ORGAIN, BELL & TUCKER, L.L.P.
ATTORNEYS AT LAW
P. O. BOX 1751
BEAUMONT, TEXAS 77704-1751
470 ORLEANS BUILDING, FOURTH FLOOR 77701
TELEPHONE (409) 838-6412
FAX (409) 838-6959
www.obt.com

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September 29, 2006

Mr. Charles L. Babcock
Jackson & Walker L.L.P.
1401 McKinney, Suite 1900
Houston, Texas 77010

Dear Chip:

Enclosed herein are Rules 904, 606 and 609, which are ready for presentation to the full Supreme Court Advisory Committee.

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosures

cc: Mr. Jody Hughes
Rules Attorney
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

DISPOSITION CHART
TEXAS RULES OF EVIDENCE AGENDA
OCTOBER 20-21, 2006

RULE NO.	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASONS
904 (new)	Referred by SBOT Administration of Rules of Evidence Committee	Adopt rule that is attached. *Also attached is Government Code § 22.004 and Civil Practice & Remedies Code § 18.001 and § 18.002.	Reduce costs and effectuate the purpose of original CPRC § 18.001-.002. *See attached letter of February 21, 2006.
606	Referred by SBOT Administration of Rules of Evidence Committee	Leave rule as it presently is.	Texas law is clear, unlike federal law wherein the circuits have differed. Clerical error has clear definition under Texas case law.
609	Referred by SBOT Administration of Rules of Evidence Committee	Leave rule as it presently is.	"Credibility" is preferable to "character for truthfulness". We presently instruct the jury they are sole judges of credibility of witnesses.

904

RULE 904. AFFIDAVIT OF COST AND NECESSITY OF SERVICES

(a) This rule applies to civil actions only, but not to an action on a sworn account.

(b) An affidavit that the amount a service provider charged for a service was reasonable at the time and place that the service was provided and that the service was necessary under the circumstances for which the service was performed is admissible in evidence and is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(1) An affidavit must:

(A) be taken before an officer with authority to administer oaths;
(B) be made by the person who provided the service or the custodian of records showing the service provided and charge made;
(C) include an itemized statement that clearly identifies the date and description of the service and charge; and
(D) contain the address and telephone number of the affiant who is the provider who rendered the service.

(2) Filing and service of affidavit: The affidavit must be filed with the clerk of the court and a copy of the affidavit must be served on each party at least 60 days before the day on which evidence is first presented at the trial of the case.

(3) A person signing an Affidavit of Cost and Necessity, other than a custodian of records, must be timely disclosed in response to a proper discovery request.

(c) A counter-affidavit stating that the amount a person charged for a service was not reasonable at the time and place that the service was provided or that the service was not necessary under the circumstances for which the service was performed is admissible in evidence to support a finding of fact by judge or jury that the amount charged was not reasonable or that the service was not necessary. A counter-affidavit may not assert that an affiant, who is a custodian of records, testifying under section (b) is not qualified by knowledge, skill, experience, training, education, or other expertise to attest to the matters set forth in an affidavit.

(1) A counter-affidavit must:

(A) be taken before an officer with authority to administer oaths;
(B) specifically set forth the factual basis for controverting any of the contested matters contained in the affidavit;
(C) be made by a person who is qualified by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the affidavit; and
(D) include or attach the curriculum vitae or facts to support section (c)(1)(C) of the counter-affiant, which must include the address and telephone number of the counter-affiant.

(2) Filing and service of counter-affidavit: A counter-affidavit must be filed with the clerk of the court and a copy of the counter-affidavit must be served on each party within 30 days after the date the affidavit is served, or with leave of court, at any time before the day on which evidence is first presented at the trial of the case.

(d) This rule does not affect the admissibility of other evidence concerning reasonableness and necessity, except that an opponent of an affidavit may not contest reasonableness and necessity of the services unless the opponent:

(1) files a counter-affidavit, or

(2) has specifically disclosed a testifying expert as to the specific issue in question.

(e) In the event an affidavit and/or counter-affidavit is filed under this rule after the discovery period has ended but within the time period permitted in this rule, or at a time that would not otherwise reasonably permit discovery of an affiant or counter-affiant, then only in that event, the party adversely affected may nevertheless take and use the deposition of, and/or subpoena for trial, the affiant or counter-affiant.

(f) **PROPOSED FORMS OF AFFIDAVIT**

(1) An affidavit concerning cost and necessity of services of the person who provided the service is sufficient if it substantially follows the following form:

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____ COUNTY,
John Roe	§	TEXAS
(Name of Defendant)		

AFFIDAVIT OF SERVICE PROVIDER

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT) _____, who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT) _____. I am of sound mind and capable of making this affidavit which is based upon my personal knowledge and is true and correct. A true and correct copy of my curriculum vitae is attached as Exhibit A which contains my address and telephone number.

On _____(DATE) _____, I provided a service to _____ (NAME OF PERSON WHO RECEIVED SERVICE) _____. An itemized statement of the service and the charge for the service is attached to this Affidavit as Exhibit B and contains _____ pages.

The service I provided was necessary and the amount that I charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20___.

My commission expires:

_____

_____
Notary Public – State of Texas
Printed name of Notary: _____

(2) An affidavit concerning cost and necessity of services by the custodian of records showing the service provided and the charge made is sufficient if it substantially follows the following form:

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____ COUNTY,
John Roe	§	TEXAS
(Name of Defendant)	§	

AFFIDAVIT BY CUSTODIAN OF RECORDS

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT) _____, who, being by me duly sworn, deposed as follows:

I am of sound mind and legally capable of making this affidavit which is based upon my personal knowledge and is true and correct.

