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ARTICLE I OF THE TEXAS RULES OF EVIDENCE AND ARTICLES I AND XI OF THE TEXAS RULES OF CRIMINAL EVIDENCE: APPLICABILITY OF THE RULES, PROCEDURAL MATTERS, AND PRESERVING ERROR*

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The texts of Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence are reproduced as the Appendix to this article.

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I. INTRODUCTION

The purpose of this article, like others in the series by this author,[1] is to provide Texas lawyers and judges with a practical guide to portions of the recent codifications of evidence law in Texas, the Texas Rules of Evidence and the Texas Rules of Criminal Evidence.[2]Article I of the Civil Rules is entitled "General Provisions"; Articles I and XI of the Criminal Rules are respectively entitled "General Provisions" and "Miscellaneous Provisions." Within these somewhat ambiguous designations are located three kinds of rules: (1) rules that govern the applicability of the respective evidence codes (Civil Rule 101, Criminal Rules 101 and 1101); (2) rules of construction (Rule 102 in both codes); and (3) rules that govern the procedures by which evidence is admitted and excluded, including the highly important matters of "making the record" and "preserving error" (Civil Rules 103 through 106, Criminal Rules 103 through 107).

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1. *See* Wellborn, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477 (1983); Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371 (1985); Wellborn, *The "Best Evidence" Article of the Texas Rules of Evidence*, 18 ST. MARY'S L.J. 99 (1986); Wellborn, *Judicial Notice Under Article II of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. — (1987).

2. For convenience and clarity, the Texas Rules of Evidence will be referred to in the text as the "Texas Rules of Civil Evidence" or the "Civil Rules." The Texas Rules of Criminal Evidence will be referred to in the text as the "Criminal Rules."

II. A COMPARISON OF THE TEXAS RULES OF EVIDENCE, THE TEXAS RULES OF CRIMINAL EVIDENCE, AND THE FEDERAL RULES OF EVIDENCE

Texas adopted many of the Federal Rules without change. In some instances, such as Article IX[3] and Article X,[4] Texas embraced whole articles with very few changes. By comparison, Texas repeatedly departed from the federal models in Articles I and XI. Rule 102 is the only Federal Rule in these articles that appears verbatim in either of the Texas codes; it appears verbatim in both. In Rules 101, 103, and 104, the Texas Civil and Criminal Rules differ both from the federal versions and from one another. In Rules 105 and 106, the Texas Civil and Criminal Rules are identical to one another but different from the federal originals. Texas Criminal Rule 107 has no counterpart in either the Federal or Texas Civil Rules.

Texas Criminal Article XI contains only one provision, Rule 1101, which is based upon the Federal Rule of like number, but with several changes. There is no Article XI in the Texas Civil Rules.

III. PROVISION-BY-PROVISION ANALYSIS OF ARTICLES I AND XI

A. *Rule 101: Title and Scope*

1. Civil Rule 101

Civil Rule 101(a), Title, is based upon Federal Rule 1103. Civil Rule 101(b), Scope, is based upon Federal Rule 101. The exemption of small claims courts from formal rules of evidence is consistent with the organic legislation creating the small claims courts, which prescribes that hearings be "informal."[5]

The Texas Supreme Court promulgated the Texas Rules of Evidence by order on November 23, 1982. These Rules became effective September 1, 1983.[6] Article 1731a of the Civil Statutes, enacted by

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3. *See* Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371, 373 (1985).

4. *See* Wellborn, *The "Best Evidence" Article of the Texas Rules of Evidence*, 18 ST. MARY'S L.J. 99, 101-02 (1986).

5. *See* TEX. GOV'T CODE ANN. § 28.033(c) (Vernon Pamphlet 1987). "The judge shall hear the testimony of the parties and the witnesses that the parties produce and shall consider the other evidence offered." *Id.* "The hearing is informal, with the sole objective being to dispense speedy justice between the parties." *Id.* § 28.033(d). *See generally* Comment, *Small Claims Courts in Texas: Paradise Lost*, 47 TEXAS L. REV. 448 (1969).

6. *See* Supreme Court Order of Nov. 23, 1982, eff. Sept. 1, 1983, *reprinted in* 46 TEX. B.J.

the Texas Legislature in 1939, invests the supreme court "with the full rule-making power in the practice and procedure in civil actions."[7] The same article gives the court the power to repeal statutes in conflict with its rules.[8] The court repealed thirty-seven statutes in connection with the promulgation of the Rules of Evidence.[9] As a result of this house-cleaning, the introductory qualifying phrase in Rule 101(b) is of limited significance; that is, there are, currently, few statutes that dictate civil rules of evidence. The recent codification entitled the Civil Practices and Remedies Code contains a chapter entitled "Evidence," but it contains only two sections: one permitting proof of the cost and necessity of services by affidavit,[10] and one providing for a presumption that foreign interest rates are identical to those in Texas.[11] The latter provision does not in fact overlap with the Rules of Evidence because the Rules contain no provisions regarding presumptions. The former provision does augment the Civil Rules, creating in effect an additional hearsay exception for affidavits that meet its terms.[12]

In addition, various civil statutes contain special evidence doctrines. The proviso beginning Rule 101(b) acknowledges the preemptive effect of these statutory rules. For example, Chapter 54 of the Family Code prescribes judicial proceedings concerning delinquent children and children in need of supervision. It contains several evidence provisions: some that promote admissibility,[13] and some that restrict it.[14]

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196 (Feb. 1983). The background and history of the Rules is extensively recounted in Caperton & McGee, *Background, Scope and Applicability of the Texas Rules of Evidence*, 20 HOUS. L. REV. 49, 49-68 (1983).

7. TEX. REV. CIV. STAT. ANN. art. 1731a, § 2 (Vernon 1962); *see also* TEX. CONST. art. V, § 25.

8. TEX. REV. CIV. STAT. ANN. art. 1731a, § 3 (Vernon 1962).

9. *See* Supreme Court Order of Nov. 23, 1982, eff. Sept. 1, 1983, *reprinted in* 46 TEX. B.J. 196, 197 (Feb. 1983).

10. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (Vernon 1986).

11. *See id.* § 18.031.

12. *See id.* § 18.001; *see also* TEX. R. EVID. 802. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court *or by law*." *Id.* (emphasis added).

13. *See* TEX. FAM. CODE ANN. § 54.01(c) (Vernon 1986). "At the detention hearing, the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." *Id.*; *see also id.* § 54.02(e), 54.04 (b) (allowing same kinds of reports at transfer hearing and at disposition hearing); *id.* § 54.05(e) (allowing same kinds of reports at hearing to modify disposition).

14. *See id.* § 54.03(e) (at adjudication hearing, child has privilege not to be witness or

Although the civil version of Rule 101 does not contain a provision on hierarchical governance corresponding to Criminal Rule 101(c), it is not difficult to construct a parallel hierarchy for civil cases. Hierarchical governance in civil cases is in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause,[15] the Constitution of Texas, Texas civil statutes, the Texas Rules of Evidence and the Texas Rules of Civil Procedure,[16] the common law of England.[17]

2. Criminal Rule 101

Criminal Rules 101(a) and (b) are based upon the corresponding civil provisions. Where Civil Rule 101(b) uses the phrase "[e]xcept as otherwise provided by statute," the criminal version uses "except where otherwise provided." The reason for the difference in phraseology is that in the Criminal Rules, unlike the Civil Rules, it is "otherwise provided" within the Rules themselves. Criminal Rule 1101, which is examined in a later section,[18] elaborates upon the applicability of the criminal rules, setting forth particular situations and proceedings in which the rules are inapplicable or applicable only in part.

The legislature, in 1985, granted the Court of Criminal Appeals the authority to promulgate rules of evidence.[19] The Court of Criminal Appeals issued the Rules of Criminal Evidence by order on December 18, 1985, and the Rules became effective on September 1, 1986.[20] In

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otherwise incriminate himself; extra-judicial statement may not be used if not properly obtained; extra-judicial confession or accomplice testimony must be corroborated; illegally obtained evidence inadmissible).

15. *See, e.g.,* Federal Register Act § 7, 82 Stat. 1276, 44 U.S.C. 1507 (providing that "the contents of the Federal Register shall be judicially noticed"). It appears that this provision operates upon state as well as federal courts. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 335, at 939 n.8 (3d ed. 1984). Therefore, even though no provision of Article II of the Texas Rules of Evidence prescribes judicial notice of federal regulations (as opposed to Texas rules and regulations, judicial notice of which is mandated by TEX. R. EVID. 204), Texas courts must take judicial notice of federal regulations found in the Federal Register by virtue of the federal law.

16. *See* TEX. R. CIV. P. 182 (testimony of adverse party).

17. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 1986). "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state." *Id.*

18. *See infra* text accompanying notes 164-196.

19. *See* TEX. REV. CIV. STAT. ANN. art. 1811f, § 5 (Vernon Supp. 1987).

20. *See* Supreme Court Order of Nov. 23, 1982, eff. Sept. 1, 1983, *reprinted in* 49 TEX. B.J. 220 (Mar. 1986).

connection with the adoption of these rules, the court, pursuant to the enabling statute, ordered the repeal of a number of laws, including many provisions of the Code of Criminal Procedure, and many old civil statutes that had already been repealed for civil cases when the civil evidence rules were adopted.[21] Although this repeal eliminated statutes that would have been inconsistent or redundant with the new rules, there remain a number of statutes, chiefly in the Code of Criminal Procedure, which address matters of admissibility of evidence in criminal cases.[22] These provisions antedate the Rules of Criminal Evidence. The legislature and the Court of Criminal Appeals chose to leave them in effect but not to incorporate them into the Rules of Criminal Evidence.

Paragraph (c) of Criminal Rule 101 is a checklist of the various sources of criminal evidence law in order of preemptive force. Two matters in the list are worthy of mention. First, the ranking of civil statutes immediately after criminal statutes is consistent with prior law.[23] Secondly, the reference to the common law as being supplementary to the Rules is supported by a civil statute currently in force.[24]

B. *Rule 102: Purpose and Construction*

Rule 102, the only one of the Federal Rules in Article I or XI that Texas adopted without change, is ostensibly a rule of "liberal" construction applicable to all the Rules of Evidence. The reason it was embraced without tampering is not difficult to surmise: to have amended it would have been tantamount to quibbling about the terms

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21. *See id.* at 237.

22. *See, e.g.,* TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986) (statements and testimony of child victim); *id.* art. 38.072 (hearsay statement of child abuse victim); *id.* art. 38.08 (adverse comment upon or inference from failure of defendant to testify prohibited); *id.* art. 38.12 (religious opinion does not render person incompetent to be witness); *id.* art. 38.16 (evidence in treason); *id.* art. 38.22 (statements by accused as evidence, elaborate regulation); *id.* art. 38.23 (illegally obtained evidence inadmissible); *id.* art. 38.33, § 2 (evidence of conviction of driving while intoxicated); *id.* art. 38.34 (photographic evidence in theft cases).

