OBJECTIONS CHECKLIST

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Chapter 8 State Bar of Texas Annual Meeting: Ultimate Trial Notebook

Objections Checklist Chapter 8

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Objections Checklist

by

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This Article is a quick-reference source for meeting evidentiary predicates and making evidentiary objections in court. The types of evidence and objections are listed in alphabetical order. TRCP=Texas Rules of Civil Procedure; TRE=Texas Rules of Evidence; TRAP=Texas Rules of Appellate Procedure; and FRE=Federal Rules of Evidence.

I. MEETING PREDICATES

Physical Evidence: Evidence must be authenti cated or identified, in order to be admissible. TRE 901 provides that "the requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A piece of evidence can be authenticated or identified by a witness with personal knowledge (TRE 901(b)(1)), or by other methods which establish that the matter in question is what its proponent claims. See TRE 901. Some items are self-authenticating. See TRE 902.

Testimony: Testimony, in order to be admissi ble, must be from a competent witness (i.e., the witness cannot be insane or too young, and must not violate the "dead man statute; the witness cannot be the presiding judge or a juror in the case; etc."). If the testimony is from a lay witness (i.e., non-expert), the testimony must be based upon personal knowledge. TRE 602 provides that the testimony of a lay witness is not admissible "unless evidence is introduced sufficient to support a finding that [the witness] has personal knowledge of the matter."

II. MAKING OBJECTIONS

TRE 103(a) governs complaints on appeal from the improper admission or exclusion of evidence. TRE(a) provides that the admission or exclusion of evidence in the trial court is not reversible error "unless a substantial right of the party is affected and":

> (1) Objection. In case the rul ing is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When 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.

The Court in City of Mesquite v. Moore, 800 S.W.2d 617, 619 (Tex. App.--Dallas 1990, no writ) said:

> A valid objection to an offer of evidence is one that names the particular rule of

evidence that will be violated by admission of the evidence.

As to timely, a hearsay objection first made after a statement was repeated three times was not considered timely in Atlantic Richfield v. Misty Products, 820 S.W.2d 414, 421 (Tex. App.--Houston [14th Dist.] 1991, writ denied). And error was waived regarding plaintiff's counsel mentioning defendant's insurance in voir dire, when defendant failed to move for mistrial until conclusion of plaintiff's voir dire. See Meuth v. Hartgrove, 811 S.W.2d 626, 628 (Tex. App.--Austin 1990, no writ).

III. OBJECTIONS OUTSIDE THE PRESENCE OF THE JURY

TRE 103(c) provides:

> (c) Hearing of the Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such a making statements or offers of proof or asking questions in the hearing of the jury.

Occasionally, in the objections set out below, it is suggested that counsel first approach the bench before making an objection. This is particularly true of objections seeking to exclude evidence where the jury might draw significant inferences from the making of the objection.

IV. PRELIMINARY MATTERS OUTSIDE PRESENCE OF THE JURY

TRE 104(c) provides:

> (c) Hearing of Jury. In a criminal case, a hearing on the admissibility of a confession shall be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or in a criminal case

> when an accused is a witness and so requests.

TRE 104 is taken from FRE 104. The Notes of the Advisory Committee on Proposed Federal Rules make the following comments regarding FRE 104:

> Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1771, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is save by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

V. OBJECTIONS

1. Ambiguity

> Your Honor, I object that counsel is attempting to offer evidence as to the meaning of a document that is not ambiguous, and extrinsic evidence is not admissible to explain or create an ambiguity regarding a document that is not ambiguous on its face.
>
> Superior Oil Co. v. Stanolind Oil & Gas Corp., 240 S.W.2d 281 (Tex. 1951) (re: deed); Miles v. Martin, 321 S.W.2d 62 (Tex. 1959) (re: deed); Prairie Producing Co. v. Schlachter, 786 S.W.2d 409, 413 (Tex. App.--Texarkana 1990, writ denied) (re: deed).

2. Audits

Unfortunately, no evidentiary objections can be levied against court-ordered audits. TRE 706 provides:

> Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

3. Authentication

Your Honor, this exhibit has not been properly authenticated [or identified] as required by TRE 901.

Under TRE 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication may be by testimony of a witness with knowledge, by nonexpert opinion on handwriting, comparison by the

trier of fact or expert witness to genuine specimens, consideration of distinct characteristics, voice identification based on having heard the voice, etc.

Some documents are self-authenticated: domestic govt. 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."

4. Best Evidence Rule

Your Honor, I object that under TRE 1002 the best evidence of the contents of the [writing/recording/photograph] would be the item itself.

Under TRE 1002, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law."

Response: Your Honor, under TRE 1004 an original is not required, and other evidence of a writing, recording, or photograph is admissible if:

- the original is lost or destroyed
- the original is not obtainable
- no original is located in Texas
- the opponent has the original and has failed to produce it
- the instrument is "not closely related to a controlling issue."

5. Business Records

Your Honor, I object that the exhibit is hearsay. A written document is hearsay, since it constitutes "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 stated." This document is clearly hearsay.

