RULES OF EVIDENCE

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I. INTRODUCTORY COMMENTS

The Texas Rules of Evidence ("Texas Rules") are derived from the Federal Rules of Evidence ("Federal Rules"). To some degree the numbering sequence even matches. This outline analyzes the ways in which the admission of evidence in civil and criminal cases in Texas differs from the admission of evidence in federal cases.

II. RELEVANCE

A. EXCLUSION OF RELEVANT EVIDENCE

Relevant evidence that is not excluded by any other exclusionary rule of evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. Texas Rule 403 eliminates "waste of time" as a ground for exclusion, but this seems insignificant since evidence can be excluded if it causes undue delay or needless presentation of cumulative evidence. Like the Federal Rules, this rule does not list surprise as a ground for exclusion.

B. RECURRING RELEVANCE QUESTIONS

Some of the recurring questions outlined herein are treated differently under the Texas Rules than under the Federal Rules. Only these differences are addressed here.

1. Subsequent Remedial Measures

Like Federal Rule 407, Texas Rule 407 bars the admission of subsequent remedial measures to prove negligence or culpable conduct. Texas Rule 407, however, contains two important exceptions contrary to the Federal Rule. First, evidence of subsequent remedial measures is admissible in **product liability cases based on strict liability**. Second, even in negligence suits, evidence of **written notification of a product defect** sent by a manufacturer to a purchases is admissible to prove the existence of the defect.

2. Character

a. Generally Inadmissible

Texas Rule 404 has adopted the spirit of the Federal Rule 404 that evidence of a person's character or character trait is generally not admissible in civil cases to prove the person acted in conformity with that character or trait on a particular occasion. But the Texas Rules include certain exceptions to this general rule not found in the Federal Rules, and the Federal Rules include an exception to this general rule not found in the

Texas Rules.

b. Exceptions Found in Texas Rules but Not in Federal Rules

In Texas civil cases, evidence of a person's character is admissible to prove the person acted in conformity with his character in two situations. The Federal Rules do not contain such exceptions for civil cases.

1) Moral Turpitude

A person accused of conduct involving moral turpitude may introduce evidence of a pertinent trait of his own character, much as the defendant in a criminal case may open the door to his own good character to show innocence. Once the door has been opened, the accusing party may rebut this evidence.

2) Self-Defense

If self-defense has been raised as an issue in a civil assault case, evidence of the violent character of the alleged victim may be introduced by the accused; the allege victim may offer evidence of his peaceable character in rebuttal.

c. Exception Found in Federal rules but Not in Texas Rules

Federal Rule 415 authorizes the admission of character evidence in civil cases in which a claim for damages or other relief is based on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation. In such cases, evidence that the party had committed other acts of sexual assault or child molestation is admissible for any purpose for which it may be relevant, including as evidence of the party's character. The Texas Rules do not contain such an exception.

3. Past Sexual Conduct

The Texas Rules do not include a rule for civil cases that corresponds to the federal rape shield provision (Federal Rule 412). Nevertheless, Texas Rule 404 renders evidence of a complainant's past sexual conduct inadmissible in a tort action arising from a sexual assault if the evidence is offered to prove the complainant's character and thereby establish that the complainant consented on the occasion in question.

III. JUDICIAL NOTICE

A. JUDICIAL NOTICE OF FACT

The Texas Rules follow the Federal Rules in limiting judicial notice to the particular facts of the case, often called "the adjudicative facts," as opposed to the legislative facts that govern larger policy considerations. In civil cases, the jury shall be instructed to accept as conclusive any fact judicially noticed. [Texas Rule 201]

B. JUDICIAL NOTICE OF LAW

The Federal Rules contain no rules covering judicial notice of law. The Texas Rules are designed to permit a court to take judicial notice of the laws of any state, country, or Texas city, county, or agency. In all instances where judicial notice is taken of law, the court's determination is subject to review as a ruling on a question of law.

1. Determination of Law of Other States

Judicial notice of the common law, decisional law, statutes, and rules of any state or territory of the United States is mandatory if requested by a party. The judge must be furnished with sufficient information to properly comply with the request, and opposing counsel must be given sufficient notice to prepare to meet the request. [Texas Rule 202] All parties are entitled to notice and a hearing on the court's taking judicial notice of the law of other states.

2. Determination of Law of Foreign Countries

a. Notice and Proof Required

A party intending to raise an issue of law of a foreign country must give written notice of such intent in the pleadings or otherwise, and at least 30 days prior to trial must furnish to all parties all sources to be relied on as proof of the foreign law, in the original language and in English translation.

b. Use of Additional Resources

In taking judicial notice of foreign law, the judge is not restricted to the sources supplied by counsel but may consider any other sources, without regard to the rules of evidence. All parties are notified of the additional sources looked to by the court and are given an opportunity to comment on those sources. [Texas Rules 203]

3. Determination of Texas City and County Ordinances, Contents of Texas Register, and Published State Agency Rules

A court on its own may, or on request of any party shall, take judicial notice of the ordinances of Texas municipalities and counties, of the contents of the Texas Register, and of codified Texas agency rules published in the Administrative Code. All parties are entitled to notice and a hearing on the propriety of the court taking judicial notice. [Texas Rule 204]

IV. DOCUMENTARY EVIDENCE

A. SELF-AUTHENTICATION

1. Business Records Accompanied by Affidavit

a. Requirements and Scope of Rule

Under the Federal Rules, business records are self-authenticating if a custodian or other qualified person certifies that the records meet the requirements of the business records exception. The Texas Rules provide that business records may be self-authenticated by means of an affidavit. The following requirements must be met:

(i) The affidavit must be made by a person who could lay the foundation for the business records exception [Texas rule 803(6)];

(ii) The affidavit must state that the records meet the requirements for the business records exception; *i.e.*, that they were made in the regular course of the business, it was the regular course of the business to make such records, they were made at or near the time of the event recorded, and they were made by an employee who had personal knowledge;

(iii) The records in question must be attached to the affidavit and must be the originals or exact duplicates; ***and***

(iv) The affidavit must be filed with the clerk of the court at least 14 days before trial and prompt notice of the filing must be given to opposing parties.

