

## MEMORANDUM

From: SCAC Evidence Subcommittee

To: SCAC Committee

Date: November 18, 2021

Re: Proposals to amend TRE 404(b) and 601(b)

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Our subcommittee was asked to study and make recommendations regarding changes proposed to TRE 404(b) and a proposed repeal of TRE 601(b). The proposals were made by the State Bar of Texas Administration of Rules of Evidence Committee.

### **TRE 404(b)**

The attached memo from AREC (dated June 14, 2021) details the reasons for the proposed changes. Quick summary of AREC's memo: until 2020, the Texas and federal versions of Rule 404(b) were substantially the same. Last year, Federal Rule 404(b) was amended to impose additional notice requirements on the prosecution in a criminal case. AREC supports amending our state rule to track the federal changes. AREC believes that the expanded notice requirements imposed on prosecutors by the new federal rule will promote important interests (ie., will better protect defendants in criminal cases).

Our subcommittee was unanimous in agreeing with AREC's proposed changes to TRE 404(b). A redlined version of the proposed changes can be found in AREC's memo (attached). We did want to flag for the entire committee that the proposed changes to TRE 404(b) would only be applicable in criminal cases, which raises questions for us about the extent of input the Court may want to seek from the Court of Criminal Appeals and/or from lawyers and lower court judges who routinely handle criminal matters. But we thought those questions were beyond the scope of our charge so we only note them here.

### **TRE 601(b)**

A second attached memo from AREC (dated September 7, 2021) details the reasons for the proposed repeal of TRE 601(b), known as the Dean Man's Rule. Also attached is an excerpt from Professor Steven Goode's evidence treatise that addresses the rule. Quick summary of AREC's memo:

Current Rule 601(b) (as was true of prior versions of the rule, and of the statute on which the rule was originally based) is said to be "aimed at preventing one party from gaining an unfair advantage over an opponent by testifying to conversations and transactions with the deceased, which the deceased was, of course, unable to controvert," as Steven Goode explains in his treatise. Or, as AREC explains, 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.” But for almost a century the rule has long been seen as problematic and unnecessary: *problematic* for a number of reasons, including both that it is written so confusingly that it rarely achieves its intended purpose and that it can be applied in ways that makes it harder to successfully establish even bona fide claims against an estate; and *unnecessary* because, as AREC’s memo notes, even if the rule is abolished, other extant admissibility rules still apply, including, *e.g.*, hearsay and the statute of frauds. Only a minority of states still maintain the rule. AREC recommends repealing the rule entirely.

Our subcommittee was unanimous in supporting changing the rule. All but two of us fully supported AREC’s proposal to repeal the rule entirely. However, two of the subcommittee members suggest either amending the rule, as indicated below, or including some sort of instruction to the jury about not being required to accept uncontradicted testimony about oral statements made by someone now deceased. As to the former suggestion of amending the rule, here is the suggestion that has been made that two of our subcommittee support. The rest of our subcommittee disagrees with this proposed amendment because we think it would effectively retain the Dead Man’s Rule (along with all of the problems it long has caused).

*Current Rule 601(b):*

**(b) The “Dead Man’s Rule.”**

**(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:

**(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.

*Proposed amendments to Rule 601(b) from two members of the subcommittee:*

(b) Testimony concerning oral statements allegedly made by a testator, intestate, deceased or ward.

- 1) A person is competent to testify about an oral statement allegedly made by a testator, intestate, ward, or decedent.
- 2) If the person's testimony about an oral statement under (b)(1) is not corroborated by other evidence, the finder of fact is not required to accept the testimony though it is uncontradicted. In a jury trial the court, on timely request, must modify its instruction to the jury that it is the sole judge of the credibility of witnesses and the weight given their testimony to incorporate this rule.