Administration of Rules of Evidence Committee (AREC)

Recommendations with Regard to Potential Amendments to Texas Rules of Evidence on Adopting Certain Federal Rules of Evidence

1. a. Texas Rule 804
   b. Federal Rule 804
   c. Texas Rule 803
   d. Federal Rule 807 (No TRE 807)
   e. AREC Report
2. a. Federal Rule 301
   b. Federal Rule 302
   c. AREC Report
3. a. Texas Rule 403
   b. Federal Rule 403
   c. AREC Report
4. a. Texas Rules 509, 510
   b. AREC Report
   c. Supreme Court has amended these rules as recommended.
5. a. Texas Rule 704
   b. Federal Rule 704
   c. AREC Report
6. a. Texas Rules 701, 702, 703, 705
   b. Federal Rules 701, 702, 703, 705
   c. AREC Report
7. a. Texas Rule 203
   b. Federal Rule of Procedure 44.1
   c. AREC Report
8. a. Texas Rule 408
   b. Federal Rule 408
   c. AREC Report
      1) 408(a)
      2) 408(b)
      3) 408 (a)(2)

TRE 804. EXCEPTIONS TO THE RULE AGAINST HEARSAY—WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony that:

(A) when offered in a civil case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding or in a deposition in a different proceeding; and

(ii) is now offered against a party and the party—or a person with similar interest—had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination.

(B) when offered in a criminal case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding; and

(ii) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or

(iii) was taken in a deposition under—and is now offered in accordance with—chapter 39 of the Code of Criminal Procedure.

(2) *Statement Under the Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

History of TRE 804 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxvi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733 34 S.W.2d [Tex.Cases] xc): To TRCE 804(b)(1), deleted "the same or" before "another proceeding"; in some circum

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(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [*Other Exceptions.*] [Transferred to Rule 807.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

History of FRE 804: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Dec. 12, 1975, P.L. 94-149, §1(12), (13), 89 Stat. 806; Mar. 2, 1987, eff. Oct. 1, 1987; Nov. 18, 1988, P.L. 100-690, §7075(b), 102 Stat. 4405; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011.

TRE 803. EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

"Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) it is offered in a civil case and:

(i) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(ii) the conviction was for a felony;

(iii) the evidence is admitted to prove any fact essential to the judgment; and

(iv) an appeal of the conviction is not pending; or

(B) it is offered in a criminal case and:

(i) the judgment was entered after a trial or a guilty or nolo contendere plea;

(ii) the conviction was for a criminal offense;

(iii) the evidence is admitted to prove any fact essential to the judgment;

(iv) when offered by the prosecutor for a purpose other than impeachment, the judgment was against the defendant; and

(v) an appeal of the conviction is not pending.

(23) *Judgments Involving Personal, Family, or General History or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

History of TRE 803 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxii). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] xc): To (6), added "or by affidavit that complies with Rule 902(10)." Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii): Added the following comment: The provision in par. (6) rejects the doctrine of *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty." Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lvii). Source: FRE 803. See TRCS arts. 3718-3737e (repealed).

See Fam. Code §54.031 for statutory exceptions to hearsay rule for testimony of certain abuse victims in criminal proceedings; *O'Connor's Texas Rules * Civil Trials* (2015), "Introducing Evidence," ch. 8-C, p. 747; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 838.

FRE 807. RESIDUAL EXCEPTION

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

History of FRE 807: Adopted Apr. 11, 1997, eff. Dec. 1, 1997. Amended Apr. 26, 2011, eff. Dec. 1, 2011.

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June 8, 2016

AREC REPORT ON RULES 804 AND 807

CHARGE

This Committee was charged with making a recommendation on whether to modify Texas Rules of Evidence 804 and consider a new rule 807 through adopting the language in Federal Rules of Evidence 804 and 807. While Texas does not currently have a Rule 807 or its equivalent, it has previously considered a similar version, which is set out below.

RULE 804

Texas Rule 804 has several differences which separate it from Federal Rule 804:

- Different definitions of unavailability under Rules 804(a)(5)
- Differences in the criminal and civil former-testimony exception and dying declaration exception
- The Federal Rules put declarations against interest in the unavailability section, 804(b)(3), while the Texas Rule is found in 803(24), which does not require unavailability

Texas Rule 804(b)(5) applies broadly to all of the exceptions listed in the remainder of Rule 804. However, the Federal Rule limits the application of the 'unable to secure' provision only certain subsections under certain circumstances. The Texas Rule is easier to use and apply, as there are fewer pre-requisites to admissibility of the evidence and it broadly applies to all subsections. The Committee is not aware of any concern about the Texas Rule being overbroad in this regard and, therefore, recommends no change.

The differences between Texas Rule 804(b) and Federal Rule 804(b) are relatively minor. The Texas Rule incorporates the requirements of the Confrontation Clause and makes specific reference to the deposition procedure under the Texas Code of Criminal Procedure. In criminal cases, courts are bound by the U.S. Constitution and precedent on the Confrontation Clause to apply the standards set out in the Texas Rule, but there is no apparent disadvantage or danger by incorporating the requirements into the Texas Rule. Therefore, the committee recommends no change.

Federal of Evidence 804(b)(3) is similar to Texas Rule of Evidence 803(24). The largest difference between the two rules is that Texas does not require that the witness be unavailable to offer a statement against interest; it is simply an 803 hearsay exception. The Federal Rule require that the witness be unavailable to offer such a statement. This would be a significant change to Texas practice. The value of moving the rule from a hearsay exception to Rule 804, where witness unavailability is a pre-requisite to admission is questionable at best. It could potentially cause problems with cross-examining a live witness based on previous unsworn statements against interest that are offered for the truth of the matter asserted, rather than just for inconsistency. The purpose of the rule on statements against interest is that they are trustworthy because people normally would not utter statements detrimental to themselves, their position, or

their organization unless they were true (under most circumstances). That motivation is not changed or altered by their availability for a deposition or to appear at trial. Therefore, the committee recommends no change.

PROPOSAL TO ADOPT TEXAS VERSION OF RULE 807

Additionally, the committee was charged with looking at Federal Rule of Evidence 807, which does not have a Texas equivalent. This is not the first time a committee, then the 'Liason Committee' has been asked to look at adding a residual exception to the Texas Rules. The Committee proposed Rule 803(25) for the Civil Rules of Evidence only. The Supreme Court deleted it from the Rules that it approved. The proposal read as follows:

803(25) Other exceptions

a. In civil proceedings. A statement not specifically covered by any of the foregoing exceptions but having substantial guarantees of trustworthiness.

b. In criminal proceedings. A statement not specifically covered by any of then foregoing exceptions b having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Some other states have omitted the residual exception, including Florida and Maine, apparently out of a concern that despite the purported safeguards regarding guarantees of trustworthiness, it still left the door open for trial judges to utilize their discretion in a way that could differ greatly, as it remains unclear exactly what equivalent or substantial guarantees of trustworthiness entail. The phrases also give little guidance to a judge on what factors they can and cannot utilize in reaching such a decision. This creates uncertainty for parties over which particular documents will and will not be admissible at trial.

