

EVIDENCE IN TEXAS COURTS

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PRESUMPTIONS AND BURDEN OF PROOF

1. A presumption assigns the burden of producing evidence, or the burden of persuasion, or both
2. The claimant starts with both burdens on claims; the defendant starts with both on defenses
3. Evidence admitted can shift one or both burdens to the opposing party
4. With a traditional summary judgment, both burdens are on the movant; with a “no evidence” MSJ, both burdens are the same as at trial
5. Some presumptions vanish in the face of contrary evidence (Thayer presumptions); some presumptions carry through to the fact finding (Morgan presumptions) (*Weed v. Frost Bank* (San Antonio 2018, pet. denied))
6. Thayer presumptions shift only the burden of producing evidence; Morgan presumptions shift both the burden of producing evidence and the burden of persuasion (*Weed v. Frost Bank*)
7. Generally, presumptions shift only the burden of producing evidence, and disappear when contrary evidence is produced (*General Motors Corp. v. Saenz* (Tex. 1993))

DETERMINING ADMISSIBILITY, TRE 104

TRE 104

- (a) The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is *not bound by evidence rules*, except those on privilege.

RELEVANCY

- Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence (TRE 401)
- Relevant evidence is admissible unless barred by constitution, statute, or court rule (TRE 402)
- Relevant evidence can be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence (TRE 403)

AUTHENTICATION

- Must provide evidence sufficient to support a finding that the exhibit is what it is claimed to be (TRE 901(a))
- Extrinsic vs. Intrinsic vs. Circumstantial Evidence
- Self-Authentication (TRE 902)
- Authentication Through Production in Discovery (TRCP 193.7)
- Authentication Does Not Guarantee Admissibility

AUTHENTICATION BY EXTRINSIC, INTRINSIC, OR CIRCUMSTANTIAL EVIDENCE

- *Fleming v. Wilson* (Tex. 2020): evidence can be authenticated by extrinsic or intrinsic evidence
- Extrinsic evidence: testimony of a witness with knowledge, lay opinion on genuineness of handwriting, identification of a voice by someone who has heard the speaker speak, expert opinion, etc.
- Intrinsic evidence: “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances”
- Circumstantial evidence: “A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.” (PJC 200.8)

HEARSAY

- Out-of-court statement offered for the truth of the matter asserted (TRE 801(d))
- Admission of a Party Opponent (not hearsay)
- Excited Utterance (exception)
- Statement Against Interest (exception)
- State of Mind Exception (limited admissibility)
- Statement Made for Medical Diagnosis or Treatment (exception)
- Hearsay Within Hearsay
- Hearsay Exception for Genetic Testing Report (Fam. Code § 160.621)
- Child Custody Evaluation Reports (subject to Rules of Evid.) (Fam. Code § 107.114)
- Tex. Fam. Code ch. 104, Evidence

TEX. FAM. CODE Ch. 104, EVIDENCE

- 104.001 Rules of Evidence Apply
- 104.002 Prerecorded Statement of Child
- 104.003 Prerecorded Videotaped Testimony of Child
- 104.004 Remote Televised Broadcast of Testimony of Child
- 104.005 Substitution for In-Court Testimony of Child
- 104.006 Hearsay Statement of Child Abuse Victim
- 104.007 Video Testimony of Certain Professionals

BEST EVIDENCE

1. Original of a writing, recording, or photograph is ordinarily required (TRE 1002)
2. Duplicates are admissible unless (i) authenticity is questioned or (ii) admitting duplicate would be unfair under the circumstances (TRE 1003)
3. Exceptions: (i) original is lost or destroyed, (ii) original cannot be obtained through judicial process, (iii) original not in Texas, (iv) original controlled by opposing party who failed to produce upon request, or (v) the original is not closely-related to a controlling issue (TRE 1004)
4. Copies of Public Records: certified copy or authenticating witness (TRE 1005)
5. Summaries of documents that cannot be “conveniently examined in court” (TRE 1006)
6. Through testimony or writing of party against whom offered (TRE 1007)

