Texas Supreme Court ADVISORY

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RULES ADVISORY COMMITTEE MEETING
April 11-12, 2003

Texas Supreme Court advisory

SUPREME COURT ADVISORY COMMITTEE TO MEET FRIDAY AND SATURDAY
The Supreme Court Advisory Committee will meet Friday and, if needed, Saturday at the Room 101 at the Texas Law Center (State Bar of Texas building), 1414 Colorado in Austin. The Friday meeting will begin at 9 a.m. and, if business is not completed Friday, the meeting will continue at 8:30 a.m. Saturday.

Supreme Court Advisory Committee meetings are open to the public.

The committee meeting is the first since 15 new members were appointed in February.
A copy of the February order appointing the committee can be found at
http://www.supreme.courts.state.tx.us/MiscDocket/03/03902300.PDF.

1. WELCOME AND OVERVIEW OF SCAC

2. REPORT FROM JUSTICE HECHT

2.1 Status Report

Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the November 2002 meeting. Justice Hecht also may refer new issues for the committee's study.

3. CIVIL LITIGATION IMPROVEMENTS TASK FORCE REPORT

The committee will review for comment recommendations by the Task Force on Civil Litigation Improvements, appointed by the Court and chaired by Houston lawyer Joe Jamail. This will be the first meeting that the Task Force's recommendations as a whole will be discussed, although the committee previously considered another proposal related to offers of settlement.

3.1 Offer of Settlement
rules/Committee/Apr-2003/offer task force.pdf TAB 1

This draft is different from previous committee drafts on settlement offer rules, which remain pending for discussion.

3.2 Appearance By Counsel: TRCP 7 and 8 TAB 2
rules/Committee/Apr-2003/attorney task force.pdf

3.3 Class Actions: TRCP 42 TAB 3
rules/Committee/Apr-2003/class action task force.pdf

3.4 Complex Litigation: TRCP 42 TAB 4
rules/Committee/Apr-2003/complex lit task force.pdf

3.5 Ad Litem Appointments, Responsibility and Compensation: TRCP 173

TAB 5

rules/Committee/Apr-2003/ad litem task force.pdf

4. REPORT FROM SUBCOMMITTEES

4.1 Settlement Issues, continued

Discussion of issues related to rules proposals similar to "offers of judgment" or "offers of settlement" described by Federal Rule of Civil Procedure 68 and other states' procedural rules. The current draft:
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.1%20outline.pdf CARLSON MEMO TAB 6
http://courtstuff.com/sct/rules/Committee/Nov-2002/Rule1666172002.pdf LAST SCAC DRAFT TAB 7

4.2 Affidavits Concerning Cost and Necessity of Services: TRCP 904 TAB 8 (Low Evid. Memo)
(No documents or description at this time)

4.3 Ex Parte Communications and Physician-Patient Confidentiality: TRCP 509

Discussion topics will include whether an existing federal statute bars ex parte communication of a patient's medical condition by a physician to any other person. The SCAC will also discuss several other recommended changes to the Texas Rules of Evidence to make them conform with the Federal Rules of Evidence.

TAB 8 (Low Evid. Mem

http://courtstuff.com/sct/rules/Committee/Nov-2002/RULE509cmtereport.pdf
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.6%20sample.pdf
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.6%20edwards.pdf
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.6%20letters.pdf
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.6%20letters2.pdf

4.4 Prefiling, Investigative Depositions: TRCP 202

The committee has been asked to review the effectiveness and operation of Texas Rule of Civil Procedure Rule 202 that allows depositions before a suit is filed or to investigate a claim.

http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.9%20background.pdf TAB 9
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.9%20duggins.pdf
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.9%20sweeny.pdf

4.5 Sealing Court Records: TRCP 76A

The SCAC has been asked to review the effectiveness and operation of Texas Rule of Civil Procedure Rule 76a addressing the appropriateness of and method for sealing court records. A copy of the most recent information on this issue is below:
http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.11%20background.pdf TAB 10

Any person at any time may comment on rules proposals before the Supreme Court of Texas or the Supreme Court Advisory Committee or offer suggested changes to the Texas Rules of Court, including the Texas Rules of Civil Procedure, the Texas Rules of Appellate Procedure, the Texas Rules of Evidence, the Rules of Judicial Administration and the Parental Notification Rules.

Written comments may be mailed to the Chris Griesel, rules attorney, P.O. Box 12248, Austin, Texas 78711, or may be faxed to the attention of the Rules Attorney at (512) 463-1365, or e-mailed to chris.griesel@courts.state.tx.us.

Thank you for coming today. Welcome to the Supreme Court Advisory Committee Meeting (or as some looking around the room commented a moment ago, the Harris County District Judges meeting.) The Court really appreciates the time and commitment that each of you bring today and during the course of the day several members of the court will be dropping in to say thank you. We are glad each of you accepted the Court's invitation to work for free. We simply could not do this process without you.

There are a number of new members and a new deputy liaison from the court, Justice Jefferson.

(Add advice and guidance to new members)

Let me bring you up to date, with Judge Wainwright's swearing in in january, we are now at 9 who aren't going anywhere for a while. The court's docket has been very busy, as Mr. Hatchell and Ms. Cortell can attest to. We have a lot of work to complete between now and the close of business this term,

Complicating that are our friends across the street. We are watching a number of items that will impact the civil judicial system, not the least of which is the courts of the states budget. Most agencies of the state and the courts are predicting a budget cut of between 12 and 7 percent. For the courts, that will likely mean the loss of some personnel. It also means a big drop in the budgets for visiting judges throughout the state, both on the trial and appellate level. We'll have to see how that plays out.

There are several bills pending in the legislature that would also effect how the courts do business in this some. Some call for the Court to adopt new procedural rules within a rather short time frame, other will

cause us to rewrite some existing provisions to avoid statutory conflicts. Again, by our next meeting we will have a better idea of the amount of homework the legislature will want us to do during the next interim.

I would like to thank the Committee for its previous work on the TRAP rules. The civil provisions appear to have been implemented without much problems or complaint.

I'm glad we are starting you new members out on a meeting filled with dull and decided issues. One word of advice, don't be shy to express your views , Lord knows Orsinger and Dorsaneo aren't.

Chip Babcock

With that said, I'd like to give you an overview of the Jamail report.

Elaine Carlson

Lisa Coleman

Richard Orsinger

Tommy Jacks

Del Kelly

Harry Reasoner

Steve Susman

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 03-9023

SUPREME COURT RULES ADVISORY COMMITTEE

ORDERED:

1. The Court's Orders establishing the Supreme Court Rules Advisory Committee, issued in Misc. Docket Nos. 99-9167 (September 7, 1999) and 00-9057 (April 4, 2000) are vacated, and the following Order is substituted:

The Supreme Court Rules Advisory Committee, first created in 1940 and reconstituted at various times since then, assists the Supreme Court in the continuing study, review, and development of rules and procedures for the courts of Texas, taking into consideration the rules and procedures of other courts in the United States and proposals for changes from whatever source received. The Committee drafts rules as directed by the Court; solicits, summarizes, and reports to the Court the views of the bar and the public on court rules and procedures; and makes recommendations for change. The Court is not bound by the Committee's recommendations.

The meetings of the Committee are held after public notice and are open to the public. A record is made of all Committee proceedings. The Office of Court Administration serves as Secretariat for the Committee. The expenses of the Committee are paid from funds appropriated by the Legislature, or by the State Bar of Texas.

Members of the Committee are appointed by the Supreme Court, which shall from time to time determine their number, qualifications, and terms of service. A Chair appointed by the Court to serve at its pleasure calls meetings with the approval of the Court, prepares an agenda in advance of each meeting, and presides over the meetings. The Court and each Committee member are given the proposals, drafts, and other materials to be discussed at each meeting.

2. The following persons are appointed to serve as members of the Supreme Court Rules Advisory Committee from the date of this Order until December 31, 2005:

Prof. Alexandra W. Albright	Austin	David Jackson	Dallas
Charles L. Babcock	Dallas	Lamont Jefferson	San Antonio
Pamela Stanton Baron	Austin	Hon. Terry Jennings	Houston
Hon. Levi Benton	Houston	Hon. Tom Lawrence	Humble
Hon. Jane Bland	Houston	Hon. Carlos Lopez	Dallas
Jeffrey S. Boyd	Austin	Gilbert I. Low	Beaumont
Hon. Scott A. Brister	Houston	John H. Martin	Dallas
Harvey Brown	Houston	Anne McNamara	Dallas
Prof. Elaine A. G. Carlson	Houston	Robert E. Meadows	Houston
Hon. Tracy E. Christopher	Houston	Richard G. Munzinger	El Paso
Nina Cortell	Dallas	Richard R. Orsinger	San Antonio
Alistair B. Dawson	Houston	Hon. Jan Patterson	Austin
Prof. William V. Dorsaneo III	Dallas	Hon. David Peeples	San Antonio
Ralph H. Duggins	Fort Worth	Robert H. Pemberton	Austin
Hon. Sarah B. Duncan	San Antonio	Pete Schenkkan	Austin
William R. Edwards	Corpus Christi	Luther H. Soules	San Antonio
Hon. David B. Gaultney	Beaumont	Kent C. Sullivan	Houston
Frank Gilstrap	Arlington	Stephen D. Susman	Houston
Hon. Tom Gray	Waco	Paula Sweeney	Dallas
W. Wendell Hall	San Antonio	Stephen G. Tipps	Houston
O.C. Hamilton Jr.	McAllen	Robert A. Valadez	San Antonio
Hon. Andy Harwell	Waco	Charles R. Watson, Jr.	Amarillo
Michael A. Hatchell	Tyler	Hon. Bonnie Wolbrueck	Georgetown
Sen. Juan "Chuy" Hinojosa	McAllen	Stephen Yelenosky	Austin
Tommy Jacks	Austin		

3. The following persons are appointed *ex officio* members of the Committee to serve at the pleasure of the Court: a Member of the Court of Criminal Appeals designated by that Court; a lawyer designated by the Lieutenant Governor; and a lawyer designated by the Speaker of the House.

4. Charles L. Babcock of Dallas is appointed chairman of the Committee. Gilbert I. Low is appointed vice-chairman of the Committee.

5. The Court's liaison to the Committee is Justice Nathan L. Hecht. The deputy liaison is Justice Wallace B. Jefferson

SIGNED AND ENTERED this 2nd day of April 2003.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

Harriet O'Neill, Justice

Wallace B. Jefferson

Michael H. Schneider

Steven Wayne Smith

J. Dale Wainwright

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TO: SCAC MEMBERS

FROM: Professor Elaine A. Carlson

RE: Offer of Judgment Proposal: Rule 166b

March 1, 2002

Chairman Babcock has requested the SCAC Offer of Judgment Subcommittee review the proposed Offer of Judgment Rule 166b generated by the Supreme Court Task Force Committee chaired by Joe Jamail. (Attachment A) We have reviewed the proposed rule and the literature surrounding the subject and set forth the following analysis and observations for your consideration.

I. Overview of Offer of Judgment Rule

An offer of judgment rule provides for the shifting of costs upon an offeree who fails to accept an offer of judgment from their adversary when the ultimate judgment in the case is less favorable than that offered. Federal Rule of Civil Procedure 68, as well as many parallel state rules or statutes, provide that if a defendant offers to have judgment entered against him, the plaintiff does not accept, and the plaintiff's judgment is not more favorable than the offer, then the plaintiff must pay the defendant's post-offer costs.[1] "The effect

[1] It has been reported that twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all. See Solimine & Pacheco,

is to reverse the usual rule that a losing party must pay the winner's costs."[2] State rules vary as to whether the offer of judgment mechanism extends to both plaintiffs and defendants and as to what is recoverable beyond costs, with some providing recovery for attorney's fees as well as expert fees under a myriad of offer of judgment schemes.

Proposed Rule 166b is an offer of judgment rule that applies to both plaintiffs and defendants. It provides for the shifting of litigation costs including costs of court, attorneys fees, as well as reasonable expert fees when an offer of judgment is rejected and the offeree suffers a less favorable judgment. A less favorable money judgment is defined by the rule as a judgment more favorable to the offeror when the amount of monetary damages awarded is equal to or great than twenty-five percent of the offer to settle. A more favorable nonmonetary judgment results when the "judgment is more favorable to the party who made the offer to settle the claims".[3]

A majority of our subcommittee is opposed to an offer of judgment rule. However, a majority of the subcommittee endorses a modification to rule 131 to clarify that the trial court has the discretion to tax costs against a prevailing plaintiff who receives less than the amount offered by a Defendant before trial. The following discussion reflecting our concerns is offered for the full committee's consideration.

II. Historical Overview of Fee and Cost Shifting

The United States has long rejected the "English Rule", followed in Great Britain and most European nations, that the loser must pay the successful party's attorney's fees.[4] The historical justification for the "American Rule"- that parties bear the costs of their own attorney's fees in litigation whether

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State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[2] Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 Law & Contemporary Problems 13, 13-14, Autumn 1988.

[3] See Appendix A. Proposed Rule 166b.

[4] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

they win or lose- is premised upon the American belief in liberal access to the courts to redress wrongs.[5] A deterrent, including the threat of paying the other sides attorney's fees if suit is unsuccessful, raises the concern that wrongs may go unremedied in our society, and that any such rule would disproportionately impact the plaintiff's access to the courts. It has been suggested that the differences in our two systems justifies these practices:

> England virtually abolished juries in civil cases (except for libel and malicious prosecution) more than 50 years ago. Cases are tried before judges whose decisions are narrowly bound by precedent, not only on liability but on damages as well. Outcomes, therefore, tend to be more predictable in England than in the United States..... Moreover, lack of predictability in American law is not limited to juries. Substantive and procedural law has undergone constant and sometimes dramatic change during the past 40 years. Law in America is more volatile and less precedent-bound than in England. Propositions that might at one time have been thought frivolous, or at least highly speculative, have become accepted. It is a rare case of which one can say with assurance that it cannot prevail.[6]

There are a number of exceptions to the American rule that permit recovery of attorney's fees by a claimant. For example, a party determined to have brought an action in bad faith may be responsible for the attorneys fees of an opponent. Further, a myriad of statutory provisions allow the recovery of attorney's fees by a prevailing party despite the American rule. Further, some states have adopted offer of judgment rules that allow for the shifting of attorney's fees when an offeree refuses his opponent's offer to settle and does no better at trial. (The state adoptions are both by rule and by statute).

Offer of judgment rules are intended to encourage settlements and avoid protracted litigation. Perhaps more precisely, the object of such rules are "to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases

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[5] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

[6] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 149-150.

before the heaviest expenses have been incurred".[7]

Federal Rule 68 provides for an offer of judgment mechanism. It "resembles the English practice, except that by its terms it is limited to court costs, generally only a fraction of attorney fees. As noted above, the rule permits a defendant at any time more than 10 days before trial to serve an offer of judgment for money or other relief and costs then accrued. If the plaintiff accepts the offer within 10 days, judgment is entered. If the plaintiff does not accept and the final judgment "is not more favorable (to the plaintiff) than the offer," it must pay the costs incurred after the making of the offer. If an offer is not accepted, a subsequent offer may be made."[8]

Federal Rule 68 was adopted in 1938, and since that time over thirty states have adopted by rule or statute an offer of judgment mechanism.[9] The Federal Advisory Committee on the Civil Rules, noted in its proposed 1983 amendment to Rule 68, that the rule "has rarely been invoked and has been considered largely ineffective in achieving its goals."[10] [11] In particular, the federal rule has been criticized as: (1) it only provides for a defending party to make an offer of judgment, (2) it only provides for the recovery of court costs, and not attorney's fees so there is insufficient incentive to utilize it, and, (3) the time to make and accept an offer is too limited to allow parties to assess whether the proposed offer should be accepted. Proposed

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[7] See Committee on Federal Rules of Civil Procedure, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Submitting Proposals for Amendment of the Federal Rules of Civil Procedure (Aug. 1984), reprinted in 102 F.R.D. 423, 423-24 (1984).)

[8] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147.

[9] See Solimine & Pacheco, State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[10] Wright, Miller & Marcus, Federal Practice & Procedure 2d, § 3001 (West Publishing, 2001).

[11] Fisher, Federal Rule 68, A Defendant's Sublte Weapon: Its Use and Pitfalls, 14 DePaul Bus. L. J. 89, 90 (Fall 2001): "Commentators claim that Rule 68 is not often utilized. More likely, its use is underreported. A Rule 68 offer that is not accepted will not be filed with the court. Thus, no reliable mechanism exists for counting the frequency of Rule 68 offers. In addition, a defendant may prefer to settle privately even though it has made a Rule 68 offer. The plaintiff usually loses nothing by settling privately and may gain additional concessions from the defendant, such as additional money for a confidentiality provision. In such situations, the parties will settle privately, outside the scope of Rule 68. While this will not be reported as a "successful" Rule 68 offer, the application of the rule was nonetheless an important force driving the settlement."

amendments to the federal rules to correct these deficiencies were not adopted. As observed by Professor Sherman:

> Although proposals for changes in Rule 68 have primarily focused on expanding it to apply to offers by plaintiffs and recovery of attorneys' fees, a number of proposals have also tinkered with the basic terms of what triggers cost shifting. One of the more interesting proposals came from the local rule experimentation fostered by the Civil Justice Reform Act of 1990 (CJRA). For example, the CJRA-generated plan adopted in 1993 by the United States District Court for the Eastern District of Texas [See Appendix B] provides that "a party may make a written offer of judgment" and "if the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by 10%, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected." "Litigation costs" is defined to include "those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition costs and fees for expert witnesses." If the plaintiff recovers either more than the offer or nothing at trial, or if the defendant's offer is not realistic or in good faith, the cost shifting sanctions do not apply. Chief Judge Robert M. Parker reported that in the rule's first two years, hundreds of parties made offers of judgment, generally resulting in settlement at a subsequently negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10% better than the offer. There is a question, however, as to whether such a local federal rule is inconsistent with Rule 68, and similar modification of Rule 68 has not been followed in other local rules. (citations omitted).

Indeed, the fifth circuit held the local rule to be invalid[12]:

> In Ashland Chemical Inc. v. Barco Inc., the Fifth Circuit held that an award of attorney's fees as litigation costs under a United States District Court for the Eastern District of Texas local rule was a substantive, rather than procedural, rule and thus required

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[12] Ashland Chemical Inc. v. Barco Inc., 123 F.3d 261, 268 (5th Cir. Sept. 1997).

> congressional approval..... The Fifth Circuit held that Congress must authorize substantive departures from the American rule, which requires each party to pay its own attorney's fees. After reviewing congressional history, as well as the Civil Justice Reform Act of 1990, the Fifth Circuit found that there was no congressional approval for the fee-shifting provision of the Eastern District's local rule. (citations omitted).[13]

The ABA proposed amendments to Federal Rule 68 are reproduced in Appendix C.

III. Propriety of Court Rule Making Power to Effectuate Fee Shifting

Is an offer of judgment rule that includes fee shifting within the rule making power of the courts? As noted above, federal rule 68 does not provide for shifting attorney's fees, only costs, so the issue has not been directly addressed in federal jurisprudence. However, the United States Supreme Court has expressed general disapproval of the judicial creation of fee-shifting provisions. Perhaps to compensate for the omission in the federal offer of judgment rule to allow for the recovery of attorney's fees, the private attorney general doctrine developed whereby federal courts could exercise their inherent equity powers to award fees "when the interests of justice so required." By 1970, intermediate court decisions permitted the recovery of fees in the absence of a fee-shifting statute by prevailing plaintiffs who "vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance."

