AGENDA
JULY 19-20, 1996
SCAC MEETING

INDEX

CHART SHOWING ACTION TAKEN
BY SUPREME COURT ADVISORY COMMITTEE

RULE NO.	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
606 - CIV 606 - CRIM	Change rule to be same as TRCP Rule 327 - except committee approved adding that a juror may be called to testify as to whether juror was qualified to serve. Same was actually included in draft on TRCP 327.
204 - CIV 204 - CRIM	No change
407a - CIV	No change
413 - CIV (NEW)	No change - no new rule
510(d)(6) - CIV	Table - Richard Orsinger to give me information
703 - CIV	No change
902(10) - CIV	No change
514 - CIV (NEW)	Table
503(a)(2) - CIV	Table
509(d) & 510(d) - CIV	Richard Orsinger to give me recommendations on this - either add administrative proceedings in one or take it out in the other
412 - CIV	Table
702 - CIV 702 - CRIM	Table
182 CIV	No change
504 CRIM	Follow Code of Criminal Procedure Statute - rule to be presented to committee as drawn by joint effort of Evidence Committee of State Bar and Evidence Committee of Supreme Court Advisory Committee

DISPOSITION CHART
TEXAS RULES OF EVIDENCE
MATTERS RECEIVED SINCE MEETING
OF MARCH 15-16, 1996

RULE NO.	PAGE NO.	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
(NEW)	Unknown	Doris Stella Ramirez: Limit compensation that can be paid to expert witnesses	None	Not proper under Rules of Evidence and subject is legislative instead of matter of evidence or procedure
(NEW) Adoption of Federal Rule 706	Unknown	Robert M. Martin, Jr.: Recommends adoption of Federal Rule 706 allowing court appointed experts	None	Judges are not empowered to call witnesses and should not be so empowered - not proper role for state judge

DRAFT - JUNE 13, 1996

PROPOSED UNIFIED "TEXAS RULES OF EVIDENCE" COMBINING PREVIOUS CIVIL AND CRIMINAL RULES

Table of Rules

ARTICLE I. GENERAL PROVISIONS

ARTICLE II. JUDICIAL NOTICE

ARTICLE III. PRESUMPTIONS

[No Rules Adopted at This Time]

ARTICLE IV. RELEVANCY AND ITS LIMITS

ARTICLE V. PRIVILEGES

ARTICLE VI. WITNESSES

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

ARTICLE VIII. HEARSAY

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

ARTICLE I. GENERAL PROVISIONS

RULE 101. TITLE AND SCOPE

(a) **Title.** These rules shall be known and cited as the Texas Rules of Evidence.

(b) **Scope.** Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates)[1] in all courts of Texas, except small claims courts.

(c) **Special Rules of Applicability in Criminal Proceedings.** In criminal proceedings:

(1) hierarchical government shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law of England. Where possible, inconsistency is to be removed by reasonable construction.[2]

(2) these rules apply in the following proceedings to the extent matters of evidence are not provided for in the statutes which govern procedure therein or in another court rule prescribed pursuant to statutory authority:[3]

(A) Sentencing or punishment assessment by the court or the jury;

(B) Probation revocation;

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[1]This provision is from TEX. R. CRIM. EVID. 1101(a).

[2]This provision is from TEX. R. CRIM. EVID. 101(c). Does it make more sense for this paragraph to be designated paragraph (c) entitled "Hierarchial Government in Criminal Proceedings" and to renumber current paragraph (c) as (d) "Special Rules of Applicability in Criminal Proceedings" leaving (and renumbering) current subparagraphs (2) through (5) under paragraph (d)?

[3]All of subparagraph (2) is from TEX. R. CRIM. EVID. 1101(d). To follow the convention followed in the remainder of the proposed rules, the first letter in each sentence of the subparagraphs should be lower case and the sentence should not end with a period, but should have a semicolon. Example:

(A) sentencing or punishment assessment by the court or the jury;

(B) probation revocation;

* * *

This applies to subparagraph (3) as well.

(C) A hearing to proceed to judgment following deferred adjudication of guilt or conditional discharge;

(D) Motions to suppress confessions, or to suppress illegally obtained evidence under Texas Code of Criminal Procedure article 38.23;

(E) Proceedings conducted pursuant to Texas Code of Criminal Procedure Article 11.07.

(3) these rules, except with respect to privileges, do not apply in the following situations:[4]

(A) *Preliminary Issues of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(B) *Grand Jury.* Proceedings before grand juries.

(C) *These Miscellaneous Proceedings*:

(i) Application for habeas corpus in extradition, rendition, or interstate detainer proceedings;

(ii) A hearing under Texas Code of Criminal Procedure article 46.02, by the court out of the presence of a jury, to determine whether there is sufficient evidence of incompetency to require a jury determination of the question of incompetency;

(iii) Proceedings regarding bail except hearings to deny, revoke or increase bail;

(iv) A hearing on justification for pretrial detention not involving bail;

(v) Issuance of search or arrest warrant; or

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[4]All of subparagraph (3) is from TEX. R. CRIM. EVID. 1101(c).

The proposal as submitted by the SBOT Evidence Committee italicizes the paragraph headings in subparagraphs (A), (B), etc. I was of the opinion that the convention was to bold the first level (designated by small letters) and italicize the second level (designated by arabic numerals). But I do not know what the convention has been regarding any other levels.

In addition, this is the only instance of paragraph titles at this level in the proposed rules. Further, the titles are followed by colons rather than periods. (Example: "(A) Preliminary Issues of Fact:") Should we recommend deletion of the titles altogether? Deleting the titles is really a matter for the Court of Criminal Appeals.

(vi) Direct contempt determination.

(4) these rules with respect to privileges apply at all stages of all actions, cases, and proceedings.[5]

(5) evidence in hearings under the Texas Code of Military Justice, article 5788, shall be governed by that Code.[6]

Notes and Comments

"Criminal proceedings" rather than "criminal cases" is used since that is the terminology in the prior criminal rules of evidence. In subpart (b), "trials before magistrates" comes from prior Criminal Rule 1101b. In the prior criminal rules, both Rule 101 and Rule 1101 dealt with the same thing, viz, the applicability of the rules. Thus, Rule 101(c) has been written to combine them and eliminate Rule 1101. Unlike the prior criminal rules, there is no "Art. XII, Miscellaneous Provisions."

RULE 102. PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

RULE 103. RULINGS ON EVIDENCE

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) **Offer of Proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or additionally in criminal cases was apparent from the context within which questions were asked.

(b) **Record of Offer and Ruling.** The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury,

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[5]This provision is from TEX. R. CRIM. EVID. 1101(b).

[6]This provision is from TEX. R. CRIM. EVID. 1101(e).

its offer of proof. 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. The court may, or at request of a party shall, direct the making of an offer in question and answer form.

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Fundamental Error in Criminal Cases.** In criminal cases, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Notes and Comments

This rule is not meant to change the harmless error doctrines in Texas civil or criminal cases as specified in the Texas Rules of Appellate Procedure. No substantive change in the law is intended.

RULE 104. PRELIMINARY QUESTIONS

(a) **Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of Jury.** In criminal cases, hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or when an accused who is a witness in a criminal case so requests.

(d) **Testimony by Accused Out of the Hearing of the Jury.** The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

RULE 105. LIMITED ADMISSIBILITY

(a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

(b) When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part there of 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.

Notes and Comments

This rule is the federal rule with one modification. Under the federal rule, a party may require an opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party, rather than the opponent, to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the parties' own case. *Cf.* Tex. Code Crim. Proc. Ann., art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirements. *See also* Tex. R. Evid. 611(a).

RULE 107. 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, and 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, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

Notes and Comments

This rule is the former Rule 107, Tex. R. Crim. Evid., except that the example regarding "when a letter is read" has been relocated so as to more accurately indicate the provision it

explains. While this rule appeared only in the prior criminal rules, it is not so limited because it accurately reflects the common law rule of optional completeness in civil cases.

ARTICLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing Jury.** In civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In criminal cases, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

RULE 202. DETERMINATION OF LAW OF OTHER STATES

A court upon its own motion may, upon motion of a party in a criminal case may, or upon the motion of a party in a civil case shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage

of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Notes and Comments

This rule is not intended to alter the requirements of Sections 2002.022 and 2002.054 of the Texas Government Code.

RULE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party 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 all parties 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 all 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. The court's determination shall be subject to review as a ruling on a question of law.

RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, AND THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE.

A court upon its own motion may, or upon the motion of a party in a criminal case or upon the motion of a party in a civil case, shall, take judicial notice of the ordinances of municipalities 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 court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

ARTICLE IV. RELEVANCY AND ITS LIMITS

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.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally**. Evidence of a person's character or character trait is not admissible for the purpose of proving action conformity therewith on a particular occasion, except:

(1) **Character of Accused in a Criminal Case and of a Party Accused in a Civil Case of Conduct Involving Moral Turpitude.** Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) **Character of Victim in a Criminal Case and of Alleged Victim of Assaultive Conduct in a Civil Case.** In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) **Character of Witness.** Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) **Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

(c) **Character Relevant to Punishment in Criminal Cases.** In the penalty phase of a criminal trial, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of his character may be offered by an accused or by the prosecution. Nothing herein limits the provisions of Article 37.071, Code of Criminal Procedure.

RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation or Opinion.** In all cases in which evidence of a person's character or character trait of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or character trait of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses is relevant to prove that the

conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

(b) **Notification of Defect.** A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) in civil cases, a plea of *nolo contendere*, and in criminal cases, a plea of *nolo contendere* which was later withdrawn;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere* which was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or a plea of *nolo contendere* or which do result in a plea, later withdrawn, of guilty or *nolo contendere*. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.[7]

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

(a) **Reputation or Opinion Evidence.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) **Evidence of Specific Instances.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

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[7]The SBOT Evidence Committee has included this sentence as part of paragraph (4). It is not part of paragraph (4) in the current rules and arguably applies to paragraphs (1), (2), (3) and (4). If included as part of paragraph (4), I think it clearly only applies to paragraph (4). The SBOT Evidence Committee debated the matter and was of the opinion that the sentence was never intended to apply to paragraphs (1) through (3), but was supposed to apply only to paragraph (4).

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) **Procedure for Offering Evidence.** If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) **Record Sealed.** The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

Notes and Comments

Section (e) relating to the admissibility of evidence of promiscuous conduct of a child 14 years old or older has been deleted since the 1994 Texas Penal Code eliminated the former defense of promiscuity of a child.

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing

RULE 502. **REQUIRED REPORTS PRIVILEGED BY STATUTE**

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

RULE 503. **LAWYER-CLIENT PRIVILEGE**

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

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A representative of a client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of

professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege**. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or a representative of the client and the lawyer or a representative of the lawyer,

(2) between the lawyer and the lawyer's representative;

(3) by the client or a representative of the client or a lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client;

(5) among lawyers and their representatives representing the same client; or

(6) In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) **Who May Claim the Privilege**. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions**. There is no privilege under this rule:

(1) **Furtherance of Crime or Fraud**. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **Claimants Through Same Deceased Client**. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) **Breach of Duty by a Lawyer or Client**. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) **Document Attested by a Lawyer**. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness: or

(5) **Joint Clients**. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Notes and Comments

This rule contains the language used in both the prior civil and prior criminal rules. Court decisions, both before and after the adoption of the Tex. Crim. R. Evid. in 1986, indicate that the scope of the lawyer-client privilege is the same in civil and criminal cases. *See, e.g., Ballew v. State*, 640 S.W.2d 237 (Tex. Cr. App. 1980) and *Manning v. State*, 766 S.W.2d 551 (Tex. App. -- Dallas 1989), *aff'd.*, 773 S.W.2d 568 (Tex. Crim. App. 1989). To avoid confusion, the vestigial language of the last sentence of the prior Criminal Rule 503(b) is omitted.

This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. *See* Tex. R. Civ. P. 166b. The language of former paragraph (d) was deleted because it was deemed unnecessary. This deletion was not intended to change the common law rule that communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer/client relationship.

RULE 504. **HUSBAND-WIFE PRIVILEGES**

(a) **Definition**. A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.

(b) **General Rules**.

(1) **Confidential Communication Privilege**. A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.

(2) **Privilege Not to Testify in Criminal Cases**. In criminal cases:

(A) The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 610(b).

(B) Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(c) **Who May Claim the Privilege.** The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do is presumed. The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(d) **Exceptions to the Confidential Communication Privilege.** There is no confidential communication privilege:

(1) **Furtherance of Crime or Fraud.** If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) **Proceeding Between Spouses in Civil Cases.** In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.

(3) **Commitment or Similar Proceeding.** In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(4) **Proceeding to Establish Competence.** In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions to the Privilege Not to Testify in Criminal Cases.** The privilege of a person's spouse not be called as a witness for the state does not apply:

(1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or

(2) as to matters occurring prior to the marriage.

Notes and Comments

The present rule eliminates the spousal testimonial privilege for prosecutions in which the spouse is the alleged victim of a crime by the spouse. This is intended to be consistent with Article 38.10 of the Code of Criminal Procedure, effective September 1, 1995.[8]

[8] The SBOT Evidence Committee recommended this change both in 1989 and 1992. This is a significant change in the law and may be for the Court of Criminal Appeals to decide.

RULE 505. COMMUNICATIONS TO MEMBERS OF THE CLERGY

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

(1) A "member of the clergy" is 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 with such individual.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege**. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as spiritual adviser.

(c) **Who May Claim the Privilege**. The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

RULE 508. IDENTITY OF INFORMER

(a) **Rule of Privilege**. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assist in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim**. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

(c) **Exceptions**.

(1) **Voluntary Disclosure; Informer a Witness**. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) **Testimony on Merits.** If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case to which the public entity is a party, or on guilt or innocence in a criminal case, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, the court in a civil case may make any order that justice requires, and in a criminal case shall, on motion of the defendant, and may, on the court's own motion, dismiss the charges as to which the testimony would relate. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) **Legality of Obtaining Evidence**. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The judge shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

RULE 509. **PHYSICIAN/PATIENT PRIVILEGE**

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

(1) A "patient" means any person who consults or is seen by a physician to receive medical care.

(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) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) **Limited Privilege in Criminal Proceedings**. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

(c) **General Rule of Privilege in Civil Proceedings**. In a civil proceeding:

(1) Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed.

(2) Records of the identity, diagnosis, evaluation,or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.

(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann. art. 4590i (Vernon Supp. 1984).

(d) **Who May Claim the Privilege in a Civil Proceeding**. In a civil proceeding:

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

(2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(e) **Exceptions in a Civil Proceeding**. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, Tex. Rev. Civ. Stat. Ann. art. 4495b, or of a registered nurse under or pursuant to Tex. Rev. Civ. Stat. Ann. arts. 4526, 4527a, 4527b, and 4527c, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);

(6) when the disclosure is relevant in any suit affecting the parent-child relationship;

(7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under

(A) the Texas Mental Health Code Tex. Rev. Civ. Stat. Ann. art. 5547-1 *et seq.*;

(B) the Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann. art. 5547-300;

(C) Section 9, Chapter 411. Acts of the 53rd Legislature, Regular Session, 1953 (Tex. Rev. Civ. Stat. Ann. art. 5561c);

(D) Section 2, Chapter 643, Acts of the 61st Legislature, Regular Session, 1969 (Tex. Rev. Civ. Stat. Ann. art. 5561c-1);

(8) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in Sec. 1, Ch. 684, Acts of the 67th Legislature, Regular Session, 1981 (Tex. Rev. Civ. Stat. Ann. art. 4442c, Sec. 2).

(f) **Consent.**

(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor.or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (Tex. Rev. Civ. Stat. Ann. art. 5547-1 *et seq.*); the Mentally Retarded Persons Act of 1977 (Tex. Rev. Civ. Stat. Ann. art. 5547-300); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Tex. Rev. Civ. Stat. Ann. art. 5561c); Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Tex. Rev. Civ. Stat. Ann. art. 5561c-1); Chapter 5, Texas Probate Code; and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

Notes and Comments

This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by Tex. Rev. Civ. Stat. Ann. art 4495b, Sec. 5.08. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule.

RULE 510. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION IN CIVIL CASES

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

(1) "Professional" means any person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) reasonably believed by the patient to be included in any of the preceding categories.

(2) "Patient" means any person who:

(A) consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A representative of the patient is:

(A) any person bearing the written consent of the patient;

(B) a parent if the patient is a minor;

(C) a guardian if the patient has been adjudicated incompetent to manage his personal affairs; or

(D) the patient's personal representative if the patient is deceased.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

(b) **General Rule of Privilege.**

(1) Communication between a patient and a professional is confidential and shall not be disclosed in civil cases.

(2) Records of the identity, diagnosis, evaluation,or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases.

(3) Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose in civil cases the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(4) The provisions of this rule apply even if the patient received the services of a professional prior to the enactment of Tex. Rev. Civ. Stat. Ann. art. 5561h (Vernon Supp. 1984).

(c) **Who May Claim the Privilege.**

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

(2) The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** Exceptions to the privilege in court proceedings exist:

(1) when the proceedings are brought by the patient against a professional, including but not limited to malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) When the patient waives the right in writing to the privilege of confidentiality of any information, or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(6) when the disclosure is relevant in any suit affecting the parent-child relationship; or

(7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution as defined in Tex. Rev. Civ. Stat. Ann. art. 4442c, Sec. 2 (Vernon Supp. 1984).

Notes and Comments

This rule only governs disclosures of patient/professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by Tex. Rev. Civ. Stat. Ann. art. 5561h (Vernon Supp. 1984).

RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or a trait of the person's character insofar as such communications are relevant to such character or character trait.

RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) **Comment or Inference Not Permitted.** Except as permitted in Rule 504(b)(2)(B), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Claim of Privilege Against Self-Incrimination in Civil Cases.** Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present civil proceeding, of the privilege against self-incrimination.

(d) **Jury Instruction.** In criminal cases, except as provided in Rule 504(b)(2)(B) and in paragraph (c) of this Rule, upon request any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

(a) **General Rule.** Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding 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.

(b) **"Dead Man Rule" in Civil actions.** In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither part 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 trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying.instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

RULE 604. INTERPRETERS

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

Notes and Comments

See Rule 183, Texas Rules of Civil Procedure, regarding appointment and compensation of interpreters.

RULE 605. COMPETENCY OF JUDGE AS A WITNESS

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

RULE 606. COMPETENCY OF JUROR AS A WITNESS

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

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

RULE 607. WHO MAY IMPEACH

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

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

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

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

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

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

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

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

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

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

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

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

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

(d) **Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.

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

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

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

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

Notes and Comments

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that the witness' character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. This is prior Rule of Criminal Evidence 615.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

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

(c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Notes and Comments

The purpose of the 1988 amendment is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification ordinarily is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the cross-examination of a party by the party's own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying either

(1) while testifying;

(2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or

(3) before testifying, in criminal cases;

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

RULE 613. 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 the witness, 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 the witness at

that time, but on request the same shall be shown 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, 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 the witness at that time, but on request the same shall be shown 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.

(c) **Prior Consistent Statements of Witnesses.** A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).

RULE 614. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

(1) a party who is a natural person or in civil cases the spouse of such natural person;

(2) an officer or employee of a party in a civil case or a defendant in a criminal case that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

RULE 615. PRODUCTION OF STATEMENTS OF WITNESSES IN CRIMINAL CASES

(a) **Motion for Production**. This rule applies only in criminal cases. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) **Production of Entire Statement.** If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) **Production of Excised statement.** If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of appeal.

(d) **Recess for Examination of Statement.** Upon delivery of the statement to the moving party, the court, upon application of that party, shall recess proceedings in the trial for a reasonable examination of such statement and for preparation for its use in the trial.

(e) **Sanction for Failure to Produce Statement.** If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) **Definition.** As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Notes and Comments

This is verbatim from prior Criminal Rule of Evidence 614.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Notes and Comments

Regarding the 1990 change by the Texas Supreme Court: This amendment conforms this rule of evidence to the civil rules of discovery in utilizing the term "reviewed by the expert." *See also* comment paragraph with Notes and Comments to T.R.C.P., Rule 166b. While terminology is conformed between prior Civil and Criminal Rules 703, there is no change intended in meaning. The language in the prior criminal rule was "made known to" the expert. "Reviewed by" and "made known" to the expert should be interpreted the same in any given fact situation. "Perceived by or made known to" is uniform with the federal rule.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

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.

(b) ***Voir Dire.*** In criminal cases, prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, 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.** In criminal cases, if the court determines that the expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(d) **Balancing Test; Limiting Instructions.** In criminal cases, when the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.[9]

Notes and Comments

This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert or into the bases of the expert's opinion under Rule 703. This rule does not preclude the application of Rule 403.[10]

RULE 706. AUDIT IN CIVIL CASES

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

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[9]The SBOT Evidence Committee has in the past recommended this language as new subpart of the Civil Rule 705.

[10]The prior Criminal Evidence Rule comment provided "This rule does not preclude a party from conducting a *voir dire* examination into the qualifications of an expert."

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) **Declarant**. A "declarant" is a person who makes a statement

(c) **Matter Asserted.** "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.

(d) **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(e) **Statements Which Are Not Hearsay**. A statement is not hearsay if:

(1) **Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except in a criminal case, a grand jury proceeding, or in a deposition;

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;

(C) one of identification of a person made after perceiving the person; or

(D) taken and offered in a criminal case in accordance with Article 38.071 of the Texas Code of Criminal Procedure; or

(2) **Admission by Party-Opponent.** The statement is offered against a party and is:

(A) the party's own statement in either an individual or representative capacity;

(B) a statement of which the party has manifested an adoption or belief in its truth;

(C) a statement by a person authorized by the party to make a statement concerning the subject;

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(3) **Depositions.** In a civil case, it is a deposition taken in the same proceeding, as same proceeding is defined in Rule 207, Texas Rules of Civil Procedure. Unavailability of deponent is not a requirement for admissibility.

Notes and Comments

Comment: The definitions in Rule 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 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.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection**. A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If

admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(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, or by affidavit that complies with Rule 902(10), 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.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, but excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;

unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and presented by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report statement, or data compilation, or entry.

(11) **Records of Religious Organizations**. Statement of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family Records**. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property**. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property**. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents**. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications**. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or an established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History**. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation Concerning Boundaries or General History**. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character**. Reputation of a person's character among his associates or in the community.

(22) **Judgment of Previous Conviction**. In civil cases, evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), judging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. In criminal cases, evidence of a judgment, entered after a trial or upon a plea of guilty or nolo contendere, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused. In all cases, the pendency of an appeal renders such evidence inadmissible.

(23) **Judgment as to Personal, Family, or General History, or Boundaries**. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Statement Against Interest**. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Notes and Comments

Comment on Paragraph (6): 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 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of Unavailability**. "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong-doing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions**. The following are not excluded if the declarant is unavailable as a witness:

(1) **Former Testimony**. In civil cases, testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases, testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases the use of depositions is controlled by Chapter 39 of the Texas Code of Criminal Procedure.

(2) **Dying Declarations**. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) **Statement of Personal or Family History**.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(e)(2) (C), (D), or (E), or in civil cases a statement defined in Rule 801(e)(3), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to impeach the declarant, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of Witness With Knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Nonexpert Opinion on Handwriting.** Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by Trier or Expert Witness.** Comparison by the trier of fact or by expert witness with specimens which have been found by the court to be genuine.

(4) **Distinctive Characteristics and the Like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice Identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

(6) **Telephone Conversations**. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public Records or Reports**. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient Documents or Data Compilation**. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) **Process or System**. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods Provided by Statute or Rule**. Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority.

RULE 902. SELF-AUTHENTICATION

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

(1) **Domestic Public Documents Under Seal**. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic Public Documents Not Under Seal**. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents**. A document purporting to be executed or attested in his official capacity by a person, authorized by the laws of a foreign country to make the

execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

(4) **Certified Copies of Public Records**. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.

(5) **Official Publications**. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals**. Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like**. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged Documents**. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents**. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(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 record 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 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 days prior to commencement of trial in said cause.

(B) **Form of Affidavit.** A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No _____

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

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said ____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or

diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

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

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

_____

My commission expires:

_____

(l) **Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.
(Amended Nov. 10, 1986, eff. Jan. 1, 1988.)

Notes and Comments

Paragraph (10) is based on portions of the affidavit authentication provisions of Tex. Rev. Civ. Stat. Ann. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-ray, hospital records, or any other kind of regularly kept medical record.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(a) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating,

photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(b) **Photographs**. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(c) **Original**. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an"original."

(d) **Duplicate**. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

RULE 1002. REQUIREMENT OF ORIGINALS

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) **Originals Lost or Destroyed**. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(b) **Original Not Obtainable**. No original can be obtained by any available judicial process or procedure;

(c) **Original Outside the State**. No original is located in Texas;

(d) **Original in Possession of Opponent**. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or

otherwise, that the content would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(e) **Collateral Matters**. The writing, recording or photograph is not closely related to a controlling issue.

RULE 1005. PUBLIC RECORDS

The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

RULE 1009. TRANSLATION OF FOREIGN LANGUAGE RECORDS AND DOCUMENTS

This Committee in 1992 recommended the adoption of new Rules 1009 for CIVIL and CRIMINAL cases. Neither Rule has been adopted by the Texas Supreme Court or the Texas Court of Criminal Appeals. Both "proposed" rules are re-printed below and this Committee recommends their adoption and recommends as an agenda item that the Rules be reconciled and merged into one Rule 1009.

RULE 1009. **Translation of Foreign Languages Records (1992 Proposed Civil Rule)**

(a) **Translation, Affidavit, and Filing.** An accurate translation of a foreign language record or set of records or photographically reproduced copies of such records which would otherwise be admissible shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records, provided further that such affidavit, translation and the record or records in the foreign language translated are duly and promptly served upon all parties in accordance with Rule 21(a) of the Texas Rules of Civil Procedure at least sixty days prior to the day upon which the trial of said cause commences.

(b) **Objections.** Any party may object to the accuracy of the translation served in accordance with paragraph (a) by serving an objection verified under oath upon all parties in accordance with Rule 21(a) of the Texas Rules of Civil Procedure at least thirty days prior to the commencement of trial. The objection shall point out the specific inaccuracies of the original translation.

(c) **Admissibility and Failure to Object.** If no objection is timely served, or if no conflicting translation has been timely served in accordance with paragraph (a), the court shall admit a translation submitted under paragraph (a) without further need of proof provided the underlying records are otherwise admissible under the Texas Rules of Civil Evidence. The time limits set forth herein may be varied by order of the court. Failure to serve a conflicting translation in accordance with paragraph (a) or failure to timely and properly object to the accuracy of a translation in accordance with paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation.

(d) **Expert Testimony of Translator, and Court Appointment.** Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony, either live or by deposition, of a qualified translator as an expert. The court may, when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

RULE 1009. **Translation of Foreign Languages Documents (1992 Proposed Criminal Rule)**

(a) **Translation; Affidavit; Filing**. An accurate translation of a foreign language record or set of records which would otherwise be admissible under these rules shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records. The affidavit, translation and the record or records in the foreign language shall be 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 thirty days prior to the day upon which trial of said cause commences, and the other parties to said cause shall be given prompt notice by the party filing the foreign language records and their translation.

(b) **Objections; Counter Affidavits**. Any party may object to the accuracy of the translation filed in accordance with Paragraph (a) by filing such objection with the court at least ten days prior to the commencement of trial, pointing out the specific inaccuracies of the original translation.

(c) **Admissibility**. If no objection is timely filed or if an objection is made and the trial judge after notice to all parties and a hearing has determined pursuant to Tex. R. Crim. Evid. 107(a), that the translation is accurate, the court shall admit that translation without further need of proof at trial if the foreign language record is otherwise admissible under the Texas Rules of Criminal Evidence. The time limits set forth herein may be varied by order of the court.

(d) **Expert Testimony of Interpreter**. This Rule does not prohibit or restrict the admission of an accurate translation of a foreign language record or records, during trial by the testimony of a qualified translator as an expert.