Response: Your Honor, these records meet the TRE 803(6) exception to the hearsay rule for "business records." The predicate to establish documents as business records is:

- made at or near the time the information was acquired by the business
- by a person with personal knowledge, or using information from a person with personal knowledge
- made in the ordinary course of business
- kept in the ordinary course of business

We have met this predicate and proved these as business records.

NOTE: The court may still exclude the evidence if "the source of information or the method or circumstances of preparation indicate lack of trust worthiness." TRE 803(6).

NOTE: TRE 805 provides that hearsay contained within hearsay is not admissible

unless both levels of hearsay meet exceptions to the hearsay rule.

Your Honor, I object that the exhibit has not been properly authenticated.

> Response: Your Honor, these records are self-authenticated as business records by the affidavit of the custodian or other qualified witness, as provided in TRE 902(10).
>
> - Or -
>
> Response: Your Honor, we have authenticated these as business records through the deposition [or live testimony] of the custodian or other qualified witness. We have met the requirements of TRE 902(10).

NOTE: TRE 803(8) provides that the government records exemption to the hearsay rule does not apply in criminal cases to matters observed by police officers and other law enforcement personnel. Cole v. State, 839 S.W.2d 798, 805, 811 (Tex. Crim. App. 1990), extended this exclusion to business records as well.

6. Chart

I object. This chart does nothing but reiterate the testimony of [name witness.] It adds nothing new. It is cumulative and is nothing more than an attempt to reduce testimony to writing and send it into the jury room.

“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).

7. Child

I object. The competency of this witness to testify has not been established under Rule 601.

Under TRE 601(a)(2), a child cannot testify if the court finds, from its own examination, that the child appears "not to possess sufficient intellect to relate transactions with respect to which they are interrogated." Note that this test has nothing to do with the child’s ability to distinguish truth from falsity or appreciate the penalties of perjury.

8. Collateral Estoppel

Your Honor, this evidence is precluded by the doctrine of collateral estoppel. The issue was decided in a previous lawsuit, where the matter in question was determined adverse to [the proponent's] claim. [The proponent] cannot now offer proof to the contrary.

Collateral estoppel, or issue preclusion, precludes the relitigation of identical issues of fact or law that were actually litigated and essential to the judgment in a prior suit. Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985). Collateral estoppel applies even if the prior judgment is on appeal, as long as the appeal is not a "trial de novo." Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 6 (Tex.

1986).

9. Computer Records

Your Honor, these records have not been properly authenticated.

Computer-generated business records may be authenticated in the same manner as other business records. It is not necessary to show that the machine operated properly or that the operator knew what he was doing. Longoria v. Greyhound Bus Lines, Inc., 699 S.W.2d 298, 302 (Tex. App.--San Antonio 1985, no writ). However, to qualify as business records the data must, at its inception, be based upon personal knowledge.

10. Copies [See Duplicates]

11. Damage Award

Your Honor, Counsel is attempting to have this witness tell the Jury what damages it should award in this case. Under the law, a lay witness cannot tell the Jury what, if anything, should be awarded as damages for alleged injuries.

Clark v. McFerrin, 760 S.W.2d 822 (Tex. App.--Corpus Christi 1988, writ denied) (lay witness' opinion on damage award is not rationally based on perception of witness, as required by TRE 701).

12. Discovery Sanctions

Your Honor, may we approach the bench. . . . Your Honor, the evidence counsel is trying to elicit is not admissible in that TRCP 193.6 precludes the admission of evidence which should have been produced in discovery but was not. In interrogatory number [request for disclosure, request for production, etc.] . . . [tell story.] I object to the admission of this evidence.

Response:

Your Honor, we request the opportunity to show good cause why the evidence should be admitted.

TRCP 193.6 says:

> (a) Exclusion of Evidence and Exceptions. A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
>
> > (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
> >
> > (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.
>
> TRCP 193.6(b) Burden of Establishing Exception. The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

Response:

Your Honor, under the authority of TRCP 193.6(c), I request a continuance or a temporary postponement of the trial.

TRCP 193.6(c) Continuance. Even if

the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

13. Duplicates

Your Honor, I object that this exhibit is not the original document--it is a copy.

Response: Your Honor, under TRE 1003 "[a] duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

14. Dead Man Rule

Your Honor, I object. This witness cannot testify to an alleged oral statement by the deceased [or ward], under TRE 601(b).

Exception: But this testimony is corroborated.

Exception: But this is cross-examination and the witness was called by the opposite party to testify to the oral statement.

In actions by or against executors, administrators, or guardians, TRE 601(b) excludes oral statements of a testator, intestate or ward, unless the testimony to the oral statement is corroborated, or unless the witness is called to testify thereto by the opposite party.

If Sustained: Your Honor, I would ask the Court pursuant to TRE 601(b) to instruct the Jury that my client is not permitted by law to give evidence of any oral statement by the deceased [or ward] unless it is corroborated or unless the witness is called at trial by the opposite party.

15. Experiments

Your Honor, I object that the experiment counsel wishes to present before the jury is not admissible because there is not a substantial similarity between the conditions existing at the time of the experiment and the conditions existing at the time of the accident.