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), however, the Supreme Court eliminated the private attorney general doctrine, holding that the federal judiciary had exceeded its authority in crafting the broad private attorney general exception to the American Rule. Justice White, writing for the majority opined that fee shifting was generally a matter within the legislative province and that federal courts could not play a role in creating substantive exceptions to the American Rule of attorneys' fees, "no matter how noble the purpose" Justice White wrote:

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[13] James M. McCown, Civil Procedure Survey, 30 Tex. Tech L. Rev. 475, 504 (1999).

> [The] rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."

Subsequently, Congress enacted a myriad of statutes allowing for the recovery of attorneys fees, some expressly providing for the recovery of attorney's fees as part of the plaintiff's costs.

One academician opines that *Aleyska* has been misinterpreted and concludes "that properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[14]

Attorney fee shifting has been allowed on a limited basis in federal practice. The United States Supreme Court in Marek v. Chesny, 473 U.S. 1 (1985), held that when a statute provides for an award of attorneys' fees to a prevailing party and the statute defines the fees as costs, a prevailing plaintiff who does not obtain a judgment more favorable than the defendant's offer of judgment loses the right to recover his or her attorneys' fees. In *Marek*, the successful Plaintiff lost its statutory right to recover attorney's fees as provided in the Civil Rights Attorney's Fees Award Act of 1976, due to its failure to accept an offer of judgment when the resulting judgment was less favorable and the fees were awarded as a part of costs. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees, according to the majority, are to be included as costs for purposes of applying Federal Rule 68.

Justice Brennan's dissent suggests that the majority's interpretation of Rule 68 to include attorney's fees as a part of costs in these types of cases

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[14] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

violates the separation of powers doctrine and is beyond the judiciary's rulemaking authority. Procedural rules or interpretation of rules that abridge, enlarge or modify a substantive right of a litigant are prohibited by the Federal Rules Enabling Act. (Citing: The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act, 98 Harv.L.Rev. 828, 844 (1985)). [Texas Rules Enabling Act has substantially the same limitation.] Justice Brennan opined that "The right to attorney's fees is substantive under any reasonable definition of that term" and that while the courts have "inherent authority to asses fees against parties who act in bad faith, vexatiously, wantonly or for oppressive reasons" it may not impose a mechanical per se rue awarding attorneys fees that supplants the congressionally prescribed reasonableness standard for imposing fees in civil rights cases. Justice Brennan noted that the September 1984 revised version of Rule 68, provided for the recovery of attorney's fee but only if a court determined that "an offer was rejected unreasonably," and the proposal sets forth detailed factors for assessing the reasonableness of the rejection. It would seem that a majority of the Court would view an Offer of Judgment rule that provides for the recovery of attorney's fees due to the unreasonable rejection of an offer of judgment as proper and within the rule making authority of the court. Our subcommittee considered inclusion of this restriction, but rejected it due to concerns that any reasonableness standard would provoke satellite litigation and needlessly consume judicial resources.

In 1991 the United States Supreme Court handed down its decision in Chambers v. NASCO, Inc.,[15] limiting the scope of Aleyeska's determination that fee shifting is substantive in nature and thus must be the subject of congressional approval. The district court, in reliance of its inherent powers, sanctioned the defendant for its bad faith conduct ordering the payment to plaintiff of approximately one million dollars in attorneys' fees and expenses. The Supreme Court upheld the award recognizing the trial court's inherent powers to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The Court further held that when a federal court sits in a diversity case, its inherent power to use fee shifting as a sanction for bad-faith conduct is not limited by the forum state's law regarding sanctions.[16]

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[15] 501 U.S. 32 (1991).

[16] Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

Two other United States Supreme Court decisions interpreting fee shifting under Rule 68 are noteworthy. In Evans v. Jeff, 475 U.S. 717 (1986), the Court expanded fee shifting under the rule holding that an offer of settlement in a class action could properly be conditioned upon the Plaintiff's attorney waiving his or her right to statutory attorney's fees. The Ninth Circuit viewed these types of offers of judgment as inherently unfair, noting the potential conflict that would exist between the plaintiff's attorney and the client. The Supreme Court, however, upheld the settlement offer as a proper offer of judgment, dismissed the conflict issue, and acknowledged "the possibility of a tradeoff between merits relief and attorney's fees." The Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), held that Rule 68 fee shifting is not implicated when the judgment is for the defendant, presenting the anomaly that a plaintiff may be better off under the fee shifting provision by a take nothing judgment that a plaintiff's verdict that was less favorable than the rejected offer. Academicians suggest that "The virtue of this literal interpretation of the rule...is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." [17]

A necessary corollary to the debate over rule making authority that is dependent upon whether fee shifting provisions are substantive or procedural in nature, is the question as to the law that should apply when the law of another state is controlling or Erie principles are implicated in federal court. One academician has concluded that "properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[18]

Assuming that rule making power supports an offer of judgment rule allowing for the shifting of attorney's fees, consideration should be given to

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[17] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1880-1881 (1998).

[18] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

the extensive legislative entrenchment in the recoverability of attorney's fees and the advisability of the court entering this arena.

IV. Pros vs Cons-Offer of Judgment Rule

Pros

Promotion of earlier settlement and serious consideration of offers to settle.

An offer of judgment rule serves to elicit realistic settlement offers early by giving parties a potential gain together with incentives for an adversary to take the offer seriously.

Settlement at an earlier stage than otherwise might occur, should lead to more dispositions of cases before the heaviest expenses have been incurred.

An offer of judgment that is not accepted, nonetheless may promote settlement on other terms.

An offer of judgment device affecting liability for post-offer fees should give parties with strong claims or defenses, who otherwise might have to yield more in negotiations than the merits seem to warrant (because of the threat of unrecoverable fees), an effective way of countering groundless opposition.

Offer of judgment rules may help fulfill a goal of remedial law, full compensation of injured plaintiffs. Rather than being limited to damages minus a large attorney's fee, a party with a strong claim who makes a reasonable, early offer seems likely to get an early settlement with relatively little fee expense or a judgment including a fee award. Similarly, a defendant could be compensated for expenses suffered because of a plaintiff's unjustified persistence.

Application of a properly constructed offer of judgment is within the rule making authority of the court and is equitable. Is it fair for a party that makes a reasonable offer to settle that is rejected to bear the post-offer costs and fees for preparing and trying the case successfully to judgment?

Criticisms of Offer of Judgment Rule

There is no preexisting procedural duty to settle. Parties who file suit do not have a duty to settle. Thus, the premise underlying an offer of judgment rule is faulty. An offer of judgment rule undermines access to the courts.

Gain from increased settlement is marginal and is offset by the complexity in applying an offer of judgment rule

Parties do not have an obligation to accurately predict the outcome of the suit.

An offer of judgment rule that shifts attorney's fees is arguably beyond the rule making authority of the court and is a matter for legislative determination. (See discussion above)

Prevailing parties should not be punished for losing a gamble or insisting on litigating a nonfrivolous claim. Offer of judgment rules are "Vegas rules" that "force a party to accept an offer of judgment, even if they reasonably believe that they are entitled to a larger judgment and even if they reasonably believe that they are entitled to adjudicate their legal claim in court--or they may gamble that they will receive more at trial than the offer, thereby risking their status as prevailing party for purposes of costs and, in some cases, attorneys' fees."[19]

Given the difficulty of predicting jury verdicts in many cases, is it illogical and incongruous to have a rule of civil procedure that punishes parties who reasonably believe that they will fare better at trial beyond that offered pre-trial?[20]

Rules of civil procedure should not punish litigants for nonfrivolous, nonvexatious, good faith pursuit of claims or defenses.

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[19] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145 (1999).

[20] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 148-49.

Auto Policy Litigation. Will an auto policy cover the additional costs and fees under an offer of judgment rule, or must the parties pick up those fees? If the latter, is this fair when the insurer directs the defense? Further, many offers to settle are already routine under the Stowers doctrine.

What is the harm we are trying to address? Ninety-five percent of cases settle. The federal offer of judgment rule was formulated before alternate dispute resolution. Today, a large percentage of cases settle after mediation. Further, sanctions rules allow for the imposition of attorney's fees in appropriate circumstances. Why allow attorney's fees under an offer of judgment rule in cases where the parties have bona fide differences as to the value of the case: example: cases where experts advance competing damage models.

An offer of judgment rule does more than promote or encourage settlements; it coerces settlement. Proposed Rule 166b provides a hammer to the defense, will likely result in lower settlements, and harms plaintiffs of limited means disproportionately. On the other hand, plaintiffs with no assets may actually value the claim higher with the potential increased recovery under an offer of judgment rule. Instead of encouraging settlements, litigants who believe they have a strong potential for offer of judgment recovery may "dig in" and not seriously entertain future bona fide offers. [21]

The savings from settlement are not evenly distributed between the parties and the rule favors wealthier litigants.

A defendant willing to offer a particular amount to settle without a cost- (or fee-) shifting rule will offer something less under an offer of judgment. Even with a bilateral rule, the detrimental effects on plaintiffs would remain in the many cases in which the plaintiff is more risk-averse than the defendant or when a prevailing plaintiff would already be entitled to costs (or fees) in the absence of an offer of judgment rule.[22]

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[21] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[22] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

VI. Issues To be Decided In Crafting an Offer of Judgment Rule

1) Time for Making Offer

a) The timing is important. Should a party be able to make an offer of judgment immediately after service of process when there has not been adequate time for discovery and to fairly evaluate clams and defenses? On the other hand, the offer should be made before trial and at such time as parties may seriously entertain settlement negotiations.
Reasonable time after discovery, after suit is filed? But no later than _____ days before trial?

Under federal rule, an offer may be made after the complaint is filed. This arguably leads to gamesmanship and does not allow for an honest evaluation of the value of the case before an offer must be responded to. It is arguably not desirable to allow an offer to be made too early in the litigation, as evidenced by the following strategies:

> Plaintiffs. "First, plaintiffs should conduct as much investigation and research as possible before filing suit. Second, plaintiffs should conduct all formal discovery as early in the case as possible. Third, when an unsatisfactory rule 68 offer is received, plaintiffs should immediately launch into intensive discovery before rejecting the offer. Fourth, when unable to evaluate an offer within ten days, plaintiffs should seek an extension of time to respond. Fifth, plaintiffs' attorneys should modify their fee arrangements in fee-shifting cases to account for the new situation created by Marek. Sixth, if a plaintiff ultimately obtains a judgment less favorable than a rejected settlement offer, the plaintiff should be prepared to argue vigorously that rule 68 does not apply."
>
> Defendants. "Rule 68 allows a defendant to make an offer of judgment as soon as the complaint is filed. Defendants should take advantage of this right by making rule 68 offers as soon as possible, meaning as soon as the case can be roughly evaluated. If a defendant anticipates suit, then she should evaluate the anticipated suit and prepare a rule 68 offer to be served on the plaintiff immediately after the complaint is filed.
>
> Early offers have several advantages. First, if an offer is successful (i.e., if the offer equals or exceeds the judgment finally obtained by the

plaintiff), it stops costs from accruing at the earliest possible point. Especially in fee-shifting suits, cutting off costs at the earliest possible moment will make a substantial economic difference.

Second, an early offer may catch the plaintiff by surprise before the plaintiff has had an opportunity to evaluate the case. The plaintiff may then either accept an offer that is too low or reject one that is too high, saving the defendant money in either instance. More specifically, since the plaintiff is not ordinarily entitled to responses to interrogatories or document requests until forty-five days after the complaint is served, and since the plaintiff has only ten days to respond to the offer, an early offer may force the plaintiff to accept or reject the offer before taking any discovery.

Third, if the plaintiff rejects it, the rule 68 offer will hang over the litigation like a guillotine, influencing the plaintiff's behavior in several ways." (Citations Omitted) [23]

2) The Offer

a) Apply to Plaintiffs and Defendants.
Federal rule only applies to defendants. ABA proposal applies to both plaintiffs and defendants. Proposed Rule 166b allows plaintiffs as well as defendants to make offers of judgment.

b) As to all claims.
To qualify, an offer must extend to all claims. Otherwise, piecemeal settlement would be encouraged and the purpose of the offer of judgment rule would not be fulfilled.

c) Buffer. Should the rule include a buffer or a cap?
As proposed, the rule provides offerees a 25% margin of error before they can be subjected to cost shifting. This tracks the ABA proposal. "The 75%-125% percentages that trigger cost shifting were chosen in the belief that case evaluations by parties and their attorneys often lack exact precision and that a margin of error should be accorded to offerees before imposing cost shifting." See Sherman article. The offeree who rejects a more

[23] Simon, The New Meaning of Rule 68: Marek v. Chesney and Beyond, 14 N.Y.U. Rev. L. & Soc. Change 475 (1986).

favorable offer than she receives at trial must pay the offeror's costs, including all reasonable attorney's fees and expenses incurred after the date of the offer. However, this penalty provision does not operate to shift costs to the offeree unless the final judgment is greater than 125% of the amount of the offer. Similarly, an offeror cannot recover costs unless the final judgment obtained is less than 75% of the amount of the offer.

d) Cap.
The proposal specifically limits the maximum fee award to the amount of the judgment,

e) Joint Offers. Should multiple parties be entitled to make a joint offer of judgment, and if so, may they be conditioned upon acceptance by al the parties?

- Nevada's rule provides extensive provisions regarding multi-parties.
    a) Multi-parties may make a joint offer of judgment.
    b) A party may make two or more parties an apportioned offer of judgment that is conditioned upon acceptance by all the parties.
    c) The sanctions for refusing an offer apply to each party who rejected the apportioned offer, but not to a party who accepted the offer.
    d) An offer to multiple <u>defendants</u> only applies if:
        1) the same person is authorized to decide whether to settle the claims against all defendants; AND
        2) there is a single common theory of liability against all the defendants; OR
        3) the liability of one or more of the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made; OR
        4) the liability of all the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made

e) A similar provision applies to multiple plaintiffs.

- Wisconsin requires a plaintiff suing multiple defendants under multiple theories to make separate settlement offers. Wisconsin also allows defendants who are jointly and severally liable to submit joint offers of judgments to an individual plaintiff. [24]

- ABA Proposal. When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

f) Admissability. An offer of judgment is served by the offeror upon the offeree. It is not filed with the court and is inadmissible except on the issue of costs and attorneys' fees. The court will see the offer only if the offeror puts it at issue to recover its litigation expenses.

3) Time Period for Keeping the Offer Open

Revocability of Offer. Should an offer be irrevocable for a time period? How long should an offer be open to constitute an offer of judgment?

4) Terms of the Acceptance

Should the acceptance of the offer be unconditional to be effective for purposes of cost shifting?

5) The Fee Shifting Formula

a. What Litigation Costs Should be Shifted? Costs only, costs x10, attorney's fees, some cap on recovery of attorney's fees, expert fees?

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[24] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment.

b) Costs. Should costs include both taxable[25] and non-taxable costs?
c) Limits. Should the rule limit the offeror's recovery of costs, including attorneys' fees, to the total amount of the judgment.?

d) Fees. Plaintiff's Recovery of Contingent Fees. Ordinarily, Plaintiffs do not keep hourly time records, how would Plaintiff prove up reasonableness of fee after offer of judgment rejected by the Defense? Would a lodestar apply? Should factors for reasonable of attorney's fees be included in any offer of judgment rule?

e) Statutory Basis Exists Already for Recovery of Attorney's Fees. Does that mean a prevailing Plaintiff under the Offer of Judgment rule, gets to recover double as to those fees incurred after the Defense rejects the offer and the Plaintiff obtains a more favorable option? One option is to prohibit double recovery.

6) What is a more favorable judgment?

a) Is a more favorable judgment limited to a verdict, does it include summary judgment, or other final disposition of the case?

b) Fees and Costs incurred after the expiration of a refused offer. Should the same be excluded in determining whether a judgment is more favorable than the offer?

- Much of the comparison depends on the details and terms of the offer. (E.g. if costs and fees are independently specified in the offer)

- The Unadopted Amendments to FRCP 68 exclude costs, attorney's fees, and other items after the expiration of a refused offer.

    ? E.g. A defendant offered a lump sum of $50,000, and the plaintiff received a $45,000 judgment. The judgment would be "more favorable" to the plaintiff if the costs, attorney's fees, and other items awarded for the period before the offer expired total more than $5,000.

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[25] See Allen & Ellis, "What are Taxable Costs in Texas?" 36 Houston Lawyer 14, October 1998.

- **Colorado's** rule provides that any amount of the final judgment representing interest subsequent to the date of the settlement offer should not be considered when comparing the amount of the judgment and the amount of the settlement.

- **Oklahoma** subtracts attorney's fees and costs from the judgment when calculating the difference between the offer and judgment. **Wisconsin** also compares the offer and judgment exclusive of costs.[26]

c) Should a take-nothing judgment be considered a more favorable judgment for the defendant who has made an offer that was rejected by the Plaintiff? The U.S. Supreme Court held federal offer of judgment rule does not apply to a take-nothing judgment applying the literal language of the rule. (Delta Airlines v. August). "The virtue of this literal interpretation of the rule...is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." On the other hand, it is ironic that a Plaintiff may fare better by a take nothing judgment than a very small judgment in its favor. A majority of the subcommittee believes that a take nothing judgment is a more favorable judgment for the Defendant.

d) Remittiturs. Should the offer of judgment rule expressly include a provision that takes into account a remittitur in determining the ultimate judgment?

e) Should an offer of judgment rule apply to cases seeking injunctive or declaratory relief[27] and, if so, how should a court compare a Rule 166b offer to the final judgment when injunctive relief has been offered or awarded?

f) Non-Monetary Relief. What constitutes a favorable judgment? We should clarify how the rule would apply in cases seeking equitable relief. Proposal:

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[26] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment

[27] Rhodes v. Stewart, 488 U.S. 1, 2 (1988) (per curiam). (Obtaining a declaratory judgment does not automatically mean that a party has prevailed within the meaning of the Fees Act. Citing its "equivalency doctrine," the Court held that a plaintiff only achieves prevailing party status if the litigation affects the "behavior of the defendant towards the plaintiff.").

The terms of the offer must address all non-monetary relief. A judgment is not more favorable unless it includes substantially all non-monetary relief requested.

g) Non-Monetary and Monetary Relief. What constitutes a favorable judgment? Any offer of judgment rule should clarify how the rule would apply in cases where a party recovers one but not the other requested relief.

7) Exemptions:

a) Class Actions? Derivative suits? DTPA? Family law cases? Workers Comp?

b) Statutory Cap Damage Cases. Won't the defense (in a clear liability case) always make an offer 25% below the cap so as to shift the post-offer expense of fees and cost to the Plaintiff? Should statutory cap cases be exempted from the offer of judgment rule, or should the Defendant be required to offer the cap, before the fee shifting under an offer of judgment rule would apply?

c) Exempt action between a landlord and tenant affecting the tenant's residence. Perhaps exempt all actions brought before a justice court?

