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October 29, 2002

FEDERAL EXPRESS

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

Dear Chip:

The Evidence Subcommittee of the Supreme Court Advisory Committee has considered several matters and has recommendations on several matters that have not been brought to the attention of the full Supreme Court Advisory Committee. I recommend that all these matters be presented at our upcoming meeting. I am attaching disposition chart and attachments on all these matters and ask that you make them available to all members of the Supreme Court Advisory Committee so that we can discuss these. I don't anticipate any of them will take very long except the Rule 509 (Ex Parte Communications with Plaintiff's Doctor).

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosures

RECEIVED
OCT 30 2002

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 *Attached is copy of Government Code § 22.004 giving rule making authority to Supreme Court
509	Referred by Bill Edwards - concerning ex parte conversations with a doctor under Exception (e)(4) to 509	Make amendment which is attached.	SBOT Administration of Rules of Evidence Committee made recommendations for change, consistent with

			new Federal Regulations and our committee felt that there should be some notice requirement and some procedure outlined. Attached is proposed rule. Also attached is copy of present Rule 509.
705	Referred by SBOT Administration of Rules of Evidence Committee	Adopt amended rule that is attached *Also attached is rule recommended by SBOT Administration of Rules of Evidence Committee	Consistency with Federal Rule 703 and applicable language in Texas Rule 403. *Attached is Federal Rule 703 and Texas Rule 403

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
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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 the 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.

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

ercise his discretion in some manner. O'Don-
v. Golden (App. 12 Dist. 1993) 860 S.W.2d

obate court's failure to rule on surviving
's motion for appointment as substitute per-
l representative for her father's estate after
estate's independent executrix died demon-
ed failure on part of court to perform his duty
ile on motion within reasonable time justifying
of mandamus, where court had motion for
intment under advisement for more than 13
ths and had filed no response to mandamus
eeding setting forth legal grounds to justify
lelay in ruling on motion, and, in response to
damus proceeding, court acknowledged that it
ready and willing to rule in favor of surviving
following disposition of mandamus proceed-
but had ignored attempts for nine months to
in ruling on motion. O'Donniley v. Golden
. 12 Dist. 1993) 860 S.W.2d 267.

though writ of mandamus would issue requir-
trial court to rule on surviving child's motion
ppointment as substitute personal representa-
of her father's estate after death of estate's
pendent executrix, court would not issue writ
andamus requiring court to enter order ap-
ting child as personal representative since
decision lay within discretion of trial court
was outside scope of mandamus powers.
onniley v. Golden (App. 12 Dist. 1993) 860
.2d 267.

andamus is an extraordinary remedy and it
lie only to correct clear abuse of discretion or
tion of duty imposed by law when there is no
quate remedy at law. O'Donniley v. Golden
. 12 Dist. 1993) 860 S.W.2d 267.

upreme Court did not have exclusive manda-
jurisdiction over Texas Workers' Compensa-
Commission (TWCC) executive director or
Subsequent Injury Fund administrator, and
, Supreme Court would not grant leave to file
al writ of mandamus in Supreme Court, where
ctor and administrator were subject to manda-
in district court. City of Arlington v. Nadig
. 1997) 960 S.W.2d 641.

rit of mandamus will issue to compel a public
ial to perform a ministerial act. Medina Coun-
Com'rs Court v. Integrity Group, Inc. (App. 4
. 1999) 21 S.W.3d 307, review denied.

sions

rict court order issued in partition suit for
sion of husband's military retirement benefits;
rt of Appeals had statutory authority only for
eas matters arising from restraint due to viola-
s of orders entered in divorce, custody or
port cases. Ex parte Maroney (App. 6 Dist.
) 741 S.W.2d 566.

§ 22.004. Rules of Civil Procedure

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

Amended by Acts 1989, 71st Leg., ch. 297, § 1, eff. Aug. 28, 1989; Acts 2001, 77th Leg., ch. 644, § 1, eff. June 13, 2001.

Historical and Statutory Notes

1989 Legislation

The 1989 amendment, in subsec. (b), deleted the last sentence.

2001 Legislation

Acts 2001, 77th Leg., ch. 644, in subsec. (b), added the fourth sentence; in subsec. (c), substituted "is repealed or modified in any way" for "in the court's judgment is repealed".

Cross References

Bond for temporary restraining order or temporary injunction, rules, see V.T.C.A., Civil Practice & Remedies Code § 65.045.

Inmate lawsuits, exception, see V.T.C.A., Civil Practice & Remedies Code § 14.014.

Receiver for mineral interests owned by nonresident or absentee, service of notice, see V.T.C.A., Civil Practice & Remedies Code § 64.091.

Security for judgments pending appeal, rules of appellate procedure, conflicts, see V.T.C.A., Civil Practice & Remedies Code § 52.005.

Transcripts, requests, conflicts of law, see V.T.C.A., Government Code § 52.047.

Law Review and Journal Commentaries

The revised attorney-client privilege for corporations in Texas, Cullen M. Godfrey, 30 Tex. Tech L.Rev. 139 (1999).

That these theories are distinct counsels against appellate redefinition of the class.

The trial court defined a class based on the Rhodes study's identification of those producers who had been taken from non-ratably. While the pleadings and the record of the class-certification proceedings mention the Dow-waiver program, the trial court and the parties focused primarily on the methodology and results of the Rhodes study at the certification hearing. As a result, the parameters of the proposed new class are not easily identified from the record. Thus, if we were to redefine the class, we would be assuming the trial court's discretion to define the class under rule 42.

