against a defendant. *See Weeks v. U.S.*, 232 U.S. 383 (1914) (under the so-called "exclusionary rule," evidence obtained by the government in violation of the defendant's constitutional rights cannot be used in federal prosecution); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the *Weeks* rule to state court prosecutions). The U.S. Supreme Court, in determining whether to exclude unconstitutionally-acquired evidence from a civil proceeding involving the U.S. government, balances the likely social benefits of applying the exclusionary rule against the cost of excluding the evidence. *U.S. v. Janis*, 428 U.S. 433 (1976). In *Janis*, the exclusionary rule prevailed in a federal income tax case brought against a "bookie." The exclusionary rule lost out in *Immigration & Naturalization Serv. v Lopez-Mendoza*, 468 U.S. 1032 (1984), a civil deportation proceeding. These matters are explored in detail in *Vara v. Sharp*, 880 S.W.2d 844 (Tex. App.--Austin 1994, no writ), where evidence seized in derogation of constitutional privacy rights was excluded from a state tax proceeding.

The Eleventh Circuit Court of Appeals has held that the Fourth Amendment does not apply to searches by private persons, unless they are acting as an instrument or agent of the government. *United States v. Ford*, 765 F.2d 1088, 1090 (11th Cir. 1985). Under this view, the U.S. Constitution does not provide a basis for excluding communications illegally intercepted by private individuals who are not acting on the government's behalf.

Is There a Common Law Exclusionary Rule in Private Civil Litigation? The public policies announced in connection with the criminal exclusionary rule involve deterrence against the government violating the constitutional rights of persons. The policies do not apply to civil litigation between private persons.

One Texas case held that in civil suits evidence otherwise admissible may not be excluded because it has been wrongfully obtained. *Sims v. Cosden Oil & Chem. Co.*,

663 S.W.2d 70, 73 (Tex. App.--Eastland 1983, writ ref'd n.r.e.). Testimony of a real estate appraiser was suppressed in *Schenck v. Ebby Halliday Real Estate*, 803 S.W.2d 361, 372-73 (Tex. App.--Fort Worth 1990, no writ), where the appraiser trespassed on the opposing party's real estate to make his appraisal. However, this was done as a discovery sanction and not pursuant to a civil "exclusionary rule."

**D. FEDERAL STATUTORY RULE OF EXCLUSION.** The Federal Wiretap Act provides that "[w]henever any wire . . . communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." 18 U.S.C. § 2515. "Wire communication" is defined as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection. . . ." 18 U.S.C. 2510(1). An aural transfer involves the ear, and so has been interpreted by federal courts to include live conversations between people, and voice mail messages, but not email.

In *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that retrieving someone else's stored voicemail message, without consent, is an "interception" under the Federal Wiretap Act. Thus the voicemail message must be excluded from evidence at trial. The subsequently-adopted USA Patriot Act brought voicemail under the Stored Communication Act, and thus negates *U.S. v. Smith*'s application of the FWA's rule of exclusion to purloined voicemails.

**E. TEXAS CASES ON ILLEGAL INTERCEPTION.** In *Turner v. P.V. Int'l. Corp.*, 765 S.W.2d 455, 469-70 (Tex. App.--Dallas 1988), *writ denied*, 778 S.W.2d 865 (Tex. 1989) (per curiam), the court of appeals held that the Federal anti-wiretapping statute precludes admission of tapes of telephone conversations that were recorded in violation of the statute. In that case the Supreme Court, by per curiam opinion, stated that it was reserving its judgment regarding the illegality and admissibility of wiretap tapes. *See Fabian v. Fabian*, 765 S.W.2d 516, 518 (Tex. App.--Austin 1989, no writ) ("fruit of the poisonous tree" argument rejected because information came from sources other than wiretap); *Kortla v. Kortla*, 718 S.W.2d 853, 855 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) ("tape recordings, even if obtained without the consent of a party to it, are admissible if the proper predicate is laid"). In *Collins v. Collins*, 904 S.W.2d 792 (Tex. App.--Houston [1st Dist.] 1995), *writ denied*, 923 S.W.2d 569 (Tex. 1996) (per curiam), the First Court of Appeals sitting en banc reversed a divorce and custody case in which the court-appointed mental health expert had listened to tape-recordings of conversations that the court of appeals believed had been illegally recorded. The Court held that illegally taped recordings cannot be used in a civil proceeding.

The Texas Supreme Court analyzed the ECPA in *In re CI Host, Inc.*, 92 S.W.3d 514 (Tex. 2002). In this case, customers of an internet service provider (ISP) initiated a class action against the ISP, and sought through discovery back-up tapes of it web hosting and email activities. The ISP argued that the Stored Communication Act made stored emails privileged. The plaintiffs argued that information on the back-up tapes, other than emails, did not fall within the Act, and that the Stored Communication Act protects emails only while in temporary, intermediate storage, prior to the time they are received by the addressee. The trial judge ordered disclosure. Because the ISP did not prove its privilege properly, the Supreme Court refused to mandamus the trial judge. However, the Supreme Court expressed concern that privacy rights of third parties had been waived without their notice, and so referred the matter back to the trial court to address these privacy considerations as the case proceeds.

**F. INTERSPOUSAL INTERCEPTION.** There is disagreement among the courts as to whether the federal statute prohibits one spouse from surreptitiously tape-recording the other spouse in the family home. The Fifth Circuit Court of Appeals said no, in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974), and the Second Circuit Court of Appeals agreed. *See Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977). Other courts disagree, and say that the behavior is illegal as between spouses in the family home. *See Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *U.S. v. Jones*, 542 F.2d 661 (6th Cir. 1976). The El Paso Court of Appeals, in *Duffy v. State*, 33 S.W.3d 17, 24 (Tex.App.--El Paso 2000, no pet.), affirmed a conviction where a divorcing husband connected a tape recorder to the telephone in his own home, and recorded his wife talking on the telephone. The Court of Appeals rejected the husband's argument that placing of a device on one's own telephone, even if the device records the telephone conversations of the person's spouse, should not be a violation of the Texas statute. Thus, the *Simpson* exception was not recognized for the state statute.

**G. E-MAIL**. Title I of the ECPA of 1986 updated the Federal Wiretap Act of 1968, and expanded the prohibition against intercepting to include email communications. 18 U.S.C. §§ 2510 - 2520. However, the ECPA treats email differently from voice communication, as explained below.

**1. Contemporaneous Interception.** The Fifth, Ninth and Eleventh Circuit Courts of Appeals have held that "intercepting" an email can occur only while the email is in transit, and not after it has been received by the recipient's internet service provider. *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2002); *U.S. v. Steiger*, 318 F.3d 1039 (11th Cir. 2003). Stated differently, under this view the Federal Wiretap Act prohibits only acquisitions of email that are

contemporaneous with transmission. As noted by one author, the window of prohibited activity for email lasts only a few seconds, or even mili-seconds–the time it takes for a newly-composed email message to travel from the sender to the receiver's internet service provider. Jarrod J. White, *E-Mail @ Work.com: Employer Monitoring of Employee E-Mail*, 48 ALA. L. REV. 1079, 1083 (1997). As a practical matter, it is only keystroke loggers (like the Federal government's *Magic Lantern*), or "sniffers"(like the FBI's *Carnivore*) that captures email messages in transit, or "re-routing software" that surreptitiously sends duplicate copies of a sender's email to a third person, that would fit the contemporaneous requirement of the Federal Wiretap Act. The most likely offenders would be employers who contemporaneously capture email traffic of their employees, and employer who do that are well-advised to establish employee consent. *See generally* Comment, *The "Magic Lantern" Revealed: A Report of the FBI's New "Key Logging" Trojan and Analysis of Its Possible Treatment in a Dynamic Legal Landscape*, 20 JOHN MARSHALL J. COMPUTER & INFO. LAW 287 (2002).

On 9-6-2001 *Wired News*, at the following URL, described an AP report of a husband charged with e-mail snooping on his estranged wife. Go to <http://www.wired.com/news/ privacy/0,1848,46580,00.html>and search for "eblaster." The husband installed "eblaster" software on his wife's computer that "caused all her Web surfing and Internet communication to be e-mailed to Brown as frequently as every 30 minutes without her knowledge . . ." A friend of the husband reported the incident to the Michigan Attorney General's High Tech Crime Unit, and the husband's computer equipment was seized. The husband was charged with installing an eavesdropping device, eavesdropping, using a computer to commit a crime and having unauthorized computer access. You can see the AG's press release on this case at http://www.ag.state.mi.us/press_release/pr10251.htm.

**2. No Rule of Exclusion for E-Mail.** The Eleventh Circuit has held that while the Federal Wiretap Act, as amended in 1986, makes it illegal to intercept electronic communications, it does not provide a basis for excluding illegaly intercepted electronic communications from litigation. *U.S. v. Steiger*, 318 F.3d 1039, (11th Cir. 2003). Under this view, illegal interceptions of wire (i.e., telephone) and oral interceptions are excluded from evidence, but illegal interceptions of email are not excluded from evidence. *Accord*, *United States v. Meriwether*, 917 F.3d 955, 960 (6th Cir. 1990); *United States v. Reyes*, 922 F.Supp. 818, 837 (S.D.N.Y. 1996).