23. *See* TEX. CRIM. PROC. CODE ANN. art. 38.02 (Vernon 1979) (repealed effective Sept. 1, 1986). "The rules of evidence prescribed in the statute law of this state in civil suits shall, so far as applicable, govern also in criminal actions when not in conflict with the provisions of this Code or of the Penal Code." *Id.*

24. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 1986). "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state." *Id.*

of Superman's credo, "Truth, Justice and the American way!"[25] Rule 102 is based upon equivalent provisions in the Federal Rules of Civil Procedure[26] and the Federal Rules of Criminal Procedure.[27] A similar "rule," however, may be found in nearly every procedural codification.[28]

The only trouble with such lofty pronouncements is that they are impossible not to ignore. Professors Wright and Graham aptly comment:

> The ultimate values embraced by Rule 102 are so universal that they can be invoked in support of almost any procedural system yet devised. The progressive values supposed to guide interpretation are so vague and inconsistent as to render meaningless the use of the mandatory "shall" in the Rule. . . . Even if the caveat against technical construction were attached to every rule, like the health warnings on cigarette packages, it is doubtful that lawyers and judges could kick the habit.[29]

Indeed, the elimination of "technical construction" from the law of evidence is not only unlikely but also unwise, since one man's technicality is another's "fairness." Surely Rule 102 has a less drastic purpose. Perhaps it was believed that something like Rule 102 was necessary as assurance against application of the old common law doctrine that statutes and rules in derogation of the common law are to be strictly construed.[30] This relatively modest interpretation of the rule may be supported by the comment of Professor Cleary, the Chief Reporter for the Federal Rules:

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25. Florida's drafters did not flee from sacrilege. They spurned Federal Rule 102's pieties and substituted a matter-of-fact provision, "Construction," which states, "This chapter shall replace and supersede existing statutory or common law in conflict with its provisions." FLA. STAT. ANN. § 90.102 (West 1979) (Evidence Code).

26. *See* FED. R. CIV. P. 1. "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.*

27. *See* FED. R. CRIM. P. 2. "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." *Id.*

28. *See* TEX. R. CIV. P. 1. "The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction." *Id.*; *see also* TEX. CRIM. PROC. CODE ANN. art. 1.03 (Vernon 1977) (Code seeks "[t]o insure a trial with as little delay as is consistent with the ends of justice" and "[t]o insure a fair and impartial trial").

29. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5022, at 126 (1977).

30. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 102.1, at 3 (2d ed. 1986).

> It seems essential that the rules contain at some point a provision allowing expansion by analogy to cover new or unanticipated situations, and the provision in question should serve this purpose.[31]

Since no set of procedural rules can be expected to cover by terms every situation that will arise in practice, a reasonable degree of flexibility in the interpretation and application of rules is essential. This is the mundane directive to be gleaned between Rule 102's sonorous lines.

C. *Rule 103; Rulings on Evidence; Rule 103(a): Effect of Erroneous Ruling*

Both sets of Texas rules adopt Federal Rule 103(a) without change. The opening clause of Rule 103(a) incorporates the common law doctrine of harmless error, by stating as a prerequisite to any claim of error in the admission or exclusion of evidence that a substantial right of the party must have been affected by the ruling. Both the Advisory Committee's Note to the Federal Rule and the Comment to the Texas Criminal Rule state that the provision does not change the law with respect to harmless error. The same is true, despite the omission of a similar comment, of the Texas Civil Rule.

The Texas Rules of Civil Procedure contain a somewhat more elaborate formula for harmless error than that found in evidence Rule 103:

> [N]o judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case . . . .[32]

Similar language appears in cases.[33] Case law also holds that the burden of showing probable prejudice is upon the appellant, and that in

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31. Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. ser. 2 (Supp.), at 4 (1973) (Letter of March 22, 1973, from Professor Edward W. Cleary to Herbert E. Hoffman, Esq.).

32. TEX. R. CIV. P. 434.

33. *See* Holmes v. J.C. Penney Co., 382 S.W.2d 472, 473 (Tex. 1964) ("appellate courts are not permitted to reverse a judgment and order a new trial unless they be of the opinion that the error of the trial court amounted to such a denial of the rights of the appellant as was reasonably calculated and probably did cause the rendition of an improper judgment"); Pittman v. Baladez, 158 Tex. 372, 381, 312 S.W.2d 210, 216 (1958) ("only necessary [for defend-

making the determination of harm, the appellate court is to consider the entire record.[34]

The formula for harmless error employed in Texas criminal cases, by terms at least, is somewhat more favorable to appellants:

> The test for harmless error, even where the error is constitutional, is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction or affected the punishment assessed.[35]

Thus, in criminal cases, a "reasonable possibility" of harm suffices for reversal, whereas in civil cases, reversal is supposed to occur only if harm "probably did" result from the error.

Where the error in a criminal case concerns a constitutional right, the standard for harmlessness is even more stringent. According to both the United States Supreme Court and the Texas Court of Criminal Appeals, affirmance in cases involving constitutional error requires a finding by the appellate court that the error was harmless beyond a reasonable doubt.[36]

Another formula for determining harmless error, found in both federal and Texas criminal cases where inadmissible evidence has been received, is whether the appellate court believes that "the minds of an average jury" would have found the state's case "significantly less persuasive" without the erroneously admitted evidence.[37] This formulation seems functionally equivalent to the determination of whether there was a "reasonable possibility" of harm. The Court of Criminal Appeals has also said that the determination of whether an evidentiary error is harmful is "an ad hoc determination based on the merits of each case."[38]

Two doctrines concerning harmless error merit special mention. One was stated by the Texas Supreme Court as follows:

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ant to] establish that the evidence was reasonably calculated to and probably did cause the rendition of an improper judgment").

34. *See* City of Galveston v. Hill, 151 Tex. 139, 145, 246 S.W.2d 860, 863 (1952); Texas Power & Light Co. v. Hering, 148 Tex. 350, 353, 224 S.W.2d 191, 192 (1949).

35. Johnson v. State, 660 S.W.2d 536, 538 (Tex. Crim. App. 1983).

36. Chapman v. California, 386 U.S. 18, 24 (1967); Bird v. State, 527 S.W.2d 891, 895 (Tex. Crim. App. 1975).

37. *See* Vanderbilt v. State, 629 S.W.2d 709, 724 (Tex. Crim. App. 1981) (quoting Schneble v. Florida, 405 U.S. 427 (1972)), *cert. denied*, 456 U.S. 910 (1982).

38. *See* Bass v. State, 622 S.W.2d 101, 104 (Tex. Crim. App. 1981), *cert. denied*, 456 U.S. 965 (1982).

> The general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.[39]

The Court of Criminal Appeals has announced the same principle:

> It has long been held that the admission of improper evidence will not require reversal if the same facts are proved by "other and proper" testimony.[40]

In recent years, the Court of Criminal Appeals has referred to this principle as "the doctrine of curative admissibility."[41] This, however, is an incorrect use of the term. The correct meaning of the term "curative admissibility" is exemplified by the following statement by the Supreme Court of Minnesota:

> The doctrine of curative admissibility allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has "opened the door" by introducing similarly inadmissible evidence on the same point.[42]

Thus, the doctrine of curative admissibility, correctly identified, is closely related to the doctrine of optional completeness codified in Rule 107 of the Texas Rules of Criminal Evidence.[43] Curative admissibility, as the term itself suggests, is a doctrine of admissibility—not of harmless error. In cases where the Court of Criminal Appeals misuses this term, admissibility of the defendant's responsive evidence is not challenged. If it were, the true doctrine of curative admissibility would apply and provide admissibility. The issue in these cases is whether the evidence presented by the defendant in response to inadmissible evidence improperly admitted over his objection has the ef-

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39. Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984). *But see* Bunnett/Smallwood & Co. v. Helton Oil Co., 577 S.W.2d 291, 295 (Tex. Civ. App.—Amarillo 1978, no writ). "Where a party makes a proper objection to the introduction of testimony and is overruled, he is entitled to assume that the judge will make the same ruling as to the other offers of similar testimony, and he is not required to repeat the objection." *Id.*

40. Alvarez v. State, 511 S.W.2d 493, 498 (Tex. Crim. App. 1973); *accord* Nicholas v. State, 502 S.W.2d 169, 175 (Tex. Crim. App. 1973). "[I]f a fact is proven without objection, its erroneous proof over objection, although still error, is harmless error since the same facts have been proven without objection."*Id.*

41. Maynard v. State, 685 S.W.2d 60, 65 (Tex. Crim. App. 1985); *see also* Thomas v. State, 572 S.W.2d 507, 512 (Tex. Crim. App. 1978).

42. Busch v. Busch Constr., Inc., 262 N.W.2d 377, 386 (Minn. 1977). *See generally* 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 15, at 731-57 (P. Tillers rev. 1983) (collecting cases from many jurisdictions).

43. *See infra* text accompanying notes 151-63.

fect of rendering the original error harmless, or of "waiving" the error. This is a matter quite distinct from the concept of curative admissibility.

Even though misnamed by the Court of Criminal Appeals, the general rule is well-established in both civil and criminal cases that an error in admitting evidence may be rendered harmless or waived if the aggrieved party himself introduces evidence to the same effect, or permits the opponent to do so at another point in the trial without objection. The general rule, however, is subject to an important qualification. As the Court of Criminal Appeals has noted:

> While an accused may waive the error of improper admission of evidence if such evidence comes in elsewhere without objection, he does not waive the error if he offers 'testimony to rebut, destroy, or explain' the improperly admitted evidence.[44]

The same qualification is recognized in civil cases:

> If incompetent evidence is admitted over proper objection, the objecting party is not left to suffer injury in the instant trial and take his chances on appeal and retrial. He may defend himself without waiving his objection. He may explain or rebut or demonstrate the untruthfulness of the incompetent evidence.[45]

The second special doctrine about harmless error concerns nonjury cases. In a case tried to the court, an appellate court will presume that the trial judge disregarded any incompetent evidence.[46] Therefore, reception of inadmissible evidence in a nonjury case will not require reversal unless the record shows an absence of competent evidence to support the judgment.[47]

D. *Rule 103(a)(1): Objection*

Four subparts of Article I deal with the basics of preserving error, also known as "making the record": Rules 103(a)(1) and 103(a)(2) on

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44. Alvarez v. State, 511 S.W.2d 493, 499 (Tex. Crim. App. 1973); *see also* Maynard v. State, 685 S.W.2d 60, 65 (Tex. Crim. App. 1985); Thomas v. State, 572 S.W.2d 507, 512 (Tex. Crim. App. 1978); Nicholas v. State, 502 S.W.2d 169, 175 (Tex. Crim. App. 1973).