8) Withdrawal of Offers and Subsequent Offers

a) Withdrawal. Should withdrawal of an offer be forbidden within the time period during which the offer stated that it would remain open? Should the court have the discretion to permit withdrawal for good cause shown and to prevent manifest injustice?

b) Subsequent Offers. Should subsequent offers be allowed? It would seem so. Even if an offeror has locked in an offeree with an unaccepted offer, the offeror may want to improve its chances of recovery of its costs and attorneys' fees by improving the offer which thereby improves the chances of settlement, thereby fulfilling the objective of the rule.

9) Court Discretion to Deny Fee Shifting.

"The ABA proposal contains a broad discretionary grant to the court to reduce or eliminate cost shifting to avoid undue hardship, in the interest of justice, or for other compelling reason to seek judicial resolution."

Rule 166b(9)(c). Do we need a more precise standard for the court's discretion to decline to award litigation costs under the rule, other than "the amount as justice requires"?

Should parties be able to "opt out" of an offer of judgment rule? Should the court have discretion, on motion of a party, to determine that the offer of judgment rule will be inapplicable to the case at hand?

10) Collateral estoppel implications.

What are the collateral estoppel implications when a defendant offers a judgment, as to other cases involving the same incident or transaction? One option is to provide in the rule or by comment, that a judgment reached under the rule is not the basis for collateral estoppel in other proceedings.

VII. Alternative Proposals Discussed

Amend the Cost Rules.

Clarify that costs may be taxed against a prevailing party for the unreasonable rejection of an offer of judgment. Rule 131 provides that a prevailing party is entitled to costs "unless the court otherwise directs." The rule could be amended to make clear that the trial court may consider an unreasonable rejection of a settlement offer when determining whether to award costs to a prevailing party, to deny such costs, or even to award them to a losing party who made a good faith settlement offer that was unreasonably rejected. The addition of the following sentence to Texas Rule of Civil Procedure 131 is suggested:

> When a plaintiff receives less than the amount offered by a Defendant before trial, the trial court has the discretion to tax all or part of the costs against the Plaintiff.

Alternate suggestion: provide for shifting of costs under offer of judgment principles in cases in which "the judgment finally entered is not more favorable to the offeree than the rejected offer", and provide for taxation to up

to ten times taxable costs.[28]

Amend the Sanctions Rules.

Sanctions rules could be amended to provide that all offers of settlement and refusals of such offers must not be presented for any improper purpose, as well as be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and be supported by evidence obtained after a reasonable pre-offer (or pre-refusal) inquiry.[29] Alternatively, provide for shifting of attorneys' fees only when settlement offers were rejected "frivolously, in bad faith, or for an improper purpose." [30] Our subcommittee rejected this idea.

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[28] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

[29] See Professor Burbank, Proposals to Amend Rule 68--Time to Abandon Ship, 19 U. MICH. J.L. REF. 425 (1986); Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[30] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

Subcommittee Recommendation

Appendix A

Revised 2/01/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. Election By Governmental Units; Waiver.

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. Service. When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. Offer To Settle.

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. Acceptance of Offer.

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. Withdrawing an Offer

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. Rejection of Offer. For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. Award of Litigation Costs.

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in any action for personal injury or death.

10. Attorney's Fees.

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. Evidence Not Admissible.

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

Appendix B

Proposed 1984 Amendments to Rule 68 Offer of Judgment Rule Incorporating Unreasonable Rejection of Offer As Prerequisite to Recovery of Attorney's Fees.

> "At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counteroffer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.
>
> "If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.
>
> "In determining the amount of any sanction to be imposed under this

rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree. "This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1984), reprinted in 102 F.R.D. 407, 432-433 (1985).

Appendix C A.B.A. Report on Offer-of-Judgment Legislation

§1. Offer of Judgment

At any time in a suit in which the claims are for monetary damages, or where any non-monetary claims are ancillary and incidental to the monetary claims, but at least 60 days after the service of the complaint and not later than 60 days before the trial date, any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer.

When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

§ 2. Form of Offer of Judgment

An offer of judgment must be in writing and state that it is made under this rule; must be served upon the opposing party to whom the offer is made but not be filed with the court except under the conditions stated in § 11; must specify the total amount of money offered; and must state whether the total amount of money offered is inclusive or exclusive of costs, interest, attorney's fees and any other amount which the offeror may be awarded pursuant to statute or rule. Only items expressly referenced shall be deemed included in the offer.

§ 3. Determination of Applicability

At any time after the commencement of the action, any party may seek a ruling from the court that this rule shall not apply as between the moving party or parties and any opposing party or parties by reason of the fact that an exception to the rule exists or that one or more of the circumstances set forth in Section 11(e) for eliminating the application of the rule exists. The court, upon receiving and considering any such application, may grant the application, deny the application, or, in its discretion, defer a ruling on the application until a later time including a time after the entry of judgment. Any

moving party obtaining the relief sought under such a motion prior to judgment may not, itself, use the rule as to any opposing party to which the motion is applied.

§ 4. Time Period During Which Offer Remains Open.

An offer may state the time period during which it remains open, which in no event may be less than 60 days. An offer that states a time period of less than 60 days is an invalid offer. An offer that does not state the time period during which it remains open is deemed to remain open for 60 days, and thereafter indefinitely until 60 days before the date set for trial unless withdrawn pursuant to the provisions of § 8 in which case it shall have no further consequence under this rule.

§ 5. Extension of Time Period During Which Offer Remains Open

Upon the application of the offeree, the court may, for good cause shown, extend the time period during which an offer remains open. If the court extends the time period during which an offer may remain open, the offeror has the option of withdrawing the offer.

§ 6. Acceptance of Offer.

An offer is accepted when a party receiving an offer of judgment serves written notice on the offeror, within the time period during which the offer remains open, that the offer is accepted without qualification.

§ 7. Refusal of Offer.

An offer is deemed to be refused if it is not accepted within the time period during which the offer remains open.

§ 8. Withdrawal of Offer.

An offer may not be withdrawn, except with the consent of the court for good cause shown and to prevent manifest injustice, before the expiration of the time period during which the offer stated that it would remain open. An offer not made subject to an expressly stated time period may be withdrawn after 60 days by serving the offeree with written notice of the withdrawal and

shall have no further consequence under this rule.

§ 9. Inadmissibility of An Offer Not Accepted.

Evidence of an offer not accepted is not admissible for any purpose except in a proceeding to determine costs and attorney's fees under a statute or rule permitting recovery thereof or pursuant to an entry of judgment under § 11.

§ 10. Subsequent Offers.

The fact than an offer is made but not accepted does not preclude any party from making subsequent offers. If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee- shifting under § 11(a) or (b) as to any one of such offers.

§ 11. Effect of Rejection of an Offer.

If an offer made by a party is not accepted and is not withdrawn before final disposition of the claim that is the subject of the offer, the offeror may file with the clerk of the court, within 10 days after the final disposition is entered, the offer and proof of service thereof. A final disposition is a verdict, order on motion for summary judgment, or other final order on which a judgment can be entered, including a final judgment, but a judgment based on a settlement agreement will not result in cost-shifting unless the parties expressly agree to cost-shifting rights under this rule. The court, after due deliberation and after providing the parties to the offer an opportunity to submit proposed findings, will enter judgment as follows:

(a) If a final judgment obtained by a claimant who did not accept an offer from an adverse party is not greater than 75% of the amount of the offer, the claimant offeree shall pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorneys fees under court rule or contract, the

court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off. This subsection (a) shall not apply if the claimant offeree receives a take-nothing judgment.

(b) If a final judgment obtained by a claimant against an adverse party who did not accept an offer from such claimant is greater than 125% of the amount of the offer, the offeree shall pay the claimant offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the claimant offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorney fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off.

(c) In comparing the amount of a monetary offer with the final judgment, which shall take into account any additur or remittitur, the latter shall not include any amounts that are attributable to costs, interest, attorney's fees, and any other amount which the offeror may be awarded pursuant to statute to rule, unless the amount of the offer expressly included any such amount.

(d) If both the offeree and the offeror may be entitled to recovery of attorneys fees under rules or contract, the court shall determine the amount of the recovery of such attorneys' fees by either side by the application of this rule, of such other rule as may apply to the recovery of fees, the language of any contract providing for fees and general principles of law.

(e) The court may reduce or eliminate the amounts to be paid under subsections (a) and (b) to avoid undue hardship, or in the interest of justice, or for any other compelling reason that justifies the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of judgment.

(f) The amount of any attorney's fees to be paid under subsections (a) and (b) shall be a reasonable attorney's fee for services incurred in the case as to the claims for monetary damages after the date the offer was made, calculated on the basis of an hourly rate which may not exceed as to the claims for monetary damages that which the court considers acceptable in the jurisdiction of final disposition of the action, taking into account the attorney's qualifications and experience and the complexity of the case, except that any attorney's fees to be paid by an offeree shall not:

(1) exceed the actual amount of the attorney's fees incurred by the offeree as to the claims for monetary damages after the date of the offer; or

(2) if the offeree had a contingency fee agreement with its attorney, exceed the amount of the reasonable attorney's fees that would have been incurred by the offeree as to the claims for monetary damages on an hourly basis for the services in connection with the case.

§ 12. Nonapplicability.

This provision does not apply to an offer made in an action certified as a class or derivative action, involving family law or divorce, between a landlord and a tenant as to a residence, or in which there are claims based on state or federal constitutional rights.

This provision for fee shifting also does not apply to any case in which attorneys fees are statutorily available to a prevailing party to insure the ability of claimants to prosecute a claim in implementation of the public policy of the statute.

Revised 6/17/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a civil suit to recover damages, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages on a claim, including a counter-defendant, cross-defendant, or third-party defendant.

(d.) "Court costs" means taxable costs actually incurred by the offering party after the date of the rejection or expiration of the rejected offer to settle which is the basis for a request for an award of court costs under Section 9 of this rule.

(e.) "Offer to settle" or "offer" means an offer to settle or compromise a claim made in compliance with Section 4.

(f) "Judgment" means the final judgment of the court, after any remittitur, setoff, or credit.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) a claim brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) a claim brought under the Family Code;

(4) a claim for declaratory, injunctive, or other non-monetary relief (but this rule does apply to a claim that is primarily for damages and only incidentally for non-monetary relief);

(5) a claim by or against the state, any unit of state government, or any political subdivision of the state;

(6) a claim to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code;

(7) a claim filed in small claims courts or justice courts;

(8) a claim in which all parties to the suit have agreed in compliance with Rule 11 to be exempted from this Rule.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 4 of this rule does not entitle the party to recover court costs under this rule.

3. Service. When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure, provided that Section 4(b)(8) of this rule governs which parties must be served with an offer to settle under this rule..

4. Offer To Settle.

(a.) A party may serve on an opposing party an offer to settle the entire claim in the suit between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle the entire claim pursuant to this section;

(3) must specify the terms by which the claim may be settled;

(4) must specify a deadline by which the offer must be accepted in compliance with Section 4(c)(5);

(5) may include a demand for the taxable court costs (including attorneys' fees in a case in which a statute provides for the recovery of attorneys' fees by the offering party) that have been incurred by the offering party to the date of the offer, provided, however, that if such a demand is made, the offer shall specifically state the amount of the taxable court costs incurred up to such time ;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer;

(7) may be conditioned on acceptance by other parties of an offer under this rule to such other parties; and

(8) must be served on the party to whom the offer is made but notwithstanding any other rule, need not be served on parties to the suit that are not parties to the offer..

(c.) A party may not make an offer to settle under this section:

(1) In a case governed by a Level 1 discovery control plan under Rule 190.2, sooner than 60 days after the date the answer of a defendant is due;

(2) In a case governed by a Level 2 discovery control plan under Rule 190.3, sooner than 90 days after the date the answer of a defendant is due;

(3) In a case governed by a Level 3 discovery control plan, sooner than 90 days after the date the answer of a defendant is due or such later date as the court may determine in its order;

(4) In any case, later than the 45th day before the date the trial is set; and

(5) In any case, the offer must remain open for no less than 45 days after the date it was received by the party or parties to whom it was made, although an offer may be withdrawn prior to its acceptance in accordance with Section 6.

(d.) The parties shall not file an offer to settle with the court except in connection with an action or proceeding described in Sections 5(c) or 11(a).

(e.) A party may make multiple successive offers to settle under this rule after a previous offer has been rejected or withdrawn.

(f) When there are multiple defendants in a case, the date the answer is due for each defendant shall govern as to that defendant for purposes of computing the time period in subsection (c)(1), (2) or (3) of this section 4. .

5. Acceptance of Offer.

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 45th day after the date the party received the offer to settle or before any later deadline specified in the offer.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice

of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance. The Court may seal the amount of the settlement but may not seal any other portion of the judgment without first complying with Rule 76a, T.R.C.P..

6. Withdrawing an Offer

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) A withdrawn offer may not serve as a basis for the recovery of court costs under this rule.

8. Rejection of Offer. For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer pursuant to Section 5(a).

9. Award of Court Costs.

(a.) A party who made an offer to settle the claim between that party and the party to whom the offer was made may recover court costs provided:

(1) the offer to settle was rejected or expired without being accepted;

(2) the court entered a judgment on the claim and;

(3) (A) the amount of monetary damages awarded on the claim in the judgment is more favorable to the party who made the offer than the

offer to settle the claim; and

(B) the difference between the amount of monetary damages awarded on the claim in the judgment and the amount of the offer to settle the claim exceeds twenty-five percent of the amount of the offer to settle the claim, provided, however, that if the claim is subject to a statutory limitation on compensatory damages and the offer was made by a claimant to settle such claim for an amount no greater than the statutory limit and no less than 75% of that amount, this paragraph 9(3)(B) shall be disregarded.

(b.) The court will determine the amount of court costs incurred by the offering party after the rejection or expiration of the offer. The amount of court costs awarded shall be ten times the amount of such taxable court costs determined by the court.

(c) In no event may the amount awarded as court costs against a claimant or defendant exceed the amount of damages awarded in the court's judgment to the claimant on the claim that was the subject of the offer.

(d) Nothing in this rule shall affect the court's determination of which party is the prevailing party for the purposes of awarding taxable court costs or other relief pursuant to any other applicable law. If the party to whom court costs are awarded under this rule is not the prevailing party in the litigation and suffers an award of court costs, then those court costs shall be setoff against any court costs awarded under this rule when the court enters its judgment in the case.

10. Attorney's Fees.

(a.) A party may not recover attorneys' fees as court costs under this rule. If a statute authorizes the awarding of attorneys' fees to a party: (i) the determination of the attorneys' fees to be awarded shall be governed by the applicable law and not by this rule, and (ii) in determining the difference between the amount of monetary damages awarded on the claim in the judgment and the amount of the offer to settle under section 9(a)(3)(b) of this rule, the court shall disregard any amount included as attorneys' fees in either the offer or the judgment.

(b.) If the amount of court costs to be awarded under this rule is contested, the court may award the party who prevails on that issue its reasonable and necessary attorneys' fees for the cost of supporting or contesting the amount of the award of court costs under this rule.

11. Evidence Not Admissible.

(a.) Evidence relating to offers to settle that would otherwise be inadmissible in evidence is not made admissible under this rule except in an action to enforce a judgment entered pursuant to the acceptance of an offer of judgment under this rule or in a proceeding before the court to obtain court costs under this rule.

(b.) Except in an action to enforce a judgment entered pursuant to the acceptance of an offer of judgment under this rule, the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

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October 29, 2002

FEDERAL EXPRESS

Mr. Charles L. Babcock, Chair
Supreme Court Advisory Committee
Jackson & Walker L.L.P.
1100 Louisiana Street, Suite 4200
Houston, Texas 77002

Dear Chip:

The Evidence Subcommittee of the Supreme Court Advisory Committee has considered several matters and has recommendations on several matters that have not been brought to the attention of the full Supreme Court Advisory Committee. I recommend that all these matters be presented at our upcoming meeting. I am attaching disposition chart and attachments on all these matters and ask that you make them available to all members of the Supreme Court Advisory Committee so that we can discuss these. I don't anticipate any of them will take very long except the Rule 509 (Ex Parte Communications with Plaintiff's Doctor).

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosures

DISPOSITION CHART
TEXAS RULES OF EVIDENCE

RULE NO.	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASONS
409	Referred by SBOT Administration of Rules of Evidence Committee - was considered previously and sent back to SBOT Committee for further study which resulted in amended recommendation by said committee	Proposed revised rule attached	No need to limit rule just to medical expenses. *Attached is copy of present rule and copy of proposed rule
103	Referred by SBOT Administration of Rules of Evidence Committee to add sentence that was included in Federal Rule 103	Leave rule the same and not add sentence included in the Federal Rules	Present rule meets the practices and customs in Texas and is unambiguous. *Attached is copy of Federal Rule 103, as well as present Texas Rule 103
904 (New)	Referred by SBOT Administration of Rules of Evidence Committee	Adopt the proposed amendment	For simplicity and savings of costs. *Subcommittee had reservations about implementation of this, whether through legislative action or amendment to rule with approval of the legislature. Full discussion to be held at meeting. *Proposed amendment attached *Attached is copy of Government Code § 22.004 giving rule making authority to Supreme Court
509	Referred by Bill Edwards - concerning ex parte conversations with a doctor under Exception (e)(4) to 509	Make amendment which is attached.	SBOT Administration of Rules of Evidence Committee made recommendations for change, consistent with

			new Federal Regulations and our committee felt that there should be some notice requirement and some procedure outlined. Attached is proposed rule. Also attached is copy of present Rule 509.
705	Referred by SBOT Administration of Rules of Evidence Committee	Adopt amended rule that is attached *Also attached is rule recommended by SBOT Administration of Rules of Evidence Committee	Consistency with Federal Rule 703 and applicable language in Texas Rule 403. *Attached is Federal Rule 703 and Texas Rule 403

Stam v. Mack, 984 S.W.2d 747, 752 (Tex.App.—Texarkana 1999, no pet.). "Settlement agreements may be admissible ... if offered for other purposes, such as proving bias or prejudice. One kind of settlement agreement that is admissible is a 'Mary Carter' agreement. ... These agreements are admissible to show the true alignment of the parties."

State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex.App.—Houston [14th Dist.] 1992, orig. proceeding). "[O]ffers of settlement and compromise are excluded in order to allow a party to buy his peace and encourage settlement of claims outside of the courthouse."

Ochs v. Martinez, 789 S.W.2d 949, 959 (Tex.App.—San Antonio 1990, writ denied). "The [TRE] 408 exception allowing for admission of evidence of bias or prejudice [even if statement made during settlement negotiations] is a narrow one drafted in consideration of strong Texas judicial policy favoring the disclosure of conflicts of interest among parties to a lawsuit...."

TRE 409. PAYMENT OF MEDICAL & SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

See *Commentaries*, "Motion in Limine," ch. 5-E; Herasimchuk, ***Texas Rules of Evidence Handbook***, p. 332 (2001).

History of TRE 409 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 409.

Port Neches ISD v. Soignier, 702 S.W.2d 756, 757 (Tex.App.—Beaumont 1986, writ ref'd n.r.e.). A letter from an insurance company authorizing medical expenses for a workers' compensation [P] and stating that all future medical bills should be sent to the insurance company goes beyond TRE 409 and actually admits coverage, and thus is admissible.