I am the custodian of the billing records of the person who provided the service _____ (later referred to as the "Service Provider"). Attached hereto are _____ pages of records from the Service Provider. These said _____ pages of records are kept by the Service Provider in the regular course of business of the Service Provider, and it was the

regular course of business of the Service Provider for an employee or representative of the Service Provider, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original. The service provided was necessary and the amount charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20__.

My commission expires:

_____

_____
Notary Public – State of Texas
Printed name of Notary: _____

(3) A counter-affidavit to rebut cost and necessity of service by a competent person (provided by this Rule) who rebuts the reasonableness or necessity of the service is sufficient if it substantially follows the following form:

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____ COUNTY,
John Roe	§	TEXAS
(Name of Defendant)	§	

COUNTER-AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF COUNTER-AFFIANT) _____, who, being by me duly sworn, deposed as follows:

My name is _____(NAME OF COUNTER-AFFIANT) _____. I am of sound mind and capable of making this affidavit which is based upon my personal knowledge and is true and correct.

On _____(DATE) _____, I reviewed the records of _____

(NAME OF AFFIANT IN AFFIDAVIT BEING CONTROVERTED) _____ pertaining to _____ (NAME OF PERSON RECEIVING SERVICE) _____ which were attached to the Service Provider's affidavit. My curriculum vitae which is true and correct is attached as Exhibit A. I am qualified by knowledge, skill, experience, training, education, and other expertise to testify in opposition to the matters contained in the affidavit because _____. I specifically take exception to the services rendered and/or charges made because (NOTE: Be specific as to which particular services are inappropriate and why and/or which charges are not reasonable and necessary.

Based upon the foregoing, I do not believe the services rendered were reasonable and/or necessary at the time and place that the service was provided.

_____
Counter-Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20__.

My commission expires:

_____

_____
Notary Public – State of Texas
Printed name of Notary: _____

Comment: This rule is a change in the law. See CPRC §§ 18.001-002 and Government Code § 22.004. Under this rule each affidavit, whether controverted or not, is sufficient to raise an issue of fact on the reasonableness of costs and the necessity of the services which are the subject of the affidavit. If an affidavit is controverted by a counter-affidavit, the parties may present additional evidence on the controverted subject, as may be permitted by the Court and in compliance with the scheduling order, if any.

The rule only addresses reasonableness of costs and necessity of services; it does not address other issues. If brought to the Court's attention, it should strike any portion of an affidavit or counter-affidavit that is beynod the scope of this rule.

Rule 904(e) includes two new concepts: (1) the discovery period has ended or (2) at a time that would not otherwise reasonably permit discovery. The first part is self-explanatory, the second part would be used if the affidavit/counter-affidavit were filed, as an example, on the last day of

the discovery period. Thus it doesn't meet part (1), but part (2) could be utilized to still obtain discovery of the affiant or counter-affiant.

In the counter-affidavit, that affiant should briefly state in the blank after the word "because" why the affiant is qualified; e.g., "I am a medical doctor who performs similar services to which I have taken exception."

rehearing denied 106 Tex. 160, 160 S.W. 471; Tyler v. Sowders (Civ.App.1915) 172 S.W. 205; Lingo Lumber Co. v. Garvin (Civ.App.1915) 181 S.W. 561.

Supreme Court is without authority to promulgate a court rule which violates statutory law. Durham v. Scrivener, 1925, 270 S.W. 161.

If there is any conflict between the statutes and the rules for district and county courts, the statutes will control. Shelton Motor Co. v. Higdon (Civ.App. 1940) 140 S.W.2d 905, reversed 138 Tex. 121, 157 S.W.2d 627. Courts ⇐ 80(1)

5. Habeas corpus

Supreme Court, not Court of Appeals, had jurisdiction of habeas corpus proceeding filed by husband adjudged guilty of contempt for violating district court order issued in partition suit for division of husband's military retirement benefits; Court of Appeals had statutory authority only for habeas matters arising from restraint due to violations of orders entered in divorce, custody or support cases. Ex parte Maroney (App. 6 Dist. 1987) 741 S.W.2d 566. Courts ⇐ 472.2

§ 22.004. Rules of Civil Procedure

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

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

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

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

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

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 297, § 1, eff. Aug. 28, 1989; Acts 2001, 77th Leg., ch. 644, § 1, eff. June 13, 2001.

was a resident at the time the cause of action accrued but has subsequently moved.

(c) Service of process under this section shall be made in the manner provided by this chapter for substituted service on nonresident motor vehicle operators, except that a copy of the process must be mailed by certified mail.

(d) Service under this section is in addition to procedures provided by Rule 117a of the Texas Rules of Civil Procedure and has the same effect as personal service.

(e) Service of process on the secretary of state under this section must be accompanied by the fee provided by Section 405.031(a), Government Code, for the maintenance by the secretary of state of a record of the service of process.

History of CPRC §17.091: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 384, §14, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., 2nd C.S., ch. 6, §60, eff. Sept. 1, 1991; Acts 1995, 74th Leg., ch. 579, §1, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 948, §5, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 1430, §34, eff. Sept. 1, 2001.

See also ***O'Connor's Texas Rules***, "Serving the Defendant with Suit," ch. 2-H.

CPRC §17.092. SERVICE ON NONRESIDENT UTILITY SUPPLIER

A nonresident individual or partnership that supplies gas, water, electricity, or other public utility service to a city, town, or village in this state may be served citation by serving the local agent, representative, superintendent, or person in charge of the nonresident's business.