45. State v. Chavers, 454 S.W.2d 395, 398 (Tex. 1970); *accord* 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 18, at 836-38 (P. Tillers rev. 1983). "[A]n opponent ordinarily waives his own objection if he makes subsequent use of evidence similar to that which he had previously objected, except where such subsequent use was done merely in self-defense, to explain or rebut the original evidence." *Id.*

46. *See* Gillespie v. Gillespie, 644 S.W.2d 449, 450 (Tex. 1982).

47. *See id.*

objections and offers of proof, and Rules 105(a) and 105(b) on evidence that is admissible against one party or for one purpose but not against another party or for another purpose. None of these provisions changes the common law. The basic principle that runs through all doctrines about preserving error is party responsibility.[48] It is not the role of the judge to present evidence or to render the proponent's evidence into a form required by the rules of evidence; nor is it the judge's responsibility to exclude or limit evidence as provided by evidence law, except insofar as the party opposing the evidence precisely and timely requests the judge to do so.

As for the question of *which* party has the responsibility regarding any particular matter, it is infallibly accurate to answer with another question: which party is now complaining on appeal? This result obtains because, in a real sense, both parties are always responsible for the application of the rules of evidence. Whichever party complains on appeal about the trial judge's action must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule in question and its precise and proper application to the evidence in question. If the party complaining on appeal failed to perform these tasks at the trial, the complaint in all likelihood will be ignored. These rules concerning preservation of error are quite neutral between the parties, proponent and opponent; they simultaneously place total responsibility on both. The "party" who is favored or protected by the doctrines is the trial judge.

The idea that responsibility rests upon both parties may be illustrated by the following example. Suppose the proponent offers a group of documents, some which are competent evidence and some which contain inadmissible hearsay. The opponent objects to the entire offer on the ground of hearsay. In this state of the record, the trial judge can do no wrong, in the sense that he may either sustain or overrule the objection and either ruling will be invulnerable on appeal. If he sustains the objection, excluding the competent documents along with the incompetent, the proponent may not successfully complain on appeal that his competent evidence was excluded, even though it was. The objector of the evidence will be told by the appellate court that it was his responsibility to separate the admissible parts from the inadmissible parts of the offer, and an objection that was

48. *See* E. CLEARY, MCCORMICK ON EVIDENCE §§ 51, 52 (3d ed. 1984).

good as to part of the unsegregated mass may be sustained as to all.[49] On the other hand, if the trial judge overrules the overbroad objection, admitting the incompetent portions of the offer along with the competent, the ruling will be equally impervious to review on appeal by the objector. The objector will be told that his objection to the whole offer, which did not point out precisely which parts were inadmissible, was properly overruled if any part of the offer was admissible.[50] This example illustrates how the responsibilities of both parties in the invocation and application of evidentiary rules are independent of one another. A party seeking to complain on appeal must have fully discharged his responsibilities to alert the trial judge to the proper rule and its proper application. If the party failed to do so, he is barred from complaining. Furthermore, it is immaterial that the opposing party below also failed in his coordinate responsibilities.

To preserve error in the admission of evidence, Rule 103(a)(1) requires a timely and specific objection or motion to strike. This merely restates the common law.[51] The reasons that all courts have insisted upon timely and specific objections in order to invoke evidence rules are not difficult to discern. The Texas Court of Criminal Appeals explained the bases of timely, specific objection requirements as follows:

> The generally acknowledged policies of requiring specific objections are two-fold. First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony.[52]

There are four aspects as to which an objection may be wanting in specificity and, therefore, may be inadequate to protect the rights of the objector: grounds, parts, parties, and purposes. A failure of speci-

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49. *See Ex rel.* T.L.H., 630 S.W.2d 441, 445 (Tex. App.—Corpus Christi 1982, no writ); Lister v. Employers Reinsurance Corp., 590 S.W.2d 803, 805 (Tex. Civ. App.— Houston [14th Dist.] 1979, writ ref'd n.r.e.).

50. *See* Speier v. Webster College, 616 S.W. 617, 619 (Tex. 1981); Brown & Root, Inc. v. Haddad, 142 Tex. 624, 628, 180 S.W.2d 339, 341 (1944); Ramos v. State, 419 S.W.2d 359, 364 (Tex. Crim. App. 1967); Eubanks v. Winn, 469 S.W.2d 292, 296 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

51. *See* FED. R. EVID. 103(a) advisory committee's note (*"Subdivision (a)* states the law as generally accepted today.") (emphasis in original).

52. Zillender v. State, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977) (footnote omitted); *accord* Texas Mun. Power Agency v. Berger, 600 S.W.2d 850, 854 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

ficity in any of these four respects may have the result that the objector cannot successfully complain on appeal if the objection is overruled, even though the evidence was in fact not properly admissible or not admissible as offered. The problems of specificity of objections as to parties and purposes are addressed in Rule 105 and are examined in the discussion of that provision.[53] Rule 103(a)(1) refers to "stating the specific ground of objection." This language is interpreted to refer to specificity as to parts, as well as to legal grounds.[54]

An objection preserves only the specific ground or grounds named. A so-called "general" objection, such as the notorious "irrelevant, incompetent, and immaterial," preserves no ground for appeal, except perhaps the ground of total irrelevancy to any issue in the case.[55] Rule 103(a)(1) contemplates that an objection general by itself may acquire specific meaning in the context in which it was made; in such instances, the contextual meaning will be recognized on appeal. This is in accord with prior Texas practice.[56]

Since an objection only preserves the specific grounds named, if an objection naming an untenable ground is overruled, the ruling will be affirmed on appeal even though a good—but unnamed—ground existed for exclusion of the evidence.[57] If an objection naming an untenable ground is sustained, the ruling will not be upheld on appeal on the basis of an unnamed valid ground if the valid ground might have been obviated by the proponent had it been raised at the trial.[58]

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53. *See infra* text accompanying notes 136-143.

54. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.2, at 13 (2d ed. 1986); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 9, at 43 (1977).

55. *See* Bridges v. City of Richardson, 163 Tex. 292, 293-94, 354 S.W.2d 366, 368 (1962); Xanthull v. State, 172 Tex. Crim. 481, 482, 358 S.W.2d 631, 632 (1962); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.2, at 14 (2d ed. 1986).

> [I]t is uniformly held that a general objection to the introduction of testimony because it is irrelevant, incompetent, and immaterial is tantamount to no objection and unless the objection specifically states why the proffered testimony is irrelevant, immaterial or incompetent the objection will not support an assignment in the appellate court.

Capitol Hotel v. Rittenberry, 41 S.W.2d 697, 705 (Tex. Civ. App.—Amarillo 1931, writ dism'd).

56. *See* Zillender v. State, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977); Coca-Cola Bottling Co. v. Tannahill, 235 S.W.2d 224, 225 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

57. *See* Williams v. State, 549 S.W.2d 183, 187 (Tex. Crim. App. 1977); Harrington v. State, 547 S.W.2d 616, 620 (Tex. Crim. App. 1977); Douglas v. Winkle, 623 S.W.2d 764, 768 (Tex. App.—Texarkana 1981, no writ); Eubanks v. Winn, 469 S.W.2d 292, 296 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

58. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.2, at 13-14 (2d ed.

An objection must be specific as to parts as well as grounds. If part of an offer is admissible and part inadmissible, an objection to the whole, even if it names a valid specific ground, may be properly overruled, and the entire offer admitted, if the objector fails to specify properly which part or parts of the offer are inadmissible.[59] If the objector does point out parts of the offer that are inadmissible on specified grounds, the court may not thereafter admit the whole, but must at least exclude the parts properly designated as inadmissible by the objection.[60]

In addition to the requirement of specificity as to grounds and parts, Rule 103(a)(1) codifies the common-law requirement that objections and motions to strike be "timely." To be timely, a party must invoke an evidence point as soon as the ground for its application becomes manifest. In the case of an offer of real or documentary evidence, the proper time for objection is when the item is formally offered; after it has been admitted is too late.[61] In the case of oral testimony, the objection must normally precede the witness' answer.[62] In some circumstances an objection after the answer, accompanied by a motion to strike and a request for an instruction to the jury to disregard the answer, will be timely; for example, where a witness gives an objectionable answer to a question that is unobjectionable.[63] Subsequent objection is also timely where the witness answers an objectionable question too quickly for the objection to be interposed, where the witness volunteers an objectionable statement, or where the defect

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1986); E. CLEARY, MCCORMICK ON EVIDENCE § 52, at 131 (3d ed. 1984); 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 26, at 35 (Texas Practice 3d ed. 1980).

59. *See* Speier v. Webster College, 616 S.W.2d 617, 619 (Tex. 1981); Brown & Root, Inc. v. Haddad, 142 Tex. 624, 628, 180 S.W.2d 339, 341 (1944); Ramos v. State, 419 S.W.2d 359, 364 (Tex. Crim. App. 1967); Eubanks v. Winn, 469 S.W.2d 292, 296 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.2, at 13 (2d ed. 1986); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 9, at 43 (1977).

60. *See* Hurtado v. Texas Employers' Ins. Ass'n, 574 S.W.2d 536, 538 (Tex. 1978).

61. *See* J.A. Robinson Sons, Inc. v. Wigart, 420 S.W.2d 474, 486 (Tex. Civ. App.—Amarillo 1967), *rev'd on other grounds*, 431 S.W.2d 327 (Tex. 1968); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 8, at 37 (1977); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5037, at 188 (1977).

62. *See* Guzman v. State, 521 S.W.2d 267, 269 (Tex. Crim. App. 1975); Meza v. State, 172 Tex. Crim. 544, 549, 360 S.W.2d 403, 406 (1962); Zamora v. Romero, 581 S.W.2d 742, 747 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); Fox v. Amarillo Nat'l Bank, 552 S.W.2d 547, 551 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

63. *See* Johnson v. Hodges, 121 S.W.2d 371, 373 (Tex. Civ. App.—Fort Worth 1938, writ dism'd).

does not appear on the face of the testimony but is revealed later (such as where a witness testifies on direct examination as if from first-hand knowledge but cross-examination or voir dire reveals that in fact his testimony is based upon hearsay).[64] Of course, the motion to strike is itself subject to a requirement of timeliness.[65] In addition, a motion to strike, like an objection, must be specific. If it is overbroad, asking for the deletion of admissible as well as inadmissible evidence, it will not be error to overrule it.[66]

Texas courts have recognized the "running objection" as sufficient to preserve error with regard to a series of similar offers of evidence.[67] Indeed, some courts have gone further and held that "[w]here a party makes a proper objection to the introduction of testimony and is overruled, he is entitled to assume that the judge will make the same ruling as to the other offers of similar testimony, and he is not required to repeat the objection."[68] All authorities have interpreted Rule 103(a)(1) to be consistent with these practices.[69]

Time requirements for objections in depositions are governed by Rule of Civil Procedure 204(4). It provides that objections other than as to the "form of questions or the non-responsiveness of answers"

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64. *See generally* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.3, at 16-17 (2d ed. 1986); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 8, at 36-37 (1977); E. CLEARY, MCCORMICK ON EVIDENCE § 52, at 127 (3d ed. 1984); 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 23, at 28-29 (Texas Practice 3d ed. 1980).

