J. Wallace

5-18-84
Committee meeting

AGENDA FOR MEETING

10 A.M., FRIDAY, MAY 18, 1984, ROOM 104, TEXAS LAW CENTER

COMMITTEE ON ADMINISTRATION OF RULES OF EVIDENCE IN CIVIL CASES

The members of the committee and judges of Texas Courts down through the county level have been asked for criticisms of, and problems with, the Texas Rules of Evidence. Apparently the Rules have been generally favorably received by bench and bar.

A few problems have been called to our attention. Reporters have submitted proposals for rule changes in response to these problems. A proposed change may or may not be favored by the reporter, the proposal simply being one possible solution to the problem raised.

If a member of the committee plans not merely minor amendment, but substantial redrafting, it is suggested that he reword and bring about forty-five copies to the meeting. Minor amendment creates little problem. Major redrafting in mid-air causes most of us to get lost.

Rule 103(b). Record of offer and ruling.

Adopted

The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may, or at request of ~~either counsel~~ any a party shall, direct the making of an offer in question and answer form.

Reporter's Note: On occasion proponent's defective or weak position might be hidden behind a puffed general offer. Opposing counsel may want to force the offer into question and answer form to expose such weakness for the record.

On occasion proponent's evidence should be admitted. By insisting that his offer be put into question and answer form, he better protects the record and, perhaps, even causes the trial judge to change his mind and admit the evidence.

Inserting the word either removes ambiguity.

Rule 106. Rule of Optional Completeness. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions. ~~The court shall exercise reasonable control over implementation of this rule to make the presentation of the evidence effective for the ascertainment of truth and to avoid needless consumption of time.~~

Reporter's note. Rule 106 came from federal 106, the latter entitled "Remainder of or Related Writings or Recorded Statements." In 1982 the reporters to the Liaison Committee recommended complete codification of the Texas common law doctrine of optional completeness and entitled 106 "Rule of Optional Completeness." The Liaison Committee rejected that codification and adopted federal 106. But everyone forgot to change the title back to the federal title. That change should be made.

The question has arisen whether rule 106 includes depositions. The federal cases treat 106 as including depositions.

One judge has expressed concern about frequent interruptions by the adverse party. While the rule permits a prompt supplying of context, the adverse party might abuse by insisting on a sentence by sentence procedure. The final sentence of the proposal above makes clear the court's control, although that might be sufficiently indicated by rule 610(a), from which the proposal is taken.

Further, the question has arisen whether "remainder of or related writings" includes impeachment. Likely there are cases where impeachment matter is clearly a part of necessary context and cases where it would not be. The last sentence in the

proposal, as well as the phrase from the original rule, "...which ought in fairness to be considered contemporaneously with it," may give the court adequate guidance.

Rule 106. Rule of Optional Completeness; Rule Permitting Prompt Introduction of Remainder of or Related Writings or Recorded Statements.

(a) Rule of optional completeness. When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration, conversation, writing or recorded statement is given in evidence, any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence. "Writing or recorded statement" includes depositions.

(b) Rule permitting prompt introduction of remainder of or Related Writings or Recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions. [The court shall exercise reasonable control over implementation of this rule to make the presentation of the evidence effective for the ascertainment of truth and to avoid needless consumption of time.]

Reporter's note. An advisory committee is presently considering evidence rules for criminal cases and is considering codification of the common law rule of optional completeness. That advisory committee has asked our committee to consider a rule combining the optional completeness concept and the acceleration concept of federal and Texas 106. The above draft is such a proposal. It uses the language of art. 38.24, Texas Code of Criminal Procedure, in part (a), changed to include recorded statements and to make clear that depositions are included. Doubtless the language of 38.24 could be improved, but one advantage to using existing language is to assure lawyers and judges that changes in the law are not intended.

See, generally, the reporter's note to alternate 106 above.

Rule 202. Determination of Law of Other States

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, rules, regulations, and ordinances and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review. The court's determination shall be subject to review ~~on appeal~~ as a ruling on a question of law.

Hutash → this would be interpreted as appeal of interlocutory ruling or writ of error and not to discretionary review in CCA.

Rule 203. Determination of the Laws of Foreign Countries

Adopted

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other

reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish to the opposing party or counsel copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish to the opposing party or counsel both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give the parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. ~~It's~~ The court's determination shall be subject to review on appeal as a ruling on a question of law.

Reporter's note. Rules 202 and 203 came at different times from different sources. It has been suggested that differences in the final sentence of each rule might lead to interpretation differences. The changes proposed are intended to produce uniform treatment.

