SPECIAL PROBLEMS ADMITTING BUSINESS RECORDS CONTAINING EXPERT EVIDENCE

RICHARD R. ORSINGER

and

KIMBERLY P. HARRIS

McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P.
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)

* * * *

310 S. St. Mary's Street, Suite 1616
San Antonio, Texas 78205
(210) 225-5567 (Telephone)
(210) 267-7777 (Telefax)

* * * *

Email: richard@momnd.com
kimberlyh@momnd.com

State Bar of Texas
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CHAPTER 11

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
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-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

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

Organizations and Committees:

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

Professional Activities and Honors:

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

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (2002, 2003)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002) [Won national ACLEA Award]
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003, 2004)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)

Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

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

SELECTED CLE SPEECHES AND ARTICLES

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

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

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

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

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

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

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

Kimberly P. Harris
McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P.
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)

Education

J.D. from Texas Tech University School of Law, 1997
B.B.A., Accounting from Texas Tech University, 1994

Licensed

State Bar of Texas (1997)
United States District Courts for the Northern (2000),
Southern (2003) and Eastern (2003) Districts of Texas
United States Fifth Circuit Court of Appeals (2000)

Area of Practice

Family Law

Professional Employment

McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P.
Attorney - October 2003 to Present

Grau Koen, P.C., Dallas, Texas
Attorney - April 2003 to September 2003

Fletcher & Springer, L.L.P., Dallas, Texas
Attorney - October 2002 to April 2003

Grau, Ashley & Koen, P.C., Dallas, Texas
Attorney - August 2000 to October 2002

McMahon, Tidwell, Hansen, Atkins & Peacock, P.C., Odessa, Texas
Attorney - August 1997 to August 2000

Legal Memberships

Dallas Bar Association
Dallas Association of Young Lawyers

Representative Cases

Raburn v. KJI Bluechip Investments, et.al., 50 S.W.3d 699 (Tex.App.-Fort Worth 2001, no writ)
Express One International, Inc. v. Steinbeck, 53 S.W.3d 895 (Tex.App.-Dallas 2001, no writ)
McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793 (Tex.App.-Texarkana 2001, no writ)
Long v. Wal-Mart Stores, Inc., 2001 WL 1337690 (Tex.App.-Austin 2001, no writ)

TABLE OF CONTENTS

SPECIAL PROBLEMS ADMITTING BUSINESS RECORDS CONTAINING EXPERT EVIDENCE

Richard R. Orsinger
Board Certified in Family Law
and Civil Appellate Law
Texas Board of Legal Specialization

and

Kimberly P. Harris

I. INTRODUCTION.

This Article discusses the admissibility of business records, and more specifically, the problems associated with admitting business records containing expert opinions and/or evidence. In this Article, TRE = Texas Rules of Evidence and FRE = Federal Rules of Evidence.

II. ADMISSIBILITY OF BUSINESS RECORDS.

The admissibility of business records is affected by many rules of evidence, including: authentication, hearsay, and best evidence rules. If business records contain expert opinions, they may also implicate evidentiary rules relating to expert witnesses.

A. Authentication.

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).

Business records can be authenticated by the testimony of a person with personal knowledge that the records are records of the business. *See* TRE 901(b)(1). Business records can also be authenticated by affidavit of the custodian of the records or other, as provided in TRE 902(10).

1. Proof By Witness.

Business records can be authenticated by "the testimony of the custodian or other qualified witness." TRE 901(b)(1); *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 Texmarc Conveyor Co. v. Arts*, 857 S.W.2d 743, 748-749 (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); *Curran v. Unis*, 711 S.W.2d 290, 294 (Tex. App.–Dallas 1986, no writ) (testimony of bookkeeper/custodian of records that he was custodian of records, made in the regular course of business, at or near the time of events reported by someone with personal knowledge, as was the regular practice, was sufficient to lay proper predicate for admission of tax returns).

2. Proof By Affidavit.

Business records can also be authenticated 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 is 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).

B. Hearsay.

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).

1. Business Records Exception to Hearsay Rule.

Properly authenticated business records are not excluded by the hearsay rule if they meet the business records exception set out in TRE 803(6). Rule 803(6) creates an exception to the hearsay rule for records of a regularly conducted activity. The exception applies to:

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

However, the exception does not apply when the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. TRE 803(6).

"The primary emphasis of rule 803(6) is on the reliability or trustworthiness of the records sought to be introduced." *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990) (quoting *United States v. Veytia-Bravo*, 603 F.2d 1187, 1189 (5th Cir.1979)); *see also Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 278-279 (5th Cir. 1991) (statements made to physician contained in medical records not admissible because of a lack of trustworthiness because the person who made the statement was not acting in the "regular course of business").

The burden is on the party against whom the evidence is offered to show a lack of trustworthiness. *See e.g. March v. Victoria Lloyds Insurance Company*, 773 S.W.2d 785, 789 (Tex. App.–Fort Worth 1989, no writ) (TRE 803(6) and 902(10) do not require the sponsoring witness to testify as to the trustworthiness of the report).

For purposes of this exception to the hearsay rule, a business includes any and every kind of regular organized activity whether conducted for profit of not. TRE 803(6). This creates a comprehensive and liberal category of businesses whose records are admissible under this section. Note particularly that business records may contain opinions and diagnoses as described in more detail below.

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

2. 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). *See Wilson v. Zapata Off-Shore Company*, 939 F.2d 260 (5th Cir. 1991). In *Wilson*, the plaintiff challenged the district court's refusal to exclude portions of hospital records reporting a statement by plaintiff's sister to a social worker, who recorded that "informant reports that the patient is a habitual liar and has been all of her life." *Id.* at 271. The hospital record contained double hearsay. The first level of hearsay, the hospital record, had a proper foundation under FRE 803(6) through the affidavit of the custodian of records. For the second-level of hearsay, the statements made by plaintiff's sister, the court found that under FRE 803(4) (identical to TRE 803(4)), the statements could be appropriate and helpful background information for the psychiatrists to consider in the diagnosis and treatment of plaintiff; however, the statements were compromised by their total generality and conclusory nature.