PRIVILEGES

1. Privilege Against Self-Incrimination (5th Amendment)
 - a. Invoking the Privilege (party v. non-party) (TRE 513(c))
 - b. Reasonable inferences from party's invoking privilege
 - c. Assertion of privilege alone not sufficient to support a judgment (*Lozano* (Tex. 2001))
2. Physician-Patient (TRE 509) and Mental Health (TRE 510) Privilege
 - a. Exception when party relies on condition as part of claim/defense (TRE 509(4) & 510(5))
 - b. Balancing test (precise need for information vs. legitimate privacy interests) (1998 Comment)
3. The Offensive Use Doctrine (*Ginsberg v. Fifth Court of Appeals* (Tex. 1985))
4. Abrogated in child abuse/neglect proceeding except atty-client (Tex. Fam. Code § 261.202)

PUBLIC RECORDS

1. Definition of public record (TRE 901(7))
2. Copy of public records (TRE 1005: certified copy; comparison by witness)
3. The public record hearsay exception (TRE 803(8))
4. Tex. Fam. Code ch. 261 investigation into abuse/neglect
5. 911-recording (public record or authenticated recording)

PUBLIC RECORDS HEARSAY EXCEPTION, TRE 803(8)

1. Record or statement of public office (authenticated under TRE 901(7) & TRE 1005)
2. That sets out the office's activities
3. On matter observed while under legal duty to report
4. Or factual findings from a legally-authorized investigation
5. And opponent fails to demonstrate lack of trustworthiness
6. Hearsay within hearsay

BUSINESS RECORDS

1. Authenticating Business Records
 - a. Proof by extrinsic or intrinsic evidence
 - b. Proof by affidavit (TRE 902(10))
2. Hearsay exception for business records (TRE 802(7))
3. Prepared in anticipation of litigation
4. Hearsay within hearsay
5. Records of second business inside first business

HEARSAY EXCEPTION FOR BUSINESS RECORDS, TRE 803(7)

1. Memorandum, report, record or data compilation
2. Reflecting on act, event, condition, or diagnosis
3. Made at or near the time
4. By or from person with knowledge
5. Made and kept in the regular course of business
6. Established by custodian or other qualified witness
7. Opponent fails to demonstrate that source, or method, or circumstances of preparation indicate lack of trustworthiness.

COMPUTER-BASED INFORMATION

1. Authentication (extrinsic/intrinsic evidence)
2. Best Evidence Rule (print-out is an original) (TRE 1001(d))
3. Hearsay (TRE 801); exceptions (TRE 803)
4. Process or System (must produce accurate result) (TRE 901(9))
5. Voice mail, e-mail, texts, Tweets, Facebook posts, etc.
 - a. Authentication (extrinsic/intrinsic)
 - b. Best Evidence Rule (print out is an original)
 - c. Hearsay; exceptions; hearsay within hearsay

AUDIO/VIDEO RECORDINGS

1. Audio recording: authenticate by extrinsic, intrinsic, or circumstantial evidence (voicemail is an audio recording)
2. Video recording without sound is like a photograph
3. Video recording with sound: must authenticate both audio and video
4. Hearsay; exceptions; hearsay within hearsay
5. Mute the sound and have witness narrate the video
6. Transcripts (Cumulative? Unwarranted emphasis)

PRESENTATION OF EVIDENCE DURING TRIAL

THE ORDER OF PROCEEDINGS

1. Voir Dire: can't seek commitment regarding facts of the case
2. Opening Argument: use of exhibits; opening the door to inadmissible evidence
3. Evidence Phase: offer, objection, admission or exclusion; offer of proof
4. Resting: motion for directed verdict (jury) or motion for judgment (non-jury)
5. Jury Charge: objection to legal insufficiency of the evidence
6. Closing Argument: evidence and reasonable inferences from the evidence (TRCP 269(e))
7. Motion for JNOV: preserves legal insufficiency of the evidence complaint
8. Motion for New Trial: preserves factual (or legal) insufficiency of the evidence
9. No need to preserve insufficient evidence complaint in non-jury trial