Furthermore, the trial court on remand will still have to determine whether the newly defined class satisfies the rule 42(a) and (b)(4) requirements of numerosity, commonality, typicality, adequacy of representation, and predominance. That decision will require the trial court to resolve questions of fact, as well as legal issues, from this record or whatever additional evidence is developed in the trial court. For this Court to redefine the class in this case would therefore constrain the trial court by imposing on it a definition it would be foreclosed from changing, even if the proceedings on remand revealed a more appropriate class definition or if later case developments called for modification under rule 42(c)(1). In light of the record and the trial court's considerable authority to monitor this class action, including its discretion to certify, modify, or decertify the class if it becomes necessary, we cannot redefine the class. For these same reasons, we cannot decide in this case, as Intratex urges, whether attaining a precise class definition is futile.

Without a sufficiently defined class to bring this action, Plaintiffs cannot currently meet rule 42's prerequisites. *Cf. Metcalf*, 64 F.R.D. at 409 (holding that plaintiffs' attempts to define class were futile, therefore, they could not satisfy certification requirements). Therefore, we do not reach the parties' arguments concerning the enumerated requirements of rule 42(a) and (b)(4). Only with a properly defined class can the explicit class-certification provisions be examined appropriately. If, on remand, the trial court finds a suitable class definition, it must also ensure that the newly defined class complies with the requirements of rule 42(a) and (b).

Because the trial court abused its discretion when it certified the class, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings consistent with this opinion.

Justice HARRIET O'NEILL did not participate in the decision.

Mark Matthew JOHNSTONE, Petitioner,

v.

The STATE of Texas, Respondent (Two Cases).

Nos. 99–0446, 99–0463.

Supreme Court of Texas.

March 9, 2000.

Following jury trials for court-ordered mental health services, the Probate Court, Harris County, William McCulloch, J., and Jim Scanlan, J., signed judgments ordering patient's temporary commitment to state hospital for 90 days on two occasions. Patient appealed from both judgments. Consolidating the cases, the Houston Court of Appeals, First District, Alele Hedges, J., affirmed. Granting patient's petition for discretionary review, the Supreme Court held that patient appealing temporary mental commitment order need

not file motion for new trial as prerequisite to challenging factual sufficiency of evidence.

Court of Appeals reversed and remanded thereto.

1. Mental Health ⇐37.1

Rules of Civil Procedure apply generally to mental health commitment proceedings. Vernon's Ann.Texas Rules Civ. Proc., Rule 1 et seq.

2. Courts ⇐85(1)

When a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided under provision governing Supreme Court's rulemaking. V.T.C.A., Government Code § 22.004.

3. Mental Health ⇐45

Rule requiring person to file motion for new trial as prerequisite to challenging factual sufficiency of evidence does not apply to person appealing temporary mental commitment order. Vernon's Ann.Texas Rules Civ.Proc., Rule 324.

Scott Kevin Boates, Sherea A. McKenzie, Houston, for Petitioner in No. 99–0446.

Sherea A. McKenzie, Jeffrey D. Kyle, Houston, for Petitioner in No. 99–0463.

Lisa S. Rice, Michael R. Hull, John Cornyn, Austin, for Respondent in No. 99–0446.

Michael R. Hull, Michael P. Fleming, Houston, John Cornyn, Austin, for Respondent in No. 99–0463.

PER CURIAM.

[1, 2] These consolidated cases present the question of whether a person appealing from a temporary mental health commitment order must comply with Texas Rule of Civil Procedure 324's motion-for-new-trial requirement to complain about factual insufficiency on appeal. The Texas Rules of Civil Procedure apply generally to mental health commitment proceedings. However, when a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004. *See Kirkpatrick v. Hurst*, 484 S.W.2d 587, 589 (Tex.1972); *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex.1971). Texas Health and Safety Code section 574.070 requires a proposed mental health patient to file notice of appeal ten days after the trial court signs the commitment order. We conclude that rule 324 and section 574.070 conflict. Therefore, we hold that Rule 324 does not apply in temporary mental health commitment proceedings. Accordingly, we reverse and remand to the court of appeals to review the factual sufficiency of the evidence.

Mark Matthew Johnstone appeals two separate temporary mental health commitment orders in which the trial court temporarily committed Johnstone to Rusk State Hospital for in-patient treatment not to exceed ninety days.[1] *See* TEX. HEALTH & SAFETY CODE § 574.034(g). Johnstone filed a motion for new trial after the first hearing, but did not file one after the second hearing. The court of appeals consolidated the appeals and held that a motion for new trial was required to preserve factual insufficiency error. 988 S.W.2d 950, 952. It also held that the motion for new trial that Johnstone filed in the first case did not preserve factual insufficiency error because it only complained of legal sufficiency. *Id.* at 953. As a result, the court of appeals held that Johnstone waived factual sufficiency error for both hearings.

1. Although Johnstone has already been released from his temporary commitments, his legal and factual sufficiency challenges are not moot. *See State v. Lodge*, 608 S.W.2d 910, 912 (Tex.1980) (collateral consequences exception to the mootness doctrine applies to temporary mental health commitment orders).

Section 574.070 of the Health & Safety Code governs appeals from orders requiring court-ordered mental health services. *See* TEX. HEALTH & SAFETY CODE § 574.070. Subsection (b) mandates that notice of appeal from an order requiring court-ordered mental health services must be filed not later than the 10th day after the trial court signs the order. *Id.* § 574.070(b). Subsection (c) provides that the clerk shall immediately send a certified transcript of the proceedings to the court of appeals once an appeal is filed. *Id.* § 574.070(c). Subsection (e) states that the "court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket." *Id.* § 574.070(e). By enacting these provisions, the Legislature intended for appeals from commitment orders to proceed expeditiously because the orders result in confinement. *Id.* § 571.002(6) (one of the purposes of the Mental Health Code is to establish procedures for prompt and fair decisions); *see also Moss v. State*, 539 S.W.2d 936, 940 (Tex.Civ.App.—Dallas 1976, no writ) ("Expeditious disposition of such an appeal is appropriate in view of the deprivation of liberty involved and the fact that [hospitalization can only last] ninety days.").

