J. Wallace

April 25, 1984

RULES OF EVIDENCE

INTEGRATED

ARTICLES I, GENERAL PROVISIONS

Rule 101. Title and Scope

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

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

(c) Hierarchical 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 in criminal cases, civil statutes in civil and criminal cases, these rules, the Rules of Civil Procedure in civil cases, the common law of England. Where possible, inconsistency is to be removed by reasonable construction. [Blakely 4-6-84]

Note: Repeal C.C.P. 38.01 and 38.02. [Blakely 4-6-84]

Comment: These rules are meant to apply in all civil and criminal proceedings unless otherwise provided by the Code of Criminal Procedure, Penal Code or Constitution of the United States or Texas, or court rule prescribed pursuant to statutory authority.

Rule 102. Purpose and Construction

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

Rule 103. Rulings on Evidence

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

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; 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

Rule 103. Rulings on Evidence (Con't)

which it was offered, the objection made, and the ruling thereon. It may, or at request of counsel shall, direct the making of an offer in question and answer form.

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

(d) Fundamental error. In criminal cases, 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: 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 on the criminal side.

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) Hearing of jury. [~~Hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require.~~] 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. [Sharlot 4-6-84]

(d) 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.

Rule 104. Preliminary Questions (Con't)

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

Rule 105. Limited Admissibility

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

(b) When evidence referred to in paragraph (a) 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. Rule of Optional Completeness

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.

Blakely	4:2
Sharlot	1:1
Levy	2:1

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. Cf. TEX.C.CRIM.P., art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirement.

ARTICLE II, JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

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

Rules 201. Judicial Notice of Adjudicative Facts (Con't)

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

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

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

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

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

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Rule 202. Determination of Law of Other States

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, [~~rules,--regulations,--and~~] ordinances, [~~and~~] court decisions and, except in criminal cases, rules and regulations of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. [~~The-rulings-of the-judge-on-such-matters--shall-be-subject-to review.~~] Its determination shall be subject to review on appeal as a ruling on a question of law. [Parker 4-6-84]

[In re: last sentence, but defer to Civil Rules Committee for consistency with Rule 203.]

Rule 203. Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish to the opposing party or counsel copies of any written materials or sources

Rule 203. Determination of the Laws of Foreign Countries (Con't)

that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish to the opposing party or counsel both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give the parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. Its determination shall be subject to review on appeal as a ruling on a question of law.

[In re: last sentence, defer to Civil Rules Committee for consistency with Rule 202.]

ARTICLE III

[No rules recommended at this time.]

ARTICLE IV, RELEVANCY AND ITS LIMITS

Rule 401. ~~Test of Relevancy~~ Definition of "Relevant Evidence"

~~[(a) "Materiality" inquires whether there is any rational relationship or pertinence of the proffered evidence to any provable or controlling fact issue in dispute.~~

~~(b) "Relevancy" inquires whether the proffered evidence has probative value tending to establish the presence or absence, truth or falsity, of a fact.~~

~~(c) "TEST: Is it material? If not, exclude. If yes, and only in that event, is it relevant? If not, exclude. If yes, admit.~~

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [Wellborn 4-6-84]

[This is Federal Rule 401 verbatim in conflict with one of Supreme Court changes to the liaison committee's proposed code. Since it conflicts and affects civil procedures, we are deferring to Civil Rules Committee.]

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, [~~by the Supreme Court,~~] by these rules or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible. [Blakely 4-6-84]

Rule 403. Exclusion of Relevant Evidence on Special Grounds

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

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused.

a. In criminal cases. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

b. In civil cases. Evidence of a pertinent trait of his character offered by a party accused of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) Character of victim.

a. In criminal cases. Subject to Rule 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of [~~a character trait of peacefulness~~] peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; [Sharlot 4-6-84]

b. In civil cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

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

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes (Con't)

Comment: Since this rule only restricts the use of character evidence when it is offered for the purpose of proving conduct "on a particular occasion," it does not apply in the punishment phase of a criminal trial. Admissibility of character evidence concerning the defendant in the punishment phase is governed by Texas Code of Criminal Procedure, arts. 37.07, 37.071.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Levy 2:2

