



1996

Civil Evidence

Linda L. Addison

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Recommended Citation

Linda L. Addison, *Civil Evidence*, 49 SMU L. Rev. 755 (1996)
<https://scholar.smu.edu/smulr/vol49/iss4/5>

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CIVIL EVIDENCE

Linda L. Addison*

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DURING the Survey period, the Texas appellate courts handed down numerous decisions construing various rules of civil evidence. The cases of greatest significance arose in the following substantive areas: (1) Article I—General Provisions; (2) Article II—Judicial Notice; (3) Burden of Proof, Presumptions, and Inferences; (4) Article IV—Relevancy and Its Limits; (5) Article V—Privileges; (6) Article VI—Witnesses; (7) Article VII—Opinions and Expert Testimony; (8) Article VIII—Hearsay; (9) Article IX—Authentication and Identification; and (10) Parol Evidence.

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I. ARTICLE I—GENERAL PROVISIONS

The Texas Rules of Civil Evidence apply in all civil proceedings except as otherwise provided by statute.¹ Texas Rule of Civil Evidence 102 provides that the civil evidence 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 so that the truth may be ascertained and proceedings justly determined.² The statutory design of the Family Code manifests a legislative intent not to restrict the information received in nonadjudicative juvenile proceedings by strict application of the rules of evidence.³

II. ARTICLE II—JUDICIAL NOTICE

Texas Rule of Civil Evidence 201,⁴ which governs judicial notice of adjudicative facts, permits a court to take judicial notice of a wide variety of facts. Judicial notice is usually limited to matters that are generally known or easily proven and that cannot be reasonably disputed.⁵

The Eastland Court of Appeals took judicial notice of a section of a city employee handbook, in an action brought by city employees alleging retaliatory dismissal under the Whistleblower Act and the state constitution. Employees reported the chief of police for violating a section of the employee handbook and the court took judicial notice of a section stating that the city will make every effort to provide a harassment-free work environment.⁶

In *Circle Dot Ranch v. Sidwell Oil and Gas*, the Amarillo Court of Appeals took judicial notice in an oil and gas lessors' action.⁷ The action sought to cancel a gas unit that was voluntarily pooled by the lessees and to recover royalties under the lease based upon the lessees' bad faith. The court of appeals, on a party's motion without objection, took judicial notice of the hearing examiner's adjudicative fact that "the Commission would not require [appellee] to file a Form P-12 under these facts."⁸

In *Xu v. Davis*, judicial notice was also taken in a mandamus proceeding.⁹ In this case, an ex-wife sought to require a Brazos County court to hear her motion to determine the date when she or her attorney were first notified or actually knew of the default divorce judgment rendered

1. TEX. R. CIV. EVID. 101(b); *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App.—Houston [1st Dist.] 1994, no writ) (applying the Texas Rules of Civil Evidence to discretionary transfer of juvenile to criminal district court under TEX. FAM. CODE § 56.01).

2. TEX. R. CIV. EVID. 102.

3. *In re A.F.*, 895 S.W.2d 481, 485 (Tex. App.—Austin 1995, n.w.h.).

4. TEX. R. CIV. EVID. 201.

5. TEX. R. CIV. EVID. 201(b).

6. *Jones v. City of Stephenville*, 896 S.W.2d 574, 576 (Tex. App.—Eastland 1995, n.w.h.) (citing TEX. R. CIV. EVID. 201).

7. 891 S.W.2d 342 (Tex. App.—Amarillo 1995, writ denied) (citing TEX. R. CIV. EVID. 201).

8. *Id.* at 346.

9. 884 S.W.2d 916 (Tex. App.—Waco 1994, orig. proceeding) (citing TEX. R. CIV. EVID. 201(b)).

for her ex-husband. The Waco Court of Appeals took judicial notice of local rules adopted by the county court at law and district courts in Brazos County. The rules allow judges, “‘when a setting has been given,’ to consider requests from counsel to appear by telephone in a hearing that ‘does not involve the presentation of evidence.’”¹⁰

A court cannot judicially notice another court’s records in another case “‘unless a party provides proof of those records.”¹¹ The Texas Family Code does not require a court to take judicial notice of pleadings filed in paternity cases, but only to admit the items into evidence.¹²

Although a court may take judicial notice *sua sponte*, it must notify the parties at some point in a proceeding that it has done so. Where the record did not establish that the trial court in fact took judicial notice of the underlying trial in a bill of review proceeding, the court of appeals could not presume the trial court had done so.¹³

Texas Rule of Civil Evidence 202 governs determining other states’ laws by judicial notice.¹⁴ In the absence of proving a foreign jurisdiction’s law, it is presumed to be the same as Texas law.¹⁵

Texas Rule of Civil Evidence 203 governs determining foreign countries’ laws by judicial notice.¹⁶ Rule 203 is a hybrid rule by which presenting of foreign law to the court resembles presenting of evidence. But the determination ultimately is made as a legal question.¹⁷ Like questions of fact, however, a court will generally accept the uncontroverted opinions of a foreign law expert as true, so long as they are reasonable, consistent with the text of the law, and the only evidence before the court.¹⁸

Texas Civil Practice and Remedies Code section 38.004 permits judicial notice of attorney’s fees in certain circumstances.¹⁹ In *Long Trusts v. Atlantic Richfield Co.*, section 38.004 permitted a court to take judicial notice of the case file where attorney’s fees were incurred, even though that record was physically located in another court.²⁰ Notice was allowed because the appellate court had severed and remanded the issue of attor-

10. *Id.* at 918 n.2.

11. *Bhalli v. Methodist Hosp.*, 896 S.W.2d 207, 210 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (court of appeals could not take judicial notice of another proceeding where the party failed to present the trial court with any pleadings from earlier litigation) (citing TEX. R. CIV. EVID. 201(b)).

12. *State ex rel. Latty v. Owens*, 893 S.W.2d 728, 730-731 (Tex. App.—Texarkana 1995) *rev’d on other grounds*, 907 S.W.2d 484 (citing TEX. FAM. CODE ANN. § 21.28 (Vernon 1995)) (not citing TEX. R. CIV. EVID. 201).

13. *McDaniel v. Hale*, 893 S.W.2d 652, 673-74 (Tex. App.—Amarillo 1994, writ denied) (citing TEX. R. CIV. EVID. 201 (c), (e)).

14. TEX. R. CIV. EVID. 202.

15. *Unocal Corp. v. Dickinson Resources*, 889 S.W.2d 604, 607 n.2 (Tex. App.—Houston [14th Dist.] 1994, writ denied, per curiam) (citing TEX. R. CIV. EVID. 202).