**H. CAPTURING STORED COMMUNICATIONS.** Title II of the ECPA is the Stored Communication Act, which regulates privacy of stored communications. The Act prohibits any person from "intentionally acces[sing] without authorization a facility through which an electronic communication service is provided . . . and thereby obtains . . . access to a wire . . . communication while it is in storage in such system" 18 U.S.C. § 2701.

The Stored Communication Act provides for criminal punishment, 18 U.S.C. § 2701(b), and civil damages, 18 U.S.C. § 2707, but it contains no rule of exclusion that would prohibit the use of such evidence in trial. *See United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998).

In *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that illegally retrieving a stored voicemail message is an interception that violates the Federal Wiretap Act, not the Stored Communications Act. Thus the statutory rule of exclusion under the Federal Wiretap Act was applied to the voice mail. The USA Patriot Act more clearly describes voice mails as stored communications, probably negating *U.S. v. Smith*'s idea that the FWA's rule of exclusion applies to voicemails.

**I. CRIMINAL RISK TO LAWYERS FOR USE.** Lawyers should be aware that the proscriptive statutes bring criminal and civil sanctions to bear not only against one who makes illegal interceptions, but also one who merely uses them.

> Defendant, an Ohio attorney, was retained . . . by David Ricupero to represent him in a divorce action . . . . During a one-week period . . ., Mr. Ricupero intercepted and recorded all telephone calls at the Ricupero's marital home without Mrs. Ricupero's prior knowledge or consent . . . . Mr. Ricupero gave these tapes to the defendant for use in the divorce proceeding and represented that he had recorded the telephone conversations with his wife's knowledge . . . . During the defendant's cross-examination of Mrs. Ricupero he used the written summaries of the transcripts in an attempt to impeach her testimony . . . . The defendant was convicted on counts 4, 6 and 8 of the indictment for using the contents of the non-consensual recordings in violation of section 2511(1)(d) on three subsequent occasions. [Fn] Mr. Ricupero was granted use immunity for his testimony in the defendant's trial and was not prosecuted under Title III."

*United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992).

**XXIII. INVOKING FIFTH AMENDMENT; STRIKING OF PLAINTIFF'S PLEADINGS**.

Invoking the Privilege. A witness in a civil proceeding can invoke the self-incrimination privilege. *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972). For non-parties, it must be done outside the presence of the jury, "to the extent practicable." TRE 513. See *In re L.S.*, 748 S.W.2d 571, 575 (Tex. App.--Amarillo 1988, no writ) (where witness testified fully on some questions and only selectively invoked his privilege against self-incrimination, impracticable to isolate invocation of privilege outside presence of jury). A *party* can be required to invoke the privilege *in the presence of the jury*, and opposing counsel *can comment* to the jury and the jury may draw an inference therefrom. TRE 513(c).

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

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

Once having related part of a transaction, a witness cannot thereafter assert the Fifth Amendment in order to prevent disclosure of additional, relevant facts. *Draper v. State*, 596 S.W.2d 855, 857 (Tex. Crim. App. 1980). "If [a witness] voluntarily states a part of the testimony, he waives his right, and cannot afterwards stand on his [Fifth Amendment] privilege." *Id.*, citing *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438 (1951). Each additional question may raise new potential for self-incrimination, and therefore, once the witness invokes the privilege, the court must determine ". . . whether the question present[s] a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures." Rogers v. United States, 340 U.S. 367, 374, 71 S. Ct. 438, 442 (1951).

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

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

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

**XXIV. WITNESS REFRESHING MEMORY**. A witness is permitted to refresh his or her memory by looking at notes or prior writings. However, under TRE 612, if a witness uses a writing to refresh his memory for

purposes of testifying, the opposing party may be able to see that writing. If the witness uses the writing to refresh memory *while testifying*, the opposing party's right to see the writing is absolute. If the witness uses the writing to refresh memory before testifying, the other party can see the writing if the trial court in its discretion determines is it necessary in the interest of justice. *See City of Dennison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.--Dallas 1986, no writ).

**XXV. TELEPHONE DEPOSITIONS**. Telephone depositions can present a problem regarding the swearing of the witness. TRCP 199.1(b) requires that the oath be administered by a person present with the witness and who is authorized to administer oaths in that jurisdiction, but the court reporter is not required to be in the presence of the witness. An earlier case had held that it is permissible for the court reporter to administer the oath to the unseen deponent over the telephone, *provided the witness ultimately swears to the deposition under oath in the presence of a notary public. Clone Component Distributors of America, Inc. v. State*, 819 S.W.2d 593, 597-98 (Tex. App.--Dallas 1991, no writ); *see Green v. Reyes*, 836 S.W.2d 203, 213 n. 10 (Tex. App.--Houston [14th Dist.] 1992, no writ) (agreeing that court reporter need not be in room with deponent). It appears that TRCP 199.1(b) has eliminated the *Clone Component* option of having no swearing officer beside the witness during the deposition, and imposing the oath by having the witness swear to the deposition when it is signed.

The *Clone Component* case also considered the use of exhibits in a telephone deposition. The appellate court suggested that the exhibits could be mailed to the witness in advance, pre-marked with exhibit numbers. The exhibits could then be attached to the deposition and the deponent could check the legitimacy of the exhibits before swearing to the written transcription of the deposition. Another alternative suggested by the court is to telefax the exhibits to the witness during the deposition.

If there is a possibility that someone might coach the witness on the unseen other end of the telephone line, arrange to videotape the deponent while he is testifying. *See* Branton, *Deposition Problems: The Obstructive Lawyer; Objections, Payment, Duty to Supplement, Etc.*, STATE BAR OF TEXAS ADVANCED EVIDENCE AND DISCOVERY COURSE P-5 (1991).

**XXVI. USING DEPOSITION FROM ANOTHER CASE**. TRE 804(b)(1) ("Hearsay Exceptions; Declarant Unavailable") creates an exception to the hearsay rule for the testimony of a witness given at a prior hearing in the same or another case, or testimony given in a deposition taken in another case, if the party against whom the testimony is now offered, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In *Keene Corp. v. Rogers*, 863 S.W.2d 168, 176-77 (Tex. App.--Texarkana 1993, bankruptcy filed), a party offered a deposition of an expert witness taken in 1983, in a case against the same corporate defendant, regarding when the witness informed the corporation about the dangers to workers of products containing asbestos. The tender was rejected, because there was no showing that the witness was "unavailable." The Court remarked that "[I]n Texas, unavailability of a witness means that the witness is dead, has become insane, is physically unable to testify, is beyond the jurisdiction of the court, or that the whereabouts of the witness is unknown and that a diligent search has been made to find the witness, or that the witness has been kept away from the trial by the adverse party." *Id.* at 177. *See Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975). In the present case, counsel only made the unsworn assertion that the witness was aged and no longer appearing live in court cases.

**XXVII. EDITING AND MIXING VIDEOTAPE DEPOSITIONS**. In editing a videotaped deposition for playing at trial, what is the propriety of switching around questions and answers so that they flow in a different sequence from the original sequence?

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

**XXVIII. IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT**. The rule for impeaching a witness with a prior inconsistent statement is TRE 613:

- before further cross-examination regarding the prior inconsistent statement, and before any proof is made regarding the content of the statement, the examiner must: tell the witness (i) the contents of the statement and (ii) the time, place and person to whom it was made and must (iii) give the witness an opportunity to explain or deny the prior inconsistent statement.

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

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

Thus, under TRE 613(a), prior to examining a witness about a prior inconsistent statement, counsel must tell the witness the contents of the statement, and the time and place and to whom the statement was made, and must afford the witness an opportunity to explain or deny the statement. Extrinsic evidence of the prior statement is admissible only if the witness does not unequivocally admit making the statement. The questioner need not show the statement, if in writing, to the witness. However, the other attorney is entitled to see it in writing.

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

*See U.S. v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994), cert. denied ____ U.S. ____, 115 S. Ct. 1969 (1995) (where witness testified differently from a prior statement, the prior inconsistent statement was admissible as *substantive evidence*, despite the fact that it is hearsay). *See Chance v. Chance*, 911 S.W.2d 40, 54 (Tex. App.--Beaumont 1995, writ denied) (where witness made 16 denials of prior statements, it was proper to play a tape of the conversation for rebuttal and impeachment purposes).

**XXIX. IMPEACHMENT BY PRIOR DEPOSITION TESTIMONY**. A question arises as to whether or not the rule regarding impeachment by prior inconsistent statement applies to prior contradictory deposition testimony.