TABLE OF CONTENTS
TEXAS RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule

ARTICLE II: JUDICIAL NOTICE

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Rule

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

DERIVATION TABLE—TEXAS RULES OF EVIDENCE

June 1996

TRE . . . . . is derived from . . . . TRCivE	and/or from . . . . . TRCrimE
101(a) . . . . . 101(a)	. . . . . 101(a)
101(b) . . . . . 101(b)	. . . . . 101(b), 1101(a)
101(c)(1)	. . . . . 101(c)
101(c)(2)	. . . . . 1101(d)
101(c)(3)	. . . . . 1101(c)
102 102	 102
103(a)(1)-(2) . . . . . 103(a)(1)-(2)	. . . . . 103(a)(1)-(2)
103(b) . . . . . 103(b)	. . . . . 103(b)
103(c) . . . . . 103(c)	. . . . . 103(c)
103(d)	. . . . . 103(d)
104(a) . . . . . 104(a)	. . . . . 104(a)
104(b) . . . . . 104(b)	. . . . . 104(b)
104(c) . . . . . 104(c)	. . . . . 104(c)
104(d)	. . . . . 104(d)
104(e) . . . . . 104(d)	. . . . . 104(e)
105(a) . . . . . 105(a)	. . . . . 105(a)
105(b) . . . . . 105(b)	. . . . . 105(b)
106 106	 106
107	 107
201(a)-(g) . . . . . 201(a)-(g)	. . . . . 201(a)-(g)
202 202	 202
203 203	 203
204 204	 204
401 401	 401
402 402	 402
403 403	 403
404(a)(1)-(3) . . . . . 404(a)(1)-(3)	. . . . . 404(a)(1)-(3)
404(b) . . . . . 404(b)	. . . . . 404(b)
404(c)	. . . . . 404(c)
405(a)-(b) . . . . . 405(a)-(b)	. . . . . 405(a)-(b)
406 406	 406
407(a)-(b) . . . . . 407(a)-(b)	. . . . . 407(a)-(b)
408 408	 408
409 409	 409
410 410	 410
411 411	 411
412(a)-(d)	. . . . . 412(a)-(d)

DERIVATION TABLE - TEXAS RULES OF EVIDENCE

TRE	TRCivE	TRCrimE
501	501	501
502	502	502
503(a)(1)	503(a)(1)	503(a)(1)
503(a)(2)	503(a)(2)	503(a)(2)
503(a)(2)(A)-(B)	new	new
503(a)(3)	503(a)(3)	503(a)(3)
503(a)(4)	503(a)(4)	503(a)(4)
503(a)(5)	503(a)(5)	503(a)(5)
503(b)-(d)	503(b)-(d)	503(b)-(d)
504(a)	504(a)	504(1)(a)
504(b)(1)	504(b)	504(1)(b)
504(b)(2)(A)-(B)		504(2)(a)
504(c)	504(c)	504(1)(c)
504(d)(1)	504(d)(1)	504(1)(d)(1)
504(d)(2)	504(d)(2)	
504(d)(3)		504(1)(d)(2)
504(d)(4)	504(d)(3)	
504(d)(5)	504(d)(4)	
504(e)		504(2)(b)
505(a)-(c)	505(a)-(c)	505(a)-(c)
506	506	506
507	507	507
508(a)-(c)	508(a)-(c)	508(a)-(c)
509(a)	509(a)	
509(b)		509, 510
509(c)	509(b)	
509(d)	509(c)	
509(e)	509(d)	
509(f)	509(e)	
510(a)-(d)	510(a)-(d)	
511	511	511
512	512	512
513(a)-(b)	513(a)-(b)	513(a)-(b)
513(c)	513(c)	
513(d)		513(c)

DERIVATION TABLE - TEXAS RULES OF EVIDENCE

TRE	TRCivE	TRCrimE
601(a)	601(a)	601(a)
601(b)	601(b)	
602	602	602
603	603	603
604	604	604
605	605	605
606(a)-(b)	606(a)-(b)	606(a)-(b)
607	607	607
608(a)-(b)	608(a)-(b)	608(a)-(b)
609(a)-(f)	609(a)-(f)	609(a)-(f)
610	610	
611(a)-(c)	611(a)-(c)	610(a)-(c)
612	612	611
613(a)-(c)	613(a)-(c)	612(a)-(c)
614	614	613
615(a)-(f)		614(a)-(f)
701	701	701
702	702	702
703	703	703
704	704	704
705(a)	705	705(a)
705(b)-(d)		705(b)-(d)
706	706	
801(a)-(d)	801(a)-(d)	801(a)-(d)
801(e)(1)(A)-(C)	801(e)(1)(A)-(C)	801(e)(1)(A)-(C)
801(e)(1)(D)		801(e)(1)(D)
801(e)(2)	801(e)(2)	801(e)(2)
801(e)(3)	801(e)(3)	
802	802	802
803	803	803
804	804	804
805	805	805
806	806	806
901	901	901
902(a)-(j)	902(1)-(10)[1]	902(1)-(10)[2]
903	903	903

DERIVATION TABLE - TEXAS RULES OF EVIDENCE

TRE	TRCivE	TRCrimE
1001(a)-(d)	1001(1)-(4)[3]	1001(1)-(4)[4]
1002	1002	1002
1003	1003	1003
1004(a)-(e)	1004(1)-(5)[5]	1004(1)-(5)[6]
1005	1005	1005
1006	1006	1006
1007	1007	1007
1008	1008	1008
1009	new	new

FOOTNOTES

1. This presumes the recommended change for subparagraphs from numbers to letters.

2. Ditto.

3. Ditto.

4. Ditto.

5. Ditto.

6. Ditto.

DISPOSITION TABLE—TEXAS CRIMINAL RULES OF EVIDENCE

June 1996

TRCrimE . .	has become	TRE
101(a)		101(a)
101(b)		101(b)
101(c)		101(c)(1)
102		102
103(a)(1)-(2)		103(a)(1)-(2)
103(b)		103(b)
103(c)		103(c)
103(d)		103(d)
104(a)		104(a)
104(b)		104(b)
104(c)		104(c)
104(d)		104(d)
104(e)		104(e)
105(a)		105(a)
105(b)		105(b)
106		106
201(a)-(g)		201(a)-(g)
202		202
203		203
204		204
401		401
402		402
403		403
404(a)(1)-(3)		404(a)(1)-(3)
404(b)		404(b)
404(c)		404(c)
405(a)-(b)		405(a)-(b)
406		406
407(a)-(b)		407(a)-(b)
408		408
409		409
410		410
411		411
412(a)-(d)		412(a)-(d)

TRCrimE . .	has become	TRE
501		501
502		502
503(a)(1)		503(a)(1)
503(a)(2)	. .	503(a)(2)503(a)(3)503(a)(3)
503(a)(4)		503(a)(4)
503(a)(5)		503(a)(5)
503(b)-(d)		503(b)-(d)
504(1)(a)		504(a)
504(1)(b)		504(b)(1)
504(1)(c)		504(c)
504(1)(d)(1)		504(d)(1)
504(1)(d)(2)		504(d)(3)
504(2)(a)		504(b)(2)(A)-(B)
504(2)(b)		504(e)
505(a)-(c)		505(a)-(c)
506		506
507		507
508(a)-(c)		508(a)-(c)
509		509(b)
510		509(b)
511		511
512		512
513(a)-(b)		513(a)-(b)
513(c)		513(d)
601(a)		601(a)
602		602
603		603
604		604
605		605
606(a)-(b)		606(a)-(b)
607		607
608(a)-(b)		608(a)-(b)
609(a)-(f)		609(a)-(f)
610(a)-(c)		611(a)-(c)
611		612
612(a)-(c)		613(a)-(c)
613		614
614(a)-(f)		615(a)-(f)

TRCivE . . . has become	TRE
701	701
702	702
703	703
704	704
705(a)-(d)	705(a)-(d)
801(a)-(d)	801(a)-(d)
801(e)(1)(A)-(C)	801(e)(1)(A)-(C)
801(e)(2)	801(e)(2)
802	802
803	803
804	804
805	805
806	806
901	901
902(1)-(10)	902(a)-(j)[1]
903	903
1001(1)-(4)	1001(a)-(d)[2]
1002	1002
1003	1003
1004(1)-(5)	1004(a)-(e)[3]
1005	1005
1006	1006
1007	1007
1008	1008
1101(a)	101(b)
1101(b)	
1101(c)	101(c)(3)
1101(d)	101(c)(2)

FOOTNOTES

1. This presumes the recommended change for subparagraphs from numbers to letters.

2. Ditto.

3. Ditto.

DISPOSITION TABLE—TEXAS CIVIL RULES OF EVIDENCE

June 1996

TRCivE . . . has become . . . . . TRE	
101(a)	101(a)
101(b)	101(b)
102	102
103(a)(1)-(2)	103(a)(1)-(2)
103(b)	103(b)
103(c)	103(c)
104(a)	104(a)
104(b)	104(b)
104(c)	104(c)
104(d)	104(e)
105(a)	105(a)
105(b)	105(b)
106	106
201(a)-(g)	201(a)-(g)
202	202
203	203
204	204
401	401
402	402
403	403
404(a)(1)-(3)	404(a)(1)-(3)
404(b)	404(b)
405(a)-(b)	405(a)-(b)
406	406
407(a)-(b)	407(a)-(b)
408	408
409	409
410	410
411	411
501	501
502	502
503(a)(1)	503(a)(1)
503(a)(2)	503(a)(2)
503(a)(3)	503(a)(3)
503(a)(4)	503(a)(4)

TRCivE . . . has become . . . . . TRE	
503(a)(5)	503(a)(5)
503(b)-(d)	503(b)-(d)
504(a)	504(a)
504(b)	504(b)(1)
504(c)	504(c)
504(d)(1)	504(d)(1)
504(d)(2)	504(d)(2)
504(d)(3)	504(d)(4)
504(d)(4)	504(d)(5)
505(a)-(c)	505(a)-(c)
506	506
507	507
508(a)-(c)	508(a)-(c)
509(a)	509(a)
509(b)	509(c)
509(c)	509(d)
509(d)	509(e)
509(e)	509(f)
510(a)-(d)	510(a)-(d)
511	511
512	512
513(a)-(b)	513(a)-(b)
513(c)	513(c)
601(a)	601(a)
601(b)	601(b)
602	602
603	603
604	604
605	605
606(a)-(b)	606(a)-(b)
607	607
608(a)-(b)	608(a)-(b)
609(a)-(f)	609(a)-(f)
610	610
611(a)-(c)	611(a)-(c)
612	612
613(a)-(c)	613(a)-(c)
614	614

TRCivE . . . has become	TRE
701	701
702	702
703	703
704	704
705	705(a)
706	706
801(a)-(d)	801(a)-(d)
801(e)(1)(A)-(C)	801(e)(1)(A)-(C)
801(e)(2)	801(e)(2)
801(e)(3)	801(e)(3)
802	802
803	803
804	804
805	805
806	806
901	901
902(1)-(10)	902(a)-(j)[1]
903	903
1001(1)-(4)	1001(a)-(d)[2]
1002	1002
1003	1003
1004(1)-(5)	1004(a)-(e)[3]
1005	1005
1006	1006
1007	1007
1008	1008

FOOTNOTES

1. This presumes the recommended change for subparagraphs from numbers to letters.

2. Ditto.

3. Ditto.

7/9/96

TEXAS STATE BAR ADMINISTRATION OF THE RULES OF EVIDENCE COMMITTEE ("AREC") -- 1995/96 RECOMMENDATIONS

1. Rule 412. Rule 412 concerns evidence of previous sexual conduct in criminal cases. The issue is whether to recommend that the rule also apply to prosecutions for indecency with a child.

AREC ACTION: The subcommittee recommended that the Committee take no action to revise the current rule. After a brief discussion of the issue, the recommendation was adopted by a unanimous vote of the Committee.

2. Rule 503. The question under this lawyer/client privilege rule concerns the accuracy of subsection (d)(5) on Joint Clients and its relationship with the rules of civil procedure and the other parts of Rule 503, specifically subpart (b) the general rule of privilege. The specific issue is whether to recommend changes to incorporate the "common interest" privilege, fairly well developed in federal case law, regarding joint clients consulting one or more of their attorneys on a matter of common interest. It is somewhat less well developed in Texas, but recognized. See, Rio Hondo Implement v. Euresti, (13-95-191-CV), 7/13/95, CC. ST, 1041. The rule apparently was intended to codify the common law which at present is probably broader than as is stated in the rule.

AREC ACTION: The subcommittee recommended that no action be taken to revise Rule 503. After a brief discussion of the issue, the recommendation was adopted by a unanimous vote of the Committee.

3. Rule 705, Subpart(b). The specific Rule 705(b) issue is whether to recommend a rule change, or a new comment, for the existing civil rule (or in any unified rules on expert witnesses) indicating that a party may conduct a voir dire examination into the qualifications of the expert or into the basis of the expert's opinion under Rule 703. In Brook v. Brook, 865 S.W.2d 166 (Tex. App.--Corpus Christi 1993), the Court of Appeal upheld the trial court's denial of petitioner's request in a child custody action to examine an opponent's expert witness's qualifications on voir dire. The court observed that the Rules of Criminal Evidence require that a party against whom opinions are being offered have the opportunity to conduct a voir dire but the Rules of Civil Evidence do not.

AREC ACTION: The subcommittee recommend that no action be taken to revise Civil Rule 705(b) to provide as a matter of right the opportunity to voir dire an expert at the time of trial. After a discussion of the issue, the recommendation was adopted by a Committee vote of 17 "for" and 3 "against."

4. Rule 1009. This committee has already submitted separate proposed Rules 1009 for civil and criminal cases. Neither of these rules has yet been adopted by either the Texas Supreme Court or the Court of Criminal Appeals. In the committee's work last year on the

proposed unified rules, we identified these two pending rules, but at that time did not make a proposal for "unified" language adapting both "proposed" rules into common language. This subcommittee should consider the two previous proposals and come up with a recommendation, if possible, as to a unified Rule 1009 which could be either part of unified rules of evidence or adopted separately as a criminal and civil rule.

AREC ACTION: The subcommittee prepared a uniform rule on the translation of foreign language records which merged the proposed civil and criminal rules previously approved by the Committee in 1994. The subcommittee recommended that the uniform rule be approved and submitted to the Supreme Court as part of the Court's uniform rules initiative. After a discussion of the issue, the recommendation was adopted by a unanimous vote of the Committee. (Copy attached).

5. Rule 407. This rule concerns subsequent remedial measures. This subcommittee will consider whether to recommend changes to address a related or similar privilege developing in the case law, particularly at the federal level, concerning what has been called the "self-critical analysis privilege." While not precisely a "subsequent remedial measure," the concept is similar enough to justify its consideration in conjunction with this rule even though any recommended change might be in a separate rule or the rules of civil procedure or a comment, or some combination of the foregoing.

AREC ACTION: The subcommittee recommended approval of a new Rule 514 which would establish a basis for the self-critical analysis privilege in Texas. After an extended discussion of the issue, the recommendation was adopted by a Committee vote of 12 "for" and 9 "against." (Copy attached).

6. Rules 702, 703, 704 and 705. This subcommittee will study, analyze and make a recommendation as to whether the civil and/or criminal rules need to be modified in any respect (either by word changes or additional comments) in light of the Texas Supreme Court's decision in DuPont v. Robinson, 38 T. S. Ct. J 852 (June 15, 1995). Robinson adopted to a large extent the U.S.S. Court's holding in Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 Supreme Court 2786 (1993). In order to focus the committee, the specific starting issue is whether Rule 702 should be reworded, or a comment should be added, to provide guidance to trial judges in their roles as "scientific evidence gatekeepers."

AREC ACTION: The subcommittee recommended that no rule be amended but that a comment be added to Rule 702. After a discussion of the issue, the recommendation was adopted by a Committee vote of 11 "for" and 7 "against." An amendment to include language proposed in the subcommittee's minority report was defeated by a vote of 7 "for" and 10 "against." (Copy attached).

7. Rules 801 and 804. The Supreme Court Advisory Committee in July, 1995, approved and sent on to the Texas Supreme Court a proposed new Texas Rule of Civil Procedure titled "Signing, Certification of Use of Depositions." It's new number is "16." A number of

other changes and consolidations of the discovery rules were adopted at the same time. Although these proposed new rules have not yet been adopted by the Court (and changes to them are likely), the Supreme Court Advisory Committee has requested our committee to consider possible changes to Texas Rules of Civil Evidence 801e(3) and 804b(1) in light of proposed Rule 16. For purposes of this assignment then the assumption would be that new Rule 16 will be adopted. If so, what changes (if any) should be recommended for Rules 801e(3) and 804b(1) concerning the use of depositions in the "same" or "different" proceedings.

AREC ACTION: The subcommittee recommended that there be no changes to Rules 801 and 804. After a brief discussion of the issue, the recommendation was adopted by a unanimous vote of the Committee.

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

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Telecopier Number (512) 471-6988

Unanimously adopted

April 9, 1996

Michael Prince, Esq.
Carrington, Coleman, Sloman, & Blumenthal
200 Crescent Court
Suite 1500
Dallas, Texas 75201

Re: State Bar Administration of Rules of Evidence Committee
Subcommittee on Rule 412

Dear Mike:

I write on behalf of the subcommittee, consisting of James D. Norvell and myself, on Rule 412. The issue submitted to our subcommittee was whether to recommend that Rule 412 be amended so as to extend to prosecutions for indecency with a child. The present rule applies only to prosecutions for sexual assault or aggravated sexual assault, or attempts to commit those crimes.

We respectfully advise the committee against the proposed extension of Rule 412. Rape shield laws like Rule 412 were created to put an end to the old use of evidence of "unchaste character" to support a defense of consent in charges of forcible rape. This is a laudable purpose, but unfortunately most of the shield laws (most of which were drafted in the 1970's), were not carefully tailored to that purpose. Our rule is typical. Instead of simply prohibiting the use of any form of evidence of "unchaste character" to support a claim of consent, it more broadly bars any evidence of prior sexual conduct or sexual propensity of a victim, subject to a few narrow exceptions plus a catch-all exception for evidence that is "constitutionally required to be admitted."

Generally, courts applying the shield rules or statutes have ended up admitting evidence of particular instances of sexual behavior on the part of a victim in any situation in which the evidence has had genuine relevancy other than the

discredited one of showing propensity to consent. In order to achieve this result, however, the courts have had to rely considerably on the "constitutionally required" type of exception. An excellent analysis and survey of cases from throughout the country is Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn.L.Rev. 763 (1986).

In child victim cases, the shield laws have been particularly troublesome. Since consent is not a defense in these cases, the rape shield rules should probably not extend to them at all. Prior sexual behavior of a child victim will seldom have any relevancy, and so will normally be excluded by Rule 402. If in the circumstances the evidence is relevant, however, its admissibility should derive from its special relevancy, and not be limited to the exceptions listed in Rule 412. A good example of this type of problem is one that has arisen in a number of jurisdictions. The accused is charged with a sexual assault of some kind on a young child. The child testifies, describing the details of the alleged assault. The jury is likely to draw the inference (in some cases, juror affidavits have indicated that they in fact drew the inference) that the incident that is the basis of the charge must have occurred, because otherwise such a young child would not be capable of describing the physical details. In order to respond to this natural inference, the accused wants to introduce evidence that the child had suffered sexual contact of the type described in the testimony on an earlier occasion, from another perpetrator. The courts have agreed that the accused must be permitted to introduce this evidence. See, e.g., Summitt v State, 101 Nev. 159, 697 P.2d 1374(1985); State v. Howard, 121 N.H. 53, 426 A.2d 457 (1981). The rules and statutes, however, have not anticipated this type of situation and have not created an exception to fit it. There are other examples. Again see the article by Galvin, supra.

It is not necessary to extend Rule 412 to indecency with a child cases. Such an extension would create rather than solve problems. On the merits, as the foregoing

discussion indicates, I would favor rewriting Rule 412 so as to narrow its scope substantially along the lines recommended by Galvin. I foresee political problems with any such proposal, however, and I do not mean to advance such a proposal at this time.

James D. Norvell, the other member of the subcommittee on Rule 412, has not seen this letter in advance, but we have discussed the issue and he concurs in the conclusion that Rule 412 should not be extended to indecency with a child cases at this time.

I look forward to seeing you at the meeting in May.

Very truly yours,

Olin G. Wellborn III
Wm C. Liedtke, Sr. Professor of Law

C: James D. Norvell

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January 15, 1996

Mike Prince
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL
200 Crescent Court, Suite 1500
Dallas, TX 75201

RE: SBOT Administration of the Rules of Evidence Committee

Dear Mike:

I have your recent letter. My thought, at this point, is that it would be better for us to hold up on any decision about the "joint defense privilege" until we hear from the Supreme Court.

As you know, two cases are pending before the Court. Last Fall, the Supreme Court heard oral arguments in the case of *National Medical Enterprises, Inc., et al vs. Honorable David C. Godbey, Judge of the 160th District Court, Dallas County, Texas*; 94-10808-H, Dallas County, Texas. One of the points on appeal in that case directly relates to the "joint defense privilege."

A petition for mandamus is pending before the Supreme Court in the *Rio Hondo Implement Company* case.

I do not think the Supreme Court has written on either one of these cases, but, as soon as we have those opinions, I think the sub-committee would be in a better position to make a recommendation to the full committee. In the meantime, if you need me to do anything, please let me know.

Yours truly,

John Simpson

JES/lc

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TEXAS STATE BAR ADMINISTRATION OF THE RULES OF EVIDENCE COMMITTEE

IN RE: RULE 705, SUBPART(b)

ISSUE: Whether to recommend a rule change, or a new comment, for the existing civil rule indicating that a party may conduct a voir dire examination in the qualifications of an expert or under the basis of the expert's opinion under Rule 703.

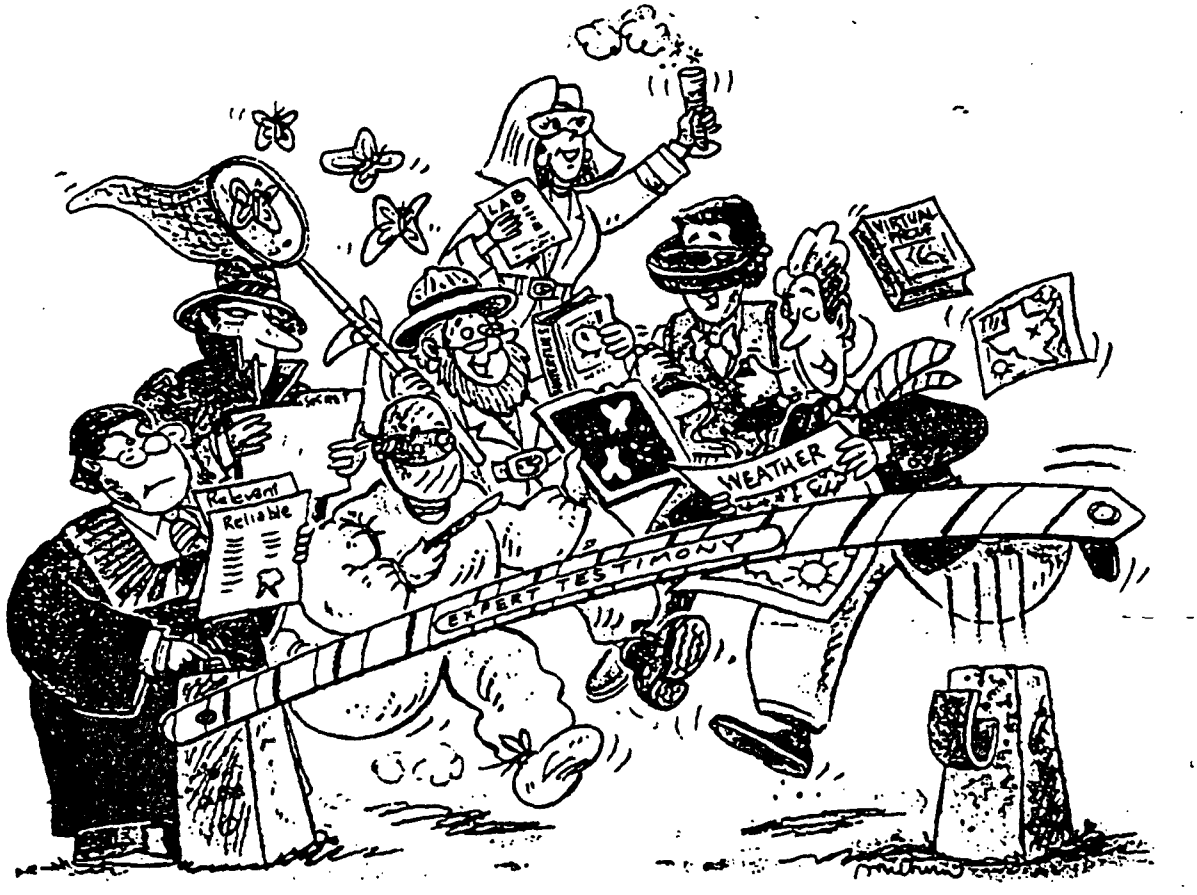
COMMENT: Rule 705, Subpart(b) of the criminal rules of evidence states "in criminal cases, prior to the expert giving an opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

The subcommittee has no strong feeling one way or another on this issue. We note that in criminal cases there is very limited discovery wherein civil cases, one normally deposes the opposing expert prior to deposition. If a party is serious about making a legitimate effort to exclude the testimony of the opposition's expert, this could probably be best handled during pre-trial hearing.

We note suggestions contained in an article authored by Robert M. Martin, Jr., Expert Testimony - The New Buzzword "Gatekeeping" contained in the Texas Bar Journal Volume 51, No. 1, Page 16 offers suggestions on how to attempt to exclude certain expert's testimony in accordance with the Du Pont case. It is suggested that additional expert testimony is needed to the affect that the testimony attempted to be proffered by the expert attempting to be excluded is not based on scientific knowledge, etc. An attempt to exclude such testimony merely in a voir dire examination outside the presence of the jury would be difficult and awkward. Further, there is some concern that such a rule could be abused by attorneys attempting to get a brief pre-testimony deposition from the witness rather than making a legitimate attempt to exclude the witnesses testimony.

Expert Testimony —

The New Buzzword "Gatekeeping"



Twenty years ago, expert witnesses in a trial were almost a rarity. In condemnation cases, lawyers used real estate appraisers, and in personal injury cases, the testimony of medical doctors was widely used. Today, experts on every conceivable subject are used, and it is unusual to find a litigated case of any magnitude that does not involve expert testimony. The codified Rules of Evidence (Rules 701-705), substantially identical in federal and state rules, cover the subject.[1] Rule 704 states that in civil cases, the fact that the expert's testimony embraces the ultimate issue does not render it objectionable.[2] In other words, the expert can say that the conduct of an actor in the scenario before the court was or was not reasonably prudent, customary, or in conformance with a standard. This is a far cry from the function

With regard to expert testimony, criticism began to be heard from the courts. The first noteworthy case was *In re Air Crash Disaster*, where Judge Higginbotham stated:

> We know from our judicial experience that many such able persons present studies and express opinions that they might not be willing to express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review. We think that is one important signal, along with many others, that ought to be considered in deciding whether to accept expert testimony. Second, the professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and

testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an "expert."[3]

Some writers began to describe certain expert testimony as "junk science." Merrell Dow Pharmaceuticals, Inc. can probably be credited for bringing the issue of unbridled expert testimony to the U.S. Supreme Court in connection with one of its products, an anti-nausea drug called Benedectin. Of three cases in process, the *Daubert* case reached the U.S. Supreme Court in 1993.[4]

The precise question before the court was whether or not the district court erred in granting Merrell Dow's motion for summary judgment because plaintiffs failed to establish that the principle upon which their experts based their opinions was "generally accepted" by the relevant scientific community. In 1923, a court of appeals for the District of Columbia decided a case styled *Frye v. United States*, which announced the rule of "general acceptance."[5] The plaintiffs urged the Supreme Court to hold that the Federal Rules of Evidence (Rules 701-705, in particular 702) replaced the standard of the *Frye* case. The Supreme Court held that the Rules of Civil Evidence did replace the *Frye* rule, and that Rule 702 permitted testimony by a witness qualified as an expert by knowledge, skill, experience, training, or education, without the requirement that his or her opinion be "generally accepted."

Some writers discussing the *Daubert* opinion believe that the Supreme Court should have stopped at that point. However, Justice Blackmun, in his final major opinion on the court, did not limit the decision to the precise holding. In Section II B of the opinion, the first paragraph announces the "gatekeeper" decision in the following words:

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the [illegible] that any and all scientific testimony or evidence admitted is not only relevant, but reliable.[6]

Justice Blackmun did not use the word "gatekeeper," but it has been used many times since and it is an apt expression. He goes on to expand on the two standards which the testimony must meet: it must be *relevant* and it must be *reliable*. He invokes Rule 104(a)—of the Federal Rules of Evidence (identical to the Texas Rule of Civil Evidence) for the authority and the duty of a trial judge to make the determination that the proffered testimony is both relevant and reliable.

The major criticism of Justice Blackmun's opinion relates to the reliability standard. There has not been much argument concerning relevancy, but as stated in Chief Justice Rehnquist's dissent, there is a difference of opinion and there will be considerable argument over the fitness of trial judges to make the determination of whether or not under the scientific standards involved, the preferred testimony is "reliable," which he calls the "gatekeeping responsibility." A thorough reading of Justice Blackmun's opinion expands the word "reliable" to mean "scientifically reliable." His comment on the difference of opinion with Chief Justice Rehnquist about the ability of trial judges reads:

> This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review.[7]

Justice Blackmun states that he does not presume to set out a definitive checklist, but he makes general observations. His primary criteria is whether or not the theory or technique is one that can be "tested." He points out that peer review and publication, and for that matter, general acceptance, are still in the picture and that they are elements of whether or not the proffered testimony has scientific reliability.

The dissent by Chief Justice Rehnquist comments, quite simply, that Rule 702 does not talk about "reliability," and further

at a loss to know how to apply the scientific reliability test.

The Supreme Court of Texas was not too far behind, and in *E. I. Du Pont DeNemours and Co., Inc. v. C. R. Robinson et al.*, the court adopted the standard enunciated by Justice Blackmun. In the opening paragraph, the opinion says: "We hold that Rule 702 requires expert testimony to be relevant and reliable."[4] In the next sentence, the court holds that the proponent of the testimony offered "failed to establish that the proper testimony was *scientifically reliable*" (emphasis added), and that the trial court did not abuse its discretion by excluding the testimony of the expert witness.

The *Du Pont* case involved the opinion of Dr. Carl Whitcomb, the holder of various degrees, including a doctorate from Iowa State University in horticulture, plant ecology, and agronomy. His testimony was to the effect that Benlate 50 WF, a fungicide manufactured by Du Pont, because of contaminants, caused damage to the pecan orchard of C. R. and Shirley Robinson. In Section I, Justice Gonzales, who wrote the majority opinion, recited Dr. Whitcomb's testimony in detail. In Section III, the court examined the bases for the expert's opinion and the opinion concluded in Section IV that the trial judge was correct in excluding the testimony.

Section II of the majority opinion deals with the legal reasoning which led the court to hold that the decision in *Daubert* was correct and is essentially adopted by the Supreme Court of Texas. One of the cases cited by Justice Gonzales is a criminal case, *Kelly v. State*.[5] The case dealt with DNA identification, and the Court of Criminal Appeals expressed the opinion that scientific evidence is reliable "if the underlying theory and technique in applying it are valid and the technique was properly applied on the occasion in question." The opinion then goes on to list the factors to be considered:

(1) the extent to which the theory has been or can be tested;
(2) the extent to which the technique relies upon the subjective interpretation of the expert (3 Weinstein & Berger, supra, ¶ 702[03]);
(3) whether the theory has been subjected to peer review and/or publication;
(4) the technique's potential rate of error;
(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
(6) the non-judicial uses which have been made of the theory or technique.[6]

Justice John Cornyn, joined by three of the justices (Hightower, Gammage, and Spector) wrote the dissent which is based on two grounds. Justice Cornyn joins Chief Justice Rehnquist in arguing that a trial judge will have to make a determination of whether or not an expert witness' opinion is "scientifically reliable." He expresses the belief that such scientifically reliable determination invades the jury's province as "sole judge of the credibility of the witness and the weight to be given their testimony." Justice Cornyn also argues that there was, at the trial level, in his opinion, a "lack of any evidence to controvert Dr. Whitcomb's testimony that his opinion has been grounded in good science." Needless to say, as a lawyer reads the opinion, the record of trial is not before him, and whether or not Du Pont put on experts to demonstrate that Dr. Whitcomb's methods were not scientifically reliable is really unknown. The statement in the majori-

ty opinion, however, makes two statements about Dr. Whitcomb's testimony that are rather compelling. First, Dr. Whitcomb admitted that Benlate in its uncontaminated form was harmless to pecan trees. He stated that there were some contaminants which caused the damage. He then conducted tests, and the majority opinion emphasized the following statement: "*The tests did not reveal the presence of SU contaminants.*" In other words, the majority opinion was based on the fact that cross-examination of Dr. Whitcomb revealed deficiencies in his approach which did not require an opposing expert to take the stand and say, for example, that the lack of contaminants rendered Dr. Whitcomb's opinion invalid for the purpose of establishing the causation of the damage to the pecan trees. This difference of opinion on the Texas Supreme Court, however, would tell a cautious lawyer to make a very good record in opposing expert testimony that the testimony sought to be excluded is not scientifically reliable.

The difference of opinion between the majority and the dissent in both the U.S. and Texas supreme courts deserves a comment. Both Justices Rehnquist and Cornyn expressed some doubt as to the competency of trial judges to decide the question of "scientific reliability." Justice Rehnquist said that deciding whether to admit or exclude such evidence requires the trial judges to become "amateur scientists." Justice Cornyn echoes this concern, using the phrase coined by Justice Rehnquist.