Several courts have held that "statements contained in a medical record as to how an accident happened or where it happened, age, medical history, etc. are not admissible under this exception to the hearsay rule because the party making the entry in the record does not have personal knowledge as to these matters, and the statements do not become trustworthy just because it is hospital routine to record them." *Cornelison v. Aggregate Haulers, Inc.*, 777 S.W.2d 542, 545 (Tex. App.–Fort Worth 1989, writ denied); *see also Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298, 305 (Tex. 1962) (hospital employees do not have personal knowledge as to the cause of an accident, which was based on plaintiff's statements, therefore the entry in the medical records was inadmissible unless it fell within another exception to the hearsay rule, such as admission by party opponent); *Texas Steel Co. v. Recer*, 508 S.W.2d 889 (Tex. Civ. App.–Fort Worth 1974, writ ref'd n.r.e.) (doctor's report that the patient had been suffering pain since the date of the injury was inadmissible because the doctor had no personal knowledge of this fact).

C. 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. TRE 1002. 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.

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'."

1. Custodian of the Records.

Copies of business records can be authenticated by the testimony of the custodian of the records or other qualified witness *See* TRE 803(6). Authentication can also be done by affidavit, as provided in TRE 902(10).

2. Summaries.

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).

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. *See Black Lake Pipe Line Co. v. Union Construction Co., Inc.*, 538 S.W.2d 80, 95 (Tex. 1976) (finding underlying source records to be inadmissible hearsay because they contained statements and opinions of the plaintiff's employees and, therefore, summaries of those documents were also inadmissible).

3. Cases.

See 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); *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"); *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).

D. Lack of Trustworthiness – Anticipation of Litigation.

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

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

See also State v. Hardy, 71 S.W.3d 535, 537-538 (Tex. App.–Amarillo 2002, no pet.) (letter from pump manufacturer submitted as evidence that defendant had offered for sale pumps stolen from distributor was prepared in anticipation of litigation, inherently unreliable and therefore inadmissible); *Freeman v. American Motorists Insurance Company*, 53 S.W.3d 710, 714-715 (Tex. App.–Houston [1st Dist.] 2001, no pet.) (letter from physician to plaintiff's attorney sent over 10 years after the cause of action accrued and 10 days prior to the summary judgment hearing and seemingly at the request of plaintiff's attorney lacked trustworthiness); *Willis v. State*, 2 S.W.3d 397, 401 (Tex. App.–Austin 1999, no pet.) (narrative report was prepared in view of future litigation and therefore indicated a lack of trustworthiness).

E. Expert Opinions or Diagnoses Within Business Records.

TRE 803(6) includes, as part of the hearsay exception, "opinions or diagnoses" contained in business records.

1. Reasonable Medical Certainty or Probability.

Under the statute that preceded TRE 803(6), opinions and diagnoses in medical or hospital records were often excluded. *Loper v. Andrews*, 404 S.W.2d 300 (Tex. 1966). In *Loper*, the Court held that medical opinions and diagnoses in business records were not admissible unless otherwise shown to be based upon a reasonable medical certainty. However, by adding "opinions" and "diagnoses" to the business records exception in TRE 803(6), the Texas Supreme Court eliminated *Loper's* "reasonable medical certainty"

requirement. *See* comment to TRE 803(6), effective September 1, 1983.

2. Medical Causation.

A plaintiff must establish two distinct causal nexuses to recover damages in a personal injury case:

(1) a causal nexus between the conduct of the defendant and an event; and
(2) a causal nexus between the event and the plaintiff's injuries.

Blankenship v. Mirick, 984 S.W.2d 771, 775 (Tex. App.–Waco 1999, rev. denied) (citing *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984)); *see also General Motors Corporation v. Harper*, 61 S.W.3d 118, 130 (Tex. App.–Eastland 2001, pet. filed) (to establish liability for a design defect, a plaintiff must prove that the defendant's conduct must have been a substantial factor in bringing about the injury and that the injury would not have occurred but for the defendant's conduct)*; Cruz v. Paso Del Norte Health Foundation*, 44 S.W.3d 622, 629-630 (Tex. App.–El Paso 2001, rev. denied) (the causal link requirement in a medical malpractice action is satisfied when plaintiff presents proof that establishes a direct causal connection between the damages awarded, the defendant's actions, and the injury suffered).

To constitute evidence of causation, an expert opinion, **whether expressed in testimony or in a medical record**, must rest in "reasonable medical probability." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995). This requirement helps avoid opinions based on speculation and conjecture. *Id.* "**The term "reasonable medical probability" relates to the question of whether 'competent evidence' on the issue of causation has been shown and not to the standard by which an expert witness must testify**." *Blankenship*, 984 S.W.2d at 775 (emphasis added); *see also Cruz*, 44 S.W.3d at 632 (the rule of "reasonable medical probability" relates to the showing that must be made to support an ultimate finding of fact and not to the standard by which the medical expert must testify). "Reasonable medical probability is determined by the substance and context of the opinion, and does not turn on semantics or on the use of a particular term or phrase." *Id.* (*citing Insurance Co. of North Am. v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966)). "The effect of the reasonable medical probability standard is to allow recovery only where the measure is 'something more than a fifty percent chance.'" *Marvelli, M.D. v. Alston*, 100 S.W.3d 460, 479 (Tex. App.–Fort Worth 2003, pet. denied).

