

TEXAS RULES OF EVIDENCE
ARTICLE VIII. HEARSAY
TRE 705 - 801

Restyled 2015



- (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] lv). Source: FRE 705.

See O'Connor's *Texas Rules * Civil Trials* (2015), "Motion to Exclude Expert," ch. 5-N, p. 447; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 733.

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Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd., 249 S.W.3d 380, 389-90 (Tex.2008). "[E]xperts are not required to introduce ... foundational data at trial unless the opposing party or the court insists."

Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 252 (Tex.2004). "[B]ecause Rule 705(a) contemplates that the party against whom the evidence is offered may elicit testimony regarding the underlying facts or data on cross-examination, a motion to strike the testimony after such cross-examination is timely."

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

rate of error, whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and the non-judicial uses that have been made of the theory or technique."

TRE 706. AUDIT IN CIVIL CASES

Notwithstanding any other evidence rule, the court must admit an auditor's verified report prepared under Rule of Civil Procedure 172 and offered by a party. If a party files exceptions to the report, a party may offer evidence supporting the exceptions to contradict the report.

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

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 749.

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

ARTICLE VIII. HEARSAY

TRE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

- (a) **Statement.** "Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.
- (b) **Declarant.** "Declarant" means the person who made the statement.
- (c) **Matter Asserted.** "Matter asserted" means:
- (1) any matter a declarant explicitly asserts; and
 - (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter.
- (d) **Hearsay.** "Hearsay" means a statement that:
- (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (e) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

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- (1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
- (A) is inconsistent with the declarant's testimony and:
 - (i) when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
 - (ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding—or in a deposition;
 - (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (C) identifies a person as someone the declarant perceived earlier.
- (2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:
- (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make a statement on the subject;
 - (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
 - (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
- (3) ***A Deponent's Statement.*** In a civil case, the statement was made in a deposition taken in the same proceeding. "Same proceeding" is defined in Rule of Civil Procedure 203.6(b). The deponent's unavailability as a witness is not a requirement for admissibility.

Comment to 2015 restyling: Statements falling under the hearsay exclusion provided by Rule 801(e)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 803(24) exception for declarations against interest. No change in application of the exclusion is intended.

The deletion of former Rule 801(e)(1)(D), which cross-references Code of Criminal Procedure art. 38.071, is not intended as a substantive change. Including this cross-reference made sense when the Texas Rules of Criminal Evidence were first promulgated, but with subsequent changes to the statutory provision, its inclusion is no longer appropriate. The version of article 38.071 that was initially cross-referenced in the Rules of Criminal Evidence required the declarant-victim to be available to testify at the trial. That requirement has since been deleted from the statute, and the statute no longer requires either the availability or testimony of the declarant-victim. Thus, cross-referencing the statute in Rule 801(e)(1), which applies only when the declarant testifies at trial about the prior statement, no longer makes sense. Moreover, article 38.071 is but one of a number of statutes that mandate the admission of certain hearsay statements in particular circumstances. See, e.g., Code of Criminal Procedure art. 38.072; Family Code §§54.031, 104.002, 104.006. These statutory provisions take precedence over the general rule excluding hearsay, see Rules 101(c) and 802, and there is no apparent justification for cross-referencing article 38.071 and not all other such provisions.

History of TRE 801 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Jan. 1, 1999, by order of Dec. 31, 1998 (981-82 S.W.2d [Tex.Cases] xxxviii). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] xc): Amended (c)(3). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lvi): The definitions in TRE 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct; these are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration. Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease, witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The testimony is to a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. In a rape prosecution to prove that Richard, the defendant, was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement and the probative value of the statement as offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

Source: FRE 801.

See *O'Connor's Texas Rules • Civil Trials* (2015), "Admissibility," ch. 6-F, §12.1, p. 583; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 784; *O'Connor's Texas Civil Forms* (2014), FORM 5E:1.

ANNOTATIONS

TRE 801(d)

In re M.S., 115 S.W.3d 534, 543 (Tex.2003). "[T]he Agreement [between D and Child Protective Services]