16. TEX. R. CIV. EVID. 203.

17. *AG Volkswagen v. Valdez*, 897 S.W.2d 458, 461 (Tex. App.—Corpus Christi 1995, orig. proceeding) (citing TEX. R. CIV. EVID. 203).

18. *Id.*

19. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1986).

20. 893 S.W.2d 686 (Tex. App.—Texarkana 1995, writ requested).

ney's fees.²¹ Testimony about attorney's fees from the original trial was not hearsay at the remanded attorney's fees hearing. The evidence was part of the case file, of which the court took judicial notice.²² Taking judicial notice of a case file and the usual and customary attorney's fees constituted some evidence in support of an attorney's fee award, and no further evidence was needed.²³

Redistricting and voting rights cases are not covered by Texas Civil Practices and Remedies Code section 38.001. Where testimony established the amount and necessity of legal services but there was no expert testimony regarding reasonableness of the fee, section 38.004 could not be used to justify the reasonableness of the attorney's fees.²⁴

III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence addresses presumptions. Because the Texas Rules of Civil Evidence lack a corresponding Article III, Texas common law continues to govern the law of presumptions.

If facts lie peculiarly within a party's knowledge and cannot be known to the adversary due to the nature of the case, then the knowledgeable party has the burden of proving those facts.²⁵

"Spoliation" is the intentional destruction of evidence relevant to a case; it raises a presumption that the destroyed evidence would not have been favorable to its destroyer. The intentional spoliation rule presumes that evidence was unfavorable to the spoliator only when evidence has been intentionally destroyed, not merely lost.²⁶ The rule is only implicated in cases where physical, tangible evidence has been destroyed.²⁷ The improper suppression or alteration of evidence is an "admission by conduct." This conduct serves as evidence that the party is conscious that its case is weak or unfounded. From this consciousness it may be inferred that the cause itself lacks truth and merit.²⁸ The spoliation rule raises a presumption that the destroyed declarant's statements would not have been favorable to its destroyer if the statements still existed and were produced and admitted at trial.²⁹

21. *Id.* at 688.

22. *Id.*

23. *Id.*

24. *Richards v. Mena*, 907 S.W.2d 566, 573 (Tex. App.—Corpus Christi 1995 writ *dism'd*); *but see Matelski v. Matelski*, 840 S.W.2d 124, 130 (Tex. App.—Fort Worth 1992, writ *dism'd*) (appeal from judgment enforcing and clarifying final divorce decree, not a suit under § 38.001, in which the court took judicial notice of reasonable attorney's fees); *In re Estate of Kidd*, 812 S.W.2d 356, 359 (Tex. App.—Amarillo 1991, writ *dism'd*) (a discovery sanction issue in a will contest, not a suit under § 38.001, in which the court took judicial notice of reasonable attorney's fees).

25. *In re Marriage of Moore*, 890 S.W.2d 821, 835 (Tex. App.—Amarillo 1994, n.w.h.).

26. *Williford Energy Co. v. Submersible Cable Servs.*, 895 S.W.2d 379, 389-90 (Tex. App.—Amarillo 1994, n.w.h.).

27. *American Maint. & Rentals v. Estrada*, 896 S.W.2d 212, 222-23 (Tex. App.—Houston [1st Dist.] 1995, *judgm't* *dism'd* by *agr.*).

28. *Id.* at 223-24.

29. *Id.* at 222-24.

Under the rules governing filing and serving pleadings and motions, if a hearing notice is properly addressed and mailed with postage prepaid, it is presumed that the addressee received the notice. But the "presumption may be rebutted by an offer of proof of nonreceipt."³⁰ The presumption that the mailed notice was properly received by the addressee is based on a party's or attorney's certificate of notice.³¹

The law of sister states and foreign countries is presumed to be the same as that of Texas, absent sufficient information to the contrary.³² There is a general presumption of an adequate remedy at law.³³ The law presumes that one possesses good character and that even the limited good reputation of a person of bad character could be worse.³⁴

IV. ARTICLE IV—RELEVANCY AND ITS LIMITS

Texas Rule of Civil Evidence 401 defines relevant evidence.³⁵ Several courts during the Survey period used Rule 401 as a basis for excluding evidence.³⁶ Two courts during the Survey period used Texas Rule of Civil Evidence 402, which excludes irrelevant evidence, as a basis for excluding evidence.³⁷

Texas Rule of Civil Evidence 403 permits the exclusion of relevant evidence on special grounds.³⁸ During the Survey period, two courts admitted evidence over a Rule 403 objection that the evidence was unfairly prejudicial. In a suit to terminate the parental rights of a father and his common-law wife, the court in *Trevino v. Texas Department of Protective*

30. *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 11 (Tex. App.—Dallas 1994, no writ).

31. *Id.*

32. *Unocal Corp. v. Dickinson Resources*, 889 S.W.2d 604, 607 (Tex. App.—Houston [14th Dist.] 1994, writ denied, per curiam (907 S.W.2d 453)). See text accompanying note 15, *supra*.

33. *AG Volkswagen v. Valdez*, 897 S.W.2d 458 (Tex. App.—Corpus Christi 1995, orig. proceeding).

34. *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App.—Austin 1994, writ denied).

35. TEX. R. CIV. EVID. 401.

36. *J.C. v. State*, 892 S.W.2d 87, 90 (Tex. App.—El Paso 1995, n.w.h.) (holding that the trial court erred by allowing prosecutor to ask victim of alleged sexual abuse what the victim wanted to have happen to defendant because the question was not designed to elicit evidence on any relevant point in case); *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 885 S.W.2d 603, 631 (Tex. App.—Beaumont 1994, writ granted) (complaint letter summarizing nature of complaints received by photographic processor prior to purchase of manufacturer's defective emulsion was not relevant to breach of warranty claims and was properly excluded; trial court arguably erred on grounds on which evidence was excluded); *In re Martin*, 881 S.W.2d 531, 534 (Tex. App.—Texarkana 1994, writ denied) (in a paternity action, the defendant was not entitled to present evidence of the mother's sexual activity with others outside of the 90-day period during which the child had been conceived because such evidence was not relevant to any issue in the case).

37. *J.C.*, 892 S.W.2d at 90; *FFP Operating Partners v. Love*, 884 S.W.2d 898, 899 (Tex. App.—Texarkana 1994, n.w.h.) (trial court erred in allowing statement of plaintiff's counsel during voir dire which informed jury panel that the employer had decided not to elect coverage under the workers' compensation law because the statement was not relevant to any issue in the action).