The definition of Hearsay in Texas was purposefully defined more broadly than the Federal Rule to encompass more than just statements and matters asserted. Verbal expressions and matters implied may seem like a subtle difference, but Texas' broader rule excludes more evidence.

While time has passed and technology has progressed, it does not appear to the committee that there are categories of evidence which are being regularly excluded under the current Rules, but seem as though they should be admissible at trial for the reasons stated in the proposed Rule from 1982. Therefore, the committee recommends no change to the Rule at this time.

RECOMMENDATION: No changes

ARTICLE III. PRESUMPTIONS IN CIVIL CASES

FRE 301. PRESUMPTIONS IN CIVIL CASES GENERALLY

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

History of FRE 301. Adopted Jan. 2, 1975, PL 93-595, §1, 88 Stat. 1926, eff July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011

FRE 302. APPLYING STATE LAW TO PRESUMPTIONS IN CIVIL CASES

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

History of FRE 302: Adopted Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011.

MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Fed. R. Evid. 301 & 302, Tex. R. Evid. 403 & 408 (Fed.R.Evid. 403 & 408)
Date: June 7, 2016

Assignment

We were asked to study and consider:

(1) whether Texas should add rules on "presumptions in civil cases" similar to/or in conformity with Fed.R.Evid. 301 & 302;

(2) whether to bring Tex.R.Evid. 403 in conformity with Fed.R.Evid. 403;

(3) whether to bring Tex.R.Evid. 408 in conformity with Fed.R.Evid. 408.

Analysis and Recommendations

1. FED.R.EVID. 301 and 302:
We recommend that Texas not adopt rules to mirror FED.R.EVID. 301 and 302 regarding presumptions in civil cases. Texas has over 400 presumptions, and different burdens (of proof and shifting of burden and going forward with the evidence) apply uniquely to each presumption. The subcommittee believes that adoption of a rule or rules dealing with presumptions is not necessary and will lead to confusion.

2. FED.R.EVID. 403 and TEX.R.EVID. 403:
We recommend that Texas not adopt the language of FED.R.EVID. 403 that includes "wasting time" as an additional basis for excluding relevant evidence because such addition will create new issues/law and that the "wasting of time" grounds are included/subsumed in the "undue delay, or needlessly presenting cumulative evidence" grounds for exclusion.

3. FED.R.EVID. 408 and TEX.R.EVID. 408:
We recommend that Texas
1. Amend TEX.R.EVID. 408(a) as indicated below.
2. Amend TEX.R.EVID. 408(b) as indicated below.
3. Not amend TEX.R.EVID. 408(a)(2) to conform to the FED.R.EVID. 408(a)(2) [see bracketed language from FED.R.EVID. 408(a)(2) below]. Such amendment would result in a substantive change and no need for a substantive change has been made known to the Committee. AREC is available to solicit further input from the criminal bar upon request from the SCAC.

TRE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

History of TRE 403 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). 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 403.

See *Commentaries*, "Objecting to Evidence," ch. 8-D, p. 781; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 208.

FRE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

History of FRE 403: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Introducing Evidence," ch. 8-C, p. 771

4

MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Fed. R. Evid. 301 & 302, Tex. R. Evid. 403 & 408 (Fed.R.Evid. 403 & 408)
Date: June 7, 2016

Assignment

We were asked to study and consider:

(1) whether Texas should add rules on "presumptions in civil cases" similar to/or in conformity with Fed.R.Evid. 301 & 302;

(2) whether to bring Tex.R.Evid. 403 in conformity with Fed.R.Evid. 403;

(3) whether to bring Tex.R.Evid. 408 in conformity with Fed.R.Evid. 408.

Analysis and Recommendations

1. FED.R.EVID. 301 and 302:
We recommend that Texas not adopt rules to mirror FED.R.EVID. 301 and 302 regarding presumptions in civil cases. Texas has over 400 presumptions, and different burdens (of proof and shifting of burden and going forward with the evidence) apply uniquely to each presumption. The subcommittee believes that adoption of a rule or rules dealing with presumptions is not necessary and will lead to confusion.

2. FED.R.EVID. 403 and TEX.R.EVID. 403:
We recommend that Texas not adopt the language of FED.R.EVID. 403 that includes "wasting time" as an additional basis for excluding relevant evidence because such addition will create new issues/law and that the "wasting of time" grounds are included/subsumed in the "undue delay, or needlessly presenting cumulative evidence" grounds for exclusion.

3. FED.R.EVID. 408 and TEX.R.EVID. 408:
We recommend that Texas
1. Amend TEX.R.EVID. 408(a) as indicated below.
2. Amend TEX.R.EVID. 408(b) as indicated below.
3. Not amend TEX.R.EVID. 408(a)(2) to conform to the FED.R.EVID. 408(a)(2) [see bracketed language from FED.R.EVID. 408(a)(2) below]. Such amendment would result in a substantive change and no need for a substantive change has been made known to the Committee. AREC is available to solicit further input from the criminal bar upon request from the SCAC.

TRE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) **Definitions.** In this rule:

(1) A "patient" is a person who consults or is seen by a physician for medical care.

(2) A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(b) **Limited Privilege in a Criminal Case.** There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1) to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

(c) **General Rule in a Civil Case.** In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) **Who May Claim in a Civil Case.** The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(e) **Exceptions in a Civil Case.** This privilege does not apply:

(1) *Proceeding Against Physician.* If the communication or record is relevant to a physician's claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) *Consent.* If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) *Action to Collect.* In an action to collect a claim for medical services rendered to the patient.

(4) *Party Relies on Patient's Condition.* If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) *Disciplinary Investigation or Proceeding.* In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §164.001 et seq., or a registered nurse under Tex. Occ. Code §301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A) the patient's records would be subject to disclosure under paragraph (e)(1); or

(B) the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) *Involuntary Civil Commitment or Similar Proceeding.* In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 464 (Facilities Treating Alcoholics and Drug-Dependent Persons);[1]

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With Mental Retardation Act).[2]

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

(f) Consent for Release of Privileged Information.

(1) Consent for the release of privileged information must be in writing and signed by:

(A) the patient;

(B) a parent or legal guardian if the patient is a minor;

(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

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

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

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

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

Comment to 2015 restyling: The physician-patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in Tex. Rev. Civ. Stat. art. 4495b. That statute provided that the privilege applied even if a patient had received a physician's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

The former rule's reference to "confidentiality or" and "administrative proceedings" in subdivision (e) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. Tex. Occ. Code §159.004 sets forth exceptions to a physician's duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See Rule 101(b). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code §2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

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 *K.A. 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.