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

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

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

**XXXI. THE RULE OF OPTIONAL COMPLETENESS**. The Rule of Optional Completeness, TRE 106, says that when one party introduces part of a writing or recorded statement the adverse party may then or later introduce any other part or any other writing or recorded that in fairness ought to be considered contemporaneously. *Azar Nut Co. v. Caille*, 720 S.W.2d 685 (Tex. App.--El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987), extends the application of the doctrine to a letter written in response to another letter which was admitted into evidence. TRE 106 specifically applies the rule to depositions. Justice Nathan Hecht, in Hecht, *Common Evidence Problems*, STATE BAR OF TEXAS ADVANCED EVIDENCE AND DISCOVERY COURSE pp. DD 4-6 (1990), suggested that the rule does not apply to ordinary oral testimony.

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

**XXXIII. RELIABILITY OF EXPERT'S METHODOLOGY**.

**A. THE CASE LAW.** In the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), the U.S. Supreme Court held that Federal Rule of Evidence 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. Under Rule 702, the expert's opinion must be based on "scientific knowledge,"

which requires that it be derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed factors for the trial court to consider: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. *See Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995) (Gonzalez, J., concurring) (applying the *Daubert* analysis to an expert's testing of pigs' feet and rejecting the test results as not being sufficiently scientific); *America West Airline Inc. v. Tope*, 935 S.W.2d 908 (Tex. App.--El Paso 1996, no writ) (somewhat unorthodox methods of mental health worker did not meet the admissibility requirements of *Robinson*). Ordinarily, the burden is on the party offering the evidence, to establish the admissibility of such scientific evidence. *Du Pont*, at 557.

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

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

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

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

The Court said:

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

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

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

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

The reliability requirement for expert testimony has become one of the most controversial evidentiary issues, nationwide. Virtually every week some court in the USA makes a ruling on *Daubert* or *Robinson*-like issues. The Fifth Circuit Court of Appeals issued a lengthy en banc opinion overturning a panel decision and saying that *Daubert* reliability standards applied to a clinical physician. *See Moore v. Ashland Chemical Co., Inc.*, 95-20492 (5th Cir. Aug. 14, 1998) (en banc). In *Kumho Tire Co. v. Carmichael*, __ U.S. __, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999), the U.S. Supreme Court said that the principles of *Daubert* apply to all experts, and where objection is made the court must determine whether the evidence has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id.*

Texas Supreme Court cases on expert witness reliability include:

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

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

- *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002)--the Court ruled inadmissible real estate valuation testimony relating to a condemned parcel of land, where the expert calculated his value based on the condemnation project which, under the project-enhancement rule, is not a value for which a landowner may recover.

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

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

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

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

- *Romero v. KPH Consol., Inc.*,48 Tex. Sup. Ct. J. 752 , 2005 WL 1252748 (Tex. May 27, 2005)–the Supreme Court held that expert testimony is required to support liability of a hospital for malicious credentialing of a surgeon. The Court also held that the unsupported opinion of a medical expert was legally insufficient to establish that the hospital was consciously indifferent to the risk of harm to the patient.

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

**B. REVISED FRE 702.** On December 1, 2000, amendments to the Federal Rules of Evidence became effective. FRE 702 was modified to read as follows:

> **Rule 702. Testimony by Experts**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

**C. PRESERVING THE COMPLAINT.** There are several ways to raise objection to the reliability of an expert's methodology.

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

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

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

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

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

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

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

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

**"No Evidence" Challenge.** A party in a Texas civil proceeding can attack the sufficiency of the evidence on appeal, on the ground that the expert testimony admitted into evidence did not meet the necessary standards of reliability and relevance. *Merrill Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). However, this complaint cannot be raised for the first time after trial. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998). *Accord, General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 282 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Harris v. Belue*, 974 S.W.2d 386, 393 (Tex. App.–Tyler 1998, pet. denied) (party, who did not object to admission of expert testimony on *Daubert* grounds until after plaintiff rested and in connection with motion for instructed verdict, waived *Daubert* attack).

**XXXIV. EXPERT AS CONDUIT FOR HEARSAY.** Lay witnesses can express opinions, but they cannot rely upon hearsay in formulating those opinions. TRE 701. Experts, on the other hand, can rely upon hearsay in formulating opinions, as long as the hearsay is of a type reasonably relied upon by experts in the particular field. TRE 703.

TRE 705(a) provides that an expert "may . . . disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data" on which his/her opinion is based. A question arises as to what

extent an expert can relate to the jury hearsay upon which his opinion is based. Both the state and federal rules require a balancing test to resolve this question.

**Caselaw Predating 1998 Amendment to TRE 705.** In Goode, Wellborn & Sharlot, TEXAS RULES OF EVIDENCE: CIVIL & CRIMINAL § 705.3 (Texas Practice 1988), the professors state their opinion that "[i]f an expert has relied upon hearsay in forming an opinion, and the hearsay is of a type reasonably relied upon by such experts, the jury should ordinarily be permitted to hear it."

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

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

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

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

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

In *Decker v. Hatfield*, 798 S.W.2d 637, 638 (Tex. App.--Eastland 1990, writ dism'd w.o.j.), it was not error to permit a psychologist to tell the jury that the child said he wanted to live with his mother. The appellate court cited the Goode, Wellborn & Sharlot treatise excerpt saying that the jury ordinarily should be entitled to hear the underlying hearsay, and relied upon TRE 705 to hold that the evidence was admissible to show the basis for the expert's opinion.

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

**1998 Amendment to TRE 705.** The contrary lines of authority have to some extent been supplanted by the 1998 amendment to TRE 705. TRE 705 reads:

> **RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION**
>
> **(a)** **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
>
> **(b)** **Voir dire.** Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

> **(c) Admissibility of opinion.** If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.
>
> **(d) Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.
>
> **Notes and Comments**
>
> Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

It can be seen that post-1998 TRE 705(b) offers a right to voir dire the expert about the underlying facts or data outside the presence of the jury. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient basis for his opinion. And TRE 705(d) establishes a balancing test for underlying facts or data that are inadmissible except to support the expert's opinion: the court should exclude the inadmissible underlying information if the danger of misuse outweighs the value as explanation or support for the expert opinion.

**Amended FRE 703**

On December 1, 2000, amendments to the Federal Rules of Evidence became effective. FRE 703 was modified to read as follows:

> **Rule 703. Bases of Opinion Testimony by Experts**
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Thus, FRE 703 contains a balancing test like TRE 705(d), but under the Federal rule probative value must substantially outweigh prejudicial effect.

**XXXV. PROVING UP DAMAGES ON DEFAULT JUDGMENT.** Failure of a defendant to file an answer admits liability. However, it does not relieve the plaintiff of the burden to prove unliquidated damages with competent evidence. TRCP 243.

Assume that the lawyer is proving up unliquidated damages in a default judgment proceeding. TRE 802 provides that hearsay evidence admitted without objection has probative value. And TRE 103(a)(1) provides that to preserve complaint for appellate review, a party must make a timely objection and secure a ruling from the trial court or your complaint is waived. Given all that, consider the following three questions:

1. At the default judgment hearing, can the plaintiff testify to hearsay, and the hearsay evidence is competent for purposes of appeal?

2. Can the plaintiff submit affidavits of third parties who do not appear at the hearing, and have the affidavits be given full evidentiary weight?

3. Can the plaintiff submit unsworn written statements of third parties who do not appear at the hearing, and have the affidavits be given full evidentiary weight?

Preservation of Error When the issue of preserving error from a default judgment arose in writ of error appeals from default judgments, the courts of appeals were divided on the question. For example, in *Tankard-Smith, Inc. General Contractors v. Thursby*, 663 S.W.2d 473, 478-79 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.), the Fourteenth Court of Appeals held that, where the appellant in a writ of error appeal raised issues that must be preserved by complaint in the trial court and had not preserved error on those complaints in the trial court, it had waived error on those grounds. A later decision by the Dallas Court of Appeals disagreed, at least as to the Rules of Procedure then in effect, saying that old TRCP 373 (carried forward as amended in old TRAP 52 which has been amended and is now new TRAP 33.1) provided that where a party had no opportunity to object to a ruling at the time it was made, the absence of an objection does not waive error on appeal. *First Dallas Petroleum, Inc. v.*

*Hawkins*, 727 S.W.2d 640, 646 (Tex. App.--Dallas 1987, no writ). The Dallas Court said that to preclude consideration of any error that was not preserved by objection during the trial from which the appellant was absent would "vitiate the remedy of review by writ of error." Id. at 646. The Court noted, however, that the language in TRCP 373 which it was relying on in its holding was not carried forward into old TRAP 52, and said that the applicability of the requirement in old TRAP 52(a) for preservation of error was for later courts to decide. *Id*. at 647.

The Texas Supreme Court supported the use of affidavits as proof in a TRCP 243 hearing, in *Texas Commerce Bank, N.A. v. New*, 3 S.W.3d 515 (Tex. 1999). The Supreme Court held:

> We conclude that because unobjected-to-hearsay is, as a matter of law, probative evidence affidavits can be evidence for purposes of an unliquidated damages hearing pursuant to Rule 243.

*Id.* at 516.

