

# **RULES OF EVIDENCE FOR THE INVESTIGATOR**

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# WHAT IS EVIDENCE?

- Evidence is the foundation to establish proof of one fact or another.
- Evidence is not necessarily information. (Although evidence can derive from information).
- Evidence is not proof. (Although that is what we are hoping for).
- TRE = Texas Rules of Evidence (exists in both Criminal and Civil matter).
- Generally, Evidence lies in the position of this equation:

PLEADINGS  $\geq$  EVIDENCE  $\geq$  PROOF  $\geq$  VERDICT



# WITNESSES

- Practical understanding – Why are these important. Organize your file accordingly.
- Who can be a witness?
  - TRE 601, et seq – Competency of Witnesses – All are competent except;
    - Some, Judge (TRE 605), Jurors (TRE 606)(with exceptions), Those that Lack Personal Knowledge.
  - 2 Questions Always:
    - Insane Persons – Competent unless insane at the time offered or at the event testified about.
    - Children – must appear to possess sufficient intellect to relate the transactions with respect to which they are interrogated.
    - (BUT, be aware of Juvenile Justice Code and political implication)



# WITNESSES CONTINUED...

- Lay v. Expert [Scientific or Advanced Training]
- Invoking the Rule – Will likely be done to sequester the witnesses. So, when in the hallway keep an eye out for other witnesses. [If you find them in violation either exclusion of testimony or contempt]. SOME exceptions,
  - Party and Spouse (in Civil Cases) Why?
  - Corporation Officer in Civil Case
  - Victim in Criminal Case
  - AND YOU (MAYBE) you might be allowed to stay “as a person necessary to the defense.” TRE 614 and *Peters v. State*, 997 S.W.2d 377.



# IMPEACHMENT

- Multiple Ways to Impeach.
- For Investigators (2 Common Ways)
  - Impeachment by Conviction – Must be felony or crime of moral turpitude. Limited to the last 10 years. However, that is not a solid rule. Generally, the court makes the decision (probative value v. prejudicial effect). Some exemptions.
    - Juvenile Adjudications
    - Deferred Prosecution or Adjudications – But, not if second strike.
  - Impeachment by Prior *Inconsistent* Statement – TRE 613. Doesn't have to be written. Realize that if you do this, the other side is going to get it under TRCP 192.3(h) (Statements).
    - Also, a party has a duty to turn over the statement to the party and to the witness ONLY ON WRITTEN REQUEST. Think about your copy.



# AUDIO, PHOTOS AND VIDEOS

- Photos and videos – Generally, photos and videos (without sound) can be admitted under a pretty simple showing by testimony of a witness who;
  - 1. Saw the subject of the photograph;
  - 2. Recognizes the representation seen, AND;
  - 3. Agrees that it is a true and accurate representation of the subject as it appeared at a relevant time.

Sound Recordings – Usually, unless used to impeach (WHY), hold a bit higher burden. Require testimony that machine accurately recorded, that the witness can recognize the voices on the tape, no changes of the tape have been made, the operator of the machine knew what he was doing, the recording was made without any inducement and the recording was preserved properly..



# BUSINESS RECORDS

- All police records, hospital records and even your own records are admitted under this common rule. TRE 803(6). The key is that as long as it is a record of a regularly conducted activity.
  - If at least 14 days to trial, instead of a records custodian (WHO IS THIS?) you can authenticate these documents by AFFIDAVIT [TRE 902(10)] and ask them to be admitted.
  - You, as a investigative agency, (with a good P&P) can authenticate your regularly prepared reports.
    - [Some objections are still here; BUT the practicality of it is that many times they are never made]
    - [Great benefit, because they can take your report back with the jury and judge]
    - [Score points with your reports with or without you being present to testify.]



# SOCIAL MEDIA

- New Case!!!
  - *Palmieri v. USA*, F. Supp. 3d, No. CV 12-1403 (JDB)(D.D.C. Nov. 3, 2014).

Revocation of Security Clearance. Can a friend give you Facebook information? Yes, no violation of 4<sup>th</sup> amendment for law enforcement. Not unreasonable that a friend gave the

Key here is third party. If you give information to third party then, generally, you lose an expectation of privacy claim on that information.

See Also; *Guest v. Leis*, 255 F.3d 325, 333 (6<sup>th</sup> Cir. 2001) (finding that writer's of email, just like a letter, lose their expectation of privacy in the emails contents upon delivery to a third party). [*Generally*, if no 4<sup>th</sup> amendment violation, then no invasion of privacy claim].



# SOCIAL MEDIA

- Ok, but what about using a *pretext* to befriend them? Is that possible and can it be used?
  - Not a Criminal Violation, BUT, if you are working for an Attorney (or have one in the mix) it may be a violation of the Texas Disciplinary Rules. Several States Bar Association's have opined that a lawyer, or his paralegal or investigator, can't direct a third person to "friend" the individual to obtain information. Basically, a violation of the ABA's Model Rules (Texas Disciplinary Rules of Professional Conduct) of Deceit, Truthfulness in Statements to Others, and Responsibilities of Non-Lawyer Assistants.