Mottu v. Navistar Intern. Transp. Corp. 804 S.W.2d 144, 148 (Tex.App.--Houston [14th Dist.] 1990, writ denied).

16. Fifth Amendment

As to non-party witness: Your Honor, may we approach the bench? . . . Your Honor, I believe that this witness may invoke his self-incrimination privilege in connection with questions he may be asked. Under TRE 513(b), the Court must conduct the proceedings "so as to facilitate the making of claims of privilege without the knowledge of the jury." I would ask the Court to have counsel outline his examination to the witness outside the presence of the jury, so that the Court can determine whether the privilege will be invoked. If so, then counsel should be instructed not to pose those questions to the witness in the presence of the jury.

General Rule: A witness in a civil proceeding can invoke the self-incrimination

privilege. Kastigar v. U.S., 406 U.S. 441, 444 (1972). For non-witnesses, 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).

When Privilege Applies: 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).

Must He Take the Stand? 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.2l 196 (Tex. 1975).

17.
Government Records

Your Honor, this exhibit is not a certified copy of the public record, and has therefore not been properly authenticated under TRE 1005.

Response:
Your Honor, TRE 1005 permits authentication of a public record by the testimony of a witness who has compared the copy with the original. The sponsoring witness testified that she personally compared the copy to the original and that the copy was correct.

Response:
Your Honor, I would like to show the Court that a certified copy could not be obtained by the exercise of reasonable diligence, and that under TRE 1005 other evidence of the contents of the document may be used.

Your Honor, may I take the witness on voir dire to show that the sources of information for this report and other circumstances indicate a lack of trustworthiness . . . Your Honor, I object that the sources of information and other circumstances indicate a lack of trustworthiness.

Your Honor, this exhibit is hearsay.

> Response: Your Honor, this document has been shown by the sponsoring witness to meet the TRE 803(8) government record exception to the hearsay rule.

Public records are excepted from the hearsay rule, under TRE 803(8). To be public records, the documents must be from a government office, setting forth (1) the activities of the office, or (2) legally required reports on matters observed pursuant to duty imposed by law; or (3) factual findings resulting from an investigation made by authority granted by law. The court can still exclude the evidence if the sources of information or other circumstances indicate a lack of trustworthiness.

18. Illegally Acquired Evidence

Your Honor, may we approach the bench? . . . . Your Honor, this evidence was illegally obtained and under the “exclusionary rule” illegally obtained evidence is not admissible. I would ask the Court for permission to take the witness on voir dire outside the presence of the jury to establish illegality.

> Response: Your Honor, there is no “exclusionary rule” in civil proceedings between private litigants.

The “exclusionary rule” of Weeks v. U.S., 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), bars the admission of unconstitutionally-acquired evidence in criminal cases brought by the government against a defendant. Those cases do not apply to illegally, as opposed to unconstitutionally, acquired evidence, and they do not apply to civil litigation between private parties. Tex. Code Crim. P. art. 38.23 prohibits the admission in a criminal proceeding of evidence obtained in violation of any laws of Texas or the U.S.A. One case has 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."

19. Insanity

I object. The witness is not competent to testify under TRE 601(a)(1).

Under TRE 601(a)(1), a person who in the opinion of the Court is "in an insane condition of mind" when offered as a witness cannot testify. The same is true if he was insane when the events happened regarding which he is called to testify.

20. Judicial Estoppel

Your Honor, I object to any testimony from this witness on the subject of _____ because [Plaintiff/Defendant] is judicially estopped from disputing the fact that _____. I would now tender a certified

copy of [Plaintiff/Defendant]'s sworn pleading from a prior case in which [Plaintiff/Defendant] asserted _____.

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.

21. Judicial Notice

Your Honor, the Court cannot take judicial notice of the fact as requested by counsel, because under 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." The point raised by counsel doesn't meet these criteria.

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.

A court cannot take judicial notice of the records of another court in another case unless a party provides proof of those records. Bhalli v. Methodist Hospital, 896 S.W.2d 207, 210 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

22. Law

Your Honor, I object that counsel is asking the witness to testify about the law of this state which is not permitted.

No one can testify as to his or her opinion of what the law is of the jurisdiction where the case is pending. U.S. v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977). However, “an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts.” Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361, 365 (Tex.1987). In Faulkner v. Thrapp, 616 S.W.2d 344 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.), it was permissible for the attorney who drafted a will to testify to whether the testator had testamentary capacity, even though it involved a legal definition and a legal test. See also Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965). Cluett v. Medical Protective Co., 829 S.W.2d 822 (Tex. App.--Dallas 1992, writ denied), held that an expert could not render an opinion on whether a particular event was or was not within the scope of an insurance policy. 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), 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. Lyondell Petrochemical Co. v. Fluor Daniel, Inc., 888 S.W.2d 547, 554 (Tex. App.--Houston [1st Dist.] 1994, writ denied), held that 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 Crum & Forster, Inc. v. Monsanto Co.,

887 S.W.2d 103, 134 (Tex. App.--Texarkana 1994, writ dism'd by agr.), the court said:

> [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.

23. Leading Question

Your Honor, counsel is leading the witness.