TRE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS & RELATED STATEMENTS

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

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

(2) in civil cases, a plea of *nolo contendere*, and in criminal cases, a plea of *nolo contendere* that was later withdrawn;

(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, in a civil case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere* that was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority, in a civil case, that do not result in a plea of guilty or that result in a plea of guilty later withdrawn, or in a criminal case, that do not result in a plea of guilty or a plea of *nolo contendere* or that results in a plea, later withdrawn, of guilty or *nolo contendere*.

However, such a statement is admissible 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.

See *Commentaries*, "Motion in Limine," ch. 5-E; Herasimchuk, ***Texas Rules of Evidence Handbook***, p. 336 (2001).

History of TRE 410 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 410.

Cox v. Bohman, 683 S.W.2d 757, 758 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). "Unless a plea of guilty to a traffic offense was made in open court ... evidence of such guilty plea is not admissible in a civil suit for damages arising out of negligence giving rise to the charge. ... A plea of *nolo contendere* to a traffic violation cannot be admitted into evidence in a civil suit for damages arising out of the same incident."

TRE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person 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.

See Herasimchuk, ***Texas Rules of Evidence Handbook***, p. 349 (2001).

History of TRE 411 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xl). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 411.

Thornhill v. Ronnie's I-45 Truck Stop, Inc., 944 S.W.2d 780, 794 (Tex.App.—Beaumont 1997, writ dism'd). TRE 411 "only prohibits the admission of

Current Proposed Revision of Rule 409:

> **Payment of Damages or Expenses.** Evidence of furnishing or paying or offering or promising to furnish or pay any damages or expenses occasioned by a personal injury or property damage is not admissible to prove liability for such personal injury or property damage.

EXHIBIT
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ARTICLE I. GENERAL PROVISIONS

FRE 101. SCOPE

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

Cross references to FRE 101: *Commentaries*, "Introduction to the Federal Rules," ch. 1-A, p. 3. Power of Supreme Court to prescribe rules of procedure and evidence, see 28 U.S.C. §2072.

Source of FRE 101: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1929; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.

In re Nautilus Motor Tanker Co., 85 F.3d 105, 111 (3d Cir.1996). The FREs "were enacted by Congress and must be regarded ... as any other federal statute. *At 112:* Accordingly, [administrative regulations cannot] limit the authority of Congress to prescribe and enforce rules for the admissibility of evidence in the federal courts."

Washington v. Department of Transp., 8 F.3d 296, 300 (5th Cir.1993). "In a diversity action, we apply federal procedural law, such as the [FREs]."

Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir.1989). The FREs "are intended to have uniform nationwide application...."

FRE 101

FRE 102. PURPOSE & 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.

Cross references to FRE 102: *Commentaries*, "Introduction to the Federal Rules," ch. 1-A, p. 3.

Source of FRE 102: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1929.

New York v. Operation Rescue Nat'l, 80 F.3d 64, 72 (2d Cir.1996). "Both the mandate of [FRCP 1] that those rules be construed 'to secure the just, speedy, and inexpensive determination of every action,' the dictate of [FRE 102] that those rules be construed to eliminate 'unjustifiable expense and delay,' and the allowance in [FRE 1006] for complex evidence to be presented in summary form should be read to preclude an absolute right of a litigant to command that a videotape be shown in full, or every word of a document be read, in open court."

Krumme v. West Point-Pepperell, Inc., 735 F.Supp. 575, 580 (S.D. N.Y.1990). "[W]hen considering [FRE] 102, it should be noted that the core provisions of the [FREs] were 'chiefly designed to serve [the] fundamental and comprehensive need in our adversary system to develop all relevant facts before the trier [of fact]'. ... Specifically, the court should also be concerned with the '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.'"

Gentile v. County of Suffolk, 129 F.R.D. 435, 458 (E.D. N.Y.1990), *aff'd*, 926 F.2d 142 (2d Cir.1991). "The trial court is given broad discretion to control the trial by the [FREs]. ... In controlling the trial the court will necessarily consider 1) whether the jury is in a position to properly evaluate the evidence before it without further help and 2) the amount of time the evidence will require as compared to alternate forms of proof. These general administrative considerations for the judicial officer presiding at the trial are designed to carry out the direction and policy of [FRE] 102. They are related to, but much broader in scope, than the special factors set out in [FRE] 403."

FRE 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.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may 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) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

2000 Notes of Advisory Committee

[¶1] The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g.*, Collins v. Wayne Corp., 621 F.2d 777 (5th Cir.1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g.*, Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir.1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g.*, Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir.1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. Wilson v. Williams, 182 F. 3d 562 (7th Cir.1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

[¶2] The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g.*, United States v. Vest, 116 F.3d 1179, 1188 (7th Cir.1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); United States v. Valenti, 60 F.3d 941 (2d Cir.1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

[¶3] The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g.*, Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir.1997) (although the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

[¶4] Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve a claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir.1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); United States v. Roenigk, 810 F.2d 809 (8th Cir.1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

[¶5] A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof or motion to strike. *See* Old Chief v. United States, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See* Huddleston v. United States, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

[¶6] Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g.*, Wells v. Shriners Hospital, 109 F.3d 198, 200 (4th Cir.1997)("[I]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

[¶7] Nothing in the amendment is intended to affect the rule set forth in Luce v. United States, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. Luce answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The Luce principle has been extended by many lower courts to other situations. *See* United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985) (applying Luce where the defendant's witness would be impeached with evidence offered under Rule 608). *See also* United States v. Goldman, 41 F.3d 785, 788 (1st Cir.1994) ("Although Luce involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); Palmieri v. DeFaria, 88 F.3d 136 (2d Cir.1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); United States v. Ortiz, 857 F.2d 900 (2d Cir.1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); United States v. Bond, 87 F.3d 695 (5th Cir.1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

[¶8] The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g.*, United States v. Fisher, 106 F.3d 622 (5th Cir.1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); Judd v. Rodman, 105 F.3d 1339 (11th Cir.1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir.1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Cross references to FRE 103: *Commentaries*, "Making Objections & Preserving Error," ch. 1-F, p. 26; "Objecting to Evidence," ch. 8-D, p. 433.

The annotated cases, reference notes, and history notes that follow the rules are not part of the official rules; they are copyrighted material included with the rules to assist in research.

TEXAS RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

TRE 101. TITLE & SCOPE

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

(b) Scope. Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.

(c) Hierarchical Governance in Criminal Proceedings. Hierarchical governance shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law. Where possible, inconsistency is to be removed by reasonable construction.

(d) Special Rules of Applicability in Criminal Proceedings.

(1) *Rules not applicable in certain proceedings.* These rules, except with respect to privileges, do not apply in the following situations:

(A) the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104;

(B) proceedings before grand juries;

(C) proceedings in an application for habeas corpus in extradition, rendition, or interstate detainer;

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

(E) proceedings regarding bail except hearings to deny, revoke or increase bail;

(F) a hearing on justification for pretrial detention not involving bail;

(G) proceedings for the issuance of a search or arrest warrant; or

(H) proceedings in a direct contempt determination.

(2) *Applicability of privileges.* These rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(3) *Military justice hearings.* Evidence in hearings under the Texas Code of Military Justice, Tex. Gov't Code §432.001-432.195, shall be governed by that Code.

Comment to 1998 change: "Criminal proceedings" rather than "criminal cases" is used since that was the terminology used in the prior Rules of Criminal Evidence. In subpart (b), the reference to "trials before magistrates" comes from prior Criminal Rule 1101(a). In the prior Criminal Rules, both Rule 101 and Rule 1101 dealt with the same thing—the applicability of the rules. Thus, Rules 101(c) and (d) have been written to incorporate the provisions of former Criminal Rule 1101 and that rule is omitted.

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 65 (2001).

History of TRE 101 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvi): added "Civil" to title of rules in (a). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: For TRE 101(a), see FRE 1103; for TRE 101(b), see FRE 101.

TRE 102. PURPOSE & 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.

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 78 (2001).

History of TRE 102 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: FRE 102.

TRE 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. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(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 offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the

absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

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

(d) Fundamental Error in Criminal Cases. In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Comment to 1998 change: The exception to the requirement of an offer of proof for matters that were apparent from the context within which questions were asked, found in paragraph (a)(2), is now applicable to civil as well as criminal cases.

See *Commentaries*, "Motion in Limine," ch. 5-E; "Objecting to Evidence," ch. 8-D; "Offer of Proof & Bill of Exceptions," ch. 8-E; Herasimchuk, *Texas Rules of Evidence Handbook*, p. 79 (2001).

History of TRE 103 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxii). Amended eff. Jan. 1, 1988, by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xciv): Added 2d sentence to (a)(1), to conform to TRAP 52(b); deleted the phrase "or was apparent from the context within which questions were asked" from (a)(2); and added 1st sentence to (b), requiring party make offer before jury is charged. Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxx): Substituted the words "a party" for "counsel" in the last sentence of (b). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: FRE 103, with changes: Party entitled to make offer in question-and-answer form.

Bean v. Baxter Healthcare Corp., 965 S.W.2d 656, 660 (Tex.App.—Houston [14th Dist.] 1998, no pet.). "[A]ppellant[ ] preserved error after its initial offer of the videotape. If exclusion of evidence is based on the substance of the evidence, however, the offering party must reoffer it if it again becomes relevant. This may occur when the evidence is pertinent to rebuttal. Error is waived if the offering party fails to reoffer evidence for a limited purpose after it has been excluded pursuant to a general objection."

Hill v. Heritage Resources, Inc., 964 S.W.2d 89, 136 (Tex.App.—El Paso 1997, pet. denied). "To obtain a reversal of judgment based upon a trial court's decision to admit or exclude evidence, the appellant must show: (1) that the trial court abused its discretion in making the decision; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. [¶] It has been held that when evidence is sharply conflicting and the case is hotly contested, any error of law by the trial court will be reversible...."

Ludlow v. Deberry, 959 S.W.2d 265, 270 (Tex. App.—Houston [14th Dist.] 1997, no writ). "The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence. An offer of proof is sufficient if it apprised the court of the substance of the testimony and may be presented in the form of a concise statement. ... When the trial court excludes evidence, failure to make an offer of proof waives any complaint about the exclusion on appeal."

Rendleman v. Clarke, 909 S.W.2d 56, 58 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd). "We do not reach the merits of the admissibility of evidence of other falls because in each case, appellant either failed to object, or objected only after the testimony had been offered and received. To preserve a complaint for appellate review, a party must present to the trial court a *timely* request, objection, or motion, state the specific grounds therefor[e], and obtain a ruling before the testimony is offered and received."

Chance v. Chance, 911 S.W.2d 40, 52 (Tex.App.—Beaumont 1995, writ denied). "[T]he rule requiring that proffered evidence be incorporated in a bill of exception does not apply to cross-examination of an adverse witness.... When cross-examination testimony is excluded, appellant need not show the answer to be expected but only need show that the substance of the evidence was apparent form the context within which the question was asked."

TRE 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 the court 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.

3

PROPOSED NEW RULE 904

§ 18.001. Affidavit Concerning Cost and Necessity of Services

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) ~~Unless a controverting affidavit is filed as provided by this section,~~ An affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary but does not require such a finding.

(c) The affidavit must:
(1) be taken before an officer with authority to administer oaths;
(2) be made by:
(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and
(3) include an itemized statement of the service and charge.

(d) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(e) A party ~~intending~~ may not offer evidence to controvert a claim reflected by the affidavit ~~must~~ unless that party files a counteraffidavit with the clerk of the court and serves a copy of the counteraffidavit on each other party or the party's attorney of record:
(1) not later than:
(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or
(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must ~~give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit~~ specifically set forth the factual basis for controverting the contested charges reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. The counteraffidavit may not be based upon the assertion that an affiant testifying under section (c)(2)(B) is not qualified by knowledge, skill, experience, training, education, or other expertise to testify concerning the matters set forth in section (b).

(g) Affidavits properly filed under (c) and (d) and counteraffidavits properly filed under (e) and (f) may be submitted to the trier of fact.

EXHIBIT
tabbies
F

ercise his discretion in some manner. O'Don-
v. Golden (App. 12 Dist. 1993) 860 S.W.2d

obate court's failure to rule on surviving
's motion for appointment as substitute per-
l representative for her father's estate after
e s independent executrix died demon-
ed nure on part of court to perform his duty
le on motion within reasonable time justifying
of mandamus, where court had motion for
intment under advisement for more than 18
hs and had filed no response to mandamus
eeding setting forth legal grounds to justify
lelay in ruling on motion, and, in response to
lamus proceeding, court acknowledged that it
ready and willing to rule in favor of surviving
following disposition of mandamus proceed-
but had ignored attempts for nine months to
n ruling on motion. O'Donniley v. Golden
. 12 Dist. 1993) 860 S.W.2d 267.

hough writ of mandamus would issue requir-
rial court to rule on surviving child's motion
ppointment as substitute personal representa-
of her father's estate after death of estate's
endent executrix, court would not issue writ
andamus requiring court to enter order ap-
ing child as personal representative since
decision lay within discretion of trial court
was outside scope of mandamus powers.
nniley v. Golden (App. 12 Dist. 1993) 860
2d 267.

ndamus is an extraordinary remedy and it
ie only to correct clear abuse of discretion or
ion of duty imposed by law when there is no
ate remedy at law. O'Donniley v. Golden
. 12 Dist. 1993) 860 S.W.2d 267.

preme Court did not have exclusive manda-
jurisdiction over Texas Workers' Compensa-
Co mission (TWCC) executive director or
S uent Injury Fund administrator, and
Supreme Court would not grant leave to file
l writ of mandamus in Supreme Court, where
tor and administrator were subject to manda-
in district court. City of Arlington v. Nadig
1997) 960 S.W.2d 641.

it of mandamus will issue to compel a public
l to perform a ministerial act. Medina Coun-
m'rs Court v. Integrity Group, Inc. (App. 4
1999) 21 S.W.3d 307, review denied.

ons

t court order issued in partition suit for
n of husband's military retirement benefits;
of Appeals had statutory authority only for
s matters arising from restraint due to viola-
of orders entered in divorce, custody or
rt cases. Ex parte Maroney (App. 6 Dist.
741 S.W.2d 566.

§ 22.004. Rules of Civil Procedure

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

Amended by Acts 1989, 71st Leg., ch. 297, § 1, eff. Aug. 28, 1989; Acts 2001, 77th Leg., ch. 644, § 1, eff. June 13, 2001.

Historical and Statutory Notes

1989 Legislation

The 1989 amendment, in subsec. (b), deleted the last sentence.

2001 Legislation

Acts 2001, 77th Leg., ch. 644, in subsec. (b), added the fourth sentence; in subsec. (c), substituted "is repealed or modified in any way" for "in the court's judgment is repealed".

Cross References

Bond for temporary restraining order or temporary injunction, rules, see V.T.C.A., Civil Practice & Remedies Code § 65.045.

Inmate lawsuits, exception, see V.T.C.A., Civil Practice & Remedies Code § 14.014.

Receiver for mineral interests owned by nonresident or absentee, service of notice, see V.T.C.A., Civil Practice & Remedies Code § 64.091.

Security for judgments pending appeal, rules of appellate procedure, conflicts, see V.T.C.A., Civil Practice & Remedies Code § 52.005.

Transcripts, requests, conflicts of law, see V.T.C.A., Government Code § 52.047.

Law Review and Journal Commentaries

The revised attorney-client privilege for corporations in Texas, Cullen M. Godfrey, 30 Tex. Tech L.Rev. 139 (1999).

That these theories are distinct counsels against appellate redefinition of the class.

The trial court defined a class based on the Rhodes study's identification of those producers who had been taken from non-ratably. While the pleadings and the record of the class-certification proceedings mention the Dow-waiver program, the trial court and the parties focused primarily on the methodology and results of the Rhodes study at the certification hearing. As a result, the parameters of the proposed new class are not easily identified from the record. Thus, if we were to redefine the class, we would be assuming the trial court's discretion to define the class under rule 42.

Furthermore, the trial court on remand will still have to determine whether the newly defined class satisfies the rule 42(a) and (b)(4) requirements of numerosity, commonality, typicality, adequacy of representation, and predominance. That decision will require the trial court to resolve questions of fact, as well as legal issues, from this record or whatever additional evidence is developed in the trial court. For this Court to redefine the class in this case would therefore constrain the trial court by imposing on it a definition it would be foreclosed from changing, even if the proceedings on remand revealed a more appropriate class definition or if later case developments called for modification under rule 42(c)(1). In light of the record and the trial court's considerable authority to monitor this class action, including its discretion to certify, modify, or decertify the class if it becomes necessary, we cannot redefine the class. For these same reasons, we cannot decide in this case, as Intratex urges, whether attaining a precise class definition is futile.

Without a sufficiently defined class to bring this action, Plaintiffs cannot currently meet rule 42's prerequisites. *Cf. Metcalf*, 64 F.R.D. at 409 (holding that plaintiffs' attempts to define class were futile, therefore, they could not satisfy certification requirements). Therefore, we do not reach the parties' arguments concerning the enumerated requirements of rule 42(a) and (b)(4). Only with a properly defined class can the explicit class-certification provisions be examined appropriately. If, on remand, the trial court finds a suitable class definition, it must also ensure that the newly defined class complies with the requirements of rule 42(a) and (b).

Because the trial court abused its discretion when it certified the class, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings consistent with this opinion.

Justice HARRIET O'NEILL did not participate in the decision.

Mark Matthew JOHNSTONE, Petitioner,

v.

The STATE of Texas, Respondent (Two Cases).

Nos. 99–0446, 99–0463.

Supreme Court of Texas.

March 9, 2000.

Following jury trials for court-ordered mental health services, the Probate Court, Harris County, William McCulloch, J., and Jim Scanlan, J., signed judgments ordering patient's temporary commitment to state hospital for 90 days on two occasions. Patient appealed from both judgments. Consolidating the cases, the Houston Court of Appeals, First District, Alele Hedges, J., affirmed. Granting patient's petition for discretionary review, the Supreme Court held that patient appealing temporary mental commitment order need

not file motion for new trial as prerequisite to challenging factual sufficiency of evidence.

Court of Appeals reversed and remanded thereto.

1. Mental Health ⇐37.1

Rules of Civil Procedure apply generally to mental health commitment proceedings. Vernon's Ann.Texas Rules Civ. Proc., Rule 1 et seq.

2. Courts ⇐85(1)

When a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided under provision governing Supreme Court's rulemaking. V.T.C.A., Government Code § 22.004.

3. Mental Health ⇐45

Rule requiring person to file motion for new trial as prerequisite to challenging factual sufficiency of evidence does not apply to person appealing temporary mental commitment order. Vernon's Ann.Texas Rules Civ.Proc., Rule 324.

Scott Kevin Boates, Sherea A. McKenzie, Houston, for Petitioner in No. 99–0446.

Sherea A. McKenzie, Jeffrey D. Kyle, Houston, for Petitioner in No. 99–0463.

Lisa S. Rice, Michael R. Hull, John Cornyn, Austin, for Respondent in No. 99–0446.