65. *See* 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 8, at 37-38 (1977); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5037, at 190 (1977).

66. *See* City of Kennedale v. City of Arlington, 532 S.W.2d 668, 678 (Tex. Civ. App.— Fort Worth 1976, writ dism'd).

67. *See* Baldwin v. State, 697 S.W.2d 725, 732 (Tex. App.— Corpus Christi 1985, no pet.); City of Baytown v. Bayshore Constructors, Inc., 615 S.W.2d 792, 794 (Tex. Civ. App.— Houston [1st Dist.] 1980, no writ).

68. Bunnett/Smallwood & Co. v. Helton Oil Co., 577 S.W.2d 291, 295 (Tex. Civ. App.— Amarillo 1978, no writ); *accord* Welch v. Texas Employers' Ins. Ass'n, 636 S.W.2d 450, 453 (Tex. App.—Eastland 1982, no writ); D.L.N. v. State, 590 S.W.2d 820, 823 (Tex. Civ. App.— Dallas 1979, no writ) ("[f]ailure to repeat objections to similar evidence may not be a waiver when previous objections have been overruled").

69. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.2, at 15 (2d ed. 1986).

> A party who has objected and obtained a ruling clearly indicating the attitude of the court to the admissibility of the evidence is not required to repeat the objection each time such evidence is offered whether during the examination of the same witness or another witness. Where the court has clearly ruled, repetition of the objection serves only to waste time and prejudice the objecting party in the eyes of the jury. A request for a continuing objection . . . offers counsel additional protection.

Id.; *accord* 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 10, at 44-45 (1977); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5037, at 191-92 (1977).

need not be made during the deposition, but may instead be made for the first time at trial if the deposition is offered in evidence.[70]

It has been repeatedly held by Texas courts that a ruling denying a motion in limine does not suffice to preserve error in the admission of evidence; the party must object when the evidence is offered at trial.[71] If a motion in limine is granted, a proper objection at trial is required to preserve error with regard to questions that are claimed to violate it.[72]

E. *Rule 103(a)(2): Offer of Proof*

To preserve error in the exclusion of evidence, Rule 103(a)(2), like the common law, requires that the substance of the evidence be shown by offer of proof. The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful.[73] A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence.[74]

Texas courts have consistently held that error in the exclusion of evidence may not be urged unless the proponent perfected an offer of proof or bill of exception.[75] There has been some doubt whether the requirement of an offer of proof to preserve error applies to questions posed on cross-examination. It has been suggested that since counsel may not know the answer an adverse witness will give to his question, this requirement does not ordinarily apply.[76] Yet this circumstance would not preclude an offer in question-and-answer form; and, on the issues of admissibility and harm, a complete record would be of equal

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70. TEX. R. CIV. P. 204(4).

71. *See* Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); Harrington v. State, 547 S.W.2d 616, 620 (Tex. Crim. App. 1977); Simpson v. State, 507 S.W.2d 530, 532 (Tex. Crim. App. 1974); Crider v. Appelt, 696 S.W.2d 55, 59 (Tex. App.—Austin 1985, no writ) (applying Rule 103(a)(1)). For an extensive discussion of motion in limine practice in Texas, see Hazel, *The Motion in Limine: A Texas Proposal*, 21 HOUS. L. REV. 919 (1984).

72. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 637 (Tex. 1986).

73. *See* E. CLEARY, MCCORMICK EVIDENCE § 51, at 123-24 (3d ed. 1984).

74. *See id.*

75. *See* Moore v. State, 462 S.W.2d 574, 576 (Tex. Crim. App. 1970); Davidson v. State, 162 Tex. Crim. 640, 646-47, 288 S.W.2d 93, 97 (1956); Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 847 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); Morris v. City of Houston, 466 S.W.2d 851, 856 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); Bell v. Hoskins, 357 S.W.2d 585, 588 (Tex. Civ. App.—Dallas 1962, no writ); City of Houston v. Huber, 311 S.W.2d 488, 495 (Tex. Civ. App.—Houston 1958, no writ).

76. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 51, at 124 n.9 (3d ed. 1984).

value on cross-examination as on direct examination. Texas authority is divided on this issue.[77] Rule 103(a)(2) permits only one exception to the requirement of offer of proof: where "the substance of the evidence . . . was apparent from the context within which questions were asked." This exception, which was also recognized in Texas before the adoption of the Rules,[78] may frequently apply during cross-examination.[79]

As noted in a previous section, Texas courts have consistently held that a motion in limine does not by itself preserve error in the admission of evidence; the complainant must make a timely and specific objection at trial as well.[80] Texas courts have also consistently held that if a motion in limine is granted, the party against whom the exclusion operates must make an offer of proof in order to preserve error.[81] Rule 103(a)(2) continues this requirement.

If the trial judge refuses to permit a party to perfect an offer of proof, and the ruling which excluded the party's proof is erroneous, then the appellate court must regard the error as harmful and thus reversible.[82] It is proper, however, for the trial judge to postpone the

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77. *Compare* Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 847 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.)

> [W]hen tendered evidence is excluded, whether testimony of one's own witness on direct examination or testimony of the opponent's witness on cross-examination, in order to later complain it is necessary for the complainant to make an offer of proof on a bill of exception to show what the witness' testimony would have been. Otherwise there is nothing before the appellate court to show reversible error in the trial court's ruling.

with Foster v. Bailey, 691 S.W.2d 801, 803 (Tex. App.— Houston [1st Dist.] 1985, no writ) (offer of proof not required to show error in sustaining objection to relevant inquiry on cross-examination of opposing party; right to cross-examine sole adverse party regarding ultimate disputed issue not predicated on a showing that cross-examination will be successful) *and* Ledisco Fin. Servs., Inc. v. Viracola, 533 S.W.2d 951, 958 (Tex. Civ. App.—Texarkana 1976, no writ) (requirement of offer of proof or bill of exception to preserve error does not apply to cross-examination of adverse party).

78. *See* Ledisco Fin. Servs., Inc. v. Viracola, 533 S.W.2d 951, 958-59 (Tex. Civ. App.—Texarkana 1976, no writ).

79. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.7, at 25-26 (2d ed. 1986); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 12, at 69-71 (1977); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5040, at 219-21 (1977).

80. *See supra* text accompanying notes 71-72.

81. *See* Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 662-63 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Roberts v. Tatum, 575 S.W.2d 138, 144 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

82. *See* Ledisco Fin. Servs., Inc. v. Viracola, 533 S.W.2d 951, 959 (Tex. Civ. App.—Texarkana 1976, no writ). "It is reversible error to refuse a party the right to perfect his bill of exceptions." *Id.*

making of a formal offer of proof until a convenient time, such as the noon hour, when the jury will have been removed from the courtroom.[83]

F. *Rule 103(b): Record of Offer and Ruling*

The first sentence of Rule 103(b), which is identical to the federal version, gives the trial judge discretion to augment the record in order "to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court."[84] This procedure is consistent with prior Texas practice.[85]

The second sentence of the Texas versions of Rule 103(a) differs from the federal version in that it makes a question-and-answer offer of proof, as opposed to an attorney's summary of anticipated testimony ("If it please the court, let the record show that if permitted, the witness would testify that . . ."), mandatory upon the request of any party. The Texas rule, as originally promulgated by the supreme court in 1983, used the term "counsel" instead of the present "a party" in the second sentence. The change, effected by amendment in 1984,[86] makes it clear that either proponent or opponent may insist upon a question-and-answer form of offer of proof. A proponent may prefer a question-and-answer form so as to eliminate doubt as to the harm caused by the exclusion, and possibly to encourage the trial judge to reconsider the ruling. An opponent, on the other hand, may prefer a question-and-answer form in order to "call the bluff" of an opponent whose summary may be optimistic.

G. *Rule 103(c): Hearing of Jury*

Rule 103(c), which, in the two Texas codes, is identical to the Federal Rules, sets out a rule of practice that is both necessary and traditional. Rule 104(c) restates the same principle as applied to the particular matter of hearings on preliminary questions.[87] In order to

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83. *See* Davidson v. State, 162 Tex. Crim. 640, 647, 288 S.W.2d 93, 97 (1956).

84. FED. R. EVID. 103(b) advisory committee's note.

85. *Cf.* TEX. R. CIV. P. 372(h), (i) (giving trial judge power to suggest corrections in bills of exception or to file his own bill if his suggested corrections are rejected).

86. Supreme Court Order of June 25, 1984, eff. Nov. 1, 1984, *reprinted in* 47 TEX. B.J. 933 (Sept. 1984).

87. *See infra* text accompanying notes 129-132; *see also* TEX. CRIM. PROC. CODE ANN. art. 38.05 (Vernon 1979) (trial judge, in ruling on admissibility of evidence, may not comment upon weight of evidence or make any remark suggesting opinion on case).

comply with the command to prevent inadmissible evidence from being suggested to the jury, several devices are available: the jury may be withdrawn from the courtroom, the judge and counsel may retire to chambers, or counsel may approach the bench.[88] Other increasingly popular devices to shield the jury from inadmissible evidence are the motion in limine[89] and, in criminal cases, the motion to suppress evidence.[90]

H. *Criminal Rule 103(d): Fundamental Error*

Criminal Rule 103(d) is identical to the Federal Rule except that the Texas term "fundamental" replaces the federal term "plain." The official Texas comment states that the provision is intended to be purely declarative of prior case law.[91]

In the Texas Civil Rules, Rule 103(d) was eliminated by the supreme court. The Texas Supreme Court had previously held:

> Fundamental error survives today only in rare instances in which the record shows on its face that the court lacked jurisdiction or that the public interest is directly and adversely affected as the interest is declared in the statutes or Constitution of Texas.[92]

Since it is hardly possible that an error in the admission or exclusion of evidence in a civil case could be fundamental according to this test, it would have been misleading for any version of Federal Rule 103(d) to appear in the Texas Rules of Civil Evidence.