[Texas Rule 902(10)] [FRE 902 (11)]

b. Suggested Form of Affidavit

The following suggested form of affidavit is set forth in Texas Rule 902(10(b):

No. _____

John Doe		In the _____
(Name of Plaintiff)	)	
v.	)	Court In and For
John Roe	)	
(Name of Defendant)	)	_____ County, Texas

AFFIDAVIT

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

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

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on _____ day of _____, 20____.

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

_____ _____

2. Federal Declarations

Under the Federal Rules [28 USC §1746] a written declaration made under penalty of perjury can be used instead of a sworn affidavit. The declaration must be dated and state *"I declare (certify, verify, or state) under penalty of perjury that the forgoing is true and correct"*. This can be very useful in civil cases when a sworn pleading is required but a notary public is not available.

3. Foreign Public Documents

The final certification of genuineness that must accompany a foreign certified public document before it is self-authenticating under the Federal Rules is dispensed with under the Texas Rules if the foreign country and the United States are parties to a treaty that abolishes or displaces the certification requirement. [TRE and FRE 902(3)]

B. BEST EVIDENCE RULE (Parole Evidence)

The Texas Rules specifically ***permit secondary evidence*** to be admitted to establish the contents of a writing, recording, or photograph ***when no original is located in Texas***. This is an additional satisfactory ground for nonproduction of the original. [Texas Rule 1004(a)] Also, Texas Rule 1009 authorizes the translation of a foreign language document to be proved by an affidavit of a qualified translator. The Federal Rules contain no corresponding rule.

C. REMAINDER OF RELATED WRITINGS

1. Party Requesting Remainder Takes Over Witness Questioning

Under Federal Rule 106, when a writing or recorded statement or part thereof is introduced at trial, the other party may require the offering party to introduce any part of the same or other writing that the judge rules ought to be, in fairness, considered contemporaneously. Texas Rule 106 differs from the Federal Rule in that the party requesting that the remainder or other writing be offered is allowed to take over the questioning of the witness for this purpose.

2. Scope of Rule

"Writing or recorded statement" includes depositions. Texas Rule 106 does not circumscribe the right of a party to develop fully the matter on cross-examination or as part of her own case. Nor does it affect the common law "rule of optional completeness," whereby a party may waive all objections to otherwise inadmissible parts of writings or conversations by introducing other parts (*see* below). If the otherwise inadmissible parts must be considered in order to provide the jury with a complete understanding of the writing or conversation, those parts become admissible.

3. "Rule of Optional Completeness"

In addition to Rule 106, which authorizes the contemporaneous introduction of the remainder of a writing or recorded statement, Texas Rule 107 explicitly sets forth the common law "rule of optional completeness." This rule provides that when part of an act, declaration, conversation, writing, or recorded statement is introduced in evidence by one party, other portions of the act, declaration, conversation, writing, or recorded statement may be introduced by the other party if necessary to make the originally introduced portion fully understood. Note that this rule differs from Rule 106 in two respects. First, it applies to nonwritten and nonrecorded statements. Second, it does not authorize contemporaneous introduction of the other portions of the act, declaration, etc. The party seeking to introduce the other material must wait until she presents her case. The Federal Rules do not expressly contain such a rule, although federal courts follow this practice.

D. AUDITS

Regardless of any other evidence rule, a verified report of an auditor appointed by the court pursuant to the rules of civil procedure is admissible. [Texas Rule 706]

VI. TESTIMONIAL EVIDENCE

A. COMPETENCY OF WITNESS

1. General Rule of Competency

a. Personal Knowledge and Oath Required

Texas follows the Federal Rules in requiring that the witness have personal knowledge of the matter she is to testify about as a qualification for competency and in requiring the witness to declare by oath or affirmation that

she will testify truthfully. [Texas Rules 602, 603]

b. Insane Persons and Children Are Not Competent to Testify

In addition, insane persons and children are declared to be incompetent to testify. It is up to the court to determine whether the witness is in "an insane condition of mind" at the time the testimony is offered or was in such a condition at the time of the events about which the witness offers to testify. A determination of insanity at either time will disqualify the witness. Children or others who, upon examination by the court, do not possess sufficient intellect to relate transactions will be disqualified. [Texas Rule 601(a)(1), (2)] (usually under 10 years of age testimony will be suspect)

2. Dead Man's Statute

a. Protected Parties

The protected parties under the Texas Dead Man's Statute [Texas Rule 601(b)] are: (i) executors, (ii) administrators or guardians in any action by or against them, and (iii) heirs or legal representatives in any action by or against them, that is based in whole or in part on an oral statement of decedent.

b. Scope of Exclusion

The rule excludes only the testimony of a party as to an ***oral statement*** by the decedent or the incompetent offered against another party. Testimony as to other transactions with the decedent is now admissible. *But note:* A party may testify as to oral statements of the decedent or the incompetent in ***two instances***:

(I) If the oral statement is ***corroborated***; or

(ii) If the witness is ***called at trial by the opposing party*** to testify as to the oral statement.

