BUILDING BLOCKS OF EVIDENCE

RICHARD R. ORSINGER
LAW OFFICE OF RICHARD R. ORSINGER
1616 Tower Life Building
San Antonio, Texas 78205
210-225-5567
richard@orsinger.com

Partner, McCurley, Kinser, McCurley,
Nelson & Orsinger, LLP
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
214-273-2400
richard@mkmn.com

State Bar of Texas
EVIDENCE AND DISCOVERY COURSE BOOT CAMP
March 5, 2003
Dallas

CHAPTER 1

© 2003
Richard R. Orsinger
All Rights Reserved

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified by the Texas Board of Legal Specialization
Family Law (1980), Civil Appellate Law (1987)

Memberships:

Chair, Family Law Section, SBOT (1999-2000)
Chair, Appellate Practice & Advocacy Section, SBOT (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-01)
Member, Supreme Court Advisory Comm. on Rules of Civil Procedure (1994-2002); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-2001; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Appointed Member, Supreme Court Task Force on Jury Charges (1992-93)
Appointed Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
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

Professional Activities and Honors:

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
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education:

Chairman, State Bar of Texas Continuing Legal Education Committee (2000-2002)
Course Director, State Bar of Texas 2002 *Enron, The Legal Issues*
Course Director, State Bar of Texas Practice in the Supreme Court Course (June, 2002)
Course Director, State Bar of Texas Advanced Expert Witness Course (2001,2002)
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
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
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)

Authored

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (1999) (2 Volume Set)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (2000)
---*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)
---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 ACTIVITY

State Bar's 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);

State Bar'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)

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)

State Bar'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)

State Bar's Advanced Appellate 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); Judges vs. Juries: A Debate (2000); Appellate Squares (2000)

State Bar'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); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

TABLE OF CONTENTS

I. SCOPE OF ARTICLE. 1

II. INTRODUCTION. 1

III. GENERAL REQUIREMENT TO PRESERVE COMPLAINT 1

IV. MAKING OBJECTIONS 1
- **A. Valid Complaint** 1
- **B. Timely Asserted** 2
- **C. Secure Ruling** 2
- **D. Let the Record Reflect** 2

V. OFFER OF PROOF OF EXCLUDED EVIDENCE. 2

VI. AUTHENTICATION REQUIREMENT. 3

VII. BEST EVIDENCE RULE. 3

VIII. THE HEARSAY RULE 4

IX. HEARSAY WITHIN HEARSAY. 4

X. OFFER FOR LIMITED PURPOSE. 4

XI. STATE OF MIND EXCEPTION TO HEARSAY RULE. 5

XII. GOVERNMENT RECORDS 5
- **A. Authentication of Government Records.** 5
- **B. The "Government Record" Exception to the Hearsay Rule.** 6
- **C. The "Absence of Public Record or Entry" Exception to the Hearsay Rule.** 6

XIII. BUSINESS RECORDS AUTHENTICATION; (HEARSAY EXCEPTION). 6

XIV. JUDICIAL NOTICE. 8

XV. IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT. 8

XVI. THE RULE OF OPTIONAL COMPLETENESS. 8

XVII. EXPERT WITNESSES. 8
- **A. Qualifications.** 8
- **B. Reliability.** 9
- **C. Relevance.** 9
- **D. Assisting the Trier of Fact.** 9

BUILDING BLOCKS OF EVIDENCE©

I. SCOPE OF ARTICLE.

This Article discusses the building blocks of evidence. This includes preserving error, making objections, offer of proof, authentication, best evidence rule, hearsay, offer for limited purpose, government records, business records, judicial notice, impeachment by prior inconsistent statement, and the rule of optional completeness.

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; 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. MAKING OBJECTIONS

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).

2. The complaint raised on appeal must be the same as that presented to the trial court. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135 (Tex. App.--Dallas 1992), *agreed motion to dismiss and vacate granted*, 843 S.W.2d 486 (1993); *Pfeffer v. Southern Texas Laborers' Pension Trust Fund*, 679 S.W.2d 691 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

3. Global objections, profuse objections, or those overly general or spurious in nature, preserve no error for review. *Smith v. Christley*, 755 S.W.2d 525 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (dealing with objections to the jury charge).

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*, 687 S.W.2d 791 (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. New 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 statement of facts, 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 has been cured by new 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.

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.

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 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 <u>10 days</u> 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.

<u>Public Records.</u> 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.

<u>Business Records.</u> 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'."

<u>Summaries.</u> The use of a summary ordinarily would violate the best evidence rule. TRE 1006 creates an exception to the best evidence rule, for summaries. 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, 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).

<u>Cases.</u> *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); *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, which is 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 excluded evidence met state-of-mind exception to hearsay rule when the party made only a general offer of the evidence, and not an offer for the limited purpose of showing state-of-mind). *See Texas Commerce Bank v Lebco Constructors, Inc.*, 865 S.W.2d 68, 76 (Tex. App.--Corpus Christi 1993, writ denied) (evidence admitted for the limited purpose of punitive damages could not be used on appeal to support the verdict on actual damages).
Using hearsay as an example, the sequence is as follows:

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. 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 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).

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. *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"). There is an exception to the hearsay rule which applies to government records. TRE 803(8) provides:

Public Records and Reports. Records, reports, statement s, 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 im posed 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.

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).

XIII. BUSINESS RECORDS AUTHENTICATION; (HEARSAY EXCEPTION).

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 prepara-

tion 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).

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. Nov. 2, 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.

XIV. JUDICIAL NOTICE.

TRE 201 governs the 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).

XV. 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).

XVI. 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.

XVII. EXPERT WITNESSES.

For expert testimony to be admissible, the expert must establish his or her qualifications to render expert opinions, and the expert's methodology must be shown to be reliable. Additionally, the expert's testimony must be relevant to the issues to be decided in the case, and the expert testimony must assist the jury in deciding a matter they could not decide without expert evidence.

A. Qualifications.

Under TRE 702, a person may testify as an expert only if (s)he has knowledge, skill, experience, training or education that would assist the trier of fact in deciding an issue in the case. *See Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996). Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to decide an issue in the case. Courts sometimes evaluate the first prong, of adequate knowledge , skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must

be limited to situations in which the issues are beyond that of an average juror"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993) [Westlaw cite 30 HOULR 797].

B. Reliability.

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 FRE 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 Court used the word "reliability" to describe this necessary quality. The U.S. Supreme Court's opinion in *Daubert* applies in all federal court proceedings.

In *Daubert*, the Supreme Court gave a non-exclusive list of factors to consider on the admissibility of expert testimony in the scientific realm: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. In *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 11 S. Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, 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.* *Kuhmo Tire* acknowledged that the list of factors in *Daubert* did not apply well to certain types of expertise, and that other factors would have to be considered by the court in such instances.

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.

C. Relevance.

Daubert contains a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998):

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

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

D. Assisting the Trier of Fact.

Rule 702 requires that the expert's testimony "assist the trier of fact." There are some issues where the jury is capable of making its own determination, without the assistance of expert testimony. In those instances, expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony.")