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

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent Remedial Measures; Notification of Defect

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

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

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove civil or criminal liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [McCall 4-6-84]

Rule 409. Payment of Medical and Similar Expenses

[~~In civil proceedings,~~ e] Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove civil or criminal liability for the injury. [Wellborn 4-6-84]

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

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

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

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal pro-

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements (Con't)

ceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

[Note: Portions of §26.13, second sentence, repealed. Sharlot 4-7-84]

Rule 411. Liability Insurance

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

Rule 412. Evidence of Previous Sexual Conduct

(a) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted in prosecutions under Sections 21.02 through 21.05 of the Texas Penal Code ([~~rape~~] sexual assault, aggravated [~~rape~~] sexual assault, sexual abuse, and aggravated sexual abuse), or an attempt to commit any of the foregoing, only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

In criminal cases only,

(1) In a prosecution for a rape, aggravated rape, sexual abuse, and aggravated sexual abuse, or in a prosecution for an attempt to commit such a crime, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(2) In a prosecution for rape, aggravated rape, sexual abuse, and aggravated sexual abuse, or for an attempt to commit such a crime, evidence of specific instances of the victim's past sexual behavior, other than reputation or opinion evidence, is not admissible, unless such evidence other than opinion or reputation evidence is

(a) Admitted in accordance with paragraphs and of subsection of this section, and

(b) Evidence that:

A. Relates to the motive or bias of the alleged victim

B. Is necessary to rebut or explain scientific or medical evidence offered by the state

C. Relates to past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged.

D. Is otherwise constitutionally required to be admitted.

(b) If the defendant proposes to ask any questions concerning specific instances, opinion evidence, or reputation evidence of the victim's sexual conduct, either by direct examination or cross-examination of any witness, the defendant must inform the court out of the hearing of the jury prior to asking any such question. After this notice, the court shall

(3) If the defendant proposes to ask any questions concerning specific instances [~~,--opinion-evidence,--or-reputation-evidence~~] of the victim's past sexual conduct, either by direct examination or cross-examination of any witness, the defendant must inform the court out of the hearing of the jury prior to asking

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conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under Subsection (a) of this section. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under Subsection (1) of this section. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(c) The court shall seal the record of the in camera hearing required in Subsection (b) of this section for delivery to the appellate court in the event of an appeal.

(4) Same as (c).

(d) This section does not limit the right of the state or the accused to impeach credibility by showing prior felony convictions nor the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to [~~rape~~] sexual assault of a child, sexual abuse of a child, or indecency with a child, or an attempt to commit any of the foregoing. If evidence of a previous felony conviction involving sexual conduct or evidence of promiscuous sexual conduct is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

(5) Same as (d).

[Alan Levy's recommendation adopted "conceptually." Sharlot 4-7-84]

[U.T. Reporters to append more procedural guidance. Wellborn 4-7-84]

[Note: Repeal Penal Code § 22.065?]

ARTICLE V, PRIVILEGES

Rule 501. Privileges Recognized only as Provided

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

(1) Refuse to be a witness; or
(2) Refuse to disclose any matter; or
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter on producing any object or writing.

Rule 502. Required Reports Privileged by Statute

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides.

Rule 502. Required Reports Privileged by Statute (Con't)

No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

Rule 503. Lawyer-Client Privilege

(a) Definitions. As used in this rule:

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

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

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

(4) A "representative of the lawyer" is: (1) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; (2) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(4) [Defer to Civil Rules Committee on whether "by the lawyer" should be struck. Steele 4-7-84]

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representa

Rule 503. Lawyer-Client Privilege (Con't)

tive of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) The prohibitions of this section continue to apply to confidential communications or records concerning any client irrespective of when the client received the services of an attorney.

(d) [Defer to Civil Rules Committee. Steele 4-7-84]

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

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

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

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

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

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

Comment: This rule governs only the lawyer client privilege. It does not restrict the scope of the work product doctrine, either in civil cases,[~~-see-TEX.R.CIV.P.-186a,~~] or in criminal cases[~~,-see-TEX.C.CRIM.P.-38.10~~].