How do you handle problem of judicial notice of ordinances unknown and unavailable to practicing lawyer.

Rule 204. Determination of Texas city and county ordinances, the contents of the Texas Register, the rules of agencies published in the Administrative Code.

Adopted

Judicial notice shall be taken of the ordinances of munici-

palities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the ~~judge~~ court sufficient information to enable ~~him~~ it properly to comply with the request, and shall give each adverse party all parties such notice, if any, as the ~~judge~~ court may deem necessary, to enable the adverse party all parties fairly to prepare to meet the request. The court's determination shall be subject to review on appeal as a ruling on a question of law.

Reporter's note. It may be argued that the provisions of city and country ordinances are judge business and not jury business.

The Administrative Procedure and Texas Register Act, art. 6252-13a, sec. 4(c) provides:

(c) The contents of the Texas Register are to be judicially noticed and constitute prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of the notation. Without prejudice to any other mode of citation, the contents of the Texas Register may be cited by volume and page number.

The Administrative Code Act, art. 6252-13b, sec.4 provides:

Sec. 4. The codified rules of the agencies published in the Texas Administrative Code, as approved by the secretary of state and as amended by documents subsequently filed with the office of the secretary of state, are to be judicially noticed and constitute prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of the notation.

~~Rule 401. Test of Relevancy~~

~~(a) "Materiality"--inquires whether there is any rational relationship or pertinence of the proferred evidence to any~~

~~provable or controlling fact issue in dispute.~~

~~(b) "Relevancy" inquires whether the proffered evidence has probative value tending to establish the presence or absence, truth or falsity, of a fact.~~

~~(c) TEST: Is it material? If not, exclude. If yes, and only in that event, is it relevant? If not, exclude. If yes, admit.~~ Much relevant evidence is not admissible, hence for material, so the test is not ~~exactly~~ literally correct.

adopted 12-3

Rule 401.

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Reporter's note. The proposal would replace the Supreme Court's rule 401 with the federal rule 401. Federal rule 401 was recommended by the Liaison Committee in 1982 but the recommendation was rejected by the Supreme Court. One source has strongly urged that our committee ask that the Supreme Court reconsider.

Rule 503. Lawyer-Client Privilege

adopted proposed (b)

Comment. This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. See TEX.R.CIV.P. ~~186a~~ 166b.

Reporter's note. The 1984 amendments to the Rules of Civil Proce-

necessary because it commits errors such procedural as in rules, can prevail & the comment is necessary to draw readers attention to what comment

dure transferred 186a into 166b.

Another reporter's note. Work-product. The Comment to Rule 503 notes that it does not restrict the scope of the work-product doctrine and cites to Texas Rule of Civil Procedure 186a. The language of the Comment to the integrated code that was recommended last year by the Liaison Committee cited article 38.10 of the Code of Criminal Procedure as well. However, the Advisory Committee which is considering an integrated code again this year voted to recommend repeal of article 38.10 of the Code of Criminal Procedure and consequently to delete reference to that provision in the Comment to an integrated Rule 503. The suggestion was then made in that committee that, in the interest of parallelism, the reference to the Texas Rules of Civil Procedure be deleted as well. Even if this committee recommends retention of the reference to the rules of civil procedure in the comment, account should be taken of the recent changes in those rules. Rule 186a has been repealed. Work product is now covered in Rule 166b.

Proposal A:

> Comment. This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. ~~See TEX. R. CIV. P. 186a.~~

Proposal B:

> Comment. This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. See TEX. R. CIV. P. ~~186a~~ 166b.

Rule 503. Lawyer-Client Privilege

(a) Definitions.. As used in this rule:

(4) A "representative of the lawyer" is ~~(1) one~~ employed by the lawyer or Client ~~Consulted by the lawyer~~ to assist the lawyer in the rendition of professional legal services; ~~or (2) an accountant who is reasonably necessary for the lawyer's rendition of profession [sic] legal services.~~

Reporter's note. Several questions about the precise meaning of Rule 503 were raised at the April meeting of the Advisory Committee of the Subcommittee on Criminal Matters of the Senate Select Committee on the Judiciary. Although no major issues are involved, there appeared to be some sentiment in the committee

that clarification is desirable.