Rule 324 provides that a motion for new trial is required to preserve factual insufficiency error. *See* TEX.R. CIV. P. 324(b)(2). A party has thirty days from the date the trial court signs the judgment to file a motion for new trial. *See* TEX.R. CIV. P. 329b(a). The trial court has seventy-five days from the date it signed the judgment to rule on the motion or it is overruled by operation of law. *See* TEX.R. CIV. P. 329b(c). Once the motion is ruled on, the trial court has thirty additional days of plenary jurisdiction. *See* TEX.R. CIV. P. 329b(e). When a party files a motion for new trial, notice of appeal need not be filed until ninety days after the trial court signs the judgment. *See* TEX.R.APP. P. 26.1(a)(1).

The motion-for-new-trial requirement of our rules conflicts with section 574.070's terms and purpose. The appeals schedule the Legislature created does not contemplate the filing of a motion for new trial. In these types of cases, notice of appeal must be filed ten days after the trial court signs the order, *see* TEX. HEALTH & SAFETY CODE § 574.070(b), while under Rule 329b(a) a motion for new trial would not be due until thirty days after the trial court signs the judgment. It would frustrate the statutory purpose to require a complainant to file a motion for new trial after the deadline for perfecting an appeal has already passed. *See Moss v. State*, 539 S.W.2d 936, 941 (Tex.Civ.App.—Dallas 1976, no writ) (holding it would be contradictory to require a motion for new trial after the appeal is already perfected). In *Moss*, the court was interpreting the former version of section 574.070, which required notice of appeal to be filed five days after the order. The court rejected the argument that because the statute was silent on a motion for new trial, the statute did not affect that requirement. It reasoned that had the Legislature wanted a proposed patient to file a motion for new trial, it would have provided for notice of appeal to be filed after the motion for new trial.[2] *See id.* at 940. Because the statute did not allow time to dispose of a motion for new trial, the trial court held that a motion for new trial was not required. *See id.*

In addition, a motion for new trial serves no practical purpose once the appeal has

2. We note that two other courts of appeals have held that a person appealing from a temporary mental health commitment order does not have to file a motion for new trial. *See L.S. v. State*, 867 S.W.2d 838, 841 n. 2 (Tex.App.—Austin 1993, no writ); *In re P.W.*, 801 S.W.2d 1, 2 (Tex.App.—Fort Worth 1990, writ denied). These courts held that because temporary mental health commitments involve incarceration, factual sufficiency review should be conducted like it is in criminal cases, without preservation of error. *See L.S.*, 867 S.W.2d at 841 n. 2; *In re P.W.*, 801 S.W.2d at 2. Because we conclude that the rule and the statute conflict, we do not comment on the reasoning of these opinions.

already been perfected. Moreover, the statutory scheme supersedes the appellate timetable established by Rule 324 in conjunction with Rule 329b and Texas Rule of Appellate Procedure 26.1.

[3] For these reasons, we conclude that a person appealing a temporary mental commitment order need not file a motion for new trial as a prerequisite to challenging the factual sufficiency of the evidence. Without hearing oral argument, we reverse and remand these cases to the court of appeals for review of the factual sufficiency of the evidence. *See* TEX.R.APP. P. 59.2.

Lea BORNEMAN, Petitioner,

v.

STEAK & ALE OF TEXAS, INC., d/b/a Bennigan's, Respondent.

No. 98-1167.

Supreme Court of Texas.

April 6, 2000.

Passenger in vehicle brought action under Dram Shop Act against restaurant that served driver of vehicle alcohol for injuries sustained in vehicle accident. Following jury verdict, the District Court No. 236, Tarrant County, Thomas Wilson Lowe, III, entered judgment awarding passenger actual and punitive damages. Appeal was taken. The Fort Worth Court of Appeals reversed and rendered. Petition for review was filed. The Supreme Court held that: (1) jury question, which asked jury if it found conduct of restaurant to be proximate cause of occurrence in question, was erroneous, and (2) jury charge was not so defective that it warranted rendition of judgment, and thus remand was necessary. Court of Appeals reversed and remanded.

1. Intoxicating Liquors ⇐282, 291

Generally, the Dram Shop Act provides the exclusive means for recovery against a provider of alcohol, and its requirements are twofold, it must be apparent to the defendant at the time the alcohol is provided, sold, or served that the person consuming the alcohol is obviously intoxicated to the extent that he presents a clear danger to himself and others, and the intoxication of the recipient must be a proximate cause of the damages suffered. V.T.C.A., Alcoholic Beverage Code §§ 2.01-2.03.

2. Trial ⇐352.1(6)

Jury question in action brought under Dram Shop Act, which asked jury if it found conduct of restaurant to be proximate cause of vehicle accident in which passenger was injured, was erroneous, where question could have allowed jury to consider restaurant's act or omission, such as failing to call taxicab for driver, as basis for causation, and where Act required that liability could be imposed only if driver's intoxication was proximate cause of injury. V.T.C.A., Alcoholic Beverage Code § 2.02(b)(1, 2).

3. Trial ⇐241

As a general rule, when a statutory cause of action is submitted, the charge should track the language of the provision as closely as possible.

4. Appeal and Error ⇐1177(5)

Jury charge was not so defective that it warranted rendition of judgment for restaurant in dram shop action brought by passenger of vehicle against restaurant that served driver alcohol, and thus remand was necessary, even though jury was given erroneous question, which would have allowed jury to consider act or omission of restaurant, such as failing to call taxicab for driver, as basis for causation,

4

Rule 509(g)

(g) (1) *Ex Parte Communications by Defendant.* Unless otherwise prohibited by law, Defendant may communicate *ex parte* with a Plaintiff's physician or health care provider only under the following conditions:

(A) Defendant must provide to the health care provider at least seven days before the date on which any substantive conversation is scheduled to occur the Notice to Health Care Provider described in subpart (g)(2).