[1. Civil cite defer to Civil Rules Committee. Wellborn 4-7-84.]
[2. Wellborn 4-7-84.]
[Note: Repeal C.C.P. 38.10]

Rule 504. Privilege not to be Called as a Witness Against Spouse in a Criminal Case

(a) General rule of privilege. In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse

Rule 504. Privilege not to be Called as a Witness Against Spouse in a Criminal Case (Con't)

from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in Rule 611(b). Failure by an accused to call his spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(b) Exceptions. There is no privilege under this rule (1) in a proceeding in which an accused is charged with a crime against the person of a minor child of either spouse or [~~a minor child who is a~~] any member of the household of either spouse other than the witness; or (2) as to matters occurring prior to the marriage. [Sharlot 4-7-84]

Rule 505. Husband-Wife Communication Privilege

(a) Definition. 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.

(b) General rule of privilege. A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during their marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to his spouse while they were married.

(c) Who may claim the privilege. The privilege may be claimed by the person or his guardian or representative, or by the spouse on his behalf. The authority of the spouse to do so is presumed.

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

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

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

(3) Commitment or similar proceeding. In a proceeding to commit either spouse or otherwise to place him or his property, or both, under the control of another because of his alleged mental or physical condition.

Rule 505. Husband-Wife Communication Privilege (Con't)

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

(5) In a proceeding in which an accused is charged with a crime against the person of a minor child of either spouse or any member of the household of either spouse other than the witness. [Wellborn 4-7-84]

[Note: Repeal C.C.P. 38.11. Sharlot 4-8-84]

Rule 506. Communications to Clergymen

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting him.

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

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

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

(d) Waiver. The holder of the privilege waives the privilege by calling the clergyman to testify to the good character or devoutness of the holder. [Blakely 4-7-84]

Note: Repeal C.C.P. 38.111. Sharlot 4-8-84]

Rule 507. Political Vote

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

Rule 508. Trade Secrets

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

Rule 508. Trade Secrets (Con't)

of the holder of the privilege and of the parties and the furtherance of justice may require.

Rule 509. Identity of Informer

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

(b) Who may claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished[~~,~~] , except that the privilege shall not be allowed if the state objects. [Levy 4-7-84]

(c) Exceptions.

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

(2) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issues of guilt, [~~or~~] innocence or punishment in a criminal case or of a material issue on the merits in a civil case to which the public entity is a party, and the public entity invokes the privilege, the judge shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the

Rule 509. Identity of Informer (Con't)

public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present. [Fitzgerald 4-7-84]

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

Rule 510. Physician/Patient Privilege

(a) Definitions. As used in this rule:

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

(2) a "physician" means a person licensed to practice medicine.

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

(b) General rule of privilege.

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

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

Rule 510. Physician/Patient Privilege (Con't)

(3) The prohibitions of this section continue to apply to confidential communications or records concerning any patient irrespective of when the patient received the services of a physician.

(c) Who may claim the privilege.

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

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

(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:

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

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

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

(4) in any civil litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, art. 4495b, Vernon's Texas Civil Statutes, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (d)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (c);

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Rule 510. Physician/Patient Privilege (Con't)

(6) [~~in--any--criminal--investigation-or--proceeding;~~] in any criminal prosecution where the patient is a victim, witness or defendant. [Wellborn 4-7-84]

[Note: Repeal Art. 4495, V.A.T.S., appropriate section?]

(7) when the disclosure is relevant to an involuntary civil commitment or hospitalization proceeding under:

(A) the Texas Mental Health Code (Article 5547-1 et seq., Vernon's Texas Civil Statutes);

(B) the Mentally Retarded Persons Act of 1977 (Article 5547-300, Vernon's Texas Civil Statutes);

(C) Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Article 5561c, Vernon's Texas Civil Statutes);

(D) Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Article 5561c-1, Vernon's Texas Civil Statutes).