[Under TRAP 30 (effective Sept. 1, 1997), "restricted appeals" replaced writ of error appeals to the court of appeals.]

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

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

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

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

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

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

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

former Texas Supreme Court Justice and a law professor were improperly allowed to testify to their views of what the law is).

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

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

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

Lawyer's Notes on Flip Chart. Can a lawyer stand up in the courtroom and write on a flip chart his/her short-hand summary of what the witness says? For example, a five minute answer is written down as "Lost Profits = $250,000.00". Trial courts routinely permit this. The other lawyer can object that the lawyer is using his own words and not the witness' words if the written comments are too slanted. The court can permit the chart to be marked as an exhibit and to go with the jury into the jury room. *See Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981).

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

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

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

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

**XXXVIII. AUTHENTICATING EVIDENCE IN SUMMARY JUDGMENT PROCEEDINGS.** In reliance upon the case of *Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608 (Tex. App.--Dallas 1988, writ denied), lawyers used to go to extraordinary lengths to authenticate deposition excerpts for use in summary judgment motions or responses. Thankfully, this procedure was repudiated by the Supreme Court in *McConathy v. McConathy*, 869 S.W.2d 341, 341-42 (Tex. 1994), which declared that deposition excerpts submitted as summary judgment evidence do not have to be authenticated. The Supreme Court reasoned that "[a]ll parties have ready access to depositions taken in a cause, and thus deposition excerpts submitted with a motion for summary judgment may be easily verified as to their accuracy. Authentication is not necessary and is not required under the present rules." *Id.* at 342. **NOTE: TRCP 193.7 provides that documents produced by a party in response to written discovery are automatically authenticated as against that party, unless the producing party makes an objection within 10 days of learning of the intended use.**

**XXXIX. EVIDENTIARY OBJECTIONS IN SUMMARY JUDGMENT PROCEEDINGS.** Evidentiary objections, such as a hearsay objection, or lack of personal knowledge, etc. must be made in the summary judgment response or reply in order to stop the trial court and the appellate court from relying upon the inadmissible evidence in connection with the summary judgment. *Washington v. McMillan*, 898 S.W.2d 392, 397 (Tex. App.--San Antonio 1995, no writ); *Roberts v. Friends-*

*wood Dev. Co.*, 886 S.W.2d 363, 365 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied). The trial court's ruling sustaining an objection to summary judgment evidence must be reduced to writing, filed, and included in the transcript, to be given effect on appeal. *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied). This can be done by having the trial court sign a written order ruling on the objection. Or by including a ruling on the objection in the summary judgment order. Or, if all else fails, you can use a formal bill of exception under new TRAP 33.2. Formal bills must be filed no later than 30 days after the filing party's notice of appeal is filed.

Further details can be obtained from: David Hittner & Lynne Liberato's new law review article on *Summary Judgments in Texas*, 54 Baylor L. Rev. 1 (2002).

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

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

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

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

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

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

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

> for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a non-party patient who is or may be a consulting or testifying expert in the suit.

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

**XLII. MENTAL HEALTH PRIVILEGE.**

**A. TRE 510.** Under TRE 510, mental health information is privileged. One exception to the privilege is when the communications and records are "relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." TRE 510(d)(5). *See R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994) [discussed in preceding paragraph], in a case involving the similarly-worded exception to the doctor-patient privilege.

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

New TRE 510, which became effective on March 1, 1998, eliminated the parent-child relationship suit exception to the mental health privilege. However, the Court issued a comment, quoted in the preceding section, saying that the relevancy exception applies in SAPCRs, but that confidential mental health records of expert witnesses cannot be reached. When the trial court is asked to "ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege," the court and counsel should examine *Jaffee v. Redmond*, 518 U.S. ___, 135 L.Ed.2d 337, 116 S.Ct. 1923 (1996), where the U.S. Supreme Court for the first time recognized a federal common law mental health privilege. The Court described the legitimacy privacy interests protected by the privilege in the following way:

> Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Trammel, 445 U.S. at 51. TREatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[9] As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult, if not impossible, for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this

> general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment.
>
> Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)). By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests. [Footnote omitted.]

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

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

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

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

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

**XLIV. REDACTING INADMISSIBLE PORTIONS OF EXHIBIT.** In some instances parts of a document are admissible while parts are not. According to one decision, when the trial court has ruled that a document can be admitted after certain information is redacted, the party offering the exhibit has the duty to be sure that the inadmissible portions are properly redacted. *American Gen. Fire & Cas. Co. v. McInnis Book Store, Inc.*, 860 S.W.2d 484, 487-

88 (Tex. App.--Corpus Christi 1993, no writ); *Firo v. State*, 878 S.W.2d 254, 256 (Tex. App.--Corpus Christi 1994, no pet.). However, the complaining party still has the burden to show that permitting the exhibit to go to the jury unredacted was reversible and not harmless error. *Id*. at 488.

## XLV. PRIOR CONVICTIONS.

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

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

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

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

Juvenile Adjudications. Juvenile adjudications are not admissible, TRE 609(d).

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

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

## XLVI. MULTIPLE PARTY LAWSUITS.

Make Your Own Objections. Each litigant must preserve error for himself or herself. One party cannot rely upon an objection asserted by another party as a basis for preserving error. *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481, 482 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ dism'd). *But see Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.--Corpus Christi 1990, no writ) (trial court may in its discretion rule that one defendant's objection preserved error for all defendants).

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

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

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

**XLVII. ADMISSIBILITY OF OFFERS OF SETTLEMENT.** Settlement offers are not admissible on the issue of liability or damages. Likewise, conduct or statements made in negotiations is not admissible. TRE 408. The rule does not require exclusion of evidence which can be obtained in another manner, merely because the matter was raised in compromise negotiations. *Id.* The evidence is not excludable where offered for another purpose, such as proving bias or prejudice of a witness, negating a claim of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. *Id.* However, "[t]he exception for bias or prejudice or interest is a narrow one that refers to so-called "Mary Carter" agreements." *Rural Development, Inc. v. Stone*, 700 S.W.2d 661, 668 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.) ("Evidence whether Durham liked or disliked Stone may be a proper subject for consideration by the jury, but that evidence must come from some other source than conduct and statements at a meeting to attempt a settlement"). *See Barrett v. United States Brass Corp.*, 864 S.W.2d 606, 633-34 (Tex. App.--Houston [1st Dist.] 1993), *rev'd on other grounds subnom, Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996) (defendant's settlement offers not admitted, even though offered as relevant to issue of mental anguish damages, unconscionability and plaintiff's failure to mitigate damages).

**XLVIII. NO MENTION OF LIABILITY INSURANCE.** It is improper to mention to the jury that the plaintiff or the defendant is or is not insured when that evidence has been kept from the jury. *Ford v. Carpenter*, 147 Tex. 447, 216 S.W.2d 558, 559 (1949). TRE 411 says:

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

As to securing reversal on appeal, the Austin Court of Appeals made the following statement:

> The mention of insurance before a jury is not always reversible error. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962). The party appealing must show: (1) that the reference to insurance probably caused the rendition of an improper judgment in the case; and (2) that the probability that the mention of insurance caused harm exceeds the probability that the verdict was grounded on proper proceedings and evidence. *Id.*; *cf. Reviea v. Marine Drilling Co.*, 800 S.W.2d 252, 256 (Tex. App. 1990, writ denied) (holding that no harm was shown when a prospective juror spontaneously brought up the issue of a party's insurance coverage). The logic behind the rule excluding evidence of liability insurance is that a jury is more likely to find against a party who is insured. *Pride Transp. Co. v. Hughes*, 591 S.W.2d 631, 634 (Tex. Civ. App. 1979, writ ref'd n.r.e.).

In *University of Texas at Austin v. Hinton*, 822 S.W.2d 197, 201 (Tex. App.--Austin 1992, no writ), members of the venire asked plaintiff's lawyer whether plaintiff was insured, and expressed concern that plaintiff might be "double-dipping" by recovering both from insurance and from the defendants. Plaintiff's counsel informed the panel that plaintiff was insured, but would have to reimburse the insurance company for its expenditures. Defendants objected. The appellate court ruled that while a party cannot inform the jury about the other party's insurance or lack of insurance, no rule of law prohibited a party from informing the jury about his/her own insurance.

In *Bleeker v. Villarreal*, 941 S.W.2d 163 (Tex. App.--Corpus Christi 1996, writ granted, writ

withdrawn and dism'd by agr.), plaintiffs sued a defendant as well as plaintiffs' own insurance company. The defendant wanted to offer evidence that the insurance company covered plaintiffs, and not defendant. The trial court's exclusion this evidence was not an abuse of discretion, and was deemed harmless anyway, since the defendant's counsel was permitted in voir dire to tell the panel that the insurance company covered the plaintiffs, and not the defendant.