38. TEX. R. CIV. EVID. 403.

& Regulatory Services admitted evidence relating to the father's involvement in the death of his minor nephew.³⁹ The court found that the prejudicial effect of this highly relevant evidence was not unfair and did not substantially outweigh the evidence's probative value in proceedings to terminate the father's parental rights to his own children.⁴⁰ In *McLellan v. Benson*, evidence of a defendant's alleged sexual assault on another woman twenty-six months earlier was admissible in a civil tort suit for sexual assault.⁴¹ The evidence showed that the defendant intended to have sexual intercourse with the plaintiff without her consent, notwithstanding the prejudicial effect of the evidence on the defendant. The jury was instructed to consider the testimony only on the contested issue of intent or consent. The probative value of the prior misconduct was particularly compelling, and the plaintiff had a compelling need for the testimony.⁴²

Two courts during the Survey period excluded evidence as unfairly prejudicial under Rule 403. A trial court did not abuse its discretion under the Texas Rules of Civil Evidence when it excluded evidence of an employee's criminal conviction and extraneous sexual abuse of his stepchildren. The trial was a sexual assault case filed by an adult against the employer.⁴³

In *Maritime Overseas Corp. v. Ellis*, testimony regarding a plaintiff seaman's previous arrest for driving while intoxicated was inadmissible in a toxic tort Jones Act and general maritime law case.⁴⁴ The court held that the prejudicial effect of that evidence outweighed its probative value.⁴⁵ However, the court did allow some testimony about the seaman's use of alcohol and a possible relationship between excessive alcohol use and the symptoms alleged by the seaman.⁴⁶

Rule 403 also permits exclusion of cumulative relevant evidence. In *Cecil v. T.M.E. Investments*, a health spa member who slipped on a stone at the swimming pool's edge brought a premises-liability negligence claim against the spa owner.⁴⁷ The member failed to show that she was harmed by the exclusion of photographs allegedly depicting the edge of the pool. The plaintiff did not include copies of the pictures in the appellate record. Two other photographs of the pool's edge were admitted into evidence and there was no showing that the excluded photographs were not

39. 893 S.W.2d 243 (Tex. App.—Austin 1995, n.w.h.).

40. *Id.* at 249 (citing TEX. R. CIV. EVID. 403).

41. 877 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1994, no writ); compare *Porter v. Nemir*, 900 S.W.2d 376 381-82 (Tex. App.—Austin 1995, n.w.h.) (citing TEX. R. CIV. EVID. 403) (the trial court did not abuse its discretion under Rule 403 when it excluded evidence of an employee's criminal conviction and extraneous acts of sexual abuse of his stepchildren in a sexual assault case filed by an adult against the employer).

42. *McLellan*, 877 S.W.2d at 458-590.

43. *Porter*, 900 S.W.2d at 381-82 (citing TEX. R. CIV. EVID. 403); compare *McLellan*, 877 S.W.2d at 458-59.

44. 886 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1994, writ requested).

45. *Id.* at 794.

46. *Id.* at 794.

47. 893 S.W.2d 38 (Tex. App.—Corpus Christi 1994, n.w.h.).

cumulative.⁴⁸

In *Parker v. Miller*, the court of appeals found that a summary of a mentally retarded state-school client's prior assaultive conduct record was properly excluded from evidence in a personal injury suit.⁴⁹ The client allegedly beat another client to unconsciousness. The summary was of records that were already in evidence and was therefore cumulative.⁵⁰

Relevant evidence that is confusing or misleading can be excluded under Rule 403.⁵¹ A trial court did not abuse its discretion in excluding Food and Drug Administration incident reports concerning a topical lotion in a medical malpractice action against a physician who prescribed the lotion. The trial court found that the relevance of the reports was outweighed by the danger of confusing and misleading the jury. The reports did not establish a causal link between the lotion and the patient's reported symptoms; rather, the reports merely created a suspicion without any medical proof. The reports themselves also specifically stated that the submission of the report did not constitute an admission that the lotion caused an adverse reaction.⁵²

Rule 403 also applies to expert testimony. During the Survey period, the Texas Supreme Court held that the trial judge must determine whether to exclude relevant and reliable expert testimony if an issue exists whether its probative value is 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."⁵³ Physical evidence used by a defense expert in conducting experiments was lost. Because of this, the trial court was justified in concluding that the possible prejudice to the plaintiff did not substantially outweigh the probative value of the defense expert's testimony. This was despite the fact that the plaintiff had provided its own testing evidence to the defendant.⁵⁴

Rule 404(b) excludes evidence of other wrongs or acts to prove a person's character showing that he acted in conformity with it.⁵⁵ But "other acts" evidence is admissible to show intent when intent is at issue.⁵⁶ In a sexual assault case, intent was raised by the defense's claim that the sexual contact was consensual.⁵⁷ Therefore, evidence that the defendant sexually abused his stepson had some relevance under Rule 404(b) to

48. *Id.* at 45.

49. 860 S.W.2d 452 (Tex. App.—Houston [1st Dist.] 1993, no writ).

50. *Id.* at 458.

51. TEX. R. CIV. EVID. 403.

52. *Reynolds v. Warthan*, 896 S.W.2d 823, 828 (Tex. App.—Tyler 1995, n.w.h.).

53. *E. I. du Pont Nemours and Co. v. Robinson*, 38 Tex. S. Ct. J. 852, 859 (June 15, 1995) (citing *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2798 (1993)).

54. *Williford Energy Co. v. Submersible Cable Servs.*, 895 S.W.2d 379, 390 (Tex. App.—Amarillo 1994, n.w.h.) (citing TEX. R. CIV. EVID. 403).

55. TEX. R. CIV. EVID. 404(b).

56. *Id.*

57. *Porter*, 900 S.W.2d at 381 (citing TEX. R. CIV. EVID. 404(b)) (evidence was properly excluded under TEX. R. CIV. EVID. 403 and 609(a)).

show his intent to abuse individuals who trusted him.⁵⁸

In a civil tort suit seeking damages for sexual assault, evidence that the defendant had assaulted another woman under similar circumstances twenty-six months earlier was relevant to the material issue of defendant's intent.⁵⁹ The defendant admitted sexual intercourse, but claimed that intercourse was consensual.⁶⁰

Texas Rule of Civil Evidence 405 governs methods of proving character.⁶¹ Where evidence of a conviction was properly excluded as unfairly prejudicial under Rule 403, reputation testimony about the inadmissible conviction logically was also inadmissible under Rule 405.⁶²

Offers to compromise are not admissible under Rule 408.⁶³ Thus, bad faith insurance cases based on the inadequacy of the insurer's settlement offer have been severed so that the contractual and extra-contractual claims can be tried separately.⁶⁴ During the Survey period, however, an uninsured motorist carrier was not entitled to severance of contractual and extra-contractual causes of action by its insureds. Evidence of the settlement offers would be highly prejudicial to the defense of the contract claims but necessary to the defense of the bad faith claims. The appellate court reasoned that the jury would be able to follow an instruction limiting consideration of settlement offers to the determination of the bad faith claims.⁶⁵ The court also noted that the decision whether to sever was within the discretion of the trial court.⁶⁶

Although settlement offers are not admissible to show liability or amount of damages, they are admissible for other purposes.⁶⁷ Where no "other purpose" could be found, one appellate court affirmed the trial court's exclusion of letters containing settlement offers.⁶⁸

V. ARTICLE V—PRIVILEGES

Article V of the Texas Rules of Civil Evidence governs privileges. No person has a privilege to refuse disclosure of any matter⁶⁹ unless the rules

58. *Id.*

59. *McLellan*, 877 S.W.2d at 457-58.