(8) when the disclosure is relevant in any suit affecting the parent-child relationship.

(9) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect of the resident of an "institution" as defined in Section 1, Chapter 684, Acts of the 67th Legislature, Regular Session, 1981 (Art. 4442c, Sec. 2, Vernon's Texas Civil Statutes).

(e) Consent.

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

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

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

Rule 510. Physician/Patient Privilege (Con't)

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

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

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

Comment: This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX.REV.CIV.STAT.ANN. art. 4495b, Sec. 5.08.

Rule 511. Confidentiality of Mental Health Information

(a) Definitions. As used in this rule:

(1) "Professional" means any person (A) authorized to practice medicine in any state or nation; or (B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder; or (C) involved in the treatment or examination of drug abusers; or (D) reasonably believed by the patient/client to be included in any of the preceding categories.

(2) "Patient/client" means any person who (A) consults, or is interviewed by a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and other drug addiction; or (B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A representative of the patient/client is (A) any person bearing the written consent of the patient/client; or (B) a parent if the patient/client is a minor; or (C) a guardian if the patient/client has been adjudicated incompetent to manage his personal affairs; or (D) the patient/client's personal representative if the patient/client is deceased.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient/client in the diagnosis, examination, evaluation, or treatment, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis,

examination, evaluation, or treatment under the direction of the professional, including members of the patient/client's family.

(b) General rule of privilege.

(1) Communication between a patient/client and a professional is confidential and shall not be disclosed.

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

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

(4) The prohibitions of this rule continue to apply to confidential communications or records concerning any patient/client irrespective of when the patient/client received services of a professional.

(c) Who may claim the privilege.

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

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

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

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

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

Rule 511. Confidentiality of Mental Health Information (Con't)

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

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

(5) in any civil litigation or administrative proceedings, if relevant, brought by the patient/client or someone on his behalf if the patient/client is attempting to recover monetary damages for any mental condition.

(6) [~~when a defendant in a criminal case raises the defense of his insanity or incompetence.~~] in any criminal prosecution where the patient is a victim, witness or defendant. [Wellborn 4-7-84]

[Note: Repeal Art. 5561h, V.A.T.S.?]

(7) when the disclosure is relevant in any suit affecting the parent-child relationship.

(8) in any proceeding regarding the abuse or neglect of the resident of an "institution" as defined in Section 1, Chapter 684, Acts of the 67th Legislature, Regular Session, 1981 (Art. 4442c, Section 2, Vernon's Texas Civil Statutes).

Comment: This rule only governs disclosures of patient/client-professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by TEX.REV.CIV.STAT.ANN. art 5561h.

Rule 512. Waiver of Privilege by Voluntary Disclosure

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Rule 513. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

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

Rule 514. Comment Upon or Inference From Claim of Privilege; Instruction

Sharlot 1:2

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

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

(c) Jury instruction. In criminal cases, upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(d) Claim of privilege against self-incrimination. In civil proceedings, paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present proceeding, of the privilege against self-incrimination.

ARTICLE VI, WITNESSES

Rule 601. Competency and Incompetency of Witnesses

Sharlot 1:2
Levy 2:3

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

(1) Insane persons. Insane persons who, in the opinion of the Court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the Court, were in that condition when the events happened of which they are called to testify.

(2) Children. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

(b) In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral

Rule 601. Competency and Incompetency of Witnesses (Con't)

statement by, the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof.

Rule 602. Lack of Personal Knowledge

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

Rule 603. Oath or Affirmation

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

Rule 604. Interpreters

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

Sharlot 1:2
Levy 2:3

Rule 605. Competency of Judge as Witness

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

Sharlot 1:2
Levy 2:3

Rule 606. Competency of Juror as a Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the

Blakely 4:2

Rule 606. Competency of Juror as a Witness (Con't)

opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. In criminal cases, upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

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

[Note: Only difference is that "wnether extraneous prejudicial information was improperly brought to the jury's attention or" Phrase is deleted in civil version. Precede (c) with "In civil cases," after title.]