**XLIX. SUBSEQUENT REMEDIAL MEASURES.** TRE 407(a) provides that remedial measures taken after an event (that is, measures that would have made the accident in question less likely to happen) are not admissible to prove negligence or culpable conduct. However, remedial measures can be admitted for other purposes, such as proving ownership, control, feasibility of precautionary measures (if controverted) or impeachment. *Keetch v. Kroger Co.*, 845 S.W.2d 276, 282 (Tex. App.--Dallas 1990), *aff'd*, 845 S.W.2d 262 (Tex. 1992). The Rule doesn't apply in products liability cases based on strict liability.

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

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

However, an exception to this rule exists: a party's prior acts or transactions with other persons are admissible to show that party's intent where material, if they are so connected with the transaction at issue that they may all be parts of a system, scheme or plan. *See, e.g., Texas Farm Bureau Mutual Insurance Co. v. Baker*, 596 S.W.2d 639, 642-43 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.); *Payne v. Hartford Fire Ins. Co.*, 409 S.W.2d 591, 594 (Tex. Civ. App.--Beaumont 1966, writ ref'd n.r.e.); *Texas Osage Co-Operative Royalty Pool, Inc. v. Cruze*, 191 S.W.2d 47, 51 (Tex. Civ. App.--Austin 1945, no writ). *Accord, Underwriters Life Ins. Co., v. Cobb*, 746 S.W.2d 810, 815 (Tex. App.--Corpus Christi 1988, no writ).

TRE 404(b) provides:

> Evidence of other wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

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

> with which the act under investigation was done.[221]

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

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

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

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

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

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

Also, TRE 406 permits admission of a person's habit, or an organization's routine, to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

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

*See Schlueter v. Schlueter*, 929 S.W.2d 94 (Tex. App.--Austin 1996, writ granted) (father's assisting one son in earlier divorce through illegal methods was admissible on question of motive and intent to commit fraud during other son's divorce, ten years later); *Johnson v. Houston*, 928 S.W.2d 251 (Tex.App.--Houston [14th Dist.] 1996, no writ) (proper to exclude testimony of former co-worker that he had been fired in retaliation for filing a workers comp. claim; one instance does not rise to level of frequency and regularity necessary to be considered a routine practice under TRE 406); *McLellan v. Benson*, 877 S.W.2d 454, 456-57 (Tex. App.--Houston [1st Dist.] 1994, no writ) (in case involving "date rape," it was not error to admit another instance of date rape on the issue of defendant's intent); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex.App.--Tyler 1993, no writ) (proper to exclude evidence of three prior accidents in previous six years, since that did not constitute habit under TRE 406). *See also Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 269-270 (Tex. App.--El Paso 1994, writ denied) (other incidents should not be excluded under TRCE 403 just because they are prejudicial; the prejudicial effect must substantially outweigh the relevance of the evidence). *Missouri Pacific R. Co. v. Roberts*, 849 S.W.2d 367 (Tex. App.--Eastland 1993, writ denied) (res inter alios acta subsumed into TRE 401, 402, 403 & 404(b)). *See also Pena v. Neal, Inc.*, 901 S.W.2d 663 (Tex. App.--San Antonio 1995, writ denied) (driver's habit of stopping at convenience store to buy and drink alcohol, and clerk's habit of providing alcohol to driver, was admissible under TRCE 406 to prove that behavior on night of accident was in conformity with the habit); *see generally Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718 (Tex. App.--San Antonio 1995, writ dism'd) (similar accidents at other stores, while not admissible on defendant's knowledge of an unsafe condition, was admissible to establish expert's familiarity with shelving procedures in the industry).

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

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

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

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

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

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

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

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

Running objections have been recognized in civil cases such as *Leaird's, Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690-91 (Tex. App.--Waco 2000, pet. denied), where the court said:

> If a trial court permits a running objection as to a particular witness's testimony on a specific issue, the objecting party "may assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objection." Commerce, Crowdus & Canton, 776 S.W.2d at 620; City of Fort Worth v. Holland, 748 S.W.2d 112, 113 (Tex. App.---Fort Worth 1988, writ denied); accord Atkinson Gas, 878 S.W.2d at 242; Crispi v. Emmott, 337 S.W.2d 314, 318 (Tex. Civ. App.--Houston 1960, no writ).

Some courts have held that, in jury trials, running objections apply only to similar testimony by the same witness. *Commerce, Crowdus & Canton v. DKS Const.*, 776 S.W.2d 615 (Tex. App.--Dallas 1989, no writ); *Leaird's Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690 (Tex. App.--Waco 2000, pet. denied); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied). The extent to which a running objection covers testimony of subsequent witnesses depends on several factors: (1) the nature and similarity of the subsequent testimony to the prior testimony; (2) the proximity of the objection to the subsequent testimony; (3) whether

the subsequent testimony is from a different witness; (4) whether a running objection was requested and granted, and (5) any other circumstances which might suggest why the objections should not have to be reurged. *Correa v. General Motors Corp.*, 948 S.W.2d 515, 518-19 (Tex.App.--Corpus Christi 1997, no writ). The Texas Supreme Court recently made the following comment on a running objection in a jury trial:

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

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

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

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

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

**LIII. MOTION IN LIMINE VS. RULING OUTSIDE PRESENCE OF JURY.**

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

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

*Id.* at 335. Nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ) (after motion in limine was sustained as to certain evidence, counsel conducted the balance of his examination of the witness without ever eliciting the excluded evidence; error was therefore waived); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ) (fact that motion in limine was sustained, and proponent offered exhibit on informal bill of exceptions, did not preserve error, since it was incumbent upon the proponent to tender the evidence offered in the bill and secure a ruling on its admission).

If a motion in limine is granted and the evidence is nonetheless offered, or argument of counsel made, in violation of the order in limine, an objection to the offending evidence or argument is prerequisite to raising a complaint on appeal at the violation of the order. If the objection is sustained, then the aggrieved party should move that the jury be instructed to disregard the improper evidence or argument. If the instruction is denied, complaint can be premised on the denial. If the instruction is granted, it will cure harm, except for incurable argument, such as an appeal to racial prejudice. In criminal cases, the aggrieved party who timely objects and receives a curative instruction, but who is still not satisfied, must push further and secure an adverse ruling on a motion for a mistrial, in order to preserve appellate complaint. Immediately pushing for a mistrial should not be necessary in a civil proceeding, for the following reason. If the harm is curable, then by necessity a curative instruction will cure the harm. If the harm is incurable, then an instruction will not cure the harm, and the only relief is a new trial. However, a new trial is not

necessary if the aggrieved party wins. Judicial economy suggests that the aggrieved party should be able to raise incurable error after the results of the trial are known, rather than having civil litigants moving for mistrial in a case that they otherwise might have won. TRCP 324(b)(5) specifically permits incurable jury argument to be raised by motion for new trial, even if it was not objected to at the time the argument was made. *See generally In re W.G.W.*, 812 S.W.2d 409, 416 (Tex. App.--Houston [1st Dist.] 1991, no writ) (insinuation that cervical cancer was caused by immoral conduct was incurable error). Counsel's violation of a motion in limine exposes the lawyer to a contempt citation.

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

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

> [A] motion in limine characteristically includes: (1) an objection to a general category of evidence; and (2) a request for an instruction that the proponent of that evidence approach the bench for a hearing on its admissibility before offering it. Conspicuously absent from a motion in limine is a request for a ruling on the actual admissibility of specific evidence.
>
> In contrast, Rule 52(b) seems to require both specific objections and a ruling on the admissibility of contested evidence. In fact, we question whether Rule 52(b) comes into play until specific evidence is actually offered for admission. Rule 52(b) only provides that complaints about the admission of evidence are preserved when the court hears objections to offered evidence and rules that such evidence shall be admitted.

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

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

**LIV. MEDICAL MALPRACTICE EXPERTS.**

Locality Rule. Texas has traditionally recognized a "locality rule" in malpractice cases. Generally stated, a plaintiff seeking to hold a physician liable for negligence at common law must prove by expert testimony that the defendant failed to act as a reasonable and prudent physician practicing in the same or similar community would have acted. *Hickson v. Martinez*, 707 S.W.2d 919, 925 (Tex. App.--Dallas 1985), *writ ref'd n.r.e. per curiam*, 716 S.W.2d 449 (Tex. 1986). This allows local physicians to set the standards against which their conduct will be measured in malpractice cases. *Greene v. Thiet*, 846 S.W.2d 26, 30 (Tex. App.--San Antonio 1992, writ denied). However, that rule has been altered by statute in some instances. *Id.*, at 30-31 (in suits against physicians for failure to disclose risks of medical procedure, the locality rule has been displaced by the "reasonable person" rule of Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.02, which focuses on the disclosures which would influence a reasonable person in deciding for or against medical treatment). The Medical Liability and Insurance Improvement Act was repealed in 2003 and replaced with TCP&RC § 74.101, which preserved verbatim the language of § 6.02. This statutory standard focuses on the patient, whereas the common law rule focuses on the doctor. *Price v. Hurt*, 711 S.W.2d 84, 87 (Tex. App.--Dallas 1986, no writ).