(B) Defendant must, at least 21 days in advance of any substantive conversation with a Plaintiff's health care provider, deliver written notice to Plaintiff or, if Plaintiff is represented by counsel, Plaintiff's attorney, that it intends to contact such health care provider *ex parte*, stating the name, address and telephone number of the physician or health care provider with whom Defendant intends to communicate .

(C) Defendant may not discuss Plaintiff's HIV status;

(D) Defendant may not discuss with the physician or health care provider anything about Plaintiff's medical condition or history that is not included in medical records that have already been produced in the case; and

(E) Defendant shall notify Plaintiff's counsel that a substantive communication has occurred with a health care provider within fourteen days following the communication in the case.

(2) *Ex Parte Communications by Plaintiff's Counsel* Plaintiff's attorneys may communicate *ex parte* with Plaintiff's health care provider with the consent of Plaintiff unless (A) the health care provider is a party to the case or an employee of a party to the case, or (B) Plaintiff's counsel has been previously advised by the health care provider that the provider is represented by counsel retained specifically for the action brought by Plaintiff .

(3) *Form of Notice to Treating Physicians.* A form of the notice to and acknowledgement of the physician or health care provider shall substantially comply with the following form:

NOTICE TO HEALTH CARE PROVIDER

Your patient [insert name, social security number, and date of birth], is a plaintiff [or decedent] in a case claiming physical injuries. The name and number of the case, and the court in which it is filed, are as follows: _____ v. _____, No. _____, in the ___ Court, _____ County, Texas. I represent a party who is on the opposite side of the case from your patient. I am sending you this Notice because I desire to converse with you about your patient's condition outside the presence of your

patient's attorney. Under Texas law, I must send you this notice before you and I have any substantive conversation about your patient's health information.

The name, address and telephone number of the attorney representing your patient [decedent] in this case is:_____, _____, _____. You are free to discuss your patient's health information with the patient's attorney so long as your patient consents to your doing so.

Under Texas law, a patient who files a personal injury lawsuit is deemed to have made a limited waiver of the confidential physician-patient privilege with regard to the care and treatment of his or her physical condition. This limited waiver does not ordinarily extend to care for mental or emotional conditions. In any event, there is no waiver of the confidential physician-patient privilege except to the extent that the conditions and treatment are related to the claimed injuries in this suit. In other words, conditions or treatment that are not related to the patient's claimed injuries remain confidential.

In addition to Texas law, there are federal laws, including the Health Insurance Portability and Accountability Act ("HIPAA"), which protect patient privacy. Under HIPAA, certain patient health information may be disclosed only after the patient has received notice that disclosure of such information may take place. Thus, the patient's attorney named above in this notice has been given notice of my intent to communicate with you. If the Plaintiff's attorney objects to your discussing your patient's health information with me outside his or her presence, the court will determine whether and under what conditions you may communicate with me alone.

You are under no obligation to communicate with me or any of the other attorneys in this lawsuit, but you may communicate with me if your patient's attorney does not timely object, or if your patient consents to the communication, or if the court orders it despite an objection. In any of those events, you may, if you choose, review and discuss with me those medical records in my possession which I obtained through discovery procedures in this case. You should not provide me with any medical records in your possession, nor should you discuss your patient's HIV status, or other conditions that either are beyond the scope of the records I have obtained in discovery or that are beyond the scope of the limited waiver discussed above. Additionally, you should not discuss your patient's mental or psychiatric condition except to the extent that I already have records on this issue in my possession and show them to you during our conversation.

If you are willing to discuss the Plaintiff's condition with me, you must sign the following acknowledgment:

ACKNOWLEDGEMENT OF HEALTH CARE PROVIDER

I understand that except for the waiver described in the proceeding notice, information concerning the Plaintiff [or the decedent] remains privileged and I am bound to maintain that privilege and preserve the confidentiality of that information.

_____
Signature of Health Care Provider

_____
Date:

Comment:
For examples of other laws that may prevent disclosure, see § 611.004, 611.045 (Right To Mental Health Record), and 42 CFR Part 2 (confidentiality of alcohol and drug abuse patient records).

S.Ct. Adv. Rule509(G)

In re Bates, 555 S.W.2d 420, 430 (Tex.1977). Where the "role of the informer was very minor and occurred quite early in the [bribery] investigation; and absent other evidence concerning the relevance of the identity of the informer; the disclosure [of the informer's identity] is not required."

Warford v. Childers, 642 S.W.2d 63, 66-67 (Tex. App.—Amarillo 1982, no writ). The rule blocking disclosure "is a recognition of the fact that most informants relay rumor, gossip and street talk of no evidentiary value and the exceptions [to the rule] are designed for the rare case where the informant can give eyewitness testimony about the alleged crime or arrest."

TRE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "patient" means any person who consults or is seen by a physician to receive medical care.

(2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) Limited Privilege in Criminal Proceedings. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

(c) General Rule of Privilege in Civil Proceedings. In a civil proceeding:

(1) Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed.

(2) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.

(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. art. 4590i.

(d) Who May Claim the Privilege in a Civil Proceeding. In a civil proceeding:

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(e) Exceptions in a Civil Proceeding. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, Tex. Rev. Civ. Stat. art. 4495b*, or of a registered nurse under or pursuant to Tex. Rev. Civ. Stat. arts. 4525**, 4527a**, 4527b**, and 4527c**, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);

(6) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under Tex. Health & Safety Code ch. 462; tit. 7, subtit. C; and tit. 7, subtit. D;

(7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

(f) Consent.

(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as authorized by Tex. Health & Safety Code tit. 7, subtits. C and D; Tex. Prob. Code ch. V; and Tex. Fam. Code §107.011; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

* Now Occupations Code, title 3, subtitle B-C.