1. Editor's note: Now titled "Facilities Treating Persons with a Chemical Dependency." *See* S.B. 219, §3.1179, 84th Leg., R.S., eff. Apr. 2, 2015.

2. Editor's note: Now titled "Persons with an Intellectual Disability Act." *See* S.B. 219, §3.1400, 84th Leg., R.S., eff. Apr. 2, 2015.

History of TRE 509 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). 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): Rewrote (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," 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-or-

TRE 510. MENTAL HEALTH INFORMATION PRIVILEGE IN CIVIL CASES

(a) Definitions. In this rule:

(1) A "professional" is a person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) who the patient reasonably believes to be a professional under this rule.

(2) A "patient" is a person who:

(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A "patient's representative" is:

(A) any person who has the patient's written consent;

(B) the parent of a minor patient;

(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D) the personal representative of a deceased patient.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) Who May Claim. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The professional may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) *Proceeding Against Professional.* If the communication or record is relevant to a professional's claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) *Written Waiver.* If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) *Action to Collect.* In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) *Communication Made in Court-Ordered Examination.* To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) *Party Relies on Patient's Condition.* If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) *Abuse or Neglect of "Institution" Resident.* In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

Comment to 2015 restyling: The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at Tex. Health & Safety Code §611.001 et seq.) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

Technical Amendments to Rule 509

1. Amend Rule 509(e)(1) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

(1) ***Proceeding Against Physician.*** If the communication or record is relevant to a ~~physician's~~ claim or physician's defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

Explanation: The word "physician's" in the introductory language should be moved so that it immediately precedes "defense." Before restyling, Rule 509(e)(1) referred to "the claims or defense of a physician." Clearly, "of the physician" modified only "defense." The exception referenced the claims of the patient and the defense of the physician. Therefore, the language of the restyled rule -- "physician's claim or defense" – inaccurately and unintentionally changed the substance of the rule, and it should be corrected.

2. Amend Rule 509(e)(6)(A) and (C) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

* * *

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter ~~464~~ 462 (Treatment of Persons With Chemical Dependencies~~Facilities Treating Alcoholics and Drug-Dependent Persons~~);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability ~~Mental Retardation~~ Act).

Explanation: Rule 509(e)(6)(A) mistakenly refers to chapter 464 (Facilities Treating Alcoholics and Drug-Dependent Persons). The reference should be to chapter 462 (Treatment of Persons With Chemical Dependencies). The citation in the corresponding statutory version of the privilege in the Health and Safety Code is chapter 462. Chapter 462, which governs hearings for court-ordered treatment, is clearly the correct reference. The title of this chapter was changed last legislative session from "Treatment of Chemically Dependent Persons" to "Treatment of Persons With Chemical Dependencies." Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 3.1160, eff. April 2, 2015.

Rule 509(E)(6)(C) refers to title 7, subtitle D (Persons With Mental Retardation Act). The title of the act was changed last legislative session to Persons With an Intellectual Disability Act, and so the reference in (e)(6)(C) should correspondingly be changed. Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 3.1401, eff. April 2, 2015.

These are totally nonsubstantive, housekeeping changes.

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Technical Amendment to Rule 510

Amend Rule 510(d)(1) as follows:

(d) **Exceptions.** This privilege does not apply:

(1) ***Proceeding Against Professional.*** If the communication or record is relevant to a ~~professional's~~ claim or professional's defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

Explanation: The word "professional's" in the introductory language should be moved so that it immediately precedes "defense." Before restyling, Rule 510(d)(1) referred to "the claims or defense of a professional." Clearly, "of the professional" modified only "defense." The exception referenced the claims of the patient and the defense of the professional. Therefore, the language of the restyled rule -- "professional's claim or defense" –inaccurately and unintentionally changed the substance of the rule, and it should be corrected.

TRE 704. OPINION ON AN ULTIMATE ISSUE

An opinion is not objectionable just because it embraces an ultimate issue.

History of TRE 704 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). 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.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 747.

FRE 704. OPINION ON AN ULTIMATE ISSUE

(a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

History of FRE 704: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Oct. 12, 1984, P.L. 98-473, §406, 98 Stat. 2067; Apr. 26, 2011, eff. Dec. 1, 2011.

on facts or data he has "reviewed." It is debatable whether the term "reviewed" is necessary, as it would seem that any data the expert has "reviewed" would be encompassed by facts or data the expert "has been made aware of." It is possible that the term "reviewed" is included in the Texas rule because of the language of Tex. R. Civ. P. 192.3(e)(6), which defines the material that is discoverable from an expert witness, and includes:

> (6) all documents, tangible things, reports, models, or data compilations that have been provided to, *reviewed by*, or prepared by or for the expert in anticipation of a testifying expert's testimony;

(emphasis added). Notably, TRE 703 makes no mention of facts or data "provided to" or "prepared by" an expert, and both of those phrases are also contained in TRCP 192.3(e)(6).

The Committee unanimously recommends that the word "reviewed" be deleted from the first sentence of TRE 703. The Committee believes that the concept of data an expert has "reviewed" is captured by the existing phrase referring to data the expert "has been made aware of." The change has the added benefit of bringing this portion of TRE 703 into complete alignment with the federal rule. The Committee further recommends the inclusion of a comment stating that no substantive change is intended by this amendment.

The other difference between the rules relates to the second sentence of FRE 703, which addresses when the proponent of an expert may disclose to the jury material relied on by the expert that is otherwise inadmissible, and the balancing test the trial court is to use to make that decision. The TRE contains a similar provision, contained in Rule 705(d). The balancing test in the Texas rule is slightly different, as it calls for the court to simply balance the probative value of the facts or data against their prejudicial effect, while the federal rule allows the facts or data to be disclosed only when their probative value ***substantially*** outweighs the prejudicial effect. Further, the Texas rule contains a provision requiring the trial judge, upon proper request, to give a limiting instruction if it allows the disclosure of the otherwise inadmissible material.

The Committee does not recommend any change to this portion of TRE 705(d), as changing either the balancing test, or the requirement of a limiting instruction, would be a substantive change to Texas law, and no party has suggested such a change is warranted, nor do any Committee members see a reason to make such a change.

Rule 704

TEX. R. EVID. 704. Opinion on an Ultimate Issue	FED. R. EVID. 704. Opinion on an Ultimate Issue
An opinion is not objectionable just because it embraces an ultimate issue.	**(a) In General—Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
	(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

TRE and FRE 704 both state—in identical language—that the fact that a witness's opinion embraces an "ultimate issue" does not make the opinion objectionable. The difference between the two rules is FRE 704's inclusion of subpart (b). The language of FRE 704(b) was adopted in response to the prosecution of John Hinckley for attempting to assassinate Ronald Reagan.