Michael R. Hull, Michael P. Fleming, Houston, John Cornyn, Austin, for Respondent in No. 99–0463.

PER CURIAM.

[1, 2] These consolidated cases present the question of whether a person appealing from a temporary mental health commitment order must comply with Texas Rule of Civil Procedure 324's motion-for-new-trial requirement to complain about factual insufficiency on appeal. The Texas Rules of Civil Procedure apply generally to mental health commitment proceedings. However, when a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004. *See Kirkpatrick v. Hurst*, 484 S.W.2d 587, 589 (Tex.1972); *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex.1971). Texas Health and Safety Code section 574.070 requires a proposed mental health patient to file notice of appeal ten days after the trial court signs the commitment order. We conclude that rule 324 and section 574.070 conflict. Therefore, we hold that Rule 324 does not apply in temporary mental health commitment proceedings. Accordingly, we reverse and remand to the court of appeals to review the factual sufficiency of the evidence.

Mark Matthew Johnstone appeals two separate temporary mental health commitment orders in which the trial court temporarily committed Johnstone to Rusk State Hospital for in-patient treatment not to exceed ninety days.[1] *See* TEX. HEALTH & SAFETY CODE § 574.034(g). Johnstone filed a motion for new trial after the first hearing, but did not file one after the second hearing. The court of appeals consolidated the appeals and held that a motion for new trial was required to preserve factual insufficiency error. 988 S.W.2d 950, 952. It also held that the motion for new trial that Johnstone filed in the first case did not preserve factual insufficiency error because it only complained of legal sufficiency. *Id.* at 953. As a result, the court of appeals held that Johnstone waived factual sufficiency error for both hearings.

1. Although Johnstone has already been released from his temporary commitments, his legal and factual sufficiency challenges are not moot. *See State v. Lodge*, 608 S.W.2d 910, 912 (Tex.1980) (collateral consequences exception to the mootness doctrine applies to temporary mental health commitment orders).

Section 574.070 of the Health & Safety Code governs appeals from orders requiring court-ordered mental health services. *See* TEX. HEALTH & SAFETY CODE § 574.070. Subsection (b) mandates that notice of appeal from an order requiring court-ordered mental health services must be filed not later than the 10th day after the trial court signs the order. *Id.* § 574.070(b). Subsection (c) provides that the clerk shall immediately send a certified transcript of the proceedings to the court of appeals once an appeal is filed. *Id.* § 574.070(c). Subsection (e) states that the "court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket." *Id.* § 574.070(e). By enacting these provisions, the Legislature intended for appeals from commitment orders to proceed expeditiously because the orders result in confinement. *Id.* § 571.002(6) (one of the purposes of the Mental Health Code is to establish procedures for prompt and fair decisions); *see also Moss v. State*, 539 S.W.2d 936, 940 (Tex.Civ.App.—Dallas 1976, no writ) ("Expeditious disposition of such an appeal is appropriate in view of the deprivation of liberty involved and the fact that [hospitalization can only last] ninety days.").

Rule 324 provides that a motion for new trial is required to preserve factual insufficiency error. *See* TEX.R. CIV. P. 324(b)(2). A party has thirty days from the date the trial court signs the judgment to file a motion for new trial. *See* TEX.R. CIV. P. 329b(a). The trial court has seventy-five days from the date it signed the judgment to rule on the motion or it is overruled by operation of law. *See* TEX.R. CIV. P. 329b(c). Once the motion is ruled on, the trial court has thirty additional days of plenary jurisdiction. *See* TEX.R. CIV. P. 329b(e). When a party files a motion for new trial, notice of appeal need not be filed until ninety days after the trial court signs the judgment. *See* TEX.R.APP. P. 26.1(a)(1).

The motion-for-new-trial requirement of our rules conflicts with section 574.070's terms and purpose. The appeals schedule the Legislature created does not contemplate the filing of a motion for new trial. In these types of cases, notice of appeal must be filed ten days after the trial court signs the order, *see* TEX. HEALTH & SAFETY CODE § 574.070(b), while under Rule 329b(a) a motion for new trial would not be due until thirty days after the trial court signs the judgment. It would frustrate the statutory purpose to require a complainant to file a motion for new trial after the deadline for perfecting an appeal has already passed. *See Moss v. State*, 539 S.W.2d 936, 941 (Tex.Civ.App.—Dallas 1976, no writ) (holding it would be contradictory to require a motion for new trial after the appeal is already perfected). In *Moss*, the court was interpreting the former version of section 574.070, which required notice of appeal to be filed five days after the order. The court rejected the argument that because the statute was silent on a motion for new trial, the statute did not affect that requirement. It reasoned that had the Legislature wanted a proposed patient to file a motion for new trial, it would have provided for notice of appeal to be filed after the motion for new trial.[2] *See id.* at 940. Because the statute did not allow time to dispose of a motion for new trial, the trial court held that a motion for new trial was not required. *See id.*

In addition, a motion for new trial serves no practical purpose once the appeal has

2. We note that two other courts of appeals have held that a person appealing from a temporary mental health commitment order does not have to file a motion for new trial. *See L.S. v. State*, 867 S.W.2d 838, 841 n. 2 (Tex.App.—Austin 1993, no writ); *In re P.W.*, 801 S.W.2d 1, 2 (Tex.App.—Fort Worth 1990, writ denied). These courts held that because temporary mental health commitments involve incarceration, factual sufficiency review should be conducted like it is in criminal cases, without preservation of error. *See L.S.*, 867 S.W.2d at 841 n. 2; *In re P.W.*, 801 S.W.2d at 2. Because we conclude that the rule and the statute conflict, we do not comment on the reasoning of these opinions.

already been perfected. Moreover, the statutory scheme supersedes the appellate timetable established by Rule 324 in conjunction with Rule 329b and Texas Rule of Appellate Procedure 26.1.

[3] For these reasons, we conclude that a person appealing a temporary mental commitment order need not file a motion for new trial as a prerequisite to challenging the factual sufficiency of the evidence. Without hearing oral argument, we reverse and remand these cases to the court of appeals for review of the factual sufficiency of the evidence. *See* TEX.R.APP. P. 59.2.

Lea BORNEMAN, Petitioner,

v.

STEAK & ALE OF TEXAS, INC., d/b/a Bennigan's, Respondent.

No. 98–1167.

Supreme Court of Texas.

April 6, 2000.

Passenger in vehicle brought action under Dram Shop Act against restaurant that served driver of vehicle alcohol for injuries sustained in vehicle accident. Following jury verdict, the District Court No. 236, Tarrant County, Thomas Wilson Lowe, III, entered judgment awarding passenger actual and punitive damages. Appeal was taken. The Fort Worth Court of Appeals reversed and rendered. Petition for review was filed. The Supreme Court held that: (1) jury question, which asked jury if it found conduct of restaurant to be proximate cause of occurrence in question, was erroneous, and (2) jury charge was not so defective that it warranted rendition of judgment, and thus remand was necessary.

Court of Appeals reversed and remanded.

1. Intoxicating Liquors ⇐282, 291

Generally, the Dram Shop Act provides the exclusive means for recovery against a provider of alcohol, and its requirements are twofold, it must be apparent to the defendant at the time the alcohol is provided, sold, or served that the person consuming the alcohol is obviously intoxicated to the extent that he presents a clear danger to himself and others, and the intoxication of the recipient must be a proximate cause of the damages suffered. V.T.C.A., Alcoholic Beverage Code §§ 2.01-2.03.

2. Trial ⇐352.1(6)

Jury question in action brought under Dram Shop Act, which asked jury if it found conduct of restaurant to be proximate cause of vehicle accident in which passenger was injured, was erroneous, where question could have allowed jury to consider restaurant's act or omission, such as failing to call taxicab for driver, as basis for causation, and where Act required that liability could be imposed only if driver's intoxication was proximate cause of injury. V.T.C.A., Alcoholic Beverage Code § 2.02(b)(1, 2).

3. Trial ⇐241

As a general rule, when a statutory cause of action is submitted, the charge should track the language of the provision as closely as possible.

4. Appeal and Error ⇐1177(5)

Jury charge was not so defective that it warranted rendition of judgment for restaurant in dram shop action brought by passenger of vehicle against restaurant that served driver alcohol, and thus remand was necessary, even though jury was given erroneous question, which would have allowed jury to consider act or omission of restaurant, such as failing to call taxicab for driver, as basis for causation,

4

Rule 509(g)

(g) (1) *Ex Parte Communications by Defendant.* Unless otherwise prohibited by law, Defendant may communicate *ex parte* with a Plaintiff's physician or health care provider only under the following conditions:

(A) Defendant must provide to the health care provider at least seven days before the date on which any substantive conversation is scheduled to occur the Notice to Health Care Provider described in subpart (g)(2).

(B) Defendant must, at least 21 days in advance of any substantive conversation with a Plaintiff's health care provider, deliver written notice to Plaintiff or, if Plaintiff is represented by counsel, Plaintiff's attorney, that it intends to contact such health care provider *ex parte*, stating the name, address and telephone number of the physician or health care provider with whom Defendant intends to communicate .

(C) Defendant may not discuss Plaintiff's HIV status;

(D) Defendant may not discuss with the physician or health care provider anything about Plaintiff's medical condition or history that is not included in medical records that have already been produced in the case; and

(E) Defendant shall notify Plaintiff's counsel that a substantive communication has occurred with a health care provider within fourteen days following the communication in the case.

(2) *Ex Parte Communications by Plaintiff's Counsel* Plaintiff's attorneys may communicate *ex parte* with Plaintiff's health care provider with the consent of Plaintiff unless (A) the health care provider is a party to the case or an employee of a party to the case, or (B) Plaintiff's counsel has been previously advised by the health care provider that the provider is represented by counsel retained specifically for the action brought by Plaintiff.

(3) *Form of Notice to Treating Physicians.* A form of the notice to and acknowledgement of the physician or health care provider shall substantially comply with the following form:

NOTICE TO HEALTH CARE PROVIDER

Your patient [insert name, social security number, and date of birth], is a plaintiff [or decedent] in a case claiming physical injuries. The name and number of the case, and the court in which it is filed, are as follows: _____ v. _____, No. _____, in the ___ Court, _____ County, Texas. I represent a party who is on the opposite side of the case from your patient. I am sending you this Notice because I desire to converse with you about your patient's condition outside the presence of your

patient's attorney. Under Texas law, I must send you this notice before you and I have any substantive conversation about your patient's health information.

The name, address and telephone number of the attorney representing your patient [decedent] in this case is:_____, _____, _____. You are free to discuss your patient's health information with the patient's attorney so long as your patient consents to your doing so.

Under Texas law, a patient who files a personal injury lawsuit is deemed to have made a limited waiver of the confidential physician-patient privilege with regard to the care and treatment of his or her physical condition. This limited waiver does not ordinarily extend to care for mental or emotional conditions. In any event, there is no waiver of the confidential physician-patient privilege except to the extent that the conditions and treatment are related to the claimed injuries in this suit. In other words, conditions or treatment that are not related to the patient's claimed injuries remain confidential.

In addition to Texas law, there are federal laws, including the Health Insurance Portability and Accountability Act ("HIPAA"), which protect patient privacy. Under HIPAA, certain patient health information may be disclosed only after the patient has received notice that disclosure of such information may take place. Thus, the patient's attorney named above in this notice has been given notice of my intent to communicate with you. If the Plaintiff's attorney objects to your discussing your patient's health information with me outside his or her presence, the court will determine whether and under what conditions you may communicate with me alone.

You are under no obligation to communicate with me or any of the other attorneys in this lawsuit, but you may communicate with me if your patient's attorney does not timely object, or if your patient consents to the communication, or if the court orders it despite an objection. In any of those events, you may, if you choose, review and discuss with me those medical records in my possession which I obtained through discovery procedures in this case. You should not provide me with any medical records in your possession, nor should you discuss your patient's HIV status, or other conditions that either are beyond the scope of the records I have obtained in discovery or that are beyond the scope of the limited waiver discussed above. Additionally, you should not discuss your patient's mental or psychiatric condition except to the extent that I already have records on this issue in my possession and show them to you during our conversation.

If you are willing to discuss the Plaintiff's condition with me, you must sign the following acknowledgment:

ACKNOWLEDGEMENT OF HEALTH CARE PROVIDER

I understand that except for the waiver described in the proceeding notice, information concerning the Plaintiff [or the decedent] remains privileged and I am bound to maintain that privilege and preserve the confidentiality of that information.

_____
Signature of Health Care Provider

_____
Date:

Comment:
For examples of other laws that may prevent disclosure, see § 611.004, 611.045 (Right To Mental Health Record), and 42 CFR Part 2 (confidentiality of alcohol and drug abuse patient records).

S.Ct. Adv. Rule509(G)

In re Bates, 555 S.W.2d 420, 430 (Tex.1977). Where the "role of the informer was very minor and occurred quite early in the [bribery] investigation; and absent other evidence concerning the relevance of the identity of the informer; the disclosure [of the informer's identity] is not required."

Warford v. Childers, 642 S.W.2d 63, 66-67 (Tex. App.—Amarillo 1982, no writ). The rule blocking disclosure "is a recognition of the fact that most informants relay rumor, gossip and street talk of no evidentiary value and the exceptions [to the rule] are designed for the rare case where the informant can give eyewitness testimony about the alleged crime or arrest."

TRE 509. 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 in any state or nation, or reasonably believed by the patient so to be.

(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 those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) Limited Privilege in Criminal Proceedings. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

(c) General Rule of Privilege in Civil Proceedings. In a civil proceeding:

(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.

(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. art. 4590i.

(d) Who May Claim the Privilege in a Civil Proceeding. In a civil proceeding:

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient 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.

(e) Exceptions in a Civil Proceeding. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

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

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

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

(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, Tex. Rev. Civ. Stat. art. 4495b*, or of a registered nurse under or pursuant to Tex. Rev. Civ. Stat. arts. 4525**, 4527a**, 4527b**, and 4527c**, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);

(6) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under Tex. Health & Safety Code ch. 462; tit. 7, subtit. C; and tit. 7, subtit. D;

(7) 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 Tex. Health & Safety Code §242.002.

(f) 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 personal affairs, or an attorney ad litem appointed for the patient, as authorized by Tex. Health & Safety Code tit. 7, subtits. C and D; Tex. Prob. Code ch. V; and Tex. Fam. Code §107.011; 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

(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 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 extent consistent with the authorized purposes for which consent to release the information was obtained.

* Now Occupations Code, title 3, subtitle B-C.

** Now Occupations Code, chapter 301.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TRCS art. 4495b, § 5.08 [now Occ. Code ch. 159]. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex.1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

See ***Commentaries***, "Scope of Discovery," ch. 6-B; "Medical Records," ch. 6-I; Cochran, ***Texas Rules of Evidence Handbook***, p. 458 (2001).

History of TRE 509 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xlvii). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvii): Re-wrote (d)(4); added references to statutes relating to registered nurses in (d)(5). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxiii): In (a)(2) added the words "in any state or nation, or reasonably believed by the patient so to be", in (b)(3) substituted the word "provisions" for "prohibitions"; substituted the word "rule" for "section continue to", deleted the phrase "to confidential communications or records concerning any patient irrespective", substituted "even if" for "of when"; in (b)(3) added the phrase "prior to the enactment of the Medical Practice Act, TRCS art. 4590i (Vernon Supp.1984)"; in (c)(1) substituted the words "by a representative of the patient" for the word "physician"; and in (d)(7) deleted the words "when the disclosure is relevant to" and substituted the words "proceeding, proceeding for court-ordered treatment, or probable cause hearing" for "or hospitalization proceeding." Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xlvi). Source: TRCS art. 4495b, §5.08 (repealed).

R.K. v. Ramirez, 887 S.W.2d 836, 842 (Tex.1994). "[T]he patient-litigant exception to the [TRE 509 & 510] privileges applies when a party's condition relates in a significant way to a party's claim or defense. *At 843 n.7:* Whether a condition is a part of a claim or defense should be determined on the face of the pleadings, without reference to the evidence that is allegedly privileged. *At 843:* [T]he exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance."

Groves v. Gabriel, 874 S.W.2d 660, 661 (Tex.1994). "[A] trial court's order compelling release of medical records should be restrictively drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit. The global release in this case does not meet the *Mutter* standard."

Mutter v. Wood, 744 S.W.2d 600, 601 (Tex.1988). "Even in the interest of broad discovery directed at seeking the truth, no privilege should be totally ignored." A court order requiring the plaintiffs to waive the physician-patient privilege was too broad.

Rios v. Texas Dept. of MHMR, 58 S.W.3d 167, 169-70 (Tex.App.—San Antonio 2001, n.p.h.). Plaintiffs "complain that opposing counsel's *ex parte* contact with [P's physician] was improper and should be declared impermissible because it conflicts with a physician's fiduciary duty of loyalty to his patient and invites improper influence that threatens the relationship of trust confidence. [Ps] presented no evidence that [D] elicited confidential, privileged medical information as a result of its interview with [P's physician]. [Ds] contacted [P's physician] more than four years following his consultation with [P], and at a time when the doctor did not consider himself a 'treating physician' to [P]."

THE STATE BAR OF TEXAS ADMINISTRATION OF THE RULES OF EVIDENCE COMMITTEE
Minutes of Committee Meeting – October 25, 2002

A meeting of the State Bar of Texas Administration of the Rules of Evidence Committee ("AREC") was held on Friday, October 25, 2002 at the Texas Law Center in Austin. Written notice and a written agenda (including Subcommittee reports), copies of which are attached as Exhibits "A" and "B," respectively, were sent out in advance of the meeting. The meeting was called to order at approximately 10:15 a.m. and a quorum of the voting members of the Committee was present. The attendance record of the meeting is attached at Exhibit "C." The Committee then proceeded to take up a number of Subcommittee reports and recommendations.

A. Report of Subcommittee Regarding Ex Parte Communications with Treating Physicians.

Terry Jacobson reported on his subcommittee's work on a potential rule regarding evidence obtained through ex parte communications with treating physicians. A copy of his subcommittee's report, including a new proposed rule and minority reports, is attached as Exhibit "D." Mr. Jacobson gave a detailed report on the work performed by his subcommittee. He reported that, after careful study, the subcommittee had determined that the Federal HIPAA regulations preempt state law, severally limit the circumstances under which a health care provider can disclose health care information, and impose penalties on the health care provider for violation of the regulations. For that reason, a majority of his subcommittee believed that a new rule restricting ex parte communications was required. Mr. Jacobson then discussed the specifics of the subcommittee's proposed rule, which was based on language taken directly from the HIPAA Regulations.

Following Terry Jacobson's report, other subcommittee members provided their views. Included among these was a report by Victor Haley regarding the defense bar perspective (also set out in the subcommittee's minority report). According to Mr. Haley, the defense bar does not agree that HIPAA preempts state law regarding ex parte communications, although he stated that these regulations were a "concern." He also discussed his view that the proposed recommendation would not be fair to the defense bar since plaintiff's counsel would then have sole access to treating physicians and defense counsel could only gain access through expensive formal discovery. Mr. Haley urged AREC to do nothing at this time and to reject the subcommittee's proposal. David Starnes and Steve Harrison, also subcommittee members, then gave a report of the plaintiff bar's perspective. Mr. Starnes strongly urged a complete ban on ex parte communications and stated that the rule should make clear that any evidence obtained through ex parte is inadmissible at trial. Mr. Harrison's view was that unrestricted ex parte communications allowed far too much room for mischief and that there was no way to "police" the communications. However, he believed that the appropriate remedy would be to allow a procedure for ex parte communications under certain limited circumstances pursuant to court order. He favored the subcommittee's proposed rule. Finally, Dean Sutton, also a subcommittee member, stated his view that he had a strong concern for the treating doctors who are the subject of the ex parte communications and who run the risk of the penalties imposed by HIPAA. He also stated his belief that HIPAA preempts state law on this issue and that a rule like the one recommended by the subcommittee was needed.