** Now Occupations Code, chapter 301.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TRCS art. 4495b, § 5.08 [now Occ. Code ch. 159]. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex.1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

See ***Commentaries***, "Scope of Discovery," ch. 6-B; "Medical Records," ch. 6-I; Cochran, ***Texas Rules of Evidence Handbook***, p. 458 (2001).

History of TRE 509 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xlvii). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvii): Re-wrote (d)(4); added references to statutes relating to registered nurses in (d)(5). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxiii): In (a)(2) added the words "in any state or nation, or reasonably believed by the patient so to be", in (b)(3) substituted the word "provisions" for "prohibitions"; substituted the word "rule" for "section continue to", deleted the phrase "to confidential communications or records concerning any patient irrespective", substituted "even if" for "of when"; in (b)(3) added the phrase "prior to the enactment of the Medical Practice Act, TRCS art. 4590i (Vernon Supp.1984)"; in (c)(1) substituted the words "by a representative of the patient" for the word "physician"; and in (d)(7) deleted the words "when the disclosure is relevant to" and substituted the words "proceeding, proceeding for court-ordered treatment, or probable cause hearing" for "or hospitalization proceeding." Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xlvi). Source: TRCS art. 4495b, §5.08 (repealed).

R.K. v. Ramirez, 887 S.W.2d 836, 842 (Tex.1994). "[T]he patient-litigant exception to the [TRE 509 & 510] privileges applies when a party's condition relates in a significant way to a party's claim or defense. *At 843 n.7:* Whether a condition is a part of a claim or defense should be determined on the face of the pleadings, without reference to the evidence that is allegedly privileged. *At 843:* [T]he exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance."

Groves v. Gabriel, 874 S.W.2d 660, 661 (Tex.1994). "[A] trial court's order compelling release of medical records should be restrictively drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit. The global release in this case does not meet the ***Mutter*** standard."

Mutter v. Wood, 744 S.W.2d 600, 601 (Tex.1988). "Even in the interest of broad discovery directed at seeking the truth, no privilege should be totally ignored." A court order requiring the plaintiffs to waive the physician-patient privilege was too broad.

Rios v. Texas Dept. of MHMR, 58 S.W.3d 167, 169-70 (Tex.App.—San Antonio 2001, n.p.h.). Plaintiffs "complain that opposing counsel's *ex parte* contact with [P's physician] was improper and should be declared impermissible because it conflicts with a physician's fiduciary duty of loyalty to his patient and invites improper influence that threatens the relationship of trust confidence. [Ps] presented no evidence that [D] elicited confidential, privileged medical information as a result of its interview with [P's physician]. [Ds] contacted [P's physician] more than four years following his consultation with [P], and at a time when the doctor did not consider himself a 'treating physician' to [P]."

THE STATE BAR OF TEXAS ADMINISTRATION OF THE RULES OF EVIDENCE COMMITTEE
Minutes of Committee Meeting – October 25, 2002

A meeting of the State Bar of Texas Administration of the Rules of Evidence Committee ("AREC") was held on Friday, October 25, 2002 at the Texas Law Center in Austin. Written notice and a written agenda (including Subcommittee reports), copies of which are attached as Exhibits "A" and "B," respectively, were sent out in advance of the meeting. The meeting was called to order at approximately 10:15 a.m. and a quorum of the voting members of the Committee was present. The attendance record of the meeting is attached at Exhibit "C." The Committee then proceeded to take up a number of Subcommittee reports and recommendations.

A. Report of Subcommittee Regarding Ex Parte Communications with Treating Physicians.

Terry Jacobson reported on his subcommittee's work on a potential rule regarding evidence obtained through ex parte communications with treating physicians. A copy of his subcommittee's report, including a new proposed rule and minority reports, is attached as Exhibit "D." Mr. Jacobson gave a detailed report on the work performed by his subcommittee. He reported that, after careful study, the subcommittee had determined that the Federal HIPAA regulations preempt state law, severally limit the circumstances under which a health care provider can disclose health care information, and impose penalties on the health care provider for violation of the regulations. For that reason, a majority of his subcommittee believed that a new rule restricting ex parte communications was required. Mr. Jacobson then discussed the specifics of the subcommittee's proposed rule, which was based on language taken directly from the HIPAA Regulations.

Following Terry Jacobson's report, other subcommittee members provided their views. Included among these was a report by Victor Haley regarding the defense bar perspective (also set out in the subcommittee's minority report). According to Mr. Haley, the defense bar does not agree that HIPAA preempts state law regarding ex parte communications, although he stated that these regulations were a "concern." He also discussed his view that the proposed recommendation would not be fair to the defense bar since plaintiff's counsel would then have sole access to treating physicians and defense counsel could only gain access through expensive formal discovery. Mr. Haley urged AREC to do nothing at this time and to reject the subcommittee's proposal. David Starnes and Steve Harrison, also subcommittee members, then gave a report of the plaintiff bar's perspective. Mr. Starnes strongly urged a complete ban on ex parte communications and stated that the rule should make clear that any evidence obtained through ex parte is inadmissible at trial. Mr. Harrison's view was that unrestricted ex parte communications allowed far too much room for mischief and that there was no way to "police" the communications. However, he believed that the appropriate remedy would be to allow a procedure for ex parte communications under certain limited circumstances pursuant to court order. He favored the subcommittee's proposed rule. Finally, Dean Sutton, also a subcommittee member, stated his view that he had a strong concern for the treating doctors who are the subject of the ex parte communications and who run the risk of the penalties imposed by HIPAA. He also stated his belief that HIPAA preempts state law on this issue and that a rule like the one recommended by the subcommittee was needed.

Following the report by the subcommittee and its various members, the Chair opened the floor for a general discussion by all members of AREC. As part of this discussion, the Committee also considered a rule restricting ex parte communications received from Buddy Low's Evidence Subcommittee of the Supreme Court Advisory Committee ("SCAC"). This rule, a copy of which is attached as Exhibit "E," was prepared by Judge Harvey Brown and Tommy Jacks. The Committee also discussed a new proposal by Judge David Godbey that was consistent with the previous debate the Committee had at its May 24, 2002 meeting. Under this proposal, ex parte communications would be prohibited absent written consent or a court order. Following these discussions, the Committee voted on the various proposals.