The Committee considered, but does not recommend, adopting the language of FRE 704(b). It is unclear that there is any need for a similar subpart in Texas. The addition of subsection (b) to the federal rules has not been terribly helpful, and this issue has not created a problem for Texas courts, so the subcommittee does not believe there is a need to adopt the federal approach contained in FRE 704(b).

Rule 705

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) TEX. R. EVID. 705(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly. **[discussed above with TRE 703]**

FED. R. EVID. 705. Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

TEX. CODE CRIM. P. art. 39.14(b)

(b) On a party's request made not later than the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin, the party receiving the request shall disclose to the requesting party the name and address of each person the disclosing party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Except as otherwise provided by this subsection, the disclosure must be made in writing in hard copy form or by electronic means not later than the 20th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin. On motion of a party and on notice to the other parties, the court may order an earlier time at which one or more of the other parties must make the disclosure to the requesting party.

TRE 705(a) is identical to the entirety of what is FRE 705. TRE 705 goes on to include three more subdivisions, one of which—Rule 705(d)—was discussed above in connection with FRE 703. The

substantive change in Texas law, and should not change the way courts rule on the admissibility of expert opinion testimony.

TEX. R. EVID. 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2016 Amendment: The reference to "reviewed" has been deleted to bring the rule into alignment with Fed. R. Evid. 703, and because "reviewed" is covered by the broader phrase "made aware of." Courts have not made substantive decisions on the basis of the term "reviewed" in the rule. This is not intended as a substantive change in the law.

TEX. R. EVID. 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) [Admissibility of Opinion.] [Transferred to Rule 702(b).]

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2016 Amendment: Subdivision (c) was made superfluous by the addition of Tex. R. Evid. 702(b), and it has therefore been deleted from the rule. This is not intended as a substantive change in the law.

ARTICLE VII. OPINIONS & EXPERT TESTIMONY

TRE 701. OPINION TESTIMONY BY LAY WITNESSES

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

History of TRE 701 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 701.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 678.

TRE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

History of TRE 702 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 702.

See *Commentaries*, "Motion to Exclude Expert," ch. 5-N, p. 461; "Testimony from expert," ch. 8-C, §5.5, p. 772; "Objection to opinion of expert," ch. 8-D, §4.2, p. 783; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 693.

TRE 703. BASES OF AN EXPERT'S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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.

History of TRE 703 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). 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.

See *Commentaries*, "Foundation test," ch. 5-N, §2.4, p. 465; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 734.

TRE 705. DISCLOSING THE UNDERLYING FACTS OR DATA & EXAMINING AN EXPERT ABOUT THEM

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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.

History of TRE 705 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). 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] iv) Source: FRE 705.

See *Commentaries*, "Motion to Exclude Expert," ch. 5-N, p. 461; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 752.

ARTICLE VII. OPINIONS & EXPERT TESTIMONY

FRE 701. OPINION TESTIMONY BY LAY WITNESSES

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

See selected Notes of Advisory Committee to FRE 701, p. 1346.

FRE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

See selected Notes of Advisory Committee to FRE 702, p. 1347.

History of FRE 702: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Motion to Exclude Expert Witness," ch. 5-O, p. 420; "Lay & expert testimony," ch. 8-C, §4.2.2, p. 773.

FRE 703. BASES OF AN EXPERT'S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

History of FRE 703: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Introducing Evidence," ch. 8-C, §4, p. 772.

FRE 705. DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

History of FRE 705: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 2011, eff. Dec. 1, 2011.

ANNOTATIONS

B.F. Goodrich v. Betkoski, 99 F.3d 505, 525 (2d Cir. 1996). "An expert's testimony, in order to be admissible under Rule 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 and 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 EXPERT WITNESSES

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Tex. R. Evid. 701-705
Date: June 8, 2016

Assignment:

We were asked to study Tex. R. Evid. 701 - 705, and consider:

(1) whether to bring the Texas rules into conformity with the Federal rules;

(2) whether to revise the rules (primarily Tex. R. Evid. 702) as discussed in the correspondence between Buddy Low (on behalf of the SCAC) and Justice Hecht in 2005;

(3) whether to amend either Tex. R. Evid. 615 or 705(b) in light of the provisions of the Michael Morton Act.

Analysis & Recommendations

Rules 701 & 702

Because similar considerations apply to both Rules 701 and 702, the recommended amendments to these rules are discussed together. The current texts of the Texas and federal rules, respectively, state:

TEX. R. EVID. 701 Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

FED. R. EVID. 701 Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

TEX. R. EVID. 702 Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

FED. R. EVID. 702 Testimony by an Expert

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

The current content of Texas Rules 701 and 702 predate *Daubert* and its progeny (which we refer to by the shorthand "*Daubert*"). The federal rules, and particularly FRE 702, were amended after *Daubert* to codify the rule set out in those cases, and that is the primary reason for the differences in the rules.

TRE 701 addresses when a witness is permitted to offer lay opinion testimony. The only difference between TRE and FRE 701 is the federal rule's inclusion of subdivision (c). The federal rule comments indicate subsection (c) was included to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." The question we considered is whether this concern is worthy of a specific subdivision in the Texas rules. One could argue that subsection (c) is unnecessary, as the very existence of Rules 701 and 702 make the same distinction. On the other hand, adopting the language of the federal rule would not be a substantive change to Texas law, given that FRE 701(c) is consistent with Texas case law, and furthers the policy that a party may not avoid the disclosure requirements for experts by presenting an expert as a "lay opinion witness." *See, e.g., Reid Road Mun. Util Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851 (Tex. 2011).

The difference between TRE and FRE 702 is that FRE 702 codifies the basic rule of *Daubert* in subdivisions (b) - (d), while the Texas rule does not do so, leaving it to case law to set out those rules. The lack of these subdivisions is irrelevant in practice, as Texas case law requires the very same factors be established for a witness to be permitted to testify as an expert. Thus, the addition of subparts (b) - (d) would not change Texas practice.

The primary issue presented to the Committee on both rules, therefore, was whether there is sufficient benefit from bringing the Texas rules into complete alignment with the federal rules to justify the change. In general, it has been our policy to seek such alignment when doing so does not change, or is not inconsistent with, Texas law. Several committee members expressed concern that—even with a comment that the change is not substantive and does not change current practice—parties might argue, and courts might rule, that certain types of witnesses who have always been permitted to testify as experts and render opinions might no longer be permitted to do so. For example, a witness testifying as an expert based only on his long experience (an oil rig hand

testifying about some aspect of the drilling rig, for example), might be excluded from testifying because of an argument based on subdivisions (b) - (d) (such as, the rig hand's testimony is not the product of "reliable principles or methods"). These Committee members argued that the adoption of subdivisions (b) - (d) would unduly emphasize the scientific or technical requirement of testimony being "the product of reliable principles and methods" at the expense of testimony by a witness with specialized knowledge based on training, skill or experience. They argue this added emphasis in the rule could change the outcome for such witnesses' ability to offer expert opinions.

