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February 21, 2002

Mr. Charles L. Babcock, Chair
Supreme Court Advisory Committee
Jackson & Walker L.L.P.
1100 Louisiana Street, Suite 4200
Houston, Texas 77002

Dear Chip:

Enclosed herein please find Disposition Chart reflecting the recommendations of the Evidence Subcommittee following a meeting of the committee on February 7, 2002. We will be prepared to discuss these recommendations at the next meeting of the Supreme Court Advisory Committee.

Thank you very much.

Sincerely,

Buddy Low

BL:cc
Enclosure
cc: Mr. Chris Griesel

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February 8, 2002

To: Supreme Court Advisory Subcommittee on Evidence

From: Gilbert I. Low

Dear Members of the Evidence Subcommittee:

Thanks for your thoughts and comments on our telephone conference meeting of February 7, 2002. I am enclosing herein Disposition Chart which shows action taken. If you have any corrections to make to the same or any suggestions, please let me know. I will hold off a couple of weeks before putting this together and mailing it for consideration at our next meeting.

In summary, we still have two matters for consideration. First will be Rule 509, and secondly will be Rule 614 that Mark Sales mentioned. He is getting me something on that and I will forward it to you. These are the only two matters we will have still pending.

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosure

DISPOSITION CHART
TEXAS RULES OF EVIDENCE

RULE NO.	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASONS
409	Referred by SBOT Administration of Rules of Evidence Committee - was considered previously and sent back to SBOT Committee for further study which resulted in amended recommendation by said committee	Proposed revised rule attached	No need to limit rule just to medical expenses. *Attached is copy of present rule and copy of proposed rule
103	Referred by SBOT Administration of Rules of Evidence Committee to add sentence that was included in Federal Rule 103	Leave rule the same and not add sentence included in the Federal Rules	Present rule meets the practices and customs in Texas and is unambiguous. *Attached is copy of Federal Rule 103, as well as present Texas Rule 103
904 (New)	Referred by SBOT Administration of Rules of Evidence Committee	Adopt the proposed amendment	For simplicity and savings of costs. *Subcommittee had reservations about implementation of this, whether through legislative action or amendment to rule with approval of the legislature. Full discussion to be held at meeting. *Proposed amendment attached
509	Referred by Bill Edwards - concerning ex parte conversations with a doctor under Exception (e)(4) to 509	Mark Sales to submit this to SBOT Administration of Rules of Evidence Committee for further consideration before we reconsider same	Further research needed, particularly on statutes that may affect same (providing penalties for disclosure by physician). Also, need for further discussions on effect any amendment will have.

Attachment 1

Stam v. Mack, 984 S.W.2d 747, 752 (Tex.App.—Texarkana 1999, no pet.). "Settlement agreements may be admissible ... if offered for other purposes, such as proving bias or prejudice. One kind of settlement agreement that is admissible is a 'Mary Carter' agreement. ... These agreements are admissible to show the true alignment of the parties."

State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex.App.—Houston [14th Dist.] 1992, orig. proceeding). "[O]ffers of settlement and compromise are excluded in order to allow a party to buy his peace and encourage settlement of claims outside of the courthouse."

Ochs v. Martinez, 789 S.W.2d 949, 959 (Tex.App.—San Antonio 1990, writ denied). "The [TRE] 408 exception allowing for admission of evidence of bias or prejudice [even if statement made during settlement negotiations] is a narrow one drafted in consideration of strong Texas judicial policy favoring the disclosure of conflicts of interest among parties to a lawsuit...."

TRE 409. PAYMENT OF MEDICAL & SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

See *Commentaries*, "Motion in Limine," ch. 5-E; Herasimchuk, ***Texas Rules of Evidence Handbook***, p. 332 (2001).

History of TRE 409 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 409.

Port Neches ISD v. Soignier, 702 S.W.2d 756, 757 (Tex.App.—Beaumont 1986, writ ref'd n.r.e.). A letter from an insurance company authorizing medical expenses for a workers' compensation [P] and stating that all future medical bills should be sent to the insurance company goes beyond TRE 409 and actually admits coverage, and thus is admissible.