Following the report by the subcommittee and its various members, the Chair opened the floor for a general discussion by all members of AREC. As part of this discussion, the Committee also considered a rule restricting ex parte communications received from Buddy Low's Evidence Subcommittee of the Supreme Court Advisory Committee ("SCAC"). This rule, a copy of which is attached as Exhibit "E," was prepared by Judge Harvey Brown and Tommy Jacks. The Committee also discussed a new proposal by Judge David Godbey that was consistent with the previous debate the Committee had at its May 24, 2002 meeting. Under this proposal, ex parte communications would be prohibited absent written consent or a court order. Following these discussions, the Committee voted on the various proposals.

With respect to Victor Haley's recommendation that no action be taken and the issue left to the courts to decide, AREC voted against such a proposal by a vote of 15-3. With respect to David Starnes's proposal to adopt a rule completely banning ex parte communication under any circumstances, AREC again voted against such a proposal by a vote of 13-5. As to the proposed rules drafted by the subcommittee and the proposed rule prepared by Judge Harvey Brown and Tommy Jacks, no one on the Committee favored either proposal. Although the concept of the Subcommittee's proposed rule was workable, the Committee members felt that, as drafted, the rule was too long and complex and did not address health care information covered by statutes other than HIPAA, such as those relating to HIV status and mental health. The Committee members also felt that the Brown/Jacks proposal was flawed because it was written in Plaintiff/Defendant terms, it did not completely satisfy the requirements of HIPAA, it was vague in several respects and limited the ex parte contact too narrowly to the information contained in previously produced medical records.

Instead, AREC ultimately voted in favor of the proposal made by Judge Godbey which allowed for ex parte contact only by written consent or through a court order. The substance of the new rule, which the Committee believes is consistent with HIPAA, is as follows:

> *New Rule 514. Limitation on ex parte communications in civil proceedings.* In civil cases, a party or party's representative may not communicate with or obtain healthcare information from a healthcare provider outside of formal discovery except by (1) written authorization of the patient or patient's representative, or (2) pursuant to a court order which specifies the scope and subject matters that may be disclosed and which states that the healthcare provider is under no obligation to discuss such matters outside of formal discovery. A copy of such order must be provided to the healthcare provider prior to any such communication or disclosure. Evidence obtained in violation of this Rule is inadmissible except upon a finding of good cause. Nothing in this Rule precludes the parties from communicating, obtaining or sharing healthcare information in connection with a joint representation, privilege or agreement.

A copy of the text of the proposed rule is also attached as Exhibit F. The language set forth above was approved by a 13 to 3 vote. However, a number of observations were made regarding the proposal, including the following:

1. The Rule may be better suited for inclusion in Rule 192, as a procedural/discovery rule.

2. HIPAA Regulations will likely have a far-reaching effect on the physician-patient

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privilege, and discovery in general, and need to be studied further. These regulations will undoubtedly affect other areas of evidence and procedure.

3. Some concern was expressed regarding who is and who is not a "healthcare provider." Rule 509 currently applies only to physicians. There are other provisions in the *Health & Safety Code* and *Occupation Code* which extend similar privileges to non-physicians (podiatrist, hospitals, etc.). The term "healthcare provider" may need to be defined or explained in a comment.

4. There was also discussion regarding whether evidence obtained in violation of the rule ought to be inadmissible. For the evidence to be admissible in the first place, it must be relevant. Therefore, the question arose whether the Rule should penalize a party by making discoverable and relevant information obtained in the wrong fashion "inadmissible." This needs to be given further consideration, although most Committee members believe the trial court has authority to protect against such conduct through the use of sanctions.

The Chair asked that Victor Haley prepare any additional minority report relating to this rule and advised the Committee members that both the AREC's proposal and the minority report would be forwarded on to the Supreme Court Advisory Committee as soon as possible.

B. Report on Roundtable Discussion by Judge Cathy Cochran.

Judge Cathy Cochran gave a brief report regarding the civil justice roundtable forum put together by Cathy Snapka at Justice Tom Phillips' request. This roundtable was formed to address a number of issues of concern to civil practioners, including public perception issues related to the civil justice system. The roundtable consisted of various attorney groups from around the state including the AREC, the State Bar Rules Committee, the Litigation Section of the State Bar of Texas, the Texas Trial Lawyers Association, and the Texas Association of Defense Counsel. Judge Cathy Cochran attended the first roundtable discussion as a representative of AREC and the Chair thanked her for her attendance and her report.

C. Report on Prior Recommendation Regarding Rule 705.

Chair Mark Sales reported that Bubby Low's Evidence Committee of the SCAC had considered AREC's prior recommended change to Rule 705 regarding the circumstances under which an expert could provide testimony that would otherwise be inadmissible. Buddy Low's Evidence Committee recommended that the SCAC adopt AREC's proposal in part and reject it in part. In particular, Buddy Low's subcommittee recommended a change to Rule 705(d) that tracts the exact language of Rule 703 of the Federal Rules of Evidence instead of AREC's proposed language which would make clear that the proponent of the otherwise inadmissible had the burden of convincing the trial court to admit the evidence. Because of time constraints, the Chair deferred further discussion on this issue until AREC's spring meeting.

D. Other Issues.

Also due to time constraints, the Chair deferred a discussion on Terry Jacobson's subcommittee

studying potential rule changes relating to the admissibility of electronically stored materials and documents. That subcommittee will report at the spring AREC meeting. Also, the Chair appointed Judge Cathy Cochran and Professor Jerry Powell to study potential rule changes relating to Rule 803 regarding a corroboration requirement for admitting statements against penal interest. This subcommittee will also report back at AREC's spring meeting.

There being no further business, the meeting was adjourned at approximately 1:45 p.m.

PROPOSED CHANGE TO TEXAS RULE OF EVIDENCE 705.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The only changes to Texas Rule of Evidence 705 are:

(a) Where we refer to subparagraph (d) and in paragraph (d) wherein we adopt the federal language verbatim. Also, there is a comment to this change.

PROPOSED CHANGE TO TEXAS RULE OF EVIDENCE 705.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts and Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. Subject to subparagraph (d) the expert may disclose on direct examination, or may be required to disclose on cross-examination, the underlying facts or data.

(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is bases. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do no provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

Comment to 1998 change: Paragraphs (b), (c) and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a voir dire examination into the qualifications of an expert.

Proposed additional comment: The changes to subparagraph (d) are based on the recent changes to Federal Rule of Evidence 703.

III. PROPOSED CHANGES TO TEXAS RULE OF EVIDENCE 705, FROM AREC PROPOSAL OF JUNE 2002, RED-LINED AGAINST THE CURRENT RULE, WHICH IS IN REGULAR TYPE. ~~PROPOSED DELETIONS LOOK LIKE THIS~~, AND PROPOSED ADDITIONS LOOK LIKE THIS.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. Subject to paragraph (d), ~~T~~the expert may ~~in any event~~ disclose on direct examination, or be required to disclose ~~,~~ on cross-examination, the underlying facts or data.

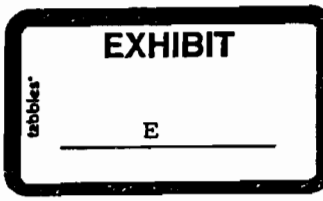
(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, ~~the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial.~~ the underlying facts or data shall not be disclosed by the proponent unless the proponent establishes that their probative value in evaluating the expert's opinion outweighs their prejudicial effect. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a voir dire examination into the qualifications of an expert.



Tanner v. Westbrook, 174 F.3d 542, 546 (5th Cir. 1999). Defendant, "in its motion for an FRE 104 hearing, called the [P's] experts' opinions on causation 'sufficiently into question,' by providing conflicting medical literature and expert testimony."

FRE 703. BASES OF OPINION TESTIMONY BY EXPERTS

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 the expert 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Cross references to FRE 703: *Commentaries*, "Introducing Testimony," ch. 8-C, §4, p. 434; 2000 Notes to FRE 703, p. 1053.

Source of FRE 703: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987.

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 747 (3d Cir.1994). "While [FRE] 702 focuses on an expert's methodology, [FRE] 703 focuses on the data underlying the expert's opinion. [¶] We have held that the district judge must make a factual finding as to what data experts find reliable ... and that if an expert avers that his testimony is based on a type of data on which experts reasonably rely, that is generally enough to survive the Rule 703 inquiry."

FRE 704. OPINION ON ULTIMATE ISSUE

(a) Except as provided in subdivision (b), 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.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Source of FRE 704: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Pub. L. 98-473, title II, §406, Oct. 12, 1984, 98 Stat. 2067.

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1212-13 (D.C. Cir.1997). "[A]n expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied."

Woods v. Lecureux, 110 F.3d 1215, 1220 (6th Cir. 1997). "[T]estimony offering nothing more than a legal conclusion—i.e., testimony that does little more than tell the jury what result to reach—is properly excludable under the [FREs]."

Lightfoot v. Union Carbide Corp., 110 F.3d 898, 911 (2d Cir.1997). The FREs "allow a lay witness to testify in the form of an opinion.... The fact that the lay opinion testimony bears on the ultimate issue in the case does not render the testimony inadmissible."

FRE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to 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.

Source of FRE 705: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.

B.F. Goodrich v. Betkoski, 99 F.3d 505, 525 (2d Cir. 1996). "An expert's testimony, in order to be admissible under [FRE] 705, need not detail all the facts and data underlying his opinion in order to present that opinion."

University of R.I. v. A.W. Chesterton Co., 2 F.3d 1200, 1218 (1st Cir.1993). FRE 703 & 705 "normally relieve the proponent of expert testimony from engaging in the awkward art of hypothetical questioning, which involves the ... process of laying a full factual foundation *prior* to asking the expert to state an opinion. In the interests of efficiency, the [FREs] deliberately shift the burden to the cross-examiner to ferret out whatever empirical deficiencies may lurk in the expert opinion. Nevertheless, Rules 703 and 705 do not afford automatic entitlements to proponents of expert testimony. [U]nder the broad exception to Rule 705 ... the trial court is given considerable latitude over the order in which evidence will be presented to the jury."

FRE 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

TRE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert 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.

Comment to 1998 change: The former Civil Rule referred to facts or data "perceived by or reviewed by" the expert. The former Criminal Rule referred to facts or data "perceived by or made known to" the expert. The terminology is now conformed, but no change in meaning is intended.

See *Commentaries*, "Introducing Evidence," ch. 8-C; "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 685 (2001).

History of TRE 703 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Amended eff. Sept. 1, 1990, by order of Apr. 24, 1990 (785-86 S.W.2d [Tex.Cases] cvii): Changed the words "made known to him" to "reviewed by the expert."; this amendment conforms TRE 703 to the rules of discovery by using the term "reviewed by the expert." See former TRCP 166b. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 703.

Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex.1997). "The substance of the [expert's] testimony must be considered. *At 712:* [A]n expert's bald assurance of validity is not enough. *At 713:* The underlying data should be independently evaluated in determining if the opinion itself is reliable."

Stam v. Mack, 984 S.W.2d 747, 750 (Tex.App.—Texarkana 1999, no pet.). TRE 703 and 705 "now allow a testifying expert to relate on direct examination the reasonably reliable facts and data on which he relied in forming his opinion, subject to an objection under [TRE] 403 that the probative value of such facts and data is outweighed by the risk of undue prejudice. ... The details of those facts and data may be brought out on cross-examination pursuant to [TRE] 705(a), 705(b), and 705(d). Moreover, the opponent of such evidence may ask for a limiting instruction if he fears the evidence may be used for a purpose other than support for the testifying expert's opinion."

Sosa ex rel. Grant v. Koshy, 961 S.W.2d 420, 427 (Tex.App.—Houston [1st Dist.] 1997, pet. denied). "Under rule 703, Officer Null, as an expert on accident reconstruction, properly relied on hearsay evidence provided by eyewitnesses to the accident if experts in his field would reasonably rely on such evidence."

TRE 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.

See *Commentaries*, "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 697 (2001).

History of TRE 704 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 704.

Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361, 365 (Tex.1987). "Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." An expert may testify that conduct constituted "negligence" and "gross negligence," and that certain acts were "proximate causes" of the plaintiff's injuries.

Dickerson v. DeBarbieris, 964 S.W.2d 680, 690 (Tex.App.—Houston [14th Dist.] 1998, no pet.). "Although rule 704 allows an expert to state an opinion on a mixed question of law and fact, it does not permit an expert to state an opinion or conclusion on a pure question of law because such a question is exclusively for the court to decide and is not an ultimate issue to be decided by the trier of fact."

Isern v. Watson, 942 S.W.2d 186, 193 (Tex.App.—Beaumont 1997, pet. denied). "[B]efore a testifying expert's opinion can be rendered [on negligence, gross negligence, or proximate cause], a predicate must be laid showing that the expert is familiar with the proper legal definition in question."

TRE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be

permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

See Cochran, ***Texas Rules of Evidence Handbook***, p. 704 (2001).

History of TRE 705 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii): Added "disclose on direct examination, or" and "on cross-examination" to last sentence. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 705.

Weiss v. Mechanical Assoc. Servs., 989 S.W.2d 120, 124-25 (Tex.App.—San Antonio 1999, pet. denied). "The non-exclusive list of factors the court may consider in deciding admissibility [under TRE 705(c)] includes the extent to which the theory has been or can be tested, the extent to which the technique relies upon the subjective interpretation of the expert, whether the theory has been subjected to peer review and/or publication, the technique's potential rate of error, whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and the non-judicial uses that have been made of the theory or technique."

Stam v. Mack, 984 S.W.2d 747, 750 (Tex.App.—Texarkana 1999, no pet.). See Annotation in TRE 703.

TRE 706. AUDIT IN CIVIL CASES

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

See Cochran, ***Texas Rules of Evidence Handbook***, p. 720 (2001).

History of TRE 706 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxi). Adopted eff. Jan. 1, 1988, by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xcvii): To conform to TRCP 172. Source: New rule.

Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex.App.—Houston [14th Dist.] 1987, writ denied). "The audit report before this court contains no such affidavit as is required by [TRCP] 172. ... Further, 6 days before trial [P] filed an objection to the audit. Therefore, the trial court did not err in admitting evidence that contradicted and supplemented the auditor's report."

ARTICLE VIII. HEARSAY

TRE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person 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 the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;

this Court were to take judicial notice of the ordinance [Ps] proffered, there is no showing that this is the version of the ordinance on which the district court rendered its judgment. To enable an appellate court to review a municipal or county ordinance, parties must both comply with the provisions of [TRE] 204 and make the ordinance a part of the trial-court record."

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

ARTICLE IV. RELEVANCY & ITS LIMITS

TRE 401. DEFINITION OF "RELEVANT EVIDENCE"

"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.

See Cochran, ***Texas Rules of Evidence Handbook***, p. 193 (2001).

History of TRE 401 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvii). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxiii): Title and entire rule were changed. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxix). Source: FRE 401.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex.1995). "[T]o constitute scientific knowledge which will assist the trier of fact, the proposed [scientific] testimony must be relevant and reliable. [¶] The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under [TRE] 401 and 402.... To be relevant, the proposed testimony must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'"

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24-25 (Tex.1994). "Simply because a piece or pieces of evidence are *material* in the sense that they make a 'fact that is of consequence to the determination of the action more ... or less probable' does not render the evidence *legally sufficient*. As Professor McCormick succinctly put it, 'a brick is not a wall.'"

Castillo v. State, 939 S.W.2d 754, 758 (Tex.App.—Houston [14th Dist.] 1997, writ ref'd). "The evidence need not prove or disprove a particular fact; the evidence is sufficiently relevant if it provides 'a small nudge' towards proving or disproving any fact of consequence. Furthermore, '[t]he motives which operate upon the mind of a witness when he testifies are never regarded as immaterial or collateral matters.'"

TRE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

See ***Commentaries***, "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 193 (2001).

History of TRE 402 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxix). Source: FRE 402.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex.1995). "Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy [TRE] 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under [TRE] 702 as well as under [TRE] 401 and 402."

Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988). The rules of evidence do not "contemplate exclusion of otherwise relevant proof unless the evidence proffered is unfairly prejudicial, privileged, incompetent, or otherwise *legally* inadmissible. We do not circumscribe, however, a trial judge's authority to consider on motion whether a party's discovery request involves unnecessary harassment or invasion of personal or property rights."

Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds*, ***Walker v. Packer***, 827 S.W.2d 833 (Tex.1992). "To increase the likelihood that all relevant evidence will be disclosed and brought before the trier of fact, the law circumscribes a significantly larger class of discoverable evidence [than admissible evidence] to include anything reasonably calculated to lead to the discovery of material evidence."

TRE 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.

See ***Commentaries***, "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 210 (2001).

[redacted]

[redacted] *Plaintiffs,* v. [redacted] HOSPITAL, ET AL., *Defendants.*	IN THE COUNTY COURT OF DALLAS COUNTY [redacted]

ORDER BARRING *EX PARTE* COMMUNICATIONS WITH TREATING PHYSICIANS

On August 31, 2001, Plaintiffs filed a Motion for Protective Order Barring Ex-Parte Interviews Between Defense Counsel & Mrs. [redacted] Treating Physicians. Defendants requested an opportunity to brief the Court on that issue, and a hearing was therefore set on Plaintiffs' motion for September 5, 2001. At the hearing, all interested parties appeared and a record was made of the proceedings. Following the hearing, Plaintiffs presented additional authorities regarding the propriety of *ex parte* interviews between defense counsel and plaintiff's treating physicians.

As many of the authorities presented state, this issue is not settled in Texas. In this Court's opinion, however, the better-reasoned decisions are those that prohibit *ex parte* communications. In addition to all of the reasons set forth in the various cases, the mere fact that *ex parte* communications with Plaintiff's treating physicians are an issue in this case at all suggests the real-world significance of allowing or disallowing such communications. Although counsel for Defendants are to a person

highly competent and professional, whatever privileges[1] may remain between Mrs. [redacted] and her treating physicians, regardless how brief the treatment, are hers to assert, not Defendants.[2]

IT IS THEREFORE ORDERED that Defendants immediately cease communications with Mrs. [redacted] treating physicians or staff[3] regarding Mrs. [redacted] treatment at issue in this cause except as expressly authorized by Mrs. [redacted] the Texas Rules of Civil Procedure, or further order of this Court.

IT IS SO ORDERED this 5th day of September, 2001.

[redacted]

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[1] As the Court in *Perkins* wrote, "the problem is not *whether* the physicians' opinions are discoverable, the issue is the *manner* in which those opinions can be obtained." *Perkins v. United States*, 877 F. Supp. 33, 332 (E.D. Tex. 1995).