WITNESS REFRESHING MEMORY, TRE 612

1. Options: right to have writing produced in hearing, to inspect, and to cross-examine about it, and to introduce related portions
2. Refreshing memory while testifying (absolute right)
3. Refreshing memory prior to testifying (if justice requires)
4. Producing party can claim matters are unrelated, leading to in-camera inspection, & possible redaction

“OPENING THE DOOR” TO INADMISSIBLE EVIDENCE

1. *Schutz v. State* (Tex. Crim. App. 1997): “[O]therwise inadmissible evidence may be admitted if the party against whom the evidence is offered ‘opens the door.’ But, the party offering the evidence may not ‘stray beyond the scope of the invitation.’”
2. *Gabriel v. Lovewell* (Texarkana 2005, no pet.): ‘Opening the door’ or inviting testimony that would otherwise pertain to an inadmissible subject matter does not mean that such testimony is necessarily invited into evidence in any form, including hearsay. However, where such testimony pertains to the same subject matter and is directly contrary to earlier testimony, it is admissible, including hearsay.”
3. *Southwestern Elec. Power Co.*, 966 S.W.2d 467 (Tex. 1998): “A party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he, himself, introduced the same evidence or evidence of a similar character.”

REMAINDER OF RELATED WRITINGS OR RECORDED STATEMENTS, TRE 106

1. If one party introduces all or part of a writing or recording, the adverse party may, at any time, introduce any other part or *any other writing* that *in fairness* ought to be considered.
2. Can make inadmissible evidence admissible
3. The other writing must be on the same subject and “necessary to make the admitted portion fully understood.” *In re C.C.*, (Amarillo 2015, no pet.)
4. Email string; text exchanges; Twitter tweets; voice recordings
5. Applies to depositions
6. What about photographs and video recordings?

THE RULE OF OPTIONAL COMPLETENESS, TRE 107

1. If a party introduces any part of “an act, declaration, conversation, writing, or recorded statement,”
2. The adverse party can “inquire into any other part on the same subject,” or
3. “Introduce any other act, declaration, conversation, writing or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent”
4. *Azar Nut Co.* (Tex. 1987): Rule applies to a responsive letter
5. Applies to depositions but not oral testimony
6. What about photographs and video recordings?

DEMONSTRATIVE AIDS

1. Duty to produce prior to trial?
2. Are demonstrative aids admissible as evidence?
3. Lawyer writing down points from witness's testimony
4. Can demonstrative aids lead the witness?
5. Using demonstrative aids during voir dire, opening and closing arguments
6. The record may not reflect demonstrative aids
7. Consider motion in limine

IMPEACHMENT

1. Witness's character for truthfulness or untruthfulness (TRE 608)
2. Impeachment by prior convictions (TRE 609)
3. Impeachment by prior inconsistent statement (TRE 613(a))
4. Impeachment by prior deposition testimony (TRE 613 vs. TRCP 203.6)
5. Witness's bias or interest (TRE 613(b))
6. Request a limiting instruction
7. Not substantive evidence

IMPEACHMENT BY PRIOR CONVICTION, TRE 609

1. Only felonies and crimes of moral turpitude
2. Can make written request under TRE 609(f)
3. Not if conviction or last incarceration was more than 10 years ago, except “in the interest of justice”
4. Successful probation precludes use of conviction, unless there is a subsequent conviction for felony or crime of moral turpitude
5. Juvenile adjudications not admissible except when witness is party in the juvenile proceeding
6. Not admissible if conviction is on appeal

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT, TRE 613(a)

1. Must first tell the witness:
 - (1) the contents of the statement;
 - (2) the time and place of the statement; and
 - (3) the person to whom the witness made the statement.
2. If in writing, need not show to witness but must show to opposing counsel, upon request.
3. Extrinsic evidence of prior inconsistent statement is not admissible unless the witness fails to “unequivocally admit making the statement.”
4. Rule does not apply to admission by an opposing party (not hearsay under TRE 801(e)(2)).
5. Is it in for all purposes, or only for impeachment?