A mere assertion by an expert that an opinion is based on reasonable medical probability does not meet the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995), and the Texas Rules of Evidence set out in detail below. *Weiss v. Mechanical Associated Services, Inc.*, 989 S.W.2d 120, 125-126 (Tex. App.–San Antonio 1999, rev. denied); *see also Black v. Food Lion, Inc.*, 171 F.3d 308, 310 (5th Cir. 1999)(in a slip and fall action, the plaintiff's burden under Texas law was to prove, based on a reasonable medical probability **and scientifically reliable evidence**, that her fall at the store caused her injuries).

Specifically, the 1st District Court of Appeals out of Houston in *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591 (Tex. App.–Houston [1st Dist.] 2002, pet. denied), discussed in detail the standard for expert testimony, including that found in medical records. In *Coastal*, the administratrix of a deceased's estate brought a personal injury action for unseaworthiness and negligence against the deceased's former employer alleging that the deceased contracted pneumonia while working as a crew member on the employer's ship. The court reviewed whether the trial court abused its discretion in finding the expert testimony reliable under TRE 702. The evidence of causation analyzed included expert testimony as well as physician statements in medical records. Coastal objected to the testimony of plaintiff's sole testifying expert witness and to the medical records to the extent they included opinions regarding medical causation.

The majority ultimately found that the expert testimony was not sufficient to meet the *Daubert/Robinson* requirements as it could not show general causation. Additionally, the court found that the medical records and other evidence of general causation, aside from the expert testimony, were not legally sufficient to support a verdict as that evidence to was not sufficient to meet the *Daubert/Robinson* inquiry as to general causation.

Justice Brister, in his concurring opinion, specifically references the admissibility of the medical records containing the expert opinions. Justice Brister noted that the primary issue the parties briefed and argued was whether, *even without* the physician's testimony, the references in the medical records and the product sheet about the disease were enough to establish causation. Justice Brister believed that the documents could NOT establish causation because they could not independently meet the *Daubert* and *Havner* factors that serve as a predicate for reliability. Justice Brister noted that none of the notations in the records indicated the methodology

used, support from medical studies or general acceptance in the medical community, and only one record indicated how or why the author reached his conclusion. He listed three reasons why documents cannot replace an expert:

- First, none of the records are under oath. The Justice found it difficult to believe that sworn doctor's opinions would be required to support a trial continuance due to health problems, but not for a doctor's opinion on causation, the critical issue supporting a million-dollar verdict.
- Second, "it is too easy to reach the wrong conclusion by picking and choosing parts of a document and using them out of context."
- Third, because of the 'wisdom of the rule' that bars admission of 'learned treatises' in place of expert testimony.

The dissent, comprised of Justices Cohen, Mirabal and Smith, agreed with the majority's ruling as to the expert testimony; however, dissented from the findings with regard to the medical records and other evidence of causation. The Justices believed that Coastal did not sufficiently object under *Robinson* and *Daubert* to the medical records. Specifically, they argued that Coastal's general objection to the medical records 'to the extent they include opinions regarding medical causation for the reasons that we have previously discussed' was too broad. The dissent found that the 'reasons previously discussed' related to plaintiff's testifying expert, not the physician whose opinions were contained in the medical records. Additionally, the dissent argued that Coastal should have objected specifically, noting the objectionable pages of the records. As the dissent believed that Coastal did not properly object, they found the records were some evidence of general causation.

3. Other Expert Testimony.

Both the Texas Supreme Court and the Texas Court of Criminal Appeals have held that non-scientific expert testimony (i.e., that involving technical or other specialized knowledge) must also meet the reliability requirement of *Daubert/Robinson/Jordan*. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.w.2d 713, 718 (Tex. 1998); *Nenno v. State*, 970 S.W.2d 549, 562 (Tex. Crim. App. 1998), *overruled on other grounds*, *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). The United States Supreme Court in *Daubert* noted that "under the Rules, the trial judge must ensure that *any and all scientific testimony* ***or evidence*** admitted is not only relevant, but reliable." *Id*. at 589, 113 S.Ct. At 2795 (emphasis added).

4. Cases.

- *Gutierrez v. Excel Corporation*, 106 F.3d 683, 689 (5th Cir. 1997) (opinions in medical records do not support causation in reasonable medical probability, therefore, do not establish causation for cumulative trauma disorder)
- *Fowler v. Carrollton Public Library,* 799 F.2d 976 (5th Cir. 1986) (medical records from hospital stay with no accompanying expert explanation of their significance or testimony on causation were inadmissible as they could have led only to unwarranted speculation by the jury, inferences in favor of claimant, and a prejudicial impact outweighing the benefit of these records)
- *Burroughs Wellcome Company v. Crye*, 907 S.W.2d 497 (Tex. 1995) (as hospital admission records indicated that admitting diagnosis was merely recitation of medical history or opinion as to causation provided by other records, patient herself, or her treating physician, and records did not reveal independent expert opinion concerning causation, they were no evidence that plaintiff's use of the spray caused a frostbite injury)
- *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. App.–Fort Worth 2001, pet. denied) (because doctor had no information how long decedent had stayed at nursing home, what conditions he suffered from before he entered nursing home, or the physician's orders while decedent was at the nursing home, there was no evidence upon which doctor testify as to causation; therefore, hospital records and doctor's testimony as to causation were speculative, inflammatory and not admissible)
- *Glenn v. C & G Electric, Inc.*, 977 S.W.2d 686, 689 (Tex. App.–Fort Worth 1998, pet. overruled) (a challenge to business records as being testimony by undisclosed experts did not somehow trigger an automatic metamorphosis of the business records into the testimony of experts who are testifying at trial, thus requiring their disclosure pursuant to interrogatory requesting identification of each expert witness to testify at trial and each consulting expert)
- *Luxton v. State*, 941 S.W.2d 339, 342 (Tex. App.–Fort Worth 1997, no pet.) (TRE 705 does not allow a party to conduct voir dire of an expert whose observations, diagnoses, or opinions are offered as part of a business record)
- *March v. Victoria Lloyds Insurance Company*, 773 S.W.2d 785, 789 (Tex. App.–Fort Worth 1989, writ denied) (blood alcohol content report admissible without
- analysis under TRE 701-703 because no expert interpretation of the results was needed to understand

that it was evidence that there was alcohol in March's bloodstream at the time of the accident)