Definition of "representative of the lawyer." Rule 503(a)(4)(1) defines "representative of the lawyer" as "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." As was noted at the committee meeting, this language leaves communications between a client and an expert consulted to assist in the rendition of legal services unprotected if the expert was employed by the client instead of by the lawyer. This problem was addressed by Professor Sharlot and me in our Houston Law Review article on Article V. We argued there that the phrase "employed by the lawyer" should be given a broad reading:

> any expert employed at the lawyer's behest should be considered "employed by the lawyer," even if his fee is paid directly by the client. Otherwise, the applicability of the privilege will hinge on the formalism of whether the expert is paid directly by the client or indirectly by the client as reimbursement to the attorney for expenses.

The Supreme Court's addition of sub-paragraph (a)(4)(2), which makes specific reference to accountants, may well have been prompted by the requirement that the consultant have been employed "by the lawyer." A reasonable reading of Rule 503 as it now stands is that an accountant employed by the client to assist in the rendition of legal services may be considered a representative of the lawyer, but anyone else must be employed by the lawyer to achieve such status. No compelling justification can be offered for singling out accountants for such special treatment. This problem can be resolved simply by eliminating the phrase "by the lawyer." Sub-paragraph (a)(4)(2) would then be surplusage and could be eliminated as well.

Proposal A:

> (4) A "representative of the lawyer" is: (1) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or (2) an accountant who is reasonably necessary for the lawyer's rendition of profession [sic] legal services.

Proposal B:

> (4) A "representative of the lawyer" is: (1) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or (2) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

Proposal C:

> (4) A "representative of the lawyer" is: (1)(i) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or ~~(2)~~(ii) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

only change from proposal sub clause (1) to (2) + (i) to (ii)

Recommendation. I would recommend Proposal A. Proposal B would likely achieve the same result, but would leave courts and lawyers to ponder over the meaning of the accountant sub-paragraph. This may result in unwarranted distinctions being drawn between accountants and others consulted by lawyers and clients. A few editorial changes have also been suggested in each of the proposals. Proposal C consists solely of editorial suggestions.

Rule 503. Lawyer-Client Privilege

~~(d) The prohibitions of this section continue to apply to confidential communications or records concerning any client irrespective of when the client received the services of an attorney.~~ lawyer

Former paragraph (d) was eliminated as unnecessary. This deletion was not intended to change the common law rule that the privilege is not extinguished by termination of the lawyer/client privilege.

Reporter's note. Sub-paragraph (d). Questions were raised in the Advisory Committee meeting as to the significance of sub-paragraph (d). This provision was not part of the Liaison Committee's recommendation to the Supreme Court last year. The language is derived from the statutory psychotherapist- and physician- patient privileges. It also appears in Rules 509 and 510.

Two possible problems were noted with the language. First, what, if any, meaning is to be given to the words "continue to" preceding "apply." Second, what is the significance of the addition of "or records" after "confidential communications" when reference throughout the rest of the rule is made simply to "communications." These comments possess a great deal of merit. Presumably, inclusion of sub-paragraph (d) was intended to emphasize that the privilege does not cease with the termination of the attorney-client relationship. Sub-paragraph (c), which states that the privilege may be claimed by, inter alia, the representative of a deceased client or a corporation no longer in existence, makes clear that Rule 503 incorporates the common law rule that the privilege outlives the attorney-client relationship. Neither the Federal Rules nor the code of any other jurisdiction includes a provision equivalent to sub-paragraph (d), yet I know of no controversy which has arisen due to its absence.

Such a provision is necessary for the psychotherapist- and

physician-patient privileges. Because they were newly-created, guidance was required as to whether communications made prior to the enactment of the privilege should be protected. No such necessity exists, however, with regard to the lawyer-client privilege. Like the spousal and clergyman communication privileges (neither of which has an equivalent provision), the lawyer-client privilege antedated the code. Given the potential for "creative" interpretation of the current sub-paragraph (d), it would be advisable to delete it or, at the least, modify its language.

Proposal A:

> Delete sub-paragraph (d). Redesignate sub-paragraph (e) as (d).

Proposal B:

> Delete sub-paragraph (d) in its present form and substitute the following:
> (d) Communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer-client relationship.

Proposal C:

> (d) The prohibitions of this section continue to apply to confidential communications or records concerning any client irrespective of when the client received the services of an attorney.

Recommendation. I would recommend that Proposal A be adopted.

Rule 505. Communications to Clergymen

Reporter's note. Two questions have been raised with regard to this privilege. The first concerns the scope of the definition of clergyman; the second, whether the privilege is waived when the communicant calls the clergyman to testify as to character.

