The Supreme Court of Texas

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October 25, 2021

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Civil Procedure 76a. Since its adoption in 1990, the Court has received a number of complaints about Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. The Committee should draft any rule amendments that it deems advisable and, in making its recommendations, should take into account the June 2021 report of the Legislative Mandates Subcommittee.

Texas Rule of Civil Procedure 162. In the attached email, Judge Robert Schaffer proposes amendments to Texas Rule of Civil Procedure 162. The Committee should review and make recommendations.

Texas Rule of Civil Procedure 506.1(b). Texas Rule of Civil Procedure 506.1(b) states in part: "A plaintiff must file a $500 bond. A defendant must file a bond in an amount equal to *twice the amount of the judgment*." (Emphasis added.) The Court asks the Committee whether the bond amount—double the judgment—is too high, especially as justice court jurisdiction has increased. The Court also asks the Committee to consider other changes that would clarify whether attorney fees are included in calculating the bond amount.

Texas Rule of Evidence 404(b). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amendments to Texas Rule of Evidence 404(b). The Committee should review and make recommendations.

Texas Rule of Evidence 601(b). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes the repeal of Texas Rule of Evidence 601(b). The Committee should review and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

From: Nathan Hecht
To: Schaffer, Judge Robert (DCA); Chip Babcock
Cc: Martha Newton; Jaclyn Daumerie; Pauline Easley
Subject: RE: Suggested Rule Change-Rule 44
Date: Tuesday, September 21, 2021 8:30:23 AM

Thanks, Bob. We'll look into it.

From: Schaffer, Judge Robert (DCA) <Robert_Schaffer@Justex.net>
Sent: Monday, September 20, 2021 10:05 AM
To: Nathan Hecht <Nathan.Hecht@txcourts.gov>; Chip Babcock <cbabcock@jw.com>
Subject: Suggested Rule Change-Rule 44

Chief and Chip:

There is a conflict in the rules as it relates to nonsuits of claims in which minors are parties.

Rule 162 says, "at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." Caselaw says that "granting a nonsuit is a ministerial act, and a plaintiff's right to a nonsuit exists from the moment a written motion is filed or an oral motion is made in open court, unless the defendant has, prior to that time, sought affirmative relief."

Rule 44 states that when a next of friend files a lawsuit, "Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit."

The conflict is occurs when we get a motion for a nonsuit of a lawsuit in which minors are making claims. When this happens I have set a status conference to determine whether a settlement is being made for a minor in which the minor is getting money that is being paid directly to the minor's parent. One of my colleagues has this situation in which the case settled and 3 minors received around $10,000 each and that money was paid directly to the parent of the minors. After the settlement was concluded, the parties filed a motion for nonsuit. There was no minor settlement hearing and the court did not have an opportunity to hear the evidence to determine whether the settlement was in the minor's best interest. If Rule 162 applied, we would have dismiss the case without any determination as to whether the settlement

was in the minor's best interest or whether the minor or next friend on behalf of the minor received any money.

It feels like Rule 162 needs to be amended to allow a trial court to approve or reject a minor settlement before a nonsuit is granted. We would suggest the following change to the second paragraph of Rule 162:

"Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the Court pursuant to Rule 44. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court."

This suggestion is made to ensure that the court's ability to oversee claims involving minors is not impaired and the minor's interest is protected.

Robert K. Schaffer
Judge, 152nd District Court
Harris County Civil Courthouse
201 Caroline, 11th Floor
Houston TX 77002
832-927-2425

MEMORANDUM

June 14, 2021

From: Johnathan Stone, Chair of State Bar of Texas (SBOT) Administration of Rules of Evidence Committee (AREC).

To: The Texas Supreme Court Advisory Committee (SCAC).

Re: Proposed amendments to Tex. R. Evid. 404(b).

BACKGROUND

Texas R. Evid. 404(b) and Fed. R. Evid. 404(b) were substantially the same. Last year, the Federal rule was amended.