The protection of the statute are ***not*** waived if the witness is deposed by the opposing party before trial.

c. Interested Witness's Testimony

If the action does not involve an executor, administrator, guardian, heir, or legal representative, no witness will be disqualified from giving testimony as to transactions or conversations with a decedent or incompetent merely because the witness is a party or an interested person in the action.

d. Required Instruction

Where a witness is barred from testifying as to an uncorroborated oral statement by the Dead Man's Statute, the court is required to instruct the jury

that the party is precluded by law from so testifying.

3. **Juror as Witness**
The Texas Rules declare members of the jury incompetent to testify in the trial of the case in which they are sitting as jurors, and upon inquiry into the validity of the verdict, a juror is competent to testify only as to whether any outside influence was improperly brought to bear upon any juror.

4. **Judge as Witness**
A judge is incompetent to testify at a trial over which the judge is presiding. [Texas Rule 605] Furthermore, judges should be allowed to testify in other cases only in relatively rare circumstances. [Joachim v. Chambers, 815 S.W.2d 234 (Tex. 1991)]

B. FORM OF EXAMINATION OF WITNESS–LEADING QUESTIONS

Ordinarily, a party may not lead her own witness without first showing that the witness is hostile, adverse, or identified with an adverse party. However, a party may lead her own witness where necessary to develop the witness's testimony; *e.g.*, on preliminary matters, to refresh memory, or where the witness is ignorant, illiterate, or a child. [Texas Rule 611(c)]

C. OPINION TESTIMONY

1. **Admissibility of Expert Testimony**
Adopting the reasoning of the United States Supreme Court n *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Texas Supreme Court has held that expert testimony is admissible only if the trial court finds that the theory or technique underlying the expert's testimony is ***reliable*** and that the testimony is ***relevant*** to the issues in the case. Among the factors that the trial court may consider in making this determination are: (i) the extent to which the theory has or can be tested; (ii) the extent to which the expert must subjectively interpret the data; (iii) whether the theory has been published or subjected to peer review; (iv) the technique's potential rate of error; (v) whether the underlying theory or technique has been generally accepted in the relevant scientific community; and (vi) the extent to which the theory or technique has been put to nonjudicial use. [E.I. Du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex.1995)]

2. **Expert Opinion on Mixed Questions of Law and Fact**
The Texas Supreme Court has explicitly held that an expert may testify in terms of "negligence" and "proximate cause" as long as the testimony is "based on proper legal concepts." [Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361 (Tex. 1987); Louder v. DeLeon, 754 S.W.2D 148 (Tex. 1988)]

3. **No Court-Appointed Experts**
The provision in the Federal Rules [FRE 706] providing for court-appointed experts has been deleted in the Texas Rules of Evidence.

D. CREDIBILITY

1. Prior Inconsistent Statement

a. Requirements–Foundation; Opportunity to Explain

The Texas Rules require that a foundation be laid before cross-examination on, or extrinsic evidence of, a prior inconsistent statement will be permitted. The witness must be given an opportunity to explain or deny the statement. extrinsic evidence will ***not*** be admitted if the witness admits having made the statement. [Texas Rule 613(a)] By comparison, the Federal Rule has no foundation requirement before cross-examination concerning a prior inconsistent statement and permits extrinsic evidence to be introduced without laying a foundation "when the interests of justice require."

b. Permissible Use

The prior statement is hearsay, admissible only for impeachment unless it was made under oath at a prior trial or deposition. [Texas Rule 801(e)(1)]

2. Bias or Interest

The Texas Rules require a foundation to be laid before cross-examination on, or extrinsic evidence of, circumstances or statements showing bias or interest will be permitted. The witness must be told the details of the statement or the circumstances and must be given an opportunity to explain or deny them. No extrinsic evidence may be introduced if the witness admits the bias or interest. [Texas Rule 613(b)]

3. Conviction of Crime

a. Use for Impeachment

A witness may be impeached by showing he has been convicted of a crime only if:

(i) The crime was a felony or involved moral turpitude; ***and***

(ii) Its probative value outweighs its prejudicial effect.

In contrast, under the Federal Rules, any crime involving dishonesty or false statement (rather than the broader moral turpitude) is admissible for impeachment purposes. With respect to a felony not involving dishonesty or false statement, a federal court may exercise discretion to exclude it. The Federal Rules employ different balancing tests for the exercise of this discretion depending on whether the felony is being offered to impeach the accused or a witness other than the accused. The standard applied when a felony is offered against the accused favors exclusion because the probative value of the felony must outweigh its prejudicial effect. In the case of all other witnesses, the test favors admission because the conviction will be

excluded only if the danger of unfair prejudice substantially outweighs its probative value.

b. Time Limitations and Notice

If more than 10 years have elapsed since the witness was released from the confinement imposed for the conviction, the conviction is not admissible [TRE 609, FRE 609(3)] unless the court determines that its probative value substantially outweighs its prejudicial effect. Texas Rule 609(f) requires that written notice be given of intent to use a conviction if there is a timely request by the adverse party.

c. Effect of Pardon

Evidence of a conviction is not admissible if the person convicted has been pardoned because of rehabilitation or has successfully completed probation ***and*** has not subsequently been convicted of a felony or a crime involving moral turpitude. Evidence of a conviction subsequently pardoned due to a finding of innocence is never admissible.

d. Effect of Appeal

Unlike the Federal rules [FRE 609(e)], the Texas Rules do not permit a witness to be impeached with a conviction that is pending on appeal.

e. Method of Proof

Under the Texas Rules, a party can prove that a witness has been convicted of a crime either by eliciting that information from him or by introducing a public record.