Definition of clergyman. Judge Martin has suggested that uncertainty exists as to whether "certain lay functionaries" in the Roman Catholic Church fall within the ambit of Rule 505. The rule currently defines a clergyman as a:

> minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting him.

This definition is identical to Uniform Rule of Evidence 505, which in turn modified the proposed Federal Rule by adding "accrediteed Christian Science Practitioner."

The Advisory Committee's Note to the proposed Federal Rule is instructive on this issue posed. "A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis." Applicability of the privilege thus requires an inquiry into the nature of the activities performed by the lay functionaries and the regularity with which they are performed. Note that Advisory Committee's Note makes clear that the privilege is not restricted only to communications penitential in character. All confidential communications made to a clergyman in his role as spiritual advisor are protected.

I do not believe that an amendment to the rule is a desirable response to this problem. First, I would not know how to draft language to clarify the applicability of the privilege to "certain lay functionaries." Second, as the Advisory Committee's Note states, devising a more specific definition of clergyman does not appear possible given the lack of licensing and certification procedures for clergymen.

Recommendation. No change. adopted

Rule 509. Physician/Patient Privilege

(a) Definitions. As used in this rule:

(1) . . .

adopted 8-7

(2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) . . .

(b) General rule of privilege.

(1) . . .

(2) . . .

(3) The prohibitions provisions of this ~~section~~ rule ~~continue to~~ apply ~~to confidential communications or records concerning any patient irrespective~~ even if ~~of when~~ the patient received the services of a physician prior to the enactment of the Medical Practice Act, Acts of the 67th Legislature, 1st Called Session, 1981.

adopted

(c) Who may claim the privilege.

(1) The privilege of confidentiality may be claimed by the patient or ~~physician~~ by a representative of the patient acting on the patient's behalf.

adopted

. . .

(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:

. . .

(7) in ~~when the disclosure is relevant to~~ an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing ~~or hospitalization proceeding under~~: under

adopted

[sub-sections (A) through (D) remain the same].

Reporter's note. Several changes ought to be considered to Rule 509. The current physician/patient privilege is taken in large part from its statutory predecessor, Tex. Rev. Civ. Stat. Ann. art. 4495b, 5.08, which in turn was modeled on the statutory psychotherapist-patient/client privilege, Tex. Rev. Civ. Stat. Ann. art. 5561h. In several respects, however, the language of the physician/patient and psychotherapist-patient/client differs, for no apparent reason. The physician-patient privilege should, therefore, be amended to bring it into line with the psychothera-

pist (and in some instances, the attorney-client) privilege.

Second, the Legislature last session amended the language of sub-paragraph (d)(7), which creates an exception to the privilege for civil commitment proceedings. The purpose of the amendment was to conform the language of the privilege to the terminology of the new Mental Health Code. Rule 509 should be modified to reflect this change.

Third, the problems that have occurred as a result of the language of Rule 510(b)(4) (concerning the applicability of the psychotherapist-patient/client privilege to communications made prior to its enactment) are certain to arise under the identical language of Rule 509(b)(3).

Divergence between Rules 509 and 510. In several instances, differences in the language between Rule 509 and 510 cannot be readily explained.

1. Rule 509(a)(2) provides that a physician is a person licensed to practice medicine, but does not stipulate whether he or she may be licensed outside of Texas. In contrast, Rule 510 is explicit in this regard, including within the definition of "professional" any person authorized to practice medicine anywhere in the nation or licensed by Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder. In addition, Rule 503 defines a lawyer as one licensed to practice anywhere in the nation. Rule 509 should be amended to make clear that non-Texas physicians are to be deemed "physicians" for purposes of the privilege. Otherwise, confidential communications made by a patient in another jurisdiction to a physician licensed in that jurisdiction would not be privileged in subsequent litigation in Texas, even if the former jurisdiction recognized a physician-patient privilege. Communications made to physicians called into Texas for consultation or to commissioned or contract surgeons of the military or Public Health Service, see Tex. Rev. Civ. Stat. Ann. art. 4495b, 3.06(b)(8), (11), would likewise be unprotected.

Another point of divergence occurs in the same sub-paragraph. Rule 510 includes within its definition of "professional" one whom the patient/client reasonably believes to be a professional. Similarly, Rule 503 provides that a lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law. No such provision is found in Rule 509. Because there is no apparent reason for the different treatment of physicians, Rule 509 should be amended.