History of CPRC §17.092: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CPRC §17.093. SERVICE ON FOREIGN RAILWAY

In addition to other methods of service provided by law, process may be served on a foreign railway by serving:

(1) a train conductor who:

(A) handles trains for two or more railway corporations, at least one of which is the foreign corporation and at least one of which is a domestic corporation; and

(B) handles trains for the railway corporations over tracks that cross the state's boundary and on tracks of a domestic corporation within this state; or

(2) an agent who:

(A) has an office in this state; and

(B) sells tickets or makes contracts for the transportation of passengers or property over all or part of the line of the foreign railway.

History of CPRC §17.093: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CHAPTER 18. EVIDENCE

Subchapter A. Documentary Evidence

§18.001 Affidavit Concerning Cost & Necessity of Services

§18.002 Form of Affidavit

Subchapter B. Presumptions

§18.031 Foreign Interest Rate

§18.032 Traffic Control Device Presumed to Be Lawful

§18.033 State Land Records

Subchapter C. Admissibility

§18.061 Communications of Sympathy

Subchapter D. Certain Losses

§18.091 Proof of Certain Losses; Jury Instruction

SUBCHAPTER A. DOCUMENTARY EVIDENCE

CPRC §18.001. AFFIDAVIT CONCERNING COST & NECESSITY OF SERVICES

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or

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

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

(d) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(e) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and

(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or

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

(f) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

History of CPRC §18.001: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, §3.04(a), eff. Sept. 1, 1987.

See also TRE 902(10), Business Records Accompanied by Affidavit.

Jackson v. Gutierrez, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, n.p.h.). "A plaintiff may prove medical expenses are reasonable and necessary either by presenting expert testimony, or by submitting affidavits in compliance with §18.001...." *See also* ***Rodriguez-Narrera v. Ridinger***, 19 S.W.3d 531, 532 (Tex.App.—Fort Worth 2000, no pet.).

Turner v. Peril, 50 S.W.3d 742, 747 (Tex.App.—Dallas 2001, pet. denied). "Significantly, while §18.001(c)(2)(B) permits charges to be proved by a non-expert custodian, §18.001(f) requires a counter affidavit to give reasonable notice of the basis on which the party filing it intends to controvert the claim reflected by the initial affidavit *and* be made by a person qualified to testify in contravention about matters contained in the initial affidavit. [S]ection 18.001 places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings. [¶] An affidavit ... is insufficient unless its allegations are direct and unequivocal and perjury can be assigned to it."

City of El Paso v. PUC, 916 S.W.2d 515, 524 (Tex. App.—Austin 1995, writ dism'd). "Section 18.001 does not address the *admissibility* of an affidavit concerning cost and necessity of services but only the *sufficiency* of the affidavit to support a finding of fact that a charge was reasonable or a service was necessary. [¶] Section 18.001 makes no reference to requirements for admissibility of affidavits."

Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex.App.—Eastland 1995, no writ). CPRC "§18.001 is an evidentiary statute which accomplishes 3 things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit. ... The statute does not provide that the evidence is conclusive, nor does it address the issue of causation." *See also* ***Sloan v. Molandes***, 32 S.W.3d 745, 752 (Tex.App.—Beaumont 2000, no pet.).

CPRC §18.002. FORM OF AFFIDAVIT

(a) An affidavit concerning cost and necessity of services by the person who provided the service is sufficient if it follows the following form:

No. _____

John Doe	§	In the _____
(Name of Plaintiff)	§	Court in & for
v.	§	_____ County,
John Roe	§	Texas
(Name of Defendant)	§	

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT), who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT). I am of sound mind and capable of making this affidavit.

On _____ (DATE), I provided a service to _____ (NAME OF PERSON WHO RECEIVED SERVICE). An itemized statement of the service and the charge for the service is attached to this affidavit and is a part of this affidavit.

The service I provided was necessary and the amount that I charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 19___.

My commission expires:

_____

_____
Notary Public, State of Texas
Notary's printed name:

_____

(b) An affidavit concerning cost and necessity of services by the person who is in charge of records showing the service provided and the charge made is sufficient if it follows the following form:

No. _____

John Doe	§	In the _____
(Name of Plaintiff)	§	Court in & for
v.	§	_____ County,
John Roe	§	Texas
(Name of Defendant)	§	

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT), who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT). I am of sound mind and capable of making this affidavit.

I am the person in charge of records of _____ (PERSON WHO PROVIDED THE SERVICE). Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that _____ (PERSON WHO PROVIDED THE SERVICE) provided to _____ (PERSON WHO RECEIVED THE SERVICE) on _____ (DATE). The attached records are a part of this affidavit.

The attached records are kept by me in the regular course of business. The information contained in the records was transmitted to me in the regular course of business by _____ (PERSON WHO PROVIDED THE SERVICE) or an employee or representative of _____ (PERSON WHO PROVIDED THE SERVICE) who had personal knowledge of the information. The records were made at or near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original.

The service provided was necessary and the amount charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 19___.

My commission expires:

_____

_____
Notary Public, State of Texas
Notary's printed name:

_____

(c) The form of an affidavit provided by this section is not exclusive and an affidavit that substantially complies with Section 18.001 is sufficient.

History of CPRC §18.002: Acts 1993, 73rd Leg., ch. 248, §1, eff. Aug. 30, 1993.

See also TRE 902(10), Business Records Accompanied by Affidavit.

Sections 18.003-18.030 reserved for expansion

SUBCHAPTER B. PRESUMPTIONS

CPRC §18.031. FOREIGN INTEREST RATE

Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in this state and interest at that rate may be recovered without allegation or proof.

History of CPRC §18.031: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CPRC §18.032. TRAFFIC CONTROL DEVICE PRESUMED TO BE LAWFUL

(a) In a civil case, proof of the existence of a traffic control device on or alongside a public thoroughfare by a party is prima facie proof of all facts necessary to prove the proper and lawful installation of the device at that place, including proof of competent authority and an ordinance by a municipality or order by the commissioners court of a county.