Other jurisdictions have drawn similar conclusions – specifically, that opinions or diagnoses contained in medical records must meet admissibility standards of expert testimony:

- *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981) (expressions of opinion or conclusions in business record are admissible only if subject matter calls for expert or professional opinion and is given by one with required competence)
- *Kohl v. Tirado*, 569 S.E.2d 576 (Ga. App.–2002) (medical record containing diagnostic opinions and conclusions may be admitted into evidence if proper foundation is laid; i.e. person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate facts upon which the entry was based)
- *Brooks v. Friedman*, 769 N.E.2d 696 (Ind. App.–2002) (medical opinions and diagnoses in hospital records must meet the requirements for expert opinions in order to be admitted into evidence)
- *Kohn v. La manufacture Francaise Des Pheumatiques Michelin*, 476 N.W.2d 184 (Minn. App.–1991) (in tire design defect case, results from tests conducted by university research institute were admissible as business records, where expert testified that he was familiar with the results of the tests and how they were conducted, the tests were existing documents not prepared for the litigation and it was the function of the institute to conduct tests and prepare reports directly related to transportation research)
- *Cabinet for Human Resources v. E.S.*, 730 S.W.2d 929 (Ky. 1987) (social worker's opinions and conclusions entered in the case record were expert testimony and, since no evidence was offered to establish her qualifications to express those opinions and conclusions, they were inadmissible without regard to whether other requirements for admission under the business records exception to the hearsay rule were met)
- *Lindsey v. Miami Development Corp.*, 689 S.W.2d 856 (Tenn. 1985) (expert opinions contained in medical records must meet the same requirements for admissibility as though the physician offered testimony identical to the information contained in the records)
- *McCable v. R.A. Manning Construction Company, Inc.*, 674 P.2d 699 (Wyo. 1983) (where a business record contains opinions it is subject to rules governing expert opinion testimony)
- *Keating v. Eng*, 377 N.Y.S.2d 928 (N.Y.A.D. 2 Dept. 1975) (even complete hospital records alone, without expert opinion and explanatory testimony, would require too much speculation by the jury to permit their introduction, in trial limited to issue of liability for personal injuries)

New Jersey and Pennsylvania have held that, notwithstanding the business record exception to the hearsay rule, expert opinions recorded in business records by a declarant who is not available for cross-examination may be excluded as substantive proof if the opinions relate to diagnoses of complex medical conditions difficult to determine or substantiate. *Lazorick v. Brown*, 480 A.2d 223 (N.J. Super. A.D. 1984); *Duquesne Light Co. v. Woodland Hills School Dist.*, 700 A.2d 1038 (Pa.Cmwlth.App. 1997); *Ganster v. Western Pennsylvania Water Co.*, 504 A.2d 186 (Pa.Super. 1985).

III. EXPERT REPORTS

A. Hearsay.

Hearsay is defined as "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). As such, it appears that reports prepared by experts meet this definition and should be excluded. However, there has been some case law discussing whether reports prepared by experts specifically for the litigation at hand would be admissible under the business records exception to the hearsay rule.

The operative language in TRE 803(6) when determining the admissibility of expert reports under the business records exception to the hearsay rule is: "...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..." If expert reports are made specifically for litigation, unlike invoices, contracts, records, etc. made in the routine course of business**,** they do not come within the ambit of TRE 803(6). *See State v. Tomah*, 736 A.2d 1047 (Maine 1999) (forensic report of expert on blood spatter patters, prepared specifically for trial, was not admissible in murder prosecution under business records exception to hearsay rule); *People v. Huyser*, 561 N.W.2d 481 (Mich. App. 1997) (report generated by prosecution's medical expert was not admissible under business records exception to hearsay rule, where medical expert did not treat child but examined her solely for litigation, and where expert's findings could not be duplicated in subsequent medical examination); *Kundi v. Wayne*, 806

S.W.2d 745 (Mo. App. E.D. 1991) (written reports of evaluations by expert witness were not admissible as business records); *Powell v. International Paper Company*, 1997 WL 137418 (Tex. App. – Beaumont 1997, writ denied) (expert reports prepared specifically for litigation are inadmissible under business records exception to hearsay rule).

B. Parentage Testing Report.

Parentage testing reports are admissible even without the establishment of the business records exception pursuant to Texas Family Code §160.109(b) which provides: "[a] verified written report of a parentage testing expert is admissible at the trial as evidence of the truth of the matter it contains." There is no need to lay the business records predicate; all the offering party need offer is a report that is verified, in writing, and made by a paternity testing expert. *See In the Matter of J.A.M.*, 945 S.W.2d 320, 322 (Tex. App.–San Antonio 1997, no pet.); *De La Garza v. Salazar*, 851 S.W.2d 380, 382 (Tex. App.–San Antonio 1993, no writ).

IV. AFFIDAVIT CONCERNING COST & NECESSITY OF SERVICES

(Texas Civil Practice & Remedies Code §18.001 et. seq.)

A. Generally.

Under Texas law, a claim for past medical expenses must be supported by evidence that such expenses were reasonably necessary for the plaintiff to incur as a result of her injuries. *Walker v. Ricks*, 101 S.W.3d 740, 746 (Tex. App.–Corpus Christi 2003, no pet.); *Transport Concepts, Inc. v. Reeves*, 748 S.W.2d 302, 305 (Tex. App.–Dallas 1988, no writ). It has been found that there are two ways in which a plaintiff can prove necessity of past medical expenses:

(1) presenting expert testimony on the issues of reasonableness and necessity; and
(2) presenting an affidavit prepared and filed in compliance with Sections 18.001 and 18.002 of the Texas Civil Practice and Remedies Code.