DISCUSSION

The comments to Fed. R. Evid. 404(b) succinctly explain the revisions as follows:

> ### 2020 Amendments
>
> Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.
>
> The notice provision has been changed in a number of respects:
>
> • The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.
>
> • The pretrial notice must be in writing--which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
>
> • Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance

notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied--even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. See, e.g., *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

• The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

• Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves in limine for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word "other" is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts "other" than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

RECOMMENDATION

AREC recommends amending Rule 404(b) to track the changes to the federal rule.

Expanding the prosecutor's notice obligations under Rule 404(b) will promote important protections for defendants in criminal cases. AREC believes the existing requirement that defendants request notice is an unnecessary impediment and should be deleted.

Restyling the phrase "other crimes, wrongs, or acts" clarifies that Rule 404(b) applies to other acts and not the acts charged.

Finally, the requirement that prosecutors disclose only the "general nature" of the bad act should be deleted in light of the expanded notice obligations.

Accordingly, AREC respectfully recommends that Rule 404(b) be amended to track the changes to the federal rule. Below is a redlined version of the proposed rule change:

Rule 404. Character Evidence; Other Crimes, Wrongs or ~~Other~~ Acts

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) Prohibited Uses. Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses~~; Notice in a Criminal Case~~. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor must:~~

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; ~~and~~

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial— or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Kind regards,

/s/Johnathan Stone
JOHNATHAN STONE
Chair, AREC

MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to abolish the Dead Man's Rule, Tex. R. Evid. 601(b)

Date: September 7, 2021

Summary

Texas Rule of Evidence 601(b) (the "Dead Man's Rule" or "Rule") generally prohibits interested parties in civil actions from testifying about oral communications by a decedent, unless there is corroborating evidence or an opposing party calls them to testify about the statement.

For nearly a century, Texans have asked—

> . . . whether there is any good reason for this present-day survival of a rule now only of historical interest. One wonders whether the time consumed and the difficulty in satisfactorily interpreting the statute is not out of all proportion to the end it purports to serve.

Maurice Cheek, *Testimony As to Transactions with Decedents*, 5 Tex. L. Rev. 149 (1927). The Rule has been described "deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." *Id*. (quoting Wigmore, *supra*, sec. 578 at 822).

Yet this ancient relic of English common law continues to exist in the TRE. In full, the Rule reads as follows:

> (1) Applicability. The "Dead Man's Rule" applies only in a civil case:
>
> (A) by or against a party in the party's capacity as an executor, administrator, or guardian; or
>
> (B) by or against a decedent's heirs or legal representatives and based in whole or in part on the decedent's oral statement.
>
> (2) General Rule. In cases described in subparagraph (b)(1)(A), a party may not testify against another party about an oral statement by the testator, intestate, or ward. In cases described in subparagraph (b)(1)(B), a party may not testify against another party about an oral statement by the decedent.
>
> (3) Exceptions. A party may testify against another party about an oral statement by the testator, intestate, ward, or decedent if:
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> (A) the party's testimony about the statement is corroborated; or

> (B) the opposing party calls the party to testify at the trial about the statement.
>
> (4) Instructions. If a court excludes evidence under paragraph (b)(2), the court must instruct the jury that the law prohibits a party from testifying about an oral statement by the testator, intestate, ward, or decedent unless the oral statement is corroborated or the opposing party calls the party to testify at the trial about the statement.

Tex. R. Evid. 601(b).

The Dead Man's Rule is written so confusingly as to confound its initial purpose—and has been applied by courts to allow such minimal corroboration as to limit its application into practical obscurity. The Rule cannot, and should not, be amended to clarify its text. It should be abolished.

Background

The Rule is meant to combat fraud—to prevent one party from testifying to conversations with the deceased, who is no longer available to refute the existence of truth to those respective conversations. *In re Estate of Watson*, 720 S.W.2d 806, 807 (Tex. 1986).