(b) Proof of the existence of a one-way street sign is prima facie proof that the public thoroughfare on or alongside which the sign is placed was designated by proper and competent authority to be a one-way thoroughfare allowing traffic to go only in the direction indicated by the sign.

(c) In this section, "traffic control device" includes a control light, stop sign, and one-way street sign.

(d) Any party may rebut the prima facie proof established under this section.

History of CPRC §18.032: Acts 1995, 74th Leg., ch. 165, §2, eff. Sept. 1, 1995.

COTTON
BLEDSOE
TIGHE &
DAWSON, PC
Attorneys at Law

Post Office Box 2776
Midland, Texas 79702-2776
500 West Illinois, Suite 300
Midland, Texas 79701
(432) 684-5782
(432) 684-3173 Fax
www.cbtd.com

3415 Louisiana, Suite 2700
Houston, Texas 77002
(713) 759-9281
(713) 759-0458 Fax

W. Bruce Williams • *Shareholder* • *Board Certified in Civil Trial & Personal Injury Trial Law*
(432) 685-8578 Direct • (432) 684-3173 Direct Fax • bwilliams@cbtd.com

February 21, 2006

Mr. Buddy Low
Supreme Court Advisory Committee
Orgain, Bell & Tucker, LLP
P. O. Box 1751
Beaumont, Texas 77704-1751

re: Re-submission of TRE 904 with proposed revisions

Dear Buddy:

Enclosed please find proposed TRE 904 which addresses reasonableness of costs and necessity of services currently governed under CPRC 18.001-.002. On behalf of the Administration of Rules of Evidence Committee, we earnestly recommend to the Supreme Court Advisory Committee that it endorse our proposed TRE 904 and recommend it to the Supreme Court for adoption. In the above referenced matter I have attached proposed Rule 904 (revised from previous submitted versions in 2003 and 2005) which currently includes proposed forms of affidavit and counter-affidavit with comments. This latest edit of Rule 904 is the culmination of years of work by the Administration of Rules of Evidence Committee and *such revisions were passed **unanimously** by the Committee at large.*

The fact that the changes were passed unanimously in my opinion is nothing less than miraculous. AREC's initial work on this Rule was difficult, with leanings coinciding with committee member's practices on the plaintiff or on the defense side of the bar. In my opinion, AREC's unanimous recommendation of TRE 904 as revised is due to two things: 1) the stellar makeup of the sub-committee and its commitment to devising an equitable rule and 2) the blatant gamesmanship that members of the committee have observed in practice by both sides of the bar in utilizing the current CPRC 18.001 - .002 as a sword or a shield. Further, these changes are needed in light of recent opinions by Courts of Appeal that there are no forms given for counter affidavits thus adding to uncertainty and gamesmanship. ***Turner v. Peril***, 50 SW3d 742, 747 (Tex. App. - Dallas, 2001, pet. den.) Accordingly, even though the intent of CRPC 18.001 - .002 is to reduce the costs to litigants, that purpose is frustrated in multiple ways under the current Rule.

Courts of Appeal have also recognized that CPRC, Sec. "18.001 is an evidentiary statute, [*see* ***Beauchamp v. Hambric***, 901 SW2d 747, 749 (Tex. App. - Eastland, 1995, no writ)] and yet there is no Texas rule of evidence. The Texas Supreme Court, has rule making authority under Tex. Gov. Code § 22.004 that repeals all conflicting laws and parts of laws governing civil actions.

Gamesmanship under the current CPRC 18.001 - 18.002 includes, but is not limited to:

1. Parties filing multiple affidavits and slipping into the affidavit, causation language, not contemplated by the statute [***Beauchamp v. Hambric***, 901 SW2d 747, 279 (Tex. App. - Eastland, 1995, no writ); *see* also ***Sloan v. Molandes***, 32 SW3d 745, 752 (Tex. App. - Beaumont, 2000, no pet)] such as "the service I provided was necessary *due to the accident of 12/01/04* and the amount that I charged for the service was reasonable at the time and place the service was provided." In filing this language among other affidavits it may be hoped that the defendant does not catch the added causation statement or file a counter affidavit and that at trial such may be surreptitiously used to imply to the jury a health care providers' opinion on included causation.

2. The current practices of many insurance providers is to obtain a counter-affidavit on every conceivable basis, thus knocking out the affidavit and therefore evidence of costs and putting the plaintiff to the expense of bringing a witness at trial.

3. Parties may include in the bills, particularly in cases with multiple health care billers, costs of incidental health care that had nothing to do with an accident, such as visits or charges for flu, cold, pap smear and costs of other doctor's visits that are not relevant to the incident. It then becomes incumbent upon the defendant to catch these non-related charges and then hire an expert to fill out an affidavit to controvert same. Failure to controvert may have a consequence submission of non-related medical charges to the jury without ability to contest same at trial.

4. Accordingly, the cost to defendants is largely having to hire an expert to controvert and then to appear at trial based on relatively inconsequential, but wrongfully included charges. The cost to plaintiff comes in having their affidavits nullified routinely, followed by the specter of incurring the costs of having to bring someone to trial to testify as to reasonableness and necessity. Under the current Rule and practices occurring thereunder there is no certainty on either side of the docket as to admissibility of evidence and costs are magnified.