4. Specific Instances of Misconduct

The Federal Rules permit inquiry into specific instances of prior conduct of the witness during cross-examination if ***probative of truthfulness***. Except as to conviction of a crime, one may not inquire into or introduce extrinsic evidence of specific prior acts of the witness to prove the witness's untruthful character. [Texas Rule 608(b)]

F. EXCLUSION AND SEQUESTRATION OF WITNESSES

Texas Rule 614 is similar to Federal Rule 615 regarding the exclusion of witnesses, except that Texas Rule 614 also prohibits the ***spouse*** of a party from being excluded from the courtroom.

VII. HEARSAY RULE

A. TEXAS DEFINITION OF HEARSAY

1. Compared with Federal Rules

The Texas Rules' definition of hearsay attempts to codify existing common law and to achieve a different result from that obtained under the Federal Rules' definition of hearsay. The distinction is part of the continuing battle flowing from the English case of *Wright v. Tatham*. In that case, an effort was made to introduce letters written to a man whose competency was at issue. The letters did not state that the man was competent (if so, they would have been inadmissible hearsay offered to prove the truth of the matter asserted); rather, by discussing social and business affairs, they indirectly asserted that the author of the letters believed the recipient to be competent.

a. "Matter Asserted" Defined

Under the Federal Rules, a business letter that does not directly assert that its recipient is competent but allows that assertion to be inferred is not classified as hearsay. The thinking is that the business letter is not offered for the truth of the matter "directly asserted" but for a truth that is inferred from the matter asserted. Texas reverses this result by defining "matter asserted" to include not only any matter explicitly asserted but also any matter implied by a statement where the probative value of the inference drawn hinges on the declarant's credibility. [Texas Rule 801(c)]

b. "Statement" Defined

In defining "statement," both the Texas and Federal Rules distinguish between oral or written verbal expression (*i.e.*, spoken or written words) and nonverbal conduct (*i.e.*, actions).

1) Federal Rule

The Federal Rules define a statement as either an oral or written ***assertion*** or as nonverbal conduct, if intended by the actor as an assertion.

2) Texas Rule

Under the Texas Rule, any oral or written verbal ***expression*** is treated as a statement, as is nonverbal conduct that is intended as a substitute for verbal expression. [Texas Rule 801(a)]

Example: Identifying a member of a lineup by pointing at him is nonverbal conduct intended as a substitute for verbal expression; it is a statement. An involuntary shudder is not a statement because it is nonverbal conduct not intended as a substitute for verbal expression.

2. Categories of Conduct Within Texas Hearsay Rule

The Texas Rule defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, if offered to prove the truth of the matter directly or indirectly asserted. [Texas Rule 801)c), (d)] Texas Rules 801(a)

through (d) thus combine to bring four categories of conduct within the hearsay rule:

a. Verbal (Oral or Written) Explicit Assertion

An oral or written explicit assertion offered to prove the truth of the matter asserted is hearsay.

Example Witness testifies that declarant said, "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

b. Verbal (Oral or Written) Explicit Assertion as to Implied Matter

A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, with the probative value of the statement flowing from declarant's belief as to the matter, is hearsay.

Example: The only known remedy for X disease is medicine Y, and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease, witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The testimony is a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, and the probative value of the statement as offered flows from declarant's belief as to the mater. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

c. Nonassertive Verbal Conduct as to Implied Matter

Nonassertive verbal conduct offered for the truth of a matter implied by the statement, with the probative value of the statement flowing from declarant's belief as to the matter, is hearsay.

Example: In a rape prosecution to prove that Richard, the defendant, was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is a statement because it was a verbal expression. The matter asserted was that Richard was in the room because the matter is implied from the statement, and the probative value of the statement as offered flows from the declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove

the truth of the matter asserted.

d. Nonverbal Assertive Conduct Substituting for Verbal Expression
Nonverbal assertive conduct intended as a substitute for verbal expression is hearsay.

Example: W testifies that A asked declarant, "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and thus is a statement. The matter asserted is that X went north because that is implied from the statement, and the probative value of the statement as offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

B. STATEMENTS THAT ARE DEFINED AS NONHEARSAY

1. Prior Statements, Admissions, and Depositions

Certain prior statements by a witness who is present to testify and to be cross-examined and certain admissions made by a party are defined under the Federal Rules and the Texas Rules as statements that are not hearsay. [Texas Rule 801(e)(1), (2)] IN addition, the Texas Rules provide that whether or not deponent is present, depositions taken in the same proceeding are not hearsay. [Texas Rule 801(e)(3)]

C. THE HEARSAY EXCEPTIONS

1. Former Testimony

The Texas Rules make two changes n the Federal Rules governing admissibility of former testimony of an unavailable witness in a subsequent trial.

a. Unavailability
The definition of unavailability in Texas Rule 804(a) requires the proponent to ***attempt*** to take the deposition of the unavailable witness before admitting former testimony. This is not necessary under the Federal Rules.

b. Identity of Parties
Texas Rule 804(b)(1) has relaxed the identity of parties requirement for the admission of former testimony; the party against whom the testimony is now offered ***or a person with a similar interest*** must have had an opportunity to and similar motive to develop the testimony by direct, cross, or redirect examination.