IMPEACHMENT BY PRIOR DEPOSITION TESTIMONY

1. TRE 613(a) procedure for impeachment by prior inconsistent statement.
2. TRCP 203.6(b): “all or part of a deposition may be used for any purpose in the same proceeding in which it was taken.”
3. *Pope v. Stephenson* (El Paso 1989), says that prior inconsistent deposition testimony is admissible for impeachment purposes only. Why?

PRESERVING ERROR

STEPS TO PRESERVING ERROR, TRE 103

1. Valid, specific objection or motion
2. Timely asserted
3. Secure a ruling
4. Reflected in the record
5. Offer of proof of excluded evidence
6. Appellate complaint must match objection

LIMITED ADMISSIBILITY

1. Impeachment evidence
2. State of mind exception to hearsay rule (TRE 803(3))
3. Settlement offers not admissible on validity or amount of a disputed claim (TRE 408)
4. Expert's underlying facts or data (TRE 705)
5. Multiple-party lawsuits (TRE 105)

OFFER FOR A LIMITED PURPOSE

1. Proponent offers hearsay for all purposes
2. Opponent objects based on hearsay; objection is sustained
3. Proponent reoffers the hearsay for limited purpose (i.e., state of mind)
4. Opponent renews hearsay objection
5. Court overrules hearsay objection
6. Opponent requests limiting instruction
7. Object if final argument exceeds limited purpose

MULTIPLE PARTY LAWSUIT, TRE 105

1. Make your own objection
2. Make your own offer of proof
3. Evidence is inadmissible but some do not object
4. Evidence admissible against some but not all parties
5. Request limiting instruction
6. Include instruction in jury charge
7. Practical difficulties in final argument

MOTION IN LIMINE VS. RULING OUTSIDE PRESENCE OF JURY

1. The Motion in Limine (no rule)
 - a. If granted, requires permission of the court to present evidence
 - b. Does not preserve error for appeal (unless court rules on admissibility)
 - c. Must offer evidence in trial (away from jury), or re-object
2. Ruling outside presence of jury (TRE 104(c))
 - a. Preserves error for appeal
 - b. Need not re-offer or re-object in presence of the jury

REPEATED OFFER OF INADMISSIBLE EVIDENCE

1. “The general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.”
Richardson v. Green (Tex. 1984)
2. Repeating objection not required when the objection would be futile because the court has just overruled a valid objection to the same testimony. *Graham v. State* (Tex. Crim. App. 1986).
3. *Atkinson Gas Co. v. Albrecht* (Corpus Christi 1994, writ denied): whether a prior objection is sufficient to cover subsequent admission of similar evidence requires a case-by-case analysis, based on (i) proximity of the objection to the subsequent offer, (ii) which party solicited the later testimony, (iii) nature of and similarity between the prior testimony/objection and subsequent testimony, (iv) whether subsequent testimony was from the same witness, (v) whether a running objection was requested/granted, and (vi) any other circumstances.
4. A party cannot complain on appeal of improper admission of evidence where that party has introduced evidence of a similar character. *Commercial Union Ins.* (Corpus Christi 1989, no writ)

RUNNING OBJECTIONS

1. A “running objection” is a request to the court to permit a party to object to a line of questioning without having to object to each individual question.
2. *Sattiewhite v. State* (Tex. Crim. App. 1989): “as long as the running objection constituted a timely objection, stating the specific grounds for the ruling, the movement desired the court to make (if the specific grounds were not apparent from the context of the running objection) then the error should be deemed preserved by an appellate court.”
3. “Such an objection should ‘not encompass too broad a reach of subject matter over too broad a time or different witnesses.’” *In Interest of A.P. and I.P.*, (Waco 2001, no pet.).
4. *Volkswagen of America, Inc. v. Ramirez*, (Tex. 2005): where party’s initial objection preserved error “and its requested running objection clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, recognition of the running objection for more than one witness was appropriate.”