The attached proposed version of Rule 904 is an effort to bring such expensive and time consuming gamesmanship to an end and to instill some measure of certainty as to admissibility at trial. Under these proposed revisions and the comments, the plaintiff may file his reasonableness and necessity affidavit as is the current practice. Likewise, the defendant may file a counter-affidavit by a qualified person as is the current practice. However, a counter-affidavit does <u>not</u> nullify the plaintiff's original

reasonableness and necessity affidavit. Rather, both conforming affidavits are given to the jury and weighed as to their credibility. Further, if the language of the affidavits wanders into areas such as *causation* apart from reasonableness of costs and necessity of services, then the comment directs the Court to merely strike that portion of the affidavit that is beyond the scope of the rule, rather than to strike the entire affidavit. If a counter-affidavit is filed, the parties may also address reasonableness and necessity by bringing live witnesses as is also allowed under the current rule. *See* ***Jackson v. Gutierrez***, 77 SW3d 898, 902 (Tex. App. - Houston [14th Dist.] 2002, no pet.); *see* also ***Rodriguez-Narrera v. Ridinger***, 19 SW3d 531, 532 (Tex. App. - Ft. Worth, 2000, no pet.).

As was stated above the AREC unanimously recommends proposed Rule 904 as revised. If you have any questions with regard to this matter please feel free to call me.

Very truly yours,

W. Bruce Williams

WBW:ljj
enclosure

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Rule 606. Competency of Juror as a Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; ~~or~~ (2) to rebut a claim that the juror was not qualified to serve, or (3) whether there was a mistake in entering the verdict onto the verdict form.

charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argued that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

Rule 606. Competency of Juror as Witness

* * * * *

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ~~except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention,

(2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of

U.S. v. Hawkins, 76 F.3d 545, 551 (4th Cir.1996). "[T]estimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible."

U.S. v. Ward, 989 F.2d 1015, 1019 (9th Cir.1992). FRE 603 "'is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.'" *See also* ***Doe v. Phillips***, 81 F.3d 1204, 1211 (2d Cir.1996); ***U.S. v. Saget***, 991 F.2d 702, 710 (11th Cir.1993).

FRE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Source of FRE 604: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.

FRE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Source of FRE 605: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934.

U.S. v. Paiva, 892 F.2d 148, 158 (1st Cir.1989). "The prohibition of [FRE] 605 anticipates situations where the presiding judge is called to testify as a witness in the trial.... *At 159:* A federal district court judge retains the common law power to explain, summarize and comment on the facts and evidence. ... In commenting on the testimony or questioning witnesses, however, the judge may not assume the role of a witness. A judge may 'analyze and dissect the evidence, but he may not either distort it or add to it.'"

FRE 606. COMPETENCY OF JUROR AS WITNESS

Editor's Note: *The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to FRE 606, to be effective December 1, 2006. For the text of the proposed amendments, see www.uscourts.gov.*

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Source of FRE 606: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934; P.L. 94-149, §1(10), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987.

Marquez v. City of Albuquerque, 399 F.3d 1216, 1223 (10th Cir.2005). "[A] juror may not testify in impeachment of the verdict ... except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. [T]he decision whether to grant or deny a hearing on a claim that a juror was improperly exposed to extraneous information is vested in the broad discretion of the district courts, and we will review the denial of a request for such a hearing only for an abuse of discretion. [¶] A juror's personal experience ... does not constitute 'extraneous prejudicial information. [T]he inquiry is not whether the jurors became witnesses in the sense that they discussed any matters not of record, but whether they discussed specific extra-record *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby." (Internal quotes omitted.)

Pyles v. Johnson, 136 F.3d 986, 991 (5th Cir.1998). FRE 606(b) "bars juror testimony regarding the following four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations. However, the rule provides that 'a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.' We have interpreted this portion of Rule 606(b) as follows: 'Post-verdict inquiries into the existence of

impermissible extraneous influences on a jury's deliberations are allowed under appropriate circumstances so that a jury-man may testify to any facts bearing upon the question of the *existence* of any extraneous influence, although not as to how far that influence operated upon his mind.'" *See also* ***Outboard Mar. Corp. v. Babcock Indus., Inc.***, 106 F.3d 182, 186 (7th Cir.1997).

FRE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

Cross-references to FRE 607: ***Commentaries***, "Impeaching the Witness," ch. 8-C, §5, p. 508.

Source of FRE 607: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.

U.S. v. Abel, 469 U.S. 45, 49, 105 S.Ct. 465, 467 (1984). The FREs "do not by their terms deal with impeachment for 'bias'.... *At 51, 468-69:* We think ... that it is permissible to impeach a witness by showing his bias under the [FREs]. *At 52, 469:* Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. [¶] A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias."

U.S. v. Ienco, 92 F.3d 564, 568 (7th Cir.1996). FRE 607 "allows the credibility of a witness to be impeached by any party, including the party calling the witness, and the asking of leading questions is a standard technique of impeachment. ... Rule 607 abolishes the voucher rule and its corollaries, such as having to declare your witness adverse before cross-examining him or to show that his testimony surprised you."

U.S. v. Gilbert, 57 F.3d 709, 711 (9th Cir.1995). "Impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible."

U.S. v. Ince, 21 F.3d 576, 579 (4th Cir.1994). "One method of attacking the credibility of (i.e., impeaching) a witness is to show that he has previously made a statement that is inconsistent with his present testimony. Even if that prior inconsistent statement would otherwise be inadmissible as hearsay, it may be admissible for the limited purpose of impeaching the witness."

FRE 608. EVIDENCE OF CHARACTER & CONDUCT OF WITNESS

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Cross-references to FRE 608: ***Commentaries***, "Impeaching the Witness," ch. 8-C, §5, p. 508.

Source of FRE 608: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1935; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Mar. 27, 2003, eff. Dec. 1, 2003.