2. Rule 510(c) provides that the psychotherapist privilege may be claimed by the patient/client or by a representative or the professional, acting on the patient /client's behalf. Rule 509 states that the privilege may be claimed by "the patient or physician acting on the patient's behalf" and, redundantly, that "The physician may claim the privilege . . . but only on behalf

of the patient." Undoubtedly this resulted from oversight, first, in the drafting of the statute and second, in codifying the statute in rule form. The provision should be amended to provide that a representative of a patient may claim the privilege on behalf of the patient.

Recommendations:

1. Amend Rule 509(a)(2) to read:
   A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

2. Amend Rule 509(c)(1) to read:
   The privilege of confidentiality may be claimed by the patient or ~~physician~~ by a representative of the patient acting on the patient's behalf.

Legislative amendment. Last session, Senate Bill 375 was enacted, adding an exception to the physician/patient privilege in criminal proceedings and modifying the language of exception (d)(7) so as to correspond to the language of the new Mental Health Code. Rule 509(d)(7) ought to be amended accordingly.

Recommendation. Amend Rule 509(d)(7) to read:
in ~~when the disclosure is relevant to~~ an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing or hospitalization ~~proceeding~~ under:
[sub-sections (A) through (D) remain the same].

As is noted in Professor Sharlot's discussion of Rule 510, a question has been raised as to the applicability of the psychotherapist privilege to communications made prior to the effective date of Tex. Rev. Civ. Stat. Ann. art. 5561h. Although Rule 510(b)(4) addresses that question, it apparently fails to do so with sufficient clarity, as evidenced by the different answers provided by the Supreme Court and the Court of Criminal Appeals. The same question undoubtedly will arise under the physician/patient privilege. Given that Rule 509 contains language nearly identical to that of Rule 510(b)(4), an amendment is perhaps in order.

Recommendation. Amend Rule 509(b)(3) to read:
The ~~prohibitions~~ provisions of this ~~section~~ rule ~~continue to~~ apply ~~to confidential communications or records concerning any patient irrespective~~ even if ~~of~~ when the patient received the services of a physician prior to the enactment of the Medical Practice Act, Acts of the 67th Legislature, 1st Called Session, 1981.

Rule 511. Waiver of Privilege By Voluntary Disclosure.

A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his character or a trait of his character. This rule does not apply if the disclosure itself is privileged.

Reporter's note. Waiver. Judge Martin observes that clergy are often called as character witnesses for their parishioners, especially in family law cases. However, he observes that after testifying on direct examination to the good character of a parishioner, the clergyman will claim the privilege on cross-examination. Judge Martin comments that this seems unfair and states that it should be made clear that taking the stand and offering such testimony amounts to a waiver of the privilege.

These observations are, I believe, well-founded. The general rule governing waiver of a privilege, Rule 511, only addresses waiver via disclosure of a significant part of the privileged matter. By its terms, therefore, waiver does not occur when the testimony is limited to a conclusory assertion by the clergyman as to the parishioner's character.

This problem is not, however, limited to character testimony offered by the clergy. A defendant in a civil assault action might, for example, call his psychotherapist or spouse to testify to his character for peacefulness. Here too, cross-examination might be stymied by a claim of privilege. If this problem is to be addressed by a rule change, therefore, Rule 511 is the proper candidate for amendment.

Recommendation. Rule 511 should be amended to read as follows:

> A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his

character or a trait of his character. This rule does not apply if the disclosure itself is privileged.

Rule 601. Competency and Incompetency of Witnesses

(a) Every person is competent to be a witness except as otherwise provided in these rules. Incompetency under these rules extends to hearsay statements, regardless of the applicability of an exception, and to statements offered under 801(e). The following witnesses shall be incompetent to testify in any preceeding subject to these rules:

(1) Insane persons. Insane persons who, in the opinion of the Court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the Court, were in that condition when the events happened of which they are called to testify.

(2) Children. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

Reporter's note. Problem: Applicability of child incompetency rule, 601(a)(2), to (a) hearsay statements admitted under an exception; (b) nonhearsay utterances.

Proposed solutions: (a) It would seem highly illogical to admit for its truth a hearsay statement of a child who would be incompetent to testify in front of the jury under the standard of Rule 601(a)(2). Insofar as this is not apparent or readily inferable from the Rules in their present form, it would seem most logical to attack this problem in Rule 601. This could be done in either of two ways: (1) amend the text of Rule 601(a), inserting after the word "testify" in the second sentence: ",

and their hearsay statements shall be inadmissible regardless of the applicability of an exception,"; (ii) add a comment to Rule 601(a) that "The incompetency under this Rule extends to hearsay statements, regardless of the applicability of an exception."