SUMMARY JUDGMENTS

1. Rules of Evidence apply (TRCP 166a(f))
2. Traditional MSJ: burdens of producing evidence and persuasion are initially on movant but may shift
3. No Evidence MSJ: burden same as at trial
4. Conclusory affidavit does not create fact issue (*Ryland Group, Inc.* (Tex. 1996))
5. Written objections/rulings
6. Verbal rulings reflected in Reporter's Record preserve error
7. No need for offer of proof, because rejected evidence is in the summary judgment record

SUMMARY JUDGMENTS

FieldTurf USA, Inc v. Pleasant Grove Indep. Sch. Dist., — S.W.3d — (Tex. Mar. 4, 2022)
[No. 20-0507]

A trial court's on-the-record, oral ruling on an objection to summary judgment evidence is sufficient for error-preservation purposes even though the ruling was not reduced to a written order.

LAY VS. EXPERT TESTIMONY

LAY TESTIMONY

1. Lay testimony must be based on personal knowledge (TRE 604)
2. Lay opinion must be:
 - Rationally based on the witness's perception, and be
 - Helpful to clearly understanding the witness's testimony or to determining a fact in issue (TRE 701)

EXPERT TESTIMONY

1. Qualifications: knowledge, skill, experience, training, or education (TRE 702)
2. Must help trier of fact to understand evidence or determine fact in issue (TRE 702)
3. Expert's methodology must be reliable (*Daubert; Robinson*)
4. Expert can rely on inadmissible info, if experts in the field would reasonably rely on those kinds of facts or data (TRE 703)
5. Must be sufficient factual basis underlying the expert's opinion (TRE 705(c))
6. The factual basis and methodology must be relevant to the legal issues (*Robinson*)
7. Inadmissible underlying facts must be excluded if probative value is outweighed by prejudicial effect (TRE 705(d))

EXPERTS: OTHER ISSUES

1. Expert opinions in public records
2. Expert opinions in business records
3. Expert opinions in medical records (must be based on reasonable medical probability, *Burroughs* (Tex. 1995))
4. Unsupported conclusions are “no evidence”
5. Expert opinion based on assumed facts that vary materially from actual, undisputed facts is “no evidence” (*Burroughs* (Tex. 1995))
6. Inadmissible underlying facts or data can be admitted to help the jury evaluate the expert’s opinion (a limited purpose) (TRE 705(d))

EXPERT REPORTS

1. Expert reports are out-of-court statements offered for the truth of the matter stated
2. Can an expert report be a public record?
3. Can an expert report be a business record?
4. Hearsay exceptions to various portions (redacting)
5. Explaining the basis of expert's opinion
6. Balancing test (is probative value in evaluating expert's opinion outweighed by prejudicial effect?)
7. Genetic testing report

EVIDENCE OF OTHER ACTS, TRE 404(b)

1. “The doctrine of ‘res inter alios acta’ says that each act or transaction sued on must be established by its own particular facts and circumstances.” *State v. Buckner Const. Co.*, (Houston [14th Dist.] 1985, writ ref'd n.r.e.).
2. “The general rule in Texas is that prior acts or transactions by one of the parties with other persons are irrelevant, immaterial and highly prejudicial and in violation of the rule that res inter alios acts are incompetent evidence, particularly in a civil case.” *Klorer v. Block*, (San Antonio 1986, writ ref'd n.r.e.)
3. TRE 404(b)(1): “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”
4. Exceptions: admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

ZOOM TRIALS

1. Submitting exhibits varies from court to court
2. Sending exhibits to opposing attorney in advance
3. Screen-sharing of exhibits
4. Offering exhibits in a Zoom jury trial
5. Emailing exhibits to the court reporter
6. Filing exhibits with court clerk

THE END