60. *Id.*

61. TEX. R. CIV. EVID. 405.

62. *Porter*, 900 S.W.2d at 383.

63. TEX. R. CIV. EVID. 408.

64. *See, e.g.*, *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 671-73 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); *State Farm Mut. Auto Ins. Co. v. Wilborn*, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

65. *Allstate Ins. Co. v. Evins*, 894 S.W.2d 847 (Tex. App.—Corpus Christi 1995, orig. proceeding).

66. *Id.* at 850 (citing TEX. R. CIV. P.; TEX. R. CIV. EVID. 408).

67. TEX. R. CIV. EVID. 408.

68. *Barrett v. United States Brass Corp.*, 864 S.W.2d 606, 633-34 (Tex. App.—Houston [1st Dist.] 1993, writ granted) (settlement offers made by plumbing systems manufacturer to affected homebuyers offered to defeat liability and damages DTPA suit were properly excluded from evidence).

69. TEX. R. CIV. EVID. 501(2).

of evidence recognize the privilege,⁷⁰ or a statute⁷¹ or constitution⁷² grants the privilege. Some of the specific privileges provided for in the Texas Rules of Civil Evidence include: (1) the lawyer-client privilege,⁷³ (2) the husband-wife communication privilege,⁷⁴ (3) communications to clergymen,⁷⁵ (4) trade secrets,⁷⁶ and (5) the physician-patient privilege.⁷⁷

The Texas Rules of Civil Evidence provide no general privilege based upon laws of a foreign country.⁷⁸ The Texas Rules of Civil Evidence also do not provide any privilege for journalists.⁷⁹ State law also governs the privileges associated with an element of a claim or defense whenever state law dictates those elements.⁸⁰

Where a plaintiff asserts the Fifth Amendment privilege against self-incrimination in a civil proceeding, the general rule against penalizing that assertion does not prohibit a trial court from acting to ensure that the proceeding remains fair. Such action includes barring the plaintiff from introducing evidence on the subject of the privilege. A civil plaintiff who has a valid privilege against discovery will still be required, under the "offensive use" doctrine enunciated in *Republic Insurance v. Davis*, either to waive the privilege or risk discovery sanctions.⁸¹ This requirement exists regardless of whether such a privilege is evidentiary or constitutional in nature where (1) plaintiff is seeking affirmative relief, (2) plaintiff is using the privilege to protect outcome determinative information, and (3) the protected information is not otherwise available to defendant.⁸²

Not all communications between a corporate client and its counsel are privileged. In *El Centro del Barrio, Inc. v. Barlow*, a nonprofit private health care corporation, its executive director, and the executive director/general counsel for a community health center association failed to establish an attorney-client privilege.⁸³ Communications between the general counsel for the association and the executive director of the nonprofit private health care corporation were not protected by the privilege. No

70. TEX. R. CIV. EVID. 502-10.

71. See TEX. REV. CIV. STAT. ANN. 5561h (Vernon Supp. 1984), repealed by TEX. R. CIV. EVID. 509-10 as to civil cases and TEX. R. CRIM. EVID. 509-10 as to criminal cases (confidential communications between physician and patient relating to professional services rendered by a physician privilege).

72. See U.S. CONST. amend. V; TEX. CONST. art. I, § 10.

73. TEX. R. CIV. EVID. 503.

74. TEX. R. CIV. EVID. 504.

75. TEX. R. CIV. EVID. 505.

76. TEX. R. CIV. EVID. 507.

77. TEX. R. CIV. EVID. 509.

78. *AG Volkswagen*, 897 S.W.2d at 462.

79. *Dolcefino v. Ray*, 902 S.W.2d 163, 164 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (citing TEX. R. CIV. EVID. 501).

80. *Perkins v. United States*, 877 F. Supp. 330, 332 (E.D. Tex. 1995) (although there is no physician-patient privilege under federal statutes, rules, or common law, there is a physician-patient privilege under Texas law, and therefore, opinions of personal injury plaintiff's treating physicians were discoverable) (citing TEX. R. CIV. EVID. 509(d)).

81. 856 S.W.2d 158, 161 (Tex. 1993).

82. *Texas Dep't of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760-61 (Tex. 1995).

83. 894 S.W.2d 775 (Tex. App.—San Antonio 1994, orig. proceeding).

testimony was presented that the executive director was authorized to seek or act on legal advice on behalf of corporation. It was also not established that the communications were intended to be confidential.⁸⁴

Texas Rule of Civil Evidence 503(b)(3) is known as the "common defense privilege."⁸⁵ In a case of first impression, the Corpus Christi Court of Appeals in *Rio Hondo Implement Co. v. Euresti*, held that an attorney should not be able to proceed against a co-defendant of a former client.⁸⁶ The subject matter of the present controversy was substantially related to the prior representation and confidential exchanges of information which took place between the co-defendants in preparing the joint defense.

A privilege is not waived by offensive use unless it meets the three prong test articulated by the Texas Supreme Court in *Republic Insurance*.⁸⁷ For the information sought to meet the second prong of the *Republic Insurance* test "the privileged information sought must be such that, if believed by the factfinder, in all probability it would have been outcome determinative of the cause of action asserted The confidential communication must go to the very heart of the affirmative relief sought."⁸⁸ With that test in mind, the analysis to be applied by the trial court is not an "all-or-nothing" approach (i.e., if *all* of the information sought is not outcome determinative then the second prong is not satisfied). Instead, even if only a portion of the information sought goes to the heart of the party's claims while other information does not, the second prong of the test is met.⁸⁹ The third prong of *Republic Insurance* examines whether the information sought could be obtained without requiring the plaintiff to forgo his privilege. The trial court must determine whether disclosure of the confidential communication is the only means by which the aggrieved party may obtain the evidence.⁹⁰ Again, the trial court's analysis is not an all-or-nothing approach. If the trial court finds that some of the information sought can be obtained only through the plaintiff, the third prong is satisfied.⁹¹

84. *Id.* at 778-79 (citing TEX. R. CIV. EVID. 503(b)).