(b) If a statement is nonhearsay under the definition in Rule 801(a)-(d) because it is not a statement offered in evidence to prove the truth of the matter asserted--such as a verbal act--then presumably it would not be subject to the rationale for the testimonial incompetencies created in Rule 601(a). To the extent that this is not inferable from the Rules in their present form, it could be pointed out by a comment either under Rule 601(a) or Rule 801 or both. To provide for this matter in the text of the Rules would be difficult.

Rule 601. Competency and Incompetency of Witnesses

(b) In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. ~~The taking of a party's deposition shall not constitute a calling of the opposite party to testify.~~

~~discovery relating to the~~

Reporter's note. Under existing caselaw, deposing the opposite party constitutes a "calling of the opposite party" and waives protection of the statute. It has been pointed out that this is the only instance when discovery waives protection. This is felt to be anomalous and should be corrected with the proposed change.

Rule 610(d). Redirect, recross and further examinations.

Redirect examination shall be a matter of right and its scope limited only as directed by the trial court in its discretion. Introduction of new matter in any examination makes responding examination a matter of right. Except as provided, permission for, and the scope of, recross and further examinations shall be within the trial court's discretion.

Reporter's note. The above proposal was prompted by a letter from a trial judge stating in part: "A young attorney jumped up and objected to an attorney going into a matter on re-direct that was not covered by the cross-examination. Rule 610(b) covers cross-examination, but does not speak on the subject of re-direct examination."

Rule 612. Prior Statements of Witnesses: Impeachment and Support

(a) Examining witness concerning prior inconsistent statement. In examining a witness concerning a prior inconsistent statement made by him, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to

explain or deny such statement. If written, the writing need not be shown to him at that time, but on request the same shall be shown or disclosed to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

(b) Examining witness concerning bias or interest. In impeaching a witness by proof of circumstances or statements showing bias or interest, on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to him at that time, but on request the same shall be shown or disclosed to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

Reporter's note. The inserted sentence is intended to clear up ambiguity and to make clear that past Texas practice is carried forward by the new rules. This is in accord with Federal Rule 613(a).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

(a) Disclosure of facts or data. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data ~~on--cross-examination~~ ,subject to subparagraphs (b) through (d).

(b) Voir dire. Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered may, in the discretion of the court, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the expert does not have a sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinioin or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment. This rule does not preclude a party from conducting a voir dire examination into the qualifications of an expert.

Reporter's note. To the extent that the purposes of the proposed changes are not apparent, Professor Steven Goode will elaborate at the May 18 meeting.

Rule 803(6). Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not. The nature or content of an opinion or diagnosis shall not affect the admissibility of a record that otherwise meets the requirements of this provision.

Reporter's note. Problem: Uncertainty as to continued viability, if any, of Loper v. Andrews, 404 S.W.2d 300 (Tex. 1966).

According to Wellborn, 20 Hous. L. Rev. at 520-21, Rule

803(6)

22 "clearly" reject Loper v. Andrews; this is not.

entirely clear from the text of the Rule itself; it is necessary to resort to the Federal Advisory Committee's Note to find that the inclusion of the terms "opinions" and "diagnoses" is intended specifically to overturn cases like Loper.

Possible solutions: (1) Do nothing. Eventually the demise of Loper will become well-known. It is not possible to spell out every application of every rule.

(2) Add a sentence to the text of the Rule, such as the following: "The nature or content of an opinion or diagnosis shall not affect the admissibility of a record that otherwise meets the requirements of this provision."

(3) Add a comment to the Rule, such as the following: "This provision rejects the doctrine of Loper v. Andrews, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of 'reasonable medical certainty.'"

Rule 803(6). Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not. That the record complies with the foregoing requirements is a sufficient showing of the qualifications of any declarant to give the opinion

included in the record.

Reporter's note. Problem: Is it necessary to establish the qualifications of an expert whose opinion or diagnosis is offered in the form of an entry in a record under Rule 803(6)?

Professor Graham, writing on the identical (for these purposes) Federal Rule, says: "Whether the qualifications of an expert witness whose opinion is contained in the record must be affirmatively established depends upon the circumstances of the particular case." M. Graham, Handbook of Federal Evidence Sec. 803.6, at 823 (1981). The federal cases he cites appear to support his conclusion that "it depends."

Possible solutions: Do we want a hard and fast rule on this point? We can easily insert language that if an expert opinion appears in a record, some competent evidence must appear that the expert is qualified to give an opinion on the matter in question. Or, we can provide that there is no such requirement. Neither seems desirable. Language that "it depends" or is a matter of discretion, etc., is probably worthless at best.