Rule 607. Who May Impeach

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

Sharlot 1:2
Levy 2:3

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Levy 5:16
Sharlot 3:4
Sharlot 1:3

Rule 608. Evidence of Character and Conduct of Witness (Con't)

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

Rule 609. Impeachment by Evidence of Conviction of Crime

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

Levy	5:18
Sharlot	3:4
Sharlot	1:3
Levy	2:3

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

(c) Effect of pardon annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure, based on a finding of innocence, or (3) probation has been satisfactorily completed.

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

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

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to

Rule 609. Impeachment by Evidence of Conviction of Crime (Con't)

adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 610. Religious Beliefs or Opinions

In criminal cases, evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Sharlot 3:4
Sharlot 1:3

Rule 611. Mode and Order of Interrogation and Presentation

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

Sharlot 3:4
Levy 2:4

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

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

Rule 612. Writing Used to Refresh Memory

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

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court

Rule 612. Writing Used to Refresh Memory (Con't)

shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613. Prior Statements of Witnesses; Impeachment and Support

(a) Examining witness concerning prior inconsistent statement. In examining a witness concerning a prior inconsistent statement made by him, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

Sharlot 1:3
Levy 2:4

(b) Examining witness concerning bias or interest. In impeaching a witness by proof of circumstances or statements showing bias or interest, on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

(c) Prior consistent statements of witnesses. A prior statement of a witness which is consistent with his testimony is inadmissible except as provided in 801(e)(1)(B).

Rule 614. Production of Statements of Witnesses in Criminal Cases

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

Levy 2:4

Rule 614. Production of Statements of Witnesses in Criminal Cases (Con't)

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

(c) Production of excised statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

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

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

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

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

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

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

Rule 615. Exclusion of Witnesses

Sharlot 1:3

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does to authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ARTICLE VII, OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

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

Rule 702. Testimony by Experts

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

Rule 703. Bases of Opinion Testimony by Experts

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

(b) In criminal cases, an expert may base an opinion upon (1) facts or data within his personal knowledge (2) facts or data within the personal knowledge of another expert upon which experts in the particular field as the witness usually rely (3) facts or data within the personal knowledge of nonexperts who acted at the direction of or under the supervision of an expert in obtaining the information where such information is usually relied upon by experts in the particular field (4) facts or data within the personal knowledge of a patient relating to a condition which the patient relates to aid an expert in diagnosing or treating the patient or (5) facts or data introduced in evidence.

Rule 704. Opinion on Ultimate Issue

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

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

(a) In civil cases, the expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. [1-8]

Sharlot 3:4

(b) In criminal cases, before an expert may state an opinion it must first be shown that the opinion is based on facts or data within the scope of Rule 703(b). The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. In any event, the expert shall, if requested, be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party.

Sharlot 1:3

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

Rule 706. Court Appointed Experts (Con't)

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VII, HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

Sharlot 3:5
Sharlot 1:3

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

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

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

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

(e) Statements which are not hearsay. A statement is not hearsay if --

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement in either his individual or representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made

Rule 801. Definitions (Con't)

during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(3) Depositions in civil proceedings. It is a deposition taken and offered in accordance with the Texas Rules of Civil Procedure.

Comment: The definitions in 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct. These are described and illustrated below.

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

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethrope and X disease, witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The testimony is to a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. In a rape prosecution to prove that Richard, the defendant, was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the

Rule 801. Definitions (Con't)

matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement and the probative value of the statement 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.

Rule 802. Hearsay Rule

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

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

Blakely	4:3
Sharlot	3:5
Sharlot	1:3
Levy	2:4

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

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

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

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

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial (Con't)

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

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

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial (Con't)

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

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

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

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

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

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

Comment: It is the intent of the Committee that 803(14) leaves undisturbed article 52 of the Texas Probate Code and articles 3726 and 3726a, Vernon's Texas Civil Statutes. To the extent that an offer of evidence is not covered by these statutes, 803(14) gives proponent an additional alternative. [LOCATED HERE FOR CONVENIENCE]

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial (Con't)

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

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

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

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

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

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

(22) Judgment of previous conviction. Evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the State for

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial (Con't)

purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal renders such evidence inadmissible.