85. TEX. R. CIV. EVID. 503(b)(3).

86. 903 S.W.2d 128 (Tex. App.—Corpus Christi 1995, orig. proceeding) (citing TEX. R. CIV. EVID. 503(b)(3)). A party using the joint defense privilege to disqualify opposing counsel must establish in an evidentiary hearing that 1) a confidential communication has been shared; and 2) the shared information is substantially related to disqualification. *Id.* The trial court determines the confidentiality of the shared information shared. *Id.* The appellate court determines whether the trial court abused its discretion in determining if confidential information was shared. *Id.*

87. 856 S.W.2d at 163 (Tex. 1993). The Texas Supreme Court listed three factors that should guide the trial court in determining whether a waiver has occurred: (1) "the party asserting the privilege must seek affirmative relief;" (2) "the privileged information sought must be such that, if believed by the fact finder, in all probability would be outcome determinative of the cause of action asserted," and that "[m]ere relevance is insufficient;" and (3) "disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence." *Id.*

88. *Denton*, 897 S.W.2d at 761 (citing *Republic Insurance*, 856 S.W.2d at 163).

89. *Id.* at 762 (reversing appellate court's conclusion that because all questions were not outcome determinative, the second prong of *Republic Insurance* test was not satisfied).

90. *Republic Insurance*, 856 S.W.2d at 164; *Denton*, 897 S.W.2d at 762.

91. *Denton*, 897 S.W.2d at 762.

Texas Rule of Civil Evidence 510 provides confidentiality for mental health information.⁹² The Corpus Christi Court of Appeals held that a drug abuse counselor's testimony regarding what a plaintiff/patient had told her regarding the cause of a collision was not protected by the Rule 510 privilege under the doctrine of offensive use.⁹³

A court may also allow a civil jury to make a negative inference from an assertion of the Fifth Amendment privilege against self-incrimination.⁹⁴

VI. ARTICLE VI—WITNESSES

Texas Rule of Civil Evidence 601 governs competency and incompetency of witnesses.⁹⁵ A witness is not incompetent to testify due to a civil contempt or civil arrest warrant.⁹⁶

Texas Rule of Civil Evidence 609 narrowly circumscribes impeachment by evidence of conviction of a crime.⁹⁷ In a sexual assault case filed by an adult against a drug dependency program, a conviction for sexual abuse of a child by the employee whose conduct was at issue was not admissible under Rule 609, which permits the admission of a criminal conviction if the court determines "that the probative value . . . outweighs its prejudicial effect."⁹⁸

If an abandoned pleading is inconsistent with a party's present position at trial, then the abandoned pleading is admissible as an admission against interest, even though the dead pleading is not verified and bears no filemark.⁹⁹

Texas Rule of Civil Evidence 611 governs the mode and order of interrogation of witnesses and presentation of evidence.¹⁰⁰ Every trial court has "inherent power" to control disposition of cases on its docket. Such factors as economy of time and effort for itself, for counsel, and for litigants. Such power, together with the applicable rules of procedure and

92. TEX. R. CIV. EVID. 510.

93. *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 619-20 (Tex. App.—Corpus Christi 1994, writ denied).

This confidential communication goes to the very heart of appellees' suit because it relates to the cause of the collision. Appellees are attempting, on the basis of privilege, to deny Hyundai the benefit of evidence which would materially weaken or defeat their claims against Hyundai. This is an offensive, rather than a defensive use of the privilege, which lies outside the scope of TRCE 510. See *Ginsberg*, 686 S.W.2d at 107. This evidence was not available from any other source. Accordingly, we hold that the trial court erred by excluding the testimony of Jimmie Sue Felcyn.

Id.

94. *Denton*, 897 S.W.2d at 763.

95. TEX. R. CIV. EVID. 609.

96. *Great Global Assurance Co. v. Keltex Properties, Inc.*, 904 S.W.2d 771 (Tex. App.—Corpus Christi 1995, n.w.h.) (citing TEX. R. CIV. EVID. 601, 601(a)).

97. TEX. R. CIV. EVID. 609.

98. *Porter*, 900 S.W.2d at 376 (citing TEX. R. CIV. EVID. 609(a)).

99. *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243, 252 (Tex. App.—Beaumont 1994, n.w.h.) (citing TEX. R. CIV. EVID. 611(b), 801(e)(1,2)).

100. TEX. R. CIV. EVID. 611.

evidence, accords judges broad, but not unfettered, discretion in handling trials.¹⁰¹ Although the Corpus Christi Court of Appeals did not condone narrative testimony and did not discourage its future use, it did hold that in a nonjury case, the trial court's decision to allow narrative testimony was not so arbitrary and unreasonable that it amounted to an abuse of discretion.¹⁰² In a premises-liability action alleging negligence in the use of a handrail that did not extend out of a pool, a health spa owner was improperly permitted to ask its witness on direct examination a leading question concerning the ease of stepping out of a pool from the top stair under a few inches of water. The question was improper because it led the witness through her testimony on a contested material issue.¹⁰³ The error was harmless, however, as plaintiff had previously called that witness during plaintiff's case-in-chief, and the witness repeatedly refused to acknowledge that the absence of a handrail would present any difficulties.¹⁰⁴

Texas Rule of Civil Evidence 613 governs impeachment and support of witnesses by prior statements.¹⁰⁵ If an abandoned pleading is inconsistent with a party's present position at trial, then the abandoned pleading is an admissible prior statement as an admission against interest, even though the dead pleading is not verified and bears no filemark.¹⁰⁶ Where statements were admitted only to impeach a declarant's testimony, the statements were not competent evidence that could support a verdict.¹⁰⁷

Texas Rule of Civil Evidence 613, commonly known as "the rule," excludes nonparty witnesses from the courtroom under certain circumstances.¹⁰⁸ The purpose of the rule, which requires, with exceptions, that witnesses be excluded from the courtroom when not testifying, is to aid in the ascertainment of truth by preventing testimony of one witness from influencing testimony of another. A trial court erred by not requiring a corporate party to designate a representative and not excluding other officers and shareholders of the corporation from the courtroom.¹⁰⁹ However, the error did not constitute reversible error where the officers and shareholders were in constant contact due to their work, were all involved in the lawsuit from the beginning, and were parties to the suit until the individual claims were dismissed by summary judgment the day

101. *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (citing TEX. R. CIV. EVID. 611(a)).