2. Statements Against Interest

a. Unavailability Not Required

Under the Texas Rules, the witness need not be unavailable before an out-of-court statement against the witness's interest may be admitted into evidence. [Texas Rule 803(24)] The theory behind this exception is that one is unlikely to make a statement against his own interest unless it is true. For this factor of trustworthiness to be valid, the statement must have been against the declarant's interest at the time it was made.

b. Statements Included in Category

Texas has expanded the category of statements that qualify under this exception to include:

(i) A statement that is against pecuniary or proprietary interest;

(ii) A statement that tends to subject one to civil or criminal liability;

(iii) A statement that tends to render invalid a claim against another; and

(iv) A statement that tends to make the speaker an object of hatred, ridicule, or disgrace.

Note: The last category, a statement against "social interest," is not included in the Federal Rules.

3. Business Records

The Texas rules define "business" as "any and every kind of regular, organized activity whether conducted for profit or not." The Federal Rules define "business" as "business, institution, association, profession, occupation, and calling of every kind, whether conducted for profit or not." Under the Texas Rules, business records can be self-authenticated in accordance with the requirements of Texas Rule 902(10). (*See* V.A.1., *supra*.) Medical opinions and diagnoses contained in business records (*e.g.*, a hospital record) are admissible.

4. Omission of Catch-All Exception

The Texas Rules have eliminated the general hearsay exception found in the Federal Rules for matters not covered by specific exceptions.

VIII. PRIVILEGES

A. ATTORNEY-CLIENT PRIVILEGE

1. Attorney-Client Relationship

a. Representative of a Lawyer

Under the Texas Rules, the definition of a "representative of a lawyer" has been expanded to include "an accountant who is reasonably necessary for the lawyer's rendition of professional legal services." [Texas Rule 503(a)(4)(ii)] A representative of a lawyer could also be anyone hired by the lawyer to assist the lawyer "in the rendition of professional services," such as an investigator or an appraiser, as well as the lawyer's regularly employed office staff. [Texas Rule 503(a)(4)(I)]

b. Corporation as Client

A "representative of the client" is defined under the Texas Rules as a person having the authority to obtain legal services or to act on advice rendered by an attorney on behalf of the client. However, the Texas Rules have expanded the definition to also include any other person who, for purposes of effectuating legal representation for the client, ***makes or receives a confidential communication*** while acting within the scope of employment. [Texas Rule 503(a)(2)]

2. Confidential Communications

a. Scope

The privilege only covers communications between the lawyer and the client (and their respective representatives); it does not extend to third parties' communications to the lawyer. Only communications made in confidence are protected. Inadvertent disclosure (*e.g.*, telephone operator overhearing communication) does not waive the privilege, but reasonable precautions must be taken to insure confidentiality.

b. Communications in Presence of Others

The communication to the lawyer in the presence of third parties will not be confidential unless they are persons "to whom the disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

3. Discovery

In Texas, privilege matters are beyond the scope of discovery. [Tex. R. Civ. P. 166b; West v. Solito, 563 S.W.2d 240 (Tex. 1978)]

4. Attested Document Exception

The Texas Rules provide that there is no privilege "as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness." [Texas Rule 503(d)(4)] The lawyer who notarizes a document or witnesses a will may have endangered the privilege as to communications relating to the attested document, such as the testator's competency.

B. PHYSICIAN-PATIENT PRIVILEGE

1. **General Rule**

a. **Physicians Only**
The privilege in Texas extends to physicians only, not to dentists or nurses, unless they are "participating in the diagnosis and treatment under the direction of the physician." "Physician' means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient to be so. [Texas Rule 509; *and see* Tex. Civ. Stat. Ann. art. 4495b]

b. **Scope of Privilege**
The privilege covers not only confidential communication between a physician and patient but also "records of the identity, diagnosis, evaluation or treatment of a patient" that are created or maintained by a physician. [Texas Rule 509(b)(2)] The privilege continues after treatment has ended and may be claimed by a representative of the patient.

2. **Exceptions**
Texas has added the following exceptions, which further decrease the importance of the physician-patient privilege. Disclosure is permissible:

a. If disclosure is relevant to any involuntary civil commitment or hospitalization proceeding, proceeding for court-ordered treatment, or probable cause hearing;

b. In any proceeding regarding abuse or neglect of a resident of a nursing home or other similar institution;

c. If the patient consents in writing for particular information or records to be disclosed to a particular person for a particular purpose. The privilege is waived only as to the particular persons, information, and purposes set forth in the written consent, which may be withdrawn at any time; or

d. If the communication or record is relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which ***any*** party relies upon the condition as a part of the party's claim or defense.

C. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION

1. **"Professional" Defined**
A "professional" for purposes of this privilege includes any person:

a. Authorized to practice medicine;

b. Licensed or certified by the state in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

c. Involved in the treatment or examination of drug abusers; or

d. Reasonably believed by the patient to be included in any of the above categories.

2. Scope of Privilege

The privilege extends to confidential communications made to a professional by anyone who is engaged in consultation, diagnosis, evaluation, or treatment of any mental or emotional conditions or disorder, including alcoholism and other drug addiction. Records which are created and maintained by the professional are privileged. The privilege continues after the patient has terminated the relationship with the professional.