At the end of the day, a majority of the full Committee felt that subdivisions (b) - (d) simply state what is already Texas law, and, whether set out in Rule 702 or not, the *Daubert* standard applies to all experts, including those whose expertise is based solely on work experience. The Committee felt that the concerns raised could be dealt with by a comment, and the outcomes with or without the subdivisions should be the same under existing law. This has certainly been the experience in federal courts. The addition of subdivisions (b) - (d) to Federal Rule 702 has not prevented witnesses with expertise rooted in experience from being allowed to offer expert opinion testimony. In recognition of the concern raised by the dissenting members, however, the Committee agreed to expand the comment to both rules to make it explicit that no change in practice is intended.

Rule 703

TEX. R. EVID. 703 Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

TEX. R. EVID. 705(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

FED. R. EVID. 703 Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

TRE and FRE 703 address the types of facts or data on which an expert may base an opinion. The two rules are similar, though a portion of what is addressed in FRE 703 is instead contained in TRE 705, and the Texas rule contains a reference to data "reviewed" by an expert, which is absent from the federal rule.

On the latter point, in addition to allowing an expert to base his opinion on facts that the expert "has been made aware of" or "personally observed," TRE 703 also permits the expert to base his opinions

on facts or data he has "reviewed." It is debatable whether the term "reviewed" is necessary, as it would seem that any data the expert has "reviewed" would be encompassed by facts or data the expert "has been made aware of." It is possible that the term "reviewed" is included in the Texas rule because of the language of Tex. R. Civ. P. 192.3(e)(6), which defines the material that is discoverable from an expert witness, and includes:

> (6) all documents, tangible things, reports, models, or data compilations that have been provided to, *reviewed by*, or prepared by or for the expert in anticipation of a testifying expert's testimony;

(emphasis added). Notably, TRE 703 makes no mention of facts or data "provided to" or "prepared by" an expert, and both of those phrases are also contained in TRCP 192.3(e)(6).

The Committee unanimously recommends that the word "reviewed" be deleted from the first sentence of TRE 703. The Committee believes that the concept of data an expert has "reviewed" is captured by the existing phrase referring to data the expert "has been made aware of." The change has the added benefit of bringing this portion of TRE 703 into complete alignment with the federal rule. The Committee further recommends the inclusion of a comment stating that no substantive change is intended by this amendment.

The other difference between the rules relates to the second sentence of FRE 703, which addresses when the proponent of an expert may disclose to the jury material relied on by the expert that is otherwise inadmissible, and the balancing test the trial court is to use to make that decision. The TRE contains a similar provision, contained in Rule 705(d). The balancing test in the Texas rule is slightly different, as it calls for the court to simply balance the probative value of the facts or data against their prejudicial effect, while the federal rule allows the facts or data to be disclosed only when their probative value ***substantially*** outweighs the prejudicial effect. Further, the Texas rule contains a provision requiring the trial judge, upon proper request, to give a limiting instruction if it allows the disclosure of the otherwise inadmissible material.

The Committee does not recommend any change to this portion of TRE 705(d), as changing either the balancing test, or the requirement of a limiting instruction, would be a substantive change to Texas law, and no party has suggested such a change is warranted, nor do any Committee members see a reason to make such a change.

Rule 704

TEX. R. EVID. 704. Opinion on an Ultimate Issue	FED. R. EVID. 704. Opinion on an Ultimate Issue
An opinion is not objectionable just because it embraces an ultimate issue.	(a) **In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
	(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

TRE and FRE 704 both state—in identical language—that the fact that a witness's opinion embraces an "ultimate issue" does not make the opinion objectionable. The difference between the two rules is FRE 704's inclusion of subpart (b). The language of FRE 704(b) was adopted in response to the prosecution of John Hinckley for attempting to assassinate Ronald Reagan.

The Committee considered, but does not recommend, adopting the language of FRE 704(b). It is unclear that there is any need for a similar subpart in Texas. The addition of subsection (b) to the federal rules has not been terribly helpful, and this issue has not created a problem for Texas courts, so the subcommittee does not believe there is a need to adopt the federal approach contained in FRE 704(b).

Rule 705

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) TEX. R. EVID. 705(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly. **[discussed above with TRE 703]**

FED. R. EVID. 705. Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

TEX. CODE CRIM. P. art. 39.14(b)

(b) On a party's request made not later than the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin, the party receiving the request shall disclose to the requesting party the name and address of each person the disclosing party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Except as otherwise provided by this subsection, the disclosure must be made in writing in hard copy form or by electronic means not later than the 20th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin. On motion of a party and on notice to the other parties, the court may order an earlier time at which one or more of the other parties must make the disclosure to the requesting party.

TRE 705(a) is identical to the entirety of what is FRE 705. TRE 705 goes on to include three more subdivisions, one of which—Rule 705(d)—was discussed above in connection with FRE 703. The

other two subdivisions address a party's right to take an expert on voir dire, and state that an expert opinion is inadmissible if it is not supported by sufficient facts or data.

The questions related to TRE 705 that the Committee considered are: (1) should a change to TRE 705(b) be made in light of the provisions of the Michael Morton Act, contained in TEX. CODE CRIM. P. 39.14;[1] and (2) is there a continued need for TRE 705(c)?

On the first point, while an argument can be made that a trial court being required to permit voir dire of an expert in a criminal case is not entirely consistent with the Michael Morton Act, any revision to the rule would be complicated, as there are still circumstances in which no expert discovery will have taken place prior to trial in many criminal cases, and TRE 705(b) will have application there. Trying to describe the circumstances when it would not apply could be difficult. More importantly, the Court of Criminal Appeals Rules Advisory Committee has already looked at this very issue, and it decided that no change to TRE 705(b) should be made.

On the second point, things are a little more clear. TRE 705(c) dates back to the pre-*Daubert* time, and thus is somewhat of a relic. Further, and more to the point, the Committee has recommended that TRE 702 be amended to add subparts (b) - (d), and TRE 705(c) duplicates the rule contained in recommended TRE 702(b). The Committee therefore unanimously recommends the elimination of subdivision 705(c).

A red-lined and clean version of the proposed revisions are attached.

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[1]The subcommittee was also charged with considering a similar issue surrounding TRE 615, but any need for an amendment to Rule 615 was rendered moot by the Texas Court of Criminal Appeals and Supreme Court taking action on this issue. *See* Court of Criminal Appeals Order, December 7, 2015, Misc. Docket No. 15-006; and Final Order, February 29, 2016, Misc. Docket No. 16-001; and Supreme Court Order, February 16, 2016, Misc. Docket No. 16-9012.