In *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 366 (Tex. 1987), the Supreme Court said:

> The purpose of the locality rule is to prevent unrealistic comparisons between the standards of practice in communities where resources and facilities might vastly differ.

The Court found that instructing the jury that negligence required comparison of a physician acting in the "same or similar circumstances" adequately set out the locality rule.

When an expert is testifying to negligence, it is not necessary to couch the opinion in terms of the locality of the defendant. *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 217 (Tex. App.--Houston [1st Dist.] 1986, no writ) (although the standard of care used by the expert is not defined in terms of "locality" or "same school," it exemplified the modern trend away from such defined standard of care). And out-of-state experts can testify to negligence. *Goodwin v. Camp*, 852 S.W.2d 698, 699 (Tex. App.--Amarillo 1993, no writ) (permissible for out-of-state chiropractor to testify to negligence); *Hart v. Van Zandt*, 399 S.W.2d 791, 798 (Tex. 1965) (trial court erred in excluding the deposition testimony of a Pennsylvania medical doctor); *Johnson v. Hermann Hosp.*, 659 S.W.2d

124, 126 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.) ("Doctors are no longer required to be from the same city, state, or school of practice in order to testify so long as they are equally familiar with the subject of inquiry . . .").

Reasonable Medical Probability. A medical expert's opinion must be based on reasonable medical probability whether it is or not is to be determined by substance and context of the opinion, not by the presence or absence of a particular term or phrase. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995).

Requires Expertise Regarding Specific Issue. In *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), the Supreme Court held that an medical malpractice expert had to have "knowledge, skill, experience, training or education" regarding the specific issue before the court, in order to give expert opinion testimony. In *Broders*, it was held proper to exclude the testimony of an emergency room physician that calling in a neurosurgeon would have saved the patient's life. The Supreme Court recognized that when "a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields." *Id.* at 154. A plaintiff successfully overcame a motion for summary judgment, by using an affidavit from an orthopedic surgeon saying that a radiologist committed negligence, in *Silvas v. Ghiatas*, 954 S.W.2d 50 (Tex. App.--San Antonio 1997, writ denied). The court of appeals characterized the Supreme Court's holding in *Broders* as follows:

> As our Texas Supreme Court recently held, the plaintiff's controverting expert need not be a specialist in the particular area in which the defendant-physician practices so long as his affidavit demonstrates that by virtue of his knowledge, skill, experience, training, or education regarding the specific issue before the court, his testimony would assist the jury in determining the fact issues of negligence and/or causation.

*Silvas v. Ghiatas*, 954 S.W.2d at 53.

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

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

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

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

Inventory and Appraisement in Divorce. A sworn inventory and appraisement filed in divorce case can constitute judicial admission, even when not marked and offered as evidence. *Vannerson v. Vannerson*, 857 S.W.2d 659, 670-71 (Tex.App.--Houston [1st Dist.] 1993, writ denied).; *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.--El Paso 1985, writ dism'd). *Contra, Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.--Austin 1994, no writ); *Poulter v. Poulter*, 565 S.W.2d 107, 110 (Tex. Civ. App.--Tyler 1978, no writ); *Bokhoven v. Bokhoven*, 559 S.W.2d 142, 143-44 (Tex. Civ. App.---Tyler 1977, no writ).

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

Party's Testimony is Not. As a general rule, a party's testimony is not considered to be a judicial admission. *Thomas v. Service Lloyds Ins. Co.*, 860 S.W.2d 245, 252 (Tex. App.--Austin 1993) ("Texas generally follows the rule that a party's testimony must be regarded as evidence, not as an admission"), *judgment vacated without reference to merits*, 866 S.W.2d 606 (Tex. 1993). In some instances, however, a party's testimony will operate as a judicial admission. *Hennigan v. I.P. Petroleum Co., Inc.*,

858 S.W.2d 371, 372 (Tex. 1993) ("The requirements for treating a party's testimonial quasi-admission as a conclusive judicial admission include that the statement be "deliberate, clear, and unequivocal" and that "[t]he hypothesis of mere mistake or slip of the tongue must be eliminated").

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

**LVII. JUDICIAL NOTICE.** A court may take judicial notice on its own motion. A party who requests judicial notice should supply the court with necessary information. The opposing party is entitled to be heard on opposing the taking of judicial notice. Upon taking judicial notice, the Court should instruct the jury to accept as conclusive any fact judicially noticed. TRE 201: "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned.

*Tschirhart v. Tschirhart*, 876 S.W.2d 507, 509 (Tex. App.--Austin 1994, no writ) (trial court cannot take judicial notice of sworn inventory and appraisement prepared by spouse in connection with divorce; inventory must be offered and received into evidence to be considered by the fact finder); *Wright v. Wright*, 867 S.W.2d 807, 816-17 n. 6 (Tex. App.--El Paso 1993, writ denied) (court of appeals took judicial notice of fact that San Antonio is 335 miles from Odessa); *Fields v. City of Texas City*, 864 S.W.2d 66, 69 (Tex. App.--Houston [14th Dist.] 1993, no writ) (upon request, appellate court can take judicial notice of city charter provisions).

**LVIII. PROOF OF FOREIGN LAW.**

**A. PRESUMPTION OF SIMILARITY OF FOREIGN LAW.** Where neither party establishes the law of another jurisdiction, and the court does not otherwise take judicial notice of it, then it will be presumed that the law of the other jurisdiction is identical to Texas law. *Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex.1963). As noted in Olin Guy Wellborn III, *Judicial Notice under Article Ii of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 1, 28 (1986):

> [I]f no party establishes the content of applicable foreign law in accordance with the provisions of the rule, the absent law will be supplied by the common-law presumption of identity. That is, Texas courts will presume that the unproved foreign law is identical to Texas law.

**B. JUDICIAL NOTICE IN TEXAS COURT**. In Texas courts, the trial judge can take "judicial notice" of certain information, which relieves any party from having to "prove" that information through the offer of evidence to the fact-finder (judge or jury). Tex. R. Evid. 201-203 govern judicial notice. Rule 201 deals with judicial notice of "adjudicative facts." Rule 202 deals with determination of the law of other states of the United States. Rule 203 deals with determination of the law of foreign countries. Tex. R. Evid. 203 reads:

> Rule 203. Determination of the Laws of Foreign Countries
>
> A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

In *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 896 (Tex. App.-- Houston [14th Dist.] 2000, pet. denied), the court of appeals made the following comments about Rule 203:

> Rule 203 is a hybrid rule by which presentation of the law to the court resembles presentment of evidence, but which the court ultimately decides as a matter of law. See Ahumada, 992 S.W.2d at 558; Gardner v. Best West-

> ern Int'l, Inc., 929 S.W.2d 474, 483 (Tex. App.--Texarkana 1996, writ denied). The determination of the law of a foreign country may present the court with a mixed question of law and fact. Id. Summary judgment is not precluded when experts disagree on the interpretation of the law if, as in this case, the parties have not disputed that all of the pertinent foreign law was properly submitted in evidence. Id. Where experts disagree on application of the law to the facts, the court is presented with a question of law. Id. at 558-59. On appeal, we must determine whether the trial court reached the proper legal conclusion. Id.; see also Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984); Salazar v. Coastal Corp., 928 S.W.2d 162, 166 (Tex. App.--Houston [14 th Dist.] 1996, no writ).

Mentioning the intent to rely on foreign law in a motion for summary judgment met the requirement to give notice by pleading of intent to rely on foreign law.. *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 525 (Tex. App.--Texarkana 1993, writ denied).

Sometimes a litigant will need to refer the court to international law. That can be done through the procedure of judicial notice. According to Professor Olin Guy Wellborn III, *Judicial Notice under Article Ii of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 1, 28 (1986):

> Although it is not covered by rule 203, international law is subject to judicial notice as a matter of common law, because international law is "part of our law." [FN138] In addition, in Texas, Spanish and Mexican law, when and to the extent that they are applicable as the law of the former sovereign, have always been subject to judicial notice for that purpose. [FN139]

**C. IN FEDERAL COURT.** Federal Rule of Civil Procedure 44.1 governs the use of foreign law in federal district court.

> Fed. R. Civ. P. 44.1. Determination of Foreign Law
>
> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

As noted in the case of *United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir.1993):

> The determination of foreign law is a question of law to be established by any relevant source, whether or not submitted by a party or admissible under the Federal Rules of Evidence. See Fed.R.Crim.P. 26.1; United States v. Peterson, 812 F.2d 486, 490-91 (9th Cir.1987). The broad discretion afforded a court in considering evidence to determine foreign law derives from the general unavailability of foreign legal materials, and the frequent need for expert assistance in understanding and applying the materials. In determining questions of foreign law, courts have turned to a wide variety of sources including affidavits and expert testimony from an Australian Federal Judge, United States v. Molt, 599 F.2d 1217, 1220 (3rd Cir. 1979), a Peruvian Minister of Agriculture, United States v. 2,507 Live Canary Winged Parakeets, 689 F.Supp. 1106, 1009 (S.D.Fla. 1988), and a South African attorney, United States v. Taitz, 130 F.R.D. 442, 446 n. 2 (S.D.Cal.1990); certified translations of Bolivian Supreme Decrees, United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare, 636 F.Supp. 1281, 1285 (S.D.Fla. 1986); foreign case law, United States v. Peterson, 812 F.2d 486, 491 (9th Cir. 1987); a student note in a Philippine Law Review, id.; information obtained by a law clerk in a telephone conversation with the Hong Kong Trade Office and presented ex parte to the court, United States v. Hing Shair Chan, 680 F.Supp. 521, 524 (E.D. N.Y. 1988); and the court's "own independent research and analysis" of a Yugoslavian law. Kalmich v. Bruno, 553 F.2d 549, 552 (7th Cir.), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977).