Walker, 101 S.W.3d at 746; *Rodriguez-Narrea v. Ridinger*, 19 S.W.3d 531, 532-533 (Tex. App.–Fort Worth 2000, no pet.). Ordinarily, expert testimony is required to establish reasonableness and necessity of medical expenses, but Texas Civil Practice and Remedies Code §18.001 provides a limited exception to this general rule as follows:

(a) This section applies to civil actions only, but not to an action on a sworn account.
(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.
(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;
(2) be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(d) the party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.
(e) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before

> a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

Tex.Civ.Prac. & Rem.Code Ann. §18.001. A party may submit medical bills and expenses as business records under rules 803(6) and 902(10); however, proof of the amounts by themselves, is not proof of reasonableness. Recovery by submitting medical bills and expenses solely pursuant to the exception provided in rule 803(6) will be denied in the absence of evidence showing the reasonableness and necessity of such expenses. *See Rodriguez-Narrea v. Ridinger*, 19 S.W.3d 531 (Tex. App.–Fort Worth 2000, no pet.) (no recovery was possible, regardless of TRE 803(6), because plaintiff did not meet requirements of Section 18.001 and presented no expert testimony on issues of reasonableness or necessity).

The Eastland Court of Appeals has stated that Section 18.001 is an evidentiary statute which accomplishes three things:

(1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay;
(2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and
(3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit.

Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex. App.–Eastland 1995, no writ); *accord Castillo v. American Garment Finishers Corporation*, 965 S.W.2d 646, 654 (Tex. App.–El Paso 1998, no writ).

It should be noted that a non-expert witness, such as a custodian of records, may not be permitted to testify that medical bills are reasonable or necessary. *See Castillo v. American Garment Finishers Corporation*, 965 S.W.2d 646 (Tex. App.–El Paso 1998, no writ). "While the Legislature has chosen to provide for the admissibility of an uncontested affidavit of a non-expert custodian of records which establishes the reasonableness and necessity of medical expenses, it has not provided that a custodian of records is competent to offer live testimony of these same facts." *See Id.* at 654.

1. Causation.

Section 18.001 only touches upon three elements of proof: (1) the amount of the charges; (2) the reasonableness of the charges; and (3) the necessity of the charges. *See Beauchamp*, 901 S.W.2d at 748. Affidavits under Section 18.001 are "sufficient evidence to support a finding of fact," but are not conclusive as to the amount of damages. *See* Tex.Civ.Prac. & Rem.Code Ann. §18.001(b); *Beauchamp*, 901 S.W.2d at 748-749. Neither do affidavits under Section 18.001 establish any causal nexus between the accident and the medical expenses. *Beauchamp*, 901 S.W.2d at 749; *see also Walker*, 101 S.W.3d at 748.

To be entitled to recovery, a plaintiff must establish two causal nexuses:

(1) a causal nexus between the defendant's conduct and the event sued upon; and
(2) a causal nexus between the event sued upon and the plaintiff's injuries.

Walker, 101 S.W.3d at 747 (citing *Morgan v. Compugrahpic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984)). "The causal nexus between the event sued upon and the plaintiff's injuries is strictly referable to the damages portion of the plaintiff's cause of action. Even if the defendant's liability has been established, proof of this causal nexus is necessary to ascertain the amount of damages to which the plaintiff is entitled." *Morgan*, 675 S.W.2d at 732.

Specifically, a jury judges the credibility of the witnesses, and may disbelieve a witness**,** even if his testimony is not contradicted. *See id.; see also Novosad v. Mid-Century Ins. Co.*, 881 S.W.2d 546, 551 (Tex. App.–San Antonio 1994, no writ). A jury may choose to be guided by expert testimony on damages, but is not bound by it. *Peterson v. Reyna*, 908 S.W.2d 472, 477 (Tex. App.–San Antonio 1995), *modified on other grounds*, 920 S.W.2d 288 (Tex. 1996).

2. Controverting Affidavit.

Section 18.001(f) requires a counteraffidavit to "give reasonable notice of the basis on which the party filing it intends to controvert the claim reflected by the initial affidavit and be made by a person qualified to testify in contravention about matters contained in the initial affidavit." *See* Tex.Civ.Prac. & Rem.Code Ann. 18.001(f); *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.–Dallas 2001, rev. denied). This is unlike Section 18.001(c)(2)(B), which permits charges to be proved by a non-expert custodian of records. Thus, a greater burden of proof is placed on counteraffidavits. The idea behind this burden is to discourage the misuse of

counteraffidavits in "a manner that frustrates the intended savings." *See Turner*, 50 S.W.3d at 747.

In *Turner v. Peril*, Turner filed affidavits pursuant to Section 18.001. Peril filed counteraffidavits by Dr. Sibley. Every counteraffidavit was identical except for the named service provider. The court ultimately found that Dr. Sibley's counteraffidavits were insufficient to controvert plaintiff's affidavits as to reasonableness and necessity of medical expenses. Specifically, the court found that Dr. Sibley did not sufficiently show that he was "qualified ... to testify in contravention" of the matters in each of Turner's affidavits by simply reciting his credentials as an orthopedic surgeon and stating that the counteraffidavits were based on his "education, training, and experience." *See* Tex.Civ.Prac. & Rem.Code §18.001(f). He may have been qualified to contravene some of Turner's affidavits but, "his status as a licensed physician did not automatically qualify him as an expert on every medical question." *See Turner*, 50 S.W.3d at 747; *see also Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). Further, the counteraffidavits did not address whether the charges for the various medical services were reasonable in terms of cost and made only a conclusory statement that the medical records failed to show any objective finding of a significant injury.