Proposed Amendments - Redline Version

TEX. R. EVID. 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; ~~and~~

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment to 2016 Amendment: Rule 701 has been amended to add subdivision (c). Since 2000, the Federal Rules of Evidence have included this language, which is intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, Advisory Committee Note to 2000 Amendment. This same principle has been expressed by the Texas Supreme Court on numerous occasions. See, e.g., Reid Road Mun. Util Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 851 (Tex. 2011). The purpose of this amendment is simply to align Rule 701 with its federal counterpart, and to codify what is already Texas law. The addition of subdivision (c) is not intended as a substantive change in Texas law, and should not change the way courts rule on the admissibility of lay and expert opinion testimony.

TEX. R. EVID. 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Comment to 2016 Amendment: Rule 702 has been amended to add subdivisions (b) - (d), to align it with Fed. R. Evid. 702. Those subdivisions were added to the federal rule in 2000, in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and the many cases that applied it, including Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Texas adopted the same "gate keeper" principles in E.I. du Pont De Nemours and Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995) and Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992). The principles embodied in subdivisions (b) - (d) are now well established in Texas case law, and as with the amendments to Rule 701, the purpose of the amendment to Rule 702 is simply to align it with its federal counterpart, and to codify what is already Texas law. The addition of subdivisions (b) - (d) is not intended as a

substantive change in Texas law, and should not change the way courts rule on the admissibility of expert opinion testimony.

TEX. R. EVID. 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of~~, reviewed,~~ or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment to 2016 Amendment: The reference to "reviewed" has been deleted to bring the rule into alignment with FED. R. EVID. 703, and because "reviewed" is covered by the broader phrase "made aware of." Courts have not made substantive decisions on the basis of the term "reviewed" in the rule. This is not intended as a substantive change in the law.

TEX. R. EVID. 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

[**(c) Admissibility of Opinion.**] ~~An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.~~ [Transferred to Rule 702(b).]

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2016 Amendment: Subdivision (c) was made superfluous by the addition of TEX. R. EVID. 702(b), and it has therefore been deleted from the rule. This is not intended as a substantive change in the law.

Proposed Amendments

TEX. R. EVID. 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

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(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

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(d) the expert has reliably applied the principles and methods to the facts of the case.

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substantive change in Texas law, and should not change the way courts rule on the admissibility of expert opinion testimony.

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Comment to 2016 Amendment: The reference to "reviewed" has been deleted to bring the rule into alignment with Fed. R. Evid. 703, and because "reviewed" is covered by the broader phrase "made aware of." Courts have not made substantive decisions on the basis of the term "reviewed" in the rule. This is not intended as a substantive change in the law.

TEX. R. EVID. 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

TEX. R. EVID. 705. Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) Voir Dire Examination of an Expert About the Underlying Facts or Data. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) [Admissibility of Opinion.] [Transferred to Rule 702(b).]

(d) When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed;Instructing the Jury. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2016 Amendment: Subdivision (c) was made superfluous by the addition of Tex. R. Evid. 702(b), and it has therefore been deleted from the rule. This is not intended as a substantive change in the law.

TRE 203. DETERMINING FOREIGN LAW

(a) **Raising a Foreign Law Issue.** A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

History of TRE 203 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii): The words "all parties" were substituted for "to the opposing party or counsel" in the first and second sentences; in the fourth sentence, "all" was substituted for "the"; in the last sentence, "The court's" was substituted for "Its"; and the words "on appeal" were deleted. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCS art. 3718; FRCrP 26.1; FRCP 44.1.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 451; Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 145.

FRCP 44.1. DETERMINING FOREIGN LAW

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

See selected Notes of Advisory Committee to FRCP 44.1, p. 1395.

History of FRCP 44.1. Adopted Feb. 28, 1966, eff. July 1, 1966. Amended Nov. 20, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.

TO: Supreme Court Advisory Committee
FROM: Committee on Administration of Rules of Evidence
RE: Texas Rule of Evidence 203
DATE: June 8, 2016

Background

The Rule 203 subcommittee was established to discuss possible issues with the Committee's proposal regarding Rule 203 brought to the Committee's attention by the Supreme Court Advisory Committee. Specifically, the Committee had previously proposed changing the time period in Rule 203 from 30 days to 45 days. The Committee was asked by the SCAC to consider the following questions:

1. Should we make the time requirement longer than 45 days before trial?
2. Should we make the time requirement more in line with (a)(1) and Federal Rule of Civil Procedure 44.1 and require the materials or sources be supplied a reasonable time before trial?
3. Should we also amend TRE 203(b) to have the time frame for providing translations the same as the time frame for supplying materials or sources in TRE 203(a)?
4. Should the rule include language allowing a modification of the time frame for good cause?

Current Version of the Rule

Rule 203. Determining Foreign Law

(a) **Raising a Foreign Law Issue.** A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court

considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Subcommittee's Analysis and Recommendations

The subcommittee's analysis included consideration of their personal experiences with the Rule. In the subcommittee members' experience, proof of foreign law generally involves the use of experts. Texas Rule of Civil Procedure 195.2 provides that "[u]nless otherwise ordered by the court," expert designations are to be made by the later of 30 days after a request for disclosure is served or:

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;
(b) with regard to all other experts, 60 days before the end of the discovery period.

It was the experience of the subcommittee that designation of experts on foreign law (and therefore notification of the intent to raise an issue concerning foreign law) thus takes place well before trial and that it is the results of the expert discovery process (which generally involves some changes to the experts' reports/designations) that will be exchanged pursuant to Rule 203. The subcommittee therefore discussed whether the materials exchanged pursuant to Rule 203 should be both exchanged and filed with the court to facilitate obtaining the court's determination of foreign law before trial begins. It was the subcommittee's recommendation that the rule be so amended.

The subcommittee offers the following analysis and recommendations regarding the SCAC's questions.

1. **Should we make the time requirement longer than 45 days before trial?**

Particularly given the analysis above, and the subcommittee's understanding of the practical effect of the two-step process, the subcommittee recommended not lengthening the 45-day deadline because prior notice will generally come through the expert designation process.

2. **Should we make the time requirement more in line with (a)(1) and Federal Rule of Civil Procedure 44.1 and require the materials or sources be supplied a reasonable time before trial?**

Federal Rule of Procedure 44.1 states, in its entirety:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Regarding the issue of the time for such notice, the advisory committee notes state:

> The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

TRE 203 already includes a requirement of reasonable notice. The subcommittee did not believe that making the rule less specific is advisable. It was therefore the subcommittee's recommendation that the rule not be amended to be more in line with Federal Rule of Civil Procedure 44.1. The subcommittee addressed the Rule 44.1 advisory committee note in response to question 4 below.