But its application and scope are less than clear. For almost a century, the Dead Man's Rule has been criticized as an unnecessary relic of ancient English common law (which, until 1843, entirely prohibited interested parties and persons from testifying).[1] It took 55 years for Texas to follow England's lead and abolish the disqualification of all interested witnesses, but while Texas "renounced the general disqualification of interested witnesses by statute," it "carried forth a vestige of the old common law rule" in the form of the Dead Man's statute. *Lewis v. Foster*, 621 S.W.2d 400, 402 (Tex. 1981).

In 1938, Dean McCormick criticized the Rule as having a "baneful potency for injustice," where "in the name of solicitude for the dead, the law permits one set of living folks to cut off another's claim without a fair hearing." *See* Judson F. Falknor, State Bar Journal, *The American Law Institute's Model Code of Evidence*, 18 Wash. L. Rev. & St. B.J. 228, 230-31 (1943) (quotation omitted).

In 1981, the Texas Supreme Court cited severe criticism of the rule by "leading legal scholars in the field of evidence." *Lewis*, 621 S.W.2d at 402 (citing Ray, Texas Law of Evidence sec. 321-2 (Tex. Practice 1980);[2] 2 Wigmore, Evidence sec. 478 (Chadbourn Rev. 1979); McCormick, Evidence sec. 65 (2d ed. 1972); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, at 187 (1956); Cheek, *supra*, at 172).

[1] *See Lewis v. Foster*, 621 S.W.2d 400, 402 (Tex. 1981); *Adams v. Barry*, 560 S.W.2d 935, 937 (Tex. 1978) (citing, inter alia, II J. Wigmore, Evidence § 578 at 695 (3rd ed. 1940); C. McCormick & R. Ray, Texas Law of Evidence, § 323, et seq. (2d ed. R. Ray & W. Young 1956); Cheek, Testimony As To Transactions With Decedents, 5 Tex. L. Rev. 149 (1927)).

[2] *See also* Roy R. Ray, *The Dead Man's Statute – A Relic of the Past*, 10 Sw. L. J. 390 (1956), *available at* https://core.ac.uk/download/pdf/147635851.pdf.

In 1983, the Texas Dead Man's statute[3] was repealed, and replaced with a narrower version under the new Texas Rules of Evidence in Rule 601(b). *See Tramel v. Estate of Billings*, 699 S.W.2d 259, 261 (Tex. App.—San Antonio 1985, no writ). The doctrine has been criticized by many modern authorities as reflecting a cynicism inconsistent with the underlying assumption of modern evidence codes.[4]

Despite the age of the Rule and its narrow construction by courts, parties to this day attempt to apply it beyond its scope. *See MTNV, Inc. v. ALST Realty, LLC*, No. 14-18-00170-CV, 2019 WL 6317370, at *6 (Tex. App.—Houston [14th Dist.] Nov. 26, 2019, no pet.) (explaining the Rule does not apply in an action concerning prior use easement); *Wal-Mart Stores, Inc. v. Constantine*, No. 05-17-00694-CV, 2018 WL 2001959, at *7 (Tex. App.—Dallas Apr. 30, 2018, no pet.) (in wrongful death case, holding Wal-Mart's evidence for its motion to compel arbitration cannot be excluded under the Dead Man's Rule); *Conner v. Johnson*, No. 2-03-316-CV, 2004 WL 2416425, at *5 (Tex. App.—Fort Worth Oct. 28, 2004, pet. denied) (rejecting argument on appeal that Dead Man's Rule barred testimony, where parties were not suing or sued in capacities as heirs, beneficiaries, or representative of estate); *see also Hanover Ins. Co. v. Hoch*, 469 S.W.2d 717, 724 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.) (Dead Man's Rule did not exclude testimony about conversations with a decedent where the third-party defendants were sued in their individual capacities and not as legal representatives or heirs of the decedent's estate).