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

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

(25) Other exceptions. In criminal cases, a statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay Exceptions; Declarant Unavailable

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

Sharlot 3:5
Sharlot 1:3
Levy 2:4

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

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

Rule 804. Hearsay Exceptions; Declarant Unavailable (Con't)

(3) testifies to a lack of memory of the subject matter of his statement; or

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

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

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

(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness --

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a disposition taken in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

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

(3) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(4) Other exceptions. In criminal cases, a statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of material fact; (B) the statement is more probative on the point for which it is offered than any other evi

Rule 804. Hearsay Exceptions; Declarant Unavailable (Con't)

dence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. Hearsay Within Hearsay

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

Rule 806. Attacking and Supporting Credibility of Declarant

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

Sharlot 3:5

ARTICLE IX, AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

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

Sharlot 1:3
Levy 2:4

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

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

Rule 901. Requirement of Authentication or Identification (Con't)

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

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

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

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

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

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

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

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

(10) Methods provided by statue or rule. Any method of authentication or identification provided by statute or by court rule prescribed pursuant to statutory authority.

Rule 902. Self-Authentication

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

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

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

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

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to

Rule 902. Self Authentication (Con't)

be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or court rule prescribed pursuant to statutory authority.

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

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

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

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

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

(10) Business records accompanied by affidavit.

(a) Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and

Rule 902. Self Authentication (Con't)

serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause.

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

STATE OF TEXAS — IN THE _____

v. — COURT IN AND FOR

John Roe (Name of Defendant) — _____ COUNTY, TEXAS

AFFIDAVIT

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

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

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

_____
Affiant

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

_____
Notary Public in and for _____ County, Texas.

(11) Presumptions under statute or court rule prescribed pursuant to statutory authority. Any signature, document, or other matter declared by court rule prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

Comment: Paragraph (10) is based on portions of the affidavit authentication provisions of TEX.REV.CIV.STAT.ANN. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of rule 803(6) and (7), including X-rays, hospital records, or any other kind of regularly kept medical record.

Rule 903. Subscribing Witness' Testimony Unnecessary

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

Sharlot 1:3

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

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

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

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

Rule 1002. Requirement of Original

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

Rule 1003. Admissibility of Duplicates

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

Rule 1004. Admissibility of Other Evidence of Contents

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

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

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original outside the state. No original is located in Texas; or

(4) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(5) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

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

Rule 1006. Summaries

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

Rule 1007. Testimony or Written Admission of Party

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

Rule 1008. Functions of Court and Jury

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

[Sharlot 1:4 proposes C.C.P. Art. 38.25 as Rule 1009.]

ARTICLE XI, MISCELLANEOUS PROVISIONS

Rule 1101. Applicability of Rules

Sharlot 1:4
Levy 2:5

(a) General rule. These rules apply in civil and 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 a jury, to determine whether there is evidence to support a finding of incompetency to stand trial;

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

(D) A hearing on justification for pretrial detention;

(E) A hearing in small claims court;

Rule 1101. Applicability of Rules (Con't)

(F) Issuance of search or arrest warrant;

(G) Direct contempt determination;

(H) A hearing under the Texas Family Code section 54.02, Waiver of Jurisdiction and Discretionary Transfer to Criminal Court;

(I) Sentencing, or punishment assessment by Court.

(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) Punishment assessment by the jury;

(2) Probation revocation;

(3) A proceeding to revoke a deferred adjudication of guilt or a conditional discharge;

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

(5) Subject to subdivision (c)(3)(H) of this rule, proceedings under Titles 1, 2, 3, and 4 of the Family Code, with the civil Rules of Evidence governing under Titles 1, 2, and 4 and the criminal Rules of Evidence governing under Title 3; and

(6) Proceedings governed by section 22 of the Texas Probate Code.

(e) In contested cases before state agencies as defined in section 3 of the Administrative Procedure and Texas Register Act, section 14 of that Act shall govern evidence.

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