[2] Defense counsel, of course, have an ethical duty to zealously advocate Defendants' interests, and owe no such duty to Plaintiffs.

[3] That Defendants' employees might have privileged information of Mrs. [redacted] does not make that information any less privileged.

Discussion Materials Relating to Rule 202

Appendix 1. Text of Rule 202

Appendix 2. Summary of Development of Rule 202 and Cases decided by Texas Courts of Appeals under Rule 202

Appendix 3. Copies of correspondence received by the Supreme Court regarding Rule 202 since the adoption of the rule

A. Letter from Stephen F. Malouf, dated July 23, 2001

B. Letter from Gov. Rick Perry, dated

APPENDIX 1- TEXT OF RULE 202

RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS

202.1 Generally. A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

(b) to investigate a potential claim or suit.

202.2 Petition. The petition must:

(a) be verified;

(b) be filed in a proper court of any county:

(1) where venue of the anticipated suit may lie, if suit is anticipated; or

(2) where the witness resides, if no suit is yet anticipated;

(c) be in the name of the petitioner;

(d) state either:

(1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or

(2) that the petitioner seeks to investigate a potential claim by or against petitioner;

(e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;

(f) if suit is anticipated, either:

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or

(2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be

ascertained through diligent inquiry, and describe those persons;

(g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and

(h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.

202.3 Notice and Service.

(a) ***Personal service on witnesses and persons named.*** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing — in accordance with Rule 21a — on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) ***Service by publication on persons not named.***

(1) *Manner.* Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published.

(2) *Objection to depositions taken on notice by publication.* Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) ***Service in probate cases.*** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) ***Modification by order.*** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit

service on any expected adverse party.

202.4 Order.

(a) ***Required findings.*** The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

(b) ***Contents.*** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

202.5 Manner of Taking and Use. Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.

Notes and Comments

Comments to 1999 change:

1. This rule applies to all discovery before suit covered by former rules governing depositions to perpetuate testimony and bills of discovery.

2. A deposition taken under this rule may be used in a subsequent suit as permitted by the rules of evidence, except that a court may restrict or prohibit its use to prevent taking unfair advantage of a witness or others. The bill of discovery procedure, which Rule 202 incorporates, is equitable in nature, and a court must not permit it to be used inequitably.

APPENDIX 2-SUMMARY OF RULE AND TEXAS COURT DECISIONS

A. SUMMARY OF ADOPTION OF RULE 202

Rule 202 is a rewrite of former Rule 187 that is broadened somewhat to expressly permit discovery depositions prior to suit and to investigate potential claims. To this extent, Rule 202 replaces and limits the "bill of discovery" of repealed Rule 737.

The Court fashioned Rule 202 in an attempt to accommodate competing concerns of plaintiffs and defense lawyers regarding the extent to which plaintiffs should be permitted to obtain pre-suit or investigatory depositions without notice to potential parties. Under former Rule 737, a person could bring an independent action to obtain an order authorizing a deposition of any other person to investigate a potential claim or anticipated lawsuit..[1] The State Bar Court Rules Committee urged the repeal of Rule 737 on the grounds that some plaintiffs were using the rule to "set up" target defendants for later suit by obtaining one-sided depositions of key witnesses without notice to the target. While these depositions generally could not be used as evidence because the target did not have notice, they arguably had the same effect — because they could be used for impeachment, the deposition "pinned down" the witness' testimony.

The Court Rules Committee proposed that Rule 737 be repealed but that former Rule 187, which authorized pre-suit depositions to perpetuate testimony, be broadened somewhat to permit pre-suit depositions in anticipation of suit.

Plaintiffs' lawyers were strongly opposed to this proposal on several grounds. They contended that it effectively eliminated their ability to obtain pre-suit depositions to investigate a claim because (1) when merely investigating a claim, plaintiffs could not swear that they actually anticipated filing suit, a requirement under the Court Rules Committee's proposal; and (2) they could not give notice to all potential parties as required by Rule 187 and the Court Rules Committee proposal because they did not yet know who the parties might be. They urged that investigatory depositions under Rule 737 had proven to be a useful device by which plaintiffs could investigate a potential claim, a step that, they contended, has become increasingly necessary in an era of sanctions for frivolous lawsuits, "no evidence" summary judgment motions, and other heightened burdens on plaintiffs. Several practitioners commented that the results of bill of discovery depositions frequently lead them not to file suit or not to pursue a potential defendant, thereby reducing the numbers of lawsuits and overall litigation costs.

To address both sets of concerns, Rule 202 expressly permits pre-suit investigatory depositions but limits the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition. A Rule 202 deposition ordinarily can be used to the same extent as a sworn statement; that is, solely for impeaching the witness from whom the deposition was taken. But if a party

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[1] Another use of Rule 737 was to obtain postjudgment discovery. The need for such a procedure, however, has largely been eliminated by Rule 621a and by the Texas Turnover Statute, Tex. Civ. Prac. & Rem. Code § 31.002. This aspect of Rule 737 is not retained in the 1999 discovery rules revisions.

attempts to use Rule 202 abusively and/or to circumvent deposition notice requirements — such as to "set up" a target rather than for good faith investigation of a potential claim — Rule 202.5 authorizes the trial court to forbid the use of the deposition for any purpose, including impeachment.

B. SUMMARY OF TEXAS APPELLATE CASES ADDRESSING RULE 202 ISSUES

I. In re Fernandez, 1999 WL 1327603 (Tex. App.-San Antonio 1999)(orig. proceeding)

ISSUES PRESENTED: SUFFICIENT TRIAL COURT PROTECTIONS OF DEPONENT

Alta Vista brought a Rule 202 action to perpetrate the testimony of Fernandez. Earlier, Fernandez had received a Rule 202 order to depose Alta Vista employees. Fernandez's counsel objected to Alta Vista's request arguing that Fernandez's ill health precluded the Rule 202 deposition. There was, however, no evidence presented regarding the health condition. *Id.* at 1.

The trial court judge ordered the deposition conditioned on medical safeguards jointly set by the parties and medical personnel so as not "to jeopardize [Fernandez's] health and well being." *Id.* Fernandez sought mandamus.

The appeals court noted that the trial court had, as required by Rule 202.4(b), placed protections in the order necessary and appropriate to protect the witness. In fact, the San Antonio court noted that "[u]nder the circumstances [the lack of medical evidence introduced by Fernandez], the trial court could have ordered the deposition taken forthwith without any safeguards for Fernandez." *Id* at 2.

II. Valley Baptist Medical Center v. Gonzalez, 18 S.W.3d 673 (Tex.App.-Corpus Christi 2000), opinion vacated by 33 S.W.3d 821 (Tex. 2000)

ISSUE PRESENTED: APPEALABILITY OF RULE 202 ORDERS

Esther Gonzales brought a petition under Rule 202 to investigate potential claims against Valley Baptist Medical Center and Erwin R. Mierisch, M.D. Gonzales seeks information regarding a fetal vacuum extractor device. On June 8, 1999, the trial court entered an order allowing Gonzales to take the depositions of both the doctor and the corporate representative of the hospital. 18 S.W.3d at 675.

The hospital filed notice of appeal of this order and a petition for writ of mandamus. Both sought temporary relief staying the deposition. On June 25, this Court stayed the deposition pending resolution of the mandamus. Then, on July 8, we denied mandamus and vacated the stay. Defendants then filed a mandamus action in the supreme court, which was denied on July 13. *Id.*

The Corpus Christi court held that an appeal can lie from a Rule 202 order and dismiss the appeal for want of jurisdiction. The Supreme Court found that the case was moot and vacated the Corpus Christi court's opinion. 33 S.W.3d 821.

The Corpus Court had found that a Rule 202 proceeding was not, in itself, a separate lawsuit, but an ancillary proceeding, incident to and in anticipation of a suit.

Any harm from the lack of a remedy by appeal was further reduced by the right to seek mandamus. The appellate court determined that "Moreover, Rule 202 provides adequate safeguards for a defendant from whom discovery is sought. The [trial] court is required to find that either allowing the discovery may prevent a failure or delay of justice in an anticipated suit, or that the likely benefit of allowing the deposition outweighs the burden or expense of the procedure. ...Mandamus is available if the trial court commits a clear abuse of discretion." 18 S.W.3d at 678.

The appellate court also suggest that the trial court could fashion Rule 202 orders, in a number of ways "[f]or example, requiring a bond to cover defendant's costs may be appropriate, when it appears possible that plaintiff has used the procedure for improper purposes or to require plaintiff to bear the burden of risk of deposing an entirely innocent potential defendant." *Id.*

The Supreme Court, in a per curium opinion, dismissed the cause as moot. Valley Baptist argued that its dispute with Gonzalez became moot when Valley Baptist produced a corporate representative for deposition. Alternatively, Valley Baptist argued that even if the dispute was not moot, the court of appeals erred in determining that Rule 202 discovery orders are not final and appealable. 33 S.W.3d at 822.

The Supreme Court held "that Valley Baptist's appeal became moot when it produced a representative for deposition and thus complied with the trial court's discovery order. At that time, there ceased to be a live controversy between Valley Baptist and Gonzalez, who are the only parties to this appeal." Therefore under Article II, Section 1 of the Texas Constitution, the court of appeals' opinion was advisory because it was decided after the controversy became moot. "Therefore,... we grant Valley Baptist's petition for review, and without reference to the merits, vacate the court of appeals' judgment and opinion, and dismiss this cause as moot." *Id.*

III. In re Southwest Securities, 2000 WL 770117 (Tex. App.-Dallas) (orig. proceeding)

ISSUE PRESENTED: APPEALABILITY OF RULE 202 ORDER

Investment Services filed a Rule 202 petition to take a deposition of an employee of Southwest Securities. Southwest moved to compel arbitration and quash the subpoenas. The trial court granted the Rule 202 petition and denied the motion to quash. Southwest sought mandamus relief to stay the Rule 202 proceeding.

The appeals court held that a Rule 202 proceeding was "ancillary to the contemplated suit" and was not a wholly separate action. *Id.* at 1. Engaging in an analysis similar to the lower court's decision in Valley Baptist, the Dallas Court of Appeals held that "the Rule 202 order is not final and appealable." *Id.* at 2

IV. In re Nexstar Broadcasting Group, Inc., 2000 WL 10593950 (Tex. App.-Amarillo 2000)

ISSUE PRESENTED: MAY A PARTY SEEK REVIEW OF A RULE 202 ORDER BY MANDAMUS

Striet sought and received from the trial court an order allowing him to take the depositions of Nexstar and Byerly under Rule 202. The media defendants moved by mandamus to set aside the order. *Id.* at 1.

The appellate court rejected the writ, noting that the relator had failed, under *Walker v. Packer*, to they failed to present any evidence to prove the absence of an adequate legal remedy. *Id.* at 2.

V. In re Akzo Nobel Chem., Inc., 24 S.W.3d 919 (Tex. App.-Beaumont 2000)

ISSUE PRESENTED: WHAT IS THE PROPER VENUE FOR A PETITION UNDER RULE 202; DOES RULE 202 AUTHORIZE A TRIAL COURT TO ORDER DISCOVERY OTHER THAN BY DEPOSITION

Beatrice Semien, and her late husband, Anthony Semien, petitioned the trial court, invoking Rule 202, and sought a deposition preserving the testimony of Anthony Semien, an order requiring alleged tortfeasors to designate and produce witnesses to be deposed, and access to the site of an accident where Anthony Semien was injured. The trial court ordered the depositions of Anthony Semien and of witnesses designated by the alleged tortfeasors and required them to make the accident scene available for inspection, photographing, and videotaping.
Id. at 920.

The Beaumont court ruled that mandamus was proper. The alleged tortfeasors would "have no adequate remedy on appeal because their only opportunity to appeal the trial court's orders would occur after the depositions and inspection have transpired. Thus, mandamus is the Relators' only remedy." *Id.*

The court also clarified where a Rule 202 petition could be filed. "A Petition under Rule 202 must be filed where venue of the anticipated suit may lie, if suit is anticipated; or where the witness resides, if no suit is yet anticipated." The court also found that "[n]either by its language nor by implication can we construe Rule 202 to authorize a trial court, before suit is filed, to order any form of discovery but deposition." *Id.* at 921. The court found that the trial court "abused his discretion in entering both orders because the petition was not before a proper court under Rule 202.2(b), and he has ordered discovery not permitted by the rules." *Id.*

VI. In re Wagner, 2002 WL 660947 (Tex. App.-Tyler 2002)

ISSUE PRESENTED: DOES THE TRIAL COURT ABUSE ITS DISCRETION WHEN ORDERS DEPOSITIONS OF DEFENDANT'S UNDER RULE 202 AFTER THE PLAINTIFF NONSUITS THEIR INITIAL LAWSUIT.

In August 2001, Estate filed a medical malpractice action against four medical providers arising out of the death of Johnnie B. Stanley.. On January 24, 2002, Estate nonsuited their initial claim. On March 6, 2002, Estate filed a Rule 202 motion seeking to depose the original defendants "to investigate a potential claim of injury: th Stanley. The trial court granted the petition.

Some of the medical providers sought a writ of mandamus. The relators argued that the Estate failed to present any testimony or evidence to support their petition, that it was an inequitable use of Rule 202, that relief under Rule 202 was foreclosed because the Estate had previously filed and nonsuited a claim involving the same facts, which were the subject of the Rule 202 motion, and that Texas Rule of Civil Procedure and Article 4590i, both barred the granting of the motion.

The Court of Appeals rejected all the arguments finding that evidence was not required to be presented at a Rule 202 hearing; that Comment to Rule 202 on inequitable use applies only when the petition asks for an order as a bill of discovery and not as an "investigation of a potential claim"; that defending a lawsuit that is subsequently nonsuited and then defending a deposition noticed under Rule 202

may appear somewhat unfair but is not unreasonable; that the Estate's certification under Rule 13 in the first lawsuit that they made reasonable inquiry into a claim does not bar relief sought under Rule 202, and that 4590i does not preclude the nonsuit of a claim and then pre-suit discovery.

RULE 76A BACKGROUND INFORMATION

During the last legislative session, Representative Fred Bosse filed HB 3125. The bill, attached as appendix A, set out civil penalties for manufacturers and sellers who do not inform the public of defective products and knowingly market and sell such products, by creating a separate cause of action, in case involving wrongful death or personal injury caused by defective products, in which the plaintiff proves by a preponderance of the evidence that the defendant committed an act or omission that had the purpose or effect of preventing the public from becoming aware of a known risk giving rise to the claimant's claim; or committed improper conduct, such as hiding or destroying documents, that if the conduct had not been committed would have lead to the the existence of any part of the claimant's cause of action being revealed, or the existence of incidents similar to the incident that gave rise to the claimant's cause of action being revealed.

The bill specifically addressed the Rules of Civil Procedure stating:

SECTION 3.01. Not later than January 1, 2002, the supreme court shall adopt and amend rules governing practice and procedure, including the rules regarding sealing of records, to prevent the courts of this state from being used in a manner that constitutes a danger to the public health and safety and constitutes conduct described by Section 98.002, Civil Practice and Remedies Code, as added by this Act.

A copy of the complete text of the bill and the bill analysis is set out as Appendix A.

A hearing on the bill was held on March 21 and April 4, 2001. The audio of the hearing can be heard at:

http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/cmteschd/cmteschd.d2w/report?LEG=77&SESS=R&CMTECODE=C100&CTYPE=House

The following persons testified regarding the bill:

For: Al-Misnad, Evelyn (Self) Al-Misnad, Kalifa (Self) Bailey, Donna (Self) Blossey, George A. (Self) Fuhrmann, Dawn (Self) Fuhrmann, Terrin (Self) Hendricks, Vickie (Self) James, Reggie (Consumers Union SW Regional Offices) Watts, Mikal (Self and Donna Bailey)

Against: Waldrop, Alan (Texans for Lawsuit Reform)

On: Earle, Elisabeth (Self)

A description of the hearing, available through Gallerywatch, described the hearing in this way:

The House Civil Practices Committee met today to discuss a variety of bills. HB 3125 presented by Rep. Bosse states that corporations should be responsible when they withhold information about defective products. They should also be held liable when those defective products cause harm or death. There were many different testimonies for the bill by people who have lost loved ones in accidents where corporate negligence was suspected. The action taken on this bill was it was left pending.

On April 4, 2001, the committee took the bill up again and, following consideration of a

committee substitute, left the bill pending in committee.

During this interim, the House Civil Practices Committee was charged with the following interim charge:

1. Examine practices by courts and attorneys in product liability cases that may be detrimental to public health and safety. The review should include the sealing of records that might assist the public in assessing the dangers of using a product, agreements not to disclose information to the public or regulatory agencies, and any other rules, practices or laws deemed relevant by the committee.

On April 2, 2002, the interim committee meet and took testimony regarding this charge. The following persons were witnesses:

Christian, George Scott (Texas Civil Justice League) James, Reggie (Consumers Union SW Regional Office) Lambe, Dan (Texas Watch)

The testimony at the meeting focused: Chairman Bosse indicated that the impetus for the bill was a New York Times article relating to the disclosure that manufacturers failed to disclose failures to appropriate regulatory agencies. The interim committees report in November will focus on whether Rule 76a is working or whether additional modification of the rule should be made, whether confidentiality agreements should be outlawed, or whether no action should be taken. Chairman Bosse presented his proposed bill relating to requiring the Supreme Court to adopt rules relating to sealing. Mr. Christian offered his organization's help to the committee but offered no specific solutions. Mr. Lambe also offered his organization's help and didn't offer any specific solutions. He testified that

despite Rule 76A information about known dangers are being kept from Texas families by sealed settlements. Mr. James asked the committee to look specifically at court ordered agreement. He believes that on paper Rule 76a works well, but in real life, it doesn't work so well. He suggested that the interplay between Rule 76a and protective orders under Rule 166(b)(5), often allow documents that would not or could not be protected under 76a to be protected under Rule 166. He suggests solutions might include codification of Rule 76a and placing the motions requesting sealing on-line.

At the end of the meeting, Representative Bosse passed on some proposed language to the Rules Attorney relating to sealing, which was substantially similar to Section 3 of the original bill which is set out above. The proposal required the Supreme Court to adopt disciplinary Rules related to sealing and stated:

SECTION 3.01. Not later than January 1, 2004, the supreme court shall adopt and amend rules governing practice and procedure, including the rules regarding sealing of records, to prevent the courts of this state from being used in a manner that constitutes a danger to the public health and safety.

In the May meeting, Justice Hecht passed on the issue for assignment.

The House Committee will continue to study the issue at its next meeting June 13, 2002.

About Rule 76A

Rule 76a was adopted in 1990. It has not been amended since 1990. Rule 76a allows records to be sealed only upon a showing that:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

A complete copy of the text of the rule is set out as Appendix B.

During the 12 years since the passage of Rule 76a , the Supreme Court has accumulated 17 three ring binders of Rule 76a filings. Since January 1, 2002, there have been 31 filings.

Facial examination of the pleading does not often disclose the reason for the court sealings. Among the types of cases in which sealing orders have been requested in the last six months are: suits relating to adoption issues and suits seeking the sealing of documents filed by an opponent following the inadvertent production of the document. One attorney routinely files motions in probate cases stating that the disclosure of the amounts paid to beneficiary's would be improper. The Court does not receive notification if a motion under Rule 76a is granted or denied.