The same concerns voiced in the 1980s and 1920s apply today. The Rule's corroboration exception is easily met through evidence from any competent witness or document that tends "to confirm and strengthen" the testimony and "show the probability of its truth." *See Fraga v. Drake,* 276 S.W.3d 55, 61 (Tex. App.—El Paso 2008, no pet); *Donaldson v. Taylor*, 713 S.W.2d 716, 717 (Tex. App.—Beaumont 1986, no writ); *Quitta v. Fosatti*, 808 S.W.2d 636, 641 (Tex. App.—Corpus Christi 1991, writ denied), *Escamilla v. Estate of Escamilla*, 921 S.W.2d 723, 726-27 (Tex. App.—Corpus Christi 1996, writ denied); *Powers v. McDaniel,* 785 S.W.2d 915, 920 (Tex. App.—San Antonio 1980, writ denied). The Rule's continued usefulness is in question, since the general rules of evidence governing admissibility (e.g., hearsay), apply to civil actions in Texas courts.

Currently, the Rule is narrowly applied as one of exclusion in a particular subset of civil cases, and is easily hurdled through corroboration or waiver. It is also often misapplied or mis-cited by parties in cases it should never be raised in—as most general civil practitioners do not operate within the narrow confines in which the Rule is meant to apply.

Other Jurisdictions and Rules

Texas is in the minority in maintaining the Rule.[5]

The American Law Institute's Model Code of Evidence omitted the rule in 1942. MODEL CODE OF EVID. R. 101 cmt. (1942); *see also* Judson F. Falknor, State Bar Journal, *The American Law*

[3] Tex. Rev. Civ. Stat. Ann. art. 3716 (Vernon 1926) (repealed eff. Sept. 1, 1983).
[4] *See* 2 WIGMORE, §578, at 821 (criticizing Dead Man's Statutes); Mason Ladd, *A Modern Code of Evidence*, 27 Iowa L. Rev. 213, 220 (1942) (criticizing Dead Man's Statutes; model code of evidence should presuppose "a society in which honest people outnumber the degraded, the deceitful, and the false-swearing").
[5] *See* Ed Wallis, *Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 Cleve. St. Law Rev. 75, 76 n.9 (2005).

Institute's Model Code of Evidence, 18 Wash. L. Rev. & St. B.J. 228, 230-31 (1943) (explaining the Model Code qualifies everyone to be a witness unless incapable of expressing themselves intelligibly or understanding their duty to tell the truth, "abrogates entirely the so-called Dead Man Statute," and citing Dean McCormick's 1938 article that described the Dead Man's statute as one "of the ancient barnacles which will have to go").

The Uniform Rules of Evidence do not contain a Dead Man's Rule. *See* UNIF. R. EVID. 601 cmt. notes of advisory committee on proposed rules ("The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind").

The federal rules do not incorporate any version of the Dead Man's Rule, and provide that all witnesses are competent unless the rules provide otherwise. Fed. R. Evid. 601. *See* Author's Comments at (2), Handbook on Texas Evidence, Rule 601 (Goode and Wellborn, 2020).

Several states have eliminated or declined to adopt the doctrine.[6] Effective in 2017, the Wisconsin Supreme Court repealed its Dead Man's statutes.[7] Colorado, rather than abolish its Dead Man's rule, expanded it to apply to all civil cases.[8] A minority of states still retain some version of the rule.[9]

AREC'S Recommendation

AREC received an inquiry from a member of the State Bar asking the Committee to clarify whether that the Dead Man's Rule applies in closed estate matters. AREC formed a subcommittee to examine the issue, which performed research and conferred with attorneys practicing and teaching estate planning and probate law. The subcommittee did not recommend a rule amendment to make it inapplicable to closed estate matters, as such clarification could further complicate an already