No recommendation.

Rule 803(6). Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized

activity whether conducted for profit or not. Only routine records are covered by this provision. It does not cover, for example, a medical narrative prepared by a physician at an attorney's request.

Reporter's note. Problem: "Does Rule 803(6) apply to medical narratives prepared by a physician at an attorney's request?"

The answer to this question is "No." Like its predecessor, Tex. Rev. Civ. Stat. Ann. art. 3737e, Rule 803(6) only covers "routine" records--"if it was the regular practice of that business activity [here, practicing medicine] to make the . . . record." Moreover, the case posed would clearly invoke the proviso, "unless . . . the method or circumstances of preparation indicate lack of trustworthiness."

Possible solutions: (1) Do nothing. The present Rule addresses this issue clearly enough.

(2) Add a comment such as the following: "Only routine records are covered by this provision. It does not cover, for example, a medical narrative prepared by a physician at an attorney's request."

Rule 803(6). Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, adopted or made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to adopt or make the memorandum,.....

Reporter's note. One judge suggested that a company might receive merchandise and use the incoming invoice as the receiving company's permanent record of the matters stated in the invoice.

The judge suggested that adoption should be included in 803(6) as well as make.

Rule 902. SelfAuthentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(10) Business records accompanied by affidavit.

(a) Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such records or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who

file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause. A counteraffidavit shall not affect admissibility.

Reporter's note. One judge has been treating a counteraffidavit as nullifying the affidavit provided for in 902(10) (a). This has forced the proponent of the business records to authenticate at trial by live witness. The judge reports that proponent has always been able to get the records in with the live witness authentication, so that the only practical result of the counter-affidavit has been to hassle proponent of the records. If opponent has merit to his position that something in the affidavit is false, the philosophy of the rule would require him to offer contrary evidence at trial, thus making a fact issue at trial.

Rule ____?

Reporter's note. Problem: (a) Should Tex. Rev. Civ. Stat. Ann. art. 3737h be incorporated into the Rules? (b) Whether or not it is brought into the Rules, should some measure be taken to address the problem, reported by a number of attorneys, of thwarting of the provision by abusive use of counter-affidavits?

Proposed solutions: (a) It seems inappropriate to put this provision in the Rules because it speaks to the sufficiency as well as the admissibility of evidence. There is no problem with its continued applicability, given (i) it is not on the repealer; (ii) Rule 802 acknowledges statutory hearsay exceptions like this one; (iii) Rule 902(11) recognizes statutory authentication provisions like this one (see also Rule 902(8)). If art. 3737h were brought into the Rules, it would have to be chopped into pieces, rewritten, and parceled among Articles VIII and IX.

(b) On this point, the Committee could recommend legislation amending art. 3737h to prevent abusive use of counter-affidavits. Amendments for this purpose could take any of several forms. For example, section 1(b) could be changed so that the mere filling of a counter-affidavit would not render the

original affidavit null; instead, the counter-affidavit might simply be admissible contrary evidence. Thus, the party seeking to prove necessity and reasonableness of charges could still choose to rely on affidavits, or not, as a matter of trial strategy. Another possible approach would be to leave the article substantially as it is and add significant sanctions for the filing of groundless counter-affidavits. The problem with the latter approach, of course, is that it is not likely to work in practice because the judges have to actually impose the sanctions in order for them to work.

COMMITTEE ON ADMINISTRATION OF RULES OF EVIDENCE IN CIVIL CASES

MEETING OF MAY 18, 1984

RESPONSE TO RECOMMENDED CHANGES TO THE TEX. EVID. CODE
by Prof. Fred C. Moss, S.M.U.

1. Criminal Rule 106 (pg. 3)
Horrible language. What is the difference between "part of an act, etc." [(a), 1st sent.], and "a detailed act" [(a) - 2d sent.]??
RECOMMENDATION: ELIMINATE THE WORD "DETAILED" (at least).

2. RULE 503 (d) (pg. 10)
Proposal "A" [pg. 11] is ok [delete (d)].
BUT I like prop. "B" w/ the following amendment:

(d) Except as otherwise provided in this Rule . . . .

REASON: Why leave the rule to implication from para. (c)??