Appendix A

By Bosse

H.B. No. 3125

A BILL TO BE ENTITLED

AN ACT

relating to certain injuries or death, including injuries resulting from malicious conduct endangering public safety; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. CIVIL REMEDIES

SECTION 1.01. Title 4, Civil Practice and Remedies Code, is amended by adding Chapter 98 to read as follows:

CHAPTER 98. MALICIOUS CONDUCT ENDANGERING PUBLIC SAFETY

Sec. 98.001. DEFINITIONS. In this chapter:

(1) "Claimant" means a party seeking relief. The term includes a plaintiff, counterclaimant, or cross-claimant.

(2) "Defendant" means a party from whom a claimant seeks relief. The term includes a counterdefendant, cross-defendant, or third-party defendant.

(3) "Governmental agency" includes any department, board, commission, or similar regulatory agency of this state, any other state, the United States, or any foreign jurisdiction.

(4) "Knowingly" has the meaning assigned by Section 6.03(b), Penal Code.

Sec. 98.002. APPLICABILITY. (a) This chapter applies to an action for recovery of damages arising out of personal injury or death caused by a defective product, without regard to the theory on which the action is brought, in which the claimant proves by a preponderance of the evidence that the defendant:

(1) committed an act or omission that had the purpose or effect of preventing the public from becoming aware of a known risk giving rise to the claimant's claim; or

(2) committed improper conduct described by Subsection (b), if, had the conduct not been committed:

(A) the existence of any part of the claimant's cause of action would have been revealed; or

(B) the existence of incidents similar to the incident that gave rise to the claimant's cause of action would have been revealed.

(b) A defendant has committed improper conduct for the purpose of Subsection (a) if the defendant knowingly:

(1) hid the existence or location of a document or other information regarding a risk, claim, or incident, regardless of the media or format in which the information exists;

(2) destroyed or altered a document or other information regarding a risk, claim, or incident, regardless of the media or format in which the information exists;

(3) made a false or misleading statement:

(A) representing that a product has or has not been tested with respect to a risk; or

(B) relating to the testing or the results of the testing of a product with respect to a risk;

(4) failed to take timely action to recall a defective product or make the risk known to the public after the risk becomes known to the defendant;

(5) failed to comply with any regulatory requirement of any governmental agency with respect to the risk;

(6) made a false or misleading representation with respect to the risk to a governmental agency;

(7) failed to disclose any information to a governmental agency that the defendant was under a duty to disclose, with the purpose or effect of preventing, delaying, hindering, or impairing a governmental agency from:

(A) performing a duty of the agency; or

(B) taking any action to protect the public from, or to inform the public of, the risk;

(8) entered into an agreement with another person not to reveal information regarding the risk, claim, or incident, or any act or omission of the defendant described in Subsection (a), regardless of whether the agreement was:

(A) made in connection with litigation in any jurisdiction of the United States or any foreign country; or

(B) the subject of a court order in any jurisdiction of

the United States or any foreign country;

(9) violated a law of any jurisdiction of the United States or any foreign country, or any rule of any court of any jurisdiction of the United States or any foreign country, if:

(A) the purpose or effect of the law or rule is to make information available to a governmental agency, the claimant, a party, the public, or the court; and

(B) the information that was the subject of the violation relates to the risk that gives rise to the claimant's cause of action; or

(10) participated in a conspiracy with one or more other persons to engage in any of the conduct described in Subdivisions (1)-(9) or to conceal, withhold, or hide information regarding conduct described by Subsection (a).

Sec. 98.003. PRIMA FACIE SHOWING OF CLAIM. (a) A claimant may not plead that this chapter applies before the claimant makes a prima facie showing, by evidence in the record or proffered by the claimant, that the defendant engaged in conduct described by Section 98.002.

(b) The prima facie showing required by this section is not required to be made by a preponderance of the evidence and is considered satisfied if the claimant produces evidence of conduct described in Section 98.002. The evidence is not required to be in an admissible form and may include affidavits, deposition testimony, discovery responses, or other evidence.

(c) If the claimant makes the prima facie showing required by this section, the court shall permit the claimant to amend the claimant's pleadings to assert that this chapter applies to the action and to include any claims or remedies authorized by law for an action to which this chapter

applies.

(d) The Texas Rules of Civil Procedure shall be liberally construed to allow the claimant discovery that appears reasonably calculated to lead to evidence relating to whether a prima facie case exists that is sufficient to support amendment of the pleadings under this section.

Sec. 98.004. EFFECT ON CLAIM. A claimant that makes the demonstration required by Section 98.002 that this chapter is applicable to an action may pursue any legal or equitable remedy and is entitled to the rights and remedies provided with regard to the action under other law, including Chapters 16, 33, and 41.

Sec. 98.005. EXEMPTION FOR CERTAIN SELLERS; INDEMNITY. (a) In this section, "seller" and "manufacturer" have the meanings assigned by Section 82.001.

(b) This chapter does not apply to a seller of a defective product who:

(1) did not commit conduct described by Section 98.002; and

(2) after becoming aware of a risk of a defective product, acted reasonably to make the public aware of the risk.

(c) A seller described by Subsection (b) who incurs damages as a result of defending against an action relating to the defective product has, against a manufacturer or other seller who engages in conduct described by Section 98.002, a right of indemnification for the damages incurred, including:

(1) damages paid by the seller to a claimant;

(2) attorney's fees;

(3) court costs;

(4) lost earnings; and

(5) any other direct damages or costs incurred by the seller as a result of defending against an action brought against the seller for personal injury or death of which the defective product was a producing cause.

Sec. 98.006. PROTECTIONS FOR CERTAIN EMPLOYEES. (a) Notwithstanding any other law, an employer may not terminate the employment of a person or otherwise retaliate against the person in the terms and conditions of employment because the person acted to make any governmental agency or the public aware of a risk of personal injury or death created by a defective product.

(b) A person may bring a cause of action against an employer for a violation of Subsection (a). If the claimant proves by a preponderance of the evidence that the employer violated Subsection (a), the trier of fact may award the claimant actual damages, exemplary damages, and the costs of pursuing the action, including court costs and attorney's fees.

Sec. 98.007. OTHER LAW. To the extent of any conflict between this chapter and any other law, this chapter prevails.

SECTION 1.02. Section 16.003, Civil Practice and Remedies Code, is amended by adding Subsections (c) and (d) to read as follows:

(c) A cause of action for personal injury or death accrues for purposes of Subsection (b) at the time the claimant knows, or in the exercise of reasonable diligence should know, of the injury and the cause in fact of the injury.

(d) In an action to which Chapter 98 applies, the statute of limitations applicable to a cause of action for personal injury or death is tolled from the time the defendant began conduct described by Section 98.002. The period during which the statute of limitations is tolled under

this subsection ends at the time the defendant takes action to eliminate the result of the conduct described by Section 98.002, so that the claimant should, in the exercise of reasonable diligence, know of the injury and the cause in fact of the injury.

SECTION 1.03. Section 33.001, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 33.001. PROPORTIONATE RESPONSIBILITY. (a) In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.

(b) This section does not apply to an action to which Chapter 98 applies.

SECTION 1.04. Section 33.013, Civil Practice and Remedies Code, is amended by amending Subsection (d) and adding Subsection (e) to read as follows:

(d) Notwithstanding Subsection (a), in an action to which Chapter 98 applies, each liable defendant who is liable for conduct described by Section 98.002 is jointly and severally liable for the damages recoverable by the claimant under Section 33.012.

(e) This section does not create a cause of action.

SECTION 1.05. Section 41.001(7), Civil Practice and Remedies Code, is amended to read as follows:

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury to the claimant; [~~or~~]

(B) conduct described by Section 98.002; or

(C) an act or omission:

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

SECTION 1.06. Section 41.008, Civil Practice and Remedies Code, is amended by adding Subsections (f) and (g) to read as follows:

(f) Subsection (b) does not apply to an action to which Chapter 98 applies.

(g) In an action to which Subsection (b) does not apply and in which the amount of exemplary damages that may be awarded is not limited by another law, the amount of exemplary damages that may be awarded by the trier of fact is the amount allowed under the constitution of this state and of the United States.

SECTION 1.07. Section 41.011(a), Civil Practice and Remedies Code, is amended to read as follows:

(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:

(1) the nature of the wrong;

(2) the character of the conduct involved;

(3) the degree of culpability of the wrongdoer;

(4) the situation and sensibilities of the parties concerned;

(5) the extent to which such conduct offends a public sense of justice and propriety; [~~and~~]

(6) the net worth of the defendant; and

(7) in an action to which Chapter 98 applies, the extent to which the defendant engaged in conduct described by Section 98.002.

SECTION 1.08. Section 82.005(d), Civil Practice and Remedies Code, is amended to read as follows:

(d) This section does not apply to:

(1) a cause of action based on a toxic or environmental tort as defined by Sections 33.013(c)(2) and (3); [~~or~~]

(2) a drug or device, as those terms are defined in the federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 321); or

(3) an action to which Chapter 98 applies.

SECTION 1.09. Section 82.006, Civil Practice and Remedies Code, is amended by adding Subsection (c) to read as follows:

(c) This section does not apply to an action to which Chapter 98 applies.

SECTION 1.10. This article applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

ARTICLE 2. CRIMINAL PENALTIES

SECTION 2.01. Section 22.05, Penal Code, is amended by adding

Subsection (f) to read as follows:

(f) Notwithstanding Subsection (e), an offense under Subsection (a) is a felony of the second degree if, at the guilt or innocence phase of the trial the judge or jury, whichever is the trier of fact, determines beyond a reasonable doubt that the conduct engaged in by the actor is conduct described by Section 98.002(b), Civil Practice and Remedies Code.

SECTION 2.02. Section 22.09, Penal Code, is amended by amending Subsection (d) and adding Subsection (e) to read as follows:

(d) A person commits an offense if, by engaging in conduct described by Section 98.002(b), Civil Practice and Remedies Code, the person:

(1) knowingly prevents a member of the public from becoming aware of a risk from a consumer product; and

(2) knows that the product will be offered for sale to the public or as a gift to another.

(e) An offense under Subsection (b) or (d) is a felony of the second degree unless a person suffers serious bodily injury, in which event it is a felony of the first degree. An offense under Subsection (c) is a felony of the third degree.

SECTION 2.03. The heading to Section 22.09, Penal Code, is amended to read as follows:

Sec. 22.09. CONDUCT RELATED TO [~~TAMPERING WITH~~] CONSUMER PRODUCT.

SECTION 2.04. Section 32.42, Penal Code, is amended by amending Subsection (b) and adding Subsection (e) to read as follows:

(b) A person commits an offense if in the course of business he intentionally, knowingly, recklessly, or with criminal negligence commits one or more of the following deceptive business practices:

(1) using, selling, or possessing for use or sale a false weight or measure, or any other device for falsely determining or recording any quality or quantity;

(2) selling less than the represented quantity of a property or service;

(3) taking more than the represented quantity of property or service when as a buyer the actor furnishes the weight or measure;

(4) selling an adulterated or mislabeled commodity or a commodity with a defect known to the actor;

(5) passing off property or service as that of another;

(6) representing that a commodity is original or new if it is deteriorated, altered, rebuilt, reconditioned, reclaimed, used, or secondhand;

(7) representing that a commodity or service is of a particular style, grade, or model if it is of another;

(8) advertising property or service with intent:

(A) not to sell it as advertised, or

(B) not to supply reasonably expectable public demand, unless the advertising adequately discloses a time or quantity limit;

(9) representing the price of property or service falsely or in a way tending to mislead;

(10) making a materially false or misleading statement of fact concerning the reason for, existence of, or amount of a price or price reduction;

(11) conducting a deceptive sales contest; or

(12) making a materially false or misleading statement:

(A) in an advertisement for the purchase or sale of property or service; or

(B) otherwise in connection with the purchase or sale of property or service.

(e) Notwithstanding Subsection (c), at the guilt or innocence phase of the trial of an offense under Subsection (b)(4), if the judge or jury, whichever is the trier of fact, determines beyond a reasonable doubt that the conduct engaged in by the actor is conduct described by Section 98.002(b), Civil Practice and Remedies Code, the offense is:

(1) a state jail felony if the actor commits the offense with criminal negligence and a person suffers serious bodily injury or death caused by the adulterated or mislabeled commodity or commodity with a defect known to the actor;

(2) a felony of the third degree if the actor commits the offense recklessly and a person suffers serious bodily injury caused by the adulterated or mislabeled commodity or commodity with a defect known to the actor; or

(3) a felony of the second degree if the actor commits the offense knowingly and a person suffers serious bodily injury caused by the adulterated or mislabeled commodity or commodity with a defect known to the actor.

SECTION 2.05. Chapter 37, Penal Code, is amended by adding Section

37.14 to read as follows:

Sec. 37.14. CONDUCT ENDANGERING PUBLIC SAFETY. (a) A person commits an offense if the person with criminal negligence makes a misleading representation to an agency of government with respect to a risk created by a product, or fails to disclose any information to an agency of government that the person is under a duty to disclose with respect to a risk created by a product, with the purpose or effect of preventing, delaying, hindering, or impairing the agency from performing a duty of the agency or taking any action to protect the public from, or to inform the public of, the risk.

(b) An offense under Subsection (a) is a Class A misdemeanor, except that the offense is:

(1) a state jail felony if the actor commits the offense with criminal negligence and a person suffers serious bodily injury or death caused by the risk created by the product;

(2) a felony of the third degree if the actor commits the offense recklessly and a person suffers serious bodily injury caused by the risk created by the product; or

(3) a felony of the second degree if the actor commits the offense knowingly and a person suffers serious bodily injury caused by the risk created by the product.

(c) It is an affirmative defense to prosecution under this section that misrepresentation or failure to disclose information could have no effect on the agency of government's purpose for requiring, or its use of, the information that was the subject of the misrepresentation or failure.

SECTION 2.06. (a) The change in law made by this article applies only

to the punishment for an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

ARTICLE 3. JUDICIAL ACTION

SECTION 3.01. Not later than January 1, 2002, the supreme court shall adopt and amend rules governing practice and procedure, including the rules regarding sealing of records, to prevent the courts of this state from being used in a manner that constitutes a danger to the public health and safety and constitutes conduct described by Section 98.002, Civil Practice and Remedies Code, as added by this Act.

SECTION 3.02. Not later than January 1, 2002, the supreme court shall adopt rules of professional responsibility and discipline that prevent attorneys practicing law in this state from engaging in conduct that constitutes a danger to the public health and safety and constitutes conduct described by Section 98.002, Civil Practice and Remedies Code, as added by this Act. The rules must address the practice of attorneys for parties to litigation or potential litigation to enter into agreements that constitute conduct described by Section 98.002, Civil Practice and Remedies Code, as added by this Act, including agreements to return, or maintain as confidential, information obtained by a party to an action that relates to a risk to public health and safety.

ARTICLE 4. EFFECTIVE DATE

SECTION 4.01. This Act takes effect immediately if it receives a vote of

two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2001.

BILL ANALYSIS

Office of House Bill Analysis

H.B. 3125

By: Bosse

Civil Practices

3/20/2001

Introduced

BACKGROUND AND PURPOSE

The Texas legislature has enacted limitations on the assessment of punitive damages and the threshold for joint and several liability. Manufactures and sellers who fail to warn the public of risks posed by defective products and who fail to recall the products are not excepted from the limitations. House Bill 3125 sets forth civil and criminal penalties for manufacturers and sellers who do not inform the public of defective products and knowingly market and sell such products.

RULEMAKING AUTHORITY

It is the opinion of the Office of House Bill Analysis that rulemaking authority is expressly delegated to the Supreme Court of Texas in SECTIONS 3.01 and 3.02 of this bill.

ANALYSIS

House Bill 3125 amends the Civil Practice and Remedies Code to set forth provisions regarding an action for recovery of damages arising out of personal injury or death caused by a defective product in which the claimant proves by a preponderance of evidence that the defendant engaged in deceptive conduct to prevent the disclosure of a known risk to public safety (Sec. 98.002). The bill prohibits a claimant from filing such an action before the claimant provides evidence that the defendant engaged in such conduct (Sec. 98.003). The bill provides that an action cannot be filed against a seller of a defective product who did not engage in deceptive conduct and after becoming aware of a risk of a defective product acted reasonably to make the public aware of the risk. A seller who incurs damages as a result of defending against an action has, against a manufacturer or other seller who engages in deceptive conduct, a right to indemnification for damages incurred (Sec. 98.005). The bill provides protection against termination or retaliation for an employee who acts to make any governmental agency or the public aware of a risk to public safety (Sec. 98.006).

The bill sets forth provisions regarding the accrual of a cause of action for a case involving personal injury or death (Sec. 16.003). The bill provides that provisions relating to proportionate responsibility

do not apply to an action regarding deceptive practices that are detrimental to public safety as set forth in this bill (Sec. 33.001). The bill provides that each liable defendant who is liable for deceptive conduct is jointly and severally liable for the damages recoverable by the claimant (Sec. 33.013). The bill provides that exemplary damages to be paid by a liable defendant are not limited if the defendant is liable of deceptive conduct that endangers the public except by another law, the constitution of Texas, or the constitution of the United States (Sec. 41.008). The bill provides that in determining the amount of exemplary damages, the trier of the fact is required to consider the evidence, if any, relating to the extent to which the defendant engaged in deceptive conduct (Sec. 41.011). The bill provides that provisions relating to product liability do not apply to an action against a defendant who practiced deceptive conduct (Secs. 82.005 and 82.006).

The bill amends the Penal Code to provide that an offense of deadly conduct is a felony of the second degree if the trier of fact determines beyond a reasonable doubt that the conduct engaged in by the actor was deceptive conduct that endangered the public (Sec. 22.05). The bill provides that a person commits a felony of the second degree if the person engages in deceptive conduct with regard to a risk posed by a consumer product unless a person suffers serious bodily injury, in which event it is a felony of the first degree (Sec. 22.09). The bill provides that it is an offense if in the course of business a person intentionally, knowingly, recklessly, or with criminal negligence sells a commodity with a defect known to the person. The bill also specifies the grades of offenses for a person who engages in malicious conduct endangering public safety as defined in this bill and sells an adulterated or mislabeled commodity or a commodity with a defect known to the actor (Sec. 32.42). The bill provides that a person commits an offense if the person with criminal negligence makes a misleading representation or fails to disclose any information to a governmental agency with respect to a risk to public safety created

by a product and sets the grades of offenses (Sec. 37.14).

The bill requires the Supreme Court of Texas not later than January 1, 2002 to adopt and amend rules governing practice and procedure to prevent the courts of this state from being used or attorneys practicing in this state from acting in a manner that constitutes a danger to the public health and safety and constitutes deceptive conduct (SECTIONS 3.01 and 3.02).

EFFECTIVE DATE

On passage, or if the Act does not receive the necessary vote, the Act takes effect September 1, 2001.

APPENDIX B

Rule 76a. Sealing Court Records

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. Hearing. A hearing, open to the public, on a motion to seal court

records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1, has been made; the specific portions of court records which are to be sealed;

and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1, shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records

sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.