3. Exceptions in Court Proceedings

a. Disputes Between Professional and Patient

In any proceeding flowing from a dispute between the professional and the patient, the privilege does not apply.

b. Court-Ordered Examinations

In the case of court-ordered examinations where the patient is informed in advance that communications regarding his mental or emotional condition or disorder will not be privileged, the privilege does not apply.

c. Patient Places Mental Condition in Issue

In any proceeding where the patient places her mental or emotional condition in issue, or after death of the patient when ***any party*** relies on the condition as an element of her claim or defense, the privilege does not apply. [Texas Rule 510]

d. Offensive, Rather than Defensive, Use

In *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985), the Texas Supreme Court held that a plaintiff may not assert the psychotherapist-patient privilege to shield information that would be relevant to a defense raised by the defendant. According to the court, this would constitute "an offensive, rather than a defensive," use of the privilege and is impermissible.

e. Relevant to Condition that Is Part of Claim or Defense

If the communication or record is relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which ***any*** party relies upon the condition as a part of the party's claim or defense, the privilege does not apply.

D. HUSBAND-WIFE PRIVILEGE

1. **No Spousal Testimonial Privilege**
Two spousal privileges apply in criminal cases. One protects confidential communications made during the marital relationship. The other permits a wife to refuse to testify against her husband (and vice versa). In civil cases, only the first of these privileges applies. Thus, in a civil case, a confidential communication made during the marital relationship is privileged, whereas no privilege exists for a spouse to refuse to testify against the other spouse.

2. **Confidential Communications**
"A communication is confidential if it is made privately by any person to his spouse and it is not intended for disclosure to any other person." [Texas Rule 504(a)] The privilege continues ***after*** the marriage as to communications made ***during*** the marriage. It does not cover communications made before the marriage relationship.

3. **Exceptions**
The privilege does not extend to:

   a. Communications made to enable, and/or plan to commit a crime or fraud;

   b. Proceedings between spouses or between a surviving spouse and one who claims through the deceased spouse;

   c. Proceedings to commit a spouse or establish her incompetency or competency; or

   d. Proceedings in which a party is accused of conduct that would constitute a crime against the person of the spouse, any minor child, or any member of the household of either spouse.

E. COMMUNICATIONS TO CLERGY

1. **Definition of Clergy**
Texas Rule 505(a)(1) defines a member of the clergy as a "minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting him."

2. **General Rule of Privilege**
The privilege extends to confidential communications to a member of the clergy "in his professional character as spiritual advisor." [Texas Rule 505(b)]

3. **Exception–Proceeding Regarding Child Abuse or Neglect**
The privilege does not apply in a proceeding regarding the abuse or neglect of a child.

F. ACCOUNTANT-CLIENT PRIVILEGE ABOLISHED

The accountant-client privilege that formerly existed in Texas was abolished by the Texas Rules. If, however, an accountant has been employed by an attorney on behalf of the client, the accountant will be considered a "representative of the lawyer" for purposes of the attorney-client privilege, and communications made by or to the accountant ***for the purposes of facilitating the rendition of legal services*** will be covered by the attorney-client privilege.

G. WAIVER

A privilege-holder may waive a privilege in several ways:

1. Voluntary Disclosure

A privilege-holder who voluntarily discloses a significant portion of an otherwise privileged communication waives the privilege as to that communication. An inadvertent disclosure of privilege documents during discovery may be considered a voluntary disclosure and thus a waiver of the privilege as to those documents. [Granada Corp. v. First Court of Appeals, 844 S.W.2d 223 (Tex. 1993)]

2. Testimony as Character Witness

Under the Texas Rules, the holder of the privilege (or her representative) waives the privilege by calling as a character witness the person to whom the privileged communications were made. The waiver extends only to those communications that are relevant to the character traits testified to by the witness.

3. Implied Waiver Through Offensive Use of Privilege

A party impliedly waives the attorney-client privilege by asserting it in an offensive, rather than defensive, manner. [Republic Insurance Co. v. Davis, 856 S.W.2d 158 (Tex. 1993)]

IX. PROCEDURAL CONSIDERATIONS

A. PRESUMPTIONS

Most presumptions in Texas merely shift the burden of going forward; however, some have a stronger impact. The drafters of the Texas Rules found it impossible to accommodate the existing case law in these various areas with any all0encompassing rule of the weight to be given presumptions in all civil cases in Texas; Article III of the Federal Rules was simply deleted from the Texas Rules and the practitioner is left to consult the decisional law in each substantive area.

B. RULINGS ON EVIDENCE–RECORD OF OFFER OF PROOF

Under Federal Rule 103(b), whether the offer of proof regarding excluded evidence must be made in question and answer form is left to the discretion of the court. Under Texas Rule 103(b), any party may require that the offer be in this form, merely by asking; in such a case, the judge has no discretion.

X. RELATIONSHIP OF PARTIES, JUDGE, AND JURY

The Texas Rules' assignments of responsibilities to the parties, the judge, and the jury are consistent with the Rules of Procedure in Texas.

SPECIAL CRIMINAL RULES OF EVIDENCE

XI. EXTRANEOUS OFFENSE EVIDENCE

Summary:

1) **Extraneous Offense**: crime of which the accused cannot be convicted. Neither (a) charged offense; nor (b) a lesser included offense.

2) **General Rule:** Evidence of an extraneous offense is inadmissible, because the prosecution cannot prove guilt by proving that the accused is a bad person and thus must have committed the charged crime.