TRE 611 says that "[l]eading questions should not be used on the direct-examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

24. Limited Purpose

When you have offered evidence and an evidentiary objection has been sustained, then try offering the evidence for a limited purpose other than the purpose which led to the objection.

Your Honor, I would like to offer this evidence for the limited purpose of establishing [so and so].

When evidence is inadmissible for one purpose but admissible for another purpose, the court can let it in "for a limited purpose." The court should state what the limited purpose is, and what the evidence cannot be considered for. The opponent of the evidence should request that the jury be instructed not to consider the evidence for X but to consider it only for Y.

25. Lying

Your Honor, I object that it is not proper to ask a witness whether another person is lying or telling the truth.

A witness cannot opine as to whether another witness is telling the truth or lying. Ochs v. Martinez, 789 S.W.2d 949, 956 (Tex. App.--San Antonio 1990, writ denied).

26. Opinion (Expert)

General Rule: Must be scientific, technical or other specialized knowledge that would assist the trier of fact to understand evidence or determine a fact in issue. TRE 702.

Underlying Principles Not Reliable

Objection: Your Honor, may we approach the bench. . . . Your Honor, there has been no showing that the methodology used by the expert is reliable as required by the Daubert case.

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Daubert v. Merrell Dow Pharmaceuti cals, Inc., 509 U.S. 579, 589 (1993), held that FRE 702 requires that an expert who relies on scientific principles to support his opinions must show (s)he is using: (1) scientific knowledge (2) which will assist the trier of fact to understand the evidence or to determine a fact in issue. To constitute "scientific knowledge," the expert testimony must be reliable. To be helpful to the trier of fact, the evidence must be relevant. Scientific evidence is relevant when there is a "valid scientific connection to the pertinent inquiry . . . . Id. at 592. The Supreme Court enumerated four non-exclusive factors

to aid trial judges in determining whether scientific evidence is relevant and reliable and thus admissible under FRE 702: (1) whether a theory or technique can be and has been tested (falsifiability); (2) whether the theory or technique has been subjected to peer review and publication; (3) the technique's known or potential rate of error; and (4) the general acceptance of the theory or technique by the relevant scientific community. Id. at 591-94.

- E.I. du Pont de Nemours & Co., Inc., v. Robinson, 923 S.W.2d 549, 557 (Tex.1995), held that, under TRE 702, all expert testimony must be determined to be both reliable and relevant before it can be admitted into evidence. The trial court may consider: (1) the extent to which the theory has been 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. These factors are nonexclusive and will differ with every case and the nature of the evidence.

- Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex.1998): “Nothing in the language of [Rule 702] suggests that opinions based upon 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."

Assist Trier of Fact

Objection: Your Honor, this testimony is not expert testimony since the jury is equally competent to form an opinion on the ultimate fact issues.

The ultimate test of whether an opinion will assist the trier of fact is whether the jury would be equally competent as the expert to form an opinion on the ultimate fact issues.

In Herrera v. FMC Corp., 672 S.W.2d 5, 7 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), a products liability case, an expert was correctly denied the opportunity to say whether the failure to provide adequate warning exposed the plaintiff to an unreasonable risk of harm.

- "The expert testimony on the mixed question of law and fact is still subject to [TRE] 702 scrutiny as to whether it helps the trier of fact. It may also be tested under [TRE] 403, and is subject to an objection of unfair prejudice, confusion of the issues, or misleading the jury." Louder v. DeLeon, 754 S.W.2d 148, 149 (Tex. 1988).

Not Qualified as an Expert

Objection: Your Honor, this witness is not qualified as an expert by knowledge, skill, experience, training or education, as required by TRE 702, as a condition to rendering expert testimony.

- Broders v. Heise, 924 S.W.2d 148, 153 (Tex.1996): “What is required is that the offering party establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.”

PRO

- Wallace v. Wallace, 623 S.W.2d 723 (Tex. Civ. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.) (banker, a real estate appraiser, and an accountant, testified to the value of a business, and its assets).
- Gannett Outdoor Co. of Texas v. Kobeczka, 710 S.W.2d 79, 88-89 (Tex. App.--Houston [14th Dist.] 1986, no writ) (welder permitted to testify to fair cash market value of sign).
- Ervin v. Gulf States, Inc., 594 S.W.2d 134 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.) (chronic smoker of marijuana (24 years' experience) was qualified to give his expert opinion that the plaintiff was smoking the evil weed and not tobacco prior to an automobile accident. As an aside, the appellate court affirmed the trial court's decision to exclude evidence that the expert had six burglary and theft convictions, a DWI and a statutory rape conviction. [Apparently the trial judge didn't like the plaintiff.]
- Kestenbaum v. Falstaff Brewing Co., 514 F.2d 690, 698 (5th Cir. 1975), cert. den., 424 U.S. 943 (1976) (beer distributor qualified to testify as an expert regarding the goodwill of a business).
- South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Texas, 614 F.2d 1056, 1061 (5th Cir. 1980) (financial officer of a feedlot entitled to testify as to net worth of the operation).
- Austin Teachers F.C.U. v. First City Bank, 825 S.W.2d 795, 801 (Tex. App.--Austin 1992, writ denied) (banker permitted to testify to reasonableness of attorney's fees incurred by his bank).
- Walter Baxter Seed Co. v. Rivera, 677 S.W.2d 241, 244 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.) (cucumber farmers qualified as experts by virtue of practical experience).