3. **Should we also amend TRE 203(b) to have the time frame for providing translations the same as the time frame for supplying materials or sources in TRE 203(a)?**

The March 2015 Article 2 subcommittee recommendation to change the time period in Rule 203 from 30 days to 45 days, which was approved by the full Committee, proposed its change to the pre-restyling version of Rule 203. It was the assumption of the subcommittee that overlapping substantive review of Rule 203 and the restyling process simply resulted in an oversight. It was the subcommittee's recommendation that Rules 203(a)(2) and 203(b) both be amended to change the 30-day period to a 45-day period.

4. **Should the rule include language allowing a modification of the time frame for good cause?**

For the reasons expressed by the federal rules advisory committee in creating Federal Rule of Procedure 44.1, and the fact that cases involving foreign law may be complex cases warranting a Level 3 Discovery Control Plan pursuant to Texas Rule of Civil Procedure 190.4, the subcommittee recommended amending Rule 203 to allow for court modification without reference to the standard to be applied.

Proposed Rule

For the above reasons, the subcommittee proposed that Rule 203 be amended to read as follows:

Rule 203. Determining Foreign Law

(a) **Raising a Foreign Law Issue.** Unless the court orders otherwise, a ~~A~~ party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least ~~30~~ 45 days before trial, supply all parties and the court a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) **Translations.** Unless the court orders otherwise, if ~~If~~ the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least ~~30~~ 45 days before trial, supply all parties and the court both a copy of the foreign language text and an English translation.

(c) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Full Committee Vote

The Committee discussed whether the portion of the proposed rule requiring submission to the court should use "supply" or "file." The Committee agreed to leave the proposal as "supply" because that term is used throughout the rules. The edits proposed by the subcommittee passed.

The Committee wishes to bring to the attention of the Supreme Court Advisory Committee that perhaps "supply" should be "file" in the e-file era because the word supply is ambiguous as to whether the materials end up as part of the court's records and, particularly with the case of judges who ride circuit, and the court could end up without a copy of the materials on hand when needed to make rulings.

Final Proposed Rule

Rule 203. Determining Foreign Law

(e) **Raising a Foreign Law Issue.** Unless the court orders otherwise, a party who intends to raise an issue about a foreign country's law must:

(2) give reasonable notice by a pleading or other writing; and

(3) at least 45 days before trial, supply all parties and the court a copy of any written materials or sources the party intends to use to prove the foreign law.

(f) **Translations.** Unless the court orders otherwise, if the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 45 days before trial, supply all parties and the court both a copy of the foreign language text and an English translation.

(g) **Materials the Court May Consider; Notice.** In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(h) **Determination and Review.** The court—not the jury—must determine foreign law. The court's determination must be treated as a ruling on a question of law.

TRE 408. COMPROMISE OFFERS & NEGOTIATIONS

(a) **Prohibited Uses.** Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made during compromise negotiations about the claim.

(b) **Permissible Uses.** The court may admit this evidence for another purpose, such as proving a party's or witness's bias, prejudice, or interest, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment to 2015 restyling: Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The reference to "liability" has been deleted on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

Finally, the sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

History of TRE 408 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). 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] xl). Source: FRE 408.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2016), p. 311.

FRE 408. COMPROMISE OFFERS & NEGOTIATIONS

(a) **Prohibited Uses.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

History of FRE 408: Adopted Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1926, eff July 1, 1975. Amended Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "Motion in Limine," ch. 5-H, p. 377; *O'Connor's Federal Civil Forms* (2015), FORMS 5H.

4

MEMORANDUM

To: Supreme Court Advisory Committee
From: Committee on Administration of Rules of Evidence
Re: Fed. R. Evid. 301 & 302, Tex. R. Evid. 403 & 408 (Fed.R.Evid. 403 & 408)
Date: June 7, 2016

Assignment

We were asked to study and consider:

(1) whether Texas should add rules on "presumptions in civil cases" similar to/or in conformity with Fed.R.Evid. 301 & 302;

(2) whether to bring Tex.R.Evid. 403 in conformity with Fed.R.Evid. 403;

(3) whether to bring Tex.R.Evid. 408 in conformity with Fed.R.Evid. 408.

Analysis and Recommendations

1. FED.R.EVID. 301 and 302:
We recommend that Texas not adopt rules to mirror FED.R.EVID. 301 and 302 regarding presumptions in civil cases. Texas has over 400 presumptions, and different burdens (of proof and shifting of burden and going forward with the evidence) apply uniquely to each presumption. The subcommittee believes that adoption of a rule or rules dealing with presumptions is not necessary and will lead to confusion.

2. FED.R.EVID. 403 and TEX.R.EVID. 403:
We recommend that Texas not adopt the language of FED.R.EVID. 403 that includes "wasting time" as an additional basis for excluding relevant evidence because such addition will create new issues/law and that the "wasting of time" grounds are included/subsumed in the "undue delay, or needlessly presenting cumulative evidence" grounds for exclusion.

3. FED.R.EVID. 408 and TEX.R.EVID. 408:
We recommend that Texas
1. Amend TEX.R.EVID. 408(a) as indicated below.
2. Amend TEX.R.EVID. 408(b) as indicated below.
3. Not amend TEX.R.EVID. 408(a)(2) to conform to the FED.R.EVID. 408(a)(2) [see bracketed language from FED.R.EVID. 408(a)(2) below]. Such amendment would result in a substantive change and no need for a substantive change has been made known to the Committee. AREC is available to solicit further input from the criminal bar upon request from the SCAC.

Rule 408. Compromise Offers and Negotiations

(a) **Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
   (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
   (2) conduct or a statement made during compromise negotiations about the claim [--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority].

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a ~~party's or~~ witness's bias~~;~~ or prejudice, ~~or interest,~~ negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[Bracketed language in Rule 408(a)(2) appears in the Federal Rule. We do not recommend adding it.]

Explanation:

1. Amend Rule 408(a) to make clear that compromise evidence is not admissible even when not offered against the offering or settling party.

The exclusionary reach of Rule 408 extends to offers of compromise that are accepted. A defendant may settle with one of a number of persons injured in the same accident or by the same product; a plaintiff may settle with one of several defendants. Allowing a current opponent to introduce against the settling party evidence of the compromise agreement would contravene the policy of encouraging settlements. A defendant, for example, would undoubtedly hesitate to settle with one plaintiff if it feared the settlement might subsequently be used by other plaintiffs to prove defendant's liability.

In one instance, however, the evidence can be admitted without substantial fear that parties will be dissuaded from settling cases. A party will be deterred from making or accepting an offer only if it fears that this might later be used against it. The possibility that the offer or settlement might be introduced against someone else in subsequent litigation is unlikely to dampen the party's interest in compromise. Therefore, parties have sometimes argued that Rule 408 should be interpreted to allow compromise evidence as long as it is not offered against the party who offered to settle or settled.