With respect to Victor Haley's recommendation that no action be taken and the issue left to the courts to decide, AREC voted against such a proposal by a vote of 15-3. With respect to David Starnes's proposal to adopt a rule completely banning ex parte communication under any circumstances, AREC again voted against such a proposal by a vote of 13-5. As to the proposed rules drafted by the subcommittee and the proposed rule prepared by Judge Harvey Brown and Tommy Jacks, no one on the Committee favored either proposal. Although the concept of the Subcommittee's proposed rule was workable, the Committee members felt that, as drafted, the rule was too long and complex and did not address health care information covered by statutes other than HIPAA, such as those relating to HIV status and mental health. The Committee members also felt that the Brown/Jacks proposal was flawed because it was written in Plaintiff/Defendant terms, it did not completely satisfy the requirements of HIPAA, it was vague in several respects and limited the ex parte contact too narrowly to the information contained in previously produced medical records.

Instead, AREC ultimately voted in favor of the proposal made by Judge Godbey which allowed for ex parte contact only by written consent or through a court order. The substance of the new rule, which the Committee believes is consistent with HIPAA, is as follows:

> ***New Rule 514.*** *Limitation on ex parte communications in civil proceedings.* In civil cases, a party or party's representative may not communicate with or obtain healthcare information from a healthcare provider outside of formal discovery except by (1) written authorization of the patient or patient's representative, or (2) pursuant to a court order which specifies the scope and subject matters that may be disclosed and which states that the healthcare provider is under no obligation to discuss such matters outside of formal discovery. A copy of such order must be provided to the healthcare provider prior to any such communication or disclosure. Evidence obtained in violation of this Rule is inadmissible except upon a finding of good cause. Nothing in this Rule precludes the parties from communicating, obtaining or sharing healthcare information in connection with a joint representation, privilege or agreement.

A copy of the text of the proposed rule is also attached as Exhibit F. The language set forth above was approved by a 13 to 3 vote. However, a number of observations were made regarding the proposal, including the following:

1. The Rule may be better suited for inclusion in Rule 192, as a procedural/discovery rule.

2. HIPAA Regulations will likely have a far-reaching effect on the physician-patient

privilege, and discovery in general, and need to be studied further. These regulations will undoubtedly affect other areas of evidence and procedure.

3. Some concern was expressed regarding who is and who is not a "healthcare provider." Rule 509 currently applies only to physicians. There are other provisions in the *Health & Safety Code* and *Occupation Code* which extend similar privileges to non-physicians (podiatrist, hospitals, etc.). The term "healthcare provider" may need to be defined or explained in a comment.

4. There was also discussion regarding whether evidence obtained in violation of the rule ought to be inadmissible. For the evidence to be admissible in the first place, it must be relevant. Therefore, the question arose whether the Rule should penalize a party by making discoverable and relevant information obtained in the wrong fashion "inadmissible." This needs to be given further consideration, although most Committee members believe the trial court has authority to protect against such conduct through the use of sanctions.

The Chair asked that Victor Haley prepare any additional minority report relating to this rule and advised the Committee members that both the AREC's proposal and the minority report would be forwarded on to the Supreme Court Advisory Committee as soon as possible.

B. Report on Roundtable Discussion by Judge Cathy Cochran.

Judge Cathy Cochran gave a brief report regarding the civil justice roundtable forum put together by Cathy Snapka at Justice Tom Phillips' request. This roundtable was formed to address a number of issues of concern to civil practioners, including public perception issues related to the civil justice system. The roundtable consisted of various attorney groups from around the state including the AREC, the State Bar Rules Committee, the Litigation Section of the State Bar of Texas, the Texas Trial Lawyers Association, and the Texas Association of Defense Counsel. Judge Cathy Cochran attended the first roundtable discussion as a representative of AREC and the Chair thanked her for her attendance and her report.

C. Report on Prior Recommendation Regarding Rule 705.

Chair Mark Sales reported that Bubby Low's Evidence Committee of the SCAC had considered AREC's prior recommended change to Rule 705 regarding the circumstances under which an expert could provide testimony that would otherwise be inadmissible. Buddy Low's Evidence Committee recommended that the SCAC adopt AREC's proposal in part and reject it in part. In particular, Buddy Low's subcommittee recommended a change to Rule 705(d) that tracts the exact language of Rule 703 of the Federal Rules of Evidence instead of AREC's proposed language which would make clear that the proponent of the otherwise inadmissible had the burden of convincing the trial court to admit the evidence. Because of time constraints, the Chair deferred further discussion on this issue until AREC's spring meeting.

D. Other Issues.

Also due to time constraints, the Chair deferred a discussion on Terry Jacobson's subcommittee

studying potential rule changes relating to the admissibility of electronically stored materials and documents. That subcommittee will report at the spring AREC meeting. Also, the Chair appointed Judge Cathy Cochran and Professor Jerry Powell to study potential rule changes relating to Rule 803 regarding a corroboration requirement for admitting statements against penal interest. This subcommittee will also report back at AREC's spring meeting.

There being no further business, the meeting was adjourned at approximately 1:45 p.m.

HUGHES & LUCE, L.L.P.

FAX

TO:

#	RECIPIENT	COMPANY	FAX NO.	PHONE NO.
1.	Gilbert I. Low	Orgain, Bell & Tucker, L.L.P.	(409) 838-6959	(409) 838-6412

FROM:

NAME:	Mark K. Sales	DATE:	October 29, 2002
PHONE:	214.939.5626	C/M #:	955000/840
# PGS.:	5		

COMMENTS:

Attached are the meeting minutes of AREC's October 25, 2002 meeting, which includes the Committee's recommendation on a new Rule 514 regarding ex parte communications. These minutes have not yet been distributed to the entire Committee for comment. Please review and call me with any questions.