Simply put, the counteraffidavits should specifically address the claims made in the corresponding initial affidavit and state the basis for the contravention. General boilerplate language for counteraffidavits will not suffice. Such language does not give reasonable notice to controvert an initial affidavit. *See e.g. Turner*, 50 S.W.3d at 748.

V. GOVERNMENT RECORDS

A. Generally.

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 reports, or (C) factual findings resulting from an investigation made pursuant to authority granted by law." TRE 803(8).

B. Authentication.

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, if 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).

C. Hearsay.

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 that the following are not excluded by the hearsay rule:

> **Public Records and Reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> (A) the activities of the office or agency;
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
> (C) in a civil case as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

See Cowan v. State, 840 S.W.2d 435 (Tex. Crim. App. 1992) (the requirements for admissibility under "public records and reports" exception to the hearsay rule may be met by circumstantial evidence from the face of the offered document); *Wright v. Lewis*, 777 S.W.2d 520,

524 (Tex. App.–Corpus Christi 1989, writ denied) (letter from assistant U.S. attorney to Podiatry Board was not government record of U.S. Attorney's office, because it was not generated as a document pursuant to the attorney's duties as an assistant U.S. attorney; it was not a record of the State Podiatry Board because it 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.

There is one distinction between Federal Rule of Evidence 803(8) and the Texas rule. Under FRE 803(8), the "lack of trustworthiness" provision is applicable only to subdivision (C) of the rule, while in Texas, such provision is applicable to all three subdivisions.

D. Other Admissibility Issues.

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). Evidence admissible under TRE 803(6) may still be inadmissible if it does not meet the requirements of TRE 803(8). Specifically, if a public record is inadmissible due to the limitations of TRE 803(8)(B) or (C) listed above, then a party may not be allowed to circumvent those express exceptions and alternatively admit the record under TRE 803(6), even though all of the requirements of that rule are met. *See Cole v. State*, 839 S.W.2d 798, 804-806 (Tex. Crim. App. 1990); *Perry v. State*, 957 S.W.2d 894, 897 (Tex. App.–Texarkana 1997, pet. ref'd); *Nevarez v. State*, 832 S.W.2d 82, 85 (Tex. App.–Waco 1992, pet. ref'd).

1. 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. The same analysis set forth above with regard to business records also applies to public records under TRE 803(8). *See First Southwest Lloyds Insurance Company v. MacDowell*, 769 S.W.2d 954 (Tex. App.–Texarkana 1989, writ denied). In *First Southwest*, the trial court excluded a fire marshal's written report of a fire because it contained reference to an eyewitness account which did not fall within any other exception to the hearsay rule. *See id.* at 959. The written report fell within the TRE 803(8) government records exception, but the eyewitness account was not admissible under the present sense impression or the excited utterance exceptions to the hearsay rule because it was a narrative account given after the eyewitness had returned to the fire scene. *Id.*

2. Lab Reports.

The Texas Court of Criminal Appeals has made a distinction between reports prepared in a nonadversarial environment and those resulting from 'the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation:'

> This circuit has recognized that Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation. In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter...such records are, like other public documents, inherently reliable.

See Cole v. State, 839 S.W.2d 798, 804 (Tex. Crim. App. 1990). It has been found that the Texas Department of Public Safety's chemists were law enforcement personnel and that admission of their reports was prohibited by TRE 803(8)(B) because they constituted 'matters observed by police officers and other law enforcement personnel' and were not prepared in a routine, nonadversarial setting. *See Id; but see Butler v. State*, 872 S.W.2d 227, 237-238 (Tex. Crim. App. 1994) (holding that autopsy reports are admissible under Rule 803(8)); *Garcia v. State*, 868 S.W.2d 337, 342 (Tex. Crim. App. 1993) (holding that reports by medical examiners are admissible as business records and are not subject to exclusion under the other law enforcement personnel exception to the hearsay rule); *see also Aguilar v. State*, 887 S.W.2d 27 (Tex. Crim. App. 1994) (the testimony of a qualified expert chemist who did not personally perform the analysis of the substance at issue was admissible, even though he used the reports of another chemist to testify to his own opinion of the substance); *Martinez v. State*, 22 S.W.3d 504 (Tex. Crim. App. 2000) (citing *Aguilar*, a testifying chemist who did not analyze a substance may testify to his opinion about the substance and, in doing so, may rely upon the

report of the chemist who performed the analysis as long as the report is not offered into evidence).

The Court of Criminal Appeals delineated two factors to be considered in determining the admissibility of a lab report prepared by a chemist unavailable to testify: "(1) the nature of the testing process, and (2) the context in which the relevant tests were conducted." *Cole*, 839 S.W.2d at 808-810. Specifically, was the testing process subjective in nature or imprecise and subject to individual interpretation, and was the information recorded as part of a routine procedure in a nonadversarial setting.

3. Matters Observed Pursuant to Duty Imposed by Law.

TRE 803(8)(B) provides that "matters observed pursuant to duty imposed by law as to which matters there was a duty to report *excluding in criminal cases matters observed by police officers and other law enforcement personnel*," are not excluded by the hearsay rule. *See* TRE 803(8)(B)(emphasis added). Matters observed by police officers and other law enforcement personnel are excluded from this exception based on the presumption that observations by an officer at the scene of a crime are not as reliable as observations by other public officials. *See Perry v. State*, 957 S.W.2d 894, 896 (Tex. App.–Texarkana 1997, pet. ref'd). This perceived unreliability is due to the adversarial nature of encounters between the defendant and the police in the criminal context.