There is a case out of the U.S. District Court for the District of Colorado, *Renaud, et al. v. Martin Marietta Corp., et al.*, which illustrates an imaginative approach by U.S. District Judge Zita L. Weinshienk to meet this criticism.[11] Faced with completely contradictory expert opinion on the tendency of underground fluids to travel from one point to another (a question of hydrogeology) and medical causation, she appointed three experts, which she selected to aid her in the determination of whether or not the experts for both sides of the lawsuit had proceeded along appropriate lines. She did not use the words "scientifically reliable" as used in *Daubert* and *Du Pont*, (since those cases were subsequent to her 1990 decision) but opined that she was required under Rule 104(a) to determine whether or not the "underlying data is of a kind that is reasonably relied upon by experts in a particular field in reaching conclusions." The experts employed by the court were provided with the opinions of the experts from both sides of the lawsuit and then reported only to the judge. The parties were instructed not to contact the court's experts and neither side was permitted to examine the experts in open court or upon deposition. The expenses of the experts were charged as court costs, presumably assessed to the losing party. As the 10th Circuit Court said on appeal, they were "the court's experts." The court's hydrogeology expert criticized the methodology of the plaintiffs' expert's sampling of the alleged water contamination and the decay factors which were applied to calculate residual contamination at the point where human beings were exposed to the water. Although Judge Weinshienk appointed two additional experts (an epidemiologist and a toxicologist), she apparently did not employ them to examine the opinions of plaintiffs' experts, because the plaintiffs' expert on the subject of hydrogeology totally failed to meet accepted standards of reliability to establish that contaminated water ever reached the plaintiffs.[12]

It is interesting to note that on June 15, 1995, the same day that the Supreme Court of Texas decided the *Du Pont* case, it also decided *Burroughs Wellcome Co. v. Robert N. Crye, Independent Executor*, where the court unanimously agreed that experts' testimony concerning the refrigerating effect of a medicine aerosol spray on the toes of a patient constituted "no evidence" that Crye sustained a frostbite injury as a result of using the spray. The opinion does not deal with the gatekeeping function, but simply holds that there is a failure to establish causation. In short, it is a "legal deficiency of the evidence" decision.[13]

Daubert and its progeny have thus far been considered bad news for plaintiffs. The reported cases thus far would perhaps sustain this conclusion, but there is absolutely no reason to assume that experts' testimony on behalf of the defendants cannot be attacked on the bases of lack of relevancy or scientific reliability. While the gatekeeping function seems to be firmly established, and motions in limine to exclude expert testimony will probably proliferate, the real effects will depend upon the willingness of a particular trial judge in a particular case to exercise the gatekeeping function. Needless to say, the bulk of the contests over the admissibility of evidence will occur with respect to emerging scientific theories. Established scientific theories on the toxicity of many products will not be effectively questioned; on the other hand, such things as neutron activation analysis, sound spectrometry (voice transferences), psycholinguistics, atomic absorption, remote electromagnetic sensing, bite mark comparisons, and some variations of DNA evidence will perhaps be hotly contested, as indicated by the majority opinion in *Du Pont*.

1. Tex. R. Civ. Evid. 701-705; Fed. R. Evid. 701-705.
2. Tex. R. Civ. Evid. 704; Fed. R. Evid. 704.
3. *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. La. 1986).
4. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993).
5. *Frye v. United States*, 293 F. 1013 (1923).
6. *Daubert*, 113 S.Ct. at 2794-2795.
7. *Id.* at 2796.
8. *E. I. Du Pont De Nemours and Co. v. C. R. Robinson et al.*, 38 Tex. Sup. Ct. J. 852 (June 15, 1995).
9. *Kelly v. State*, 824 S.W. 2d 568 (Tex. Crim. App. 1992).
10. "That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science." *Daubert*, 43 F.3d at 1317 (upon remand) (citing *Hubert Gaddis's Revenge*, 206.09 (1991)).
11. *Renaud v. Martin Marietta Corp.*, No. 87-Z-42, 1988 U.S. District LEXIS 17531 (D. Colo. Dec. 5, 1988).
12. *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545 (D. Colo. 1990), aff'd, 972 F.2d 304 (10th Cir. Colo. 1992).
13. *Burroughs Wellcome Co. v. Robert N. Crye*, 38 Tex. Sup. Ct. J. 848 (June 15, 1995).

Robert M. Martin, Jr. has practiced law with the Dallas firm of Storey Armstrong Steger & Martin, P.C. since 1953. He has served as a trial lawyer in many cases involving expert testimony in numerous areas, including explosion, asphyxiation, automobile and aircraft causation, and [illegible]

7-0

unanimously adopted

RULE 1009. TRANSLATION OF FOREIGN LANGUAGES RECORDS

(a) Translation, Affidavit, and Filing. An accurate translation of a foreign language record or set of records or photographically reproduced copies of such records which would otherwise be admissible shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records.

In civil cases, such affidavit, translation and the record or records in the foreign language translated shall be promptly served upon all parties ~~in accordance with Rule 21(a) of the Texas Rules of Civil Procedure~~ at least sixty days prior to the day upon which the trial of said cause commences.

In criminal cases, such affidavit, translation and the record or records in the foreign language shall be 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 thirty days prior to the day upon which trial of said cause commences, and the other parties to said cause shall be given prompt notice by the party filing the foreign language records and their translation.

(b) Objections. Any party may object to the accuracy of the translation.

In civil cases, an objection ~~verified under oath~~ shall be served upon all parties ~~in accordance with Rule 21(a) of the Texas Rules of Civil Procedure~~ at least thirty days prior to the commencement of the trial. The objection shall point out the specific inaccuracies of the original translation.

In criminal cases, an objection shall be filed with the court at least ten days prior to the commencement of trial, pointing out the specific inaccuracies of the original translation.

(c) Admissibility and Failure to Object. In a civil case, if no objection is timely served, or if no conflicting translation has been timely served in accordance with paragraph (a), the court shall admit a translation submitted under paragraph (a) without further need of

proof provided the underlying records are otherwise admissible under the Texas Rules of Civil Evidence. The time limits set forth herein may be varied by order of the court. Failure to serve a conflicting translation in accordance with paragraph (a) or failure to timely and properly object to the accuracy of a translation in accordance with paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation.

In a criminal case, if no objection is timely filed or if an objection is made and the trial judge after notice to all parties and a hearing has determined pursuant to TEX.R.CRIM.EVID. 107(a), that the translation is accurate, the court shall admit that translation without further need of proof at trial if the foreign language record is otherwise admissible under the Texas Rules of Criminal Evidence. The time limits set forth herein may be varied by order of the court.

(d) Expert Testimony of Translator. Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony of a qualified translator as an expert. In a civil case, the testimony may be either live or by deposition.

(e) Court Appointment. ~~In a civil case,~~ the court may, when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

Delete to cover both Criminal & Civil

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RENE J. MOULEDOUX
ASSOCIATE GENERAL ATTORNEY

June 13, 1996

Mr. Mike Prince
Carrington, Coleman, Sloman & Blumenthal
200 Crescent Court, Suite 1500
Dallas, Texas 75201

Re: Committee on the Administration of the Rules of Evidence
Proposed Rule 514-Self Critical Analysis Privilege

Dear Mike:

I thought Ken Lewis and Richard Clarkson did an excellent job of setting forth the concerns of the dissenting minority regarding proposed Rule 514 on self-critical analysis privilege. For the sake of completeness, I have prepared the attached summary of the comments made in support of the proposed rule at our May 11, 1996, committee meeting.

Thank you for giving me the opportunity to chair the subcommittee which studied this very interesting issue.

Very truly yours,

Rene

Rene J. Mouledoux

RJM:sd
Attachment
Via Facsimile (214) 855-1333

c - w/attachment:
Mr. Kenneth W. Lewis
Mr. Richard J. Clarkson

STATE BAR OF TEXAS
COMMITTEE ON ADMINISTRATION OF RULE OF EVIDENCE

PROPOSED CIVIL RULE OF EVIDENCE RULE 514
SELF-CRITICAL ANALYSIS PRIVILEGE

1. The privilege of self-critical analysis is an emerging privilege which protects a party's internal investigation and analytical report from discovery under certain defined circumstances. The privilege is intended to promote the societal goal of encouraging candid appraisal of problems as an aid to implementing beneficial change. The privilege provides a means of encouraging safety as well as ensuring compliance with ever expanding and more complex governmental rules and regulations.

2. Self-critical analysis privilege is not new. It has been recognized in the courts for over 20 years. See Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970) aff'd 479 F.2d 920 (D.C. Cir. 1973). Although first applied to medical peer reviews in Bredice, courts have repeatedly applied to other subjects in which the public has a strong interest in preserving candid internal appraisals. For example, the self-critical analysis privilege has also been found appropriate for:

Academic Peer Reviews.

- Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977)

Post-Accident Investigations and Root Cause Analyses.

- Wylie v. Mills, 478 A.2d 1273 (N.J. Super. 1984)
- Southern Railway Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968)
- Granger v. National R. R. Corp., 116 F.R.D. 507 (E.D. Pa. 1987)

Product Safety Assessments.

- Bradley v. Melroe, 141 F.R.D. 1 (D.D.C. 1991)

Internal Securities Audits.

- In Re Crazy Eddie Securities Litigation, 792 F.Supp. 197 (E.D. N.Y. 1992)
- New York Stock Exchange v. Sloan, Fed. R.Serv.2d (Callaghan) 500 (S.D. N.Y. 1980).

Internal Police Department Reviews.

- Brown v. Thompson, 420 F.2d 1214 (5th Cir. 1970)

Internal Affirmative Action Investigations.

- Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971)

Environmental Self-Audits.

- Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994)

3. The courts which have applied the privilege recognized the general policy against privileges. These courts have closely scrutinized the privilege and satisfied themselves that compelling social policy reasons existed to support application of the privilege. While the public policy reasons supporting the privilege will vary significantly depending upon the subject matter of the information sought to be protected from discovery, the courts have

generally recognized that a) certain types of information have a strong social value, b) this socially useful information would be stifled if it is subject to discovery, and c) the social benefit of protecting the free flow of such information outweighs the public need for it in a particular proceeding.

4. Some courts have rejected the self-critical analysis privilege for procedural reasons alone without considering the merits of the privilege. This often occurs in states which have prohibitions against judicially created privileges. Texas Rule of Evidence 501 is such a prohibition. For that reason, a separate rule of evidence is needed to permit a court to recognize and apply the self-critical analysis privilege in Texas. Proposed Rule 514 establishes the basis for a Texas court to consider the privilege in an appropriate case.

5. The application of the privilege does stifle public access to the privileged information by preventing disclosure though discovery. However, in protecting the information from disclosure, the courts have recognized the strong public interest in encouraging candid self-appraisals. In order to weigh these competing public interests, the courts have developed a uniform test for the self-critical analysis privilege. The four generally accepted criteria for self-critical analysis privilege are:

a) The information must result from a self-critical analysis undertaken by the party seeking protection from discovery.

b) The public must have a strong interest in preserving the free-flow of the type of information sought.

c) The information must be of the type whose flow would be curtailed if discovery were allowed.

d) The information sought to be protected was prepared with the expectation that it would be kept confidential and it has in fact been kept confidential.

6. Proposed Rule 514 adopts these four criteria which a court is to apply on a case by case basis. As with any privilege, the party asserting the privilege has the burden of establishing the factual and legal basis for the privilege.

7. Proposed Rule 514 has been carefully crafted to limit the privilege to audits that meet certain strict requirements in addition to the four criteria stated above. As defined by the proposed rule, the audit must be non-routine, internal and voluntary. It must also be a critical self-examination of a policy, practice or procedure. Thus, routine accident investigations and audits otherwise compelled by law would not be privileged. As the comment makes clear, the privilege does not prevent the discovery of routine investigative material such as witness statements or photographs simply because the investigation has been designated as a self-critical analysis.

8. Proposed Rule 514 has been carefully drafted to establish a basis for a Texas court to consider whether or not the self-critical analysis should be applied under the circumstances of a given case. The proposed rule sets forth the proper balancing test by adopting the established criteria universally recognized by the courts applying the privilege.

9. The self-critical analysis privilege will provide a substantial incentive for Texas organizations to engage in uninhibited and critical internal examinations. The public interest in enhanced safety, better regulatory compliance and/or more efficient business operations will often outweigh the public's need for evidence. This rule will permit a Texas court to consider all the factors and protect the more compelling public interest in a given case.

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RENE J. MOULEDOUX
ASSOCIATE GENERAL ATTORNEY

April 3, 1996

VIA FACSIMILE

Mike Prince, Esquire
Carrington, Coleman, Sloman & Blumenthal
200 Crescent Court, Suite 1500
Dallas, Texas 75201

Re: Report of Self-Critical Analysis Privilege Subcommittee

Dear Mike:

This will serve as the report of the Self-Critical Analysis Subcommittee which I chair. Other members are:

Richard Clarkson
Joe Crawford
William Griffey
Gregory Jones
Richard Schell
James Richardson
William Krueger and
Sheree McCall.

You will recall the Subcommittee's membership was expanded after its preliminary report at the November 1995 meeting of the Evidence Committee.

After careful consideration at our March 20, 1996 meeting, the Subcommittee reached a consensus that there was a need for a rule of evidence to establish a basis for the self-critical analysis privilege in Texas. Although the privilege has been established through case law in other states, Texas Rule of Evidence 501 precludes court-created privileges in this state. Accordingly, the Subcommittee has drafted the attached proposed Rule 51[illegible] which sets forth the universally accepted requirements for establishment of the self-critical analysis privilege.

While consensus was reached on the benefit of such a privilege, one member (Richard Clarkson) expressed concern over the breadth of the privilege and the potential discovery abuse it might foster. The Subcommittee reworked the language of the rule and its comment to address the concerns raised. It should be noted that, although the language of the attached rule was agreed upon by all members in attendance, the proposed rule has been recommended by the Subcommittee by a vote of 5 in favor and 1 opposed. (Three members - Jones, Schell and McCall were unable to attend the meeting.)

We ask that this report and the proposed rule be provided to the Evidence Committee as whole for consideration and discussion at the May 12 meeting in Austin.

Very truly yours,

Rene J. Mouledoux

RJM:ng
Attachment(s)

c - via facsimile:

Subcommittee Members

(84) 21-3 not to adopt

[PROPOSED TEXAS RULE OF EVIDENCE ON SELF-CRITICAL ANALYSIS PRIVILEGE]

RULE 514. SELF-CRITICAL ANALYSIS PRIVILEGE

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

(1) "Self-critical analysis" means a non-routine internal, voluntary audit or other critical review of a policy, practice or procedure requested by the management of an organization and containing subjective evaluations concerning the policy, practice or procedure. A self-critical analysis may be conducted by the organization, by its employees and/or by independent consultants or counsel.

(2) "Information resulting from a self-critical analysis" includes work notes, witness statements, summaries of interviews, findings, opinions, conclusions, drafts, memoranda, drawings, computer-generated or electronically recorded information, photographs, charts, graphs, surveys and any other material collected or developed for the primary purpose and in the course of the analysis.

(3) "Organization" means any entity including a natural person, corporation, partnership, sole proprietorship or association.

(4) "Management of an organization" means such persons who are authorized by the organization to order that a self-critical analysis be conducted by or on behalf of the organization.

(b) **General Rule of Privilege.** An organization has the privilege to refuse to disclose and to prevent any other person from disclosing information resulting from a self-critical analysis if (1) the self-critical analysis was undertaken by the organization claiming the privilege, (2) there is a strong public interest in preserving the internal free-flow of the type of information sought, (3) the information is of the type whose internal flow would be curtailed if discovery was allowed, and (4) the self-critical analysis was prepared with the expectation that it would be kept confidential and it has in fact been kept confidential.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the organization, its guardian or personal representative, or the successor, trustee, or similar representative of the organization.

Comment: This privilege shall not be applicable to a self-critical analysis conducted before the adoption of this rule. This rule is not intended to prevent discovery of routine investigative material (including witness statements and photographs) simply because the investigation has been designated a self-critical analysis. This privilege shall not be construed to expand the scope of other privileges or limit discovery of materials or information otherwise subject to disclosure except as specifically set forth herein.

READUD, MORGAN & QUINN, INC.

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May 31, 1996

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In Re: State Bar Administration of the Rules of Evidence Committee -- Minority Report of Self-Critical Analysis Privilege Subcommittee

Dear Mike:

Thank you for giving me the opportunity to file a minority report expressing some of my deep concerns about the creation of a *new* privilege The heated discussion on this proposed new rule was reflected in the twelve to nine vote. If there had been present a few more members of the plaintiffs' bar, the vote would have been tied or gone the opposite way. The proponents of this *new* privilege did not obtain the vote of a single academic on the Committee. (Professor Wellborn, Dean Sutton). I believe that that fact is very significant! My research convinces me that no state has adopted this privilege as a rule of evidence or by statute.

JURISDICTION OF SUPREME COURT TO CREATE PRIVILEGE

The threshold question is whether or not the Supreme Court of Texas has the jurisdiction and authority to adopt a *new* privilege concerning self-critical analysis. Tex. R. Evid. 501 acknowledges that the Supreme Court only has authority to create a *new* privilege ".....pursuant to statutory authority,". The Texas Government Code §22.004(a) states:

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

The present Rules of Evidence were written and promulgated pursuant to the provisions of the Texas Government Code:

> "BE IT ORDERED by the Supreme Court of Texas that the following Rules of Evidence are hereby adopted, amended and promulgated to govern civil actions in the various courts of this State. Such rules are adopted, amended and promulgated in compliance with Texas Government Code Annotated § 22.004;"

See, Vernon's Texas Rules Annotated (1996 Special Pamphlet, Rules of Civil Evidence, Rules of Criminal Evidence, Rules of Appellate Procedure) (Page 4).

The proposed self-critical analysis privilege would be a change in the *substantive* law of Texas. If the Supreme Court were to add such a privilege to the Texas Rules of Evidence, the action of the Supreme Court would be in violation of Texas Government Code §22.004(a).

Fed. R. Evid. 501 recognizes that a "privilege" is a matter of substantive law. It states in part:

> "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

The court in *Republic Gear Company v. Borg-Warner Corporation*, 381 F.2d 551, 555 n.2 (2nd Cir., 1967) stated:

> "Rules of privilege are not mere "housekeeping" rules which are "rationally capable of classification as either" substantive or procedural for purposes of applying the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. (1938), see *Hanna*, 380 U.S. at 472-473, 85 S.Ct. at 1144. Such rules "affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive." *Massachusetts Mutual Life Ins. Co. v. Brei*, supra 311 F.2d at 466, quoting from Hart & Wechsler, The Federal Courts and the Federal System 678 (1953)."

We find an analysis of Congressional action on Rule 501 in *Samuelson v. Susan*, 576 F.2d, 546, 550 (3rd Cir. 1978):

> "The House of Representatives amended the proposed rules to require the application of state privilege law in cases governed by *Erie*. (It was the House amendment that was eventually enacted into law as Rule 501). The House supported its position with the following contentions: (1) privilege rules are and should continue to be considered substantive for *Erie* purposes; (2) privilege rules are outcome determinative; (3) where state law supplies the rule of decision, state rules of privilege should be applied because there is no federal interest substantial enough to justify departure from state policy; and (4) state policy regarding privilege should not be thwarted merely because of diversity jurisdiction, a situation which, if allowed, would encourage forum shopping. H.R. Rep. No. 650, 93rd Cong., 1st Sess. 9 (1973)." (Emphasis added.)

Tex. R. Evid. 501 has its origin in Fed. R. Evid. 501. See also, *Wellborn, The Federal Rules of Evidence and The Application of State Law in the Federal Courts.* ("substance" and "procedure" in the Enabling Act and the Rules of Evidence). 55 Tex. L. Rev. 371, 402-406 (1977).

CONSTITUTIONALITY OF PRIVILEGE

The proposed *new* privilege would be unconstitutional under the Texas Constitution, Art. 1, § 13; and, the United States Constitution, 14th Amendment, § 1. The *new* "privilege" would not be equally applied to all civil litigants. In fact, the only beneficiary of such a privilege would always be the defendant in civil litigation. The provision of the 14th Amendment states that no state "shall abridge the privileges **** of citizens of the United States." Likewise, the Amendment forbids "any State [to] deprive any person of life, liberty or property without due process of law;". This *new* privilege would abridge plaintiffs of their long-held privilege of discovering internal documents concerning safety and health practices and investigations of businesses and other persons. Our State Constitution provides that all free men have equal rights. Texas Constitution, Art. 1, § 3. This *new* privilege does not give equal rights to the plaintiffs' bar and the defense bar and the clients of both bars. This is a privilege that is for the exclusive benefit of the defense bar and *its* clients.

The Texas Constitution (Art. 1 § 13) is designed to guarantee equal access of citizens to our courts. Our Supreme Court in a number of instances has declared that limitations imposed by statute or otherwise constitute a violation of that constitutional prohibition. See, *Lucas v. U. S.*, 757 S.W.2d 687 (Tex. 1988) (Statutory limitation on medical malpractice damages violates open courts provision of state Constitution); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (The statutory removal of the tolling of the 2-year period of limitations in medical malpractice actions by minors after reaching the age of six is a violation of the due process guarantees set forth in the open courts provision of the Texas Constitution).

The Texas Constitution guarantees that Texas citizens who bring common-law causes of action will not unreasonably be denied access to the courts. A statutes that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under the above constitutional provisions. Neither the Legislature nor the Supreme Court can abrogate, or severely limit the right to bring a well-established common-law cause of action. The self-critical analysis privilege amounts to an arbitrary and unreasonable restriction of the right of redress and remedy that plaintiffs have until now enjoyed. This proposed privilege is written specifically to hide from plaintiffs' lawyers and their clients any documents that could form the basis of punitive damages. Such documents as the Sumner Simpson Papers would never see the light of day in discovery or in the courtroom. See, *Fiberboard Corp. v. Pool*, 813 S.W.2d 658, 668 (Texarkana 1991, writ denied). The history of asbestos litigation under this proposed new rule would probably be dramatically different than its history has been to date.

PUBLIC POLICY

Professor Charles T. McCormick stated in an article on Privileges In The Law of Evidence:

> "The development of judge-made privileges halted a century ago. The manifest destiny of evidence law is a progressive lowering of the barriers to truth. Seeing this tendency, the commentators who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege. However, some of the old privileges

> give real or fancied shelter or prestige to special groups of people. If, for example, the privilege of the accused to remain silent were taken away, it would be very hard for lawyers in a large proportion of criminal cases to put up any fight worthy of a fee. A proposal to do away with the various privileges for professional confidences would be stoutly resisted by the professions concerned. Correspondingly, newer crafts and professions whose secret communications with their patrons are not privileged are exerting pressure from time to time for new statutory privileges."

See, *McCormick, The Scope of Privilege In The Law of Evidence*, XVI Tex. L. Rev. 447, 469 (1938).

Professor McCormick argued against the extension of privileges, so has Professor Wigmore:

> There must be good reason, plainly shown, for their [privileges] existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget their exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to extend them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and enforcement of testimonial duty demand the restriction, not the expansion of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

8 *Wigmore On Evidence* § 2192 (McNaughton ed. 1961).

The quote from Professor Wigmore is found in an opinion by Justice Thomas A. Clark who was sitting as a Circuit Judge of the Fifth Circuit Court of Appeals when he wrote the opinion in *In Re Dinnan*, 661 F.2d 426,429 (5th Cir. 1981). Justice Clark followed his citation to Wigmore with:

> Recently, reasoning along these lines has carried the day and judge-made privileges have fallen into disfavor. In recent times, commentators have tended to view privileges as hindering litigation and have generally advocated a narrowing of the field. While a number of new privileges have been established recently, they generally have been statutorily created.

The only example of this in Texas is found in *Jordan v. Ct. of App. For Fourth Sup. Jud. Dist.* 701 S.W.2d 644 (Tex. 1985). There the Supreme Court recognized a statutorily created privilege of self-critical analysis for a hospital review committee. See, Tex.Rev.Civ.Stat.Ann.Art. 4447d, § 3, which is now found in the Texas Health and Safety Code, § 161.023. Our Supreme Court recognized this privilege only because it had been specifically created by the Texas Legislature:

> The statutory privilege protecting "records and proceedings" must be balanced with other competing policy considerations. Privileges are not favored in the law and are strictly construed. 3 *Jones on Evidence* § 21.1 at 745 (6th ed. 1972). Privileges contravene "the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel v. United*

> *States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950)). Although exempting from discovery "any matter protected from disclosure by privilege," Tex.R.Civ.P. 166b(3)(3), our rules of civil procedure encourage and permit liberal discovery practices, even including information "reasonably calculated to lead to the discovery of admissible eviden." Tex.R.Civ.P. 166b(2)(A). (page 647)

The origin of the self-critical analysis privilege in this country is as follows:

> The self-critical analysis privilege which the defendants seek to assert is a relatively recent development. The privilege was first recognized in *Bredice v. Doctors Hospital Inc.*,, 50 F.R.D. 249 (D.D.C. 1970), aff'd 479 F.2d 920 (D.C.Cir. 1973). *Bredice* held that the minutes of hospital peer review staff meetings were properly shielded from discovery by the plaintiff in a malpractice action against the hospital. The *Bredice* court concluded: There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded . . . These committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of the overwhelming public interest. Id. at 251.

See, *William v. Vulcan-Hart Corp.* 136 F.R.D. 457, 458-459 (W.D.Ky. 1991).

The Texas Legislature recognized that specific need and created the only example of a self-critical analysis privilege in Texas. If there is some other profession or craft which feels that it desperately needs a similar privilege, it should go to Austin and petition the **Legislature** for a similar privilege.

The public policy reasons which argue against the creation of any new privilege is set out in clear terms by Justice Clark and Professor Wigmore, speaking in tandem in *In Re Dinnan* at pgs. 427-428:

> As a preliminary consideration, however, it must be kept in mind that while the law consists of a framework of legislative actions, judicial precedent, and moral considerations, virtually every judicial inquiry begins with the goal of developing the facts. The basis of justice is the truth and our system frowns upon impediments to ascertaining that truth. This need to develop the facts if the judicial system is to function is summarized by Wigmore:
>
> > From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole–from justice as an institution and from law and order as indispensable elements of civilized life . . . . The whole life of the community, the regularity and continuity of its relations, depends upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future realized depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and

> personal, but the results that hang upon it are universal. The vital process of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in the present cause, but to the community at large and forever.

PRIVILEGE APPLIES TO DISCOVERY

When one looks at Rule 407, it is plain that subsequent remedial measures are not *admissible* to prove fault in connection with the incident made the basis of a lawsuit. There is no prohibition against obtaining through discovery documents demonstrating a subsequent remedial measure. The proposed Rule 514 is an attempt to keep plaintiffs from *even discovering* documents under the self-critical analysis privilege. This means that a party attempting to locate documents to demonstrate gross negligence, malice, or other grounds to obtain punitive damages would be barred from obtaining almost all such documents.

In more straight-forward terms, this self-critical analysis privilege enables every wrongdoer to simply direct that all internal workings of every business be done as a self-critical analysis and the information becomes unobtainable. There would be no more memoranda concerning fires and the costs of modifications for the infamous Pinto automobile. There would be no more memoranda concerning the effects MER-29 or Thalidomide on fetuses. There would be no more disclosure of data concerning the knowledge of the tobacco industries about the addictive and cancer causing effects of its products. This would be without regard to whether or not studies were undertaken on how better to market the products, make a profit, enhance the addictivity, or any other reason. No asbestos company document along lines of the Sumner Simpson Papers would ever see the light of day in a Texas courtroom. Breast implant studies would simply not be obtainable. Pilot evaluation and training files for such carriers as ValuJet, American, Delta, and all other airlines would become inaccessible as self-critical analysis privileged documents.

To state the problem of this proposed rule in yet another way, this rule is the only rule in the history of the Rules of Evidence Committee of the State Bar which proposes a new rule of evidence designed solely to serve a class of litigants rather than to serve the litigation process. Most rules, even the Robinson-Daubert Rule, will work for and against plaintiffs' lawyers, defense lawyers, family lawyers, criminal lawyers and trial lawyers generally in about the same way. The self-critical analysis rule works solely for the benefit of concealing evidence of a privileged class of litigants, i.e. insurance and corporate defendants, who stand far more to gain by concealing the evidence then any single litigant can hope to gain obtaining it. Plaintiffs will file a suit but defendants will no longer have to give up those kinds of evidence that plaintiffs have traditionally used to demonstrate fault and gross fault on the part of the defendant. Summary judgments will become more frequent and findings of gross negligence and exemplary damages more rare. The Anglo-American legal system has existed for hundreds of years without this privilege. The removal of this material from the discovery and trial process will have a profound and harmful effect on our system of justice.

CONCLUSION

Ordinarily, the discoverability of such materials, which this proposed new rule seeks to protect from view, would be beyond question because of their obvious relevance to the case and the likelihood that they would lead to other admissible evidence. The dearth of cases in which protection for similar self-critical reviews has been sought suggests that lawyers perceive little likelihood that courts will protect these materials from discovery or use at trial. No unusual justification exists to support such protection. Business necessity compels companies to continuously review their products to remain competitive. The additional incentive of confidentiality offered by immunity from discovery is therefore not necessary to induce companies to engage in critical evaluations. Product reviews and safety reviews are undertaken continuously, and so their records are maintained in the ordinary course of business. According them protection would not affect their preparation in any way.

Those courts that have considered the source of the authority for the self-critical analysis privilege have relied on their inherent power to control discovery, rather than on a rule of evidence. It is my belief that any self-critical analysis *privilege* should not be treated as an evidentiary privilege but rather dealt with as an exercise in discretionary protection found in the courts power over discovery. I have found that neither the federal courts nor any state court has incorporated the self-critical analysis privilege into its Rules of Evidence. Why should Texas?

Very truly yours,

READ, MORGAN & QUINN, INC.

By: Richard J. Clarkson
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RJC/mlr

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May 31, 1996

Mr. Mike Prince
Carrington, Coleman, Sloman & Blumenthal
200 Crescent Court, Ste. 1500
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Re: Minority Report
Committee on the Administration of Rules of Evidence
Self-Critical Analysis Privilege

Dear Mike:

Enclosed is my effort at a consensus summary of the position of the dissenting minority on the committee regarding the self-critical analysis privilege issue. I think that Richard Clarkson's memorandum might more accurately be considered the subcommittee minority report. I think the dissenters all agree that Richard raises serious legal issues but I am not sure that all of his conclusions reflect a consensus among our dissenters. Likewise, time and litigation prevent me from circulating my "report" for presubmission approval by all dissenters but I think it accurately reflects most of the key points raised by the diverse and broad-based opposition to the new privilege. I ask that both it and Richard Clarkson's memo be submitted to the Supreme Court Advisory Committee as representative of a minority report. Should any of the dissenters think the report is grossly inaccurate, I request they promptly fax their disapproval to both you and me so that it may be clear (if that is the case) that the report does not correctly reflect their viewpoint.

Thank you.