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- Milkie v. Metri, 658 S.W.2d 678, 679 (Tex. App.--Dallas 1983, no writ) (family physician inexperienced in cardiac problems not qualified to opine on bypass surgery versus medication).
- Bilderback v. Priestly, 709 S.W.2d 736, 741 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.) (non-physician with doctoral degrees in physics and biophysics qualified to testify to mechanics, forces, and effects of weights used in physical therapy in medical malpractice case).
- Warren v. Harlan, 561 S.W.2d 860 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.) (must show that witness has a particular expertise and that opinion is not outside the bounds of his area of competence; handwriting expert not qualified as an expert in the fields of alcohol-related disorders despite "lots of experience").
- Morgan v. Morgan, 657 S.W.2d 484 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd) (CPA was also allowed to testify to value of a beauty shop business based on capitalization of earnings, despite attack on his qualifications).
- Trick v. Trick, 587 S.W.2d 771 (Tex. Civ. App.--El Paso 1979, writ ref'd n.r.e.) (former banker who had never before evaluated stock in a professional corporation was not permitted to testify to the value of the husband's medical

practice).

- Central Mutual Ins. Co. v. D & B, Inc., 340 S.W.2d 525 (Tex. Civ. App.- -Waco 1960, writ ref'd n.r.e.) (court rejected an insurance company's proffer of the expert testimony of a convicted burglar that the burglary was too crudely-executed to have been done by a professional so that it must have involved collusion by the insured).

Proper Legal Concepts

Objection: Your Honor, this witness cannot give opinions on mixed fact-law questions because there has been no showing that the witness' opinion is based upon "proper legal concepts."

An expert opinion may embrace the ultimate issue to be decided by the jury. TRE 704. Opinions on mixed fact-law question must be based on "proper legal concepts." Birchfield v. Texarkana Mem. Hospit., 747 S.W.2d 361, 365 (Tex. 1987).

Expert permitted to testify that doctor was negligent, and grossly negligent, and as to proximate cause. Birchfield, 747 S.W.2d at 365.

State trooper permitted to testify that plaintiff's failure to yield right-of-way was proximate cause of the accident. Louder v. DeLeon, 754 S.W.2d 148 (Tex. 1988).

CPA permitted to testify to separate and community character of property. Welder v. Welder, 794 S.W.2d 420, 433 (Tex. App.--Corpus Christi 1990, no writ).

Relying on Inadmissible Data

Objection: Your Honor, the witness is relying upon inadmissible data, but there has been no showing that experts in the field reasonably rely on such data.

An expert may base his opinion on inadmissible data "only if the data is of a type reasonably relied upon by experts in the particular field. . . . Whether experts in the field reasonably rely upon such data is a matter for preliminary determination by the trial court pursuant to [TRE] 104(a)." Moore v. Polish Power, Inc., 720 S.W.2d 183, 191-92 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

Court took judicial notice that hearsay comments of party's counsel is of a type relied upon by attorneys in forming opinions upon the subject of reasonable attorney's fees. Liptak v. Pensabene, 736 S.W.2d 953, 957-58 (Tex. App.--Tyler 1987, no writ).

"Expert opinion cannot be based upon mere guess or speculation, but must have a proper factual basis." Ochs v. Martinez, 789 S.W. 2d 949, 958 (Tex. App.--San Antonio 1990, writ denied).

Can't Recount Hearsay

Objection: Your Honor, I object. An expert can't recount inadmissible hearsay to the jury.

"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." Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361, 365 (Tex. 1987).

After Birchfield was decided, TRE 705 was amended to provide for a balancing test, as follows:

> TRE 705(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.

accountant's testimony to the value of a business, based upon review of the company's records and discussions with the owner, was held admissible under Rule 701 (lay opinion).

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Wife's testimony that husband would have beat her if she had not signed deeds was not speculation, but was instead an opinion rationally based on knowledge of the husband, as demonstrated by evidence of prior violence. Jones v. Jones, 804 S.W.2d 623, 627 (Tex. App.--Texarkana 1991, no writ).

27. Opinion (Lay Witness)

Your Honor, I object that counsel is asking this witness for opinion testimony, and it has not been shown that the dictates of TRE 701 have been met.

TRE 701 limits the opinion testimony of a lay witness to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." A lay opinion must be based upon a perception of the witness, i.e. personal knowledge. Thus, a lay witness cannot express an opinion or draw inferences which are partially based upon hearsay.

28. Optional Completeness

Your Honor, at this time I would like to request the opportunity to offer into evidence under the Rule of Optional Completeness, TRE 106, the following evidence . . . .

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. The rule specifically applies to depositions.

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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.

- See Hochheim Prairie Farm Mut. Ins. v. Burnett, 698 S.W.2d 271, 276 (Tex. App.--Fort Worth 1985, no writ) (owner of house qualified to give lay opinion testimony as to value of house; also, a man who was a builder but not an appraiser qualified under Rule 701 to render an opinion of value of the house).