Statutes, administrative material, and judicial decisions can be proved by offering into evidence an official or authenticated copy supported by expert testimony as to their meaning. Litigants or the court may also use secondary sources such as texts, journals and even other unauthenticated documents relating to foreign law. *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D. Mass. 1993).

Once the case is tried and has gone up on appeal, in determining foreign law the appellate court is not limited to what was presented to the trial court. The appellate court may consider any relevant information. *U.S.A. ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3rd Cir. 1977); *Grand Entertainment Group v. Star Media Sales, Inc.*, 988 F.2d 476, 688 (3rd Cir. 1993) (appellate court not limited to material presented to trial judge in analyzing issues involving foreign law, and may do its own supplemental research).

**LIX. FOREIGN LANGUAGE DOCUMENTS.**

**A. IN TEXAS COURTS.** Texas Rule of Evidence 1009 governs the admissibility of translations of documents in a foreign language in Texas court proceedings. TRE 1009 provides:

> Rule 1009. Translation of Foreign Language Documents
>
> (a) Translations. A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.
>
> (b) Objections. Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.
>
> (c) Effect of Failure to Object or Offer Conflicting Translation. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.
>
> (d) Effect of Objections or Conflicting Translations. In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.
>
> (e) Expert Testimony of Translator. Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.
>
> (f) Varying of Time Limits. The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.
>
> (g) Court Appointment. The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

**B. IN FEDERAL COURTS.** The Federal Rules of Procedure and Evidence do not specifically address translations of foreign language documents other than government records. In *United States v. Chalarca*, 95 F.3d 239, 246 (2d Cir. 1996), the Court of Appeals held that "[t]he decision to receive in evidence English translations of foreign-language transcripts lies in the discretion of the district court." The 11th Circuit Court of Appeals has adopted the following rule in that circuit, *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir.1985):

> This circuit has adopted the following procedure for challenging the accuracy of an English-language transcript of a conversation conducted in a foreign language: Initially, the district court and the parties should make an effort to produce an "official" or "stipulated" transcript, one which satisfies all sides. If such an "official" transcript cannot be produced, then each side should

> produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.

**LX. INTERPRETERS.**

**A. INTERPRETERS IN TEXAS COURTS.** TRCP 183 authorizes the appointment of interpreters for use during court proceedings.

> Tex. R. Civ. P. 183 Interpreters
>
> The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Texas Rule of Evidence 604 sets certain qualifications for interpreters in Texas court proceedings. Rule 604 reads:

> Tex. R. Evid. 604. Interpreters
>
> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

The following commentary reflects some of the issues surrounding translators in the courtroom. R. Doak Bishop, *International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 BAYLOR L. REV. 131, 152-53 (1984):

> [Rule 604] introduces into our state practice the requirement that an interpreter be qualified as an expert under Rule 702 in order to practice the profession of translating from one language to another. This standard is sensible, since a reliable translation can be critical to a case. The Administrative Office of the United States Courts has even begun a program of testing and certifying Spanish-English language translators for federal courts. [FN85] This program is timely because of the increasing *152 recognition of the need for qualified interpreters. [FN86]

Two New York cases, which reached opposite results on a significant legal point because of differing translations, illustrate the importance of having an interpreter qualified in the technical area with which the substance of the testimony is concerned. In Rosman v. Trans World Airlines, [FN87] the New York Court of Appeals held that the French words 'lesion corporelle' contained in the Warsaw Convention meant bodily injury and did not connote psychic damage. The official text of the Warsaw Convention, regulating certain aviation claims, is written in French. The English translation made by the United States Department of State is unofficial only. In Palagonia v. Trans World Airlines, [FN88] however, a lower New York court later decided that 'lesion corporelle' had a broader meaning as a technical term in French legal usage, and included the concept of mental injury. In so deciding, the court rejected the testimony of defense experts and interpreters who were highly qualified in international law, the Warsaw Convention, and French lexicography and semantics, because they were without experience in translating technical French legal documents. The plaintiff's expert, on the other hand, was a lawyer with vast experience in international aviation law, in dealing with the Warsaw Convention in the French language, in teaching law in French, and in translating French legal documents.

Consequently, counsel should bear in mind that if the witness will testify about technical subjects (such as detailed engineering or legal matters, for example), then the translator may be required to have a technical background, as well as having sufficient language training and experience. An interpreter's expertise is generally shown either by a stipulation between the parties or by questioning the interpreter, on the record and under oath, at the beginning of a proceeding, about his or her qualifications.

Rule 604 also provides that an interpreter should take an oath or affirmation that he will make a true translation. This accords with present Texas practice, [FN89] even though in one case the plaintiff's counsel was permitted to

> act as interpreter without being sworn. [FN90] This unusual procedure was only upheld because the court reporter was bilingual and confirmed the translation; but even so, the court strongly recommended against this practice. Texas Rule 604 conforms with Rule 604 of the Federal Rules of Evidence.

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

**B. INTERPRETERS IN FEDERAL COURTS.** Federal Rule of Evidence 604 provides for interpreters in the trial of federal cases.

> Rule 604. Interpreters
>
> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

The decision of whether or not to use an interpreter is a matter within the sound discretion of the trial judge. *U. S. v. Rodriguez*, 424 F.2d 205 (4th Cir. 1970), *certiorari denied*, 400 U.S. 841, 91 S.Ct. 83, 27 L. Ed.2d 76. In the case of *U. S. v. Addonizio*, C.A.3 (N.J.) 1971, 451 F.2d 49 (3rd Cir 1971), *certiorari denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812, it was held that the trial court properly permitted a witness's wife to act as "interpreter" for a witness who was unable to speak loudly and apparently had difficulty in making himself understood. The trial judge examined the wife thoroughly as to her ability to translate and her motives to distort testimony.

Rule 604 applies to depositions given in a foreign tongue. However, a translator who was not sworn at the time of the original deposition could be sworn and his translation ratified by live testimony before the judge at an evidentiary hearing held prior to the deposition testimony being offered in trial. *U.S. v. Kramer*, 741 F.Supp. 893 (S.D.Fla. 1990).

Rule of Evidence 604, requiring an oath for interpreters, applies only to interpreters who translate testimony of witnesses on the witness stand, and does not apply to a language expert who took the stand under oath, to translate previously recorded conversations, and subjected himself to cross-examination. *U.S. v. Taren- Palma*, 997 F.2d 525 (9th Cir. 1993), *certiorari denied*, 511 U.S. 1071, 114 S.Ct. 1648, 128 L.Ed.2d 368.

**LXI. EVIDENCE OF DEFENDANT'S NET WORTH.** In *Lunsford v. Morris*, 746 S.W.2d 471, 472-73 (Tex. 1988), the Texas Supreme Court changed prior Texas law and held that in cases in which punitive damages may be awarded, parties may discover and offer evidence of a defendant's net worth. This was because the amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the defendant. In *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), the Supreme Court expressed a concern that "evidence of a defendant's net worth, which is generally relevant only to the amount of punitive damages, by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case." *Id.* at 30. The Supreme Court therefore held that, upon timely motion, the trial court should bifurcate the determination of the amount of punitive damages from the remaining issues. That way the jury would first hear evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages, and then return findings on those issues. If the jury finds the basis for punitive damages, then the jury would hear evidence only to the amount of punitive damages, considering the "totality of the evidence presented at both phases of the trial." *Id.* at 30. The Rule became statutory in 1995, in TEX. CIV. PRAC. & REM. CODE § 41.009.

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

This subject is treated in detail in the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL.

**LXIII. BATSON CHALLENGES IN CIVIL CASES.** In the case of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 80 (1986), the Supreme Court held

that purposeful *racial* discrimination in the selection of a jury denied a defendant's right to equal protection of the law.

In *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991), the Supreme Court announced that its holding in the criminal law area would be extended to civil trials. The rule was recognized for Texas civil proceedings in *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991). In entertaining such a challenge, civil courts are instructed follow the "same approach" utilized in evaluating a Batson challenge in a criminal context." *See Id.* 111 S.Ct. at 2088-89. *See American Chrome & Chemicals, Inc. v. Benavides*, 907 S.W.2d 516 (Tex. 1995) (per curiam denial of application for writ of error) (rejecting idea that Supreme Court has gone "a step beyond" other jurisdictions).