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PROPOSED CHANGE TO TEXAS RULE OF EVIDENCE 705.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The only changes to Texas Rule of Evidence 705 are:

(a) Where we refer to subparagraph (d) and in paragraph (d) wherein we adopt the federal language verbatim. Also, there is a comment to this change.

PROPOSED CHANGE TO TEXAS RULE OF EVIDENCE 705.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts and Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. Subject to subparagraph (d) the expert may disclose on direct examination, or may be required to disclose on cross-examination, the underlying facts or data.

(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is bases. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do no provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

Comment to 1998 change: Paragraphs (b), (c) and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a voir dire examination into the qualifications of an expert.

Proposed additional comment: The changes to subparagraph (d) are based on the recent changes to Federal Rule of Evidence 703.

III. PROPOSED CHANGES TO TEXAS RULE OF EVIDENCE 705, FROM AREC PROPOSAL OF JUNE 2002, RED-LINED AGAINST THE CURRENT RULE, WHICH IS IN REGULAR TYPE. ~~**PROPOSED DELETIONS LOOK LIKE THIS**~~, AND **PROPOSED ADDITIONS LOOK LIKE THIS**.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. **Subject to paragraph (d),** ~~**T**~~the expert may ~~**in any event**~~ disclose on direct examination, or be required to disclose ~~**,**~~ on cross-examination, the underlying facts or data.

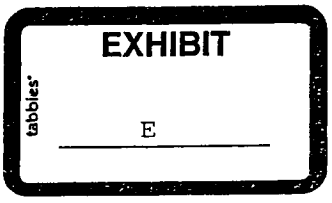
(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, ~~**the court shall exclude the underlying facts or data if the**~~ **danger** ~~**that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or areunfairly prejudicial.**~~ **the underlying facts or data shall not be disclosed by the proponent unless the proponent establishes that their probative value in evaluating the expert's opinion outweighs their prejudicial effect.** If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a voir dire examination into the qualifications of an expert.



Tanner v. Westbrook, 174 F.3d 542, 546 (5th Cir. 1999). Defendant, "in its motion for an FRE 104 hearing, called the [P's] experts' opinions on causation 'sufficiently into question,' by providing conflicting medical literature and expert testimony."

FRE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Cross references to FRE 703: ***Commentaries***, "Introducing Testimony," ch. 8-C, §4, p. 434; 2000 Notes to FRE 703, p. 1053.

Source of FRE 703: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987.

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 747 (3d Cir.1994). "While [FRE] 702 focuses on an expert's methodology, [FRE] 703 focuses on the data underlying the expert's opinion. [¶] We have held that the district judge must make a factual finding as to what data experts find reliable ... and that if an expert avers that his testimony is based on a type of data on which experts reasonably rely, that is generally enough to survive the Rule 703 inquiry."

FRE 704. OPINION ON ULTIMATE ISSUE

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Source of FRE 704: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Pub. L. 98-473, title II, §406, Oct. 12, 1984, 98 Stat. 2067.

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1212-13 (D.C. Cir.1997). "[A]n expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied."

Woods v. Lecureux, 110 F.3d 1215, 1220 (6th Cir. 1997). "[T]estimony offering nothing more than a legal conclusion—i.e., testimony that does little more than tell the jury what result to reach—is properly excludable under the [FREs]."

Lightfoot v. Union Carbide Corp., 110 F.3d 898, 911 (2d Cir.1997). The FREs "allow a lay witness to testify in the form of an opinion.... The fact that the lay opinion testimony bears on the ultimate issue in the case does not render the testimony inadmissible."

FRE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Source of FRE 705: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.

B.F. Goodrich v. Betkoski, 99 F.3d 505, 525 (2d Cir. 1996). "An expert's testimony, in order to be admissible under [FRE] 705, need not detail all the facts and data underlying his opinion in order to present that opinion."

University of R.I. v. A.W. Chesterton Co., 2 F.3d 1200, 1218 (1st Cir.1993). FRE 703 & 705 "normally relieve the proponent of expert testimony from engaging in the awkward art of hypothetical questioning, which involves the ... process of laying a full factual foundation *prior* to asking the expert to state an opinion. In the interests of efficiency, the [FREs] deliberately shift the burden to the cross-examiner to ferret out whatever empirical deficiencies may lurk in the expert opinion. Nevertheless, Rules 703 and 705 do not afford automatic entitlements to proponents of expert testimony. [U]nder the broad exception to Rule 705 ... the trial court is given considerable latitude over the order in which evidence will be presented to the jury."

FRE 706. COURT APPOINTED EXPERTS

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may

TRE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Comment to 1998 change: The former Civil Rule referred to facts or data "perceived by or reviewed by" the expert. The former Criminal Rule referred to facts or data "perceived by or made known to" the expert. The terminology is now conformed, but no change in meaning is intended.

See *Commentaries*, "Introducing Evidence," ch. 8-C; "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 685 (2001).

History of TRE 703 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Amended eff. Sept. 1, 1990, by order of Apr. 24, 1990 (785-86 S.W.2d [Tex.Cases] cvii): Changed the words "made known to him" to "reviewed by the expert."; this amendment conforms TRE 703 to the rules of discovery by using the term "reviewed by the expert." See former TRCP 166b. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 703.

Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex.1997). "The substance of the [expert's] testimony must be considered. *At 712:* [A]n expert's bald assurance of validity is not enough. *At 713:* The underlying data should be independently evaluated in determining if the opinion itself is reliable."