U.S. v. Abel, 469 U.S. 45, 55, 105 S.Ct. 465, 470 (1984). FRE 608(b) "allows a cross-examiner to impeach a witness by asking him about specific instances of past conduct, other than crimes covered by [FRE] 609, which are probative of his veracity or 'character for truthfulness or untruthfulness.' The Rule limits the inquiry to cross-examination of the witness, however, and prohibits the cross-examiner from introducing extrinsic evidence of the witness' past conduct." *See also* ***Palmer v. City of Monticello***, 31 F.3d 1499, 1507 (10th Cir.1994) (prior act must have some bearing on witness' credibility).

U.S. v. Montelongo, 420 F.3d 1169, 1175 (10th Cir. 2005). FRE 608(b) "only applies to specific instances of conduct used to attack or support the witness' character

TRE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

See TRCP 183, regarding appointment and compensation of interpreters; Cochran, ***Texas Rules of Evidence Handbook***, p. 556 (6th ed. 2005-06).

History of TRE 604 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] liv). Amended eff. Sept. 1, 1990, by order of Apr. 24, 1990 (785-86 S.W.2d [Tex.Cases] cvi): Added comment with reference to TRCP 183, regarding appointment and compensation of interpreters. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] li). Source: FRE 604.

International Commercial Bank v. Hall-Fuston Corp., 767 S.W.2d 259, 261 (Tex.App.—Beaumont 1989, writ denied). Where a foreign company attempts to introduce into evidence business records that are not written in English, it may have one of its corporate representatives orally interpret the documents under oath after being qualified as an expert.

TRE 605. COMPETENCY OF JUDGE AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

See Cochran, ***Texas Rules of Evidence Handbook***, p. 558 (6th ed. 2005-06).

History of TRE 605 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] liv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 605.

In re M.S., 115 S.W.3d 534, 538 (Tex.2003). "A judge's findings of fact are not technically the same as testimony. ... In this case, the orders submitted into evidence, containing findings based on pretrial evidence by the very judge presiding over the termination proceeding, could be, like a judicial comment on the weight of the evidence, a form of judicial influence no less proscribed than judicial testimony. [T]he jury was permitted to see findings of fact made by the very judge presiding over the trial, and those facts were the very ones that the jury itself was being asked to find. The fact-finding present in the orders admitted as evidence comes far too close to 'indicat[ing] the opinion of the trial judge as to the verity or accuracy of the facts in inquiry'...."

O'Quinn v. Hall, 77 S.W.3d 438, 448 (Tex.App.—Corpus Christi 2002, no pet.). TRE 605 "applies not only to members of the judiciary, 'but also to those performing judicial functions that conflict with a witness's role.' [¶] 'The judge is a neutral arbiter in the courtroom, and the rule seeks to preserve his posture of impartiality before the parties....'"

In re M.E.C., 66 S.W.3d 449, 457 (Tex.App.—Waco 2001, no pet.). TRE 605 "prohibit[s] not only direct testimony by the judge but also that which 'is the functional equivalent of witness testimony.'"

TRE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

See TRCP 327(b); ***Commentaries***, "MNT Based on Jury or Bailiff Misconduct," ch. 10-B, §13; Cochran, ***Texas Rules of Evidence Handbook***, p. 562 (6th ed. 2005-06).

History of TRE 606 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] liv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 606.

Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 371 (Tex.2000). An "alleged conversation between [jurors] during a trial break ... should not be considered 'deliberations' and therefore barred by [TRE] 606(b) and [TRCP] 327(b). [TRCPs] use the term 'deliberations' as meaning formal jury deliberations—when the jury weighs the evidence to arrive at a verdict."

Rosell v. Central W. Motor Stages, Inc., 89 S.W.3d 643, 661 (Tex.App.—Dallas 2002, pet. denied). "The essence of the 'outside influence' rule is to prevent outside information that affects the merits of the case from reaching the jury. The only evidence here is that the jury was told that they probably would be required to

deliberate another day. ... Thus, the bailiff informing the jury of the court's schedule was not misconduct. Further, the juror testimony that jurors traded answers on issues is testimony about deliberations and is not evidence of outside influences."

Chavarria v. Valley Transit Co., 75 S.W.3d 107, 110 (Tex.App.—San Antonio 2002, no pet.). TRE 606(b) does "not bar juror testimony about conversations during a trial break. *At III:* [However, we] believe that jurors discussing the case on breaks during deliberations is the same as deliberations themselves."

Perry v. Safeco Ins. Co., 821 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1991, writ denied). "Information gathered by a juror and introduced to other jurors by that juror—even if it were introduced to prejudice the vote—does not constitute outside influence. [¶] Further, the coercive influence of one juror upon the rest of the panel is not 'outside influence.' Proof of coercive statements and their effect on the jury is barred by the rules."

TRE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

See ***Commentaries***, "Introducing Evidence," ch. 8-C; Cochran, ***Texas Rules of Evidence Handbook***, p. 577 (6th ed. 2005-06).

History of TRE 607 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 607.

Allied Chem. Co. v. DeHaven, 824 S.W.2d 257, 265 (Tex.App.—Houston [14th Dist.] 1992, no writ). TRE 607 "allows the credibility of a witness to be attacked by the party calling him." *See also* ***Loyd Elec. Co. v. Millett***, 767 S.W.2d 476, 479 (Tex.App.—San Antonio 1989, no writ).

TRE 608. EVIDENCE OF CHARACTER & CONDUCT OF A WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

See ***Commentaries***, "Motion in Limine," ch. 5-E; "Introducing Evidence," ch. 8-C; Cochran, ***Texas Rules of Evidence Handbook***, p. 583 (6th ed. 2005-06).