The Supreme Court extended the *Batson* rationale to the exclusion of jurors based upon gender. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). *See* Cutler, *J.E.B. v. Alabama ex rel. T.B.: Excellent Ideology, Ineffective Implementation*, 26 ST. MARY'S L.J. 503 (1995) (predicting that further extension of the equal rights rationale to other groups will lead to the eventual demise of the peremptory challenge system). The Texas Court of Criminal Appeals initially extended the ruling to strikes based on religion, in *Casarez v. State*, No. 1114-93 (Tex. Crim. App. 1994) (withdrawn), but an intervening election brought two new members to the Court and the ruling changed, so that by a 5-4 vote religion can be considered in exercising peremptory challenges. [1994 WL 695868] The Supreme Court of Massachusetts ruled in *Commonwealth v. Carleton*, 641 N.E.2d 1057 (1994), that it was improper for prosecutors to strike persons with Irish or Italian names, in order to keep Catholics off of the jury, in a criminal prosecution against a Catholic priest for blockading an abortion clinic.

In *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995), a robbery case, the Supreme Court found no constitutional problem with a prosecutor's explanation for striking a black juror that the juror had long, unkempt hair, and his mustache and goatee looked suspicious.

In the case of *Miller-El v. Cockrell*, No. 01-7662 (certiorari granted March 4, 2002), the Supreme Court will determine whether the evidentiary formulation under *Batson v. Kentucky* is the exclusive formulation for determining whether peremptory strikes are discriminatory.

**LXIV. JUROR NOTE-TAKING.** In *Price v. State*, 887 S.W.2d 949 (Tex. Crim. App. 1994), the Court of Criminal Appeals, by vote of 6-3, approved juror's taking notes in criminal trials. The majority noted that "the vast majority of states and most of the federal circuits hold that jurors may take notes subject to the trial court's discretion." *Id.* at 952-53. The Court set out a four-pronged test for judges to use: (1) whether note-taking would help jurors in light of the issues and expected length of the trial; (2) the judge should tell the parties before voir dire that note-taking will be allowed; (3) the judge should give the jury a detailed admonishment when the jury is empaneled; (4) the judge should give the jury instructions in the charge prohibiting the use of notes during deliberation to resolve disputes over the evidence.

**LXV. JURORS ASKING QUESTIONS**. In *Morrison v. State*, 845 S.W.2d 882, 887-88 (Tex. Crim. App. 1993) (a 5-4 decision), the Court of Criminal Appeals held that a trial judge cannot permit jurors to ask questions in a criminal trial. In doing so, the court overruled several court of appeals decisions, and deviated from some federal case law. *See Jurors Questioning Witnesses in Federal Court*, Anno., 80 A.L.R.Fed. 892 (1986). *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, Anno., 31 A.L.R.3d 872 (1970); Michel, *Should Jurors Be Allowed to Pose Written Questions to Witnesses During a Trial?*, 55 TEX. B.J. 1020 (November 1992). See Note, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117 (1991) (many states give trial judge discretion to permit juror questioning).

The rationale for the decision was that questioning by jurors would endanger the adversary system. *Leday v. State*, 983 S.W.2d 713, 725 (Tex. Crim. App. 1998).

The following procedure was suggested by Judge Campbell, on the Texas Court of Criminal Appeals, as a safe way to permit juror questioning:

> In my view, trial courts should have the discretion to allow juror questioning provided they follow these safeguards to protect the adversary process:
>
> First, the trial judge should notify counsel before trial that she intends to allow juror questions. Such pre-trial warnings would enable counsel to modify their trial strategies, if need be, to accommodate the innovation.
>
> Second, the trial judge should inform the jurors before trial that, although their primary duty is to decide the facts from the evidence presented by counsel, they will have a limited right to ask questions. The trial judge should also explain the overall procedure involved.
>
> Third, the court should allow the juror interrogation immediately after both counsel have examined a witness, while the jurors' questions are still fresh in their minds and the witness is still available.

> Fourth, the juror questions should be kept relatively few in number but otherwise limited only by the Texas Rules of Criminal Evidence.
>
> Fifth, the questions should be submitted in writing to the trial judge, who should prohibit, sua sponte, clearly improper questions.
>
> Sixth, counsel should be able to object to any question, and get a ruling on the objection, outside the hearing of the jury. (FN1)
>
> Seventh, when the judge rejects a juror's question, she should briefly but carefully explain the rejection to the jury. Such an explanation will help prevent speculation by the jury both as to the reasons for the rejection and the forbidden answer.
>
> Eighth, if the judge accepts the question, she should ask it of the witness herself.
>
> Ninth, after the jury interrogation, counsel should have the opportunity to re--examine the witness via the usual procedure for direct and cross-examination. The re--examination should be restricted to the scope of the subject matter of the jurors' questions.

*Morrison v. State*, 845 S.W.2d at 900-02 (Tex. Crim. App. 1993) (Campbell, J., joined by McCormick, P.J., and White, J., dissenting).

The Dallas Court of Appeals upheld jurors asking questions in a civil case, in *Hudson v. Markum*, 948 S.W.2d 1 (Tex. App.--Dallas 1997, writ denied) (involving a 5-step procedure).

An article by Gordon Hunter in the September 26, 1994, edition of Texas Lawyer, page 36, titled "In the People's Court, Jurors Ask Some Off-Beat Questions," discussed guidelines used by Judge John Delaney in the 95th District Court of Dallas County, in connection with juror questions. Here are Judge Delaney's guidelines.

JURORS ASKING QUESTIONS OF WITNESSES

1. Judge explains the process to trial attorneys before voir dire (by copy of this handout or orally or both), answers any questions about the process, and assures the attorneys that they will be given opportunities to make objections to the process as well as any juror questions, both outside the presence of the jury.

2. During voir dire examination the Judge explains the process in general terms, reserving detailed instructions for after the jury is seated and sworn.

3. During preliminary instructions to the impaneled jury, the judge explains the process in detail, including the content of the following items. This can be done orally because it will be in the Statement of Facts in the event of an appeal.

4. Judge emphasizes to jurors that they are not required, expected, or necessarily encouraged to ask questions, but that the opportunity will be available to them.

5. Judge explains that juror questions may have to be excluded for legal reasons, the same as if they'd been asked by an attorney. That is, some questions are not permitted in a trial because of the Rules of Evidence that must be followed no matter who asks the question. The Judge may wish to expand on this point, to put jurors at ease, by saying they should not be intimidated by the possibility their question will violate some rule of evidence that no one expects them to know; that they should feel free to ask their question and leave its admissibility up to the Judge; but that they should not speculate on why their question was not allowed if it is not. The jury should be instructed not to discuss among themselves any question submitted by a juror, except that any question that actually is asked of a witness becomes part of the evidence in the trial and is appropriate for discussion after deliberations begin.

6. Judge informs the jurors that he cannot rephrase their questions to put them in a format for reading to the witness, so jurors should submit them in the exact form they expect them to be read to the witness. E.g., jurors should write out "What did you do... " instead of "Ask him about what he did.... "

7. After each witness is examined by all attorneys, jurors are given a chance to submit questions before that witness is excused.

8. The Judge asks jurors for a show of hands to indicate if there are any jury questions, e.g., "are there any questions from the jury?"

9. Jurors write out any questions on a sheet from their note pad and hand them up through the bailiff. As many questions as any juror has may be written on one or more pages.

10. Before there is any discussion or reading of the questions, the jury is sent to the jury room. The witness (if not a party) is also sent out of the room.

11. With the jury out, the Judge and attorneys review submitted questions, which are read into the record by the Judge.* The attorneys may examine the written questions if they wish, but in practice it has been rare that they see the need. The attorneys make any objections while the jury is out. The Judge rules on the propriety of the questions, based on the normal rules of evidence, and may

choose to exclude some if they appear to be adversarial in nature. Experience has shown that they almost never are.

12. With the jury back in the jury box, and the witness on the stand, the Judge reads each question to the witness, followed by the witness, answer. If the juror appears confused by any question, the Judge may offer to read it again. The Judge should decline to answer any question from the witness that asks the Judge to interpret the meaning of the question, but should instruct the witness to answer as best he can. The attorneys may make any objection to the form or content of the answer (e.g., narrative, includes hearsay, etc.).

13. After all jury questions have been answered by the witness, the attorneys may ask follow up questions relating to the juror questions, beginning with the sponsoring attorney.

14. The witness is then excused without further questions from the jurors. One commentator on this procedure has suggested that the juror questions should be preserved and marked as Court or appellate exhibits to be included in the trial record. This seems unnecessary, given that each question that is asked of a witness has been taken down in the Statement of Facts at least twice.

The Arizona Supreme Court adopted rules on October 24, 1995, permitting jurors to submit written questions in civil and criminal trials. The Civil Rule reads:

> Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

ARIZ. R. CIV. P. 39(b)(10). *See* similar criminal rule, ARIZ. R. CRIM. P. 18.6(e).