102. *Great Global Assurance Co.*, 904 S.W.2d at 771 (citing TEX. R. CIV. EVID. 611(a)).

103. *T.M.E. Investments, Inc.*, 893 S.W.2d at 38 (citing TEX. R. CIV. EVID. 611(a)). The court explained that although defendant should not have been allowed to ask leading questions on "cross-examination" of friendly witness who had been called to stand during plaintiff's case-in-chief, error was harmless because defense counsel phrased leading question to summarize and characterize earlier testimony that plaintiff's counsel had elicited. *Id.*

104. *Id.*

105. TEX. R. CIV. EVID. 613.

106. *Westchester Fire Ins. Co.*, 888 S.W.2d at 252.

107. *Estrada*, 896 S.W.2d at 220.

108. TEX. R. CIV. EVID. 613.

109. *Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 129-30 (Tex. App.—Texarkana 1994, writ denied) (citing TEX. R. CIV. EVID. 614).

before trial.¹¹⁰

VII. ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

In a negligence action brought against the owner of an office building, the manager of the property, and a security firm, the plaintiff alleged that she was abducted from a parking garage and raped as a result of their failure to provide adequate security. The court decided that security for a commercial office building was not a subject within the comprehension of the average juror and, to the extent that the average juror knew something about the subject, the expertise of a witness with specialized knowledge would assist the trier of fact.¹¹¹ The court found that the trial court abused its discretion in excluding the testimony of an office worker's security expert.¹¹²

Texas Rule of Civil Evidence 702 permits a witness who, by his knowledge, skill, experience, training, or education has specialized knowledge that will assist the trier of fact in understanding evidence or in determining facts in issue to express an opinion about that matter.¹¹³ In one case, the fact that an emergency room doctor, called by the plaintiffs to testify in a wrongful death action premised on medical malpractice, who was not a specialist in neurosurgery did not prevent him from testifying on the issue of whether defendants' negligence in failing to perform a CT scan and discover serious head injury was the cause in fact of a patient's death.¹¹⁴ This was so because the doctor practiced in the same field of medicine as the defendants did, and further testified as to his training in neurology and his experience in treating severe head injuries.¹¹⁵

During the Survey period, the Texas Supreme Court held that recitations of medical history or opinion as to causation provided by other records or people are not expert opinions based on reasonable medical probability.¹¹⁶

One of the most significant developments during the Survey period was the Texas Supreme Court's establishment of a new standard for the admission of scientific expert testimony in *E. I. du Pont De Nemours and Co., Inc. v. Robinson*¹¹⁷. There are many factors which a trial court may consider in making the threshold determination of admissibility under

110. *Id.* at 129-30.

111. *Glascock v. Income Property Services*, 888 S.W.2d 176, 180-81 (Tex. App.—Houston [1st Dist.] 1994, writ requested) (exclusion of expert testimony regarding security for commercial office building probably resulted in the rendition of an improper judgment and therefore, case was reversed and remanded).

112. *Id.*

113. TEX. R. CIV. EVID. 702; *Potter v. Anthony Crane Rental*, 896 S.W.2d 845 (Tex. App.—Beaumont 1995, writ denied).

114. *Heise v. Presbyterian Hosp. of Dallas*, 888 S.W.2d 264 (Tex. App.—Eastland 1994, writ granted).

115. *Id.* at 206.

116. *Burroughs Wellcome Co. v. Robert N. Crye*, 38 Tex. S. Ct. J. 848, 850 (June 15, 1995).

117. 38 Tex. S. Ct. J. 852, 858 (June 15, 1995).

Rule 702.¹¹⁸ These factors include, but are not limited to: (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) 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 nonjudicial uses which have been made of the theory or technique.¹¹⁹ Trial courts may consider other factors which may be helpful in determining the reliability of the scientific evidence.¹²⁰ Particular factors a trial court will find helpful in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each case.¹²¹ Rule 702 envisions a flexible inquiry focusing solely on the underlying principles and methodology, not on the conclusions they generate.¹²² Once the party opposing the evidence objects, the proponent bears the burden of demonstrating its admissibility.¹²³

There is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it. An expert witness may be very believable, but his or her conclusions may be based upon unreliable methodology. . . . [A] person with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system.¹²⁴

The court found no abuse of discretion by the trial court when it found the testimony of an expert to be unreliable where the expert conducted no testing to exclude other possible causes of the damage.¹²⁵ Furthermore, that an opinion was formed solely for the purposes of litigation does not automatically render it unreliable. In contrast, "when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests."¹²⁶ However, opinions formed solely for the purpose of testifying are more likely to be biased toward a particular result.¹²⁷ Where an expert's technique or methodology had not been subjected to peer review or publication, the court should inquire whether the particular technique

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. 38 Tex. S. Ct. J. at 858.

123. *Id.*

124. *Id.*

125. *Id.* ("An expert who is trying to find a cause of something should carefully consider alternative causes, and his failure to rule out other causes of the damage renders his opinion little more than speculation.")

126. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995).

127. *Id.*; *Robinson*, 38 Tex. S. Ct. J. at 860. (Although scientists may form initial tentative hypotheses, "coming to a firm conclusion first and then doing research to support it is the antithesis of this [scientific] method.")

or methodology has been subjected to a rate of error analysis.¹²⁸ An expert's self-serving statements that his methodology was generally accepted and reasonably relied upon by other experts in the field are not sufficient to establish the reliability of the technique and theory underlying his opinion.¹²⁹

Texas Rule of Civil Evidence 703 provides that the facts or data on which an expert witness relies need not be admissible in evidence.¹³⁰ For example, in *Zalesak v. Taylor*, the appellate court held that it was error for the trial court to strike certain paragraphs of an expert's affidavit supporting summary judgment based on hearsay objection because an expert can rely on hearsay.¹³¹

Expert testimony on mixed questions of law and fact is admissible under certain circumstances.¹³² Expert testimony on mixed question of law and fact must meet requirements applicable to expert testimony generally and, in particular, must be helpful to the trier of fact as required by Texas Rule of Civil Evidence 702.¹³³ Expert testimony concluding that a contractor violated an Occupational Safety and Health Administration (OSHA) regulation regarding training of employees in recognition and avoidance of unsafe conditions was admissible in an owner's action against a contractor for contribution in connection with an underlying personal injury action by the contractor's employee, even though the language of the regulation was straightforward. The testimony was admissible because the expert testified as to the factual basis for his conclusion, his attention was directed to the proper legal standard, and application of the regulation to specific facts was not straightforward in that it required more of a jury than merely making a check-off comparison between its fact-findings and specific objective regulatory standards.¹³⁴ An insured's expert's testimony on the propriety of Mary Carter agreements was admissible in an action by the insured against liability insurers for wrongfully obtaining financial interest in, and direct control of, litigation against the insured through use of such agreements, where the testimony involved a mixed question of law and fact, where some discussion of legal principles was necessary because the case was primarily about litigation, and where the testimony was supported by a proper legal predicate.¹³⁵

128. *Id.* at 861.