- In West v. Carter, 712 S.W.2d 569, 572 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.), an

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The rule cannot be used to exclude part of a recorded statement because another part is missing. The rule of optional completeness is not a rule of exclusion. Lomax v. State, 2000 WL 343585 (Tex. App.–Waco March 29, 2000, no pet. h.).

29. Parol Evidence Rule

Your Honor, I object that counsel is eliciting evidence in violation of the Parol Evidence Rule, which prohibits extrinsic evidence that varies the terms of a valid written instrument.

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).

30. Personal Knowledge

Your Honor, I object that there is no showing that this witness has personal knowledge of that matter, as required by TRE 602.

A witness can testify to an issue only if he has personal knowledge. TRE 602 requires a showing that a lay witness has personal knowledge before he can testify to a matter. Such proof may be established by the witness himself, or by other proof. This Rule does not apply to experts.

31. Photographs

Objection: Your Honor, this photograph has not been properly authenticated.

Predicate: [Mr. Witness], is this photograph, which has been marked Plaintiff's Exhibit 12, a fair and accurate representation of the circumstances depicted in photograph?

Inflammatory Photos: Your Honor, may we approach the bench. . . . Your Honor, the Supreme Court has held that photographic reproductions that are calculated to arouse the sympathy, prejudice, or passion of the jury and does not serve to illustrate disputed issues or aid the jury in its understanding of the case should not be admitted. See Heddin v. Delhi Gas Pipe Line Co., 522 S.W.2d 886, 889 (Tex. 1975) (involving photographs of dead animals).

A photograph must be authenticated by a person with knowledge of the circumstances portrayed in the photograph. TRE 901. Generally, if a verbal description of a scene would be admissible, the equivalent photograph is also admissible. State v. City of Greenville, 726 S.W.2d 162, 168 (Tex. App.--Dallas 1986, writ ref'd n.r.e.). The witness need not have taken the photograph or have been present when the picture was taken. Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314-15 (Tex. 1988). Ordinarily, inaccuracy of the photo goes to its weight and not admissibility. Davidson, 737 S.W.2d at 314-15.

TRE 1001(2) says that for purposes of Article X the term "photographs" includes photos, x-rays, video tapes, slides and motion pictures.

32. Prior Convictions

Your Honor, may we approach the bench? . . . Your Honor, I believe that counsel is going to elicit testimony regarding a prior conviction. This information is not

admissible under TRE 609 and 803(22).

No 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: Conviction not admissible if 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: Not admissible, TRE 609(d).

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

Manner of Proof: Can prove a prior conviction only by admission of the witness or by public record. TRE 609.

33. Prior Inconsistent Statement

Your Honor, counsel is attempting to prove up a prior inconsistent statement without following the procedure outlined in TRE 613(a).

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.

34. Profiles

Your Honor, Texas cases have specifically held that profiles are not admissible evidence.
Bushell v. Dean, 781 S.W.2d 652, 656 (Tex. App.--Austin 1989), rev'd o.g., 803 S.W.2d 711 (Tex. 1991).

35. Publications

Your Honor, I object that this document has not been authenticated. Under TRE 902, authentication is required unless the exhibit is a newspaper or periodical. TRE 902(6).

Your Honor, I object that this document is hearsay, and there has been no showing that this publication is generally used and relied upon by the public or by persons in particular occupations as is required by TRE 803(17) in order to make it admissible.

Curran v. Unis, 711 S.W.2d 290, 296-97

(Tex. App.--Dallas 1986, no writ).

36. Reconstruction of Accident

Your Honor, in order to justify the admission of an accident reconstruction there must be "a substantial similarity between the conditions existing at the time of the experiment and those existing at the time of the incident giving rise to the litigation." Mottu v. Navistar Intern. Transp. Corp., 804 S.W.2d 144, 148 (Tex. App.--Houston [14th Dist.] 1991, writ denied). That similarity does not exist as to this evidence, and I object.

37. Relevancy

Your Honor, that evidence is not relevant to any issue in this case.

Evidence is admissible only if it is relevant. TRE 402. Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence. TRE 401.

38. Remedial Measures

Your Honor, may we approach the bench . . . Your Honor, counsel is eliciting evidence about subsequent remedial measures and subsequent remedial measures are not admissible on the issue of negligence or culpability.

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. The Rule doesn't apply in products liability cases based on strict liability.

Response: Your Honor, this evidence is not offered to prove negligence or culpability. It is offered to show that this defendant [i.e., had ownership or control over the premises even though legal title was in the name of a separate corporation].

If the Court admits the evidence:

Rejoinder: Your Honor, we would ask the Court to instruct the jury that this evidence cannot be considered by them a proof of negligence or culpable conduct, but rather only on the issue of ownership.

39. Responsiveness

Your Honor, I object that the witness' answer was not responsive. ["Sustained."] I move the Court to instruct the jury to disregard the witness' answer.

40. Rule of Exclusion of Witnesses

Your Honor, I believe that this witness may have violated "the Rule." May I take the witness on voir dire?