TRE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS & RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty that was later withdrawn;

(2) in civil cases, a plea of *nolo contendere*, and in criminal cases, a plea of *nolo contendere* that was later withdrawn;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere* that was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority, in a civil case, that do not result in a plea of guilty or that result in a plea of guilty later withdrawn, or in a criminal case, that do not result in a plea of guilty or a plea of *nolo contendere* or that results in a plea, later withdrawn, of guilty or *nolo contendere*.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

See *Commentaries*, "Motion in Limine," ch. 5-E; Herasimchuk, ***Texas Rules of Evidence Handbook***, p. 336 (2001).

History of TRE 410 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 410.

Cox v. Bohman, 683 S.W.2d 757, 758 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). "Unless a plea of guilty to a traffic offense was made in open court ... evidence of such guilty plea is not admissible in a civil suit for damages arising out of negligence giving rise to the charge. ... A plea of *nolo contendere* to a traffic violation cannot be admitted into evidence in a civil suit for damages arising out of the same incident."

TRE 411. LIABILITY INSURANCE

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

See Herasimchuk, ***Texas Rules of Evidence Handbook***, p. 349 (2001).

History of TRE 411 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xl). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 411.

Thornhill v. Ronnie's I-45 Truck Stop, Inc., 944 S.W.2d 780, 794 (Tex.App.—Beaumont 1997, writ dism'd). TRE 411 "only prohibits the admission of

Current Proposed Revision of Rule 409:

> **Payment of Damages or Expenses.** Evidence of furnishing or paying or offering or promising to furnish or pay any damages or expenses occasioned by a personal injury or property damage is not admissible to prove liability for such personal injury or property damage.

EXHIBIT
tabbies
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Attachment 2

ARTICLE I. GENERAL PROVISIONS

FRE 101. SCOPE

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

Cross references to FRE 101: *Commentaries*, "Introduction to the Federal Rules," ch. 1-A, p. 3. Power of Supreme Court to prescribe rules of procedure and evidence, see 28 U.S.C. §2072.

Source of FRE 101: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1929; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.

In re Nautilus Motor Tanker Co., 85 F.3d 105, 111 (3d Cir.1996). The FREs "were enacted by Congress and must be regarded ... as any other federal statute. *At 112:* Accordingly, [administrative regulations cannot] limit the authority of Congress to prescribe and enforce rules for the admissibility of evidence in the federal courts."

Washington v. Department of Transp., 8 F.3d 296, 300 (5th Cir.1993). "In a diversity action, we apply federal procedural law, such as the [FREs]."

Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir.1989). The FREs "are intended to have uniform nationwide application...."

FRE 102. PURPOSE & CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Cross references to FRE 102: *Commentaries*, "Introduction to the Federal Rules," ch. 1-A, p. 3.

Source of FRE 102: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1929.

New York v. Operation Rescue Nat'l, 80 F.3d 64, 72 (2d Cir.1996). "Both the mandate of [FRCP 1] that those rules be construed 'to secure the just, speedy, and inexpensive determination of every action,' the dictate of [FRE 102] that those rules be construed to eliminate 'unjustifiable expense and delay,' and the allowance in [FRE 1006] for complex evidence to be presented in summary form should be read to preclude an absolute right of a litigant to command that a videotape be shown in full, or every word of a document be read, in open court."

Krumme v. West Point-Pepperell, Inc., 735 F.Supp. 575, 580 (S.D. N.Y.1990). "[W]hen considering [FRE] 102, it should be noted that the core provisions of the [FREs] were 'chiefly designed to serve [the] fundamental and comprehensive need in our adversary system to develop all relevant facts before the trier [of fact]'. ... Specifically, the court should also be concerned with the 'elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.'"

Gentile v. County of Suffolk, 129 F.R.D. 435, 458 (E.D. N.Y.1990), *aff'd*, 926 F.2d 142 (2d Cir.1991). "The trial court is given broad discretion to control the trial by the [FREs]. ... In controlling the trial the court will necessarily consider 1) whether the jury is in a position to properly evaluate the evidence before it without further help and 2) the amount of time the evidence will require as compared to alternate forms of proof. These general administrative considerations for the judicial officer presiding at the trial are designed to carry out the direction and policy of [FRE] 102. They are related to, but much broader in scope, than the special factors set out in [FRE] 403."