Courts have found reports prepared pursuant to other duties imposed by law admissible. *See Truck Insurance Exchange v. Smetak*, 102 S.W.3d 851 (Tex. App.–Dallas 2003, no pet.) (decision of Workers' Compensation appeals panel is admissible under rule 803(8) because such panel had a duty imposed by law to issue a decision after its review of the hearing officer's decision); *In the Interest of B.J.*, 100 S.W.3d 448 (Tex. App.–Texarkana 2003, no pet.) (disciplinary referrals prepared by a teacher employed by a public agency with a duty imposed by law to supervise children and report any violations of the student code of conduct were admissible under the public records exception); *Leyva v. Soltero*, 966 S.W.2d 765, 768 (Tex. App.–El Paso 1998, no pet.) (accident report and investigating officer's statement regarding motor vehicle accident were within hearsay exception for public records and reports); *Bingham v. Bingham*, 811 S.W.2d 678, 684 (Tex. App.–Fort Worth 1991, no writ) (social study made as the result of an order of a court in a matter affecting the parent/child relationship was admissible).

4. Law Enforcement/Investigative Reports.

TRE 803(8)(C) provides that "in civil cases 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" are not excluded by the hearsay rule. *See* TRE 803(8)(C)(emphasis added). These investigative reports are not limited to only factual findings as the rule might suggest. *See Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988) (portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion). Investigatory reports may contain opinions or conclusions, as long as they are based on a factual investigation and they satisfy the trustworthiness provision of TRE 803(8). *See Id.; Cowan v. State*, 840 S.W.2d 435, 437 (Tex. Crim. App. 1992), *see also McRae v. Echols*, 8 S.W.3d 797, 799-800 (Tex. App.–Waco 2000, pet. denied) (conclusions and opinions of police officer as to causation contained in accident report were based on factual investigation and were admissible absent evidence showing a lack of trustworthiness).

The evidence must be in the form of a record, report, statement, or data compilation of a public office or agency. TRE 803(8); *Robinson v. Warner-Lambert and Old Corner Drug*, 998 S.W.2d 407 (Tex. App.–Waco 1999, no pet.) (an article of a report of a study done by the Bureau of Public Health and the Centers for Disease Control is not a report of an agency and not admissible under Rule 803(8)(C)).

5. Lack of Trustworthiness.

The TRE 803(8) hearsay exception does not apply where *the sources of information or other circumstances indicate lack of trustworthiness.* It has been found that this rule creates a presumption of admissibility, with the burden being placed on the party opposing the admission of the record to show its untrustworthiness. *Beavers v. Northrup Worldwide Aircraft Services*, 821 S.W.2d 669, 675 (Tex. App.–Amarillo 1991, writ denied). As FRE 803(8) is identical to TRE 803(8), with the exception that the "lack of trustworthiness" paragraph is applicable to all three subdivisions in the Texas rule as opposed to only subdivision (C) in the Federal rule, federal cases interpreting the federal rule are very persuasive in the interpretation of this rule. *Id.* The United States Supreme Court has held that a JAG report based upon a factual investigation satisfied the rule's trustworthiness requirement. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); *but see Fraley v. Rockwell Int'l Corp.*, 470 F.Supp. 1264, 1267 (S.D. Ohio 1979) (holding inadmissible a JAG report

found to be untrustworthy because it was prepared by an inexperienced investigator in a highly complex field of investigation). The Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on the trustworthiness question:

(1) the timeliness of the investigation;
(2) the investigator's skill or experience;
(3) whether a hearing was held; and
(4) possible bias when reports are prepared with a view to possible litigation.

See Beech Aircraft Corp., 488 U.S. at 167-168 n.11 (citing *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943)). Advisory Committee's Notes on Fed.Rule Evid. 803(8), 28 U.S.C.App., p. 725; see Note, The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C), 96 HARV.L.REV. 492 (1982).

VI. COMPUTER RECORDS CONTAINING HEARSAY

A. Authentication.

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

B. Hearsay.

Hearsay is defined as a statement of a *person*. TRE 801(a). A machine is not a person, and therefore computer output is not inherently hearsay. *Stevenson v. State*, 920 S.W.2d 342, 343 (Tex. App.--Dallas 1996, no pet.). However, a computer may issue information that *contains* hearsay. In dealing with computerized records, it is important to distinguish human communications stored on a computer, or human communications processed by a computer, from computer-generated information that reflects the internal operation of the computer. For example, in *Burleson v. State*, 802 S.W.2d 429 (Tex. App.--Fort Worth 1991, pet. ref'd), a prosecution for harmful access to computer, the court held that information displayed by computer, as to how many payroll records were missing, was not hearsay, because it was not an out-of-court statement made by a *person*. Even if it were, said the court, the computer operator, who testified based on what he saw on the computer display, qualified as expert who could rely on the computer's display, even if the display's results were not admissible. The court observed, however, that the information reflected on the computer display was "generated by the computer itself as part of the computer's internal system designed to monitor and describe the status of the system." *Id.* at 439. The court cited two out-of-state cases. In *People v. Holowko*, 109 Ill.2d 187, 93 Ill.Dec. 344, 486 N.E.2d 877, 878-79 (1985), the Illinois Supreme Court held that computerized printouts of phone traces were not hearsay because such printouts did not rely on the assistance, observations, or reports of a human declarant. The print-out was "merely the tangible result of the computer's internal operations." In *State v. Armstead*, 432 So.2d 837, 839-41 (La. 1983), the Louisiana Supreme Court held that computerized records of phone traces were not hearsay, in that they were computer-*generated* rather than computer-*stored* declarations. *Burleson v. State*, 802 S.W.2d at 439 n. 2.