TRE 614 provides that the court must, at the request of a party, exclude all witnesses so that they cannot hear the testimony of other witnesses. However, this rule does not apply to "a person whose presence is shown by a party to be essential to the presentation of his cause." See TRCP 267 (also setting out the rule of exclusion of witnesses). This exception would apply to "an expert needed to advise counsel in the management of the litigation." Larkin & McGee, Texas Rules of Evidence Sourcebook 167 (1983). In Miller v. Universal Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981), a trial court was

upheld in prohibiting the defendant from providing his expert witness with daily transcriptions of the plaintiff's testimony when the expert was going to testify on the same matters as the plaintiff.

TRE 614 and TRCP 267 except from the operation of "the Rule" a spouse of a party.

41. Rule 403

Your Honor, may we approach the bench . . . . Your Honor, under TRE 403 the Court should exclude evidence where its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, misleading the jury, or to avoid undue delay, or needless presentation of cumulative evidence. Counsel is about to elicit testimony that [portray evidence]. The prejudicial effect against my client would be great, and would outweigh the probative value of the evidence.

- Unfair prejudice has been defined as "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one."Turner v. PV Int'l Corp., 765 S.W.2d 455, 471 (Tex. App.--Dallas 1988), writ denied per curiam, 778 S.W.2d 865 (1989).

- Pittsburgh Corning Corporation v. Walters, 1 S.W.3d 759, 770 (Tex. App.--Corpus Christi 1999, appeal abated by order of Supreme Court): "The fact that evidence has some prejudicial effect is insufficient to warrant its exclusion. Instead, there must be a demonstration that introduction of the evidence would be unfairly prejudicial to the objecting party. See TRE 403. Moreover, to be excluded, 'evidence must not only create a danger of unfair prejudice, but such danger must substantially outweigh its relevance.'"

- Undue delay: M.K.T. Railway v. Bail ey, 115 S.W. 617 (Tex. Civ. App.-- 1908, writ ref'd).

42.
Similar Transactions

Your Honor, may we approach the bench . . . . Your Honor, TRE 404(b) bars admission of evidence of other wrongs or acts if offered to show that the party acted in conformity on the occasion in question. We object that the evidence which counsel seeks to admit violates this rule.

43.
Social Studies

The court may order a social study under Tex. Fam. Code § 107.051, in a suit affecting the parent-child relationship. The social study must be filed and made part of the record, Tex. Fam. Code Ann. § 107.054, but disclosure of the contents to the jury is subject to the rules of evidence. Tex. Fam. Code Ann. § 107.055.

Inadequate notice: Your Honor, under Fam. Code § 107.055(b), I should have received the social study 7 days after completion or 5 days before trial, whichever is earlier. I did not receive the report until _____, which is an express violation of the statute. I object on these grounds to the use or admission of the social study.

Contains inadmissible hearsay: Your Honor, this social study is riddled with inadmissible hearsay. These recitations of unsworn statements of other persons are entirely inadmissible, so I object to the use or admission of the social study.

44.

State of Mind

Your Honor, a witness cannot testify as to the state of mind of another person.

- Lehman v. Corpus Christi Nat. Bank, 668 S.W.2d 687, 689 (Tex. 1987) ("Our courts have long held in other contexts that a witness cannot testify to the state of mind of another person").

- But see Ethicon, Inc. v. Martinez, 835 S.W.2d 826, 833 (Tex.App.--Austin 1992, writ denied): "Our review of the case law leads us to conclude that Texas courts have consistently held that opinion or inference testimony about another's state of mind, rationally based on the witness's perception, is admissible under Rule 701."

45. State of Mind Exception to the Hearsay Rule

Objection: Your Honor, that question calls for hearsay.

Response: Your Honor, this evidence fits the TRE 803(3) exception to the hearsay rule, in that it constitutes a statement of the person's then existing state of mind, emotion, sensation, or physical condition.

Rejoinder: Your Honor, that exception does not apply because this is a statement of memory or belief offered to prove the fact remembered or believed.

Response: Your Honor, it is not offered to prove the fact remembered or believed.

Court: I'll allow the evidence to be admitted.

Rejoinder: Then, Your Honor, I move the Court to instruct the jury that this testimony can be considered only as it reflects on the state of mind [etc.] of the person, and that it cannot be considered in any way to prove the fact supposedly remembered or believed.

TRE 803(3) excepts statements of the declarant's then existing mental, emotional, or physical condition from the operation of the hearsay rule, but not if offered to prove the fact remembered or believed, unless such fact relates to the execution, revocation, identification, or terms of the declarant's will.

46. Summaries

TRE 1006 provides that "the contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." The underlying records must be made available for examination or copying, and the court can require that the underlying records be produced in court. TRE 1006. The underlying records also must be admissible. See Aquamarine Assoc. v. Burton Shipyard, Inc., 659 S.W.2d 820 (Tex. 1983).

47. Tape Recording

Authentication

Your Honor, this tape recording has not been properly authenticated.

To authenticate a tape recording you must establish:

- Recording device capable of recording conversation

- operator competent to operate equipment
- tape is accurate recording of conversation
- tape not altered or changed
- manner in which recording has been preserved (chain of custody)
- identify voices on tape
- show statements made voluntarily and without coercion.