History of TRE 608 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 608(a).

Closs v. Goose Creek Consol. ISD, 874 S.W.2d 859, 870 n.7 (Tex.App.—Texarkana 1994, no writ). "The credibility of a witness may be attacked by evidence in the form of an opinion or reputation. Specific instances of the conduct of a witness, other than conviction for a crime, may not be inquired into nor proved by extrinsic evidence for purposes of attacking the credibility of the witness."

Rose v. Intercontinental Bank, 705 S.W.2d 752, 757 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Under TRE 608(a), "the witness' reputation for truthfulness must first be attacked before [the party] can offer rehabilitating evidence."

TRE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of

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Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 606(b) as it was released for public comment. The College agrees that the Rule should be amended to resolve a conflict in the case law over the scope of an exception for mistaken jury verdicts. But it argues that "the new rule's exception for 'clerical mistakes' is unclear, and even if that term's meaning can be divined by reference to the case law cited by the Advisory Committee, that meaning is not adequately clarified or justified." The College suggests that the term "inadvertence, oversight or mistake" should be substituted for "clerical mistake" in the proposed amendment as it was issued for public comment.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) **General rule.**—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that

the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement~~; regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not

admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a

juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under

for truthfulness. [H]owever, [Ds] did not seek to cross-examine [witness] on the prior incident in order to 'attack' his 'character for truthfulness,' but rather to negate the [Ds'] guilt of the crime charged against them.... As such, Rule 608(b) does not bar the [Ds'] cross-examination of [witness]."

U.S. v. Drury, 396 F.3d 1303, 1316 (11th Cir.2005). FRE 608 "permits rehabilitative evidence only when a witness's reputation for truthfulness has actually been attacked. [T]he prosecution's questioning the veracity of the accused's testimony and calling attention to inconsistencies therein does not constitute an attack on the accused's reputation for truthfulness permitting rehabilitative testimony."

U.S. v. Geston, 299 F.3d 1130, 1137 n.2 (9th Cir.2002). FRE 403 "modifies [FRE 608(b)] by providing that otherwise admissible and relevant evidence may be excluded if the court determines that its probative value is substantially outweighed by the danger of unfair prejudice." *See also U.S. v. Marino*, 277 F.3d 11, 24 (1st Cir.2002).

U.S. v. Shay, 57 F.3d 126, 131 (1st Cir.1995). FRE 608(a), "governing the admissibility of opinion testimony concerning a witness's character, contemplates that truthful or untruthful character may be proved by expert testimony."

U.S. v. Andujar, 49 F.3d 16, 26 (1st Cir.1995). "It is well settled that a party may not present extrinsic evidence of specific instances of conduct to impeach a witness on a collateral matter. 'A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence....'" (Internal quotes omitted.)

Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp., 37 F.3d 1460, 1464 (11th Cir.1994). FRE 608(b) "permits inquiry ... into specific instances of a witness's conduct that are 'probative of truthfulness or untruthfulness.' [¶] Acts probative of untruthfulness under Rule 608(b) include such acts as forgery, perjury, and fraud."

FRE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Editor's Note: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to FRE 609, to be effective December 1, 2006. For the text of the proposed amendments, see www.uscourts.gov.

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction

inadmissible. Evidence of the pendency of an appeal is admissible.

Cross-references to FRE 609: *Commentaries*, "Impeaching by conviction," ch. 8-C, §5.4, p. 309.

Source of FRE 609: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1935; Mar. 2, 1987, eff. Oct. 1, 1987; Jan. 26, 1990, eff. Dec. 1, 1990.

U.S. v. Valentine, 401 F.3d 609, 615 (5th Cir.2005). "[A] deferred adjudication does not subject a witness to impeachment with the use of a prior 'conviction."

U.S. v. Delgado, 401 F.3d 290, 301 (5th Cir.2005). In ***Ohler v. U. S.***, 529 U.S. 753 (2000) "the Supreme Court held 'that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error.' [¶] Here, as in ***Ohler***, the [D] offered testimony of his prior conviction before being asked about it on cross-examination. By introducing the evidence in the first instance, even if done to 'remove the sting' of the conviction, [D] has waived his appeal as to this matter."

U.S. v. Hernandez, 106 F.3d 737, 739-40 (7th Cir. 1997). "[I]n determining whether the probative value of the conviction outweighs its prejudicial effect [the district court should consider]: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue."

Gill v. Thomas, 83 F.3d 537, 540 (1st Cir.1996). D "maintains that but for the magistrate judge having indicated that he would permit [P] to raise them on cross-examination, [D] never would have revealed his misdemeanor convictions on direct examination. *At 541:* At trial, rather than waiting for [P] to introduce the misdemeanors, objecting, and allowing the magistrate judge to reconsider his *in limine* ruling, [D] opted to introduce the misdemeanors preemptively to 'remove the sting' from Thomas's anticipated impeachment. [A]s a consequence, [D] 'opened the door' to [P's] cross-examination on the misdemeanors and thereby eliminated any potential evidentiary error. [¶] To preserve his *in limine* objection ... [D] should have refrained from offering the evidence himself, waited to see if [P] introduced [it] on cross-examination, and if so, objected then." *See also* ***Ohler v. U.S.***, 529 U.S. 753, 756-57, 120 S.Ct. 1851, 1853 (2000).

U.S. v. Hamilton, 48 F.3d 149, 154 (5th Cir.1995). "Because the convictions were more than 10 years old, their admissibility is governed instead by [FRE] 609(b). We have read Rule 609(b) to say that the probative value of a conviction more than 10 years old is by definition outweighed by its prejudicial effect."