For similar reasons, the presence of Rule 103(d) in the Criminal Rules is in fact misleading. Cases in which the Court of Criminal Appeals has found reversible error as to an evidence ruling despite the failure by counsel to preserve the point at trial are as rare as gubernatorial candidates who promise new taxes and favor waste in government. The recent decision in *Perry v. State*[93] demonstrates that the

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88. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.8, at 30-31 (2d ed. 1986).

89. *See id.* at 31-32; *see also* E. CLEARY, MCCORMICK ON EVIDENCE § 52, at 128 (3d ed. 1984). *See generally* Hazel, *The Motion in Limine: A Texas Proposal*, 21 HOUS. L. REV. 919 (1984).

90. *See* TEX. CRIM. PROC. CODE ANN. art. 28.01, § 1(6) (Vernon Supp. 1987); R. DAWSON & G. DIX, TEXAS CRIMINAL PROCEDURE 341-60 (1984).

91. *See* TEX. R. EVID. 103 comment.

92. Texas Indus. Traffic League v. Railroad Comm'n, 633 S.W.2d 821, 823 (Tex. 1982); *accord* Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982).

93. 703 S.W.2d 668 (Tex. Crim. App. 1986).

realm of fundamental error is extremely small regarding evidence points. In *Perry*, the court of appeals reversed a conviction for aggravated robbery on account of an unconstitutionally suggestive pretrial photographic spread tainting identification testimony, despite the absence of any trial objection by defense counsel.[94] "In very rare instances," the court of appeals held, "an error in admitting evidence will be so clear and so prejudicial that it is subject to review on appeal, despite the failure of the defense to object at trial."[95]

The Texas Court of Criminal Appeals reversed the court of appeals and reinstated the conviction, stating:

> Although an accused person has the constitutional right to identification by due process, . . . if he fails to formally or informally complain, either orally or in writing, prior to when such testimony is elicited about either of the identifications, he has waived any complaint, unless he establishes on the record why his failure to complain or object should be excused . . . . In this regard, we point out that no procedural principle is more familiar to appellate courts of this Nation than that a constitutional right may be waived or forfeited by the failure to make timely assertion of the right.[96]

The Court of Criminal Appeals distinguished *Caballero v. State*,[97] the case upon which the court of appeals had relied as authority for the proposition that an error could be maintained despite failure to object. *Caballero* concerned evidence that clearly violated a provision in the Code of Criminal Procedure,[98] a provision which the *Perry* court described as intended by the legislature "without any limitations or restrictions" to be a "grant of use or testimonial immunity."[99]

Perry indicates that no doctrine of fundamental error as to evidence exists except as created by a particular statute. Since the official comment to Rule 103(d) disclaims any change in the case law, the rule is misleading.

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94. *See* Perry v. State, 669 S.W.2d 794, 801 (Tex. App.— Houston [1st Dist.] 1984), *rev'd*, 703 S.W.2d 668 (Tex. Crim. App. 1986).

95. *Id.*

96. Perry v. State, 703 S.W.2d 668, 673 (Tex. Crim. App. 1986).

97. 587 S.W.2d 741, 743 (Tex. Crim. App. 1979); *accord* Ballard v. State, 519 S.W.2d 426, 428-29 (Tex. Crim. App. 1975).

98. See TEX. CRIM. PROC. CODE ANN. art. 46.02, § 3(g) (Vernon 1979). "No statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding." *Id.*

99. *See* Perry v. State, 703 S.W.2d 668, 672 (Tex. Crim. App. 1986).

I. *Rule 104: Preliminary Questions; Rule 104(a): Questions of Admissibility Generally*

Both Texas codes adopt Federal Rule 104(a) without change. It embodies the orthodox common law doctrine[100] that the judge, not the jury, decides preliminary questions of fact that determine the admissibility of evidence under the rules of evidence.

Texas case law prior to the rules generally followed the orthodoxy, but also exhibited heretical departures from it.[101] In civil cases, nearly all decisions committed preliminary issues to the judge. For example, it was held that fact issues determinative of the competency of a witness under the old Dead Man Statute[102] were to be decided by the judge.[103] Also, it was clear that the trial judge was to determine the qualifications of a person offered as an expert witness.[104] On the other hand, it was held that a statement offered under the co-conspirator hearsay exception would be admitted upon a prima facie showing of a conspiracy, rather than requiring an outright determination by the judge of the existence of a conspiracy as a preliminary fact question.[105] The latter decision would be improper under Rule 104(a), which commands a judicial determination of the preliminary question by a preponderance of the evidence.[106].

In criminal cases, there was authority in Texas for the traditional rule on such issues as the competency of a child to be a witness.[107] In at least four situations, however, Texas criminal cases departed from the settled practice. As to two of these matters, since the unorthodox procedure is codified in the Code of Criminal Procedure, it will continue to apply despite the adoption of Criminal Evidence Rule 104(a).

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100. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 53, at 135 (3d ed. 1984); 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2550, at 641 (J. Chadbourn rev. ed. 1981).

101. *See generally* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 2 (Texas Practice 3d ed. 1980).

102. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926) (repealed by TEX. R. EVID. 601(b) effective Sept. 1, 1983).

103. *See* Ditto v. Ditto Inv. Co., 158 Tex. 104, 107, 309 S.W.2d 219, 220-21 (1958).

104. *See* Southwestern Bell Tel. Co. v. Sims, 615 S.W.2d 858, 862 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

105. *See* Rowley v. Braly, 286 S.W. 241, 246 (Tex. Civ. App.—Amarillo 1926, writ dism'd).

106. *See* United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

107. *See* Mackey v. State, 160 Tex. Crim. 296, 299, 269 S.W.2d 395, 396-97 (1954) (competency determined by judge); Rocha v. State, 148 Tex. Crim. 237, 239, 186 S.W.2d 267, 268-69 (1945) (judge has responsibility of determining competency of witness).

These two matters are the voluntariness of confessions, governed by article 38.22 of the Code of Criminal Procedure,[108] and the suppression of evidence challenged on the ground that it was obtained illegally, governed by article 38.23.[109]

The two other matters upon which Texas criminal cases adopted unorthodox treatment of preliminary questions of fact were dying declarations and spousal testimony. If the elements of the dying declaration hearsay exception were put in issue by the evidence, the former Texas practice was to submit the statement to the jury with an instruction not to consider it unless they first found the preliminary condition to be met.[110] This practice, which was criticized,[111] is not prescribed by statute. Therefore, it is overturned by the adoption of Criminal Evidence Rule 104(a). The proper procedure henceforth is for the judge to determine such issues as whether the declarant believed his death was imminent. Similarly, Texas cases held that where a dispute existed as to whether a witness called by the state was the spouse of the defendant and, therefore, incompetent to testify against him,[112] the jury would be given the preliminary issue of the marriage and would be instructed to disregard the testimony if they found that the witness and the accused were legally married.[113] This practice is likewise abolished by Rule 104(a).

The second sentence of Rule 104(a), with respect to determining preliminary questions relating to admissibility, liberates the trial judge from the rules of evidence, except for privileges. There are no pre-Rules Texas cases on this issue.[114] Sufficient authority elsewhere sup-

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108. *See* TEX. CRIM. PROC. CODE ANN. art. 38.22, §§ 6, 7 (Vernon 1979) (when question raised as to voluntariness of confession, judge must first make independent finding; if judge finds confession voluntary and admissible, confession is admitted, and evidence on issue of voluntariness may be presented to jury; jury instructed that it must find beyond reasonable doubt that statement was voluntary before it may consider it).

109. *See id.* art. 38.23 (providing for jury determination of preliminary question). *See generally* Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 245-49 (1981).

110. *See* Berry v. State, 143 Tex. Crim. 67, 71-72, 157 S.W.2d 650, 653 (1942).

111. *See* 1A R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 975, at 227 (Texas Practice 3d ed. 1980).

112. *See* TEX. CRIM. PROC. CODE ANN. art. 38.11 (Vernon 1979) (repealed by TEX. R. CRIM. EVID. 504 effective Sept. 1, 1986); *cf.* TEX. R. CRIM. EVID. 504 and 505.

113. *See* Huffman v. State, 450 S.W.2d 858, 862 (Tex. Crim. App. 1970).

114. *See* Black, *The Texas Rules of Evidence—A Proposed Codification*, 31 SW. L.J. 969, 972 (1977).

ports the rule, however, as do "sound sense"[115] and "practical necessity."[116]

J. Rule 104(b): Relevancy Conditioned on Fact

The principle of judicial determination of preliminary fact issues codified in Rule 104(a) is stated to be "subject to the provisions of subdivision (b)." The effect of paragraph (b), which, in both Texas rules, is identical to the federal version, is to take away from the trial judge a category of preliminary fact issues and to give them to the jury, subject to the usual judicial control over jury fact issues. That is, the trial judge, as always, permits a jury to find a fact only if there is "evidence sufficient to support a finding" of the fact.

The category of preliminary questions that is given to the jury by Rule 104(b) is labelled "conditional relevancy" by the Federal Advisory Committee.[117] The Committee gave two examples:

> [W]hen a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it.[118]

In each of these examples, the factual contingency in the offered evidence (did X hear the statement?; did Y write the letter?) is to be given to the jury (assuming the evidence is such that there is a reasonable basis for the jury to find that X heard the statement, or that Y wrote the letter), rather than to be decided by the trial judge. By contrast, suppose a hearsay statement of Z is offered as a dying declaration to show that D killed him; whether Z made the statement "while believing that his death was imminent"[119] must be determined by the trial judge before the contested evidence can be admitted. Likewise, suppose the letter by Y was to an attorney; whether it was a confidential communication for the purpose of obtaining legal services[120] must be determined by the trial judge, not the jury.

Why are the preliminary questions in the Advisory Committee's

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115. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 53, at 136 n.8 (3d ed. 1984).

116. *See* FED. R. EVID. 104(a) advisory committee's note.

117. FED. R. EVID. 104(b) advisory committee's note, *citing* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 45-46 (4th ed. 1962).

118. FED. R. EVID. 104(b) advisory committee's note.

119. *See* TEX. R. EVID. 804(b)(2); TEX. R. CRIM. EVID. 804(b)(2).

120. *See* TEX. R. EVID. 503(b); TEX. R. CRIM. EVID. 503(b).

two examples treated differently from those in the last two examples? There are two related reasons. First, questions affecting only the relevancy of evidence "are appropriate questions for juries;"[121] questions affecting competency under the various exclusionary rules such as hearsay and privilege are not appropriate for juries. It would be inconsistent with the design of the "technical" exclusionary rules to give over their administration to the jury, since in large measure the function of such rules is judicial control of the jury's access to incompetent data. Jury determination of preliminary fact questions determinative of competency would, to use a tired metaphor, be letting the fox guard the hen house. Conditional relevancy issues do not have this aspect.

Secondly, if the judge decided all conditional relevancy issues, "the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed."[122] This is because of the ubiquity of conditional relevancy. The facts of every case are interdependent. Suppose P sues D for libel, alleging that D sent a letter to A that defamed P. That D wrote a letter defaming P is in a sense relevant only if someone received it.[123] On the other hand, that A received a letter defaming P is in the same sense relevant in this litigation only if D wrote it. There is no reason to take away from the jury either of these matters, and to do so would indeed have the effect on "the functioning of the jury as a trier of fact" that was feared by the Committee.

The treatment of conditional relevancy issues mandated by Rule 104(b) is conventional and does not change Texas law, although the terminology is new to Texas. The most common example of a situation of conditional relevancy is found in the Committee's second illustration regarding authentication. The authentication of a document or an item of real evidence requires evidence sufficient to support a jury finding that the offered item is what its proponent claims. In such a situation, the function of the trial judge is merely to determine whether a prima facie case has been presented, not to decide the actual issue of genuineness. This traditional doctrine[124] is codified not

121. FED. R. EVID. 104(b) advisory committee's note.

122. *Id.*

123. The Advisory Committee calls this relevancy "in the large sense." *Id.*

124. *See* Barrera v. Duval County Ranch Co., 135 S.W.2d 518, 520 (Tex. Civ. App.—San Antonio 1939, writ ref'd).

only in Rule 104(b), but also in Rule 901(a).[125]

The new "conditional relevancy" terminology also embraces the traditional practice referred to as "connecting up."[126] Where evidence is presented that is subject to exclusion on an objection that its relevancy has not been shown or that it lacks adequate foundation, the judge may admit the evidence conditionally upon counsel's promise to "connect it up later."[127] If sufficient "connecting" evidence fails to appear by the close of the evidence, the judge will strike the conditionally-admitted evidence on the opponent's motion and instruct the jury to disregard it.[128]

K. *Rule 104(c): Hearing of Jury*

Texas Criminal Rule 104(c) is identical to the Federal Rule. The Texas civil version is abbreviated by the deletion of portions applicable only in criminal cases. The general purpose of these provisions is the same as Rule 103(c),[129] that is, to prevent inadmissible evidence from being imparted to the jury. Sometimes a hearing on a preliminary matter does not threaten to expose the jury to prejudicial inadmissible matters; if not, then the interests of justice do not require the inconvenience of withdrawing the jury. Determining this issue is a matter generally within the trial judge's discretion.[130] In two situations the criminal version of Rule 104(c) eliminates this discretion and makes withdrawal of the jury a matter of right: (1) when the hearing is to determine the admissibility of a confession;[131] (2) when an accused is a witness on the issue and he requests withdrawal of the jury.[132]

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125. *See* TEX. R. EVID. 901(a); TEX. R. CRIM. EVID. 901(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." *Id.*. *See generally* Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371, 373-75 (1985).

126. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 58, at 149-50 (3d ed. 1984).

127. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 104.2, at 42-44 (2d ed. 1986).

128. *See id.*; FED. R. EVID. 104(b) advisory committe's note. "If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration." *Id.*

129. *See supra* text accompanying notes 87-90.

130. *See* FED. R. EVID. 104(c) advisory committee's note.

131. *See* TEX. CRIM. PROC. CODE ANN. art. 38.22, § 6 (Vernon 1979); *see also* Jackson v. Denno, 378 U.S. 368, 377 (1964).

132. *See* H.R. Rep. No. 93-650, 1st Sess. 15 (1973), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS (93 Stat.) 7075, 7080. "[T]he Committee believed that a proper regard for

L. *Civil Rule 104(d) and Criminal Rule 104(e): Weight and Credibility*

Texas Civil Rule 104(d) and Criminal Rule 104(e) are identical to Federal Rule 104(e). The purpose of the provisions is to clarify that the procedures provided in Rule 104 for the disposition of preliminary questions determining admissibility do not limit the introduction of other evidence before the jury for purposes of weight and credibility. For example, the judge decides, under Rule 104(a), whether a child is competent to testify as a witness or whether a person is qualified to be an expert witness.[133] Yet a favorable determination by the judge on the preliminary issue does not preclude the opponent from introducing before the jury evidence as to the child's limited intellectual development, or the expert's limited experience or professional prestige.

M. *Criminal Rule 104(d): Testimony by Accused out of the Hearing of the Jury*

Texas Criminal Rule 104(d) is based upon Federal Rule 104(d). It was omitted from the Civil Rules because it concerns only criminal cases. It is consistent with prior case law in Texas.[134] As under prior case law, the limitation upon cross-examination of the accused applies only to testimony concerning a preliminary matter out of the hearing of the jury. If the accused chooses to testify before the jury concerning the voluntariness of a confession, for example, he is subject to cross-examination on any issue in the case.[135]

N. *Rule 105: Limited Admissibility*

Federal Rule 105 consists only of the language in the first part of Texas Rule 105(a), up to the semicolon; the remainder of Texas Rule 105(a), and all of part (b), were added by the Texas drafters. The

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the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters."

133. *See supra* text accompanying notes 100-116.

134. *See* Horne v. State, 508 S.W.2d 643, 646 (Tex. Crim. App. 1974). In *Horne*, the court stated:

> We agree with appellant that he had an absolute right to testify as to the coercion of the confession at the hearing on the motion to suppress with the cross-examination confined to the voluntary nature thereof; and, further, that he could not thereafter be called to testify because of his appearance at the motion to suppress.

135. *See* Myre v. State, 545 S.W.2d 820, 825 (Tex. Crim. App. 1977); Green v. State, 670 S.W.2d 332, 333 (Tex. App.— Eastland 1984, no pet.)

purpose of the additions is to detail the well-established responsibilities of the parties in situations of limited admissibility.

As augmented by the Texas drafters, Rule 105(a) is companion to Rule 103(a)(1)—Objection. As previously noted in the section on Rule 103(a)(1),[136] an objection, to fully protect the objector, must be specific as to four aspects: grounds, parts, parties, and purposes. Rule 103(a)(1) covers specificity as to grounds and parts;[137] Rule 105(a) addresses the objector's burdens of specificity as to parties and purposes. If evidence is offered that is admissible against party-opponent A but not against party-opponent B—for example, A's admission—Rule 105 codifies the common law practice of admission with a limiting instruction.[138] If party B fails to request the instruction, however, he may not complain on appeal if the judge admits the evidence without limitation. The same doctrine obtained in Texas prior to the Rules.[139] Similarly, if evidence is admissible only for a limited purpose, such as impeachment, Rule 105 authorizes admitting it with a limiting instruction; but as held many times prior to the Rules,[140] if the opponent fails to request the instruction, he may not complain on appeal if the evidence is admitted without limitation.

Rule 105(b) sets forth the corresponding burdens on the proponent, which were also well-established in Texas case law prior to the Rules. If evidence is admissible against one party-opponent but not against another, and a proponent fails to limit his offer accordingly, he may not complain on appeal if the evidence is excluded altogether.[141] Sim-

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136. *See supra* text accompanying notes 48-72.

137. *See id.*

138. The effectiveness (or ineffectiveness) of the limiting instruction in the particular circumstances must be considered in the decision whether to admit the partly admissible offer or to exclude it for unfair prejudice under TEX. R. EVID. 403. *See* FED. R. EVID. 105 advisory committee's note; FED. R. EVID. 403 advisory committee's note.

139. *See* Wolfe v. East Texas Seed Co., 583 S.W.2d 481, 482 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd); Fort Worth Hotel Co. v. Waggoman, 126 S.W.2d 578, 586 (Tex. Civ. App.—Fort Worth 1939, writ dism'd judgmt cor.).

140. *See* Scotchcraft Bldg. Materials, Inc. v. Parker, 618 S.W.2d 835, 837 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); Bristol-Myers Co. v. Gonzales, 548 S.W.2d 416, 430-31 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978); Miller v. Hardy, 564 S.W.2d 102, 105 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

141. *See* Luvual v. Henke & Pillot, Div. of Kroger Co., 366 S.W.2d 831, 839 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.). In *Luvual* the court noted:

> Where evidence is inadmissible against one of the parties and admissible against the other, the party offering it must offer it against the party against whom it is admissible. If he

ilarly, if evidence is admissible only for a particular purpose, and the offering party fails to specify the purpose or specifies a purpose for which it is not admissible, he cannot complain if the trial judge excludes the evidence entirely.[142]

Although not literally set forth in Rule 105(b), a similar doctrine emerges regarding evidence that contains both admissible and inadmissible parts. If an offer contains portions that are admissible and portions that are inadmissible, the judge may exclude the entire offer, and the proponent is estopped from complaining on appeal.[143]

O. *Rule 106: Remainder of or Related Writings or Recorded Statements*

Texas Civil and Criminal Rules 106 are identical to one another, but deviate slightly from the original federal rule. By amendment in 1984,[144] the second sentence was added to eliminate any doubt as to whether the provision covers depositions. In the first sentence, the federal version provides that the adverse party may require the proponent to introduce the other part or other writing or recorded statement. The Texas Committee, as explained in their comment, reworded the sentence to permit introduction of the other material by the adverse party rather than by the proponent.[145]

Rule 106 must be viewed together with Criminal Rule 107, the

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does not do so, but offers it generally and the court sustains an objection, there is no error in exclusion.

142. *See* Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 847 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); Powell v. Powell, 554 S.W.2d 850, 855 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); Kaplan v. Goodfried, 497 S.W.2d 101, 104 (Tex. Civ. App.—Dallas 1973, no writ); Gottschald v. Reaves, 457 S.W.2d 307, 309-10 (Tex. Civ. App.--Houston [1st Dist.] 1970, no writ).

143. *See* Brown v. Gonzales, 653 S.W.2d 854, 864 (Tex. App.--San Antonio 1983, no writ); Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 847 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); Hanover Ins. Co. v. Peyson, 373 S.W.2d 701, 704 (Tex. Civ. App.—Fort Worth 1963, no writ).

144. *See* Supreme Court Order of June 25, 1984, eff. Nov. 1, 1984, *reprinted in* 47 TEX. B.J. 933, 933-34 (Sept. 1984).

145. The federal version may in fact permit the "better practice" favored by the Texas Committee. *See* 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 49, at 355 (1977).

> As a matter of mechanics, where the adversary succeeds in persuading the trial judge to require the whole of a statement to come in at once, it will usually be appropriate to allow the adversary himself to read into the record the remainder of the statement omitted in the proponent's presentation, even though this means interrupting the presentation of the proponent's case.

Id..