Sincerely,

Ken Lewis

Kenneth W. Lewis

KWL/ml
Enclosure

P.S. Mike, I am working on a minority report regarding the Rule 702 comment about our concerns regarding parts of the proposed comment. This issue did not seem as critical as this one so it has been on the back burner while reading all of the self-critical analysis decisions to date. However, I will get out a brief report within the next few days. Ken

cc: David Beck, President (w/encl)
State Bar of Texas
1331 Lamar Street, Suite 1570
Houston, Texas 77010

Members of the Administration of the Rules of Evidence Committee
(w/encl and Clarkson's report)

MINORITY REPORT
COMMITTEE ON THE ADMINISTRATION OF RULES OF EVIDENCE

RE: SELF-CRITICAL ANALYSIS PRIVILEGE

The consideration and recommendation for adoption of a new TRCE 514 entitled "Self-Critical Analysis Privilege" is and was strongly opposed by a significant minority of the committee at its May 11, 1996, meeting. This report is to emphasize that there was not a strong consensus supporting the committee's majority report, to make very clear the strenuous opposition of the dissenters on the committee to this effort to create this new privilege in Texas, to provide in some detail the basis for the minority's opposition to the recommendation and to urge that the Supreme Court Advisory Committee not recommend the adoption of the proposed TRCE 514 in any form.

Some of the strong considerations for opposition to recommending adoption of the proposed TRCE 514 included:

1. Privileges by their very character are to be very limited and their promulgation to be zealously limited, as is currently recognized in TRCE 501. The acknowledged father of Texas evidence, Professor Charles T. McCormick, wrote in 1938:

> The development of judge-made privileges halted a century ago. The manifest destiny of evidence law is a progressive lowering of the barriers to truth. Seeing this tendency, the commentators, who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege. However, some of the old privileges give real or fancied shelter or prestige to special groups of people . . . [N]ewer crafts and professions whose secret communications with their patrons are not

privileged are exerting pressure from time to time for new statutory privileges.

McCormick, "The Scope of Privilege in the Law of Evidence," XVI Tex. L. Rev. 447, 449 (1938). [It is noteworthy that the two professors of law who currently edit Professor McCormick's hornbook treatise on evidence both joined in this minority report.] Therefore, we should start the consideration of adding a privilege to the rules of evidence from a very conservative posture which demands the proponents show a very strong necessity and/or public policy that requires the creation of the privilege. This conservative posture is necessary because privileges not only create totally impenetrable shields that keep information hidden from litigants and the public, but also create a very powerful sword-like weapon for the "privileged" advocate through his knowledge and control of the secret information.

2. Our current privileges have existed in the case law for hundreds of years and were urged with strong legal reasoning in appellate cases for many years prior to their adoption, creating the appropriate wealth of legal argument and judicial comment as a backdrop for their consideration. Only a total of 126 references to the self-critical analysis privilege can be found in computerized databases for all the state and federal courts in our country--a number of which deal with the same lawsuit on appeal, rehearing or remand, and many of which are limited to medical peer reviews. Most of these cases do not decide if the privilege exists, but only that it could not apply in that specific case if it exists at all. No

national pattern or trend exists at either the state or federal level. The genesis of this allegedly "evolving" privilege is a 1970 District of Columbia Circuit Court decision recognizing it as a discovery shield for minutes of hospital peer review meetings of poor outcome "incidents." Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), aff'd 479 F.2d 920 (D.C. Cir. 1973). Since Bredice, 46 states (including Texas) have adopted statutes providing this same protection for this extremely limited evaluation. [Many lawyers involved in medical negligence cases would argue that even this limited privilege is used as a shield to hide facts and knowledge of causation more often than not, with health care providers able to answer specific inquiries with "unknown" or "privileged" when they well know exactly what went wrong--with little remedial action or improvement in delivery of services resulting from the privilege.] Most state and federal courts dealing with this peer review self-critical analysis "qualified" privilege have even provided an exception that requires the disclosure when the opposition shows a certain level of necessity. Todd v. South Jersey Hosp. Sys., 152 F. RD. 676 (U.S.D.C. for District of N.J. 1993) The United States Supreme Court has addressed the issue of the existence of this privilege a single time and held unanimously that the claimed privilege for self-critical analysis for peer review materials in university employment discrimination cases would not be recognized by the Court because it lacks a historical, constitutional, or statutory basis similar to that of the qualified privileges for Presidential and grand and petit jury communications and for

deliberative intra-agency documents. University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). The very same analysis applies at this time in Texas.

3. The only argument advanced for this privilege is that public policy ought to encourage businesses to undertake such self-critical analysis for the "public good" because greater efficiency, productivity, creativity and/or safety would result and such analysis might not occur if the studies were subject to discovery in litigation. Such an argument rests upon two implicit assumptions. First, such self-critical analysis is not currently done because it might be discovered during litigation. Second, self-critical analysis discovered by opponents in litigation would be harmful to the business engaging in it in subsequent litigation. No evidence has been produced to show either implicit assumption to be correct. Logically, if self-critical analysis is not done now because of fears of litigation discovery, there is no evidence that it would ever be done. If it is currently undertaken, it is done without the protection of privilege. Professor Guy Wellborn pointed out during the committee's discussions that corporations are motivated by profits and that encourages them to conduct such self-critical analysis to improve their profits and the existence of a privilege probably will have no impact on such activities. The second implicit assumption is likewise not supported by logic. Honest and in-depth self-critical analysis is just as likely to help as to hurt a corporation in litigation. If, however, a corporation engaged in self-critical

analysis and then hid and ignored the results, it is the ostrich-like conduct and not the self-critical analysis that hurts the corporation in litigation. It is this lack of candor which rightfully angers juries. The corporation that has done really good self-critical analysis and acted wisely upon its knowledge will greatly benefit from the discovery of such work product. A large number of the courts considering adoption of the privilege have scathingly rejected these allegations of public good not otherwise attainable as rubbish and every court discussing the merits of the sought privilege has immediately identified the competing issues of litigation based on full disclosure of facts versus the desire of an organization to candidly address its problems without fear of future disclosure in litigation. Some courts have observed that any corporation concerned about safety or public good will publicly acknowledge and correct dangers immediately--engaging in recalls, industry sharing and public information campaigns--and that being the case there is no public good from secrecy, only profits and tactical advantage in litigation. ["While the cases which apply the privilege denying discovery of a self-critical analysis make recitals to the effect that such privileges is necessary for open reporting and the success of the program, this recital is never explained nor demonstrated. It is a bald assumption. It occurs to us that if a manufacturer files a self-critical analysis which demonstrates that it was marketing a hazardous product, the CPSC would instantly order it to cease and desist . . . [A] manufacturer could not, with any justice, file a self-critical analysis reflecting a dangerous propensity of an

article, and then claim a privilege. We believe that a responsible manufacturer who discovered a dangerous article and filed a self-critical analysis reflecting the danger, would cease distribution if it . . . An irresponsible manufacturer would misrepresent the hazard in the first place. In essence, we are wholly unpersuaded the privilege would appreciably aid the program." Scroggins v. Uniden Corp. of America, 506 N.E. 2d 83, 86 (Ind. 1st Ct. App. 1987).]

4. This privilege has even more shield/sword problems than most privileges because it lets an organization use those fruits of self-critical analysis which help the organization in litigation and bury those which do not help the organization. It is clear that the intended beneficiaries of this new privilege are to be major corporations. The proposed rule itself is written for "organizations," with private individuals thrown in as also constituting an organization for purposes of the rule. No one could realistically imagine a situation where a private individual might benefit from this privilege.

5. In recent years, it has become increasingly recognized that full disclosure is necessary for our civil justice system and trial by jury to properly resolve civil disputes because only full disclosure results in juries having the opportunity to decide cases on the facts. Simultaneously, society has come to demand less secrecy and more openness from all major institutions and this has come to also be recognized and encouraged by our courts. Both of these trends weigh heavily against creating this new privilege.

6. There is no great trend in courts across America to adopt this new privilege. To the contrary, only a handful of state and federal courts have addressed the issue, most have rejected the privilege, most of the few who have accepted it at all have limited it to hospital peer reviews (which is already protected from disclosure by Texas statute, perhaps to the public's current detriment), and some of the states who have adopted the concept of self-critical analysis have limited it to the status of our TRCE 407 for subsequent remedial measure, allowing its discovery but limiting its trial admissibility to limited purposes. It is telling that the subcommittee report voted on by this committee did not contain a detailed analysis of case law to support its recommendations.

7. Recent history and discoveries in complex products liability litigation provide no support for any argument profit-driven businesses will act other than in their own self-interests and failures to both engage in meaningful self-critical analysis and to implement the findings of self-critical analysis indicate that discovery and disclosure in litigation of such conduct is perhaps the best method of encouraging the conduct supposedly engendered by this proposed privilege.

8. Privileges themselves generate litigation and appellate law. This type of litigation is never directed to the merits of a case. Texas simply does not need to create a whole new category of pretrial litigation and appeals by creating this new privilege with so many new issues and vaguely worded terms and phrases.

9. The failure to circulate any memorandums of law about the supposed development of this privilege in other jurisdictions creates a procedural problem about the sufficiency of information available to the committee at the time the vote was taken on the proposal. A review of existing persuasive case law should be of paramount importance when such a radical change to the law of evidence is proposed through judicial administrative rule-making.

These considerations cause the minority members of this committee to urge that no self-critical analysis privilege be adopted in Texas. We also commend the brief legal memorandum prepared as by Richard Clarkson as the minority report of the subcommittee to the Advisory Committee for the serious legal questions it raises about the privilege and the method proposed for its adoption.

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June 3, 1996

Mike Prince
200 Crescent Court, Suite 1500
Dallas, Texas 75201

Re: State Bar Administration of the Rules of Evidence Committee

Dear Mike:

I have received and reviewed Ken Lewis and Richard Clarkson's Minority Memoranda concerning the Self-Critical Analysis Privilege. I endorse them to reflect my dissant from the vote taken by the committee.

Very truly yours,

Jack W. London

JWL:lmc
cc: Greg Jones (Via fax: 817-535-3046)
Prof. John Sutton (Via fax: 512-471-6988)
Prof. Guy Wellborn (Via fax: 512-471-6988)
Richard Clarkson (Via fax: 409-838-8236)
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Re: State Bar of Texas Administration of the Rules of Evidence Committee;
Report of Rules 702-705 Subcommittee

Dear Mike:

Our subcommittee has now completed its task of reviewing Rules 702-705 for comments or changes in light of the Texas Supreme Court's decision in Robinson. In this connection, I am enclosing a proposed comment to Rule 702 for consideration at the May committee meeting. The subcommittee believes this comment will provide helpful guidance in determining the admissibility of expert testimony under Rule 702. As discussed in the proposal, the Subcommittee also believes the comment should be broadened to include all forms of expert testimony, not just expert testimony based on scientific knowledge.

The subcommittee members who participated in drafting the proposed comment were in agreement as to its form and substance, with two narrow exceptions which are described in the enclosed letter from Scott Ozmun. I would appreciate it if you would circulate to the entire committee our proposed comment, Scott's letter, and Dean Sutton's memorandum (which you should already have) that formed the basis of our proposal. If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

Mark K. Sales

MKS:spt
Enclosure

PROPOSED COMMENT TO RULE 702

Submitted by Rule 702-705 Subcommittee of the State Bar of Texas
Administration of the Rules of Evidence Committee

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

19-2-No Comment

Proposed Comments

The proponent of expert opinion evidence based upon scientific knowledge has, under Rule 104(a), the burden of persuading the trial court by a preponderance of evidence that such evidence will assist the trier of fact. To constitute scientific knowledge that will assist the trier of fact, the proposed expert testimony must be both relevant and reliable. The trial court's determination of relevance and reliability should be made outside the presence of the jury, and should be made at a preliminary hearing in advance of trial whenever possible, or otherwise may be made during voir dire examination of the expert at trial.

The reliability inquiry is a flexible one, focusing on the scientific theory, methodology and reasoning underlying the expert's opinions and conclusions. The role of the trial court under this Rule is not to determine the validity or accuracy of the opinions and conclusions formed by the expert, but to determine whether the expert's testimony is based on relevant scientific knowledge shown to be, or known to be, reliable. There is no definitive or exclusive list of factors for determining whether the underlying relevant scientific theory, methodology,

and reasoning is reliable. For guidance the trial court should consider the factors for reliability set forth in E. I.DuPont De Nemours & Co. v. Robinson, _____ S.W.2d _____ (Tex. 1995); Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992); Daubert v. Merrill Dow Pharmaceuticals, Inc., _____ U.S. _____ (1993).

Once the trial court makes the initial determinations that the proffered scientific expert evidence is both relevant and reliable, the Court then may determine whether such evidence should be excluded under the balancing test of Rule 403.

Proposed Scope of Comment

Although the Texas Supreme Court's holding in DuPont v. Robinson and the United States Supreme Court's holding in Daubert are limited to scientific knowledge, the Subcommittee believes that the scope of this comment should apply to technical and other specialized knowledge as well. The Subcommittee believes that the same concerns regarding relevance and reliability apply to technical and other specialized knowledge, and that expert testimony based on technical or other specialized knowledge should meet the same requirements as testimony based upon scientific knowledge. Furthermore, the Subcommittee believes that limiting the scope of the comment solely to scientific knowledge would in effect set up a different standard for scientific, as opposed to technical or other specialized, knowledge and thus lead to needless confusion and additional burdens for the trial court.

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March 25, 1996

Via FAX 214/939-6100

Mr. Mark K. Sales
Hughes & Luce
1717 Main Street, Suite 2800
Dallas TX 75201

Re: State Bar Administration of the Rules of Evidence Committee and Rules 702 - 705 Subcommittee

Dear Mark:

I am writing to set out my views with regards to the subcommittee's proposal comment to Rule 702.

As we discussed, I believe the last paragraph of the proposed comment is superfluous and unnecessary. I do not believe it is the purview of the commentators to the rules of evidence to advise attorneys as to what objections to raise to evidence. This comment tells lawyers that they should raise a Rule 403 objection if they lose the initial Daubert/Robinson challenge.

Furthermore, I believe this paragraph is superfluous in that the Rules of Evidence already allow a Rule 403 objection to any evidence. Therefore, since it is already permissible, I see no reason to reemphasize it with this comment.

Additionally, I believe that language similar to that in Dean Sutton's original draft comment should be added as a final paragraph. Specifically, I would recommend the following language be inserted in the final paragraph to the comment: "Absolute reliability or proof to a scientific certainty is not required for admissibility of scientific evidence under Rule 702, and these rules generally tend to favor admissibility of evidence."

As you know, there is a great distinction between "preponderance of the evidence" and "proof to a scientific certainty," which is a much higher standard. I believe that good advocates who are trying to exclude evidence will attempt to confuse the trial court with arguments relating to proof to a scientific certainty and I think the comment should make clear that the standard of scientific

certainty or absolute reliability is not required for admissibility under a Daubert/Robinson challenge.

Thank you for giving me an opportunity to share my views.

Sincerely,

Scott Ozmun

SAO/jc

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Notes and Comments

The proponent of expert opinion evidence based upon scientific knowledge has, under Rule 104(a), the burden of persuading the court by a preponderance of evidence that the knowledge possessed by the expert regarding a relevant scientific theory will assist the trier of fact. This determination should be made at a preliminary hearing or possibly during voir dire examination of the witness outside the hearing of the jury.

The Rule 702 foundation issue for the court's decision consists of four parts: first, whether the witness possesses specialized knowledge of a reasonably reliable scientific theory; second, whether that theory is relevant to a material issue; third, whether the expert used reasonable methodology in forming an opinion based on that scientific theory, and, fourth, whether the trier of fact will be assisted by the opinion in view of the quality of the knowledge possessed by the witness, the relative reliability of the scientific theory, the appropriateness of the methodology used by the expert in forming the opinion, and the clarity with which the theory and methodology can be explained to the trier of fact.

Proof that the scientific theory has attained general acceptance in the pertinent scientific community often suffices to support a finding that the theory is reasonably reliable. If general acceptance has not been shown, and particularly if a novel, new, or questionable scientific theory is involved, the court will need to consider other factors or circumstances that are logically relevant on the issue of reliability of the scientific theory. No comprehensive checklist of relevant circumstances can be made, but in any given situation one or more of the following circumstances may be logically relevant or even critical to determination of the reliability of the scientific theory: Is the theory testable and tested? Has it been subjected to peer review or scholarly publication? Has the potential for error been determined? Has non-judicial use been made of the theory?

On the issue whether the expert used appropriate methodology in forming an opinion, similar circumstances to those listed above may be relevant, such as whether the methodology has been generally accepted, or has been tested, or has been subject to peer review or scholarly publication, or whether the expert possesses sufficient experience and skill to make appropriate use of the methodology.

Absolute reliability is not required for admissibility of scientific evidence under Rule 702, and these rules generally tend to favor admissibility of evidence. However, after the foundation facts for admissibility have been found by the court, the court may then apply the balancing test of Rule 403.

In deciding admissibility of scientific testimony, the court is not to pass upon the validity of the opinions formed by, nor the credibility of, the witness.

Rule 702 does not limit the historical use of expert opinions in answer to hypothetical questions asked of a qualified expert witness in evaluating factual evidence previously placed before the trier of fact. The rule also does not limit the ability of a fact witness who possesses specialized

knowledge to testify under Rule 701 in the form of an opinion to matters rationally based on the perception of the witness and helpful to the determination of a fact in issue.

Rule 703. Bases of Opinion Testimony.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Notes and Comments

Underlying data otherwise inadmissible is admissible under Rule 703, subject to Rule 403, for the limited purpose of illustrating or explaining the opinion of the expert but not as substantive evidence.

Comment to 1990 change: This amendment conforms this rule of evidence to the rules of discovery in utilizing the term "reviewed by the expert." See also comment to Rule 166b.

[QUERY: Should the added first sentence of this proposed comment be placed under this Rule 703, or under Rule 705? I lean toward use of Rule 705 rather than here.]

Synopsis

Tex.R.Civ.Evid. Rules 702 - 705 should not be amended. Official comments should be added to Rule 702 and 703 to aid the judge in passing on admissibility of scientific evidence. That decision is made by the judge under R. 104 (a), and the proponent of the evidence has the burden of persuasion on admissibility by a preponderance of the evidence.

The preliminary issue of fact under Rule 702 for decision by the judge is whether the proposed opinion evidence is based on scientific knowledge that is sufficiently reliable and relevant to be of assistance to the jury (or trier of fact). This is the key.

Daubert v. Merrell Dow Pharmaceuticals, Inc, 113 S. Ct. 2786 (1993) and *Robinson v. E.I. du Pont de Nemours & Co.*, ___S.W.2d___, 1995 WL 359024 (Tex. 1995) undertake to provide general guidance to the judge in passing upon that preliminary issue of fact when an opinion based on scientific knowledge is tendered. Those cases do not provide supplemental legal standards; the only legal standards are set out in the Article VII rules. Those cases do list circumstances that may (or may not) be relevant on the issue and which a court might consider in exercising its discretion. It is impossible for a court (or official comment) to list all circumstances that might bear on the issue of whether the expert opinion is based on scientific knowledge that is sufficiently reliable to be of aid to the jury (trier of fact) in understanding evidence or in passing on a fact in issue. It is impossible because any circumstance that is logically relevant on that issue should be considered.

The combined guidance is that some of the circumstances that might be relevant on the foundation issues (and which, if relevant, the judge in determining the relative reliability of the scientific theory or technique usually should consider) are these: whether it is testable and tested; whether it has been subject to peer review and scholarly publication; whether its potential for error has been considered; and whether it has attained general acceptance.

The list of such factors is not and cannot be an exclusive list of relevant circumstances. It is certainly not necessary for all suggested factors to be present for the opinion evidence to be sufficiently reliable and relevant to be of assistance to the jury. Indeed, it is possible that none of the listed factors need be present if other circumstances show that the opinion is based on scientific knowledge sufficiently reliable and relevant to be of assistance to the jury. The suggested factors will be useful mainly in situations involving opinions based on novel or questionable scientific theories. When an opinion

based on novel or questionable scientific theories is admitted, the decision on appeal as to whether the judge abused his discretion in admitting the evidence will be aided if the judge states which factors or circumstances support his decision that the opinion is based on scientific knowledge sufficiently reliable and relevant to be of assistance to the jury.

If the basic scientific theory and technique are sufficiently reliable and relevant to be of assistance to the jury, the judge also must consider whether the knowledge and methodology of the witness based on the theory and technique are adequate for the opinion of the witness to be of assistance to the jury.

The judge's role is to determine only the admissibility of opinions based on scientific knowledge, not the credibility of the opinions themselves. The judge may, however, exclude an opinion on the basis of Rule 403 if the probative value of the opinion is "substantially outweighed" by the dangers specified in Rule 403.

The decision by the judge on the preliminary issue of fact determining admissibility of the proposed opinion evidence ordinarily should be made at a preliminary hearing or on voir dire examination of the witness not in the hearing of the jury.

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The Supporting Pitch
(A preliminary Draft, not for quotation or attribution[1])

Rule 702, T.R.Civ.E., permits a witness who is qualified as a knowledgeable "expert" by reason of "skill, experience, training, or education" in regard to "scientific, technical, or other specialized knowledge" to testify "thereto" in the form of an "opinion or otherwise" if such knowledge will "assist" the trier of fact to understand the evidence or determine a fact in issue. That is the legal standard, and the "suggestions" in various cases as to how a trial judge should proceed to determine those foundation issues of fact when passing on admissibility are guidelines, not law.

The judge determines the admissibility of evidence—that is, determines the preliminary issues, or foundation issues, of fact—under Rule 104 (a). This determination is

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1 This draft has not been completed, or checked for errors of substance, or even Shepardized, much less shaped into Blue Book form. (In fact, perhaps I should not have undertaken to write even a preliminary analysis, since I was cited in both the majority and the dissenting opinion in Robinson.)

made by the preponderance of the evidence.[2] The determination is made outside the presence of the jury "when the interests of justice so require." Rule 104 (c). The burden of persuasion is on the proponent of the evidence.[3] In short, the judge proceeds under Rule 104 (a) to determine whether the foundation facts specified in Rule 702 have been shown sufficiently to meet the preponderance-of-the-evidence test for admissibility.[4]

The qualified expert may base her opinion not only on data perceived or reviewed at the hearing (as when a hypothetical question is used) but also on data perceived or reviewed before the hearing[5], and that data does not even need to be admissible data if it is of "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 703. If an issue arises as to whether the expert relied on data not reasonably relied upon by experts in the particular field, this issue, too, is decided by the judge under Rule 104 (a) on the basis of the preponderance of the evidence.

Under Rule 705, T.R.Civ.E., the knowledgeable expert on direct examination may begin by stating her opinions without first testifying in regard to the data relied upon, unless the court directs otherwise.[6] The practical result is that prior deposition examination of the expert is virtually mandated, at least in civil cases, except perhaps to the extent that the proponent of the evidence needs to prove, at a preliminary hearing, the foundation facts called for by Rule 702.

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2 *Bourjaily v. United States* 107 S.Ct. 268 (1987); *Huddleston v. United States*, 108 S.Ct. 1496 (1988). Of course, if the admissibility of one item of evidence is dependent upon proof of another fact (a.k.a. conditional relevance), the court determines admissibility by deciding whether the evidence of such other fact is "sufficient to support" a finding of such other fact. Rule 104 (b).

The Texas Court of Criminal Appeals, although its opinion actually includes a reference to Rule 104 (a), has held that the burden of persuasion upon the one offering novel scientific testimony is that of clear and convincing evidence rather than the preponderance of the evidence. See *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992). A DNA case, *Kelly* involved the scientific principle underlying "restriction fragment length polymorphism."

3 The dissenting opinion in E.I. du Pont de Nemours & Co., Inc., ___S.W.2d___, 1995 WL 359024 (Tex. 1995) disagrees with this statement.

4 Sometimes, of course, the judge also must determine the sufficiency of the proof of facts to meet the foundation requirements of Rule 703.

5 The personal knowledge requirement of Rule 602, does not apply, by its own terms, to opinion evidence by an expert.

6 The civil rules do not even provide for the opposing counsel to conduct voir dire examination prior to the time the expert witness expresses her opinions. The better view is found in T.R.Crim.E. 705 (b), reading as follows: "Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, 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."

The view that the judge serves as "gatekeeper" under Article VII regarding admissibility of expert testimony is not unique, for the judge is, of course, the "gatekeeper" regarding *all* evidence, under Rule 104.[7]

The only peculiarity regarding admissibility of opinion evidence by a knowledgeable expert under Article VII is that the preliminary issue of admissibility for the judge to decide is unusually complicated, or multifarious, viz:

(1) Does the witness have some kind of "*specialized knowledge*?"

(2) Is that specialized knowledge *relevant to a material issue* in the litigation?

(3) Will an opinion based on that specialized knowledge "*assist*" the jury[8] in either understanding evidence in the case or determining a fact issue in the case?

(4) In forming her opinion, did the knowledgeable expert rely on facts or data not admissible in evidence[9], and

(a) if so, are such inadmissible facts or data of a type "*reasonably* relied upon by experts in the "*particular field*" in forming opinions or making inferences?[10]

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7 *Daubert* noted that the preliminary admissibility decision regarding expert scientific opinion is made by the judge under Rule 104 (a). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

8 Or the judge in a non-jury case.

9 When facts and data not in evidence are relied upon by the expert and are testified to only for the purpose of showing the bases of the opinion, the balancing test of Rule 403 applies. *Gong v. Hirsch*, 913 F.2d 1269 (7th Cir. 1990); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988); *cf. Emigh v. Consolidated Rail Corp.*, 710 F.Supp. 608 (W.D. Pa. 1989). But *cf. Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361 (Tex. 1987), critiqued, Linda L. Addison, *Disclosing to the Jury Inadmissible Facts and Data —Underlying Expert Opinion*, Tex. B.J., June 1990, at 629. If such explanatory testimony is admitted the opponent is entitled to a limiting instruction under Rule 103. *Cf. Matter of James Wilson Associates*, 965 F.2d 160 (7th Cir. 1992). T.R.Crim.E. 705 (d) expressly provides for a slightly different balancing test, as well as providing for limiting instructions. *See Joiner v. State*, 825 S.W.2d 701 (Tex.Crim.App. 1992). The Texas Court of Criminal Appeals seems to use the Rule 403 balancing in determining whether scientific opinions are helpful to ["will assist"] the trier of fact. *See, e.g., Emerson v. State*, 880 S.W.2d 759, 769 (Tex.Cr.App. 1994).

The Fifth Circuit has stated: "While not discussed at length in *Daubert*, the presumption in favor of admissibility established by Rules 401 and 402, together with *Daubert's* 'flexible' approach, may well mandate an enhanced role for Rule 403 in the context of the *Daubert* analysis, particularly when the scientific or technical knowledge proffered is novel or controversial. *See Conti v. Comm'r of Internal Revenue*, 39 F.3d 658 (6th Cir. 1994) (excluding polygraph evidence on the basis of rule 403), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1793, 131 L.Ed.2d 722 (1995)." *United States v. Posado*, 57 F.3d 428, 435 (5th Cir. 1995).

Perhaps a clarifying "Comment" should be added under either Rule 703 or Rule 705 something like this: Underlying data otherwise inadmissible is admissible under Rule 703 [705], subject to Rule 403, for the limited purpose of illustrating or explaining the expert's opinion but not as substantive evidence.

The more difficult problems arise in regard to sub-issues (1) and (3)[11]. In determining whether the opinion is based on "specialized knowledge" and, if so, whether it will "assist" the jury, the judge necessarily considers the nature of that specialized knowledge and the methodology by which the expert utilized that knowledge. The "gatekeeping"[12] function—that is, the function of passing on admissibility of the tendered evidence —does not include, however, reviewing or passing upon the validity of the conclusions formed by the expert.[13] The judge determines only admissibility, not credibility nor sufficiency, of the opinion evidence. Worded differently, the role of the judge is not to determine whether the opinion is accurate, but whether the witness is basing her testimony on scientific knowledge shown to be or known to be of sufficient reliability to be of assistance to the jury.

The "gatekeeping" function—again, the determination of the preliminary issue of admissibility of tendered opinions by experts—appears not to be difficult except when "scientific"[14] or "technical"[15] knowledge is involved.[16] Those two kinds of specialized

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10 Obviously, a court "must know the basis for an expert's opinion before it can determine that the basis is not of a type reasonably relied on by experts in the field." *Ambrosini v. Labarraque*, 966 F.2d 1464, 1469 (D.C. Cir. 1992). *Accord, Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 925 (3rd Cir. 1991).

11 As to sub-issue (2), *Daubert* notes that "scientific validity for one purpose is not necessarily scientific validity for other . . . purposes." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2796 (1993). In short, good, reliable scientific evidence is not admissible if it is not relevant to a material issue. Difficult preliminary issues may also arise under sub-issue (4)(a) above, but that problem was not involved in *Daubert*.

12 To refer to the judge's task as "gatekeeping" may tend to be misleading if it indicates to the reader that the judge's task is something different from his normal task under Rule 104 (a).

13 *See Mendes-Silva v. United States*, 980 F.2d 1482 (D.C. Cir. 1993). Also, *Daubert* made it clear that the "focus . . . must be solely on [underlying] principles and methodology, not on the conclusions that they generate." *Daubert*, 113 S.Ct. at 2796. See also *In re Aluminum Phosphide Antitrust Litigation*, 893 F.Supp. 1497, 1506 (D.Kan. 1995) ("The court's focus must be solely on principles and methodology, not the conclusions that they generate.")

14 In practice, the concern has largely been with excluding "junk" science while not unreasonably restricting the use of new or developing fields of scientific knowledge. *See generally*, Michael V. Ciresi and Martha K. Wivell, *Protecting Your Evidence Against 'Junk Science' Attacks*, Trial, Nov. 1991, at 35. "Technical" knowledge is a lesser problem, apparently involving the techniques, skills, and mechanics involved in making practical application of scientific knowledge. *See, e.g., People v. Collins*, 438 P.2d 33 (Cal. 1968), where at trial an instructor of mathematics used an incorrect mathematical formula.

In view of *Daubert* and the rejection of *Frye*, polygraph evidence is no longer *per se* inadmissible. *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995).

15 *United States v. Starzecpyzel*, F.Supp. (S.D. N.Y. 1995) held that testimony by a forensic document examiner is technical, rather than scientific, and therefore *Daubert* does not apply, but, of course, that the judge must test admissibility by whether the witness possesses relevant technical evidence that will assist the trier of fact.

knowledge generally will not be within the ken of the typical judge. The question raised by *Daubert*[17] and by *Robinson*[18] is, how should the judge go about deciding the multifarious preliminary issue of admissibility when scientific (and, probably, when technical) knowledge is involved.[19]

The heart of *Daubert*[20] is its stress that, first, the concept of "scientific" implies a grounding in the methods and procedures of science and, second, the concept of

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16 "Other specialized knowledge," as used in Rule 702, seems to give little trouble regarding admissibility once it is determined that the "expert" witness does possess relevant knowledge that the jury is unlikely to have. Thus, a qualified border patrol agent may testify to the smell of marijuana, *United States v. Arrasmith*, 557 F.2d 1093 (5th Cir. 1977); a former infantryman with wartime experience may testify to the odor of decomposing human bodies, *State v. Lerch*, 677 P.2d 678 (Or. 1984); a knowledgeable FBI agent may testify as to "the peculiar argot of bookmakers," *United States v. Barletta*, 565 F.2d 985 (8th Cir. 1977); expert evidence may be given on the prevalence and feasibility of alimentary canal smuggling of diamonds from Nigeria, *United States v. Onumonu*, 967 F.2d 782 (2nd Cir. 1992); and an experienced narcotics investigator may testify to the methods used by narcotics traffickers, *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991).