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).

Hearsay

Your Honor, this tape contains unsworn assertions of fact made by non-parties to this lawsuit. These statements are rank hearsay under TRE 801, and are not admissible.

48.
Undisclosed Witness [See Discovery Sanctions above]

49.
Value

Ordinarily, a witness can testify to the value of property only if he is familiar with the market value and is qualified to render an opinion on market value. See 2 R. Ray, Texas Law of Evidence Civil & Criminal § 1422 (3d ed. 1980). However, an owner of property is always entitled to give his opinion as to the market value of his own property. Porras v. Craig, 675 S.W.2d 503, 504-05 (Tex. 1989) (as to real property). To qualify the owner to express an opinion, ask the witness if he is familiar with the market value of the property. Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755, 762 (Tex. App.--Corpus Christi 1988, writ denied) (as to businesses and personal property).

50.
Video Tapes

Authentication: Your Honor, this videotape has not been properly authenticated.

Relevancy: Your Honor, this videotape contains evidence that is not relevant.

Hearsay: Your Honor, this videotape contains inadmissible hearsay.

- Pittsburgh Corning Corporation v. Walters, 1 S.W.3d 759, 770 (Tex. App.–Corpus Christi 1999, appeal abated by order of Supreme Court) (death-bed videotape showing decedent in hospital describing his pain was admissible under TRE 803(3) hearsay exception for “then existing state of mind, emotion, sensation, or physical condition”).

TRE 403: Your Honor, may we approach the bench. . . . Your Honor, under TRE 403 the Court should exclude evidence where its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the

jury. Counsel is about to offer a videotape that [describe prejudicial evidence]. The prejudicial effect of this videotape against my client would be great, and would outweigh the probative value of the evidence.

Summary: Your Honor, this videotape has been edited down from a longer videotape, and is therefore a summary. However, it does not meet the requirements of a summary that the original be made available for examination or copying, in that the raw footage from which this summary was taken has been erased, and counsel has not produced it for us in discovery. [See Summaries]

Inflammatory images: Your Honor, may we approach the bench. . . . Your Honor, the Supreme Court has held that photographic reproductions that are calculated to arouse the sympathy, prejudice, or passion of the jury and does not serve to illustrate disputed issues or aid the jury in its understanding of the case should not be admitted.

- See Heddin v. Delhi Gas Pipe Line Co., 522 S.W.2d 886, 889 (Tex. 1975) (involving photographs of dead animals, not videotapes).

- In Bolstridge v. Central Maine Power Co., 621 F.Supp. 1202 (D. Me.1985), the court said that "videotapes should be admitted ... only when the tapes convey the observations of a witness to the jury more fully or accurately than for some specific, articulable reason the witness can convey to them through the medium of conventional, in-court examination."

- In Thomas v. C.G. Tate Const. Co., 465 F.Supp. 566 (D. S.C.1979), the court excluded a videotape of a badly burned plaintiff, showing a physical therapy session during his stay in the hospital, because of the likelihood that the tape would prejudice the jury. The court specifically noted that its decision was influenced by the fact that the plaintiff would be available to testify at trial.

Repetitious: Your Honor, may we approach the bench. . . . Your Honor, under TRE 403 the Court should exclude evidence to avoid undue delay, or needless presentation of cumulative evidence.

Accident Reconstruction Videotape [See Reconstruction of Accident]

As to predicate for admitting videotape of accident reconstruction, see Garza v. Cole, 753 S.W.2d 245, 247 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.) (videographer testified and proved up videotape reconstruction of auto accident).

51.
Wiretaps

Your Honor, this evidence was obtained through an illegal wiretap and cannot be used in this trial.

Tex. Pen. Code Ann. § 16.02 governs "unlawful interception, use, or disclosure of wire or oral communications." It criminaliz es not only the illegal interception, but also disclosure of illegally intercepted communications.

- Turner v. P.V. Int'l. Corp., 765 S.W. 2d 455, 469-70 (Tex. App.--Dallas 1988) (Federal anti-wiretapping statute precludes admission of tapes of telephone conversations that were recorded in violation of federal statute),writ denied, 778 S.W.2d 865 (Tex. 1989) (per curiam opinion in

which Supreme Court reserved its judgment regarding illegality and admissibility of wiretap tapes).

- 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), held that illegally taped recordings cannot be used in a civil proceeding.

- However, Kortla v. Kortla, 718 S.W. 2d 853, 855 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.), held that "tape recordings, even if obtained without the consent of a party to it, are admissible if the proper predicate is laid."

Tex. Code Crim. Proc. art. 18.20 provides that "[t]he contents of an intercepted communication and evidence derived from an intercepted communication may not be received in evidence in any trial, hearing, or other proceeding . . . if the disclosure of that information would be in violation of this article. The contents of an intercepted communication and evidence derived from an intercepted communication may be received in a civil trial, hearing, or other proceeding only if the civil trial, hearing, or other proceeding arises out of a violation of the Penal Code, Code of Criminal Procedure, Controlled Substances Act, or Dangerous Drug Act."