In *May v. State*, 784 S.W.2d 494, 497 (Tex. App.--Dallas 1990, pet. ref'd), the appellate court held that numbers viewed on an intoxilyzer's computer screen were hearsay. *May* in turn relied upon *Vanderbilt v. State*, 629 S.W.2d 709, 723-24 (Tex. Crim. App. 1981), which held that it was improper for the state's firearm witness, not testifying as an expert, to relate that a computer search of an FBI database rendered a print-out of a list of weapons that could generate the ballistic markings on the bullet in question, and that the gun in question was on that list. The Court of Criminal Appeals cited to an earlier case where it had held it to be error for a witness to repeat in front of the jury information obtained from a computer database. *See Vanderbilt*, 629 S.W.2d at 723. The conclusion reached in *May* was criticized in Schlueter, *Hearsay--When Machines Talk*, 54 TEX. B.J. 1135 (Oct.

1990). It is apparent that in *May* the Dallas Court of Appeals did not distinguish testimonial information contained in a computer information file from computer-generated calculations based on a scientific algorithm, with no component of human communication. This error was rectified in *Stevenson v. State*, 920 S.W.2d 342 (Tex. App.--Dallas 1996, no pet.), which said: "We overrule *May* only as to the language that refers to the intoxilyzer result, itself, as hearsay." *Id.* at 344.

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

C. Best Evidence Rule.

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

D. Process or System.

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

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

E. E-mail.

Special problems are presented by electronic mail (email).

1. Authentication.

TRE 901(a) requires, as a condition to admissibility, that the party offering an exhibit produce evidence sufficient to support a finding that the matter in question is what its proponent claims. There can be complications surrounding proof of the authorship of an email message, and the accuracy of the permanent record of the email transmission. Some email software makes it possible to falsely attribute email to another sender. An email produced the opposing party in discovery can be

authenticated for use against that party by giving notice under TRCP 173.7, if the producing party does not object.

2. Hearsay.

An email message is an out-of-court statement, and is potentially hearsay. An email message is not hearsay if it is not offered for the matter asserted TRE 801(c), or if it is an admission of a party opponent, TRE 801(e)(2). If the email message is hearsay, then the proponent must find an exception to the hearsay rule that applies. In *Vermont Electric Power Co., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F. Supp.2d 441 (D. Vt. 1999), emails between a corporation's employees were admitted as admissions of a party opponent. In *U.S. v. Ferber*, 966 F.Supp. 90, 98 (D. Mass. 1997), the issue was the admissibility of an intra-company email that recounted a telephone conversation. The trial court rejected an argument invoking the business record exception to the hearsay rule, on the ground that the proponent failed to prove that the business had a routine business practice of regularly maintaining copies of emails sent between employees. The court also rejected the email as an excited utterance under FRE 803(2), since it was made a few moments after the telephone conversation recounted in the email. *Id.* at 99. However, the court admitted the email as a present sense impression, under FRE 803(1). The business record exception was rejected for an email message in *Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994). Because of this troubling precedent, some authors suggest that companies enact specific internal policies on email retention. *See* Robert L. Paddock, *Utilizing E-Mail as Business Records Under the Texas Rules of Evidence*, 19 REV. OF LITIG. 61, 67 (2000) (citing articles to that effect).

3. Best Evidence Rule.

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

4. Articles.

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

VII. HOUSE BILL 4 - MEDICAL EXPERT REPORTS.

Effective for suits filed on or after September 1, 2003, the Texas Legislature repealed The Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes) and amended Chapter 74 of the Texas Civil Practice and Remedies Code to provide for the procedures and remedies in medical liability claims.

One of the changes delineated by the legislature dealt with expert reports in a health care liability claim. The prior law held that a claimant could file a cost bond, or place cash in an escrow account, in the amount of $5,000.00 (not later than the 90th day after the claim was filed) in lieu of filing an immediate expert report, which then had a deadline of not later than the 180th day after the date the claim was filed. The new law did away with the cost bond and requires that the claimant's expert report(s) shall be served no later than the 120th day after the date the claim was filed.

Additionally, the legislature added a deadline for each defendant physician or health care provider to serve any objection to the sufficiency of the report: not later than the 21st day after the date it was served with the report; failing which all objections are waived.

One other change to note with regard to expert reports is the legislature's removal of the ability to request an extension for the filing of an expert report upon showing "good cause." The only extension now mentioned by the legislature (other than that by agreement of the parties) is to cure a deficient expert report.

Last, all discovery in a health care liability claim is now stayed until a claimant has served the expert report and a curriculum vitae as required by Subsection (a), except for claimant's acquisition of information including medical or hospital records or other documents or tangible things, related to the patient's health care.

The new Section 74.351 of the Texas Civil Practice and Remedies Code provides as follows with regard to expert reports:

EXPERT REPORT:

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is

asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that: (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive the notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

[Subsection (d)-(h) reserved]

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (t), an expert report served under this section: (1) is not admissible in evidence by any party; (2) shall not be used in a deposition, trial, or other proceeding; and (3) shall not be referred to by any party during the course of the action for any purpose.

(l) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection ®)(6).

[Subsections (m)-(q) reserved]

(r) In this section: (1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement. (2) "Claim" means a health care liability claim. [(3) reserved] (4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant. (5) "Expert" means: (A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401; (B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402; (C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; (D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or (E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or

damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence. (6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information including medical or hospital records or other documents or tangible things, related to the patients' health care through: (1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure; (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and (3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).

VIII. TRANSLATIONS

A. In Texas Courts.

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

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

B. In Federal Courts.

The Federal Rules of Procedure and Evidence do not specifically address translations of foreign language

documents other than government records. In *United States v. Chalarca*, 95 F.3d 239, 246 (2d Cir. 1996), the Court of Appeals held that "[t]he decision to receive in evidence English translations of foreign-language transcripts lies in the discretion of the district court." The 11th Circuit Court of Appeals has adopted the following rule in that circuit, *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir.1985):

> This circuit has adopted the following procedure for challenging the accuracy of an English-language transcript of a conversation conducted in a foreign language: Initially, the district court and the parties should make an effort to produce an "official" or "stipulated" transcript, one which satisfies all sides. If such an "official" transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.