129. *Id.* (citing *Daubert*, 43 F.3d at 1316 (stating that an "expert's bald assurance of validity is not enough")).

130. TEX. R. CIV. EVID. 703.

131. 888 S.W.2d 143, 145 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.) (citing TEX. R. CIV. EVID. 703).

132. *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

133. *Lyondell Petrochem. v. Flour Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

134. *Id.*

135. *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 133-34 (Tex. App.—Texarkana 1994, writ requested).

VIII. ARTICLE VIII—HEARSAY

A. IDENTIFYING HEARSAY

Whether a record or statement offered to prove the truth of the matter asserted is hearsay is often difficult to determine.¹³⁶ During the Survey period, several Texas appellate courts considered whether proffered evidence was hearsay. Complaint letters forming the basis or grounds of an expert's opinion as to the harm caused by a breach of warranty by a seller of photographic emulsion for use in a three-dimensional photography system was inadmissible hearsay where the seller did not call a single relevant declarant to the stand so as to provide an opportunity for cross-examination.¹³⁷ Reports of witnesses who had observed a motorcycle accident and who did not testify at trial, which reports were included in a police report of an accident that was offered at trial, were hearsay and were inadmissible where they did not come within an exception to the hearsay rule.¹³⁸ In an action for negligence and gross negligence arising out of a sexual assault, it was error to exclude an out-of-court statement, not offered for the truth of the matter asserted, but rather to show the defendants' callous attitude.¹³⁹ Out-of-court statements made by an employee of a feeding company, a cattle seller, and a bank were not hearsay because they were not offered for the truth of the matter asserted; rather, the statements by the investor in the cattle feeding and marketing plan were statements offered only as operative facts, to show that they were made, as elements of fraud which the investor was trying to prove.¹⁴⁰

B. STATEMENTS THAT ARE NOT HEARSAY

Prior statements by a witness are not hearsay if they comply with the conditions of Rule 801(e)(1).¹⁴¹ A declarant's verbal assertions are not admissible against defendant as nonhearsay prior statements by the witness if they were not given under oath subject to penalty of perjury.¹⁴²

Admissions made by a party or his representative are not hearsay if they fall within Rule 801(e)(2).¹⁴³ All allegations and statements made by a party's authorized attorney are that party's statements, even pleadings of that party in other causes of action that contain statements inconsistent with that party's present position, and are receivable and

136. TEX. R. CIV. EVID. 801-806 comprehensively define the hearsay rule and its exceptions. Additionally, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." TEX. R. CIV. EVID. 602.

137. *Minnesota Mining & Mfg.*, 885 S.W.2d at 631 (citing TEX. R. CIV. EVID. 801(a)(1), (c), (d)).

138. *Kratz v. Exxon Corp.*, 890 S.W.2d 899, 905 (Tex. App.—El Paso 1994, n.w.h.).

139. *Porter*, 900 S.W.2d at 376. However, because the jury heard the substance of the excluded statement, any error was harmless.

140. *Busse v. Pacific Cattle Feeding Fund*, 896 S.W.2d 807, 816 (Tex. App.—Texarkana 1995, writ denied).

141. TEX. R. CIV. EVID. 801(e)(1).

142. *Estrada*, 896 S.W.2d at 220.

143. TEX. R. CIV. EVID. 801(e)(2).

admissible as admissions against interest.¹⁴⁴ Generally, declarations of an agent or employee are admitted against a principal or employer as statements that are not hearsay; however, the fact of agency must first be clearly established.¹⁴⁵ A declarant's written interrogatory answers and verbal assertions, stating that defendant supplied a cylinder containing flammable fluid to his company, are not admissible as admissions of a party-opponent, absent an agency relationship between the declarant and defendant.¹⁴⁶ In a suit regarding an employee's entitlement to retirement benefits, statements allegedly made to the employee by a former member of a credit union's Board of Directors did not constitute an admission by a party-opponent, hence the statements were hearsay evidence to be disregarded on summary judgment. The statements were hearsay because the former member's statement with respect to benefits allegedly paid to other employees was made outside the scope of his agency or employment, and the alleged statements were not made during the existence of the relationship in question.¹⁴⁷ A declarant's statements are not admissible as statements by a co-conspirator where the statements preceded the alleged conspiracy.¹⁴⁸ If an abandoned pleading is inconsistent with a party's present position at trial, then the abandoned pleading is admissible and receivable into evidence as a party admission, even though the dead pleading is not verified and bears no file mark.¹⁴⁹

C. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL

1. *Then Existing Mental, Emotional or Physical Condition—Rule 803(3)*

An automobile passenger's statement to his father, that he would be able to pay his car insurance bill after returning from a trip, was admissible under the "then existing state of mind" exception to the hearsay rule, for the purpose of showing that the passenger and driver were engaged in a joint enterprise at the time of the accident, so that the percentage of negligence attributed to the driver could be imputed to the passenger, thus precluding his survivors' recovery in a negligence action against another motorist.¹⁵⁰ Complaint letters are not admissible under the "state of mind" exception to the hearsay rule in breach of warranty cases because the exception does not apply to a statement of memory or belief to prove facts remembered or believed.¹⁵¹

144. *Westchester Fire Ins. Co.*, 888 S.W.2d at 252.

145. *Estrada*, 896 S.W.2d at 219.

146. *Id.*

147. *Patterson v. Mobil Oil*, 890 S.W.2d 551, 552 (Tex. App.—Beaumont 1994, n.w.h.) (citing TEX. R. CIV. EVID. 801(e)(2)(D)).

148. *Estrada*, 896 S.W.2d at 226.

149. *Westchester Fire Ins. Co.*, 888 S.W.2d at 252.

150. *Blount v. Bordens, Inc.*, 892 S.W.2d 932, 937-38 (Tex. App.—Houston [1st Dist.] 1994, writ requested) (citing TEX. R. CIV. EVID. 803(3)).

151. *Minnesota Mining & Mfg.*, 885 S.W.2d at 631 (citing TEX. R. CIV. EVID. 803(3)).