Stam v. Mack, 984 S.W.2d 747, 750 (Tex.App.—Texarkana 1999, no pet.). TRE 703 and 705 "now allow a testifying expert to relate on direct examination the reasonably reliable facts and data on which he relied in forming his opinion, subject to an objection under [TRE] 403 that the probative value of such facts and data is outweighed by the risk of undue prejudice. ... The details of those facts and data may be brought out on cross-examination pursuant to [TRE] 705(a), 705(b), and 705(d). Moreover, the opponent of such evidence may ask for a limiting instruction if he fears the evidence may be used for a purpose other than support for the testifying expert's opinion."

Sosa ex rel. Grant v. Koshy, 961 S.W.2d 420, 427 (Tex.App.—Houston [1st Dist.] 1997, pet. denied). "Under rule 703, Officer Null, as an expert on accident reconstruction, properly relied on hearsay evidence provided by eyewitnesses to the accident if experts in his field would reasonably rely on such evidence."

TRE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

See *Commentaries*, "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 697 (2001).

History of TRE 704 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 704.

Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361, 365 (Tex.1987). "Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." An expert may testify that conduct constituted "negligence" and "gross negligence," and that certain acts were "proximate causes" of the plaintiff's injuries.

Dickerson v. DeBarbieris, 964 S.W.2d 680, 690 (Tex.App.—Houston [14th Dist.] 1998, no pet.). "Although rule 704 allows an expert to state an opinion on a mixed question of law and fact, it does not permit an expert to state an opinion or conclusion on a pure question of law because such a question is exclusively for the court to decide and is not an ultimate issue to be decided by the trier of fact."

Isern v. Watson, 942 S.W.2d 186, 193 (Tex.App.—Beaumont 1997, pet. denied). "[B]efore a testifying expert's opinion can be rendered [on negligence, gross negligence, or proximate cause], a predicate must be laid showing that the expert is familiar with the proper legal definition in question."

TRE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be

permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

See Cochran, ***Texas Rules of Evidence Handbook***, p. 704 (2001).

History of TRE 705 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii): Added "disclose on direct examination, or" and "on cross-examination" to last sentence. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 705.

Weiss v. Mechanical Assoc. Servs., 989 S.W.2d 120, 124-25 (Tex.App.—San Antonio 1999, pet. denied). "The non-exclusive list of factors the court may consider in deciding admissibility [under TRE 705(c)] includes the extent to which the theory has been or can be tested, the extent to which the technique relies upon the subjective interpretation of the expert, whether the theory has been subjected to peer review and/or publication, the technique's potential rate of error, whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and the non-judicial uses that have been made of the theory or technique."

Stam v. Mack, 984 S.W.2d 747, 750 (Tex.App.—Texarkana 1999, no pet.). See Annotation in TRE 703.

TRE 706. AUDIT IN CIVIL CASES

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

See Cochran, ***Texas Rules of Evidence Handbook***, p. 720 (2001).

History of TRE 706 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxi). Adopted eff. Jan. 1, 1988, by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xcvii): To conform to TRCP 172. Source: New rule.

Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex.App.—Houston [14th Dist.] 1987, writ denied). "The audit report before this court contains no such affidavit as is required by [TRCP] 172. ... Further, 6 days before trial [P] filed an objection to the audit. Therefore, the trial court did not err in admitting evidence that contradicted and supplemented the auditor's report."

ARTICLE VIII. HEARSAY

TRE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Matter Asserted. "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.

(d) 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.

(e) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;

this Court were to take judicial notice of the ordinance [Ps] proffered, there is no showing that this is the version of the ordinance on which the district court rendered its judgment. To enable an appellate court to review a municipal or county ordinance, parties must both comply with the provisions of [TRE] 204 and make the ordinance a part of the trial-court record."

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

ARTICLE IV. RELEVANCY & ITS LIMITS

TRE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

See Cochran, *Texas Rules of Evidence Handbook*, p. 193 (2001).

History of TRE 401 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvii). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxiii): Title and entire rule were changed. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxix). Source: FRE 401.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex.1995). "[T]o constitute scientific knowledge which will assist the trier of fact, the proposed [scientific] testimony must be relevant and reliable. [¶] The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under [TRE] 401 and 402.... To be relevant, the proposed testimony must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'"

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24-25 (Tex.1994). "Simply because a piece or pieces of evidence are *material* in the sense that they make a 'fact that is of consequence to the determination of the action more ... or less probable' does not render the evidence *legally sufficient*. As Professor McCormick succinctly put it, 'a brick is not a wall.'"

Castillo v. State, 939 S.W.2d 754, 758 (Tex.App.—Houston [14th Dist.] 1997, writ ref'd). "The evidence need not prove or disprove a particular fact; the evidence is sufficiently relevant if it provides 'a small nudge' towards proving or disproving any fact of consequence. Furthermore, '[t]he motives which operate upon the mind of a witness when he testifies are never regarded as immaterial or collateral matters.'"

TRE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

See *Commentaries*, "Objecting to Evidence," ch. 8-D; Cochran, *Texas Rules of Evidence Handbook*, p. 193 (2001).

History of TRE 402 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxix). Source: FRE 402.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex.1995). "Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy [TRE] 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under [TRE] 702 as well as under [TRE] 401 and 402."

Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988). The rules of evidence do not "contemplate exclusion of otherwise relevant proof unless the evidence proffered is unfairly prejudicial, privileged, incompetent, or otherwise *legally* inadmissible. We do not circumscribe, however, a trial judge's authority to consider on motion whether a party's discovery request involves unnecessary harassment or invasion of personal or property rights."

Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds*, ***Walker v. Packer***, 827 S.W.2d 833 (Tex.1992). "To increase the likelihood that all relevant evidence will be disclosed and brought before the trier of fact, the law circumscribes a significantly larger class of discoverable evidence [than admissible evidence] to include anything reasonably calculated to lead to the discovery of material evidence."

TRE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

See *Commentaries*, "Objecting to Evidence," ch. 8-D; Cochran, *Texas Rules of Evidence Handbook*, p. 210 (2001).