Whether such "other specialized knowledge" will "assist the trier of fact" can depend on the locale of the trial; for example, the jury in a trial in Dallas County involving the issue whether a carefully described barb-wire fence is "reasonably capable of turning livestock" will be assisted by the opinion of a knowledgeable rancher, but a jury in a similar trial in Sonora, Texas, will not need that opinion evidence.

17 *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). On remand, the Ninth Circuit recognized that its task was to ensure that the expert's testimony "both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1313 (9th Cir. 1995).

See generally Bert Black, Francisco Ayala, & Carol Saffran-Brinks, *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 Tex. L. Rev. 715 (1994). This article is an interesting attempt to blend scientific methodology with the admissibility problems under Rule 702 as analyzed in *Daubert*. While helpful, the article's suggestions of various ways for the trial judge to determine admissibility of scientific evidence probably are too detailed and time-consuming to be useful, and might be viewed as relating more to the validity or soundness of the expert's conclusions rather than to whether the expert's opinions are based on reasonably reliable scientific knowledge.

18 *E.I. du Pont de Nemours & Co., Inc., v. Robinson*, ___ S.W.2d ___, 1995 WL 359024 (Tex. 1995). The majority opinion in *Robinson* relied heavily upon *Daubert*.

19 A 1994 report concerning procedures for determining admissibility of expert evidence after *Daubert*, prepared by an ad hoc subcommittee of the Federal Rules of Evidence Committee of the American College of Trial Lawyers, appears at 157 F.R.D. 571. The report suggests, at 581, that in federal courts subject to the new amendments to Rule 26()(2), F.R.Civ.P., the required disclosure concerning experts should include the basis and reasons for the expert's opinions, including factors supporting validity of methodology employed.

20 Discussion is concentrated on *Daubert* rather than on *Robinson* for three reasons: First, for the sake of uniformity, since *Daubert* is followed in the federal courts and is being picked up in many states. Second, because *Robinson* was decided by a badly split court whose membership has changed since the writing of the apparently still unreleased opinion (reference is to both the main opinion and the dissenting opinion), the

"knowledge" connotes more than subjective belief or unsupported speculation. The preliminary question for the judge under Rule 702 is, after all, nothing more or less than whether the opinions of the witness are based on "scientific knowledge" that will "assist" the jury (or trier of fact);[21] *Daubert* gives generalized definitions of "scientific" and of "knowledge" and the proponent's proof of the expert's scientific knowledge should be sturdy enough that the judge can decide, on the balance of probabilities[22], that the opinion will prove helpful to the jury.[23]

Daubert gave no definitive checklist of factors controlling the determination of whether the expert possesses (relevant) scientific knowledge. *Daubert* did, however, offer

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proposed official comments to the Rules should be written, if possible, in a way to appeal to a majority of the court as it will be constituted presently. Third, the majority opinion in *Robinson* relies heavily on *Daubert*. *Robinson* is discussed at the end of this draft.

21 Mr. Michael Paul Graham's suggested specific revision of Rule 702 (transmitted via Justice Hecht and Luke Soules) will not do. It substantially reinstates the *Frye* test (which was never the prevailing Texas view) despite the obvious conflict between the *Frye* test and the rules of Article VII. The Fifth Circuit *Christopherson* case that he cites was a pre-*Daubert* case and it has been criticized as follows: "Thus, the Fifth Circuit has incorporated *Frye* into Rule 702. This incorporation seems both unnecessary and inappropriate. As the Texas Court of Criminal Appeals and other federal circuits have noted, admissibility of scientific evidence should be based upon its reliability, not necessarily its general acceptance in the scientific community." Texas Rules of Evidence Handbook 842 (2nd ed, 1993). As indicated, Graham's proposal would create a Rule 702 standard for Texas civil cases that differs markedly from the existing standard in Texas criminal cases and all federal cases. That would be unfortunate. Also, the present wording of Rule 702 is easier than his proposed rule for a court to apply, despite his adoption of *Frye*. Furthermore, the proposed amendment apparently conflicts with Rule 103 (a), Tex.R.Civ.E., and with Rule 81 (b), Rules of Appellate Procedure. His cover letter states that the "purpose of the amendment is to require that the trial court to determine that the witness is in fact an expert, and that his testimony is based upon a well-founded methodology." However, that is the existing standard today for scientific testimony if we substitute for "well-founded" the qualification that the methodology is sufficiently reliable for the opinion to be of assistance to the trier of fact.

22 Isn't this what "preponderance of the evidence" means? The term surely does not mean the greater weight of the credible evidence, for the one without the burden of persuasion does not have to offer any evidence at all.

23 In a comprehensive opinion relating to expert opinion on scientific matters, the Third Circuit Court of Appeals recently stated: "[B]ecause the reliability standard of Rules 702 and 703 is somewhat amorphous, there is a significant risk that district judges will set the threshold too high and will in fact force plaintiffs to prove their case twice. Reducing this risk is particularly important because the Federal Rules of Evidence display a preference for admissibility. See *Daubert*, __ U.S. at __, 113 S.Ct. at 2794." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 750 (3rd Cir. 1994).

See also *United States v. Velasquez*, 64 F.3d 844, 849 (3rd Cir. 1995): "Our conclusion that Professor Denbeaux's expert testimony was admissible is consistent with the 'strong and undeniable preference for admitting any evidence having some potential for assisting the trier of fact' which is embodied in the Federal Rules of Evidence. *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 956 (3rd Cir. 1990). Rule 702, which governs the admissibility of expert testimony, specifically embraces this policy."

some relevant suggestions, but the Supreme Court stressed that the inquiry is "a flexible one" and these are suggestions only and not a laundry list of standards. Necessarily, these suggestions are not legal standards of admissibility, for the issue of fact for the trial judge is nothing more or less than this: Does the witness possess scientific knowledge that will assist the jury? Perhaps the answer is "no" if the scientific underpinning is weak, or if the witness is lacking in knowledge, or if the scientific body of knowledge or the methodology used by the witness are not sufficiently reliable for the testimony to be of assistance to the jury. The suggestions will help the judge to make an informed decision (and to explain his decision) whether the witness possesses scientific knowledge that will assist the jury.

The suggestions from *Daubert* are these: Is the theory or technique testable and tested? Has the technique or methodology been subjected to peer review and scholarly publication?[24] Has the potential for error been considered or determined? How generally has the technique or methodology been accepted?[25] No one suggestion is controlling, for the group of suggestions does not constitute an inflexible checklist.

It is obvious that, in view of the incompatibility of the *Frye* test with the Article VII rules, only general guidance can be—or, indeed, should be—provided to the judge[26] and the judge's ruling will be, or should be, upheld, the same as in other rulings under Rule 104 (a), unless the judge's discretion was abused.[27]

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24 "Some propositions, moreover, are too particular, too new, or of too limited interest to be published." *Daubert*, 113 S.Ct. at 2797.

25 "'[A] known technique that has been able to attract only minimal support within the community,' *Downing, supra*, at 1238, may properly be viewed with skepticism." *Daubert*, 113 S.Ct. at 2797.

The Texas Court of Criminal Appeals expressly rejected the *Frye* test in *Glover v. State*, 825 S.W.2d 127 (Tex.Cr.App. 1992). Prior to *Daubert*, the Texas Court of Criminal Appeals in *Kelly v. State*, 824 S.W.2d 568 (Tex.Cr.App. 1992) suggested there are three factors by which the judge determines admissibility of scientific evidence: Is the underlying scientific theory valid? Is the technique used in applying the theory valid? Was the technique properly applied on this occasion? *Accord: Emerson v. State*, 880 S.W.2d 759 (Tex.Cr.App. 1994).

26 "We emphasize, however, that this inquiry is of necessity a flexible one. Not every error in the application of a particular methodology should warrant exclusion." *United States v. Martinez*, 3 F.3d 1191, 1198 (8th Cir. 1993).

27 *In Interest of A.V.*, 849 S.W.2d 393, 397 (Tex.App —Ft. Worth 1993) ("The trial court's decision regarding the qualification of an expert will only be disturbed upon a finding that the court abused its discretion."). The case demonstrates the difficulties inherent in determining admissibility of opinions based on a novel scientific basis, here, an opinion based on the penile plethysmograph. *Robinson* again recognizes that reversal occurs only for abuse of discretion.

Some scientific evidence may be so well established that legislation may provide for its admission[28] and little preliminary showing is necessary. The reliability of some scientific techniques is so well accepted that judicial notice may be taken of their reliability[29], but nevertheless the judge in deciding admissibility may need to decide whether sufficiently reliable methodology was used in the particular case to be of assistance to the jury.[30] Indeed, one federal court has said, "*Daubert*'s narrow focus is on the admissibility of 'novel scientific evidence' under Fed.R.Evid. 702. See *Daubert*, __ U.S. __, 113 S.Ct. 2786. *Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge."[31]

E. I. du Pont de Nemours & Co v. Robinson, ___S.W.2d___, 1995 WL 359024 (Tex. 1995), held that "Rule 702 requires expert testimony to be relevant and reliable," and in order to be relevant "the proposed testimony must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" Furthermore, "[u]nreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702."

In *Robinson*, Dr. Whitcomb seemed well qualified on horticultural topics. His opinion was that Dupont contaminated Benlate during its manufacturing process and that the

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28 *See, e.g., D.W.L. v. M. J. B. C.*, 601 S.W.2d 475 (Tex.Civ.App.- Hou. (14th Dist), 1980); *In Interest of B. M. N.*, 570 S.W 2d 493 (Tex.Civ.App. - Texarkana, 1978).

29 Judicial notice may be taken of "scientific techniques and principles." *Emerson v. State*, 880 S.W.2d 759, 764 (Tex.Cr.App. 1994).

30 *United States v. Martinez*, 3 F.3d 1191 (8th Cir. 1993).

31 *Lappe v. American Honda Motor Co., Inc.*, 857 F.Supp. 222, 228 (N.D. N.Y. 1994).

The Texas Court of Criminal Appeals seems to consider, and perhaps properly so, that a trial judge need engage in elaborate "gatekeeping" as to scientific knowledge only if novel scientific evidence is involved. The court stated, in *Emerson v. State*, 880 S.W.2d 759, 763 (Tex.Cr.App. 1994):

> However, the HGN test is based on a scientific theory. We have not determined whether that theory or the technique employed in the HGN test is reliable. We will therefore consider testimony concerning the HGN test as novel scientific evidence, just as we considered DNA evidence in *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992).
>
> The admissibility of novel scientific evidence is governed by Texas Rule of Criminal Evidence 702 . . . . The threshold determination in an inquiry into the admissibility of expert testimony under Rule 702 is whether such testimony is helpful to the trier of fact. [citation omitted.] For such testimony to be helpful, the basis of the testimony must be reliable. [citation omitted.] If novel scientific evidence is found to be reliable, it may still be determined unhelpful for some other reason. *Id.* The evidence may be unhelpful, even though reliable, if its probative value is substantially outweighed by, e.g., the risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or the presentation of cumulative evidence."

The "novel scientific evidence" approach is followed in *Jordan v. State*, 877 S.W.2d 902 (Tex.App. - Ft. Worth 1994).

contaminated Benlate damaged plaintiffs' pecan trees. He examined the trees; he had conducted an experiment in 1992 in another matter; and he relied on various other matters. His opinion was based on the "comparative symptonology" methodology. The trial court, citing factors similar to those listed in *Daubert*, had excluded the opinion of plaintiffs' expert, Dr. Whitcomb, a horticulturist who had done research on the specific fungicide in question, because the opinion was not scientifically reliable and would not fairly assist the trier of fact in understanding a fact in issue. The court of appeals had reversed, holding that the opinion of a witness shown to be qualified as an expert is admissible[32] and credibility is to be determined by the trier of fact. In a 5 - 4 decision, the Supreme Court reversed the court of appeals and held that "the trial court did not abuse its discretion" because Whitcomb's testimony "was not based upon a reliable foundation." In so holding, the court cited *Daubert* and *Kelly*[33] as being persuasive.

While not expressly so stating, the majority opinion in *Robinson* seems to consider that the nature of expert testimony, as well as the term "expert," is itself prejudicial because a jury will "more readily accept[] the opinion of an expert witness as true simply because of his or her designation as an expert." Because expert scientific evidence is complex, arcane, and hard to evaluate, it has potential to be misleading. Thus, it is particularly important for the trial judge to "scrutinize proffered evidence for scientific reliability when it is based upon novel scientific theories . . . ." Authorities calling for a relevance standard, rather than a general acceptance standard, are cited, and a division of opinion among courts of appeal is noted. The majority opinion also noted that in the Texas criminal, the federal, and the Texas Civil rules of evidence, Rule 702 is identical.

Reviewing *Daubert*, the majority opinion summarized *Daubert*'s "non-exclusive factors" and said that *Frye* is at odds with the rules, that the proffered testimony must be reliable, and that the Ninth Circuit on remand of *Daubert* held the opinion testimony was inadmissible, in part because "it was not based on a reliable methodology." The majority opinion also reviewed *Kelly* and approved of its holding that scientific evidence in criminal cases must be reliable. The Court of Criminal Appeals held "that evidence is reliable if the underlying theory and the technique applying it are valid, and if the technique was properly applied on the occasion in question." "Under *Kelly*, factors affecting the trial court's determination of reliability include: (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of

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32 As stated in the opinion of the Texas Supreme Court, the court of appeals reviewed admissibility under Rule 702 on these standards: a body of pertinent scientific knowledge must exist; the witness must have sufficient experiential capacity in his relevant field; and the facts to be evaluated must be within his field of specialized knowledge.

33 *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992).

DRAFT OF TRE 801 AND 804 SUBCOMMITTEE REPORT

First, it should be noted that there are no differences between the Supreme Court Advisory Committee (SCAC) proposed Discovery Rules (reported on 7/22/95) and the State Bar Court Rules Committee Discovery Subcommittee Proposed Rules (amended 9/13/95) in the areas addressed by SCAC Discovery Rule 16 because the State Bar proposal does not address those areas. Second, the numbering of SCAC's proposed discovery rules is irrelevant when comparing to current TRCP, since the rules will need to be integrated into the existing TRCP numbering system unless the entire TRCP is renumbered.

Basically, SCAC Discovery Rule 16 consolidates current TRCP 205, 206 and 207. SCAC Rule 16(1), (2), (3), and (4) basically consolidate more artfully TRCP 205 and 206, with the additional requirement that the court reporter's certification include the newly mandated breakdown of the time used by each party at the deposition. SCAC Rule 16(5) changes the current time period under TRCP 207(3) for filing motions to suppress depositions for technical irregularities in non-stenographically recorded depositions from "one entire day before trial" to 30 days before the case is called for trial.

The real issue this subcommittee has been asked to address relates to SCAC Discovery Rule 16(6), dealing with the use of depositions. Current TRCP 207(1) addresses depositions taken in the same proceeding and TRCP 207(2) addresses depositions taken in different proceedings.

TRCP 207(1) states:

> a. *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the Texas Rules of Civil Evidence, may be used by any person against any party who was present or represented at the deposition or who had reasonable notice thereof. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying. Depositions shall include the original transcript or any certified copies thereof. Unavailability of the deponent is not a requirement for admissibility.
>
> b. *Included Within Meaning of "Same Proceeding."* Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit has been brought in a court of the United States or of this or any other state and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in each suit may be used in the other suit(s) as if originally taken therefor.

c. *Parties Joined After Deposition Taken.* If one becomes a party after the deposition is taken and has an interest similar to that of any party described in a. or b. above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity.

SCAC Discovery Rule 16(6) simplifies "use in the same proceeding" to:

6. **Use.** Any part of all of a deposition may be used for any purpose in the same proceeding in which it was taken. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible pursuant to Texas Rule of Civil Evidence 804(b)(1), or (2) if that party has had a reasonable opportunity to redepose the deponent and has failed to exercise that opportunity.

Close comparison shows the following differences:

	NEW 16(6)	OLD 207(1)
Uses:	1. For any purpose in same proceeding.	1. Insofar as admissible under TRCE against any party present or represented at deposition or who had reasonable notice thereof.
Same Proceeding:	2. Includes proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest.	2. Same
Against Added Party:	3. Admissible if (a) admissible under 804(b)(1), or (b) that party had a reasonable opportunity to redepose deponent and failed to exercise that opportunity.	3. Admissible if party has interest similar to any party against whom deposition would be admissible AND party had reasonable opportunity after being added to redepose and has failed to exercise opportunity.

The use of depositions taken in different proceedings are now controlled by TRCP 207(2):

2. **Use of Deposition Transcripts Taken in Different Proceeding.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of

> a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Civil Evidence. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying.

SCAC Discovery Rule 16(6) in its last line simplifies the use of depositions from other proceedings to:

> **6. Use.**
> ...
> Depositions taken in different proceedings may be used subject to the provisions of the Texas Rules of Civil Evidence.

Comparison shows that the only limitation on the use of depositions under both the old and proposed new rules is basically "subject to the provisions of the Texas Rules of Civil Evidence."

TRCE 801(e)(3) currently provides a hearsay exception for depositions if:

> (3) *Depositions.* It is a deposition taken in the same proceeding, as same proceeding is defined in Rule 207, Texas Rules of Civil Procedure. Unavailability of deponent is not requirement of admissibility.

TRCE 804(b)(1) currently provides a hearsay exception if the declarant is unavailable:

> **(b) Hearsay Exceptions.** The following are not excluded if the declarant is unavailable as a witness--
>
> (1) *Former Testimony.* Testimony given as a witness...in a deposition taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

The only change necessary is that the wording of TRCE 801(e)(3) be changed to reflect the correct number of the new TRCP rule that SCAC Discovery Rule 16 will necessitate be substituted in place of the current TRCP 207. Unless it is the intent of SCAC Rule 16 to change current evidence rules on the admissibility of depositions taken in different proceedings, TRCE 804(b)(1) needs no changes. (It appears from the rather straight-forward language in SCAC Rule 16(6) that no such changes were envisioned.)

Federal Counterparts

FRCP 32 provides the rules for the use of FRCP 30 oral depositions in federal trials. Basically, depositions may be used so far as admissible under the Rules of Evidence against any party present

or represented at the taking of the deposition or who had the opportunity to be, in the following situations:

(1) A deponent's deposition may be used to contradict or impeach testimony of the deponent as a witness or for any other purpose permitted by FRE;

(2) Depositions of parties (including corporate designated representatives or employees) may be used by adverse parties for any purpose;

(3) Depositions of witnesses whether or not a party may be used by any party for any purpose if the court finds:

(A) the witness is dead or
(B) the witness is 100 miles from the place of trial or out of the United States;
(C) the witness is unable to attend or testify because of age, illness, infirmity or imprisonment;
(D) the party offering the deposition has been unable to procure attendance by subpoena; or
(E) such exceptional circumstances are found to exist upon application and notice as to make it desirable and in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in the open court, to allow the deposition to be used.

FRE 804 provides a hearsay exception if the declarant is unavailable as a witness for former testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop testimony by direct, cross, or redirect examination.

FRE 804(b)(5) provides additional unavailability of a witness exceptions to hearsay are provided under when the court determines that:

(a) the statement is offered as evidence of a material fact;

(b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(c) the general purposes of these rules and in the interest of justice would best be served by admission of the statement into evidence.

FRE 803(24) has identical an exception provision to FRE 804(b)(5).

Federal court use of depositions remains considerably more limited than in Texas courts, basically allowing use of party depositions by adverse parties, for impeachment and when witnesses are "unavailable" (as defined by FRCP 32). FRE 804 extends the unavailability rule to depositions from other proceedings, while FRE 804(b)(5) would allow deposition testimony of material facts if the evidence is more probative than other evidence which the proponent can procure through reasonable efforts and the general purpose of the rules and the interest of justice would be served by its admission.

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April 8, 1996

Jack W. London, Esq.
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Re: State Bar of Texas -- Rules of Evidence Committee

Dear Mr. London:

The following is an analysis of the effect of Proposed Rule 16 on the Texas Rules Of Evidence 801(e)(3) and 804(b)(1).

My findings are as follows:

EFFECT OF PROPOSED RULE 16 ON TEXAS CIVIL RULES OF EVIDENCE RULES 801(e)(3) AND 804(b)(1)

RULE 801(e)(3)

Texas Rules of Evidence Rule 801(e)(3) provides that a deposition taken in the same proceeding is not hearsay, regardless of the deponent's availability. The Rule defers to Texas Rules of Civil Procedure for the definition of the term "same proceeding."

Texas Rules of Civil Procedure Rule 207 presently governs the use of deposition testimony from the same proceeding at trial. It allows testimony insofar as admissible pursuant to the Rules of Evidence. Proposed Rule 16 simplifies this and allows the testimony for any purpose in the same proceeding. However, this is not a substantive change, since the Texas Rules of Evidence presently permit the use of depositions in the same proceeding.

Since Rule 801(e)(3) refers to the Civil Procedure Rules for a definition of "same proceeding," the Rule will not require any change if Rule 16 is adopted, except to change the reference from Rule 207 to Rule 16. Moreover, the proposed Rule 16, presently does not alter the old rule's definition of "same proceeding."

The Federal Rules do not recognize this hearsay exception for testimony in the same proceedings.

Thus, Rule 801(e)(3) will not require any changes in order to conform to the changes to Proposed Rule 16, except for the reference to the Rules of Civil Procedure.

RULE 804(b)(1)

Texas Rules of Evidence Rule 804(b)(1) provides that former testimony of an unavailable witness, as defined by the Rules, given in a same or different proceeding, or in a deposition taken in the course of another proceeding is not hearsay so long as the party against whom the testimony is offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony.

Texas Rules of Civil Procedure Rule 207(2) presently governs the use of deposition testimony at trial. If the proposed Rule 16 is adopted it will not require any change of the Rule 804(b)(1) since both the old and new procedure rules merely allow the use of former testimony from other proceedings subject to the requirements of the Texas Rules of Civil Evidence.

Federal Rule 804(b)(1) is very similar to the Texas Rule. The primary difference in the evidence rules is that while the Texas rule allows former testimony if an unavailable person has a "similar interest" had the opportunity to develop the testimony, the Federal rule requires a "predecessor in interest."

Rule 32 of the Federal Rule of Civil Procedure controls the use of depositions in court proceedings. The Rule essentially allows deposition testimony to be used by any party for to impeach a testifying witness or when a witness is unavailable. A party's deposition can be used for whatever purpose.

If you have any questions or require further discussion of this material, or if I may be of any further assistance, please feel free to contact me at your convenience.

Very truly yours,

FLETCHER & SPRINGER, L.L.P.

Joanna R. Lippman

Joanna R. Lippman

JRL/g²

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CLERKS COMMITTEE REPORT TO SUBCOMMITTEE ON RULES 15-165

By: Bonnie Wolbrueck
Date: 7-15-96

RULE _____ DUTIES OF THE CLERK OF THE COURT

~~**Rule 23 SUITS TO BE NUMBERED CONSECUTIVELY**~~
~~It shall be the duty of the clerk to designate the suits by regular consecutive numbers, called file numbers, and he shall mark on each paper in every case the file number of the cause.~~

(1) Custodian of Record. The clerk of the court shall have custody of and shall carefully maintain, arrange and preserve the records relating to or lawfully deposited in the clerk's office.

(2) Assignment of Case Numbers Upon the commencement of a case, the clerk of the court shall assign the case a number which shall be known as the case number. Case numbers shall be assigned in consecutive order. Each document filed in every case shall bear the case number. Upon an order for severance, the clerk of the court shall assign to the severed case an entirely new case number. Unless otherwise directed by the court, upon the signing of an order to consolidate, all matters shall be consolidated under the oldest pending case number.
(New Rule from Rule 23)

COMMITTEE COMMENT: It is interesting to note that the words suits, case, cause and file are all used in Rule 23. The word "case" is only used in this new rule. The assignment of the case number in a severed or consolidated case has been added (See Rule 41 and Rule 174)

~~**RULE 24 DUTY OF THE CLERK**~~
~~When a petition is filed with the clerk he shall indorse thereon the file number, the day on which it was file and the time of filing, and sign his name officially thereof.~~

(3) Filing. The clerk of the court shall affix the date and time of filing and clerk's name to each document received for filing.
(New Rule from Rule 24)

COMMITTEE COMMENT: Rule 24 was in the "Institution of Suit" section and the endorsement requirement was for a petition. This would clarify that all documents received by the clerk shall be file marked.

~~RULE 25 CLERK'S FILE DOCKET~~

~~Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.~~

~~RULE 26 CLERK'S COURT DOCKET~~

~~Each clerk shall also keep a court docket in a permanent record that shall include the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.~~

~~RULE 27 ORDER OF CASES~~

~~The cases shall be placed on the docket as they are filed.~~

~~RULE 218 JURY DOCKET~~

~~The clerks of the district and county courts shall each keep a docket, styled, "The Jury Docket," in which shall be entered in their order the cases in which jury fees have been paid or affidavit in lieu thereof has been filed as provided in the two preceding rules.~~

~~RULE 656 EXECUTION DOCKET~~

~~The clerk of each court shall keep an execution docket in which he shall enter a statement of all executions as they are issued by him, specifying the names of the parties, the amount of the judgment, the amount due thereon, the rate of interest when it exceeds six per cent, the costs, the date of issuing the execution, to whom delivered, and the return of the officer thereon, with the date of such return. Such docket entries shall be taken and deemed to be a record. The clerk shall keep an index and cross-index to the execution docket. When execution is in favor or against several persons, it shall be indexed in the name of each person. Any clerk who shall fail to keep said execution docket and index thereto, or shall neglect to make the entries therein, shall be liable upon his official bond to any person injured for the amount of damages sustained by such neglect.~~

(4) Clerk's Record. A record shall be kept by the clerk of the court for each case. The record shall include the case number, the names of the parties and their attorneys, and, in brief form including date, a chronological listing of all proceedings had in the case, including but not limited to all appearances, pleadings, motions, writs and process issued and returns made thereon, orders, verdicts, judgments, notices and taxable court costs paid or reported to the clerk of the court, stating the party or attorney paying the costs and the date of payment. Upon order of the court, the clerk shall modify the clerk's records to reflect redesignation of a plea or pleading.

(5) Index. The clerk of the court shall keep an index of the parties to all cases, including any persons that may be added in writs of execution. The index must list the parties alphabetically using their full names and must be cross-referenced to the other parties to the case.

(6) Permanent Record. The clerk of the court shall permanently preserve a record for each case reflecting the case number, the names of the parties and their attorneys, the final judgment or other court order disposing of any party, claim or case, and any writs of execution and the returns thereon. The clerk of the court also shall permanently maintain the index described in Subdivision (5).
(New Rule from Rule 25, Rule 26, Rule 27, Rule 218, Rule 656 and Rule 71)

COMMITTEE COMMENT: This is a consolidation of Rule 25 (Clerk's File Docket), Rule 26 (Court's Docket), Rule 27 (Order of Cases), Rule 218 (Jury Docket), Rule 656 (Execution Docket). This rule requires the clerk to keep a record of all filings, issuance, pleadings, orders, etc. With consideration of the resources from county to county, the rule would allow the "record" to be kept manually in books and/or docket sheets or to be kept electronically. The last sentence of (4) is taken from Rule 71 (Misnomer of Pleading) A rule on an index was added from the statutes. If there are no statutory or rule provisions for retention, the State Library, through their advisory committee, sets retention periods for all records. This rule clarifies the information in "the record" that is required to be permanent.

(7) Issuance The clerk of the court shall issue all writs and process authorized by statute and these rules.

SECTION 1. CITATION
~~RULE 99. ISSUANCE AND FORM OF CITATION~~ a. Issuance. Upon the filing of the petition, the clerk of the court, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk of the court.

b. Form. The citation shall (1) be styled "The State of Texas," and unless otherwise specially provided by law or these rules shall be directed to any person authorized by law or these rules to serve process and shall include a return for service (2) be signed by the clerk of the court under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk of the court who issued citation, (11) contain address of the clerk of the court, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk of the court with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk of the court shall make no charge for the copies.

Comment: Rule 99 does not refer to Rule 15 on who to direct the citation for service. Rule 114 (Citation by Publication) references Rule 15. The change, taken from proposed Rule 15, is to clarify who the citation is directed for service.

SECTION 2. CITATION BY PUBLICATION

~~RULE 114. CITATION BY PUBLICATION; REQUISITES~~ a. Requisites Where citation by publication is authorized by these rules, the citation shall contain the requisites prescribed ~~by Rules 15 and 99;~~ in Section 1, in so far as they are not inconsistent herewith, provided that no copy of the plaintiff's petition shall accompany this citation, and the citation shall be styled "The State of Texas" and shall be directed to:

(1) the defendant or defendants by name, if their names are known, or to the defendant or defendants as designated in the petition, if unknown, or such other classification as may be fixed by any statute or by these rules, or

(2) if the plaintiff, his agent, or attorney, shall make oath that the names of the heirs or stockholders against whom an action is authorized by Section 17.004, Civil Practice and Remedies Code, are unknown to the affiant, ~~the clerk shall issue a citation for service by publication.~~ such citation shall be addressed to the defendants by a concise description of their classification, as "the Unknown Heirs of A.B., decreased," or " Unknown Stockholders of _____Corporation,' as the case may be, or ~~and shall contain the other requisites prescribed in Rules 114 and 115 and shall be served as provided by Rule 116~~
(Rule 111)

(3)in suits authorized by Section 17.005, Civil Practice and Remedies Code, all persons claiming under such conveyance whose names are known to plaintiff shall be made parties by name and cited to appear, in the manner now provided by law as in other suits; all other persons claiming any interest in such land under such conveyance may be made parties to the suit and cited by publication under the designation "all persons claiming any title or interest in land under deed heretofore given to _____ of _____ as grantee" (inserting in the blanks the name and residence of grantee as given in such conveyance). It shall be permissible to join in one suit all persons claiming under two or more conveyances affecting title to the same tract of land..
(Rule 112)

Where there are two or more defendants or classes of defendants to be served by publication, the citation may be directed to all of them by name and classification, so that service may be completed by publication of the one citation for the required ~~number of times~~ time. The citation shall contain the names of the parties, a brief statement of the nature of the suit (which need not contain the details and particulars of the claim) a description of any property involved and of the interest of the named or unknown defendant or defendants, and, where the suit involves land, ~~the requisites of Rule 115. In citations by publication involving land, it shall be sufficient in making the brief statement of the claim in such citation to state the kind of suit,~~ the number of acres of land involved in the suit, or the number of the lot and block, or any other plat description that may be of record if the land is situated in a city or town, the survey on which and the county in which the land is situated, and any special pleas which are relied upon in such suit.
(Rule 115)
If issued from the district or county court, the citation shall command such parties to appear and answer at or before 10 o'clock a.m. of the first Monday after the expiration of 42 days from the date of issuance thereof, specifying the day of the week, the day of the month, and the time of day the defendant is required to answer. ~~If issued from the justice of the peace court, such citation shall command such parties to appear and answer on or before the first day of the first term of court which convenes after the expiration of 42 days from the date of issue thereof, specifying the day of the week, and the day of the month, that such term will meet.~~

b. Publication The citation~~, when issued,~~ shall be ~~served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same~~ published one time ~~once each week for four (4) consecutive weeks, the first publication to be~~ at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.
(From Rule 116)

COMMITTEE COMMENT: The citation by publication rule combines Rules 111, 112, 114, 115 and 116. The section on service is removed from Rule 116 to be placed in the service rules. The last section of Rule 114 is removed to be placed in the justice of the peace rules. Publication is changed from 4 times to one.