3) If evidence showing an extraneous offense is relevant to some issue other than the accused's character, it is admissible unless the trial judge is convinced that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

4) Extraneous offense evidence may be admissible as relevant to :

   a) Motive
   b) Intent or knowledge
   c) Mistake or accident [to rebut]
   d) Identity (when D has put that in issue)
   e) Common scheme or plan

5) If a defendant makes a request, State must give defense pretrial notice of its intent to offer extraneous offense evidence as part of its case-in-chief.

RULE: A defendant puts his identity into issue (and thus triggers the State's ability to use evidence that he committed similar extraneous offenses) by either-

   a) introducing evidence that he was not the perpetrator, such as alibi testimony, or
   b) impeaching all the State's eyewitnesses.

XII. PRIOR SEXUAL CONDUCT OF SEXUAL ASSAULT VICTIM

Summary: 1) **General Rule:** When the victim of a sexual assault testifies, defense counsel may neither
   a) cross-examine the victim concerning prior sexual conduct, nor
   b) introduce evidence as to such conduct.

2) **Exception:** Defense is permitting to go into prior sexual conduct if
   a) **Probative value** of the questioning substantially outweighs the danger of undue prejudice; **and**
   b) The activity:
      (1) involved conduct with D and is offered to show consent; or
      (2) tends to show a motive for witness to falsify or bias of Witness; or
      (3) rebuts State's scientific or medical evidence; or
      (4) **is such that D is constitutionally entitled to present evidence of it.**

Note: This is a hot constitutional area, particularly in sexual assault of a child cases(the old statutory rape), because it denies a Defendant a defense of consent or enticement available in all other assaultive offenses.

45. D is on trial for sexual assault of V. V testifies that on the occasion at issue, D compelled her by force to engage in sexual activity. D's attorney wants to question V concerning prior situations in which the defense believes V voluntarily engaged in sexual activity with D. How must defense counsel go about this, and should the trial judge permit it?

Investigator must show thru Defense counsel that the questions would elicit testimony about prior conduct with the accused that is relevant to the issue of consent. To put the question before the judge, counsel should-

1. *notify the judge, out of the juries presence, of her desire to ask these questions;*
2. *when the judge holds an in camera hearing, persuade the judge that the probative value of the questions substantially outweighs the danger of undue prejudice.*
3. *when the judge rules, counsel must not go beyond that ruling without first securing the trial judge's approval;*
4. *make certain the trial court record contains the full defense contention, so the sealed record will be available in event of an appeal.*

The judge should permit it, because the activity was with D and is relevant to consent.

XIII. WRITINGS OR RECORDED STATEMENTS

Summary: 1) If one party introduces all or part of a writing or recorded statement, the other party is entitled to introduce-
   a) **any** other part of the writing or recorded statement; or
   b) **any** other writing or recorded statement;
   which should in fairness be considered by the jury at the same time.

2) The other party is entitled to introduce this immediately.

XIV. RULE OF OPTIONAL COMPLETENESS

Summary: If one party introduces part of an act, conversation, or statement, the other party is entitled to prove "the rest of the subject."

XV. CLIENT'S COMMUNICATION TO ATTORNEY

Summary: In criminal litigation, the client of an attorney is entitled to have kept confidential both:

1) a private communication to the attorney; and
2) any facts coming to the attorney's attention because of the attorney-client relationship.
3) any communication to an investigator who is assisting in the rendition of legal services by an attorney.

XVI. PRIVILEGE OF DEFENDANT'S SPOUSE- SPOUSAL PRIVILEGE

Summary:

1) Spouse of a defendant has a privilege not to be called as a witness to testify against the defendant.

2) Exceptions: the defendant's spouse **may** be called if either-

   a) the prosecution is for an offense committed against
      (1) any minor child
      (2) a household member of either spouse; or
      (3) the spouse; or

   b) the spouse is called by the State to testify only about matters that occurred prior to the spouse's marriage to the defendant.

3) Prosecutor may comment to the jury if the defendant's spouse is shown to have information relevant to the case and the defendant fails to call the spouse as a witness.

RULE: The **spousal privilege** belongs to the **spouse-witness** and provides no basis for a defendant to object to testimony by a spouse who voluntarily testifies for the State.

RULE: Whether the spousal privilege is available turns on whether the witness is married to the defendant at the time of trial.

XVII. PRIVILEGE FOR MARITAL COMMUNICATIONS

Summary:

1) Any person (including a criminal defendant) has a privilege to refuse to disclose **and** to prevent others from disclosing a confidential communication made by the person to his or her spouse during marriage.

2) Communication is "confidential" only if it was both
   a) made privately; and
   b) not intended for disclosure to any other person.

3) Exceptions: no privilege exists if-
   a) the communication was made to commit a crime or fraud; or
   b) the prosecution is for a crime committed against the person of
      (1) any minor child;
      (2) a household member of either spouse;
      (3) the spouse.

RULE: The privilege for confidential martial communications does not prevent testimony as to a spouse's actions.

XVIII. PRIVILEGE FOR PLEA BARGAINING DISCUSSIONS

Summary: A statement made by the defendant is inadmissible if-

1) it was made in the course of plea discussions with a prosecutor;
2) that either-
   a) did not result in a plea of guilty or nolo contendere; or
   b) resulted in such a plea that was later withdrawn.

XIX. PRESENTING TESTIMONY CALLING, EXAMINING, AND "BOLSTERING" WITNESSES

Summary:

1) Both sides on application to the clerk are entitled to have subpoena issued for witnesses

2) Either side is entitled to have a **writ of attachment** issued for a witness if both
   a) the witness has been properly subpoenaed; and
   b) the witness fails to appear.