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[6] *See* ALA. R. EVID. 601 & note (1998); ALASKA COMM. R. EVID. 601 & cmt; ARK. R. EVID. 601; DE. R. EVID. 601 & cmt.; IOWA R. EVID. 5.601-5.603; KS Stat § 60-407; KY. REV. STAT. ANN. § 421.210 (repealed); ME. R. EVID. 601 & note (1976); MINN. R. EVID. 617 & cmt.; NEV. REV. STAT. § 48.075 ("Evidence is not inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person"); N.D. R. EVID. 601 & note; OKLA. STAT. ANN. TIT. 12, §12-2601; S.D. COD. L. §§ 19-19-601, 19-19-804. **Utah** and **California** repealed their Dead Man's statutes, and included rules to compensate for that omission. *See* Ut. R. Evid. 601, orig. adv. comm. note; Cal. Evid. Code §§ 700, 1261; *see also* Recommendation and Study Relating to the Dead Man Statute, Calif. Law Rev. Comm'n (Feb. 21, 1957), *available at* http://clrc.ca.gov/pub/Printed-Reports/Pub007.pdf. **Florida** lacks a Dead Man's Rule under its rules of evidence, but does have a statute that allows, in a case against a personal representative, heir, trustee, etc., an unavailable declarant's statement is admissible if it is on the same subject matter as another statement by the declarant admitted into evidence by an adverse party. Fl. Stat. § 90.804(2)(e).

[7] *See* Joe Forward, *After 158 Years, Farewell to the Deadman's Statute in Wisconsin*, Stat Bar of Wisconsin Newsletter Vol. 8 No. 21 (Nov. 2, 2016), *available at* https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?volume=8&issue=21&articleid=25177.

[8] *See* C.R.S. 13-90-102; *see also* Herb E. Tucker and Marc Darling, *The 2013 Revised Colorado Dead Man's Statute*, 42 The Colorado Lawyer 45 (Sept. 2013), *available at* https://www.wadeash.com/PDF/2013-9-dead-mans-statute.pdf.

[9] Including Missouri, New York, Pennsylvania and South Carolina. *See, e.g.,* Mo. Stat. § 491.010(2) (applying to any suit where one of the parties or his agent is dead or incompetent); N.Y. Consol. L. § 4519; 42 Pa. C.S. § 5930; *see also* Hon. Mark I. Bernstein, Pennsylvania Rules of Evidence § 601[9] (Gann 2018) ("No evidentiary rule is more difficult to apply than the Dead Man's Rule"); S.C. Code §19-11-95; .

complicated rule, and could unnecessarily shift the focus of an inquiry under the rule from corroboration or waiver to whether an estate is open or closed.

In conducting research on this inquiry, the subcommittee was informed about the serious criticisms over the continued existence of the Dead Man's Rule—through written research, and through conversations with practitioners and professors of law. The subcommittee sought additional feedback from the Bar's Real Estate, Probate & Trust Law section concerning the Rule's continued viability.

One practitioner responded individually, providing her opinion that the Rule should remain in force as an additional gatekeeping process in probate matters. She noted that some trust and estate practitioners do not view the Rule as a hindrance and instead see it as vitally important to preventing uncorroborated testimony about a decedent's statements. However, if the Rule is abolished the remaining admissibility rules still apply, including the hearsay rules. Additionally, witness credibility is always subject to the factfinder's assessment. The presence, or absence, of corroborating evidence is already a factor that factfinders take into account when assessing witness credibility.

Some practitioners, and one Probate Court Judge, expressed frustration over the fact that many practitioners do not understand the rule, and do not know how to use it properly. As noted previously, the subcommittee was able to find numerous examples corroborating this conclusion.

Another practitioner and Probate Court Judge were in favor of eliminating the Rule.

The subcommittee presented its findings to AREC. After discussion and consideration of the feedback received, AREC voted to recommend that the Rule be abolished.

Recommendation

AREC recommends that the Dead Man's Rule, Tex. R. Evid 601(b), be abolished.