2. *Records of Regularly Conducted Activity—Rule 803(6)*

The diagnoses contained in medical and hospital records are admissible.¹⁵²

3. *Public Records and Reports—Rule 803(8)*

Statements by eyewitnesses to a motorcycle accident that were included in a police report of the accident did not come within the public records exception to hearsay rule and were inadmissible, where the statements did not set forth activities of the police office which possessed the statements, did not involve matters observed pursuant to duty imposed by law as to which there was a duty to report, and did not constitute factual findings resulting from an investigation made pursuant to authority granted by law.¹⁵³

4. *Learned Treatises—Rule 803(18)*

Two courts of appeals have erred in holding an expert must recognize the authoritativeness of a treatise to be used in cross-examination.¹⁵⁴

5. *Statement Against Interest—Rule 803(24)*

An affidavit submitted in support of a motion for new trial does not constitute hearsay within hearsay and is admissible where the affidavit itself is expressly contemplated as admissible under the summary judgment rule, and where the alleged hearsay statement contained in the affidavit was admissible as a statement against interest.¹⁵⁵

D. HEARSAY WITHIN HEARSAY

Texas Rule of Civil Evidence 805 provides that "hearsay included with 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."¹⁵⁶ In a summary judgment proceeding, an affidavit is not hearsay within hearsay where Texas Rule of Civil Procedure 166a(f) expressly contemplated the use of affidavits, and the alleged statement contained in the affidavit is admissible as a statement against interest under Rule 803(24).¹⁵⁷ Reports of witnesses who had observed a motorcycle accident and who did not testify at trial, which were included in a police report of the accident, were hearsay and were inadmissible where they did not come within an exception to the hearsay rule.¹⁵⁸

152. *Burroughs Wellcome Co.*, 38 Tex. S. Ct. J. at 850 (citing TEX. R. CIV. EVID. 803(6)).

153. *Kratz*, 890 S.W.2d at 905-06 (citing TEX. R. CIV. EVID. 803(8)).

154. *Reynolds*, 896 S.W.2d at 827; *Carter v. Steere Tank Lines, Inc.*, 835 S.W.2d 176 (Tex. App.—Amarillo 1992, writ denied).

155. *Washington v. McMillan*, 898 S.W.2d 392, 397 (Tex. App.—San Antonio 1995, n.w.h.) (citing TEX. R. CIV. EVID. 803(24)).

156. TEX. R. CIV. EVID. 805.

157. *Washington*, 898 S.W.2d at 397.

158. *Kratz*, 890 S.W.2d at 905.

IX. ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

Texas Rule of Civil Evidence 901(a) requires authentication or identification of evidence as a condition precedent to its admission.¹⁵⁹ The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."¹⁶⁰ Failure to authenticate unsigned, purported financial statements made them inadmissible and rendered a witness' testimony about their contents improper where the witness admitted that he could not identify the records or vouch for their accuracy, although to the best of his knowledge, they were accounting statements prepared by the business' accountants.¹⁶¹ A trial court did not abuse its discretion by excluding an exhibit showing an employment application of a securities broker who allegedly misrepresented an investment where documents forming part of the exhibit included other unauthenticated items in addition to the employment application.¹⁶²

Texas Rule of Civil Evidence 902 permits self-authentication of documents under certain circumstances.¹⁶³ Where a deficient affidavit did not certify the correctness of the attached documents, as Rule 902(4) requires, and made no reference to the documents that the proponent claimed were authenticated by it, the documents were properly admitted into evidence where cross-examination elicited from the records custodian testimony that satisfied the elements of the hearsay exceptions for business records, notwithstanding the deficiencies in the affidavit accompanying the records.¹⁶⁴ To properly establish authenticity, an affidavit should attest to the correctness of the accompanying documents that the affidavit actually identifies.¹⁶⁵ To properly overcome a hearsay objection, a separate affidavit could attest to the elements of a business record.¹⁶⁶ That a document is authentic does not make it admissible.¹⁶⁷

X. PAROL EVIDENCE

Parol evidence is not admissible to add consideration. Because a memorandum of understanding between a city and owners and operators of

159. TEX. R. CIV. EVID. 901(a).

160. *Id.*

161. *Wirtz v. Massachusetts Mut. Life Ins.*, 898 S.W.2d 414, 423 (Tex. App.—Amarillo 1995, n.w.h.).

162. *Campbell v. C. D. Payne & Geldermann Sec.*, 894 S.W.2d 411, 421 (Tex. App.—Amarillo 1995, writ denied).

163. TEX. R. CIV. EVID. 902.

164. *Director v. Lara*, 901 S.W.2d 635 (Tex. App.—El Paso 1995, writ denied) (citing TEX. R. CIV. EVID. 902(4)). The affidavit was so deficient that it left in doubt the existence of any relationship between it and the computer printouts.

165. TEX. R. CIV. EVID. 902(4).

166. TEX. R. CIV. EVID. 803(b) (business record hearsay exception), 902(10) (permitting use of affidavit to both establish authenticity and satisfy business record hearsay exception).

167. *Lara*, 901 S.W.2d 635 (where affidavit and accompanying documents are properly self-authenticating, proponent of evidence still has to overcome properly lodged hearsay objection).

petrochemical and hydrocarbon facilities and pipelines was a fully integrated document settling all controversies with the city, the parol evidence rule barred enforcement of an alleged oral agreement of what to do with some church property in the area of the facilities, which was alleged to be the real consideration for the agreement, but which would vary the terms of memorandum.¹⁶⁸ Parol evidence was also inadmissible to show the intent of an unambiguous gas lease.¹⁶⁹ A property description found in a deed is not the exclusive manner to identify the property to be conveyed, but is one of several means that can be used to identify the land, including another existing writing or other available data. Extrinsic evidence is admissible to identify land from sources other than the deed itself.¹⁷⁰ Unless there are allegations of fraud, accident, or mistake in preparation or execution of the instrument, a trial court may not permit extrinsic evidence to modify terms of an unambiguous deed. However, a trial court may allow extrinsic evidence to show delivery or nondelivery of a deed.¹⁷¹

168. *Maranatha Temple v. Enterprise Products*, 893 S.W.2d 92, 102-103 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

169. *Heritage Resources, Inc. v. Nationsbank*, 895 S.W.2d 833 (Tex. App.—El Paso 1995, writ granted) (For purposes of construing gas lease, intent of parties is controlling and when terms of lease are unambiguous, parties' objective intent is determined by language of lease itself without resort to parol evidence.).

170. *Wall v. Carrell*, 894 S.W.2d 788, 797 (Tex. App.—Tyler 1994, writ denied).

171. *Burgess v. Easley*, 893 S.W.2d 87, 91 (Tex. App.—Dallas 1994, n.w.h.).