3) **General Rule:** A party may not "bolster" the testimony of the party's own witness by-
   a) proving prior out-of-court statements by the witness consistent with the witness's testimony;

b) introducing evidence that the witness is a truthful person (character testimony).

4) **"Bolstering"** with prior consistent statements is permitted if the other party has made either an express or implied charge of-
   a) recent fabrication by the witness; or
   b) improper influence on the witness; or
   c) improper motive on the part of the witness.

5) A party may introduce testimony of a witness's truthful character only if the witness's character has been attached by evidence of untruthfulness.

CROSS-EXAMINING AND IMPEACHING WITNESSES

Summary:

1) Methods of Impeachment
   a) contradiction
   b) prior convictions
   c) showing character for untruthfulness
   d) showing bias or interest

2) Other matters can be explored on cross-examination in order to correct a misleading impression left by the witness.

3) Character evidence relating to **witnesses**
   a) A witness may be impeached by character evidence (opinion or reputation) of untruthfulness.
   b) A witness's credibility may not be attacked by inquiry into specific instances of conduct (except convictions).
   c) Evidence of a witness's character for truthfulness (opinion or reputation) may be introduced only after the other party has attacked the witness's character for truthfulness.

4) **Impeachment With "Bad Conduct":** A witness may be impeached by showing prior "bad" or criminal conduct **only if** the cross-examining party establishes:
   a) the conduct resulted in a final criminal conviction;
   b) the conviction is not "stale" (rule of thumb: not more than 10 years since conviction or release from confinement, whichever is later);
   c) the conviction was for a misdemeanor that involved moral turpitude or a felony; and
   d) the prejudicial risk of the inquiry is substantially outweighed by its probative value.

5) **Impeachment by Contradiction**

a) General Rule: A party can impeach a witness for the other side by introducing extrinsic evidence that contradicts what the witness said, unless the witness's assertion is on a collateral matter.

b) A matter is **collateral** if the impeaching party would not be able to prove it as part of its own case.

RULES: 1) **Moral turpitude crimes**: theft, perjury, forgery, making false report to police, aggravated assault on a female, prostitution

RULE: Otherwise improper cross-examination is permitted if necessary to correct a misleading impression created by a witness's nonresponsive answer.

RULE: A party can contradict a witness's testimony with extrinsic evidence only if the matter is one the party would be able to prove as part of the party's own case.

RULE: In making trial rulings, the judge must not-

1) comment on the weight of the evidence; or
2) convey to the jury the judge's opinion of the merits.

"The Rule:" Excluding Witnesses from the Courtroom

Summary: 1) **"The Rule"** [of Exclusion of Witnesses]: Upon request of either party ("invoking the Rule'") witnesses must be excluded from the courtroom except during their own testimony.

2) If a witness is found to have violated the rule, the trial court may:
   a) hold the witness in contempt; and/or
   b) exclude the testimony of that witness.

3) An investigator may be excluded from the rule if his presence is necessary to the presentation of the case, even if he will likely be a witness later.

XX. HEARSAY EXCEPTION: STATEMENTS AGAINST PENAL INTEREST

Summary: 1) A hearsay statement **is admissible** if it is shown to have been made against the declarant's penal interest

2) A hearsay statement is admissible as against "penal" interest if
   a) the statement is shown to have been incriminating regarding the declarant;
   b) a reasonable person would not have made it unless she believed it

to be true; and

c) there are corroborating circumstances that clearly indicate the trustworthiness of the statement.

RULE: In criminal litigation, a statement against penal interest is admissible only if corroborating circumstances indicate it is trustworthy.

XXI. PHOTOGRAPHS

Summary:

1) General Rule: A photograph is admissible if a witness would be permitted to give a verbal description of what the photo shows.

2) **Authentication** of a photograph generally requires that a "sponsoring" witness testify that-
   a) the witness saw the matter shown in the photo; and
   b) the photo accurately depicts what the witness knows the matter looked like.
   c) It is not necessary for the person who took the photo to testify to its accuracy as long as any witness will state it is an accurate representation of the object at the time of the offense

XXII. SPECIAL EVIDENCE PROBLEMS

Summary:

1) Evidence concerning the results of a lie detector test are inadmissable

2) Testimony of witness whose memory has been hypnotically-enhanced is admissible only if trial court finds that party offering it has shown by clear and convincing evidence that the hypnosis has
   a) not rendered the witness's memory unreliable; and
   b) not impaired the other party's ability to test the witness's recall by cross-examination.

XXIII. EXCLUSIONARY RULE ISSUES: EVIDENCE ILLEGALLY OBTAINED

Summary:

1) **Federal Rule**: Evidence obtained as a result of a violation of the defendant's Fourth, Fifth or Sixth Amendment rights cannot be used to prove the defendant's guilt.

2) **Texas Statutory Law:** (more strict than federal law) Evidence may not be admitted against the accused at trial if it was obtained by an officer or other person in violation of:
   a) the Constitution of the United States; or

b) the laws of the United States; or
c) the Constitution of Texas; or
d) the laws of Texas.

3) **"Good Faith" Exception** to Texas Rule: Illegally obtained evidence is admissible if it was obtained by an officer
   a) acting in objective good faith reliance upon a warrant; and
   b) this was issued by disinterested magistrate based on probable cause.

4) Sometimes under Texas law whether evidence was illegally obtained is a question for the trial jury.

RULE: Although a ruling on a motion in limine does not preserve a matter for appeal, a ruling on a motion to suppress does preserve the issue.