FRE 103. RULINGS ON EVIDENCE

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

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

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

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

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

2000 Notes of Advisory Committee

[¶1] The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g.*, Collins v. Wayne Corp., 621 F.2d 777 (5th Cir.1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g.*, Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir.1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g.*, Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir.1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. Wilson v. Williams, 182 F. 3d 562 (7th Cir.1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

[¶2] The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g.*, United States v. Vest, 116 F.3d 1179, 1188 (7th Cir.1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); United States v. Valenti, 60 F.3d 941 (2d Cir.1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

[¶3] The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g.*, Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir.1997) (although the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

[¶4] Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve a claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir.1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); United States v. Roenigk, 810 F.2d 809 (8th Cir.1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

[¶5] A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See* Old Chief v. United States, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See* Huddleston v. United States, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

[¶6] Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g.*, Wells v. Shriners Hospital, 109 F.3d 198, 200 (4th Cir.1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

[¶7] Nothing in the amendment is intended to affect the rule set forth in Luce v. United States, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. Luce answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The Luce principle has been extended by many lower courts to other situations. *See* United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985) (applying Luce where the defendant's witness would be impeached with evidence offered under Rule 608). *See also* United States v. Goldman, 41 F.3d 785, 788 (1st Cir.1994) ("Although Luce involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); Palmieri v. DeFaria, 88 F.3d 136 (2d Cir.1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); United States v. Ortiz, 857 F.2d 900 (2d Cir.1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); United States v. Bond, 87 F.3d 695 (5th Cir.1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

[¶8] The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g.*, United States v. Fisher, 106 F.3d 622 (5th Cir.1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); Judd v. Rodman, 105 F.3d 1339 (11th Cir.1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir.1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Cross references to FRE 103: *Commentaries*, "Making Objections & Preserving Error," ch. 1-F, p. 26; "Objecting to Evidence," ch. 8-D, p. 433.

The annotated cases, reference notes, and history notes that follow the rules are not part of the official rules; they are copyrighted material included with the rules to assist in research.

TEXAS RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

TRE 101. TITLE & SCOPE

(a) Title. These rules shall be known and cited as the Texas Rules of Evidence.

(b) Scope. Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.

(c) Hierarchical Governance in Criminal Proceedings. Hierarchical governance shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law. Where possible, inconsistency is to be removed by reasonable construction.

(d) Special Rules of Applicability in Criminal Proceedings.

(1) *Rules not applicable in certain proceedings.* These rules, except with respect to privileges, do not apply in the following situations:

(A) the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104;

(B) proceedings before grand juries;

(C) proceedings in an application for habeas corpus in extradition, rendition, or interstate detainer;

(D) a hearing under Code of Criminal Procedure article 46.02, by the court out of the presence of a jury, to determine whether there is sufficient evidence of incompetency to require a jury determination of the question of incompetency;

(E) proceedings regarding bail except hearings to deny, revoke or increase bail;

(F) a hearing on justification for pretrial detention not involving bail;

(G) proceedings for the issuance of a search or arrest warrant; or

(H) proceedings in a direct contempt determination.

(2) *Applicability of privileges.* These rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(3) *Military justice hearings.* Evidence in hearings under the Texas Code of Military Justice, Tex. Gov't Code §432.001-432.195, shall be governed by that Code.

Comment to 1998 change: "Criminal proceedings" rather than "criminal cases" is used since that was the terminology used in the prior Rules of Criminal Evidence. In subpart (b), the reference to "trials before magistrates" comes from prior Criminal Rule 1101(a). In the prior Criminal Rules, both Rule 101 and Rule 1101 dealt with the same thing—the applicability of the rules. Thus, Rules 101(c) and (d) have been written to incorporate the provisions of former Criminal Rule 1101 and that rule is omitted.

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 65 (2001).