Rule of Optional Completeness. Although the Civil Rules do not contain Rule 107, the Comment to Civil Rule 106 indicates that the common law doctrine codified in Criminal Rule 107 remains part of the civil law of evidence.[146] The relationship between the two rules may be summarized as follows: the Rule of Optional Completeness, Rule 107, is a rule of admissibility that applies broadly to any form of evidence ("act, declaration, conversation, writing or recorded statement"); Rule 106 is merely a rule of timing and it applies only to writings and recorded statements. Rule 106 is an acceleration provision that applies to a subset of the evidence that is accorded admissibility under the broader "door-opening" doctrine codified in Rule 107. Although the optional completeness doctrine in Rule 107 has always been a part of Texas civil and criminal law, the particular acceleration doctrine in Rule 106 is new to Texas.

Rule 106 is based on two considerations: (1) the danger that material may be made misleading by being taken out of context, and (2) the inadequacy of a delayed repair.[147] "For practical reasons,"[148] the rule applies only to writings and recorded statements and not to conversations. Since the exercise by an opponent of his power under Rule 106 involves interruption of the proponent's direct presentation, there is some danger of abuse. The 1984 amendment to the Texas Rule included the addition to the Comment of a cross-reference to Rule 610(a), which codifies the power of the judge to control "the mode and order of interrogating witnesses and presenting evidence."[149] The cross-reference merely reinforces the "fairness" standard in Rule 106. If an opposing party's request to interrupt the proponent's case to introduce another writing or part of a writing is calculated to defeat, rather than to further, fair and effective presentation, the trial judge has the power to reject the request and to require

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146. In addition to referring to the common law doctrine of optional completeness, the Comment to the Civil Rule cites TEX. CRIM. PROC. CODE ANN. art. 38.24 (Vernon 1979) (repealed by TEX. R. CRIM. EVID. 107 effective September 1, 1986), which was the source of Criminal Rule 107. Article 38.24 was "adopted" into the civil case law years ago. *See* Cotton v. Morrison, 140 S.W. 114, 115 (Tex. Civ. App.—Fort Worth 1911, no writ). "While this provision is only found in the Code of Criminal Procedure, it is nonetheless a part of the written law of the land, and in our judgment announces a proper rule of evidence in civil cases as well as in criminal cases." *Id.*; *see also* Travelers Ins. v. Creyke, 446 S.W.2d 954, 957 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (applying rule of optional completeness).

147. FED. R. EVID. 106 advisory committee's note.

148. *Id.*

149. TEX. R. EVID. 610(a); TEX. R. CRIM. EVID. 610(a).

the opposing party to wait until his next opportunity—such as cross-examination, redirect examination, or his next case—to present the material.[150]

P. *Criminal Rule 107: Rule of Optional Completeness*

Criminal Rule 107 is based upon an old provision in the Code of Criminal Procedure,[151] changed only by the addition of references to recorded statements and depositions.[152] The Code of Criminal Procedure provision was itself based upon a section of the Field Code,[153] which also appears in the California Evidence Code.[154] Both the Field Code and the California Code provisions employ the word "detached" where the Texas provision uses "detailed." Contextually, "detached" makes much more sense; "detailed" undoubtedly resulted from some ancient mistranscription.

Rule 107, like its statutory predecessor, is declarative of the common law. Although the Texas Civil Rules do not contain Rule 107, the common law doctrine of optional completeness persists so as to have the identical effect in civil cases. Indeed, the Code-of-Criminal-Procedure ancestor of Rule 107 was explicitly "adopted" into the Texas civil case law,[155] where it remains today, as indicated in the

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150. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5077, at 369 (1977).

> Of course, the Rule was not designed to permit counsel to disrupt his opponent's presentation of evidence unless it is necessary to prevent misleading the jury. In considering what fairness requires, the court may properly take into account the degree to which introduction of the additional material will interfere with the proponent's orderly presentation of his case.

Id.

151. *See* TEX. CRIM. PROC. CODE ANN. art. 38.24 (Vernon 1979) (repealed by TEX. R. CRIM. EVID. 107 effective Sept. 1, 1986).

152. The reference to depositions did not change the law, since the predecessor provision was applied to depositions. *See* Taylor v. State, 420 S.W.2d 601, 606-07 (Tex. Crim. App. 1967).

153. *See* NEW YORK STATE COMM'RS ON PRACTICE & PLEADING, CODE OF CIVIL PROCEDURE § 1687, at 704-05 (1850), *quoted in* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5071, at 340 n.13 (1977).

154. *See* CAL. EVID. CODE § 356 (Deering 1986).

155. *See* Cotton v. Morrison, 140 S.W. 114, 115 (Tex. Civ. App.—Fort Worth 1911, no writ). "While this provision is only found in the Code of Criminal Procedure, it is nonetheless a part of the written law of the land, and in our judgment announces a proper rule of evidence in civil cases as well as in criminal cases." *Id.*; *see also* Travelers Ins. v. Creyke, 446 S.W.2d 954, 957 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (applying rule of optional completeness).

official Comment to Civil Rule 106.[156]

Rule 107 is a rule of admissibility. "It is well established that the evidence which is used to fully explain a matter opened up by the other party need not be ordinarily admissible."[157] Thus, the necessity of completeness will justify the introduction, through the "open door," of extraneous offenses,[158] hearsay,[159] or other matters that would otherwise be incompetent.[160] There are, however, two limitations to the scope of the completeness opening. First, only parts or items that are germane to the part or item offered ("on the same subject") become admissible.[161] Second, the matter offered on the justification of completeness may be excluded under Rule 403[162] if its prejudicial effect substantially outweighs its probative value.[163]

Q. *Criminal Rule 1101: Applicability of Rules*

Criminal Rule 1101, which is loosely based upon Federal Rule 1101, modifies Criminal Rule 101(b).[164] There is no civil counterpart to Rule 1101; applicability of the Civil Rules is treated entirely in Civil Rule 101(b).[165] The overall effect of Rule 1101 is consistent with prior Texas law as to when formal rules of evidence apply in various

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156. *See* TEX. R. EVID. 106 comment (referring to common law doctrine of optional completeness).

157. Parr v. State, 557 S.W.2d 99, 102 (Tex. Crim. App. 1977).

158. *See* Evans v. State, 643 S.W.2d 157, 161 (Tex. App.— Austin 1982, no writ).

159. *See* Ware v. State, 475 S.W.2d 282, 285 (Tex. Crim. App. 1971); Jackson v. State, 423 S.W.2d 322, 323 (Tex. Crim. App. 1968).

160. *See* Jones v. State, 501 S.W.2d 308, 311 (Tex. Crim. App. 1973) (completeness overrides spousal incompetency).

161. *See* Jernigan v. State, 589 S.W.2d 681, 694-95 (Tex. Crim. App. 1979); Roman v. State, 503 S.W.2d 252, 253-54 (Tex. Crim. App. 1974); Travelers Ins. v. Creyke, 446 S.W.2d 954, 957 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ).

162. *See* TEX. R. EVID. 403; TEX. R. CRIM. EVID. 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." *Id.*

163. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 56, at 146 (3d ed. 1984); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 106.2, at 56 (2d ed. 1986); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 49, at 357-58 (1977); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5078, at 373, 378 (1977).

164. Texas Criminal Rule 101(b) provides: "These rules govern criminal proceedings in courts of Texas except as otherwise provided." TEX. R. CRIM. EVID. 101(b).

165. Texas Civil Rule 101(b) provides: "Except as otherwise provided by statute, these rules govern civil proceedings in all courts of Texas other than small claims courts." TEX. R. EVID. 101(b).

aspects of the criminal process. It does not extend formal rules to any area where they were traditionally not followed, nor does it remove them from any area where they previously operated. The Rule does, however, clarify the issue of evidence law applicability in a few areas where the pre-Rules status was unclear.

Paragraph (a) reiterates the general rule that the Rules apply in all phases of all criminal proceedings,[166] with the additional mention of examining trials before magistrates. The Code of Criminal Procedure provides: "The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."[167]

Paragraph (b), which was taken from Federal Rule 1101(c), provides that the rules of privilege apply at all stages in all cases and proceedings. "The reason to insist upon across-the-board observance of privileges is that the values sought to be protected by privileges would be undercut not merely by use at trial of privileged matter, but by forced disclosure itself."[168]

Paragraph (c) lists several situations in which the Rules of Criminal Evidence do not apply. Subparagraph (c)(1), "Preliminary questions of fact," is taken from Federal Rule 1101(d)(1). It repeats what is stated in Rule 104(a): when the judge determines a preliminary fact issue determinative of the admissibility of evidence, he is not bound by the Rules of Evidence.[169] In a sense, the reference in Rule 1101(c)(1) to Rule 104 is misleading, because there are other situations in which the judge is allowed to consider otherwise inadmissible matters in making a determination. For example, the entire process of judicial notice under Article II is not restricted to evidence admissible under the other rules.[170]

Subparagraph (c)(2), "Grand jury," exempts grand jury proceedings from formal evidence rules. Such an exemption is traditional.[171]

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166. *See* TEX. R. CRIM. EVID. 101(b).

167. TEX. CRIM. PROC. CODE ANN. art. 16.07 (Vernon 1977).

168. 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 621, at 632-33 (1981).

169. *See supra* text accompanying notes 100-16.

170. *See* Continental Oil Co. v. Simpson, 604 S.W.2d 530, 535 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

171. *See* TEX. CRIM. PROC. CODE ANN. art. 20.09 (Vernon 1977). "The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or which they shall be informed by the attorney representing the state, or any other credible person." *Id.*; *see also* Costello v. United States, 350 U.S. 359, 362-63 (1965).

Subparagraph (c)(3), which largely parallels Federal Rule 1101(d)(3), exempts from formal evidence rules a number of "Miscellaneous proceedings." Subparagraph (c)(3)(A) exempts extradition, rendition, and interstate detainer proceedings. The Federal Advisory Committee described extradition and rendition as "essentially administrative," and noted that traditionally the rules of evidence have not applied to these areas.[172] In Texas, extradition, rendition, and interstate detainer are governed in great detail by articles 51.13 and 51.14 of the Code of Criminal Procedure. These provisions do not follow formal rules of evidence.[173]

Subparagraph (c)(3)(B) exempts from the evidence rules the judge's threshold determination of whether a hearing should be held concerning the defendant's competency to stand trial. Article 46.02, section 2 of the Code of Criminal Procedure addresses how an issue of incompetency to stand trial is raised. It provides that the issues may be determined in advance of the trial on the merits "if the court determines there is evidence sufficient to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel."[174] It further provides that an incompetency hearing must be conducted if during the trial evidence of the defendant's incompetency "is brought to the attention of the court from any source."[175] In either case, the incompetency hearing itself must comply with the Rules of Evidence; the exemption in Rule 1101(c)(3)(B) goes only to the trial judge's threshold determination of whether a hearing is required.