SECTION 3. CITAITON IN SUITS FOR DELINQUENT AD VALOREM TAXES

~~RULE 117a. CITATION IN SUITS FOR DELINQUENT AD VALOREM TAXES~~
In all suits for collection of delinquent ad valorem taxes, the rules of civil procedure governing issuance and service of citation shall control the issuance and service of citation therein, except as herein otherwise specially provided.

(1). Personal Service: Owner and Residence Known, Within State.
Where any defendant in a tax suit is a resident of the State of Texas and is not subject to citation by publication under subdivision 3 below, the process shall conform substantially to the form hereinafter set out for personal service and shall contain the essential elements of Section 1 of these rules and be served and returned and otherwise regulated by the provisions ~~of Rules 99 to 107, inclusive.~~ for service in these rules.

(2). Personal Service: Owner and Residence Known, Out of State.
Where any such defendant is absent from the State or is a nonresident of the State and is not subject to citation by publication under subdivision 3 below, the process shall conform substantially to the form hereinafter set out for personal service and shall contain the essential elements and be served and returned and otherwise regulated by the provisions ~~of Rule 108.~~ for service in these rules.

(3). Service by Publication: Nonresident, Absent from State,Transient, Name Unknown, Residence Unknown, Owner Unknown, Heirs Unknown,Corporate Officers, Trustees, Receivers or Stockholders Unknown, Any Other Unknown Persons Owing or Claiming or Having an Interest.

Where any defendant in a tax suit is a nonresident of the State, or is absent from the State, or is a transient person, or the name or the residence of any owner of any interest in any property upon which a tax lien is sought to be foreclosed, is unknown to the attorney requesting the issuance of process or filing the suit for the taxing unit, and such attorney shall make affidavit that such defendant is a nonresident of the State, or is absent from the State, or is a transient person, or that the name or residence of such owner is unknown and cannot be ascertained after diligent inquiry, each such person in every such class above mentioned,together with any and all other persons, including adverse claimants, owning or claiming or having any legal or equitable interest in or lien upon such property, may be cited by publication. All unknown owners of any interest in any property upon which any taxing unit seeks to foreclose a lien for taxes, including stockholders of corporations --defunct or otherwise -- their successors, heirs, and assigns, may be joined in such suit under the designation of "unknown owners" and citation be had upon them as such; provided, however, that record owners of such property or of any apparent interest therein, including, without limitation, record lien holders, shall not be included in the designation of "unknown owners"; and provided further that where any record owner has rendered the property involved within five years before the tax suit is filed, citation on such record owner may not be had by publication or posting unless citation for personal service has been issued as to such record owner, with a notation thereon setting forth the same address as is contained on the rendition sheet made within such five years, and the sheriff or other person to whom citation has been delivered makes his return thereon that he is unable to locate the defendant. Where any attorney filing a tax suit for a taxing unit, or requesting the issuance of process in such suit, shall make affidavit that a corporation is the record owner of any interest in any property upon which a tax lien is sought to be foreclosed, and that he does not know, and after diligent inquiry has been unable to ascertain, the location of the place of business, if any, of such corporation, or the name

or place of residence of any officer of such corporation upon whom personal service may be had, such corporation may be cited by publication as herein provided. All defendants of the classes enumerated above may be joined in the same citation by publication.

An affidavit which complies with the foregoing requirements therefor shall be sufficient basis for the citation above mentioned in connection with it but shall be held to be made upon the criminal responsibility of affiant.

a. Requisites. Such citation by publication shall contain the requisites prescribed by Section I of these rules, in so far as they are not inconsistent herewith, provided that no copy of the plaintiff's petition shall accompany the citation and the citation shall be styled "The State of Texas" and shall be directed to the defendants by names or by designation as hereinabove provided, and shall be issued and signed by the clerk of the court in which such tax suit is pending. It shall be sufficient if it states the file number and style of the case, the date of the filing of the petition, the names of all parties by name or by designation as hereinabove provided, and the court in which the suit is pending; shall command such parties to appear and defend such suit at or before 10 o'clock a.m. of the first Monday after the expiration of forty-two days from the date of the issuance thereof, specifying such date when such parties are required to answer; shall state the place of holding the court, the nature of the suit, and the date of the issuance of the citation; and shall be signed and sealed by the clerk of the court.

Committee Note: Some language from Rule 114 (Citation by Publication) is added but this section does not require property description, delinquent tax amounts, etc. as provided in the Form of Citation in (5). Is it required here?

b. Publication. The citation shall be published in the English language one time ~~a week for two weeks~~ in some newspaper published in the county in which the property is located, which newspaper must have been in general circulation for at least one year immediately prior to the first publication and shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose, the first publication to be not less than twenty-eight days prior to the return day fixed in the citation; and the affidavit of the editor or publisher of the newspaper giving the date of publication, together with a printed copy of the citation as published, shall constitute sufficient proof of due publication when returned and filed in court. If there is no newspaper published in the county, then the publication may be made in a newspaper in an adjoining county, which newspaper shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose. The maximum fee for publishing the citation shall be the lowest published word or line rate of that newspaper for classified advertising. If the publication of the citation cannot be had for this fee, chargeable as costs and payable upon sale of the property, as provided by law, and this fact is supported by the affidavit of the attorney for the plaintiff or the attorney requesting the issuance of the process, then service of the citation may be made by posting a copy at the courthouse door of the county in which the suit is pending, the citation to be posted at least twenty-eight days prior to the return day fixed in the citation. Proof of the posting of the citation shall be made by affidavit of the attorney for the plaintiff, or of the person posting it. When citation is served as here provided

it shall be sufficient, and no other form of citation or notice to the named defendants therein shall be necessary.

Committee Note: Publication time changed to one time for consistency with the divorce citation. Old rules required the regular citation to be published four consecutive weeks and the tax citation published one time a week for 2 weeks.

(4). Citation in Tax Suits: General Provisions.
Any process authorized by this rule may issue jointly in behalf of all taxing units who are plaintiffs or intervenors in any tax suit. The statement of the nature of the suit, to be set out in the citation, shall be sufficient if it contains a brief general description of the property upon which the taxes are due and the amount of such taxes, exclusive of interest, penalties, and costs, and shall state, in substance, that in such suit the plaintiff and all other taxing units who may set up their claims therein seek recovery of the delinquent ad valorem taxes due on said property, and the (establishment and foreclosure) of liens, if any, securing the payment of same, as provided by law; that in addition to the taxes all interest, penalties, and costs allowed by law up to and including the day of judgment are included in the suit; and that all parties to the suit, including plaintiff, defendants, and intervenors, shall take notice that claims for any taxes on said property becoming delinquent subsequent to the filing of the suit and up to the day of judgment, together with all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered therein without further citation or notice to any parties thereto. Such citation need not be accompanied by a copy of plaintiff's petition and no such copy need be served. Such citation shall also show the names of all taxing units which assess and collect taxes on said property not made parties to such suit, and shall contain, in substance, a recitation that each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or thereafter filed in said cause by all other parties therein, or who may intervene therein and set up their respective tax claims against said property. After citation or notice has been given on behalf of any plaintiff or intervenor taxing unit, the court shall have jurisdiction to hear and determine the tax claims of all taxing units who are parties plaintiff, intervenor or defendant at the time such process is issued and of all taxing units intervening after such process is issued, not only for the taxes, interest, penalties, and costs which may be due on said property at the time the suit is filed, but those becoming delinquent thereon at any time thereafter up to and including the day of judgment, without the necessity of further citation or notice to any party to said suit; and any taxing unit having a tax claim against said property may, by answer or intervention, set up and have determined its tax claim without the necessity of further citation or notice to any parties to such suit.

(5). Form of Citation by Publication or Posting.
The form of citation by publication or posting shall be sufficient if it is in substantially the following form, with proper changes to make the same applicable to personal property, where necessary, and if the suit includes or is for the recovery of taxes assessed on personal property, a general description of such personal property shall be sufficient:
THE STATE OF TEXAS)
COUNTY OF _____)

In the name and by the authority of the State of Texas
Notice is hereby given as follows:

To _____

_____

and any and all other persons, including adverse claimants, owning or having or claiming any legal or equitable interest in or lien upon the following described property delinquent to Plaintiff herein, for taxes, to-wit:

_____

_____

Which said property is delinquent to Plaintiff for taxes in the following amounts:

$_____, exclusive of interest, penalties, and costs, and there is included in this suit in addition to the taxes all said interest, penalties, and costs thereon, allowed by law up to and including the day of judgment herein.

You are hereby notified that suit has been brought by _____ as Plaintiffs, against _____ as Defendants, by petition filed on the ___ day of _____, 19__, in a certain suit styled _____ v. _____ for collection of the taxes on said property and that said suit is now pending in the District Court of _____ County, Texas, _____ Judicial District, and the file number of said suit is _____, that the names of all taxing units which assess and collect taxes on the property hereinabove described, not made parties to this suit, are _____.

Plaintiff and all other taxing units who may set up their tax claims herein seek recovery of delinquent ad valorem taxes on the property hereinabove described, and in addition to the taxes all interest, penalties, and costs allowed by law thereon up to and including the day of judgment herein, and the establishment and foreclosure of liens, if any, securing the payment of same, as provided by law.

All parties to this suit, including plaintiff, defendants, and intervenors, shall take notice that claims not only for any taxes which were delinquent on said property at the time this suit was filed but all taxes becoming delinquent thereon at any time thereafter up to the day of judgment, including all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered herein without further citation or notice to any parties herein, and all said parties shall take

notice of and plead and answer to all claims and pleadings now on file and which may hereafter be filed in said cause by all other parties herein, and all of those taxing units above named who may intervene herein and set up their respective tax claims against said property.

You are hereby commanded to appear and defend such suit on the first Monday after the expiration of forty-two (42) days from and after the date of issuance hereof, the same being the ___ day of _____, A.D., 19__ (which is the return day of such citation), before the honorable District Court of _____ County, Texas, to be held at the courthouse thereof, then and there to show cause why judgment shall not be rendered for such taxes, penalties, interest, and costs, and condemning said property and ordering foreclosure of the constitutional and statutory tax liens thereon for taxes due the plaintiff and the taxing units parties hereto, and those who may intervene herein, together with all interest, penalties, and costs allowed by law up to and including the day of judgment herein, and all costs of this suit.

Issued and given under my hand and seal of said court in the City of _____, _____ County, Texas, this ___ day of _____, A.D., 19__.

_____
Clerk of the District Court.
_____ County, Texas,
_____ Judicial District.

(6). Form of Citation by Personal Service In or Out of State.
The form of citation for personal service shall be sufficient if it is in substantially the following form, with proper changes to make the same applicable to personal property, where necessary, and if the suit includes or is for the recovery of taxes assessed on personal property, a general description of such personal property shall be sufficient:
THE STATE OF TEXAS
To _____, Defendant, GREETING:

YOU ARE HEREBY COMMANDED to appear and answer before the Honorable District Court, _____ Judicial District, _____ County, Texas, at the Courthouse of said county in _____, Texas, at or before 10 o'clock a.m. of the Monday next after the expiration of 20 days from the date of service of this citation, then and there to answer the petition of _____, Plaintiff, filed in said Court on the ___ day of _____, A.D., 19__, against _____, Defendant, said suit being number _____ on the docket of said Court, the nature of which demand is a suit to collect delinquent ad valorem taxes on the property hereinafter described.

The amount of taxes due Plaintiff, exclusive of interest, penalties, and costs, is the sum of $_____, said property being described as follows, to-wit:
_____
_____
_____

The names of all taxing units which assess and collect taxes on said property, not made parties to this suit, are: _____

Plaintiff and all other taxing units who may set up their tax claims herein seek recovery of delinquent ad valorem taxes on the property hereinabove described, and in addition to the taxes all interest, penalties, and costs allowed by law thereon up to and including the day of judgment herein, and the establishment and foreclosure of liens securing the payment of same, as provided by law.

All parties to this suit, including plaintiff, defendants, and intervenors, shall taken notice that claims not only for any taxes which were delinquent on said property at the time this suit was filed but all taxes becoming delinquent thereon at any time thereafter up to the day of judgment, including all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered herein without further citation or notice to any parties herein, and all said parties shall take notice of and plead and answer to all claims and pleadings now on file and which may hereafter be filed in this cause by all other parties hereto, and by all of those taxing units above named, who may intervene herein and set up their respective tax claims against said property.

~~If this citation is not served within 90 days after the date of its issuance, it shall be returned unserved.~~

The officer executing this return shall promptly serve the same according to the requirements of law and the mandates hereof and make due return as the law directs.

Issued and given under my hand and seal of said Court at _____, Texas, this the ___ day of _____, A.D., 19__.

_____
Clerk of the District Court of
_____ County, Texas.
By _____, Deputy.

COMMITTEE COMMENT: The form of the citations in (5) and (6) above were not changed to conform to Rule 99 although (1) requires the citations to contain the essential elements of Rule 99. The notice is not included "You have been sued....", the address of the clerk, the attorney name and address, etc. These forms contain the old language "You are commanded to appear and answer...". Should these forms be changed to reflect the requirements in Rule 99 or is there a reason to retain the old language? Are these forms necessary since the rules give requisites for the citation...suggest to delete (5) and (6)?

SECTION 4. CITAITON IN SUIT FOR INJUNCTION

~~RULE 686 CITATION~~

Upon the filing of ~~such~~ a petition and order for temporary restraining order or temporary injunction not pertaining to a suit pending in the court, the clerk of ~~such~~ the court shall issue a citation to the defendant as in other civil cases, which shall be served and returned in like manner as ordinary citations issued from said court; provided, however, that when a temporary restraining order is issued and is accompanied with a true copy of plaintiff's petition, it shall not be necessary for the citation in the original suit to be accompanied with a copy of plaintiff's petition, nor contain a statement of the nature of plaintiff's demand, but it shall be sufficient for said citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the temporary restraining order; and provided further that the court may have a hearing upon an application for a temporary restraining order or temporary injunction at such time and upon such reasonable notice given in such manner as the court may direct.

(Rule 686)

SECTION 5. SCIRE FACIAS

The clerk of the court upon petition of the plaintiff or the representative of the decedent, his agent or attorney, shall issue a scire facias for the heirs or the administrator or executor of decedent, requiring him to appear and prosecute such suit. The scire facias and returns thereon, ~~provided in this section,~~ shall conform to the requisites of citations and the returns thereon, under the provisions of these rules.

(Rule 154 and language from Rule 151 and 152)

SECTION 6. SUBPOENA

~~RULE 176. WITNESSES SUBPOENAED~~

(1) Witnesses Subpoenaed. The clerk of the district or county court, or ~~justice of the peace, as the case may be,~~ at the request of any party to a suit pending in his court, or of any agent or attorney, shall issue a subpoena for any witness or witnesses who may be represented to reside within one hundred miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial; provided that any clerk of the court, ~~justice of the peace or other officer issuing a subpoena~~ pursuant to the provisions of this rule, or of any other rule or statute, shall issue a separate subpoena, together with a copy thereof, for each witness subpoenaed.

(2) ~~RULE 177. FORM OF SUBPOENA~~ Form of Subpoena

The style of the subpoena shall be "State of Texas." It shall state the style of the suit, the court in which the same is pending, the time and place at which the witness is required to appear,and the party at whose instance the witness is summoned. It shall be dated and attested by the clerk of the court or ~~justice~~, but need not be under the seal of the court, and the date of its issuance shall be noted thereon. It may be made returnable forthwith, or on any date for which trial of the cause may be set. It shall be addressed to any sheriff or constable of the State of Texas or other person authorized to serve and execute subpoenas as provided ~~in Rule 178.~~ by these rules.

~~RULE 177a. SUBPOENA FOR PRODUCTION OF DOCUMENTARY EVIDENCE~~

(3) Production of Documentary Evidence. A subpoena may ~~also~~ command the person to whom it is directed to produce the books, papers, documents or tangible things designated ~~therein~~ in the request

Committee Comment: This rule combines Rules 176, 177 and the first lines of Rule 177a. Reference to justice court is deleted. The beginning of Rule 176 requires the clerk to issue the subpoena and the reference to other officer has been deleted.

SECTION 7. DEPOSITION

(1) Subpoena. Upon proof of service of a notice to take a deposition, written or oral, the clerk of the court ~~or any officer authorized to take depositions and any certified shorthand reporter shall immediately~~ may issue and cause to be served upon the witness a subpoena directing ~~him~~ the witness to appear before the officer taking the deposition at the time and place stated in the notice ~~for the purpose of giving his deposition~~.

(From Rule 201(1))

(2) Notice by Publication. If the verified petition to perpetuate testimony according to Rule 187 states that the name or the residence of any expected adverse party is unknown to petitioner and his agent or attorney and cannot be ascertained after diligent inquiry, the clerk of the court ~~or justice of the~~ peace shall, on petitioner's request, cause the notice to any such party or parties to be published one time in some newspaper in the county where the petition is filed if there be a newspaper published in such county, but if no newspaper be published in such county than in a newspaper in the nearest county where a newspaper is published, ~~once each week for two consecutive weeks,~~ stating ~~the substance~~ a brief description of the petition, the court in which it is filed and the number thereof, the name of petitioner and each of the witnesses and their addresses, the names and addresses of the expected adverse parties, if hearing will be had in such petition at a designated time and place on or after the 14th day following the ~~first~~ publication of such notice.

(From Rule 187(2)

(3) Commission. Upon the granting of a commission to take the oral deposition of a person under paragraph 1 of Rule 188, ~~above,~~ the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas." The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take depositions as set forth in Section 20.001, Civil Practice and Remedies Code. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or officers at the time and place named in the commission for the purpose of giving that person's deposition.

Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and

require the officer or officers to whom the same is addressed to summon the person to be deposed before the officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission, the interrogatories and the answers of the person thereto to the clerk of the proper court, giving his official title and post office address.
(From Rule 188(2)
(4) Letter Rogatory Upon the granting of a letter rogatory under paragraph 1 of Rule 188, ~~above,~~ the clerk of the court in which the action is pending shall issue a letter rogatory to take the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission.The letter rogatory shall be addressed: "To the Appropriate Authority in [here name the state, territory or country]". The letter rogatory shall authorize and request the appropriate authority to summon the person to be deposed before the authority forthwith and to take that person's answers under oath to the oral or written questions which are addressed to that person; the letter rogatory shall also authorize and request that the appropriate authority cause the deposition of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the written deposition, with all exhibits, to be returned to the clerk of the proper court under cover duly sealed and addressed.
(From Rule 188(3)
(5) Letter of Request. Upon the granting of a letter of request, or any other device pursuant to the means and terms of any other applicable treaty or convention, to take the deposition, written or oral, of any person under paragraph 1 of Rule 188, ~~above,~~ the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition of the person named in the application at the time and place set out in the application for the letter of request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition is to be taken, such form to be presented to the clerk by the party seeking the deposition. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time fixed in the order granting the letter of request or other device.
(From Rule 188(4)

SECTION 8. ATTACHMENT

(1) Order. No writ of attachment as provided in Rule 592, shall issue except upon written order of the court after a hearing, which may be ex parte. The court, in its order granting the application, shall make specific findings of facts to support the statutory grounds found to exist, and shall specify the maximum value of property that may be attached, and the amount of bond required of plaintiff, and, further shall command that the attached property be kept safe and preserved subject to further orders of the court. Such bond shall be in an amount which, in the opinion of the court, will adequately compensate the defendant in the event plaintiff fails to prosecute his suit to effect, and to pay all damages and costs which may be adjudged against him for wrongfully suing out the writ of attachment. The court shall further find in its order the amount of bond required of defendant to replevy, which, unless the defendant chooses to exercise his option as provided in

Rule 599, shall be the amount of plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties.
(From Rule 592)

(2) Bond. No writ of attachment shall issue until the party applying therefor has filed with the officer authorized to issue such writ a bond payable to the defendant in the amount fixed by the court's order, with sufficient surety or sureties as provided by statute to be approved by such officer, conditioned that the plaintiff will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for wrongfully suing out such writ of attachment.
(From Rule 592a)

(3) Writ. A writ of attachment shall be directed to the sheriff or any constable within the State of Texas and shall be dated and signed by the clerk of the court under the seal of the court . It shall command ~~him~~ the sheriff or constable to attach and hold, unless replevied, subject to the further order of the court, so much of the property of the defendant, of a reasonable value in approximately the amount fixed by the court, as shall be found within his county. The following form of writ may be issued:"The State of Texas. "To the Sheriff or any Constable of any County of the State of Texas, greeting:

"We command you that you attach forthwith so much of the property of C.D., if it be found in your county, repleviable on security, as shall be of value sufficient to make the sum of _____ dollars, and the probable costs of suit, to satisfy the demand of A.B., and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon to be had before our court in _____, County of _____. You will true return make of this writ on or before 10 a.m. of Monday, the _____ day of _____, 19__, showing how you have executed the same."

There shall be prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:
"To _____, Defendant:
"You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:
"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Several writs of attachment may, at the option of the plaintiff, be issued at the same time, or in succession and sent to different counties, until sufficient property shall be attached to satisfy the writ.
(From Rule 593, Rule 594, Rule 595 and Rule 598a)

~~RULE 596. DELIVERY OF WRIT~~

~~The writ of attachment shall be dated and tested as other writs, and may be delivered to the sheriff or constable by the officer issuing it, or he may deliver it to the plaintiff, his agent or attorney, for that purpose.~~

Committee Comment: Additional issuance rules to be added:
Execution - Rule 622,623,624,626,627,629,630,631, 632, 633, 634,646,
Garnishment - Rule 659,661,663a,675,
Injunctions - Rule 680,683, 686,687, 688
Sequestration - Rule 696, 699,700a,

~~**RULE 261 — TRANSCRIPT ON CHANGE**~~

~~When a change of venue has been granted, the clerk shall immediately make out a correct transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send the same, with the original papers in the cause, to the clerk of the court to which the venue has been changed.~~

From RULE 89 TRANSFERRED IF MOTION IS SUSTAINED

~~The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.~~

(8) Transfer or Venue Change Upon order of the court to transfer or change venue, the clerk of the court shall send to the clerk of the court to which the venue has been changed, a transcript of all original papers in the case and certified copies of all orders entered in the case.If the order transferring or changing venue is not to all parties, instead of the original papers, the transcript shall include certified copies of such papers as directed by the court.

The clerk of the court receiving a transfer or change of venue, shall notify the plaintiff or his attorney that the transfer has been received and the amount of filing fees due. The notice shall also state that the fees are payable within thirty days from the mailing of the notice and that the case may be dismissed if the filing fee is not timely paid.
(New Rule from Rule 89 and Rule 261)

Committee Comment: This rule combines Rule 89 and Rule 261. Rule 261(Change of Venue) did not have a provision for notice to the plaintiff that the transfer was received or filing fees due. First paragraph of Rule 89 remains.

(9) Exhibits All filed exhibits admitted in evidence or tendered on bill of exception shall, until returned or otherwise disposed of as authorized by Rule ~~14b~~ _____, remain in the custody of the clerk of court except as provided in Rule ~~75b~~ _____.
(New Rule from Rule 75b)

(10) Disposition of Exhibits, Depositions and Discovery The clerk of the court in which the exhibits, deposition transcripts, ~~and~~ depositions upon written questions and other discovery are filed shall retain and dispose of such ~~exhibits~~ as directed by the Supreme Court.
(Rule 14b and Rule 209)

Supreme Court Order Relating to Retention and Disposition of Exhibits, Depositions and Discovery

In compliance with the provisions of Rule _____ ~~Rule 14b and Rule 209~~, the Supreme Court hereby directs that exhibits offered or admitted into evidence, deposition transcripts, ~~and~~ depositions upon written questions and other discovery shall be retained and disposed of by the clerk of the court in which ~~the exhibits or depositions~~ they are filed upon the following basis.

This order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

~~After first giving all attorneys of record thirty days written notice that they have an opportunity to claim and withdraw (same) the trial exhibits, the clerk,~~ Unless otherwise directed by the court, the clerk of the court may without notice to the parties or their attorneys dispose of the exhibits, deposition transcripts, ~~or~~ depositions upon written questions, or other discovery after the required time periods stated in this order. If any party requests any exhibit, deposition or other discovery, the clerk of the court may, without court order, release such to the party after the required time periods stated in this order.

If the court has ordered or any party has requested release of any exhibit, deposition or other discovery and ~~If any~~ such ~~exhibit~~ is desired by more than one ~~attorney~~ party, the clerk shall make the necessary copies and prorate the cost among all the ~~attorneys~~ parties desiring ~~the exhibit~~ same.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

COMMITTEE COMMENT: Addresses change after many years and notices mailed by the clerk after the retention periods are often returned. Frequently attorneys receiving notices must call the clerk or research their archives for information on the case because many years have passed. The notice cost is considerable for counties. This would clarify that exhibits/ depositions/ discovery may be disposed of by the clerk after the retention periods. Any party wanting the exhibits/depositions/discovery may request the court or clerk for the release of same.

(11) Copy of Decree The~~(district)~~ clerk of the court shall forthwith mail a ~~certified~~ copy of the final divorce decree ~~or order of dismissal~~ to the party signing a memorandum waiving issuance of service of process. Such divorce decree ~~or order of dismissal~~ shall be mailed to the signer of the memorandum at the address stated in such memorandum or to the office of ~~his~~ the signer's attorney of record.
(Rule 119a)

COMMITTEE COMMENT: Notice of dismissal is given under current Rule 306a(3) and a certified copy doesn't seem necessary. This should be in the Family Code.

(12) Notices

(a) Default Judgment At or ~~immediately prior to~~ before the time ~~in~~ an interlocutory or final default judgment is ~~rendered~~ signed, the party taking the ~~same or his attorney~~ judgment shall ~~certify to the clerk in writing~~ file a written certificate containing the last known mailing address of the party against whom the judgment is taken ~~which certificate shall be filed among the papers in the cause~~. Immediately upon the signing of the judgment, the clerk of the court shall give ~~mail~~ written notice by first-class mail ~~thereof~~ to the party against whom the judgment was rendered. ~~at the address shown in the certificate, and note the fact of such mailing on the docket.~~ The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, ~~and~~ the date of the signing of the judgment and shall be mailed to the address in the certificate. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.
(Rule 239a)

COMMITTEE COMMENT: Adds "first-class" mailing. Deletes noting on the docket since this new rule requires the clerk to keep a record of notices.

(b) Appealable Order When a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to the parties ~~or their attorneys of record~~ by first-class mail ~~advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).~~
(Rule 306a(3))

COMMITTEE COMMENT: This is a clerk's duty and the provisions on failure to provide notice should remain in Rule 306a for reference by attorneys.

(c) Settings If the court on its own initiative sets a case for trial or for dismissal for want of prosecution, the clerk of the court shall notify all parties of the setting by first class mail.
(New Rule from Rule 165a and Rule 246)

COMMITTEE COMMENT: This rule clarifies that the clerk is to send notice and will be repeated in Rule 165a and Rule 245 for reference by attorneys

(d) Finding of Fact and Conclusions of Law Upon the filing of a Request for Findings and Fact and Conclusions of Law or Notice of Past Due Finding of Fact and Conclusions of Law, the clerk of the court shall immediately call such to the attention of the judge who tried the case.
(from Rule 296 and Rule 297)

RULE _____ ELECTRONICALLY TRANSMITTED COURT DOCUMENTS

The following rules govern the procedure for the clerk of the court to receive and file electronically transmitted court documents.
(1) Receipt. The clerk of the court is authorized to accept for filing via electronic transmission any document which might be filed in a court action except a) returns of service on issuances; b) bonds; and c) signed order or judgments.
(2) Paper Quality. Documents electronically transmitted for filing will be received by the clerk of the court on a plain paper facsimile and printed by a laser printer, thereby rendering the copy of archival quality. No document printed on thermal paper shall be filed.
(3) Fee and Payment. No documents electronically transmitted shall be accepted by the clerk of the court for filing until court costs and fees have been paid. Court costs and fees shall be paid by a payment method authorized by the clerk of the court. Documents tendered to the clerk of the court electronically without payment of court costs and fees, or with incomplete information for payment, or which do not conform to applicable rules, will not be filed. If the clerk of the court rejects a filing, the clerk of the court will notify the sender as soon as practicable.
(4) Fee Schedule. A fee schedule for electronic filing shall be adopted annually by the clerk of the court.

(5) Original Records. An electronically transmitted document accepted for filing will be recognized as the original record of file or for evidentiary purposes when it bears the clerk of the court's official date and time file stamp.
(6) Requirements. Every document electronically transmitted for filing shall conform to the requirements for filing established by these rules, i.e., shall be on paper measuring approximately 8 ½ x 11 inches, and shall contain the individual's State Bar of Texas identification number, if any, address, telephone number and telecopier number. The quality of the original hard copy shall be clear and dark enough to transmit legibly.
(7) Original Signature. The sender shall maintain the original of the document with original signature affixed as required by Section 51.806, Texas Government Code.
(8) Cover Sheet. A cover sheet must accompany every transmission which shall: a) clearly identify the sender, the documents being transmitted, and the number of pages; b) have clear and concise instructions concerning issuance of other requests; and c) have complete information on the payment authorization for court costs and fees.
(9) Verification. The clerk of the court upon receipt of an electronically transmitted document shall verify the completeness of the transmission.
(10) Acknowledgment. After filing an electronically transmitted document, the clerk of the court will electronically transmit to the sender an acknowledgment of the filing, together with cost receipts, if any.
(11) Seals. No citation or writ bearing the official seal of the court may be transmitted electronically.
(12) Filing. Electronic transmission of a document does not constitute filing. Filing is complete when the clerk of the court's official date and time file stamp is affixed to the document. Each page of any document received by the clerk of the court will be automatically imprinted with the date and time of the receipt. The date and time imprinted on the last page of the document will determine the time of receipt but not the time of filing. Transmissions completed during a normal business day before 5:00 p.m. and accepted for filing will be filed on the day of the receipt. Transmissions completed after 5:00 p.m., on weekends or holidays will be verified and filed before 10:00 a.m. on the first business day following receipt of transmission. The sender is responsible for determining if there are any changes in normal business hours.