3. RULE 511 (pg 16)
The proposed amendment seems too broad. Suppose D is on trial in 1984 for DWI and calls his priest and wife to testify that he is a sober, temperate person. Does this mean that during an unrelated trial in 1986 (or in its discovery phase) the preacher and D's wife will be compellable to testify to confidential commos. w/ D in 1983 regarding his past fraudulent activities??? The waiver must be limited to the subject matter of the disclosure.

RECOMMENDATION: [add between the first and second sentence] CALLING A PERSON TO WHOM PRIVILEGED COMMUNICATIONS HAVE BEEN MADE TO TESTIFY AS TO THE CHARACTER OF THE HOLDER OF THE PRIVILEGE SHALL CONSTITUTE CONSENT TO THE DISCLOSURE OF PRIVILEGED MATTERS PERTINENT TO THE CHARACTER TRAIT ABOUT WHICH THE WITNESS TESTIFIES.

4. RULE 601 (a) (pg 17)

AGREE w/ the recommendation except its language. "Incompetency" per Rule 601-606 applies to persons, not statements. Thus the proposed sentence should read,

"INCOMPETENCY UNDER THESE RULES EXTENDS TO OUT OF COURT DECLARANTS, REGARDLESS OF THE APPLICABILITY OF RULES 801(E), 803, OR 804 TO THEIR STATEMENTS.

[or]

Incompetency under these Rules extends to declarants of [out of court] statements offered under the provisions of Rules 801(e), 803 and 804.

[or]

INCOMPETENCY UNDER THESE RULES EXTENDS TO DECLARANTS OF STATEMENTS MADE OTHER THAN WHILE TESTIFYING AT THE TRIAL OR HEARING , AND OFFERED IN EVIDENCE UNDER RULES 801(e), 803, or 804.

5. RULE 601 (b) (PG. 18)

OK - But remove the superfluous comma, line 4.

6. RULE 610(d) (pg. 19)

RECOMMENDATION: [in lieu of the 1st sentence]
REDIRECT EXAMINATION SHALL BE PERMITTED AS A MATTER OF RIGHT AND IS LIMITED TO MATTERS REFERRED TO ON CROSS-EXAMINATION. NEW MATTERS MAY BE INQUIRED INTO ON REDIRECT EXAMINATION ONLY AS PERMITTED BY THE TRIAL COURT IN ITS DISCRETION. [Rest the same.]

COMMENT: The above proposal states the Texas law with regard to the scope of redirect more clearly than the reporter's proposal, but accomplishes the same goal. The reporter's draft fails to give trial courts a clear understanding of where the "base line" is for ruling on objections like the one raised in the Reporter's Note on pg. 19.

7. RULE 902 (PG. 26)

Counteraffidavits - Do not cut off the use of counteraffidavits altogether. Instead, throw the burden of proof upon the opponent of the record. This could be done by creating a presumption that a record supported by an affidavit from the custodian is admissible unless the opponent of the record offers sufficient evidence to rebut it.

I submit that the issue of whether the report complies with Rule 803(6) is a question of law for the judge under Rule 104(a). Therefore, the Reporter's proposal, which would throw the matter into the jury's lap at trial is unwise.

RECOMMENDATION: [in lieu of the proposed last sentence]: A RECORD SUPPORTED BY AN AFFIDAVIT COMPLYING WITH THE REQUIREMENTS OF THIS RULE IS PRESUMED TO BE ADMISSIBLE UNLESS THE OPPONENT OF THE RECORD ESTABLISHES BY EVIDENCE OTHER THAN A COUNTERAFFIDAVIT THAT THE RECORD FAILS TO MEET THE REQUIREMENTS OF RULES 803 (6) OR (7).

[or]

NO CHANGE. Modifying the rules of evidence is not the way to remedy the abuse of affidavits by attorneys. The remedy is to discipline the abusers.

5-18-54
adopted

Rules 202. Determination of Law of Other States

[The ~~judge~~] A court upon its own motion may, ~~and~~ or upon the motion of ~~either~~ a party shall, take judicial notice of the ~~[common law,]~~ constitutions, public statutes, rules, regulations, ~~[and]~~ ordinances, ~~[and]~~ court decisions, and common law of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the ~~[judge]~~ court sufficient information to enable ~~[him]~~ it properly to comply with the request, and shall give the adverse party (all parties) such notice, if any, as the ~~[judge]~~ court may deem necessary, to enable the adverse party (all parties) fairly to prepare to meet the request. Judicial notice of such matters may be taken at any stage of the proceeding. ~~The rulings of the [judge] court on such matters shall be subject to review~~ (insert exact language, Rule 201(g)) The court's determination shall be subject to review as a ruling on a question of law.