Subparagraph (c)(3)(C) exempts bail proceedings other than hearings to deny, revoke, or increase bail. The processes by which bail is set, or reduced, are traditionally informal, not following formal evidence rules.[176] In *Ex parte Miles*,[177] the Court of Criminal Appeals disallowed the use of affidavits to deny bail.[178] Rule 1101(c)(3)(C)

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172. FED. R. EVID. 1101(d)(3) advisory committee note.

173. *See* TEX. CRIM. PROC. CODE ANN. arts. 51.13 -.14 (Vernon 1979).

174. *Id.* art. 46.02, § 2(a).

175. *Id.* § 2(b).

176. Regarding the bail process, see generally TEX. CRIM. PROC. CODE ANN. ch. 17 (Vernon 1977 & Supp. 1986); R. DAWSON & G. DIX, TEXAS CRIMINAL PROCEDURE ch. 6 (1984).

177. 474 S.W.2d 224 (Tex. Crim. App. 1971).

178. *See id.* at 225.

elaborates *Miles* by making evidence rules generally applicable where bail is denied, revoked, or increased.

"A hearing on justification for pretrial detention not involving bail," Rule 1101(c)(3)(D), is a "probable cause" hearing that is required for any extended restraint of liberty following a warrantless arrest.[179] The United States Supreme Court decision requiring such a hearing also held that it need not follow formal rules of evidence.[180]

Subparagraph (c)(3)(E), exempting from the Rules of Evidence the processes of issuance of search or arrest warrants, follows established practice.[181] "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable."[182]

The exemption of direct contempt determination, Rule 1101(c)(3)(F), follows Federal Rule 1101(b).[183] The very definition of direct contempt renders evidence rules unnecessary in its determination: "Direct contempts are those where the acts occur in the presence of the court and the court knows all of the facts which constitute the contempt."[184] Conversely, constructive contempt must always be proved according to the Rules of Evidence: "Constructive contempts relate to acts which require testimony to establish their existence."[185]

Paragraph (d) of Rule 1101 lists five types of proceedings in which the Rules of Criminal Evidence apply except as otherwise provided in the pertinent statutes (or in another court rule, of which at the present time there are none that are pertinent). In a sense, paragraph (d) is superfluous; Rules 101(b) and (c) and 1101(a) would have the same effect upon the listed proceedings. The purpose of paragraph (d) is to

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179. *See generally* Gerstein v. Pugh, 420 U.S.103, 116-19 (1975).

180. *See id.* at 120-22.

181. *See* TEX. CRIM. PROC. CODE ANN. arts. 15.03 -.05 (Vernon 1977) (issuance of arrest warrant upon complaint affidavit); *id.* art. 18.01 (issuance of search warrant upon probable cause affidavit).

182. FED. R. EVID. 1101(d)(3) advisory committee's note.

183. The federal rule approaches the issue from the other direction, stating that the Rules of Evidence apply "to contempt proceedings except those in which the court may act summarily." *See* FED. R. EVID. 1101(b).

184. *Ex parte* Supercinski, 561 S.W.2d 482, 483 (Tex. Crim. App. 1977); *accord Ex parte* Gordon, 584 S.W.2d 686, 688 (Tex. 1979). "Direct contempt occurs within the presence of the court; for example, an affront to the dignity of the court or disruptive conduct in the courtroom." *Id.*

185. *Ex parte* Supercinski, 561 S.W.2d 484, 483 (Tex. Crim. App. 1977); *accord Ex parte* Gordon, 584 S.W.2d 686, 688 (Tex. 1979). "Constructive contempt . . . is contemptuous conduct outside the presence of the court, such as the failure or refusal to comply with a valid court order." *Id.*

clarify evidence law applicability to some matters to which its application was not altogether clear in the past. Further, this paragraph addresses areas where some doubt might otherwise be raised because of different practices in other jurisdictions.

Sentencing or punishment assessment by the court or the jury, subparagraph (d)(1), are generally governed by article 37.07 of the Code of Criminal Procedure, except that capital cases are governed by article 37.071.[186] These provisions do not significantly depart from the formal rules of evidence, except that when the judge assesses punishment, he may order and use an investigative report as provided in article 42.12, section 4.[187]

Probation revocation, subparagraph (d)(2), is governed by article 42.12, section 8, of the Texas Code of Criminal Procedure.[188] This provision prescribes nothing regarding evidence rules at a revocation hearing. The Texas Court of Criminal Appeals, however, has indicated that formal evidence rules apply in probation revocation hearings.[189]

Deferred adjudication and conditional discharge, subparagraph (d)(3), are governed, respectively, by articles 42.12, section 3d, of the Code of Criminal Procedure,[190] and section 4.12 of the Controlled Substances Act.[191] A hearing to proceed to judgment, in either case, is the functional equivalent of a hearing to revoke probation. Therefore, since formal evidence rules govern probation revocations, they should likewise apply in hearings to proceed to judgment under deferred adjudication or conditional discharge.

Hearings on motions to suppress confessions or illegally obtained evidence are made subject to the Rules of Evidence by subparagraph (d)(4). Since under Texas law a judicial determination to admit the evidence in these cases is subject to redetermination by the jury,[192] it is logical to require that the judicial determination be based solely upon admissible evidence. The previous case law appears to support

186. *See* TEX. CRIM. PROC. CODE ANN. arts. 37.07, 37.071 (Vernon 1981).

187. *See id.* art. 37.07, § 3(d); art. 42.12, § 4 (Vernon Supp. 1987).

188. *See id.* art. 42.12, § 8.

189. *See* Sheffield v. State, 623 S.W.2d 403, 405 (Tex. Crim. App. 1981); Maden v. State, 542 S.W.2d 189, 193 (Tex. Crim. App. 1976) (hearsay not admissible in hearing to revoke probation).

190. *See* TEX. CRIM. PROC. CODE ANN. art. 42.12, § 3d (Vernon Supp. 1987).

191. *See* TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.12 (Vernon 1976 & Supp. 1987).

192. *See* TEX. CRIM. PROC. CODE ANN. arts. 38.22, § 6, 38.23 (Vernon 1979).

this principle.[193]

Subparagraph (d)(5) of Rule 1101 refers to article 11.07 of the Code of Criminal Procedure. Section 2(d) of article 11.07 governs hearings on post-conviction petitions for writ of habeas corpus. It provides that to resolve "controverted, previously unresolved facts which are material to the legality of the applicant's confinement," "the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection."[194]

The final paragraph of Rule 1101 refers to the Texas Code of Military Justice,[195] which governs the Texas Militia. The Code of Military Justice provides:

> The procedure, including modes of proof, in cases before military courts and other military tribunals may be prescribed by the Governor by regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the courts of the State of Texas, but which may not be contrary to or inconsistent with this Code.[196]

IV. CONCLUSION

Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence address matters of daily, practical importance to Texas lawyers and courts. They prescribe answers to fundamental questions that traverse all areas of evidence law: Do the formal rules of evidence apply to the particular matter or hearing at hand? If there is a conflict between one of the Rules of Evidence and a law in another source, which provision takes precedence? What are the respective responsibilities of the parties, the trial judge, and the jury in the application of evidence rules? What are the proper procedures for applying evidence rules?

The answers given to these questions in articles I and XI are generally consistent with Texas law prior to the adoption of the Rules. The principal contributions that codification has made on these basic procedural matters are clarification of some issues as to which prior

193. *See* Irvin v. State, 563 S.W.2d 920, 923-24 (Tex. Crim. App. 1978).

194. TEX. CRIM. PROC. CODE ANN. art. 11.07, § 2(d) (Vernon Supp. 1986); *see also Ex parte* Kanaziz, 423 S.W.2d 319, 320 (Tex. Crim. App. 1968) (use of affidavits in habeas hearings approved).

195. TEX. REV. CIV. STAT. ANN. art. 5788 (Vernon Supp. 1987).

196. *Id.* § 36.

Texas law was unclear, and the general codification benefits of organization, accessibility, and common and consistent vocabulary.

APPENDIX

TEXAS RULES OF EVIDENCE
TEXAS RULES OF CRIMINAL EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 101. Title and Scope

(a) [civil rule] Title. These rules shall be known and cited as the Texas Rules of Evidence.

(a) [criminal rule] These rules shall be known and cited as the Texas Rules of Criminal Evidence.

(b) [civil rule] Scope. Except as otherwise provided by statute, these rules govern civil proceedings in all courts of Texas other than small claims courts.

(b) [criminal rule] These rules govern criminal proceedings in courts of Texas except where otherwise provided.

(c) [criminal rule; no civil rule] Hierarchial governance shall be in the following order: the Constitution of the United States, those federal statutes which control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, the common law of England. Where possible, inconsistency is to be removed by reasonable construction.

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 of 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; or

(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 was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may, or at a 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) [criminal rule; no civil rule] Fundamental error. Nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Comment [to criminal rule, no comment to civil rule]. Adoption of this rule is not meant to change the Texas harmless error doctrine. In subsection (d) the federal rule refers to plain error. This has been changed to fundamental error which conforms to Texas practice. The Committee intends no change through 103(d) in present Texas law.

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 it 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) [civil rule] Hearing of jury. Hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require.

(c) [criminal rule] Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted

when the interests of justice require, or, when an accused is a witness, if he so requests.

(d) [civil rule] Weight and credibility. This rule does not limit the right of a party of introduce before the jury evidence relevant to weight or credibility.

(d) [criminal rule] Testimony by accused out of the hearing of the jury. The accused does not, by testifying upon a preliminary matter out of the hearing of the jury, subject himself to cross-examination as to other issues in the case.

(e) [criminal rule] 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) above 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 thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

Comment. This rule is the federal rule with one modification. Under the federal rule, a party may require his opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party himself 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 his own case. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversa-

tions, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirement. *See also* TEX. R. [CRIM.] EVID. 610(a).

Rule 107. [criminal rule; no civil rule] Rule of Optional Completeness

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

TEXAS RULES OF CRIMINAL EVIDENCE

ARTICLE XI. MISCELLANEOUS PROVISIONS

Rule 1101. Applicability of Rules

(a) General Rule. These rules apply in criminal proceedings in all Texas courts and in examining trials before magistrates.

(b) Rule of privilege. These rules with respect to privileges apply at all stages of all actions, cases and proceedings.

(c) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) *Preliminary questions 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.

(2) *Grand jury.* Proceedings before grand juries.

(3) *Miscellaneous proceedings*:

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

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

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

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

(E) Issuance of search or arrest warrant;

(F) Direct contempt determination.

(d) Rules applicable in part. In the following proceedings these rules apply 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:

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

(2) Probation revocation;

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

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

(5) Proceedings conducted pursuant to Texas Code of Criminal Procedure article 11.07.

(e) Evidence in hearings under the Texas Code of Military Justice, article 5788, shall be governed by that Code.