NOTE: To date the following rules have been addressed in the Clerk's duties section:

Rule 14b
Rule 23
Rule 24
Rule 25
Rule 26
Rule 27
Rule 71- part
Rule 75b - part
Rule 89 - part
Rule 99
Rule 111
Rule 112
Rule 114
Rule 115
Rule 116
Rule 117a
Rule 119a
Rule 176
Rule 177
Rule 177a
Rule 187
Rule 188
Rule 201
Rule 209
Rule 218
Rule 261
Rule 239a
Rule 246 - part
Rule 296 - part
Rule 297- part
Rule 306a - part
Rule 592 - part
Rule 592b
Rule 593
Rule 594
Rule 595
Rule 598a
Rule 656
Rule 686

REPORT OF SUB COMMITTEE ON RULES 15 -165

by: Bonnie Wolbrueck
Date: 7-15-96

RULE 15 WRITS AND PROCESS

The ~~style~~ title of all writs and process shall be "The State of Texas" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any person authorized by law or these rules to serve process and shall include a return for service. ~~sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon, and the date of issuance shall be noted thereon.~~ The writ or process shall be dated and issued under the signature and seal of the clerk of court.

COMMITTEE COMMENT: Writs are issued under the direction of the court's order and do not contain the "Monday next after expiration of twenty days" language. Citations contain the language and the requirement is in the citation rules. "Impressed thereon" is deleted to clarify that rubber stamps may also be used by clerks.

~~**RULE 17 OFFICER TO EXECUTE PROCESS**~~

~~Except where otherwise expressly provided by law or these rules, the officer receiving any process to be executed shall not be entitled in any case to demand his fee for executing the same in advance of such execution, but his fee shall be taxed and collected as other costs in the case.~~

COMMITTEE COMMENT: See Rule 126

~~**RULE 19 NON-ADJOURNMENT OF TERM**~~

~~Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge or other official thereof, and shall continue to be open at all times until and including the last day of the term unless sooner adjourned by the judge thereof.~~

COMMITTEE COMMENT: Delete - unnecessary

~~**RULE 20 MINUTES READ AND SIGNED**~~

~~On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. Each special judge shall sign the minutes of such proceedings as were had by him.~~

COMMITTEE COMMENT: Delete. No longer common practice.

RULE 71 MISNOMER OF PLEADING

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. ~~Pleadings shall be docketed as originally designated~~ and it shall remain identified as originally designated, unless the court orders redesignation. ~~Upon court order filed with the clerk, the clerk shall modify the docket and all other clerk records to reflect redesignation.~~

~~**RULE 75 FILED PLEADINGS; WITHDRAWAL**~~

~~All filed pleadings shall remain at all times in the clerk's office or in the court or in the custody of the clerk, except that the court may by order entered on the minutes allow a filed pleading to be withdrawn for a limited time whenever necessary, on leaving a certified copy on file. The party withdrawing such pleading shall pay the costs of such order and certified copy.~~

COMMITTEE COMMENT: Delete - withdrawal of pleadings not common practice or necessary. Clerk as custodian of record is addressed in new rule on clerks duties.

RULE 75a ~~FILING~~ EXHIBITS~~: COURT REPORTER TO FILE WITH CLERK~~

(a) The court reporter, recorder or stenographer shall file with the clerk of the court all exhibits which were admitted in evidence or tendered on bill of exception during the course of any hearing, proceeding or trial.

~~**RULE 75b FILED EXHIBITS: WITHDRAWAL**~~

~~All filed exhibits admitted in evidence or tendered on bill of exception shall, until returned or otherwise disposed of as authorized by Rule 14b, remain at all times in the clerk's office or in the court or in the custody of the clerk except as follows:~~

~~(a)~~(b) The court may by order ~~entered on the minutes~~ allow a filed exhibit to be withdrawn by any party only upon such party's leaving on file a certified, photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

~~(b)~~(c) The court reporter, recorder or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter, recorder or stenographer to transmit such original exhibits to an appellate court under the provisions of ~~Rule 379~~ Rule 53, Texas Rules of Appellate Procedure or to otherwise discharge the duties imposed by law upon said court reporter, recorder or stenographer.

COMMITTEE COMMENT: This rule combines Rule 75a and Rule 75b. and is titled "Exhibits". The paragraph on clerk having custody of the exhibits has been added to the Duty of the Clerk section. "Entered on the minutes" is unnecessary. Reference to TRAP rule is added.

RULE 89 TRANSFERRED IF MOTION IS SUSTAINED

If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. ~~The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.~~

COMMITTEE COMMENT: Requirements for clerks moved to Duties of Clerk section.

RULE 103 WHO MAY SERVE

Citation and other notice may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a ~~suit~~ case shall serve any process. Service by registered or certified mail ~~and citation by publication~~ shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

COMMITTEE COMMENT: Rule 116 states who can serve a citation by publication.

RULE 120 ENTERING APPEARANCE

The defendant may, in person, ~~or~~ by attorney, or by ~~his~~ duly authorized agent, enter an appearance in open court. Such appearance shall be noted ~~by the judge upon his docket and entered in the minutes~~ in the clerk's record, and shall have the same force and effect as if the citation had been duly issued and served as provided by law.

COMMITTEE COMMENT: Appearance shall be noted in clerk's record and entering in the

minutes seems unnecessary and is not common practice.

RULE 126 FEE FOR EXECUTION OF PROCESS, DEMAND

No sheriff or constable shall be compelled to execute any process in civil cases ~~coming from any county other than the one in which he is an officer,~~ unless the fees allowed him by law for the service of such process shall be paid in advance; except when affidavit is filed, as provided by law or these rules. The clerk issuing the process shall endorse thereon the words "~~pauper oath~~ affidavit of inability filed," ~~and sign his name officially below them~~; and the officer in whose hands such process is placed for service shall serve the same. The fee shall be taxed as costs in the case.

COMMITTEE COMMENT: Rule 17 does not require fees in advance and Rule 126 requires fees paid in advance for an "out of county" request. The two rules seem to be in conflict. Change would require all fees be paid in advance. "Pauper oath" changed to follow Rule 145. Does not seem necessary for clerk to officially sign name.

RULE 216 REQUEST AND FEE FOR JURY TRIAL

a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

b. Jury Fee. The fee required by statute ~~Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court~~ must be deposited with the clerk of the court within the time for making a written request for a jury trial. ~~The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.~~

COMMITTEE COMMENT: Fee is deleted to provide uniformity in where fees are located -- statute. No notation on docket to be consistent with the rule on the clerk's record.

RULE 245 ASSIGNMENT OF CASES FOR TRIAL

a. Setting. The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

b. Request. A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

~~RULE 246 CLERK TO GIVE NOTICE OF SETTINGS~~

c. Notice. ~~The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped.~~ Any party setting a case for trial shall immediately notify all other parties of the trial setting by written notice and shall file a copy of such notice with the clerk of the court. If the court on its own initiative sets the case for trial, the clerk of the court shall notify all parties of the setting by first class mail. Failure ~~of the clerk~~ to furnish ~~such information on proper request~~ notice shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented ~~the attorney~~ a party from preparing or presenting ~~his~~ its claim or defense.

Comment: This rule combines Rule 245 and Rule 246. It clarifies who shall give notice of trial settings.

SECTION 4
Claims and Parties

Rule 30. Parties

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest, except as provided by law. An executor, administrator, guardian, bailee, trustee of an express trust, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is sought. An assignee or subrogee may prosecute an action in the name of an assignor or subrogor provided that the identity of the real party in interest and the basis for the interest is set forth in the party's pleadings. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution

(b) Capacity to Sue or Be Sued in Assumed Name. Any partnership, unincorporated association, private corporation, other legal entity or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

[Current Rule: Tex. R. Civ. P. 28].
[Original Source: Part of Federal Rule 17(b)].
[Official Comments]:

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1971. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

(c) **Next Friends and Guardians Ad Litem.**

(1) Next Friends. A minor or incompetent person who does not have a legal guardian may sue and be represented by a "next friend" who shall have the same rights as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required. A next friend may not compromise a claim brought in behalf of a minor or incompetent person without court approval. Any money or property obtained by a next friend must be managed or invested in accordance with Chapter 142 of the Property Code or as otherwise provided by law.

(2) Guardians Ad Litem. The court must appoint a guardian ad litem to represent a minor or incompetent person who has no guardian or next friend or who is represented by a guardian or next friend who appears to the court to have an interest potentially adverse to the minor or incompetent person. The court shall allow the guardian ad litem a reasonable fee for services to be taxed as a part of the costs.

[Current Rule: Tex. R. Civ. P. 44, 173].
[Original Source: Parts 1 and 2 of Art. 1994; Art. 2159].
[Official Comments]:

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1961. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

Rule 31. Joinder of Claims

(a) Joinder of Claims. A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternative claims, as many claims as the party has against an opposing party.

(b) Joinder of Contingent Claims. If a claim is contingent on the determination of another claim, the claims may be joined in the same action. This

rule does not permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the claimant.

[Current Rule: Tex. R. Civ. P. 51].
[Original Source: Federal Rule 18].
[Official Comment]:

Change: Reference to the right of plaintiff to join an action upon a claim for money and an action to set aside a fraudulent conveyance is omitted as unnecessary in view of the decision of this state.

Change by amendment effective December 31, 1941. The last sentence has been added.

Change by amendment effective January 1, 1961. The word "statute" substituted for the word "law" in last sentence of subdivision (b).

Rule 32. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. Permissive joinder of additional parties in accordance with this rule may be disallowed by the court on the motion of any party if joinder will unduly delay or prejudice the adjudication of the rights of another party.

[Current Rule: Tex. R. Civ. P. 40; Tex. R. Civ. P. 37 (last part)].
[Original Source: Federal Rule 20, unchanged and R.C.S. Art. 1992

(unchanged)].

(b) Misjoinder of Parties. Misjoinder of parties is not grounds for dismissal of an action. Any claim against a party who has been improperly joined may be severed and proceeded with separately.

[Current Rule: Tex. R. Civ. P. 41].
[Original Source: Federal Rule 21].
[Comments: The second sentence of Rule 41 has been deleted].

Change: Addition of provision for adding and dropping parties and for consolidation of suits and for severing actions in case of misjoinder of parties or causes.

Rule 33. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as party in the action if **(1)** in the person's absence complete relief cannot be accorded among those already parties; or **(2)** the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may **(A)** as a practical matter impair or impede the person's ability to protect that interest or **(B)** leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence

will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non joinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 36.

[Current Rule: Tex. R. Civ. P. 39; Tex. R. Civ. P. 37 (last part)].
[Original Source: Federal Rule 19, with textual change and R.C.S. Art. 1992 (unchanged)].
[Official Comments]:

Change by amendment effective January 1, 1971. The rule has been completely rewritten to adopt, with minor changes, the provisions of Federal Rule 19 as amended.

Rule 34. Consolidation, Separate Trials and Severance

(a) **Consolidation**. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order the actions consolidated; and it may make such orders concerning proceedings as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

[Current Rule: Tex. R. Civ. P. 40(b) and 174].
[Original Source: Federal Rules 20(b) and 42].

(c) Severance. The court may order a severance (1) if the controversy involves more than one claim, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. A severance divides the lawsuit into two or more separate and independent cases.

Source: State Dept. of Highways v. Cotner, 845 S.W.2d 818, 819 (Tex. 1993); Hall v. City of Austin, 450 S.W.2d 836, 837-38 (Tex. 1970).

Rule 35. Interpleader

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which the claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

[Current Rule: Tex. R. Civ. P. 43].
[Original Source: Federal Rule 22(1), with minor textual change].

Rule 36. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if **(1)** the class is so numerous that joinder of all members is impracticable, **(2)** there are questions of law or fact common to the class, **(3)** the claims or defenses of the representative parties are typical of the claims and defenses of the class, and **(4)** the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Action Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: **(A)** the interest of members of the class in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **(D)** the difficulty likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be

maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivision (b)(1), and (b)(2), this notice shall advise the members of the class **(A)** the nature of the suit, **(B)** the binding effect of the judgment, whether favorable or not, and **(C)** the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(3) this notice shall advise each member of the class **(A)** the nature of the suit; **(B)** that the court will exclude him from the class if he so requests by a specified date; **(C)** that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and **(D)** that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), and (b)(2), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions. When appropriate **(1)** an action may be brought or maintained as a class action with respect to particular issues, or **(2)** a class be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such manner as the court directs.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

[Current Rule: Tex. R. Civ. P. 42].

[Original Source: Federal Rule 23].
[Official Comments]:

Change by amendment effective September 1, 1977. Rule 42 is completely rewritten. Subdivision (a) is copied from revised Federal Rule 23(a). Subdivision (b)(1) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(2) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(3 is taken from present Texas Rule 42(a)(3), omitting the reference to the character of the right as "several." Subdivision (b)(4) is adopted from revised Federal Rule 23(b)(3). Subdivision (c)(1 is adopted from revised Federal Rule (c)(1) with little change except in the choice of words. The second sentence in proposed (c)(1) is not found in the Federal Rule although the idea is implied therein. Subdivision (d) is copied from revised Federal Rule 23(c)(4). Subdivision (e) is copied from revised Federal Rule 23(e).

Change by amendment effective April 1, 1984. The paragraph concerning a derivative suit is added to subdivision (a).

Rule 37. Derivative Suits

In a derivative suit brought pursuant to article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations **(1)** that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and **(2)** with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.

[Current Rule: Tex. R. Civ. P. 42(a)].
[Original Source: Federal Rule 23(a)].

Rule 38. Intervention

(a) **Intervention of Right.** Any person shall be permitted to intervene in an action (1) when a statute confers an unconditional right to intervene; or (2) when the person claims an interest relating to the property or transaction which is the subject of the action and the person is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest, unless the person's interest is adequately protected by existing parties.

(b) **Permissive Intervention.** Any person may be permitted to intervene in an action: (1) when a statute confers a permissive or a conditional right to intervene; or (2) when a person's claim or defense arises out of the same transaction, occurrence, or series of transactions or occurrences as the main action and has a question of law or fact in common with the main action.

(c) **Procedure.** A person may intervene by filing a pleading subject to being stricken by the court on motion of any party for sufficient cause. In exercising its discretion to strike an intervention, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the other parties.

[Current Rule: Tex. R. Civ. P. 60, 61].
[Original Source: Art. 1998 and Texas Rule 30 (for District and County Courts)].
[Official Comments]: This draft is based on Fed. R. Civ. P. 24 except that paragraph (c) continues Texas practice as set forth in Tex. R. Civ. P. 60.

Rule 60, Change: Intervention is authorized without leave of court, regardless of whether the court is in session or in vacation.

Rule 60, Change by amendment effective September 1, 1990. Rules 21 and 21a control notice and service of pleadings of intervenors.

Rule 39. Substitution of Parties

(a) Death.

(1) Death of Party Before Verdict or Decision. If the claim is one that survives, no suit shall abate because of the death of any party before the verdict or decision of the court is rendered, but the case may continue as provided in this rule. Upon death of a party, the personal representative of the decedent's estate, or the heirs may appear and, upon notice of death in open court, may continue to prosecute or defend the action. Absent a timely appearance and suggestion, upon request by another party, the clerk shall issue a citation requiring the personal representative of the decedent's estate or the heirs to appear and prosecute or defend the action. A defending party may have a claim dismissed for want of prosecution upon failure of the personal representative or the heirs to respond to the citation in a timely manner.

[Current Rule: Tex. R. Civ. P. 150-153].
[Original Source: Arts. 2078, 2079, 2080, 2081, with minor textural changes].
[Official Comments]:

Rule 151, Change by amendment effective April 1, 1984. Textual changes.

Rule 153, Change by amendment effective April 1, 1984. Textual changes.

(2) Requisites of Citation. The citation and return of service shall conform to the requisites of citations and returns under these rules, except that a citation requiring the personal representative of the decedent's estate or the heirs to appear and prosecute the action must provide notice that the action may be dismissed for want of prosecution if a timely response is not made.

[Current Rules: Tex. R. Civ. P. 154].
[Original Source: Art. 2091, with minor textural changes].

(3) Surviving Parties. Where there are two or more plaintiffs or

defendants, and one or more of them die, upon notice of death being entered upon the record, the suit shall at the instance of either party proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be.

[Current Rule: Tex. R. Civ. P. 155].
[Original Source: Art. 2082, unchanged].

(4) Death After Verdict or Close of Evidence. Unless otherwise provided by law, if a party in a jury case dies between verdict and judgment, or a party in a non-jury case dies after the evidence is closed and before judgment is pronounced, judgment shall be rendered and entered as if all parties were living.

[Current Rule: Tex. R. Civ. P. 156].
[Original Source: Art. 2083, unchanged].
Official Comments]:

Change by amendment effective January 1, 1978. The rule is made applicable to non-jury as well as jury cases.

(5) Suit for the Use of Another. When a plaintiff suing for the use of another shall die before verdict, the person for whose use such suit was brought, upon such death being suggested on the record in open court, may prosecute the suit and shall be responsible for costs.

[Current Rule: Tex. R. Civ. P. 158].
[Original Source: Art. 2085, unchanged].

(6) Suit for Injuries Resulting in Death. In cases arising under the provisions of Chapter 71 of the Civil Practice and Remedies Code, the suit shall not abate by the death of either party pending the suit, but in such case, if the plaintiff dies, where there is only one plaintiff, some one or more of the parties entitled to the money recovered may be substituted and the suit prosecuted to judgment in the name of such party or parties, for the benefit of the person entitled; if the defendant dies, his personal representative or heirs, may be joined as provided in paragraph (a) and the case prosecuted to judgment.

[Current Rule: Tex. R. Civ. P. 159].

[Original Source: Art. 2086, unchanged].

(7) **Suit Against Dissolved Corporation.** The dissolution of a corporation shall not operate to abate any pending suit in which such corporation is a defendant, but such suit shall continue as provided in the Business Corporation Act.

[Current Rule: Tex. R. Civ. P. 160]
[Source: Art. 1390 (part), unchanged]
[Comment: Art. 7.12 of the Texas Business Corporation Act provides complete information concerning actions against dissolved corporations.]

(b) Public Officers: Death or Separation From Office.

(1) When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be made at any time, but the omission to enter such an order shall not affect the substitution.

(2) A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.

[Comment: This new paragraph is taken from Fed. R. Civ. P. 25(d).

(c) Substitution for Other Reasons.

If substitution of a party in the trial court is necessary for a reason other than death or separation from public office, the court may order substitution on any party's motion at any time.

[Comment: This new paragraph is modeled on proposed Appellate Rule 9.]

Rule ___. Voluntary Dismissals and Nonsuits.

(a) In General. At any time before the plaintiff has introduced all of the plaintiff's evidence other than rebuttal evidence, the plaintiff may dismiss an entire case or dismiss the action as to one or more of several parties. If the the trial is bifurcated or a court has ordered separate trials, the plaintiff cannot dismiss or nonsuit any claim on which the plaintiff has introduced all of the plaintiff's evidence other than rebuttal evidence. Omission of a party from the pleadings does not dismiss the action as to the omitted party. Notice of the voluntary dismissal of an entire case or as to one or more of the parties is immediately effective without necessity of court order if the notice is filed separately from the pleadings. A party who abandons any part of a claim or defense contained in the pleadings may have that fact entered of record during a hearing or trial. Notice of the dismissal or nonsuit must be served on any party who has answered or has been served with process in accordance with Rule ____.

(b) Defendants Not Served. When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not so served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by statute. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liability, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered.

[Current Rule: Tex. R. Civ. P. 161]
[Source: Art. 2087. Change by amendment effective April 1, 1984: Textual changes.]

(c) Avoidance of Prejudice. Any dismissal or nonsuit taken pursuant to this rule does not prejudice the right of another party to be heard on a pending claim for affirmative relief, excuse the payment of costs taxed by the clerk or authorize a party to prosecute an action without the joinder of a principal obligor, except as provided by law and these rules.

(d) Effect on Sanctions' Motions. A dismissal under this rule has 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 which terminates the case authorizes the clerk to tax court costs against the dismissing party unless otherwise ordered by the court.

Source; Tex.R.Civ.P. 162, 163, 165.

Rule _____. Actions Against Accommodation Makers and Endorsers; Official Bonds.

(a) In General. An action may not be maintained against a person that is secondarily liable unless the primary obligor is joined as a party or a judgment has previously been rendered against the primary obligor, except as otherwise provided by law or these rules. A person that is not primarily liable may be jointly sued with the person's primary obligor or may be sued alone in the cases provided by statute.

(b) Official Bonds.

(1) State officers. In suits by the State upon the official bond of a State officer, any subordinate officer who has given bond, payable either to the State or such superior officer, to cover all or part of the default sued for, together with the sureties on his official bond, may be joined as defendants with such superior officer and his bondsmen whenever it is alleged in the petition that both of such officers are liable for the money sued for.

[Current Rule: Tex. R. Civ. P. 36]
[Source: Art. 1990, unchanged.]

(2) Sheriffs and Constables. Whenever a sheriff, constable, or a deputy or either has been sued for damages for any act done in his official character, and has taken an indemnifying bond for the acts upon which the suit is based, he may make the principal and surety on such bond parties defendant in such suit, and the cause may be continued to obtain service on such parties.

[Current Rule: Tex. R. Civ. P. 34]

[Source: Art. 1988, unchanged.]

(3) Multiple Bonds. In suits brought by the State or any county, city, independent school district, irrigation district, or other political subdivision of the State, against any officer who has held an office for more than one term, or against any depository which has been such depository for more than one term, or has given more than one official bond, the sureties on each and all such bonds may be joined as defendants in the same suit whenever it is difficult to determine when the default sued for occurred and which set of sureties on such bonds is liable therefor.

[Current Rule: Tex. R. Civ. P. 36]
[Source: Art. 1989, unchanged, except that by amendment effective December 31, 1943, "irrigation district, or other political subdivision of the State," was interpolated, the second "or" omitted, and a comma placed after "city."]

SECTION 3
Pleadings and Motions

Rule 20. Pleadings Allowed; Separate Pleas and Motions

(a) Pleadings. The pleadings of the plaintiff shall consist of an original petition containing the plaintiff's claims for relief and such supplemental petitions as may be necessary to reply to the allegations made by the defendant or another party. The pleadings of the defendant shall consist of an original answer containing the defendant's grounds of defense and supplemental answers as may be necessary to reply to the allegations of the plaintiff made in an amended or supplemental petition or to the allegations of another party. The answer may contain a cross-claim or a counterclaim. In addition, if a person who was not an original party is subject to joinder under the provisions of Rule 27, a third-party complaint may be filed.

[Current Rate: Tex. R. Civ. P. 78, 80, 85, 98].

(b) Motions and Pleas. An application to the court for an order, whether in the form of a motion, plea, application or other form of request, unless made orally during a hearing or trial, shall be made in writing, state the grounds for the request and set forth the relief or order sought.

[Current Rule: Tex. R. Civ. P. 21 (part of first paragraph)].

(c) Demurrers Abolished. General demurrers shall not be used.

[Current Rule: Tex. R. Civ. P. 90 (first sentence)].

Rule 21. General Rules of Pleading.

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third-party claim, shall contain: **(1)** a short statement of the claims, stating the legal theories and describing in general the factual bases of the claims sufficient to give fair notice, and **(2)** a demand for judgment for all of the relief sought by the claimant, provided that in all

claims for unliquidated damages for more than $50,000 the demand must state only that the damages sought are within the jurisdictional limits of the court. Upon special exception, the court shall require the pleader to amend and to specify the maximum amount claimed.

[Current Rule: Tex. R. Civ. P. 47].
[Source: Federal Rule 8(a)].

Change by amendment effective January 1, 1978: Textual changes in first sentence and first sentence of (c), all of (b) and proviso in (c) are new.

Subcommittee's Comment

The Subcommittee unanimously recommends this change. The Subcommittee further proposes a Comment as follows:

Comment

Subsection (a) was amended in 1996 to provide that claims for relief should provide both the legal basis for the claim and a general description of the facts upon which liability is founded. A description of the legal basis for a claim could identify the cause of action by name, and refer to any constitutional, statutory or regulatory provision upon which the claim is founded. The factual circumstances supporting a claim may be described generally, but in sufficient detail so that the opposing party can determine from the pleading the circumstances sued upon. The claimant is not, however, required to allege specific acts or omissions giving rise to the claim for liability. Examples of stating the legal theory of a claim would include: "Plaintiff sues Defendant for negligence, in part for violating Tex. Rev. Civ. Stat. Ann. art. 6701d, § 35," or "Plaintiff seeks recovery of attorney's fees under Tex. Civ. Prac. & Rem. Code, ch. 38," or "Plaintiff was contributorily negligent,

and Defendant invokes the comparative responsibility provisions of Chapter 33 of the Tex. Civ. Prac. & Rem. Code," or "Defendant asserts the statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.004, as a defense."

(b) Denials of Claims or Defenses.

(1) General Denial. A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

[Current Rule: Tex. R. Civ. P. 92].
[Original Source: Arts. 2006 (part) and 2012, combined without change].
[Official Comment]:

Change by amendment effective April 1, 1985. The second paragraph is new. It clarifies some ambiguity in the law and undertakes to codify the law. The phrase "plea of privilege" has been corrected to "motion to transfer venue."

(2) Denials of Counterclaims or Cross-claims. When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party shall not be deemed to have waived any special appearance or motion to transfer venue. In all other respects the rules prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

[Current Rule: Tex. R. Civ. P. 81].
[Original Source: Art. 2004, unchanged].

(3) Reply to Affirmative Defense. When a party pleads an affirmative defense the adverse party is not required to deny such defense, but the affirmative defense shall be regarded as denied unless expressly admitted, but shall

not be regarded as avoided by an affirmative defense.

[Current Rule: Tex. R. Civ. P. 82].
[Original Source: Art. 2005, unchanged].

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, usury, waiver, and any other matter constituting an avoidance or affirmative defense.

[Current Rule: Tex. R. Civ. P. 94 (except last sentence)].
[Original Source: Portion of Federal Rule 8(c), unchanged].

When a defendant shall desire to prove payment, the defendant shall support the plea of payment with an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, the defendant shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.

[Current Rule: Tex. R. Civ. P. 95].
[Original Source: Art. 2014].
[Official Comments]:

Change: Omission of reference to counterclaim and set off.

(d) Waiver of Pleading Defects; Special Exceptions. Every pleading defect of form or substance not specifically identified and presented to the judge at least _____ days before trial is waived; provided that this rule may not be applied to any party against whom default judgment is rendered unless fair notice of the claim involved has been given to the defaulted party by the allegations as a whole.

A special exception may be used to object to a pleading defect. A special exception shall point out the particular pleading excepted to, be specific enough to notify the pleader of the defect or omission, and set forth the bases for the

exception.

[Current Rule: Tex. R. Civ. P. 91].
[Original Source: Texas Rule 18 (for District and County Courts)].

[Current Rule: Tex. R. Civ. P. 90].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The words "motion or" before "exception" are deleted, and "rendition of judgment" is changed to "judgment is signed."

(e) Pleading to be Plain and Concise; Consistency

(1) Each allegation must be made in plain and concise language and be sufficient to give fair notice of the plaintiff's claim or the defendant's ground of defense.

[Current Rule: Tex. R. Civ. P. 45 (first paragraph in part)].
[Original Source: This rule embraces in part Art. 1997, Texas Rules 1 and 32 (for District and County Courts), and Federal Rule 8(f)].

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

[Current Rule: Tex. R. Civ. P. 48].
[Source: Federal Rule 8(e), in part, unchanged].
[Original

(f) Construction of Pleadings. All pleadings shall be construed to do

substantial justice.

[Current Rule: Tex. R. Civ. P. 45 (last sentence)].
[Original Source: Federal Rule 8 (f)].

Rule 22. Pleading Special Matters

(a) Special act or law. A pleading founded wholly or in part on any private or special act or law of this State or of the Republic of Texas need only recite the title thereof, the date of its approval, and set out in substance so much of such act or laws as may be pertinent to the cause of action or defense.

[Current Rule: Tex. R. Civ. P. 53].
[Original Source: Art. 2000, unchanged].

(b) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

[Current Rule: Tex. R. Civ. P. 54].
[Original Source: Federal Rule 9(c)].
[Official Comment]:

Change by amendment of March 31, 1941. The practice on failure of specific denial is made clearer denial is made clearer by changes in the wording of the last sentence.

(c) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it shall be sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

[Current Rule: Tex. R. Civ. P. 55].
[Original Source: Federal Rule 9(e)].
[Official Comment: No change except the substitution of it shall

be" for "it is"].

(d) **Special Damage.** When items of special damage are claimed, they shall be specifically stated. Special damages are those damages that arise naturally but not necessarily from another's wrongful conduct.

[Current Rule: Tex. R. Civ. P. 56].
[Original Source: Federal Rule 4(g)].
[Task Force Comment: The second sentence is based on Sherrod v. Bailey, 580 S.W.2d 24 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.)].

(e) **Certain Pleas to be Verified.** A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

(1) That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.

(2) That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

(3) That there is another suit pending in this State between the same parties involving the same claim.

(4) That there is a defect of parties, plaintiff or defendant.

(5) A denial of partnership as alleged in any pleading as to any party to the suit.

(6) That any party alleged in any pleading to be a corporation is not incorporated as alleged.

(7) Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed is founded, in whole or in part an charged to have been executed by him or by his authority, and not alleged to be lost or destroyed.

Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.

(8) A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

(9) That a written instrument upon which a pleading has failed in whole or in part without consideration, or that the consideration of the same has failed in whole or in part.

(10) A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

(11) That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

(12) That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

(13) In the trial of any worker's compensation case appealed to the court the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

(A) Notice of injury.

(B) Claim for Compensation.

(C) Award of Compensation.

(D) Notice of intention not to accept the award of the Commission.

(E) Filing of petition for judicial review.

(F) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.

(G) That there was good cause for not filing claim with the Commission within the one year period provided by statute.

(H) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

(14) That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

(15) In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

[Current Rule: Tex. R. Civ. P. 93].
[Original Source: Arts. 573, 574, 1999, 2010, 3734, and 5074].
[Official Comments]:

Change: The basic statute relating to sworn pleadings was Art. 2010.

With it have been combined provisions from a number of other specific statutes requiring sworn pleas. No change of meaning has been intended in so far as the combinations, as such, are concerned. The scope of sworn denials has, however, been broadened. Subdivision (b) will, under this rule, include the plea that "the defendant has not legal capacity to be sued." Subdivision (c) has been extended to include a denial of defendant's liability in the capacity in which he is sued. In subdivision (d) the term "cause of action" has been replaced by the word "claim." Subdivisions (f) and (g) apply to allegations in any pleading, not merely to the petition as formerly stated in Art. 2010.

Change by amendment of March 31, 1941. Subdivisions (m) and (n) (Source: Art. 5546, and Acts 1937, 45th Leg., p. 535, ch. 261, sec. 2) and (o) added.

Change by amendment effective December 31, 1941. Section (6) has been added to subdivision (n).

Change by amendment effective December 31, 1943. Section (7) and the new sentence concerning sections (1) and (7) have been added to subdivision (n), and minor textual changes have been made in the last paragraph of this subdivision.

Change by amendment effective March 1, 1950. A new subdivision, designated (o) has been added, and the subdivision formerly lettered (o) has been designated (p).