History of TRE 101 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvi): added "Civil" to title of rules in (a). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: For TRE 101(a), see FRE 1103; for TRE 101(b), see FRE 101.

TRE 102. PURPOSE & CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 78 (2001).

History of TRE 102 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: FRE 102.

TRE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the

absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

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

(d) Fundamental Error in Criminal Cases. In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Comment to 1998 change: The exception to the requirement of an offer of proof for matters that were apparent from the context within which questions were asked, found in paragraph (a)(2), is now applicable to civil as well as criminal cases.

See *Commentaries*, "Motion in Limine," ch. 5-E; "Objecting to Evidence," ch. 8-D; "Offer of Proof & Bill of Exceptions," ch. 8-E; Herasimchuk, *Texas Rules of Evidence Handbook*, p. 79 (2001).

History of TRE 103 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxii). Amended eff. Jan. 1, 1988, by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xciv): Added 2d sentence to (a)(1), to conform to TRAP 52(b); deleted the phrase "or was apparent from the context within which questions were asked" from (a)(2); and added 1st sentence to (b), requiring party make offer before jury is charged. Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxx): Substituted the words "a party" for "counsel" in the last sentence of (b). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: FRE 103, with changes: Party entitled to make offer in question-and-answer form.

Bean v. Baxter Healthcare Corp., 965 S.W.2d 656, 660 (Tex.App.—Houston [14th Dist.] 1998, no pet.). "[A]ppellant[ ] preserved error after its initial offer of the videotape. If exclusion of evidence is based on the substance of the evidence, however, the offering party must reoffer it if it again becomes relevant. This may occur when the evidence is pertinent to rebuttal. Error is waived if the offering party fails to reoffer evidence for a limited purpose after it has been excluded pursuant to a general objection."

Hill v. Heritage Resources, Inc., 964 S.W.2d 89, 136 (Tex.App.—El Paso 1997, pet. denied). "To obtain a reversal of judgment based upon a trial court's decision to admit or exclude evidence, the appellant must show: (1) that the trial court abused its discretion in making the decision; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. [¶] It has been held that when evidence is sharply conflicting and the case is hotly contested, any error of law by the trial court will be reversible...."

Ludlow v. Deberry, 959 S.W.2d 265, 270 (Tex. App.—Houston [14th Dist.] 1997, no writ). "The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence. An offer of proof is sufficient if it apprised the court of the substance of the testimony and may be presented in the form of a concise statement. ... When the trial court excludes evidence, failure to make an offer of proof waives any complaint about the exclusion on appeal."

Rendleman v. Clarke, 909 S.W.2d 56, 58 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd). "We do not reach the merits of the admissibility of evidence of other falls because in each case, appellant either failed to object, or objected only after the testimony had been offered and received. To preserve a complaint for appellate review, a party must present to the trial court a *timely* request, objection, or motion, state the specific grounds therefor[e], and obtain a ruling before the testimony is offered and received."

Chance v. Chance, 911 S.W.2d 40, 52 (Tex.App.—Beaumont 1995, writ denied). "[T]he rule requiring that proffered evidence be incorporated in a bill of exception does not apply to cross-examination of an adverse witness.... When cross-examination testimony is excluded, appellant need not show the answer to be expected but only need show that the substance of the evidence was apparent form the context within which the question was asked."

TRE 104. PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Attachment 3

PROPOSED NEW RULE 904

§ 18.001. Affidavit Concerning Cost and Necessity of Services

(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 **but does not require such a finding.**

(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~~ may not offer evidence to controvert a claim reflected by the affidavit ~~must~~ unless that party files a counteraffidavit with the clerk of the court and serves 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~~ specifically set forth the factual basis for controverting the contested charges 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. The counteraffidavit may not be based upon the assertion that an affiant testifying under section (c)(2)(B) is not qualified by knowledge, skill, experience, training, education, or other expertise to testify concerning the matters set forth in section (b).

(g) Affidavits properly filed under (c) and (d) and counteraffidavits properly filed under (e) and (f) may be submitted to the trier of fact.

EXHIBIT
tabbies
F