A similar argument has been made with respect to subsequent remedial measure evidence under Rule 407. Like Rule 408, Rule 407 is written in the passive voice; neither rule specifies whose offer to settle or settlement is inadmissible. Both rules are justified on public policy grounds and relevancy grounds, with the policy grounds predominating. Many courts have agreed that allowing evidence of a third-party's subsequent remedial measure does not contravene the public policy rationale and have admitted the evidence even though the text of Rule 407 seems to bar it. E.g., Beavers on Behalf of Beavers v. Northrop Worldwide Aircraft Services, Inc., 821 S.W.2d 669, 677 (Tex. App.—Amarillo 1991, writ denied) (suit by survivors of Army captain killed in helicopter crash, claiming that defendant negligently maintained helicopter; defendant permitted to offer evidence of post-crash remedial measures taken by Army, a non-party, as proof of Army's negligence); Diehl v. Blaw–Knox, 360 F.3d 426, 429-30 (3d Cir. 2004) (plaintiff offers evidence that owner of machine, a non-party, made post-accident modifications to prove manufacturer's liability).

Courts have proved less receptive to claims that Rule 408 should be similarly interpreted. The caselaw is sparse, but tends toward a literal interpretation of the rule, excluding the compromise evidence even when

it is not being used to the detriment of the settling or offering party. See Stam v. Mack, 984 S.W.2d 747, 752 (Tex. App.—Texarkana 1999, no pet.) (trial court properly excluded evidence that former defendants to malpractice action had settled with plaintiff); Wilson v. John Frantz Co., 723 S.W.2d 189, 194 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (in suit by mortgage loan broker against developer to recover commission allegedly due, developer offered to show that non-party lender had settled suit brought against it by developer as proof that conditions set forth in the commission agreement had not been met; court, in dictum, held evidence was properly excluded under Rule 408)

In 2006, Federal Rule 408 was amended to resolve this issue. Federal Rule 408(a) now reads, "Evidence of the following is not admissible – on behalf of any party – to prove or disprove the validity or amount of a disputed claim . . ." The addition of "on behalf of any party" makes clear that the federal rule categorically bars the admission of compromise evidence even when it is not being offered against the offeror or settling party.

The subcommittee recommends that Texas Rule 408(a) be amended to conform to this part of the federal rule.

2. Amend Rule 408(a) to make clear that compromise evidence is not admissible to impeach a witness by a prior inconsistent statement or a contradiction.

Rule 408(b) provides that compromise evidence may be admissible if offered for a purpose other than proving or disproving the validity of the disputed claim or the amount of damages. It enumerates some of these other purposes: to prove the bias, prejudice, or interest of a party or witness; to negate a contention of undue delay; or to prove an effort to obstruct a criminal investigation or prosecution. But this is a nonexclusive list.

One area of uncertainty was whether Rule 408(b) authorizes the use of conduct or statements made during compromise negotiations to impeach a witness, either because it constituted a prior inconsistent statement of the witness or contradicted the substance of the witness's testimony. Caselaw addressing this issue under Federal Rule 408 was sparse, and Texas courts have not addressed this issue. The 2006 amendment to Federal Rule 408 resolved this question for federal courts. Federal Rule 408(a) now provides that compromise evidence is inadmissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." The Advisory Committee Note explains:

> The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements.

The subcommittee recommends that Texas Rule 408(a) be amended to conform to this part of the federal rule.

3. Amend Rule 408(b) by deleting references to "party" and "interest"

Federal Rule 408(b) authorizes the use of compromise evidence to prove "a witness's bias or prejudice." In contrast Texas Rule 408(b) authorizes the use of compromise evidence to prove the "a *party's or* witness's bias, prejudice, *or interest*." Texas Rule 408(b) initially added "party" and "interest" to combat Mary Carter agreements, which were still commonly used when the Supreme Court originally promulgated Texas Rule 408. Now that Mary Carter agreements are no longer allowed, see Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992), the references to "party" and "interest" in Rule 408(b) should be deleted. A witness (whether a party or nonparty) who is biased or prejudiced because he or she entered into a settlement agreement will still be able to be impeached.

The subcommittee recommends that Texas Rule 408(b) be amended to conform to this part of the federal rule.

4. Do not amend Rule 408(a)(2) to allow in criminal cases the use of some conduct or statements made during compromise negotiations as allowed in FED.R.EVID. 408 (a)(2).

Although Rule 408 typically is invoked in civil cases, proffers of settlement evidence are occasionally made in criminal cases. For example, a defendant who settled a civil fraud claim might later face a criminal prosecution arising out of the same conduct, and the state might seek to prove that the defendant settled the civil case. The text of Rule 408 – which bans compromise evidence when it is offered to "prove . . . the validity . . . of a disputed claim" – does not seem to contemplate this possibility.

In Texas, however, the rule's history provides a clear answer. Before the Texas civil and criminal rules were consolidated in 1998, the Texas Rules of Criminal Evidence included its own Rule 408, and the Court of Criminal Appeals held that evidence of offers to settle or actual settlements of civil disputes are inadmissible in criminal cases. Smith v. State, 898 S.W.2d 838, 843 (Tex. Crim. App. 1995) ("We agree that Rule 408 is applicable in criminal cases because of its presence in the Criminal Rules of Evidence * * * ").When the rules of evidence were consolidated, the Court of Criminal Appeals gave no indication that it intended the consolidation to effect a substantive change in Rule 408. Therefore, Rule 408 continues to bar the prosecution from using an accused's settlement of a parallel civil action as proof of his liability for the civil claim and thus his guilt on the criminal charge. Rule 408 may not, however, be used to block evidence of plea negotiations and plea bargains. Smith v. State, 898 S.W.2d 838, 843 (Tex. Crim. App. 1995) ("While Rule 408 is applicable in criminal proceedings, it does not apply to a State's plea offer."). These are governed by Rule 410.

The issue is more complicated under the federal rules. Before 2006, federal courts disagreed about whether Federal Rule 408 applied in criminal cases. A 2006 amendment to Federal Rule 408 resolved this question. The amended rule expressly excludes compromise evidence in criminal cases, but creates one significant exception. The amended federal rule does not protect conduct or statements made in compromise negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement activity. Offers to settle and settlements remain protected; the new exception covers only conduct or statements, such as direct admissions of fault, made in such compromise negotiations. The Advisory Committee Note to the 2006 amendment explains:

> Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.
>
> Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.
>
> In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault,

even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as evidence of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action.

The Committee believes the case for making this substantive change has not been made. The Committee, however, is available to solicit further input from the criminal bar upon request from the SCAC.