Change by amendment effective January 1, 1971. Final clause of subdivision (k) has been changed to harmonize with Rule 185 as amended. Section (8) has been added to subdivision (n).

Change by amendment effective January 1, 1976. Subdivision (p) is new and is adopted for the purpose of simplifying issues in uninsured motorist cases.

Change by amendment effective September 1, 1983. To conform to S.B. 291 and 898, 68th Legislature, 1983.

Change by amendment effective April 1, 1984. Section 10 is changed to conform to amended Rule 185.

Rule 23. Form of Pleadings, Motions and Other Papers.

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title or style of the case, the file number and an indorsement showing the pleading's position in the pleading process, such as "petition/answer," and so on. The petition shall state the names of the parties in the caption. In other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

[Current Rule: Tex. R. Civ. P. 78, 79, 83].
[Original Source: Texas Rules 3 and 6 (for District and County Courts)].

(b) Paragraphs. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings, so long as the pleading containing such paragraph has not been superseded by an amendment as provided in Rule ____ (currently Rule 65) Amended and Supplemental Pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

[Current Rule: Tex. R. Civ. P. 50].
[Original Source: Federal Rule 10(b)].

(c) Adoption by Reference. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule ____ (currently Rule 65) Amended and Supplemental Pleadings.

[Current Rule: Tex. R. Civ. P. 58].

[Original Source: Federal Rule 10(c), first sentence].

Change: Addition of words after comma

(d) **Exhibits and Pleading.** Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes. Such pleadings shall not be deemed defective because of the lack of any allegations which can be supplied from said exhibit.

[Current Rule: Tex. R. Civ. P. 59].
[Original Source: Texas Rule 19 (for District and county Courts)].
[Official Comments]:

Change: The rule has been shortened. Provision is made for copying the exhibit into the body of the pleading. Addition of provision making the exhibit a part of the pleading for all purposes and for supplying allegations from the exhibit.

Rule 24. Signing of Pleadings, Motions, and Other Papers; Sanctions

(a) **Signature Requirement.** Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, and, if available, telecopier number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, and, if available telecopier number.

[Current Rule: Tex. R. Civ. P. 57].
[Original Source: Federal Rule 11, first two sentences, unchanged].
[Official Comments]:

Change by amendment effective January 1, 1981. Rule changed to

require statement on pleadings of attorney's State Bar of Texas identification number and telephone number and the telephone number of a party not represented by a lawyer.

Change by amendment effective September 1, 1990. To supply attorney telecopier information with other identifying information on pleadings. Documents telephonically transferred are permitted to be filed under changes in Rule 45.

(b) . . .

Rule 25. Presentation of Defenses; Plea or Motion Practice

(a) When presented. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.

[Current Rule: Tex. R. Civ. P. 99].
[Original Source: Federal Rule 12b)].
[Official Comments]:

Change: The rule authorizes the clerk to issue as many citations for the defendant or defendants as the plaintiff may request, without the delay of securing a return on any prior citation.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by a separate motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of citation;

(5) insufficiency of service of process;

(6) failure to join a party under Rule 32 (currently Rule 39);

(c) Special Appearance. A defendant may appear specially for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such person or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes in connection with the objection to the court's jurisdiction do not constitute a general appearance.

Any motion to challenge the court's personal jurisdiction must be filed prior to any other plea, pleading, or motion provided that a motion to transfer venue and any other plea, pleading or motion may be contained in the same instrument without waiving the objection to juridiction. Any motion to challenge personal jurisdiction must be heard before a motion to transfer venue and before any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case.

If the court sustains the objection to jurisdiction, an appropriate order shall be made. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose without waiving the objection to personal jurisidiction.

(d) Venue. A motion objecting to improper venue must be filed prior to or concurrently with any other plea, pleading or motion, except a motion to challenge the court's personal jurisdiction. A motion objecting to improper venue may be contained in a separate instrument or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading. Issuing process for witnesses' and taking depositions does not waive a motion to transfer venue and discovery shall not be abated or otherwise affected by the pendency of a motion to transfer venue.

The determination of a motion to transfer venue shall be made promptly by the court in due order and in a reasonable time before trial. The movant has the duty

to request a setting on the motion to transfer.

If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer the case to the proper court as provided in Rule _____ (currently Rule 89).

(e) Hearings.

(1) General Rules. The defendant in an answer may plead as many several matters, whether of law or fact, as the defendant may think necessary for the defense, and which may be pertinent to the cause, and such matters shall be heard under the rules of evidence in such order as may be directed by the court, special appearance and motion to transfer venue, and the practice thereunder being excepted herefrom.

(2) Special Appearance Hearings. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts to justify the opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule _____, the court shall impose sanctions in accordance with that Chapter 10 of the The Civil Practice and Remedies Code.

(3) Venue Hearings . . . .

(A) Burden of Establishing Venue

. . .

(i) In General

. . .

[Current Rule: Tex. R. Civ. P. 84, 87, 120a].
[Original Source: Arts. 2006 (part) and 2012 (combined with minor textural changes)].
[Official Comments]:

Change: These two articles have been combined with minor textual change. See also Rule 92 for balance of Art. 2006.

Change by amendment effective March 1, 1950. The requirement that defensive matters must be filed at the same time and in due order of pleading has been eliminated, and the provisions of the last clause have been changed to allow pleas to be heard in such order as the court may direct, excepting a plea of privilege.

Change by amendment effective September 1, 1962. Words "special appearance and" inserted before "plea of privilege."

Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 26. Counterclaim and Cross-claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of the filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) Permissive Counterclaims. A pleading may state as a counterclaim

any claim against a opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount of different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules _____ (currently Rules 38, 39 and 40).

(g) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule ____ (currently Rule 174), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

[Current Rule: Tex. R. Civ. P. 97].
[Original source: Federal Rule 13].
[Official Comments]:

Change: Subdivisions (d) and (f) of the Federal Rule have been omitted and the subdivisions relettered. Subdivisions (d), (e), (f) in part, and (h) above, correspond to subdivisions (e), (g), (h), and (i) respectively of the Federal Rule. In (a) above, the compulsory counter-

claim has been limited to a claim within the jurisdiction of the court. In (c), a similar limitation has been embodied. Other subdivisions have minor textual changes.

Change by amendment of March 31, 1941. The proviso in subdivision (f) takes place of the last sentence of subdivision (f) in the original Rule 97, and subdivision (g) has been added. Subdivision (in original Rule 97 has been changed to (h).

Change by amendment effective January 1, 1971. Provisio concerning effect of judgment based upon settlement or compromise of claim of one party to a transaction has been added to subdivision (a).

Change by amendment effective April 1, 1984. Subdivision (f) is rewritten.

Rule 27. Third-Party Practice.

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff or to the plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party petition not later than thirty (30) days after serving the first responsive pleading. Otherwise, the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant shall make any defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule ____ (currently Rule 97). The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any

defenses and any counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to the third-party defendant or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Liability Insurers. This rule does not permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

[Current Rule: Tex. R. Civ. P. 38].
[Original Source: Federal Rule 14, with minor textural change].
[Official Comments]:

Change by amendment effective April 1, 1984. The rule removes the need to get leave of court to begin third-party action; makes textual changes to clarify terminology.

Rule 28. Amended and Supplemental Pleadings

(a) Amendment Defined. The object of an amendment, as contra-distinguished from a supplemental petition or answer, is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense permissible to the suit.

[Current Rule: Tex. R. Civ. P. 62].
[Original Source: Texas Rules 12 and 15 (for District and County Courts) combined, with minor textural changes].

Unless the substituted instrument shall be set aside on exceptions, the

instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

[Current Rule: Tex. R. Civ. P. 65].
[Original Source: Texas Rule 14 (for District and County Courts) with minor textural changes].

(b) When to Amend; Amended Instrument. Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule ____ (currently Rule 166), shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

[Current Rule: Tex. R. Civ. P. 63].
[Original Source: Arts. 201, subdivisions 1 and 2].
[Official Comments]:

Change: This rule authorizes amendment without leave of court when filed seven days or more before the date of trial. It requires leave to amend thereafter, which may be granted by the judge instead of by the court. Subdivision 3 of Article 2001 is superseded by Rules 66 and 67.

Change by amendment effective January 1, 1961. Language "or after such time as may be ordered by the judge under Rule 166" added.

Change by amendment effective September 1, 1990. To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.

The party amending shall point out the instrument amended, as "original petition," or "plaintiff's first supplemental petition," or as "original answer," or "defendant's first supplemental answer" or other instrument filed by the party and shall amend by filing a substitute therefor, entire and complete in itself, indorsed "amended original petition," or amended "first supplemental petition," or "amended original answer," or "amended first supplemental answer," accordingly as said instruments of pleading are designated.

[Current Rule: Tex. R. Civ. P. 64].
[Original Source: Texas Rule 13 (for District and County Courts)].

(c) Trial Amendments. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention o f the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

[Current Rule: Tex. R. Civ. P. 66].
[Original Source: Federal Rule 15(b) (last two sentences) with minor textual change].

(d) Trial by Consent. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules ____ and ____ (currently Rules 277 and 279).

[Current Rule: Tex. R. Civ. P. 67].
[Original Source: Federal Rule 15(b)].

Alternative Rule 22/Draft

Rule 22. Pleading Special Matters

(a) Special act or law. A pleading founded wholly or in part on any private or special act or law of this State or of the Republic of Texas need only recite the title thereof, the date of its approval, and set out in substance so much of such act or laws as may be pertinent to the cause of action or defense.

[Current Rule: Tex. R. Civ. P. 53].
[Original Source: Art. 2000, unchanged].

(b) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

[Current Rule: Tex. R. Civ. P. 54].
[Original Source: Federal Rule 9(c)].
[Official Comment]:

Change by amendment of March 31, 1941. The practice on failure of specific denial is made clearer denial is made clearer by changes in the wording of the last sentence.

(c) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it shall be sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

[Current Rule: Tex. R. Civ. P. 55].
[Original Source: Federal Rule 9(e)].

[Official Comment: No change except the substitution of it shall be" for "it is"].

(d) Special Damage. When items of special damage are claimed, they shall be specifically stated. Special damages are those damages that arise naturally but not necessarily from another's wrongful conduct.

[Current Rule: Tex. R. Civ. P. 56].
[Original Source: Federal Rule 4(g)].
[Task Force Comment: The second sentence is based on Sherrod v. Bailey, 580 S.W.2d 24 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.)].

(e) Capacity. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or as to whether another party is doing business under an assumed name or trade name as alleged, the party desiring to raise the issue shall do so by specific negative averment, which shall include supporting particulars as are peculiarly within the pleader's knowledge.

[Comment: this subdivision is based largely on Fed. R. Civ. P. 9(a) (second sentence). The language about a denial of assumed or trade name activity has been added. It is based on Tex. R. Civ. P. 93(14).

(f) Execution of Written Instrument; Indorsement and Assignment. A party desiring to raise an issue as to the execution by the party or by the party's authority or by a deceased person, of any instrument in writing, upon which any pleading is founded and not alleged to be lost or destroyed or the genuineness of an indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee, must raise the issue by specific negative averment, which shall include supporting particulars as are peculiarly within the pleader's knowledge. In the absence of a specific negative averment, the instrument in writing or the indorsement or assignment shall be received in evidence or otherwise held as fully proved.

[Comment: This subdivision is an amalgamation of Tex. R. Civ. P. 93 (7), (8), drafted to resemble the draft of the preceding subdivision.

(g) Workers' Compensation Cases.

. . .

(h) **Insurance Contracts.** Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability.

[Comment: This subdivision is based on the last sentence of Tex. R. Civ. P. 94. This provision is probably unnecessary in view of Ins. C. Art. 21.58 (Burden of Proof and Pleading.)

DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 15 - 165a
(as of January 22, 1996)

RULE NO.	PAGE NO. & ACTION TAKEN	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
18a No. 1	Pg 111-113 **Full SCAC rejected Subcommittee recommendation by vote of 6-to-9 on 1/20/96. No change.**	Permit late-filing of m. to disqualify/recuse based on grounds not known or upon due diligence knowable until past deadline. By Justice Charles Bleil. See his article on "Focus on Judicial Recusal: A Clearing Picture," 25 TEX. TECH L. REV. 773, 782-83 (1994).	Subcommittee unanimously recommends that disqualification can be raised at any time. Subcommittee voted 4-3 that you can file recusal up to 10 days prior to a hearing or trial, and after that can only raise matters not previously known, or upon due diligence knowable, and they will be handled in a parallel proceeding while trial judge proceeds with case.	Disqualification grounds are constitutional and already can be raised at any time. Recusal should be raised at first opportunity. Permitting recusal within 10 days of trial risks use as disguised continuance. Avoid that by permitting judge to proceed to trial, while recusal is handled in a parallel proceeding under the existing procedure of assignment to another judge.
20 No. 2	Pg 114-116 **SCAC approved eliminating TRCP 20 on 1/20/96. Changed.**	Eliminate requirement that special judge sign minutes of proceedings before him. By David Beck.	Eliminate reading and signing of minutes at end of court term, altogether, by eliminating Rule 20.	The procedure is no longer generally observed, and is unnecessary.
21 No. 3	Pg 117-129 **SCAC rejected change by vote of 11-to-4 on 1/20/96. No change.**	Require that cert. of service reflect to whom service was made, and the address, and date and manner of service. By Larry W. Wise.	Adopt suggested change. Further provide that receiving party can rebut the recital of the manner of service.	Eliminates uncertainty as to how service was effected.

21a No. 4	Pg 127-128 **On 1/20/96, SCAC voted that service should be on attorney-of-record, if there is one. Changed.**	Rule 21a permits service upon a party or his atty of record. Service should be on atty and not party. By Wendell S. Loomis.	Once party receives notice that opposing party is represented by counsel, service is upon that counsel.	Service upon the client and not the attorney creates delays, lost papers, invades privacy, etc.
No. 5	Pg 125 **SCAC rejected suggested change on 1/20/96. No change.**	Eliminate provision that service by telefax after 5 p.m. is effective next day. By Luke Soules.	Reject suggestion. Furthermore, hand-delivery after 5 pm should be effective next day.	Some offices close and lawyers leave at 5 pm. Delivery after 5 pm is tantamount to delivery next day, anyway.
No. 6	Pg 133-134 **SCAC rejected proposed change on 1/20/96. No change.**	Eliminate service by telefax. By Jose Lopez II.	Reject suggestion. Further, service should be permitted by electronic mail on parties who indicate in their initial pleading or by subsequent filing that service by E-mail is acceptable.	Telefax service is quick and effective. Also, E-mail is an efficient and quick way to transmit data. Permit service by E-mail on all parties willing to accept E-mail service.
No. 7	Pg 137-138 **SCAC rejected proposed change on 1/20/96. No change.**	Require lawyers to include on pleading a telefax no. for service, and if no telefax no. given, then no service by telefax except upon Rule 11 agreement. By Ken Fuller.	Reject suggestion.	Having the option of service by telefax is beneficial. Telefax number should be required.

21b No. 8	Pg 159-163 **SCAC voted by 16-to-1 to change rule to provide that service must be on attorney-in-charge, and to "recipient's last known address." Changed.**	This letter does not implicate Rule 21b, which relates to "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions."	Fold Rule 21b regarding sanctions into new service rule.	Consolidate related rules.
23 No. 9	Pg 164-165 **On 1/20/96, SCAC voted unanimously to reject proposed change. However, TRCP 23 will be re-written to require random assignment and deter efforts to circumvent rule. Changed.**	Continue random case assignment by having clerks "designate the suits by regular consecutive numbers....," to help combat forum shopping. By John Appleman, Jefferson Co. Dist. Clerk.	No change.	Rule 23 provides for sequential cause numbers and not sequential assignment to courts.
26 No. 10	Pg 166-167 **On 1/20/96, SCAC agreed to reject proposed change. No change.**	Does record keeping under Rule 26 include J.P. courts or just district and county courts, since J.P. courts are covered under Rule 524? By Bill Willis	Yes, Rule 26 does apply. No change.	J.P. courts have worked successfully with existing rules.
41 No. 11	Pg 168-169 **On 1/20/96, this proposal was postponed. Postponed.**	Rules 174 and 41 are at odds. Joinder matters are within discretion of TC and subject to abuse of discretion review. TC should be able to join parties if not too expensive and not prejudicial to parties. By Professor Jack Ratliff.	This Subcommittee will study revising joinder of parties, for this and other reasons.	

46(b) No. 12	Pg 170-172 **On 1/20/96, referred to Judge Till. Referred.**	Misnomer: letter actually requests change to Rule 146.	Subcommittee recommends that this matter be referred to Judge Till's Committee.	This is within the scope of Judge Till's Committee.
47 No. 13	Pg 173-177 **On 1/20/96, SCAC rejected proposed change. No change.** **On 1/20/96, SCAC rejected proposed change. No change.**	The Rule 47(b) ban against pleading the amount of unliquidated damages in an original pleading can affect the question of county court at law jurisdiction. By Broadus Spivey. Party can forum shop by filing a pleading seeking an indefinite amount of damages and then amend to assert a recovery in excess of the county court at law's jurisdictional limits. By Pat McMurray.	Subcommittee recommends Rule stays as it is. Subcommittee recommends Rule stays as it is.	This is not perceived as a problem in actual practice. This is not perceived as a problem in actual practice.
48 No. 14	Pg 178-180 **On 1/20/96, referred to Judge Till's Subcommittee. Referred.**	Misnomer: letter actually requests change to Rule 148.	Subcommittee recommends that this request be referred to Judge Till's Committee.	

63 No. 15	Pg 181-184 **On 1/20/96, proposed change was postponed. Postponed.**	Change from 7 days prior to trial to 30 days prior to trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson.	Change Rule to set deadline at 45 days before discovery cut off date.	
	Pg 183-184	Proposed addition to Rule 63 permitting the amendment of pleadings to include a party that has been overlooked or misidentified in the original pleadings, if certain criteria are met. By Gilbert Low.	Examine relevant statute to see what would be subject to rule-making power of Supreme Court.	Relation back doctrine is statutory.
64	Pg 185-186	Allow amendment by designating page or paragraph amended. Not necessary to replead everything. By Richard H. Sommer.	Recommend that the Rule not be changed.	This has already been debated by SCAC. Judges might have to go through several volumes.
67	Pg 187	No amendment to pleadings within 30 days of trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson.	Recommend no change to Rules 66 & 67, due to changes recommended to Rule 63.	We have advanced the deadline for amending pleadings, but not altered burden of proof as to good cause.

74	Pg 188-200	Permit clerks to file faxed documents, and to choose preferred method of securing payment for that service.	Recommend SCAC consider uniform electronic filing rule, yet to be prepared. This Subcommittee is preparing proposed rules.	Electronic filing will become more prevalent in the future. Uniform rules statewide will eliminate confusion, telephone calls to district clerk, etc.
75a & 75b	Pg 5-7	Exhibits are filed with the court clerk but court reporter transmits them to the appellate court. By Michael Northrup.	Will make all rules gender neutral. Reference to TRCP 379 will be changed to refer to new TRAP. Concern over exhibits has been addressed by TRAP changes.	
76a	Pg 201-203	Rule 76a(8) suggests that you can appeal from a temporary sealing order, even though based upon affidavit or verified petition. Make Rule clear that temporary sealing order is analogous to TRO and can't be appealed. By Bernard Fischman.	Recommend no change.	Temporary order should be subject to appellate review.
	Pg 204-208	1st Ct. App. ruled that Rule 76a does not apply to protective orders. No particular change suggested. By Jack J. Garland, Jr.	Change Rule 76a to provide that a confidentiality order relating to unfiled discovery is not a Rule 76a order unless the order is contested on the basis of Rule 76a.	Clarification is needed. Recommend new Rule 76a(2)(a)(4) that would exclude from "court records": "unfiled discovery for which a protective order is sought and, there is no claim that the provisions of 76a2(c) apply."

86	Pg 211	Rule does not specify time to file motion to transfer venue based on inability to obtain fair trial. Case law says motion can be filed on day of trial. By J. Hadley Edgar.	Subcommittee recommends that this and all venue rules be consolidated and caused to conform to existing venue statutes, while remaining general enough to minimize future rule changes based upon further legislative activity.	Legislature has put itself in the middle of venue rights. Rules need to provide a procedure to implement legislative mandates, but not so closely that every legislative change requires a rule change.
87	Pg 212-216	If venue is challenged, a determination based on a preponderance of the evidence should be made to be certain that the resident defendant is the real defendant. By William J. Wade.	Subcommittee will evaluate new venue rules.	Addressed in new statute.
90	Pg 217-221	Special exception needs to be presented to the trial court prior to trial to avoid waiver. By J. Hadley Edgar.	Prof. Dorsaneo is rewriting Rules 90-91. See Dallas Local Rule 1.10.a. Recommend general pretrial rule requiring disposition of motions/exceptions before trial.	Court Rules Committee suggests that 30 days before trial be the deadline for resolving special exceptions. Subcommittee would tie the deadline to the end of the discovery period, as recommended with deadline for amending pleadings.

91	Pg 222-225	Letter does not relate to R 91. By Wendell Loomis.	Prof. Dorsaneo is rewriting Rules 90-91.	
	Pg 226-229	Special exceptions should be filed 10 days prior to trial. By Broadus Spivey.	Subcommittee recommends counting back from end of discovery period.	Amended pleadings can impact scope of discovery.
	Pg 228-229	Special exceptions must be filed 30 days prior to trial if pertinent pleading has been on file for 30 days. Court may allow for good cause exceptions at any time. By unknown party; submitted by Broadus Spivey, who disagreed with the amendment.	Subcommittee recommends counting back from end of discovery period.	Amending pleadings can impact scope of discovery.
	Pg 230-231	This letter relates to TRAP 91, not TRCP 91. By Bruce Pauley.		
93	Pg 232-235	Notes and Comments should be changed to reflect the correct numbered paragraphs instead of letter paragraphs. By Bill Willis.	Fix the comments to reflect proper letters.	Achieves consistency.
98a	Pg 236-239	Comments on proposed "offer of judgment rule." No proposed rule was enclosed. Presume this would be like Federal Rule.	Subcommittee will consider this proposal.	The Federal rule may have beneficial effect if implemented in Texas practice.

100	Pg 240-241	$5 research fee demanded by Dist. Clerk is "one of the most stupid applications of money grubbing I have every heard." E.J. Wolt.	No action. There is no Rule 100.	Letter accomplished its purpose.

103	Pg 242	Threshold of qualifications for process servers is too low. By Robert Hurlbut.	Recommend no action. Can't solve by Rule. Legislature has declined to act on this point.	
	Pg 244	Proposed Rule 103 imposing requirement that process servers be registered with the Secretary of State. Also permit private process servers to serve writs of garnishment. By [unknown].	Recommend no action. This proposal was taken to the Legislature, but bill failed to pass. This is a legislative issue, not a rule issue.	
	Pg 245	Bexar County local rules re: private process servers, and req. of $100,000/ 300,000 liability insurance.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 247	Private process server advertisement.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 248-249	Do not allow private process servers to serve eviction notices. By Joe G. Bax.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 250	Allow for service by any person authorized in writing by the plaintiff and eliminate requirement of written order. Judge Louis Lopez.	Recommend no action. Recommend that court remain involved in private process serving, by approving individual who is serving process.	

105	Pg 253	To protect officer or other person, add clause that officer or person may delay execution upon request of issuing party or their attorney.	Reject change. The writ is a gov't mandate; to stop it, you should go to court and ask it to be called back.	Formal process should be handled formally and on the record. Avoid factual disputes.
106	Pg 254-255	Amend rule to permit delivery to an occupant over 16 at the defendant's place of abode.	Recommend no action. Delivery to another person in lieu of defendant should remain as substituted service, requiring prior court approval.	Court involvement desired. Critical part of litigation process, and it should remain under court control.
111	Pg 256-257	This letter does not address Rule 111. By Bruce Pauley.	Recommend no action.	Not applicable.
114	Pg 258-259	This letter does not address Trial Rule 114. It refers to Appellate Rule 114. By Bruce Pauley.	Refer to Appellate Rules Subcommittee.	Not applicable.
117(a)(6)	Pg 260-261	Delete the paragraph saying "[I]f this citation is not served within 90 days after the date of its issuance, it shall be returned unserved," so that citations do not have to be reissued. By Bexar County District Clerk, David J. Garcia.	We recommend this change.	Eliminate unnecessary expenditure of effort and needless expense.
124	Pg 262-266	Delete parenthesis. Should be Rule 21a instead of 21(a).	Okay. Make change.	Corrects an error.

145	Pg 267-273	Court clerks should be able to challenge indigency affidavit. Pro bono attys with clients referred by IOLTA programs should be able to use certificate of indigency.	Amend Rule 145 to permit clerks to contest affidavits; permit pro bono attys to establish indigency by IOLTA certificate.	Clerks should be able to contest indigency affidavits. If clients are prescreened for indigency, pro bono attorneys should not have to go through contest proceedings.
146	Pg 180	Should be able to appeal J.P. judgment by cash bond.	Refer to Judge Till's Committee.	
148	Pg 180	Should be able to appeal J.P. judgment by cash bond.	Refer to Judge Till's Committee.	
156	Pg 274	Rules 90, 156, 216(1), 307, 542 say "non-jury" and Rules 324(a) and Rule of Judicial Administration 6(b)(2) say "nonjury." Be consistent in using either "non-jury" or "nonjury." Should be consistent in all rules. By Charles Spain.	Good suggestion. Go with non-jury throughout the Rules.	Achieves consistency.
162	Pg 275	Submitted notice of amendment of Federal Rule of Civil Procedure 41, regarding terminating non-jury trials on the merits, and provided judgment on partial findings in Rule 52(c). By [unknown].	Recommend no change. The submitted language relates to directed verdict. Unrelated to TRCP 162 (non-suit).	Unclear why item was submitted.

165	Pg 276-293	Should be amended to provide that notice of dismissal be given in excess of 45 days to allow time to set the case for trial. By Howard Hasting. The word "judgment" should be replaced with the words "order of dismissal" in the first sentence in the last paragraph of 165a.3. By Prof. J. Hadley Edgar.	Committee thinks request is reasonable and will propose sixty days' notice. Subcommittee proposes to amend rule to recognize differences between the different grounds for DWOP. Subcommittee has not yet considered Prof. J. Hadley Edgar's suggestion.	Dismissal for inactivity should be handled differently from dismissal based on failure to appear, discovery sanctions, etc. Extending notice of DWOP to sixty days gives one last chance to set case for trial.
45-47	SPg 28-31	Amend Rules 45 & 47 to make parties plead constitutional, statutory, or regulatory provisions relied upon. By Richard Orsinger.	Amend Rule 47 to require pleader to state the legal basis for each claim and give a general description of the factual circumstances suff. to give fair notice.	This change conforms the rule to existing case-law and is salutory.
87	SPg 32-34	Amend Rule 87(2). Party who wishes to maintain venue in particular county has burden of proof, while party who seeks to transfer venue has burden to show venue maintainable in target county. Conflict? By Wendell Loomis.	Need to redo venue rules, in accord with statutes.	Statutory changes require changes to venue rules.

162	SPg 35	After verdict is returned in 1st phase of bifurcated trial, can plaintiff non-suit his entire case before resting in 2nd phase of trial? By Supreme Court Justice Nathan Hecht.	Provide that plaintiff can nonsuit only as to bifurcated untried issues. Write new rule for bifurcated trials.	Case law and statute require punitive damages to be tried separately, upon proper request. Need rule to provide how to conduct bifurcated trials.
18a	SSp 47-49	Where grounds for recusal not known until after 10 days before trial, motion to recuse can be filed but judge can continue to hear case and recusal hearing before other judge proceeds independently. By Jim Parker.	By 4-3 vote, adopt recommendation. See pg 1 of this Disposition Chart.	
Proposed General Rule 9, Replacing Rule 182	SSp 50-53	Combine appellate and trial rules regarding disqualification and recusal. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 5, Replacing Rule 21	SSp 54-58	Fold TRAP 4(e) and Rule 21 into new general Rule 5, regarding "Signing, Filing and Service." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
21a	SSp 61-62	When constitutionality of statute, rule or ordinance is questioned, must notify AG, city attorney, or other appropriate person, or else constitutional challenge is waived. By Charles Spain.		

21a	SSp 64-65	Telefax transmissions should be effective when last page is sent, receiver's time. By Jim Parker.	Recommend that this suggestion be accepted.	You don't have the document until you have received all of the pages.
Proposed General Rule 5, to replace present Rule 21a	SSp 66-67	Fold Rule 21a "Methods of Service" into new Rule 5, which applies to trial and appellate courts. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 5, to replace present Rule 21b	SSp 68-69	Delete Rule 21b "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions," and fold into new Rule 5 "Signing, Filing and Service." Use generic description rather than list. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
63	SSp 70-79	Deadline for amending pleadings would be 30 days prior to trial, not the current 7 days prior to trial. By SBOT Rules Committee.	Full SCAC should consider the proposal. Consider also Discovery Subcommittee proposed new Rule 63. The Subcommittee recommends the Discovery Subcommittee's approach. Also, let's define how to count backwards.	The Rules Committee has trial-related deadlines, while the Discovery Subcommittee has a discovery cut-off related deadline. The SCAC needs to reconcile the two approaches. Rules 66 & 67 should stay the same.
Proposed General Rule 5, to replace present Rule 74	SSp 80-81	Delete Rule 74 "Filing With the Court Defined" and fold into new Rule 5 "Signing, Filing, and Service." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.

Proposed General Rule 12, to replace present Rule 76	SSp 82-83	Delete Rule 76 "May Inspect Papers" and fold into Rule 12 "Attorney May Inspect." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
76a	SSp 84-123	Texas should permit audio-video cameras in courtroom. By Court Television.	Adopt uniform statewide rules. Chip Babcock is preparing draft.	Currently local rules vary. Uniform statewide rules are desirable.
86	SSp 124-127	Waiver of venue change by one defendant shouldn't waive for all defendants. By Susan S. Fortney.	Venue rules must be rewritten to conform to new statutes. New rules still under construction.	Governed by legislation passed in 1995 Session.
90	SSp 128-136	Exceptions to pleadings must be heard a reasonable time but not less than 30 days prior to trial. By SBOT Rules Committee.	Subcommittee thinks deadline for exceptions should work backward from close of discovery period.	Amended pleadings may affect scope of discovery.
103	SSp 137-186	Heard of instances where private process server served citation, interviewed defendant, and obtained admissions against interest, and was listed by plaintiff as a witness. By Larry L. Gollaher.	Subcommittee doesn't like this but doesn't think it can be effectively addressed by rule.	Impossible to micro-manage service of process.
145	SSp 187-192	Clerks should be permitted to contest affidavits of inability. Clerks should be subject to Rule 13 provisions and sanctions. By Earl Bullock.	Done. See p. 12 above.	

Proposed General Rule 145	SSp 193-195	Various edits to Rule 145, "Affidavit of Inability."	Make any appropriate changes to new version of Rule 145. See p. 12 above.	
165a	SSp 196-198	The merits of the case should be considered before it is put on the dismissal docket and subsequently dismissed. By Richard Worsham.		