FRE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Source of FRE 610: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987.

Malek v. Federal Ins. Co., 994 F.2d 49, 54-55 (2d Cir. 1993). "Because it is apparent from these questions that defense counsel attempted to show that [witness's] character for truthfulness was affected by his religious beliefs and that such questioning may have prejudiced the Maleks, the district court erred in permitting the defendants to pursue this line of questioning. We are particularly troubled about this line of questioning, especially where the impeached witness' religious affiliation is the same as that of the plaintiffs."

Virgin Islands v. Petersen, 553 F.2d 324, 328 (3d Cir. 1977). "The colloquy at side bar clearly reveals that counsel sought to put before the jury the religious affiliation and beliefs of both [alibi witness and D]. [FRE] 610, clearly prohibits such testimony when it is used to enhance the witness' credibility—and no other purpose for its admission has been suggested."

FRE 611. MODE & ORDER OF INTERROGATION & PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except

deliberate another day. ... Thus, the bailiff informing the jury of the court's schedule was not misconduct. Further, the juror testimony that jurors traded answers on issues is testimony about deliberations and is not evidence of outside influences."

Chavarria v. Valley Transit Co., 75 S.W.3d 107, 110 (Tex.App.—San Antonio 2002, no pet.). TRE 606(b) does "not bar juror testimony about conversations during a trial break. *At 111:* [However, we] believe that jurors discussing the case on breaks during deliberations is the same as deliberations themselves."

Perry v. Safeco Ins. Co., 821 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1991, writ denied). "Information gathered by a juror and introduced to other jurors by that juror—even if it were introduced to prejudice the vote—does not constitute outside influence. [¶] Further, the coercive influence of one juror upon the rest of the panel is not 'outside influence.' Proof of coercive statements and their effect on the jury is barred by the rules."

TRE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

See ***Commentaries***, "Introducing Evidence," ch. 8-C; Cochran, ***Texas Rules of Evidence Handbook***, p. 577 (6th ed. 2005-06).

History of TRE 607 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 607.

Allied Chem. Co. v. DeHaven, 824 S.W.2d 257, 265 (Tex.App.—Houston [14th Dist.] 1992, no writ). TRE 607 "allows the credibility of a witness to be attacked by the party calling him." *See also* ***Loyd Elec. Co. v. Millett***, 767 S.W.2d 476, 479 (Tex.App.—San Antonio 1989, no writ).

TRE 608. EVIDENCE OF CHARACTER & CONDUCT OF A WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

See ***Commentaries***, "Motion in Limine," ch. 5 E; "Introducing Evidence," ch. 8-C; Cochran, ***Texas Rules of Evidence Handbook***, p. 583 (6th ed. 2005-06).

History of TRE 608 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 608(a).

Closs v. Goose Creek Consol. ISD, 874 S.W.2d 859, 870 n.7 (Tex.App.—Texarkana 1994, no writ). "The credibility of a witness may be attacked by evidence in the form of an opinion or reputation. Specific instances of the conduct of a witness, other than conviction for a crime, may not be inquired into nor proved by extrinsic evidence for purposes of attacking the credibility of the witness."

Rose v. Intercontinental Bank, 705 S.W.2d 752, 757 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Under TRE 608(a), "the witness' reputation for truthfulness must first be attacked before [the party] can offer rehabilitating evidence."

TRE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of

a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) Pendency of Appeal. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

See ***Commentaries***, "Motion in Limine," ch. 5-E; "Introducing Evidence," ch. 8-C; Cochran, ***Texas Rules of Evidence Handbook***, p. 594 (6th ed. 2005-06).

History of TRE 609 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 609.

Taylor v. Texas Dept. of Protective & Regulatory Servs., 160 S.W.3d 641, 653 (Tex.App.—Austin 2005, pet. denied). "[R]ule 609 is not a categorical limitation on the introduction of convictions for any purpose. Rather, it applies only to convictions offered for purposes of impeachment. Here, [P] offered [D's] convictions not solely to impeach her credibility but as relevant evidence going to the controlling issue in her case—the best interests of [the child]."

U.S.A. Precision Mach. Co. v. Marshall, 95 S.W.3d 407, 410 (Tex.App.—Houston [1st Dist.] 2002, pet. denied). A conviction is not final for purposes of impeachment under TRE 609 if it was reversed, it is pending on appeal, or the case was dismissed after a new trial was granted.

In re M.R., 975 S.W.2d 51, 55 (Tex.App.—San Antonio 1998, pet. denied). TRE 609 "exists to establish when and within what parameters a prior conviction may be introduced. It does not *require* a conviction in order to admit some testimony. [¶] [T]he Family Code itself does not require a conviction in order to introduce evidence of family violence. Instead, it requires that the evidence be 'credible.'"

Porter v. Nemir, 900 S.W.2d 376, 382 (Tex.App.—Austin 1995, no writ). "[T]he danger of unfair prejudice was particularly great because the extraneous conduct involved sexual abuse of a child. [¶] [D's] conviction for sexual abuse of a child was not admissible under [TRE] 609 [, and] the court did not abuse its discretion in concluding that the probative value *was substantially outweighed* by the danger of unfair prejudice...."

TRE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Comment to 1998 change: This is prior Rule of Criminal Evidence 615.

See ***Commentaries***, "Motion in Limine," ch. 5-E; "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 612 (6th ed. 2005-06).

History of TRE 610 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lvi). Adopted eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxviii): While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition; thus disclosure of affiliation with a church which is a party to the litigation is allowed under the rule. Former TRCE 610 renumbered TRCE 611. Source: New rule. See FRE 610.

TRE 611. MODE & ORDER OF INTERROGATION & PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness