SCAC MEETING AGENDA (AMENDED)
Friday, October 27, 2017 - 9:00 a.m.

Location: **Texas Associations of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM MARTHA NEWTON, RULES ATTORNEY**

   Martha will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the August 11, 2017 meeting.

3. **RULES ON ENFORCEMENT OF A FOREIGN JUDGMENT OR ARBITRATION AWARD IN FAMILY LAW CASES**

   Legislative Mandates Committee Members:
   Jim Perdue, Jr. – Chair
   Hon. Jane Bland – Vice Chair
   Hon. Robert Pemberton
   Prof. Elaine Carlson
   Pete Schenkkan
   Hon. David L. Evans
   Robert Levy
   Hon . Brett Busby
   Wade Shelton
   Richard Orsinger
   Karl Hays – Texas Family Bar Foundation
   Paul Leopold – Texas Family Bar Foundation

   (a) HB 45 – Proposed Rule 308b Rev. 10/24/2017
      (i) Rule 203 Determining Foreign Law
      (ii) Cal Dive Offshore Contractors, Inv. v. Bryant
      (iii) Rule 1009 Translating a Foreign Language Document
      (iv) Castrejon v. The State of Texas
   (b) Texas 2017 HB45 Enrolled
   (c) Bill Analysis – House Committee Report
   (d) Attorney General Ken Paxton – Opinion No. KP-0094
   (e) HB 45 and Proposed Rule 308b DRAFT 10/13/2017 [Justice Busby's comments]

4. PROPOSED AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT AND POLICIES ON ASSISTANCE TO COURT PATRONS BY COURT AND LIBRARY STAFF

Judicial Administration Sub-Committee Members:

Nina Cortell - Chair
Hon. David Peeples – Vice Chair
Hon. Tom Gray
Prof. Lonny Hoffman
Hon. David Newell
Hon. Bill Boyce
Michael A. Hatchell
Kennon Wooten

(f) October 24, 2017 Memo Re: Revisions to Canon 3.B(8) of the Code of Judicial Conduct, Regarding Assistance to Court Patrons

5. TEXAS RULE OF CIVIL PROCEDURE 99

15-165a Sub-Committee Members:

Richard Orsinger – Chair
Frank Gilstrap – Vice Chair
Professor Alexandra Albright
Professor Elaine Carlson
Nina Cortell
Professor William Dorsaneo
O. C. Hamilton
Pete Schenkkan
Hon. Anahid Estevez

(g) October 23, 2017 Report of the Rules 15-165a Subcommittee: Modernizing TRCP 99, Issuance and Form of Citation

6. CIVIL CASE INFORMATION SHEET

15-165a Sub-Committee Members:

Richard Orsinger – Chair
Frank Gilstrap – Vice Chair
Professor Alexandra Albright
Professor Elaine Carlson
Nina Cortell
Professor William Dorsaneo
O. C. Hamilton
Pete Schenkkan
Hon. Anahid Estevez

(h) Richard Orsinger October 22, 2017 Email Re: Civil Case Sheet (also attached)

Rule 308b. Determining the Enforceability of Judgments or Arbitration Awards Based on Foreign Law in Certain Suits Under the Family Code

(a) Applicability.

(1) Except as provided by Subsection (b), this rule applies to the enforcement of a judgment or arbitration award based on foreign law in a suit brought under the Family Code involving a marriage relationship or a parent-child relationship.

(2) Rules 203(c) and (d) apply to an action to which this rule applies.

(b) Exceptions.

(1) This rule does not apply to an action brought under the Hague Convention on International Child Abduction, including the International Child Abduction Remedies Act (22 U.S.C. §§ 9001 et seq.).

(2) Rules 203(a) and (b), Texas Rules of Evidence, do not apply to an action to which this rule applies.

(3) In the event of a conflict between this Rule and any federal or state law, the federal or state law will prevail.

(c) Notice. A party who intends to seek enforcement of a judgment or arbitration award to which this rule applies must:

(1)(A) provide written notice to the court and to each other party in the party's original pleading; and

(B) describe the basis for the court’s authority to enforce or decide to enforce the judgment or arbitration award.

(2) no later than 60 days after the party's original petition is filed, serve upon each other party a copy of any written materials or sources the party intends to use to prove the foreign law, if the materials or sources were originally written in English or have been published in English prior to the date the petition was filed.

(d) Objections. A party who intends to oppose the enforcement of a judgment or arbitration award to which this rule applies must:

(1) provide written notice to the court and to each other party of the party's objection within 30 days of receiving the notice required by Subsection (c); and

(2) explain the basis for the party's opposition and whether the judgment or arbitration award violates constitutional rights or public policy.

(e) Translations.

(1) Except as provided by Subsections (2) and (3), a translation from a language other than English of a judgment or arbitration award to which this rule applies, and of any materials, documents or sources on which a party intends to rely that are not written in English, is subject to Rule 1009, Texas Rules of Evidence.

(2) A translation described by Rule 1009(a), Texas Rules of Evidence, that is offered by a party seeking to enforce a judgment or arbitration award to which this rule applies must be served upon each other party no later than 60 days after the party's original petition is filed.

(3) If a party contests the accuracy of another party's translation of a foreign language document, the party must serve an objection and a conflicting translation on each opposing party no later than 30 days after the party receives a translation described by Subsection (2).

(4) On a party's motion and for good cause, the court may alter the time limits for submitting and objecting to translations.

(f) Hearing. (1) The court must, after timely notice to the parties, conduct a hearing on the record at least 30 days before trial to determine whether the judgment or arbitration award based on foreign law may be enforced.

(2) The court must make the determination required by Subsection (1) no more than 10 days after the hearing.

(g) Order. Within 15 days of the hearing required by Subsection (f), the court must issue a written order regarding its determination. The order must include findings of fact and conclusions of law. The court may issue any orders necessary to preserve the principles of comity or the freedom to contract for arbitration while protecting against violations of constitutional rights and public policy.

(h) Hearings on Temporary Orders. Notwithstanding any other provision of this rule, the court may set filing deadlines and conduct the determination hearing to accommodate the circumstances of the case in connection with issuing temporary orders. The deadline for making a determination and signing a written order may not be altered absent urgent circumstances.

(i) Definitions. As used in this Rule ----

(1) "Comity" means the recognition by a court of one jurisdiction of the laws and judicial decisions of another jurisdiction.

(2) "Foreign law" means a law, rule, or code of a jurisdiction outside of the states and territories of the United States.

Addition to Rule 203, Texas Rules of Evidence

Rule 203. Determining Foreign Law

(e) Suits Brought Under the Family Code Involving a Marriage Relationship or Parent-Child Relationship. Subsections (a) and (b) of this rule do not apply to an action in which a party seeks a determination of foreign law and to which Rule 308b, Texas Rules of Civil Procedure, applies.

Addition to Rule 1009, Texas Rules of Evidence

Rule 1009. Translating a Foreign Language Document

(h) Suits Brought Under the Family Code Involving a Marriage Relationship or Parent-Child Relationship. Except as provided by Rule 308B, Texas Rules of Civil Procedure, this rule applies to a submitted translation of a foreign language document in a suit brought under the Family Code involving a marriage relationship or parent-child relationship.

Vernon's Texas Rules Annotated
Texas Rules of Evidence (Refs & Annos)
Article II. Judicial Notice (Refs & Annos)

TX Rules of Evidence, Rule 203

Rule 203. Determining Foreign Law

Currentness

(a) Raising a Foreign Law Issue. A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) Translations. If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) Materials the Court May Consider; Notice. In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) Determination and Review. The court--not the jury--must determine foreign law. The court's determination must be treated as a ruling on a question of law.

Credits
Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

Notes of Decisions (35)

Rules of Evid., Rule 203, TX R EVID Rule 203
Current with amendments received through October 1, 2017

End of Document

478 S.W.3d 914
Court of Appeals of Texas,
Houston (14th Dist.).

Cal Dive Offshore Contractors Inc., Appellant
v.
Nigel Bryant, Appellee

NO. 14–13–00883–CV
|
Opinion filed October 20, 2015

Synopsis

Background: Worker, a citizen of the United Kingdom, brought negligence action against owner of dive ship after worker slipped and fell on deck of ship while working as saturation diver on a project on the outer continental shelf of China. Following jury trial, the 152nd District Court, Harris County, entered judgment in favor of worker. Owner appealed.

Holdings: The Court of Appeals, J. Brett Busby, J., held that:

[1] worker adequately informed trial court of English law, such that, in applying English law, court was not required to presume that English law was the same as Texas law;

[2] despite application of English law, trial court acted within its discretion in submitting issue of worker's damages to jury using a question adapted from Texas pattern jury charge; and

[3] evidence was sufficient to support verdict that, under English law, owner breached duty of care to worker.

Affirmed.

West Headnotes (17)

[1] Action
What law governs

State's courts may apply foreign law.

Cases that cite this headnote

[2] Action
What law governs

When determining foreign law, a trial court may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including affidavits, testimony, briefs, and treatises. Tex. R. Evid. 203.

1 Cases that cite this headnote

[3] Evidence
Laws of foreign countries

A party asking a trial court to take judicial notice of foreign law must furnish the court with sufficient information to enable it to comply with the request; if the party seeking the application of foreign law fails to provide the necessary information to the trial court, there is a presumption that the law of the foreign jurisdiction is identical to that of Texas. Tex. R. Evid. 203.

Cases that cite this headnote

[4] Appeal and Error
Necessity of timely objection

Ship owner did not waive its challenge to application of English law in worker's negligence action through filing a responsive argument and English legal materials less than 30 days before trial, where worker was the party seeking to apply English law to his claims and had timely raised the issue with trial court. Tex. R. Evid. 203.

Cases that cite this headnote

[5] Evidence
Laws of foreign countries

Worker, who was a saturation diver, adequately informed trial court of English law, such that trial court was not required to presume that English law was the same as Texas law, in worker's negligence action

against dive ship owner in which worker successfully sought application of English law, where worker provided declaration of English solicitor stating that controlling English law provided that duty that ship owner owed to worker was to take such care for worker's safety as was reasonable under circumstances, ship owner submitted additional materials on applicable English law, including statute and case law, and worker provided trial court with citations to two American cases discussing relevant English law. Tex. R. Evid. 203.

Cases that cite this headnote

[6] Negligence

Reasonable or ordinary care in general

The common duty of care established in English law by the Occupiers Liability Act 1957 is the same as the ordinary negligence duty of care recognized by Texas, that is, that an occupier has a duty of care under English law to act as an ordinary reasonable person under the same or similar circumstances, rather than the duty of care found in Texas premises liability law.

Cases that cite this headnote

[7] Damages

Measure of Damages for Injuries to the Person

Trial court acted within its discretion in submitting issue of worker's damages to jury using a question adapted from Texas pattern jury charge, in worker's negligence action against ship owner, even though court applied English law to worker's action, where Texas law permitted recovery of same damages as those recoverable under English law.

Cases that cite this headnote

[8] Shipping

Vessels and places for work

Evidence was sufficient to support verdict that, under English law, dive ship owner breached duty of care to worker, who was working as diver and who slipped and fell on deck of ship; worker testified that a deck foreman told worker just after accident that an oily substance in area of fall had been reported three times and that foreman hoped worker's fall would lead to something being done about it, worker testified he believed that oily substance originated from ship's remotely operated vehicle (ROV), which had been taken out of water about two hours before worker's accident, and timing of ROV's removal from water was confirmed by ship's records.

Cases that cite this headnote

[9] Appeal and Error

Prejudicial Effect

To obtain reversal of a judgment based on a claimed error in excluding evidence, a party must show that the trial court did in fact err and that the error probably resulted in rendition of an improper judgment.

Cases that cite this headnote

[10] Appeal and Error

Extent of Review

To determine whether excluded evidence probably resulted in the rendition of an improper judgment, an appellate court reviews the entire record.

1 Cases that cite this headnote

[11] Appeal and Error

Evidence in General

Appeal and Error

Prejudicial Effect

To challenge a trial court's evidentiary ruling successfully on appeal, the complaining party must demonstrate that the judgment turns on the particular evidence that was excluded or admitted.

Cases that cite this headnote

[12] Appeal and Error

Evidence immaterial to issue

Appeal and Error

Same or Similar Evidence Otherwise Admitted

A reviewing court ordinarily will not reverse a judgment because a trial court erroneously excluded evidence when the excluded evidence is cumulative or not controlling on a material issue dispositive to the case.

Cases that cite this headnote

[13] Evidence

Irrelevant, collateral, or immaterial matters

Trial court acted within its discretion in prohibiting dive ship owner from questioning worker's damages expert about how expert accounted for taxation in calculating worker's damages, in worker's negligence action arising out of slip and fall and ship deck; it was undisputed that worker, an English expatriate living in Thailand, was not required to pay federal income taxes on his earnings as a deep sea diver, and expert did account for that fact in preparation of his opinion of lost earning capacity. Tex. Civ. Prac. & Rem. Code Ann. § 18.091(a).

Cases that cite this headnote

[14] Appeal and Error

Nature of evidence in general

Dive ship owner failed to preserve for appeal its challenge to trial court's denial of mistrial based on testimony regarding settlement, in worker's negligence action against owner arising out of slip and fall on ship deck, where owner did not object to settlement testimony and did not request an instruction that jury disregard such testimony.

Cases that cite this headnote

[15] Trial

Discretion of court

A trial court has discretion to grant or deny a motion for mistrial.

Cases that cite this headnote

[16] Appeal and Error

Conduct of trial or hearing in general

In reviewing a trial court's decision on a motion for mistrial, appellate court does not substitute its judgment for that of the trial court but instead decides only whether the trial court's decision constitutes an abuse of discretion.

1 Cases that cite this headnote

[17] Trial

Restriction to Special Purpose

Although offers of compromise and settlement generally are inadmissible, an error in admitting such evidence can be cured by an instruction to the jury to disregard the evidence.

Cases that cite this headnote

***917 On Appeal from the 152nd District Court, Harris County, Texas, Trial Court Cause No. 2011–57457**

Attorneys and Law Firms

Micajah Daniel Boatright, William R. Peterson and Russell S. Post, Houston, TX, for Appellee.

Chester Joseph Makowski, Houston, TX, for Appellant.

Panel consists of Chief Justice Frost and Justices Christopher and Busby.

OPINION

J. Brett Busby, Justice

Appellant Cal Dive Offshore Contractors, Inc., appeals from a final judgment in favor of appellee, Nigel Bryant, following a jury trial on Bryant's suit for injuries sustained in a slip-and-fall accident on Cal Dive's ship. Cal Dive raises six issues on appeal. In its first, second, and fourth issues, Cal Dive argues that the trial court erred in its

application of English law to the case. We overrule these issues because Bryant adequately informed the trial court of the applicable English law and the trial court did not abuse its discretion when it concluded that English law provided a general negligence standard and submitted the case to the jury using Texas general negligence and damages questions. In its third issue on appeal, Cal Dive argues there is legally and factually insufficient evidence that it breached a duty it owed to Bryant. We overrule this issue, concluding the evidence is sufficient given the testimony that an oily substance previously had been reported in the area where Bryant fell.

Cal Dive asserts in its fifth issue that the trial court abused its discretion when it prevented Cal Dive from questioning Bryant's expert economist about whether Bryant was required to pay taxes on his earnings. Because the potential prejudicial effect of this questioning significantly outweighed its probative value, we conclude the trial court did not abuse its discretion and overrule Cal Dive's fifth issue. In its final issue, Cal Dive contends the trial court erred when it denied Cal Dive's motion for mistrial based on Bryant's cross-examination of Cal Dive's corporate representative regarding Cal Dive's willingness to settle the case. We overrule this issue because Cal Dive failed to object to the settlement testimony or ask for a jury instruction to disregard, and therefore Cal Dive failed to preserve this issue for appellate review. We affirm the trial court's final judgment.

BACKGROUND

Bryant, a citizen of the United Kingdom residing in Thailand, worked as a saturation diver. Prior to the events underlying this litigation, Bryant had worked all over the world on subsurface oil and gas construction projects at depths up to 1,200 feet. In September 2010, Bryant was working for an entity related to Cal Dive on a project on the outer continental shelf of China. While Bryant was walking on the deck of the diving ship owned by Cal Dive, he slipped. Bryant tried to break his fall by grabbing a nearby handrail. Bryant suffered a severe separation of his left shoulder as a result of the fall. While standing back up after his fall, Bryant observed that there was an oily substance on the deck with water on top of it. Bryant went to see the diving vessel's medic, who believed Bryant had dislocated his shoulder and needed to be evacuated to the Chinese mainland to be examined by a medical doctor.

While waiting to be taken to the Chinese mainland by helicopter, a deck foreman saw Bryant and asked him what had happened. When Bryant mentioned the location ***918** of his fall, Bryant testified the deck foreman replied that the oily substance in that area had been reported three times, and "that, now, maybe, something would be done about it." Bryant believed that the oily substance he had slipped on had come from the vessel's Remotely Operated Vehicle (ROV), which had been taken out of the water about two hours before his fall and stored just above the gangway on which Bryant fell.

Bryant eventually returned to Thailand to have his shoulder evaluated. The doctor recommended immediate reconstructive surgery, which occurred the same day as the examination.

Following his surgery, Bryant was given a rehabilitation protocol to get him ready to return to work. Bryant was eventually cleared to return to work and he informed Cal Dive that he was ready to work once again. Cal Dive initially told Bryant there was a job for him. But, after a delay caused by confusion over whether Bryant needed a new medical clearance for deep-sea diving, Bryant testified that Cal Dive told him the position had been filled and it no longer had a job for him. Bryant then found a diving job with another company working in Malaysia.

After two weeks of dive work in Malaysia, Bryant's left shoulder began hurting again. Bryant tried to contact Cal Dive to inform Cal Dive that he was still having problems from the injury he suffered on Cal Dive's ship and needed additional medical attention. Bryant testified that Cal Dive never returned his call.

Bryant underwent a second surgery to repair his shoulder. Although the surgery was necessary to restore as much function and reduce as much pain as possible, Bryant's surgeon explained that Bryant would "never be 100 percent" and should not return to his job as a saturation diver, a job that paid him between $130,000 and $150,000 a year.

Bryant filed suit against Cal Dive in Houston, Texas, where Cal Dive maintained its principal place of business. Bryant asserted Cal Dive was negligent under the law of the United Kingdom. Pursuant to Texas **Rule of Evidence 203**, entitled "Determining Foreign Law," Bryant filed

a Notice of Intent to Rely on Foreign Law. Bryant attached the declaration of Peter George Handley, an English solicitor with experience in English maritime negligence law, to his Rule 203 submission. Bryant had asked Handley to determine whether English law provided a cause of action for a person injured aboard a vessel and, if so, the elements of that cause of action, as well as to describe the damages available to such an injured person.

In his declaration, Handley stated that English law "provides a cause of action to a Claimant injured aboard a vessel as the result of the negligence and/or breach of [a] statutory duty of the Owner of the vessel and/or other persons in possession or control of the vessel." Handley further explained that "negligence occurs where the Defendant (be it the Owner and/or the Charterer and/or the Operator and/or the Manager of the vessel) is in breach of his duty of care owed to the Claimant." Handley then described the three duties that could be breached:

(1) The duty of care owed in the law of tort to take such care for the safety of the Claimant whilst onboard the vessel as is reasonable in all the circumstances;

(2) The duty of care owed as occupiers of the vessel (pursuant to the Occupiers Liability Act 1957) to see that the Claimant is safe whilst aboard the vessel; and/or

***919** (3) The common law duty of care owed as employers to provide the Claimant (if an employee of the Defendant) with a safe place of work, safe plant, machinery and equipment, and a safe system of work.

Handley also discussed the measure of damages available to a plaintiff injured as a result of another's negligence. Handley explained that, under English law, damages in a personal injury action are meant to "put the party who has been injured ... in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." According to Handley, English law entitles a plaintiff to recover general, or non-pecuniary, damages, including physical and psychological pain and suffering, as well as physical impairment. English law also provides for the recovery of special or pecuniary damages, including "loss of earnings or loss of earning capacity," "loss of pension rights," "medication costs," "the costs of medical consultations and surgical or other treatments," "care and assistance," and "adaptation of accommodation."

Bryant filed his foreign-law submission eight months prior to trial. A short time before trial, Cal Dive filed special exceptions contending that Bryant's only English cause of action was under the Occupiers Liability Act 1957 and 1984.[1] Cal Dive provided copies of the Acts to the trial court and argued that they imposed the same status (licensee or invitee) and knowledge (actual or constructive) requirements as Texas premises liability law. Cal Dive also argued that Bryant's total damages were limited to $20,961 because English damage awards are "largely controlled by the *Guidelines for the Assessment of General Damages in Personal Injury Cases.*" Cal Dive did not file an affidavit or declaration by an English lawyer, nor did Cal Dive attach to its special exceptions the complete text of the *Guidelines,* instead attaching only an unauthenticated excerpt that it represented to the trial court came from the *Guidelines.*

Bryant filed a motion to strike Cal Dive's foreign-law submission because it was untimely. In addition to asking the trial court to strike Cal Dive's submission, Bryant also argued that Cal Dive's statements regarding English law were inaccurate. Bryant specifically argued that the Occupiers Liability Act eliminated all distinctions between invitees and licensees, and that the duty of care detailed by Handley mirrored the duty imposed by the Act. According to Bryant, both the Act and Handley characterized the duty of care as one of reasonableness under the circumstances. Bryant further asserted that the English standard is virtually identical to the duty and standard of care imposed under ordinary Texas negligence law, which provides that one generally has a duty of care to act as an ordinary reasonable person under the same or similar circumstances.

The trial court, after reviewing the submissions of the parties and hearing extensive argument on the subject, denied Cal Dive's special exceptions and decided to submit the case to the jury under English law. The court did not rule on Bryant's motion to strike, and Bryant did not object to the trial court's failure to rule. At the charge conference, the trial court provided the parties with a proposed charge embodying the court's conclusion that both the liability and damages standards under ***920** English law were the same as those imposed by Texas general negligence law, not Texas premises liability law as Cal Dive had argued. The trial court overruled Cal Dive's objections to the jury charge, refused the premises liability

questions Cal Dive had requested, and submitted the case to the jury on a general negligence theory.

The jury found that Cal Dive was negligent, failed to find that Bryant was negligent, and found that Bryant was entitled to a total of $450,000 in damages for loss of earning capacity, medical care, and past physical pain and mental anguish. The jury awarded no damages for physical impairment or future physical pain and mental anguish. The trial court signed a final judgment based on the jury's verdict. Cal Dive filed motions for new trial and for judgment notwithstanding the verdict, which the trial court denied. This appeal followed. [2]

ANALYSIS

I. The trial court did not err in its application of English law because Bryant met the requirements of Texas Rule of Evidence 203.

In its first, second, and fourth issues, Cal Dive argues the trial court erred in its application of English law to the facts of this case because (1) Bryant did not adequately inform the trial court about English law; (2) the trial court failed to submit a question to the jury inquiring into Cal Dive's knowledge of the spilled oil, which it argues is required by English law; and (3) the trial court submitted Bryant's damages to the jury using the Texas Pattern Jury Charge for personal injury damages rather than the English *Guidelines for the Assessment of General Damages in Personal Injury Cases,* which Cal Dive argued significantly limited Bryant's damages. In response, Bryant argues, among other things, that Cal Dive waived its issues challenging the trial court's application of English law because it did not file its English legal materials at least thirty days before trial as required by Rule 203. We address these issues together.

A. Standard of review and applicable law

A trial court must submit in its charge to the jury all questions, instructions, and definitions that are raised by the pleadings and the evidence. *See* Tex. R. Civ. P. 278; *Hatfield v. Solomon,* 316 S.W.3d 50, 57 (Tex.App.–Houston [14th Dist.] 2010, no pet.) (citing *Hyundai Motor Co. v. Rodriguez,* 995 S.W.2d 661, 663–64 (Tex.1999)). The goal is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely. *Hatfield,* 316 S.W.3d at 57. To achieve this goal, trial courts enjoy broad discretion so long as the charge is legally correct. *Id.* We review whether a challenged portion of a jury charge is legally correct using a de novo standard of review. *Id.* (citing *St. Joseph Hosp. v. Wolff* 94 S.W.3d 513, 525 (Tex.2003)).

[1] Texas courts may apply foreign law. *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A.,* 49 S.W.3d 347, 351 (Tex.2001). The court, not the jury, determines the laws of foreign countries. *Id.* (citing Tex. R. Evid. 203). A party intending to raise an issue about foreign law must give notice and, at least thirty days before trial, furnish copies of any written materials or sources the party intends to use as proof of foreign law. *Id.* Rule 203 is described as a hybrid rule because the presentation ***921** of foreign law to the court resembles the presentment of evidence, but the meaning of the foreign law and its application to the facts are decided and reviewed as questions of law. *Id.*; *see* Tex. R. Evid. 203 (stating court's determination of foreign law is "treated as a ruling on a question of law").

[2] **[3]** When determining foreign law, a trial court may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including affidavits, testimony, briefs, and treatises. [3] *PennWell Corp. v. Ken Assoc., Inc.,* 123 S.W.3d 756, 760 (Tex.App.–Houston [14th Dist.] 2003, pet. denied) (citing Tex. R. Evid. 203). The specific procedures established by Rule 203 must be followed for the determination of foreign law. *Id.* at 761. A party asking a trial court to take judicial notice of foreign law must furnish the court with sufficient information to enable it to comply with the request. *Id.*; *cf. Ahumada v. Dow Chemical Co.,* 992 S.W.2d 555, 558 (Tex.App.–Houston [14th Dist.] 1999, pet. denied) ("Summary judgment is not precluded when experts disagree on the interpretation of the law if, as in this case, the parties do not dispute that all of the pertinent foreign law has been properly submitted as evidence."). If the party seeking the application of foreign law fails to provide the necessary information to the trial court, there is a presumption that the law of the foreign jurisdiction is identical to that of Texas. *PennWell Corp.,* 123 S.W.3d at 760.

B. Cal Dive did not waive its challenge to the application of English law.

[4] In a cross-issue raised in his appellate brief, Bryant argues Cal Dive waived its challenge to the application

of English law because, in Bryant's view, Cal Dive did not comply with the time requirement set forth in Rule 203. *See* Tex. R. Evid. 203 (stating that "a party who intends to raise an issue about a foreign country's law must ... at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove foreign law."). Because Bryant was the party seeking to apply English law to his claims and had timely raised the issue with the trial court, we conclude Cal Dive did not waive its challenge to the application of English law by filing responsive argument and English legal materials less than thirty days before trial. *See Nexen, Inc. v. Gulf Interstate Eng'g Co.,* 224 S.W.3d 412, 418–19 (Tex.App.–Houston [1st Dist.] 2006, no pet.) (concluding that the appellant did not waive its argument that foreign law applied to case because appellee had initially raised argument that foreign law might apply and had produced and relied on foreign legal materials). Furthermore, the trial court does not appear to have set a deadline for Cal Dive's response, and that court considered Cal Dive's arguments regarding English law on the merits and rejected them in the court's jury charge. To the extent Bryant argues that Cal Dive's submission improperly included English legal materials on issues that were outside the scope of those addressed by Bryant's original submission, we conclude Bryant failed to preserve that argument for our review because he did not obtain a ruling on his motion to strike or object to the trial court's failure to rule on it. We therefore consider Cal Dive's legal arguments based on English law.

C. Bryant adequately informed the trial court of the applicable English law.

[5] ***922** Cal Dive contends in its first issue that Bryant failed to prove English law adequately, and therefore the trial court should have presumed that it was the same as Texas premises liability law.[4] Approximately eight months before trial, Bryant filed his Notice of Intent to Rely on Foreign Law with the trial court and attached Handley's declaration. Bryant argued that, as explained in Handley's declaration, controlling English law provided that the duty Cal Dive owed to Bryant was to take such care for Bryant's safety as was reasonable under the circumstances. According to Bryant, this duty mirrors the duty of ordinary care Texas courts use to charge the jury in a general negligence case. Bryant's notice began an ongoing discussion between the parties and the trial court on the applicable English law.

In the course of the discussion of English law, Cal Dive submitted additional materials on the applicable English law, including the Occupiers Liability Act 1957 and 1984, an English case, *Lowther v. H. Hogarth & Sons, Ltd.,* [1959] Vol. I Lloyd's Rep. Q.B. 171, and an excerpt allegedly from the *Guidelines for the Assessment of General Damages in Personal Injury Cases.* Cal Dive argued that: Bryant failed to meet his burden under Rule 203 to inform the trial court adequately of the applicable foreign law; English law governing the case was, for all practical purposes, the same as Texas premises liability law (an issue we discuss in Part I.D. below); and English law limited Bryant's damages to $20,961 (an issue we discuss in Part I.E. below).

Finally, Bryant provided the trial court with citations to two American cases that, he argued, established that England had eliminated all distinctions between invitees and licensees in the Occupiers' Liability Act 1957. *See Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 n. 10, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) ("These distinctions have after thorough study ... been eliminated entirely from the English law by statutory enactment."); *Nixon v. Mr. Prop. Mgmt. Co., Inc.,* 690 S.W.2d 546, 552 (Tex.1985) (Kilgarlin, J. concurring) (recognizing England's elimination of invitee and licensee and instead imposing a "common duty of care" toward all visitors).

Having reviewed the record and the parties' arguments, we see no indication that pertinent parts of English law were missing from the materials submitted to the trial court. *Cf. Ahumada,* 992 S.W.2d at 558. Although the trial court expressed uncertainty regarding the English liability standard early in the ongoing discussion, the trial court received additional materials from the parties thereafter. Accordingly, we conclude the parties adequately informed the trial court of English law. *See Phillips v. United Heritage Corp.,* 319 S.W.3d 156, 164 (Tex.App.–Waco 2010, no pet.) (concluding appellant complied with Rule 203 requirements after considering foreign legal materials filed before trial as well as a trial brief based in part on previously filed foreign legal materials); *Nexen, Inc.,* 224 S.W.3d at 418 (concluding trial court made proper choice of law after it was presented with the issue and was provided evidence of the applicable foreign law by both parties); *PennWell Corp.,* 123 S.W.3d at 761 (examining materials filed by both sides before concluding appellant

met Rule 203 burden to inform trial court adequately about Japanese law); ***923** *Lawrenson v. Global Marine, Inc.,* 869 S.W.2d 519, 525–26 (Tex.App.–Texarkana 1993, writ denied) (affirming trial court's reliance on affidavits of English solicitor to establish English law). We therefore overrule Cal Dive's first issue. [5]

D. The trial court did not err when it refused to include a premises liability theory in the jury charge.

In its second issue, Cal Dive argues that the trial court erred in its application of English law when it refused to include Cal Dive's requested jury question regarding its actual or constructive knowledge of the oily substance on the deck of the dive vessel. According to Cal Dive, the Occupiers Liability Act 1957 did not do away with the requirement under English law that a plaintiff prove the owner/occupier of the premises had actual or constructive knowledge of an unreasonable risk of harm. In Cal Dive's view, because English law retained this requirement, the trial court's failure to include a jury question on that subject was error. We disagree.

The Occupiers Liability Act 1957 abolished common-law distinctions between invitees and licensees in favor of a single designation: visitor. Occupiers Liability Act 1957 § 1(2) (stating that visitors generally "are the same ... as the persons who would at common law be treated as ... invitees or licensees"); *Kermarec,* 358 U.S. at 632 n. 10, 79 S.Ct. 406. The 1957 Act also changed the duty owed to such visitors, providing that "[a]n occupier of premises owes the same duty, the 'common duty of care,' to all his visitors," with certain exceptions not relevant here. Occupiers Liability Act 1957 § 2(1). The 1957 Act defines the common duty of care owed to all visitors as follows:

> The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

Id. § 2(2).

The 1957 Act makes clear that its purpose was to supplant the common law and impose a new liability standard. *See id.* § 1(1) (providing that the Act "shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them"); *see also Nixon,* 690 S.W.2d at 552. Contrary to Cal Dive's argument, this new duty to licensees and invitees—quoted above—does not include the common-law requirement that the occupier have actual or constructive knowledge of an unreasonable risk of harm. [6] The Occupiers Liability Act 1984 confirms this conclusion, adopting a duty to nonvisitors that does require such knowledge. [7]

[6] ***924** We conclude that the common duty of care established by the Occupiers Liability Act 1957 is the same as the ordinary negligence duty of care recognized by Texas: an occupier has a duty of care under English law to act as an ordinary reasonable person under the same or similar circumstances, not the duty of care found in Texas premises liability law. *See Trudy's Texas Star, Inc. v. City of Austin,* 307 S.W.3d 894, 914–15 (Tex.App.–Austin 2010, no pet.) (recognizing that under Texas negligence law, one generally has a duty of care to act as an ordinary reasonable person under the same or similar circumstances); *see also Lynch v. Hilton Worldwide, Inc.,* Civil No. 11–1362 JBS/AMD, 2011 WL 5240730, at *7 (D.N.J. Oct. 31, 2011) (stating that, under Occupiers Liability Act 1957, an English hotel owner has a statutory duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for which he is invited or permitted by the occupier to be there."). Therefore, the trial court did not err when it refused Cal Dive's jury question requiring actual or constructive knowledge. [8] We overrule Cal Dive's second issue.

E. The trial court did not err when it submitted the damages issues to the jury using Texas law.

[7] In its fourth issue, Cal Dive argues the trial court erred by charging the jury using elements for personal injury damages under Texas law rather than using English law as embodied in the *Guidelines for the Assessment of General Damages in Personal Injury Cases.* In Cal Dive's view, the *Guidelines* limited Bryant to maximum damages of $20,961. We disagree.

In his declaration, Handley provided an explanation of the elements of damages available to a personal injury plaintiff under English law. As summarized above, these

damages include general (or non-pecuniary) damages, such as physical and psychological pain and suffering and physical impairment, as well as special (or pecuniary) damages, such as loss of earning capacity and medical costs. Because Texas law permits the recovery of the same damages as those recoverable under English law, we conclude the trial court did ***925** not abuse its discretion when it submitted Bryant's damages to the jury using a question adapted from the Texas Pattern Jury Charge. *See Golden Eagle Archery, Inc. v. Jackson,* 116 S.W.3d 757, 763 (Tex.2003) (identifying types of damages recoverable under Texas law in a personal injury action); *see also Hatfield,* 316 S.W.3d at 57 (stating that trial court has broad discretion in submitting charge to the jury so long as charge is legally correct).

Even if we assume that the unauthenticated excerpt from the *Guidelines for the Assessment of General Damages in Personal Injury Cases* provided by Cal Dive accurately states English law on the subject, it would not change the result because the *Guidelines* deals only with general damages. As Handley explained, general damages encompass elements such as pain and suffering, loss of mental or physical capacity, and loss of enjoyment, companionship, and consortium. As Handley also explained, in addition to general damages, a personal injury plaintiff can recover special damages, such as loss of earning capacity and medical care. The jury awarded Bryant only $8,000 for past physical pain and mental anguish, an amount well within the *Guidelines*' alleged $20,961 limit. Bryant's remaining damages are special damages, which are not limited by the *Guidelines.* We overrule Cal Dive's fourth issue.

II. Legally and factually sufficient evidence supports the jury's finding that Cal Dive breached a duty owed to Bryant.

In its third issue on appeal, Cal Dive asserts (1) this is a premises liability case; and (2) the evidence is legally and factually insufficient that Cal Dive had actual or constructive knowledge of the oily substance's presence on the diving vessel's deck before Bryant slipped and fell. We already have rejected Cal Dive's premises liability argument. Regarding the presence of the oily substance, we conclude the evidence is legally and factually sufficient to support the jury's finding that Cal Dive breached its duty of reasonable care.

A. Standard of review

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding. *Univ. Gen. Hosp., L.P. v. Prexus Health Consultants, LLC,* 403 S.W.3d 547, 550 (Tex.App.–Houston [14th Dist.] 2013, no pet.). In conducting a legal-sufficiency review, we must consider the evidence in the light most favorable to the appealed finding and indulge every reasonable inference that supports it. *Id.* at 550–51 (citing *City of Keller v. Wilson,* 168 S.W.3d 802, 821–22 (Tex.2005)). The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the decision under review. *Id.* at 551. This Court must credit favorable evidence if a reasonable trier of fact could, and disregard contrary evidence unless a reasonable trier of fact could not. *Id.* The trier of fact is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Id.*

This Court may sustain a legal sufficiency (or no-evidence) issue only if the record reveals one of the following: (1) the complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence established conclusively the opposite of the vital fact. *Id.* Evidence that is so weak as to do no more than create a mere surmise or suspicion that the fact exists is less than a scintilla. *Id.*

***926** In reviewing the factual sufficiency of the evidence, we must examine the entire record, considering both the evidence in favor of, and contrary to, the challenged findings. *See Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 406–07 (Tex.1998); *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986). When a party challenges the factual sufficiency of the evidence supporting a finding for which it did not have the burden of proof, we may set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Ellis,* 971 S.W.2d at 407; *Nip v. Checkpoint Systems, Inc.,* 154 S.W.3d 767, 769 (Tex.App.–Houston [14th Dist.] 2004, no pet.). The amount of evidence necessary to affirm is far less than the amount necessary to reverse a judgment. *GTE Mobilnet of S. Tex. v. Pascouet,* 61 S.W.3d 599, 616 (Tex.App.–Houston [14th Dist.] 2001, pet. denied). This Court is not a factfinder. *Ellis,* 971

S.W.2d at 407. Instead, the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *GTE Mobilnet,* 61 S.W.3d at 615–16. Therefore, we may not pass upon the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence also would support a different result. *Id.* When presented with conflicting evidence, a jury may believe one witness and disbelieve others, and it also may resolve any inconsistencies in the testimony of any witness. *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 697 (Tex.1986). If we determine the evidence is factually insufficient, we must detail the evidence relevant to the issue and state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict; we need not do so when affirming a jury's verdict. *Gonzalez v. McAllen Med. Ctr., Inc.,* 195 S.W.3d 680, 681 (Tex.2006) (per curiam).

B. The evidence is legally and factually sufficient to support the jury's verdict.

[8] As detailed above, Bryant testified that after his fall and while he was waiting to be transported to the Chinese mainland, a Cal Dive deck foreman told Bryant that the oily substance in the area of his fall had been reported three times and that he hoped Bryant's fall and injury might get something done about it. Bryant also testified that he believed that the oily substance had originated from the dive ship's ROV, which had been taken out of the water about two hours before the fall and stored just above the gangway where he fell. The timing of the ROV's removal from the water was confirmed by the ship's records. We conclude this testimony is legally and factually sufficient evidence that Cal Dive had notice of the oily substance with sufficient time before Bryant fell to have done something about it, or, at minimum, Cal Dive had notice that accumulation of an oily substance in the area was a recurring problem that required attention. The evidence is therefore legally and factually sufficient that Cal Dive breached a duty owed to Bryant.

In its appellate brief, Cal Dive asserts that the testimony of the ship's safety officer, Ian Harrison, establishes that Cal Dive did not have actual or constructive notice of the oily substance on the deck. Cal Dive specifically points to Harrison's testimony that: (1) he had not received any reports of foreign substances leaking from the ROV; (2) the ROV was not stored in the area where Bryant fell; (3) the ROV had a containment system to prevent spills; (4) Harrison regularly patrolled the ship checking for safety issues; and (5) Harrison checked the area where Bryant fell within five minutes after speaking with Bryant about the accident and Harrison found no oily substance but instead ***927** only some water in a depression that had been worn over time in the deck surface. We disagree that the testimony emphasized by Cal Dive changes the result.

Cal Dive's argument is contrary to our standard of review. Specifically, this argument omits Bryant's testimony that the ROV was stored over the area where he fell and that a deck foreman had informed him the oily substance on the walkway had been reported three times prior to Bryant's fall. In addition, the argument fails to account for Harrison's own testimony that (1) he did not check the walkway where Bryant had fallen until after he had spoken with Bryant, which could have occurred as much as three hours after the incident; and (2) when Harrison finally arrived, a power washer was located next to the spot where Bryant had fallen. Finally, the argument overlooks the photographs Harrison took as part of his investigation of the incident, which showed a power washer at the scene of Bryant's fall. It is the jury's task to evaluate the credibility of witnesses and to resolve conflicts in, and then weigh, the evidence. *Golden Eagle Archery,* 116 S.W.3d at 761. The jury could have believed Bryant and disbelieved Harrison's testimony about the location of the ROV. *See McGalliard,* 722 S.W.2d at 697. The jury also could have believed Bryant's testimony that he slipped on an oily substance and reasonably concluded that the oily substance had been cleaned by the time Harrison made his way to check the walkway where Bryant had fallen. *See City of Keller v. Wilson,* 168 S.W.3d 802, 821 (Tex.2005) ("Courts reviewing all the evidence in a light favorable to the verdict must assume jurors made all inferences in favor of their verdict if reasonable minds could, and disregard all other inferences in their legal sufficiency review."); *Walters v. Am. States Ins. Co.,* 654 S.W.2d 423, 426 (Tex.1983) (stating that juries are entitled to make inferences if they are reasonable and based on the facts proved). We conclude the evidence is legally and factually sufficient and overrule Cal Dive's third issue. *See United Parcel Service, Inc. v. Rankin,* 468 S.W.3d 609, 617 (Tex.App.–San Antonio 2015, pet. filed) (concluding evidence was legally and factually sufficient based, in part, on reasonable inferences the jury could have made); *CA Partners v. Spears,* 274 S.W.3d 51, 75 (Tex.App.–Houston [14th Dist.] 2008, pet. denied) (concluding evidence was factually sufficient despite record containing evidence contradicting factual findings).

III. The trial court did not abuse its discretion when it prohibited Cal Dive from cross-examining Bryant's economist regarding taxation.

In its fifth issue, Cal Dive asserts the trial court abused its discretion when it sustained Bryant's objection under Texas Rule of Evidence 403 and prohibited Cal Dive from cross-examining Dr. McCoin, Bryant's expert economist, regarding how he accounted for taxation in calculating Bryant's damages for lost earning capacity.

A. Standard of review

The decision to admit or exclude evidence lies within the sound discretion of the trial court. *Bay Area Healthcare Grp., Ltd. v. McShane,* 239 S.W.3d 231, 234 (Tex.2007). A trial court exceeds its discretion if it acts in an arbitrary or unreasonable manner or without reference to guiding rules or principles. *Barnhart v. Morales,* 459 S.W.3d 733, 742 (Tex.App.–Houston [14th Dist.] 2015, no pet.) (citing *Bowie Mem'l Hosp. v. Wright,* 79 S.W.3d 48, 52 (Tex.2002)). When reviewing matters committed to the trial court's discretion, a reviewing court may not substitute ***928** its own judgment for the trial court's judgment. *Id.* Thus, the question is not whether this Court would have admitted the evidence. Rather, an appellate court will uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling, even if that ground was not raised in the trial court. *Hooper v. Chittaluru,* 222 S.W.3d 103, 107 (Tex.App.–Houston [14th Dist.] 2006, pet. denied) (op. on reh'g). Therefore, we begin by examining possible bases for upholding the trial court's decision that are suggested by the record or urged by the parties. *Id.*

Relevant evidence is generally admissible. Tex. R. Evid. 402. A trial court may exclude relevant evidence, however, 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. Tex. R. Evid. 403; *see Strauss v. Continental Airlines, Inc.,* 67 S.W.3d 428, 449 (Tex.App.–Houston [14th Dist.] 2002, no pet.).

[9] **[10]** **[11]** **[12]** To obtain reversal of a judgment based on a claimed error in excluding evidence, a party must show that the trial court did in fact err and that the error probably resulted in rendition of an improper judgment. *Hooper,* 222 S.W.3d at 107. To determine whether excluded evidence probably resulted in the rendition of an improper judgment, an appellate court reviews the entire record. *Barnhart,* 459 S.W.3d at 742 (citing *Interstate Northborough P'ship v. State,* 66 S.W.3d 213, 220 (Tex.2001)). To challenge a trial court's evidentiary ruling successfully, the complaining party must demonstrate that the judgment turns on the particular evidence that was excluded or admitted. *Hooper,* 222 S.W.3d at 107 (citing *Interstate Northborough P'Ship,* 66 S.W.3d at 220). A reviewing court ordinarily will not reverse a judgment because a trial court erroneously excluded evidence when the excluded evidence is cumulative or not controlling on a material issue dispositive to the case. *Id.*

B. The trial court did not abuse its discretion when it prohibited Cal Dive from questioning Dr. McCoin in front of the jury about how he accounted for taxation in calculating Bryant's damages.

[13] Cal Dive argues that the trial court abused its discretion by prohibiting it from questioning Dr. McCoin about how he accounted for taxation in calculating Bryant's damages for lost earning capacity. Cal Dive asserts that it should have been permitted to question Dr. McCoin on this subject under section 18.091(a) of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 18.091(a) (West 2015) (requiring claimants seeking damages for loss of earning capacity to present their evidence "in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law"). Bryant objected that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, as Cal Dive's purpose in asking Dr. McCoin this line of questioning was to paint Bryant as a bad person because he did not pay United States income taxes. The trial court agreed and sustained Bryant's objection, thereby prohibiting Cal Dive from questioning Dr. McCoin about his treatment of income taxes in the formation of his opinion.

We conclude Cal Dive has not shown the trial court abused its discretion when it sustained Bryant's Rule 403 objection. On this record, it is undisputed that (1) Bryant, an English expatriate living in Thailand, was not required to pay federal income taxes on his earnings as a deep sea ***929** diver; and (2) Dr. McCoin did account for that fact in the preparation of his opinion of lost earning capacity. Because no reduction for federal income

taxes was required, Dr. McCoin's opinion complied with section 18.091(a). Thus, we conclude the trial court reasonably could have concluded that the probative value of explaining the lack of federal taxation to the jury was negligible while its potential prejudicial effect was significant. *See* Tex. R. Evid. 403; *Farmers Tex. Cnty. Mut. Ins. Co. v. Pagan,* 453 S.W.3d 454, 463 (Tex.App.–Houston [14th Dist.] 2014, no pet.). Finally, Cal Dive has not shown on appeal how it was allegedly harmed as a result of the trial court's exclusion of this evidence. *See* Tex. R. App. P. 44.1; *Pagan,* 453 S.W.3d at 465. We therefore overrule Cal Dive's fifth issue.

IV. Cal Dive failed to preserve its challenge to the trial court's denial of a mistrial for appellate review.

[14] Travis Trahan, a Cal Dive vice-president, testified at trial regarding the qualifications to become a saturation diving supervisor, the time it would take to qualify, and the amount of money that a supervisor could potentially earn, from $800 to $1,100 a day. According to Trahan, a diving supervisor position with Cal Dive, unlike a saturation diving position, did not require heavy labor. The implication from Trahan's testimony was that Bryant, even with his injured shoulder, could continue to work in the diving industry earning a very good living.

During cross-examination, Bryant's attorney questioned Trahan not only about his testimony that Cal Dive classified a diving supervisor position as a light-to-medium-duty job rather than a heavy-duty one, but also about Cal Dive's current willingness to hire Bryant as a supervisor. Cal Dive did not lodge any objection to this line of questioning. At the end of the questions regarding Cal Dive's willingness to hire Bryant as a supervisor, the parties asked the trial court for a brief recess to discuss settlement of the case. Again, Cal Dive did not object. The parties did not settle the case during the recess and when the trial resumed, Cal Dive did not ask the trial court to instruct the jury to disregard the testimony regarding the possibility of settling the case. Cal Dive instead asked the trial court to grant a mistrial based on the testimony regarding settlement, which the trial court denied. In its sixth issue, Cal Dive argues the trial court erred when it denied Cal Dive's motion for mistrial.

[15] **[16]** A trial court has discretion to grant or deny a motion for mistrial. *Schlafly v. Schlafly,* 33 S.W.3d 863, 868 (Tex.App.–Houston [14th Dist.] 2000, pet. denied). In reviewing a trial court's decision on a motion for mistrial, we do not substitute our judgment for that of the trial court but instead decide only whether the trial court's decision constitutes an abuse of discretion. *Id.* A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241–42 (Tex.1985).

[17] Although offers of compromise and settlement generally are inadmissible, an error in admitting such evidence can be cured by an instruction to the jury to disregard the evidence. *Beutel v. Paul,* 741 S.W.2d 510, 513 (Tex.App.–Houston [14th Dist.] 1987, no writ). Because Cal Dive did not object to the settlement testimony and did not request an instruction that the jury disregard the settlement testimony, it did not preserve this issue for appellate review. *See Columbia Med. Ctr. of Las Colinas v. Bush,* 122 S.W.3d 835, 862 (Tex.App.–Fort Worth 2003, pet. denied) (citing *State Bar v. Evans,* 774 S.W.2d 656, 658 (Tex.1989)). ***930** We overrule Cal Dive's sixth issue.

CONCLUSION

Having overruled each of the issues raised by Cal Dive and the cross-issue raised by Bryant in this appeal, we affirm the trial court's judgment.

All Citations

478 S.W.3d 914

Footnotes

1 *See* Occupiers Liability Act 1957, 5 and 6 Eliz. 2, c. 31 (Eng. & Wales); *see also* Occupiers Liability Act 1984, c. 3 (Eng. & Wales).

2 We abated this appeal following oral argument because Cal Dive filed for bankruptcy. *See* Tex. R. App. P. 8.2. After the bankruptcy court lifted its stay to permit this Court to render a decision, we reinstated the appeal. *See* Tex. R. App. P. 8.3(a).

3 If the court considers sources not submitted by a party, it must give the parties notice and a reasonable opportunity to comment and to submit further materials. Tex. R. Evid. 203.

4 Cal Dive does not argue on appeal that Texas law, rather than English law, should govern Bryant's claims. Rather, Cal Dive argues only that we should presume English law is the same as Texas law because Bryant did not adequately prove the content of English law.

5 Because the trial court had adequate information to apply English law, we need not decide whether Cal Dive is correct that this case should have been submitted to the jury under Texas law using a premises liability theory.

6 The Act does not prohibit considering the occupier's knowledge in determining whether the occupier discharged its common duty of reasonable care under the 1957 Act. But there is nothing in the Act to indicate that knowledge is a separate element required for liability to visitors (i.e., licensees and invitees).

7 The 1984 Act provides:

> An occupier of premises owes a duty to another (not being his visitor) in respect of [dangers due to the state of the them] if—premises or to things done or omitted to be done on
>
> (a) he is aware of the danger or has reasonable grounds to believe that it exists;
>
> (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and
>
> (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
>
> Occupiers Liability Act 1984 § 1(3).

8 Cal Dive points to the transcript of the court's oral findings and judgment following a bench trial in a factually similar case, *Lowther v. H. Hogarth & Sons, Ltd.,* [1959] Vol. I Lloyd's Rep. Q.B. 171. That transcript includes some dicta to the effect that the common duty of care owed under the 1957 Act did not differ from the duty owed at common law, which required proper care to see that invitees were not exposed to unusual dangers of which the occupier knew or ought to have known. *Id.* at 177. This observation is inconsistent with the text of the 1957 Act discussed above, but we note that the *Lowther* court did not have the benefit of the 1984 Act, which requires knowledge only as to non-visitors. In any event, the *Lowther* court went on to apply the common duty of reasonable care from the 1957 Act and hold that no breach had occurred, finding that there was no danger from oil on the deck when the defendants' employee made his last examination, noting the impracticability—even when taking reasonable care—of maintaining passages so that there is never a slippery place, and observing that it was difficult to envisage what further efforts the defendants could have made to ensure oil was cleaned up at more frequent intervals. *Id.* at 178–79. As we shall see in Part II below, this case is different from *Lowther* in that there were reports of oil on the deck before Bryant slipped.

Vernon's Texas Rules Annotated
Texas Rules of Evidence (Refs & Annos)
Article X. Contents of Writings, Recordings, and Photographs (Refs & Annos)

TX Rules of Evidence, Rule 1009

Rule 1009. Translating a Foreign Language Document

Currentness

(a) Submitting a Translation. A translation of a foreign language document is admissible if, at least 45 days before trial, the proponent serves on all parties:

(1) the translation and the underlying foreign language document; and

(2) a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate.

(b) Objection. When objecting to a translation's accuracy, a party should specifically indicate its inaccuracies and offer an accurate translation. A party must serve the objection on all parties at least 15 days before trial.

(c) Effect of Failing to Object or Submit a Conflicting Translation. If the underlying foreign language document is otherwise admissible, the court must admit--and may not allow a party to attack the accuracy of--a translation submitted under subdivision (a) unless the party has:

(1) submitted a conflicting translation under subdivision (a); or

(2) objected to the translation under subdivision (b).

(d) Effect of Objecting or Submitting a Conflicting Translation. If conflicting translations are submitted under subdivision (a) or an objection is made under subdivision (b), the court must determine whether there is a genuine issue about the accuracy of a material part of the translation. If so, the trier of fact must resolve the issue.

(e) Qualified Translator May Testify. Except for subdivision (c), this rule does not preclude a party from offering the testimony of a qualified translator to translate a foreign language document.

(f) Time Limits. On a party's motion and for good cause, the court may alter this rule's time limits.

(g) Court-Appointed Translator. If necessary, the court may appoint a qualified translator. The reasonable value of the translator's services must be taxed as court costs.

Credits

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

Editors' Notes

NOTES AND COMMENTS

Comment to 1998 change: This is a new rule.

Notes of Decisions (14)

Rules of Evid., Rule 1009, TX R EVID Rule 1009
Current with amendments received through October 1, 2017

End of Document

428 S.W.3d 179
Court of Appeals of Texas,
Houston (1st Dist.).

Francisco J. CASTREJON, Appellant
v.
The STATE of Texas, Appellee.

No. 01–12–00601–CR.
|
Jan. 23, 2014.

Synopsis

Background: Defendant was convicted in the County Criminal Court at Law No. 1, Harris County, of prostitution. Defendant appealed.

Holdings: The Court of Appeals, Evelyn V. Keyes, J., held that

[1] State's failure to submit written translation and affidavit of qualified translator to defendant 45 days before trial did not preclude admission of recording of defendant's conversation with undercover officer;

[2] recording of conversation was admissible without written translation; and

[3] police officer was qualified to offer translation of conversation at trial.

Affirmed.

Massengale, J., filed concurring opinion.

West Headnotes (14)

[1] Criminal Law
Reception and Admissibility of Evidence

The appellate court reviews a trial court's decision to admit evidence for an abuse of discretion.

1 Cases that cite this headnote

[2] Criminal Law
Reception and Admissibility of Evidence

The appellate court will not reverse a trial court's evidentiary ruling unless it falls outside the zone of reasonable disagreement.

1 Cases that cite this headnote

[3] Criminal Law
Appointment and services of interpreter

The appellate court affords a trial court wide discretion in determining the adequacy of interpretive services for translation of foreign-language document. Rules of Evid., Rule 1009.

3 Cases that cite this headnote

[4] Criminal Law
Appointment and services of interpreter

The question on appeal regarding trial court's admission of foreign-language translation is not whether the best means of interpretive services were employed but whether the services employed were constitutionally adequate. Rules of Evid., Rule 1009.

Cases that cite this headnote

[5] Criminal Law
Appointment and services of interpreter

The foreign-language translation of document admitted by the trial court must be accurate or true, but it need not be perfect. Rules of Evid., Rule 1009.

Cases that cite this headnote

[6] Criminal Law
Sound recordings

Rule of evidence regarding admission of foreign-language translations did not affect admissibility of underlying audio recording, in defendant's trial for prostitution where

trial court admitted recording of defendant's conversation with undercover police officer posing as a prostitute; rule only applied to translation of recording. Rules of Evid., Rule 1009.

Cases that cite this headnote

[7] **Criminal Law**
Sound recordings

State's failure to submit written translation and affidavit of qualified translator to defendant 45 days before prostitution trial did not preclude admission of recording of conversation held partly in Spanish and partly in English between defendant and undercover officer posing as prostitute; 45–day notice requirement applied only to admission of translation of recording, not to admission of the underlying recording itself, 45–day notice requirement did not apply when, as in defendant's case, translation was offered by live testimony at trial, and lack of 45–day notice did not prevent defendant from requesting appointment of an interpreter. Vernon's Ann.Texas C.C.P. art. 38.30(a); Rules of Evid., Rule 1009(a, e, f).

Cases that cite this headnote

[8] **Criminal Law**
Sufficiency and Scope of Motion

Motions in limine do not preserve error.

Cases that cite this headnote

[9] **Criminal Law**
Appointment and services of interpreter

Nothing in statute governing appointment of interpreters precludes a party from requesting the appointment of an interpreter whenever the need arises during a proceeding. Vernon's Ann.Texas C.C.P. art. 38.30.

Cases that cite this headnote

[10] **Criminal Law**
Sound recordings

Criminal Law
Appointment and services of interpreter

State was not required to produce a contemporaneous written translation of audio recording of conversation held partly in Spanish and partly in English between defendant and undercover officer posing as prostitute, in order for the recording to be admissible in prostitution trial; rule of evidence did not require written translation for admission of recording, defendant did not move for appointment of licensed court interpreter to make written transcription at or before trial, and no affidavit from a qualified translator was required because no written translation was offered. Vernon's Ann.Texas C.C.P. art. 38.30; V.T.C.A., Government Code § 57.002(a); Rules of Evid., Rule 1009(a, e, g).

Cases that cite this headnote

[11] **Criminal Law**
Adding to or changing grounds of objection

Defendant did not preserve for appellate review any error in the State's failure to provide written translation of audio recording of conversation held partly in Spanish and partly in English between defendant and undercover officer posing as prostitute, prior to offering the recording into evidence in prostitution trial, although defendant objected at the time State offered the recording into evidence, where defendant objected solely on the ground of the lack of proper certified interpreter, and defendant did not object to lack of a written transcript until closing argument. Rules of Evid., Rule 1009(a).

Cases that cite this headnote

[12] **Criminal Law**
Appointment and services of interpreter

Trial court acted within its discretion, in trial for prostitution, when it implicitly determined that police officer, who posed as prostitute

and recorded conversation with defendant, and who interpreted the foreign-language part of the recording at trial, was qualified to translate the recording through testimony at trial, although officer was not certified translator and she testified that she was not fluent in Spanish; rule of evidence did not require that officer be certified translator, and officer testified that she was able to communicate with potential clients in Spanish when she worked undercover as a prostitute, that she conversed with Spanish-speaking suspects "quite frequently," that she had experience taking police reports in Spanish and questioning witnesses in Spanish, that she had taken spanish classes offered by police department, and that she spoke "street Spanish." Rules of Evid., Rule 1009(e).

Cases that cite this headnote

[13] Courts

Interpreters

Individuals called upon to act as interpreters during criminal proceedings are not required to have specific qualifications or training; instead, what is required is sufficient skill in translating and familiarity with the use of slang. Vernon's Ann.Texas C.C.P. art. 38.30; Rules of Evid., Rule 1009.

1 Cases that cite this headnote

[14] Criminal Law

Appointment and services of interpreter

Criminal Law

Appointment of interpreter or stenographer

The competency of an individual to act as an interpreter is a question for the trial court, and, absent an abuse of discretion, this determination will not be disturbed on appeal. Vernon's Ann.Texas C.C.P. art. 38.30; Rules of Evid., Rule 1009.

3 Cases that cite this headnote

Attorneys and Law Firms

***180** Michael S. Driver, Houston, TX, for Appellant.

***181** Devon Anderson, District Attorney, Carly Dessauer, Assistant District Attorney, Houston, TX, for Appellee.

Panel consists of Justices KEYES, HIGLEY, and MASSENGALE.

OPINION

EVELYN V. KEYES, Justice.

A jury convicted appellant, Francisco J. Castrejon, of the Class B misdemeanor offense of prostitution. [1] The trial court assessed punishment at ten days' confinement in the Harris County Jail and a $500 fine. In one issue, appellant contends that the trial court erroneously admitted a recorded conversation held partly in Spanish and partly in English without proper notice that the State intended to introduce this recording and without a written transcript from a licensed translator.

Specifically, appellant contends that the trial court erred in admitting the recording of a conversation he held partly in Spanish with the arresting officer, Officer G. Das, because, under Texas **Rule of Evidence 1009**(a), the State was required to give forty-five days' notice that it intended to use the recording as evidence at trial and to submit a contemporaneous written English translation prepared by a certified translator, and the State failed to do so. He also contends that, because of this failure, his defense counsel was unable to request that the trial court appoint an interpreter pursuant to Code of Criminal Procedure article 38.30 to submit a translation of the recording. He further contends that Officer Das was not qualified to render an accurate English translation of the conversation.

Concluding that appellant has misconstrued the law, we affirm.

Background

Houston Police Department ("HPD") Vice Division Officer Das was working undercover on Bissonnet Street

in southwest Houston on October 17, 2012, in an attempt to combat the prostitution problem in the area. Officer Das posed as a prostitute and maintained a telephone connection with her backup officers underneath her clothing to record any conversations that she had with individuals who propositioned her. Officer Das encountered appellant, who was driving along Bissonnet, and they negotiated payment for a sexual encounter to occur in a nearby parking lot. This conversation was recorded by audio recording. After Officer Das began to walk toward the parking lot and appellant started to follow her in his vehicle, the backup officers arrested appellant. No translation of the recording of the conversation between Officer Das and appellant, which was partly in English and partly in Spanish, was made prior to trial.

Appellant filed a pre-trial motion in limine in which he sought to exclude, among other things, "[a]ny reference to a conversation between persons if such conversation is contained in an audio recording that constitutes the best evidence of the conversation that transpired" and "[a]ny reference or attempt to translate any conversation between persons if such conversation was conducted in a foreign language, in whole or in part, except if such translation has been disclosed by the State, and served upon all parties, at least 45 days prior to the date of trial, upon the affidavit of a qualified translator pursuant to the Rules of Evidence." The trial court denied the first request and allowed the State to reference the conversation between Officer Das and appellant, but it granted the second request and required ***182** the State to approach the bench before it discussed the audio recording of this conversation or attempted to translate it.

At trial, Officer Das testified that she is able to communicate with suspects who speak only Spanish. She testified that she has experience taking police reports in Spanish and questioning witnesses in Spanish and that, over the course of her twenty-year career in the Vice Division, she has dealt with Spanish-speaking suspects "quite frequently." She also stated that she has taken Spanish classes through HPD, and she characterized the type of Spanish that she speaks as "street Spanish," which is what many suspects who solicit prostitutes speak. Officer Das acknowledged that she is not fluent in Spanish, but she is "comfortable" speaking it, she is able to "get [her] point across and [she] can understand what people are saying to [her]" in Spanish.

Officer Das testified that she was walking along Bissonnet when appellant drove by in his car, "slowed his car down considerably," made eye contact with her, pulled into the next driveway, and parked his car in the parking lot. Appellant maintained eye contact with Officer Das, so she decided to approach his car. Officer Das testified that appellant called out to her in Spanish.

After the prosecutor asked Officer Das what happened next, defense counsel objected and asked to approach the bench. He argued that any answer to this question would "necessarily involve the witness' translation of a conversation that took place in a foreign language," and he renewed his objection from his motion in limine to any reference to or attempt to translate any conversation in a foreign language because "[t]here is no certified interpreter that is present here today" and "[n]one has been disclosed to defense counsel." The trial court asked whether Officer Das was the one who had the conversation in Spanish with appellant, and, after the State responded that she was, the court overruled defense counsel's objection and allowed Officer Das to testify concerning the conversation.

Officer Das then testified that she and appellant exchanged pleasantries in Spanish, and she stated, in Spanish, what they said to one another. She stated that she informed appellant that she had a hotel room and that he asked her "how much?" She testified that she asked, "For what?" and she then stated the English translation for the two sex acts that she had offered to perform. She then specifically stated the Spanish words that she had used in the conversation with appellant and their English translations for the jury. She testified that appellant indicated, in Spanish, that he wished to have sexual intercourse with her, and she told him, also in Spanish, that that would cost $15. He repeated "fifteen" twice more during the course of their conversation. Appellant then suggested that they go to a nearby parking lot instead of a hotel room.

The State asked Officer Das whether an audio recording existed of this conversation, whether the recording was "in line with" Das' testimony, and whether the recording was in English or Spanish. Officer Das affirmed that there was an audio recording and agreed that the recording was "in line with the verbal part of [their] conversation" and that the recording contained both English and Spanish.

The State then offered the recording into evidence. The following exchange occurred:

[Defense counsel]: Judge, we renew our objection based on the Motion in Limine that any audio that is admitted into evidence without the proper certified interpreter would be a violation of not only Texas Rules of Evidence but my client's rights to confrontation.

***183** The Court: Okay. And you are not offering a transcript?

[The State]: No, Your Honor.

The Court: Simply the audio and her testimony regarding it; is that correct?

[The State]: That's correct, Judge.

The Court: Your objection will be overruled.

No written English translation of the Spanish part of the audio recording was offered into evidence. The recording was not played for the jury at that time. Defense counsel did not object to admission of the recording on the basis that the State failed to give forty-five days' notice of its intent to introduce the recording, and he did not object on the basis that no English translation of the Spanish on the recording was offered; nor did he seek a continuance so that the Spanish portion of the tape could be translated. Moreover, he did not object at any time to Officer Das' translation at trial.

During closing argument, the prosecutor indicated that he wished to play the recording for the jury. Defense counsel objected and the following occurred:

[Defense counsel]: Certainly, Judge, playing the tape that is in Spanish without a translation is going to confuse the jury. We renew our objection as stated in the motion in limine. There's been no transcript. There's no translation to what is actually on this audio. And I believe that if the jury heard it in the absence of any translation, they are just simply going to assume that whatever counsel is saying is on that tape.

The Court: Officer [Das] testified about the authenticity about the recording that she was saying and the defendant was saying, so I'm going to overrule your objection. It's already in evidence. He may publish it.

[The State]: At the risk of being redundant, just for purposes of the record, should there be an appeal, the State would also like to play in reference to closing argument to contradict the length of time the defense said the conversation went on, regardless of the statements provided and already admitted pieces of evidence. He could use it in closing arguments to show that at least the defendant was telling some untruths.

[Defense counsel]: Judge, the time has passed for cross-examination. If Your Honor is going to allow it to come in, you are certainly entitled to make that ruling, Judge. But with the added ruling that they be allowed to somehow now explain—

The Court: It's already in evidence. It's State's Exhibit No. 2 that was admitted into evidence. It can be published at this point.

[Defense counsel]: Our objection, Judge, is that publishing that without the translation is improper.

The Court: Your objection is overruled.

The jury convicted appellant of the offense of prostitution, and the trial court assessed punishment at ten days' confinement and a $500 fine.

Admissibility of Spanish Audio Recording

Appellant argues, first, that the trial court erred by admitting the recording of his conversation with Officer Das, which was partly in English and partly in Spanish, because, under Texas Rule of Evidence 1009(a): (1) the State was required to give forty-five days' notice that it intended to use the recording as evidence at trial, and the State failed to do so, and (2) the State was required to submit a contemporaneous written English translation ***184** prepared by a qualified translator, which it also failed to do. We disagree.

A. Standard of Review and Law Governing Foreign–Language Translations

[1] [2] [3] [4] [5] We review a trial court's decision to admit evidence for an abuse of discretion. *Torres v. State,* 71 S.W.3d 758, 760 (Tex.Crim.App.2002). We will not reverse a trial court's evidentiary ruling unless

it falls outside the zone of reasonable disagreement. *Id.* We afford a trial court wide discretion in determining the adequacy of interpretive services. *Linton v. State,* 275 S.W.3d 493, 500 (Tex.Crim.App.2009). The question on appeal is not whether the "best" means of interpretive services were employed but whether the services employed were constitutionally adequate. *Id.* The translation must be "accurate or 'true,' but it need not be perfect." *Flores v. State,* 299 S.W.3d 843, 855 (Tex.App.-El Paso 2009, pet. ref'd) (quoting *Linton,* 275 S.W.3d at 501–02); *see also Peralta v. State,* 338 S.W.3d 598, 604 (Tex.App.-El Paso 2010, no pet.) (holding same).

B. Failure to Provide Forty–Five Days' Notice of Intent to Use Audio Recording and Written Translation by Certified Translator

Texas Rule of Evidence 1009(a) ("Translation of Foreign Language Documents") governs the admissibility of translated documents. It provides,

> A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.

TEX.R. EVID. 1009(a). Rule 1009(a) applies when a party offers a written translation of a foreign language document. It requires that the written translation be coupled with an affidavit by a qualified translator setting forth the translator's qualifications and certifying that the translation is fair and accurate and that the translation be provided forty-five days in advance of trial. *Id.*

Rule 1009 also provides, however, that submission of a written translation of a foreign language document by a qualified translator forty-five days in advance of trial in compliance with subsection 1009(a) is not the only means by which a party may offer a translation of a document. Subsection 1009(e) allows the trial court to admit a translation of a foreign language document "at trial either by live testimony or by deposition testimony of a qualified expert translator." TEX.R. EVID. 1009(e); *see Peralta,* 338 S.W.3d at 606 ("In the event the time requirements of subsection (a) [of rule 1009] are not met, a party may nevertheless introduce the translation at trial either by live testimony or by deposition testimony of a qualified expert translator.").

1. Forty–Five Days' Notice Requirement for Admissibility

[6] **[7]** Appellant argues first that the recording was inadmissible because he was not given forty-five days' notice of the State's intent to introduce the recording, as required by subsection 1009(a). However, Rule 1009(a)'s forty-five day notice requirement does not apply to the admission of the underlying recording of appellant's conversation with Officer Das. The requirement applies only to the admission of the translation of the recording, and it applies to admission of the translation only if that translation was not admissible under another subsection of Rule 1009—here, subsection 1009(e). Rule 1009(e) does not ***185** require the contemporaneous admission of a written transcript of the exhibit being translated through live testimony; and it does not require forty-five days' notice. *See Peralta,* 338 S.W.3d at 606. It requires only that the translation be offered by live testimony or by the deposition of a certified expert translator. TEX.R. EVID. 1009(e). Thus, the fact that the State did not submit a written translation and affidavit of a qualified translator to appellant forty-five days before trial does not preclude admission of the recording.

[8] We observe, moreover, that, although appellant raised the failure of the State to provide forty-five days' notice of a written translation in his motion in limine, he did not reassert this specific objection at trial. As the State points out, "[i]t is axiomatic that motions in limine do not preserve error." *Thierry v. State,* 288 S.W.3d 80, 87 (Tex.App.-Houston [1st Dist.] 2009, pet. ref'd); *Harnett v. State,* 38 S.W.3d 650, 655 (Tex.App.-Austin 2000, pet. ref'd) ("Even if there has been a violation of the order on the motion in limine, it is incumbent that a party object to the admission or exclusion of evidence or other action in order to preserve error for appeal."); *see also Williams v. State,* 402 S.W.3d 425, 437 (Tex.App.-Houston [14th Dist.] 2013, pet. ref'd) ("The appellate complaint must comport with the specific objection made at trial. An objection stating one legal theory may not be used to support a different legal theory on appeal.") (internal citations omitted). We also note that, had appellant been concerned about the lack of time to counter the

translation, Rule 1009(f) provides that the trial court, "upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule." *See* TEX.R. EVID. 1009(f).

[9] Finally, to the extent appellant contends that because he did not receive forty-five days' notice that the State intended to offer the recording he was unable to request that the trial court appoint an interpreter pursuant to Code of Criminal Procedure article 38.30, we note that nothing in article 38.30 precludes a party from requesting the appointment of an interpreter whenever the need arises during the proceeding. Instead, article 38.30(a) expressly provides, "When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, ... an interpreter must be sworn to interpret for the person charged or the witness." TEX.CODE CRIM. PROC. ANN. art. 38.30(a) (Vernon Supp.2013); *see also Leal v. State,* 782 S.W.2d 844, 849 (Tex.Crim.App.1989) (stating that situation in which recording of conversation in foreign language is offered is "analogous to one where a non-English speaking witness testifies, and the safeguards of Art. 38.30 apply"). Upon learning that the State intended to offer the recording into evidence, defense counsel could have requested that the trial court appoint an interpreter to translate the Spanish part of the recording into English and that it grant extra time for the translation to be made. The record does not indicate that he made any such request.

2. Written Translation Requirement for Admissibility

[10] Appellant also argues that the State was required to produce a contemporaneous written translation of a foreign language recording in order for the recording itself to be admissible. Appellant did not cite any authority for his claim; nor have we found any. The text of Rule 1009, which, as we have held, does not affect admissibility of the underlying recording, but only of the translation, does not require a written transcript when the interpreter translates the recording during live testimony at trial. *See* ***186** TEX.R. EVID. 1009(e); *cf. Leal,* 782 S.W.2d at 849–50 (holding that trial court erroneously admitted unsworn translation of Spanish conversation but not addressing whether contemporaneous written transcript was required if interpreter translated conversation during live testimony); *Peralta,* 338 S.W.3d at 606 (upholding admission of videotaped confession in Spanish when English translation was accompanied by affidavit from interpreter and noting that Rule 1009(e) allows introduction of translation by live testimony at trial).

Moreover, appellant did not move for the appointment of a licensed court interpreter to make a written transcription of the recording at trial or before trial, although he was permitted to do so by Rule 1009(g) and by the Texas Government Code. *See* TEX.R. EVID. 1009(g) ("The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs."); TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp.2013) (requiring appointment of licensed court interpreter on motion of party).

Here, it is undisputed that the State did not provide to appellant and did not introduce into evidence a written English translation of the recorded conversation in mixed Spanish and English between appellant and Officer Das. Because no written English transcription of the audio recording was offered translating the Spanish on the recording into English, no affidavit from a qualified translator as to the authenticity of the translation was required. *See* TEX.R. EVID. 1009(a).

Instead, Officer Das translated portions of the conversation that she had with appellant during her live testimony at trial and was subjected to cross-examination about her testimony. Proceeding in this manner does not render the recording of the conversation inadmissible. *See* TEX. R EVID. 1009(e); *Peralta,* 338 S.W.3d at 606.

[11] Moreover, although appellant objected at the time the State offered the recording, he objected solely on the ground that "any audio that is admitted into evidence without the proper certified interpreter" would violate the rules of evidence. The trial court asked the State to clarify whether it was offering a written transcript of the recording. After the State replied that it was not, the trial court overruled appellant's objection. Appellant did not object to the lack of a written transcript until closing argument, when the State requested to publish the recording to the jury. This late objection was insufficient to preserve error. *See Wilson v. State,* 71 S.W.3d 346, 349 (Tex.Crim.App.2002) (stating that "the objection must be made at the earliest possible opportunity" to preserve error); *Bessey v. State,* 199 S.W.3d 546, 555 (Tex.App.-Texarkana 2006) (holding same), *aff'd,* 239 S.W.3d 809 (Tex.Crim.App.2007). But, even if the issue had been preserved, Officer Das' translation of the Spanish portion

of the recording in her live testimony at trial would not be inadmissible.

3. Officer Das' Qualifications to Interpret

[12] Finally, appellant argues that the trial court's admission of the audio recording was erroneous because the State failed to demonstrate that Officer Das was a certified translator and capable of accurately translating the recording for the jury.

As we have already pointed out, although appellant objected both to the admission of the recording and to Officer Das' testimony on the basis that no certified interpreter had translated the recording, appellant did not object with specificity to the accuracy of any part of Officer ***187** Das' translation. *See* TEX.R. EVID. 103(a) (providing, in relevant part, that error may not be predicated upon trial court ruling admitting evidence unless substantial right of party is affected and timely objection "stating the specific ground of objection" appears of record). **Rule of Evidence 1009**(b) provides that "[a]ny party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation." TEX.R. EVID. 1009(b).

Appellant cross-examined Officer Das, but he did not challenge her translation of the Spanish spoken in the conversation. Aside from questioning on appeal whether Officer Das "could provide a fair and unbiased translation," appellant did not bring any specific errors in her translation of the recording to the attention of the trial court, nor has he brought any specific errors to our attention. *See* TEX.R. EVID. 1009(b); *Montoya v. State,* 811 S.W.2d at 673 ("The trial court was not under a duty to interrogate the interpreter to determine his qualifications; .... Appellant has not directed this court to any part of the record where alleged errors in translation occurred which prevented him from confronting the witnesses."). Nor did appellant "stat[e] with specificity what [he] contends is a fair and accurate translation." TEX.R. EVID. 1009(b). Moreover, appellant did not move for the appointment of a certified interpreter, even though he was entitled to do so. *See* TEX.R. EVID. 1009(g) (permitting court to appoint qualified translator "if necessary"); TEX. GOV'T CODE ANN. § 57.002(a) ("A court shall appoint a certified court interpreter or ... a licensed court interpreter for an individual who ... does not comprehend or communicate in English if a motion for the appointment of an interpreter ... is filed by a party ... in a civil or criminal proceeding in the court.").

Furthermore, under its plain language, Rule 1009(e) provides for "the admission of a translation of foreign language documents at trial either by live testimony *or* by deposition testimony of a qualified expert translator." TEX.R. EVID. 1009(e) (emphasis added). Thus, the fact that a conversation was in a foreign language does not, in and of itself, render an audio recording of that conversation inadmissible. *See Leal,* 782 S.W.2d at 849. Nor does the fact that a translation of a recording is made by the live testimony of a witness who is not a qualified expert, rather than by the deposition testimony of a qualified expert, render the testimony inadmissible. Instead, the situation is analogous to one in which a non-English-speaking witness testifies, and, in that circumstance, the safeguards of Code of Criminal Procedure article 38.30 apply. *See id.*

Article 38.30 ("Interpreter") provides, in relevant part,

> When a motion for appointment of an interpreter is filed by any party ..., an interpreter must be sworn to interpret for the person charged or the witness. *Any person may be subpoenaed, attached or recognized in any criminal action or proceeding,* to appear before the proper judge or court *to act as interpreter therein, under the same rules and penalties as are provided for witnesses.* In the event that the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or the interpreter is not familiar with the use of slang, the person charged or witness may be permitted by the court to nominate another person to act as intermediary between the person charged or witness ***188** and the appointed interpreter during the proceedings.

TEX.CODE CRIM. PROC. ANN. art. 38.30(a) (emphasis added). The El Paso Court of Appeals has held that when "the interpreter was positively identified,

qualified, officially sworn, and subjected to cross-examination, the requirements of Texas Code of Criminal Procedure, Article 38.30 [are] met." *Peralta,* 338 S.W.3d at 605 (citing *Flores,* 299 S.W.3d at 856).

[13] **[14]** Neither article 38.30 nor Rule 1009 requires an interpreter to be "certified" or "licensed" in order to provide an admissible translation. *See* TEX.CODE CRIM. PROC. ANN. art. 38.30(a); TEX.R. EVID. 1009. Individuals called upon to act as interpreters during criminal proceedings are not required to have specific qualifications or training; instead, what is required is "sufficient skill in translating and familiarity with the use of slang." *Kan v. State,* 4 S.W.3d 38, 41 (Tex.App.-San Antonio 1999, pet. ref'd); *see also Leal,* 782 S.W.2d at 849 (holding that, pursuant to article 38.30, interpreter must "possess adequate interpreting skills for the particular situation" and must be "familiar with the use of slang"); *Mendiola v. State,* 924 S.W.2d 157, 161 (Tex.App.-Corpus Christi 1995, pet. ref'd) (holding that article 38.30 does not require interpreter to be "official" or "certified" interpreter). The competency of an individual to act as an interpreter is a question for the trial court, and, absent an abuse of discretion, this determination will not be disturbed on appeal. *See Kan,* 4 S.W.3d at 41; *see also Linton,* 275 S.W.3d at 500 (holding that trial court has "wide discretion in determining the adequacy of interpretive services"); *Montoya v. State,* 811 S.W.2d 671, 673 (Tex.App.-Corpus Christi 1991, no pet.) ("[C]ompetency is a question for the court, and a ruling on this subject will be reversed only for an abuse of discretion.").

Here, the person who interpreted the Spanish part of the recording was Officer Das, who was also a participant in the recorded conversation. She was placed under oath and was subject to cross-examination on the contents of the recording. The remaining question, then, is whether she was a qualified interpreter of the Spanish part of the conversation. Officer Das testified that she is able to communicate with potential clients in Spanish when she works undercover as a prostitute. She testified that she converses with Spanish-speaking suspects "quite frequently" and that she has experience taking police reports in Spanish and questioning witnesses in Spanish. She stated that she has taken Spanish classes offered by HPD and that, like many defendants in prostitution cases, she speaks "street Spanish." She acknowledged that she is not fluent in Spanish, but she also stated that she feels comfortable speaking it and that she can "get [her] point across" and can understand what is being said to her.

We conclude that the trial court reasonably could have determined that Officer Das had "sufficient skill in translating" Spanish, possessed "adequate interpreting skills for the particular situation," and was "familiar with the use of slang" in Spanish such that she could render an accurate English translation of the recording of her conversation with appellant. *See Leal,* 782 S.W.2d at 849; *Kan,* 4 S.W.3d at 41. We hold that the trial court did not abuse its discretion in implicitly determining that Officer Das was qualified to translate the recording and in admitting the recording. *See Linton,* 275 S.W.3d at 500; *Kan,* 4 S.W.3d at 41.

Appellant has not demonstrated that the trial court's admission of the audio recording or the court's allowance of Officer Das' testimony was erroneous or has in any way affected his substantial rights, as necessary ***189** to establish reversible error on appeal. *See* TEX.R.APP. P. 44.2(b).

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Justice MASSENGALE, concurring.

MICHAEL MASSENGALE, Justice, concurring.
I concur in the court's judgment, affirming Castrejon's conviction. Specifically, I agree that Castrejon waived his complaint about the absence of an appropriate translator by failing to request one as provided by law. I also agree that he has failed to demonstrate any harm resulting from the admission of the recording. Those reasons are fully sufficient to resolve this appeal. *See* TEX.R.APP. P. 33.1, 44.2.

I disagree with the majority's further analysis—which is pure dicta—positing that the Spanish-language recording was admissible because the testimony of Officer Das qualified as a translation of foreign language documents under the rules of evidence. *See* TEX.R. EVID. 1009(e).

This thoroughly unnecessary frolic is misguided for at least three reasons.

First, the analysis completely misses the point about the admissibility of the foreign language document itself, i.e., the audio recording of the conversation in Spanish between Castrejon and Das. Rule 1009(e) authorizes the admission of a "translation" of foreign language documents at trial—it does not address Castrejon's complaint about admitting and publishing to the jury the Spanish-language recording. [1]

Second, Das's testimony never purported to be a "translation" of the recording. Instead, she testified in English about her memory and understanding of what was communicated between her and Castrejon. [2] That is not the same thing as the "translation of foreign language documents," which implies transforming a foreign language document into a restatement of the substance of that document into the same substance expressed in English. In her testimony, Das distinguished between her memory of the interaction and what she wrote in her offense report, which she characterized as a "fairly accurate" "summary of and translation of the conversation," though not a "word-for-word transcription." 4 CR 68. The offense report was not admitted into evidence, though it was used at trial for impeachment purposes. The recording was not played during her testimony. Das's testimony did include some references to "translation," such as when she testified, "And then I said, translation is, 'Do you want a blow job or a f___?' " However, such references were expressions in English of what was communicated in Spanish, based on her first-hand memory of the conversation. They were not translation "of foreign language documents at trial by live testimony" as contemplated by Rule 1009(e). That rule is simply inapplicable.

Finally, to support its reliance on Rule 1009(e), the majority takes the additional step of writing the "qualified expert translator" standard out of the rule. [3] The majority ***190** replaces that standard with article 38.30(a) of the Code of Criminal Procedure, and thus imposes a much lower standard for the translation of foreign language documents at trial than the Rule 1009(e) "qualified expert translator" standard. Although it is not unprecedented to seek guidance from article 38.30 in this circumstance, [4] I respectfully suggest that such an analysis confuses the different purposes of the two rules. Rule 1009(e) is, self-evidently, a rule of evidence governing "Expert Testimony of Translator" in the broader context of Rule 1009, which governs "Translation of Foreign Language Documents." Distinct from the procedure for *translation of foreign language evidence* so that it can be understood by the jury and used in determining guilt or innocence, Article 38.30 of the Code of Criminal Procedure addresses a completely different need for *courtroom interpreters*—the need to accommodate "a person charged or a witness" who "does not understand and speak the English language." TEX.CODE CRIM. PROC. ANN. art. 38.30(a) (West Supp.2013). In such a circumstance, article 38.30 specifies a procedure by which "an interpreter must be sworn to interpret for the person charged or the witness." *Id.* The interpreter provided under article 38.30 ensures due process [5] by facilitating an understanding of trial proceedings for the purposes of a defendant or a witness. [6] The rule does not purport to undercut the standard applicable to translating documents for evidentiary purposes at trial. Nevertheless, the majority has interpreted Rule 1009(e)—titled "Expert Testimony of Translator"—to authorize the State to use police officers who have no special knowledge, training, or qualification as interpreters or translators for the purpose of offering translations of foreign language documents into evidence at trial, even if the officer admits that she is not fluent in the language. This is an incorrect and unnecessary interpretation of Rule 1009(e), but at least it can be disregarded as dicta.

***191** All of these difficulties would be avoided were the panel majority content to rely on well-established principles requiring preservation of error and demonstration of harm to overturn a conviction. *See* TEX.R.APP. P. 33.1, 44.2. Because the majority insists on embellishing its analysis, I cannot join its opinion. I therefore concur only in affirming the judgment of the trial court.

All Citations

428 S.W.3d 179

Footnotes

1 *See* TEX. PENAL CODE ANN. § 43.02(a)(1) (Vernon Supp.2013).

1 The State, in its brief, agrees. The first section of its analysis is titled: "Rule 1009 does not apply to appellant's trial." State's Br. at 7.

2 The State, in its brief, agrees. It argues: "Officer Das never translated the audio recording," and that "[s]he only testified from memory regarding what appellant told her when he propositioned her." State's Br. at 7.

3 The majority is forced to resort to this reasoning to justify its insistence upon including the Rule 1009(e) analysis because Officer Das could not possibly have served as a "qualified expert translator" as required by the text of the rule. She is not "qualified as an expert" in translation from Spanish to English "by knowledge, skill, experience, training, or education." TEX.R. EVID. 702. Das admitted at trial that she is not fluent in Spanish. She also lacks relevant training or education. On cross-examination she testified that she had taken some Spanish classes, though none in the past five years.

4 *See, e.g., Leal v. State,* 782 S.W.2d 844, 849 (Tex.Crim.App.1989). Of the three reported instances in which the Court of Criminal Appeals has relied upon *Leal* in a majority opinion, none has been for the proposition discussed above concerning the qualifications of interpreters for purposes of adducing evidence at trial. *See Hacker v. State,* 389 S.W.3d 860, 871 n. 39 (Tex.Crim.App.2013) (citing *Leal* in support of proposition that "motive alone is not sufficient to corroborate the testimony of an accomplice"); *Ex parte Goodbread,* 967 S.W.2d 859, 864 (Tex.Crim.App.1998) (quoting *Leal* for proposition that an indictment "may not charge more than one offense"); *Colella v. State,* 915 S.W.2d 834, 856 (Tex.Crim.App.1995) (citing *Leal* for proposition: "Evidence of motive alone is never sufficient to corroborate the testimony of an accomplice witness.").

5 *See Linton v. State,* 275 S.W.3d 493, 500 (Tex.Crim.App.2009) ("The federal constitution 'requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense.' " (quoting *Ferrell v. Estelle,* 568 F.2d 1128, 1132 (5th Cir.1978), *withdrawn on appellant's death,* 573 F.2d 867)); *Garcia v. State,* 149 S.W.3d 135, 140 (Tex.Crim.App.2004) ("The right to be present includes the right to understand the testimony of the witnesses.").

6 Similarly, section 21.023 of the Civil Practice and Remedies Code allows a person "well versed in and competent to speak the Spanish and English languages" to serve as a "court interpreter" in certain counties, including Harris County. TEX. CIV. PRAC. & REM.CODE § 21.023 (West 2008); *see also id.* § 21.021(4).

AN ACT

relating to requiring the Texas Supreme Court to adopt rules and provide judicial instruction regarding the application of foreign laws in certain family law cases.

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

SECTION 1. The legislature finds that:

(1) litigants in actions under the Family Code involving a marriage relationship or a parent-child relationship are protected against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards by courts of this state by a well-established body of law, described by Tex. Att'y Gen. Op. No. KP-0094 (2016), which includes protections provided under:

(A) the United States Constitution and the Texas Constitution;

(B) federal law, treaties, and conventions to which the United States is a signatory;

(C) federal and state judicial precedent; and

(D) the Family Code and other laws of this state;

(2) the legislature has enacted statutes, including the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), that address comity regarding foreign judgments and arbitration awards;

(3) as recognized by courts and commentators, the UCCJEA does not define the aspects of a foreign law that violate fundamental principles of human rights or certain terminology used by that Act;

(4) the Family Code allows parties to a suit involving the marriage relationship or affecting the parent-child relationship to engage in arbitration and authorizes the court to render an order reflecting the arbitrator's award;

(5) the Family Code should not be applied to enforce a judgment or arbitrator's award affecting a marriage relationship or a parent-child relationship based on foreign law if the foreign law applied to render the judgment or award does not:

(A) grant constitutional rights guaranteed by the United States Constitution and the Texas Constitution;

(B) consider the best interest of the child;

(C) consider whether domestic violence or child abuse has occurred and is likely to continue in the future; or

(D) consider whether the foreign judgment or arbitrator's award affecting the parent-child relationship may place the child in substantial risk of harm; and

(6) the rules of procedure and evidence adopted by the Texas Supreme Court and judicial education required by the Texas Supreme Court can ensure the full implementation and uniform application by the courts of this state of the well-established body of law described by Subdivision (1) of this section in order to protect litigants in actions under the Family Code involving a marriage relationship or a parent-child relationship against violations of constitutional rights and public policy.

SECTION 2. Subchapter A, Chapter 22, Government Code, is amended by adding Sections 22.0041 and 22.022 to read as follows:

Sec. 22.0041. RULES REGARDING FOREIGN LAW AND FOREIGN JUDGMENTS IN CERTAIN FAMILY LAW ACTIONS. (a) In this section:

(1) "Comity" means the recognition by a court of one jurisdiction of the laws and judicial decisions of a court of another jurisdiction.

(2) "Foreign judgment" means a judgment of a court, tribunal, or administrative adjudicator of a jurisdiction outside of the states and territories of the United States.

(3) "Foreign law" means a law, rule, or code of a jurisdiction outside of the states and territories of the United States.

(b) The supreme court shall adopt rules of evidence and procedure to implement the limitations on the granting of comity to a foreign judgment or an arbitration award involving a marriage relationship or a parent-child relationship under the Family Code to protect against violations of constitutional rights and public policy.

(c) The rules adopted under Subsection (b) must:

(1) require that any party who intends to seek enforcement of a judgment or an arbitration award based on foreign

law that involves a marriage relationship or a parent-child relationship shall provide timely notice to the court and to each other party, including by providing information required by Rule 203, Texas Rules of Evidence, and by describing the court's authority to enforce or decide to enforce the judgment or award;

(2) require that any party who intends to oppose the enforcement of a judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship shall provide timely notice to the court and to each other party and include with the notice an explanation of the party's basis for opposition, including by stating whether the party asserts that the judgment or award violates constitutional rights or public policy;

(3) require a hearing on the record, after notice to the parties, to determine whether the proposed enforcement of a judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship violates constitutional rights or public policy;

(4) to facilitate appellate review, require that a court state its findings of fact and conclusions of law in a written order determining whether to enforce a foreign judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship;

(5) require that a court's determination under Subdivision (3) or (4) be made promptly so that the action may proceed expeditiously; and

(6) provide that a court may issue any orders the court considers necessary to preserve principles of comity or the freedom to contract for arbitration while protecting against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards.

(d) In addition to the rules required under Subsection (b), the supreme court shall adopt any other rules the supreme court considers necessary or advisable to accomplish the purposes of this section.

(e) A rule adopted under this section does not apply to an action brought under the International Child Abduction Remedies Act (22 U.S.C. Section 9001 et seq.).

(f) In the event of a conflict between a rule adopted under this section and a federal or state law, the federal or state law prevails.

Sec. 22.022. JUDICIAL INSTRUCTION RELATED TO FOREIGN LAW AND FOREIGN JUDGMENTS. (a) The supreme court shall provide for a course of instruction that relates to issues regarding foreign law, foreign judgments, and arbitration awards in relation to foreign law that arise in actions under the Family Code involving the marriage relationship and the parent-child relationship for judges involved in those actions.

(b) The course of instruction must include information about:

(1) the limits on comity and the freedom to contract for arbitration that protect against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards in actions brought under the Family Code; and

(2) the rules of evidence and procedure adopted under Section 22.0041.

(c) The supreme court shall adopt rules necessary to accomplish the purposes of this section.

SECTION 3. The Texas Supreme Court shall adopt rules as required by this Act as soon as practicable following the effective date of this Act, but not later than January 1, 2018.

SECTION 4. This Act takes effect September 1, 2017.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 45 was passed by the House on May 6, 2017, by the following vote: Yeas 135, Nays 8, 2 present, not voting.

_____

Chief Clerk of the House

I certify that H.B. No. 45 was passed by the Senate on May 22, 2017, by the following vote: Yeas 26, Nays 5.

_____
Secretary of the Senate

APPROVED: _____
Date

_____
Governor

BILL ANALYSIS

C.S.H.B. 45
By: Flynn
Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties assert the need for clear procedures regarding how Texas courts should determine whether to afford comity to the laws of foreign nations and the judgments of foreign courts in actions under the Family Code involving the marriage relationship or the parent-child relationship to protect against violations of constitutional rights and public policy. C.S.H.B. 45 seeks to require the Supreme Court of Texas to provide such procedures.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Supreme Court of Texas in SECTION 2 of this bill.

ANALYSIS

C.S.H.B. 45 amends the Government Code to require the Supreme Court of Texas to adopt rules of evidence and procedure to implement limitations on the granting of comity to a foreign judgment or an arbitration award involving a marriage relationship or a parent-child relationship under the Family Code to protect against violations of constitutional rights and public policy and to set out requirements for such rules. The bill defines "foreign judgment," among other terms, as a judgment of a court, tribunal, or administrative adjudicator of a jurisdiction outside of the states and territories of the United States.

C.S.H.B. 45 requires the supreme court to adopt any other additional rules the supreme court considers necessary or advisable to accomplish the purposes of the bill's provisions. The bill establishes that a rule adopted under the bill does not apply to an action brought under the federal International Child Abduction Remedies Act and that, in the event of a conflict between a rule adopted under the bill and a federal or state law, the federal or state law prevails.

C.S.H.B. 45 requires the supreme court to provide for a course of instruction that relates to issues regarding foreign law, foreign judgments, and arbitration awards in relation to foreign law that arise in actions under the Family Code involving the marriage relationship and the parent-child relationship for judges involved in those actions. The bill requires the course instruction to include information about the limits on comity and the freedom to contract for arbitration that protect against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards in actions brought under the Family Code, and information about the rules of evidence and procedure adopted under the bill's provisions. The bill requires the supreme court to adopt rules necessary to accomplish the purposes of these provisions.

C.S.H.B. 45 requires the supreme court to adopt rules as required by the bill not later than January 1, 2018.

EFFECTIVE DATE

September 1, 2017.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 45 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED	HOUSE COMMITTEE SUBSTITUTE
SECTION 1. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 148 to read as follows: CHAPTER 148. APPLICATION OF FOREIGN LAWS; SELECTION OF FOREIGN FORUM Sec. 148.001. DEFINITION. In this chapter, "foreign law" means a law, rule, or legal code of a jurisdiction outside of the states and territories of the United States. The term does not include a law of a Native American tribe of a state or territory of the United States. Sec. 148.002. DECISION BASED ON FOREIGN LAW. A ruling or decision of a court, arbitrator, or administrative adjudicator may not be based on a foreign law if the application of that law would violate a right guaranteed by the United States Constitution or the constitution of this state. Sec. 148.003. CHOICE OF FOREIGN LAW OR FORUM IN CONTRACT. (a) A contract provision providing that a foreign law is to govern a dispute arising under the contract is void to the extent that the application of the foreign law to the dispute would violate a right guaranteed by the United States Constitution or the constitution of this state. (b) A contract provision providing that the forum to resolve a dispute arising under the contract is located outside the states and territories of the United States is void if the foreign law that would be applied to the dispute in that forum would, as applied, violate a right guaranteed by the United States Constitution or the constitution of this	No equivalent provision.

state.
Sec. 148.004. LIMITATION ON FORUM NON CONVENIENS. If a resident of this state commences an action in this state, a court may not grant a motion for forum non conveniens if the foreign law that would be applied to the dispute in the forum to which the moving party seeks to have the action removed would, as applied, violate a right guaranteed by the United States Constitution or the constitution of this state.

SECTION 2. (a) Section 148.002, Civil Practice and Remedies Code, as added by this Act, applies only to a ruling or decision that becomes final on or after the effective date of this Act. A ruling or decision that becomes final before the effective date of this Act and any appeal of that ruling or decision are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.
(b) Section 148.003, Civil Practice and Remedies Code, as added by this Act, applies only to a contract entered into on or after the effective date of this Act. A contract entered into before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.
(c) Section 148.004, Civil Practice and Remedies Code, as added by this Act, applies only to a motion for forum non conveniens made on or after the effective date of this Act. A motion for forum non conveniens made before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

No equivalent provision.

No equivalent provision.

SECTION 1. The legislature finds that:
(1) litigants in actions under the Family Code involving a marriage relationship or a parent-child relationship are protected against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards by courts of this state by a well-established body of law, described by Tex. Att'y Gen. Op. No. KP-0094 (2016), which includes protections provided under:
(A) the United States Constitution and the Texas Constitution;

(B) federal law, treaties, and conventions to which the United States is a signatory;
(C) federal and state judicial precedent; and
(D) the Family Code and other laws of this state;
(2) the legislature has enacted statutes, including the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), that address comity regarding foreign judgments and arbitration awards;
(3) as recognized by courts and commentators, the UCCJEA does not define the aspects of a foreign law that violate fundamental principles of human rights or certain terminology used by that Act;
(4) the Family Code allows parties to a suit involving the marriage relationship or affecting the parent-child relationship to engage in arbitration and authorizes the court to render an order reflecting the arbitrator's award;
(5) the Family Code should not be applied to enforce a judgment or arbitrator's award affecting a marriage relationship or a parent-child relationship based on foreign law if the foreign law applied to render the judgment or award does not:
(A) grant constitutional rights guaranteed by the United States Constitution and the Texas Constitution;
(B) consider the best interest of the child;
(C) consider whether domestic violence or child abuse has occurred and is likely to continue in the future; or
(D) consider whether the foreign judgment or arbitrator's award affecting the parent-child relationship may place the child in substantial risk of harm; and
(6) the rules of procedure and evidence adopted by the Texas Supreme Court and judicial education required by the Texas Supreme Court can ensure the full implementation and uniform application by the courts of this state of the well-established body of law described by Subdivision (1) of this section in order to protect litigants in actions under the Family Code involving a marriage relationship or a parent-child relationship against violations of constitutional rights and public policy.

No equivalent provision.

SECTION 2. Subchapter A, Chapter 22, Government Code, is amended by adding Sections 22.0041 and 22.022 to read as follows:

Sec. 22.0041. RULES REGARDING FOREIGN LAW AND FOREIGN JUDGMENTS IN CERTAIN FAMILY LAW ACTIONS. (a) In this section:

(1) "Comity" means the recognition by a court of one jurisdiction of the laws and judicial decisions of a court of another jurisdiction.

(2) "Foreign judgment" means a judgment of a court, tribunal, or administrative adjudicator of a jurisdiction outside of the states and territories of the United States.

(3) "Foreign law" means a law, rule, or code of a jurisdiction outside of the states and territories of the United States.

(b) The supreme court shall adopt rules of evidence and procedure to implement the limitations on the granting of comity to a foreign judgment or an arbitration award involving a marriage relationship or a parent-child relationship under the Family Code to protect against violations of constitutional rights and public policy.

(c) The rules adopted under Subsection (b) must:

(1) require that any party who intends to seek enforcement of a judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship shall provide timely notice to the court and to each other party, including by providing information required by Rule 203, Texas Rules of Evidence, and by describing the court's authority to enforce or decide to enforce the judgment or award;

(2) require that any party who intends to oppose the enforcement of a judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship shall provide timely notice to the court and to each other party and include with the notice an explanation of the party's basis for opposition, including by stating whether the party asserts that the judgment or award violates constitutional rights or public policy;

(3) require a hearing on the record, after notice to the parties, to determine whether the proposed enforcement of a judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship violates constitutional rights or public policy;

(4) to facilitate appellate review, require that a court state its findings of fact and

conclusions of law in a written order determining whether to enforce a foreign judgment or an arbitration award based on foreign law that involves a marriage relationship or a parent-child relationship;

(5) require that a court's determination under Subdivision (3) or (4) be made promptly so that the action may proceed expeditiously; and

(6) provide that a court may issue any orders the court considers necessary to preserve principles of comity or the freedom to contract for arbitration while protecting against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards.

(d) In addition to the rules required under Subsection (b), the supreme court shall adopt any other rules the supreme court considers necessary or advisable to accomplish the purposes of this section.

(e) A rule adopted under this section does not apply to an action brought under the International Child Abduction Remedies Act (22 U.S.C. Section 9001 et seq.).

(f) In the event of a conflict between a rule adopted under this section and a federal or state law, the federal or state law prevails.

Sec. 22.022. JUDICIAL INSTRUCTION RELATED TO FOREIGN LAW AND FOREIGN JUDGMENTS. (a) The supreme court shall provide for a course of instruction that relates to issues regarding foreign law, foreign judgments, and arbitration awards in relation to foreign law that arise in actions under the Family Code involving the marriage relationship and the parent-child relationship for judges involved in those actions.

(b) The course of instruction must include information about:

(1) the limits on comity and the freedom to contract for arbitration that protect against violations of constitutional rights and public policy in the application of foreign law and the recognition and enforcement of foreign judgments and arbitration awards in actions brought under the Family Code; and

(2) the rules of evidence and procedure adopted under Section 22.0041.

(c) The supreme court shall adopt rules necessary to accomplish the purposes of this section.

No equivalent provision.	SECTION 3. The Texas Supreme Court shall adopt rules as required by this Act as soon as practicable following the effective date of this Act, but not later than January 1, 2018.
SECTION 3. This Act takes effect September 1, 2017.	SECTION 4. Same as introduced version.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2016

The Honorable Dan Flynn
Chair, Committee on Pensions
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0094

Re: The extent to which a judge may refuse to apply the law of a jurisdiction outside of the United States in certain family law disputes (RQ-0083-KP)

Dear Representative Flynn:

You ask a number of questions concerning "the extent to which current law authorizes or requires a judge of a state court to refuse to apply foreign law in certain family law disputes."[1] You explain that by "foreign law," you mean "the law of a country other than the United States," and by "family law dispute," you mean "a legal dispute regarding a marital relationship or a parent-child relationship." Request Letter at 1. While you propose nineteen different factual scenarios, they each involve the application of foreign law that violates a party's right to due process or the public policy of this State. *Id.* at 1–3. As the Texas Supreme Court has explained, "[t]he basic rule is that a court need not enforce a foreign law if enforcement would be contrary to Texas public policy." *Larchmont Farms, Inc. v. Parra*, 941 S.W.2d 93, 95 (Tex. 1997). Mere differences between Texas law and foreign law do not necessarily render the foreign law unenforceable, but if a foreign law "violates good morals, natural justice, or is prejudicial to the general interests of our own citizens," a court may refuse to enforce it. *Robertson v. Estate of McKnight*, 609 S.W.2d 534, 537 (Tex. 1980). Furthermore, the United States Supreme Court has explained that "due process requires that no other jurisdiction shall give effect . . . to a judgment elsewhere acquired without due process." *Griffin v. Griffin*, 327 U.S. 220, 228 (1946). It is with these principles in mind that we address your specific questions.

You first ask whether a judge may refuse to enforce a judgment of another country that is based on the application of foreign law that violated a party's due process rights or was contrary to the public policy of this State. Request Letter at 1. "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction." *Griffin*, 327 U.S. at 228. Texas courts have long held "the chief requisite for the recognition of a foreign judgment necessarily is that an opportunity for a full and fair trial was afforded." *Banco Minero v. Ross*, 172 S.W. 711, 714–15 (Tex. 1915) (declining to recognize a judgment by a Mexican court after finding that it was entered without a full and fair trial before an

[1]Letter from Honorable Dan Flynn, Chair, House Comm. on Pensions, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Dec. 17, 2015), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

impartial tribunal). Thus, if a judgment was obtained in a foreign jurisdiction in violation of a party's due process rights, a state court judge may refuse to enforce the judgment. Similarly, Texas courts will consider whether a judgment obtained in a foreign country was based on foreign law contrary to this State's public policy, and, if so, the courts may refuse to enforce the judgment. *See Ashfaq v. Ashfaq*, 467 S.W.3d 539, 543–44 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (considering whether Pakistani divorce law violated Texas public policy).

You next ask whether a judge may refuse to enforce a decision of an agreed-upon arbitrator if the arbitrator's application of foreign law or the application of principles of a particular faith resulted in an arbitration decision violating a party's due process rights or was contrary to the public policy of this State. Request Letter at 2. "Parties in an arbitration proceeding have due process rights to notice and a meaningful opportunity to be heard." *Ewing v. Act Catastrophe-Tex. L.C.*, 375 S.W.3d 545, 551 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *see* TEX. CIV. PRAC. & REM. CODE § 171.044(a) (requiring notice of arbitration). To the extent that an arbitration award is obtained in violation of these due process rights, a judge is authorized to refuse enforcement of the award. Furthermore, a Texas court "may refuse to enforce an arbitration award that is contrary to public policy." *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 413 (Tex. App.—Dallas 2007, no pet.).

In your third question, you ask whether a judge may refuse to apply foreign law that would otherwise apply under the principles of conflict of laws if applying such law would violate due process or the public policy of this State. Request Letter at 2. Traditional conflict-of-law principles prescribe that issues that are strictly procedural in nature are governed by the laws of the forum state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971); *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 n.17 (Tex. 2008). Thus, a court of this State would apply Texas procedural law, not the procedures of a foreign law, to determine the substantive rights of the parties. With regard to the public policy concerns you raise, "[i]f the law of the foreign jurisdiction with the most significant contacts is against good morals or natural justice, or is prejudicial to the general interests of our citizens, Texas courts should refuse to enforce said law." *Vanderbilt Mortg. & Fin., Inc. v. Posey*, 146 S.W.3d 302, 316 (Tex. App.—Texarkana 2004, no pet.) (internal quotation marks omitted).

In your fourth question, you ask whether a judge may refuse to enforce a contract provision that provides for foreign law to govern the dispute if applying the law would violate a party's right to due process or the public policy of this State. Request Letter at 2. As with the choice-of-law principles discussed above, although a contract may provide for foreign law to govern the rights of parties to a dispute, a court of this State will apply Texas law to matters of procedure. *Man Indus. (India), Ltd. v. Midcontinent Express Pipeline, L.L.C.*, 407 S.W.3d 342, 352 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). With regard to foreign law that violates the public policy of this State, the United States Supreme Court has explained that a state is not required to "lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, . . . or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought." *Griffin v. McCoach*, 313 U.S. 498, 506 (1941); *see also United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("a court may refuse to enforce contracts that violate . . . public policy"). Thus, a court may refuse to enforce

a contract provision that requires the application of foreign law to a dispute if doing so would violate the public policy of this State.

In your fifth question, you ask whether a judge may refuse to enforce a contractual forum-selection provision providing that a dispute will be resolved by a court outside of the United States if doing so would violate the party's right to due process or the public policy of this State. Request Letter at 2. Enforcement of forum-selection clauses is generally mandatory; however, a court has authority to refuse to enforce the clause upon a showing that "enforcement would be unreasonable or unjust" or because "enforcement would contravene a strong public policy of the forum where the suit was brought." *In re AutoNation, Inc.*, 228 S.W.3d 663, 668 n.15 (Tex. 2007); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004). Thus, if the enforcement of a forum-selection clause would violate the party's right to due process or the public policy of this State, a court may refuse to enforce it.

You next ask, based on the principle of forum non conveniens, whether a judge may exercise jurisdiction over a case, despite a more convenient alternative forum, if the foreign forum would apply foreign law that would violate a party's right to due process or the public policy of this State. Request Letter at 2. A court generally has authority to dismiss a suit on grounds of forum non conveniens because a court outside Texas has jurisdiction over the suit and is a more appropriate forum. *A.P. Keller Dev., Inc. v. One Jackson Place, Ltd.*, 890 S.W.2d 502, 505 (Tex. App.—El Paso 1994, no writ). "[T]rial courts possess broad discretion in deciding whether to dismiss a case on forum-non-conveniens grounds." *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 676 (Tex. 2007). The United States Supreme Court has articulated, and the Texas Supreme Court has adopted, a number of factors that courts should consider in deciding a forum-non-conveniens motion. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947); *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998) ("We embraced *Gulf Oil's* analysis long ago."). Among the factors to be considered are whether an adequate alternative forum would have jurisdiction over the case and whether certain private interests of the litigants would weigh in favor of the alternative forum. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d at 677–79. In determining whether an adequate alternative forum exists, courts should consider whether the parties will be "deprived of all remedies or treated unfairly." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003). And in determining whether the private interests of the litigants weigh in favor of an alternative forum, a court should consider, among other private-interest factors, any "obstacles to [a] fair trial" in the alternative forum. *Flaiz v. Moore*, 359 S.W.2d 872, 874 (Tex. 1962). Thus, if an alternative forum to Texas would apply law that would violate a party's right to due process or the public policy of this State, such factors could provide grounds for a judge to deny a motion to dismiss for forum non conveniens.

In your seventh question, you ask whether a judge abuses his or her discretion if a judge allows the application of a foreign law in the scenarios previously described and doing so violates a party's right to due process or the public policy of this State. Request Letter at 3. A court's decision regarding whether a contract, arbitration award, foreign judgment, or application of foreign law violates public policy is a question of law that is reviewed de novo by a reviewing court. *See Sanchez v. Palau*, 317 S.W.3d 780, 785 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (court's ruling on recognition of a foreign country judgment is reviewed de novo); *Xtria, L.L.C. v. Int'l Ins. All., Inc.*, 286 S.W.3d 583, 591 (Tex. App.—Texarkana 2009, pet. denied)

(judgment confirming an arbitration award is reviewed de novo); *Johnson v. Structured Asset Servs., L.L.C.*, 148 S.W.3d 711, 726 (Tex. App.—Dallas 2004, no pet.) (whether a contract violates public policy is a question of law, which is reviewed de novo). Thus, as a matter of law, a court is without discretion to apply foreign law in a circumstance where doing so violates a party's right to due process or the clearly established public policy of this State. A trial court's forum-non-conveniens ruling is subject to review for clear abuse of discretion. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d at 676. Whether a court abuses its discretion in ruling on any given forum-non-conveniens motion will depend on a weighing of all the factors and the relevant facts of the particular case. *See id.* at 679 (considering all the factors articulated in *Gulf Oil* and concluding that the denial of a forum-non-conveniens motion was a clear abuse of discretion).

In your eighth question, you ask whether a judge may refuse to enforce a provision of a contract that is entered into voluntarily that provides for any of the following:

- An arranged marriage
- Granting custody of a child to a conservator who would remove the child to a foreign jurisdiction that allows child labor in dangerous conditions
- Granting custody of a child to a conservator who would remove the child to a foreign jurisdiction that lacks laws against child abuse
- Granting custody of a female child to a conservator who would remove the child to a foreign jurisdiction that allows the practice of female genital mutilation
- Granting custody of a child to a conservator who would remove the child to a foreign jurisdiction that allows a person to be subjected to any form of slavery
- Providing for a consequence or penalty for breach of the contract that violates the public policy of this State, such as the infliction of bodily harm

Request Letter at 3. Parties do not have a right to enter into contracts that violate the strong public policy of this State. *See Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 664 (Tex. 2008). A state's public policy is embodied in its constitution, statutes, and the decisions of its courts. *See Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002); *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 373 (Tex. 2001). With regard to family law disputes, the Legislature has clearly articulated that it is the public policy of this State to:

> (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child;

> (2) provide a safe, stable, and nonviolent environment for the child; and
>
> (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

TEX. FAM. CODE § 153.001(a). To the extent that any contract term, including those specific terms that you raise, violates the public policy of this State, a court may refuse to enforce it. *See City of Willow Park v. E.S. & C.M., Inc.*, 424 S.W.3d 702, 710 (Tex. App.—Fort Worth 2014, pet. denied) (voiding a contract after finding that "it contravenes the legislature's public policy"); *see also Southwestern Bell Tel. Co. v. Gravitt*, 551 S.W.2d 421, 427 (Tex. App.—San Antonio 1976, writ ref'd n.r.e.) ("[A] general restraint on marriage is unenforceable whether the restraint results from a promise not to marry or from enforcement of a condition providing for forfeiture of rights in case of marriage.").

In your ninth question, you ask whether a judge may refuse to enforce an adoption order entered by a foreign court or tribunal if the order would result in a violation of fundamental rights, Texas law, or the public policy of this State. Request Letter at 3. Section 162.023 of the Family Code provides:

> Except as otherwise provided by law, an adoption order rendered to a resident of this state that is made by a foreign country shall be accorded full faith and credit by the courts of this state and enforced as if the order were rendered by a court in this state *unless the adoption law or process of the foreign country violates the fundamental principles of human rights or the laws or public policy of this state.*

TEX. FAM. CODE § 162.023(a) (emphasis added). Under the plain language of the Legislature's exception in subsection 162.023(a), a court may refrain from enforcing an adoption order if doing so would violate the fundamental rights or the laws or public policy of this State.

In your tenth question, you ask whether a judge may refuse to enforce a premarital agreement or property partition agreement if the agreement is unconscionable. Request Letter at 3. "Unconscionable contracts . . . are unenforceable under Texas law." *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008); TEX. BUS. & COM. CODE § 2.302(a). Provisions in the Family Code provide specifically with regard to premarital and partition agreements that such agreements are not enforceable if the party against whom enforcement is requested proves, among other requirements, that the agreement was unconscionable when it was signed. *See* TEX. FAM. CODE §§ 4.006(a)(2), .105(a)(2). Whether any specific agreement is unconscionable must be determined by a court after analyzing the relevant facts. *See Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App.—San Antonio 2005, pet. denied) (explaining the factors to be examined in determining whether a contract is unconscionable).

You also ask whether a judge may refuse to enforce a premarital agreement if the agreement violates the public policy of this State or a statute that imposes a criminal penalty. Request Letter at 3. Section 4.003 of the Family Code authorizes the parties to a premarital agreement to contract with respect to all matters "not in violation of public policy or a statute imposing a criminal penalty." TEX. FAM. CODE § 4.003(a)(8). "[P]arties have the right to contract as they see fit as long as their agreement does not violate the law or public policy"; however, courts may refuse to enforce a contract, or a provision in a contract, on the ground that it is against public policy. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 & n.11 (Tex. 2004); *Security Serv. Fed. Credit Union v. Sanders*, 264 S.W.3d 292, 297 (Tex. App.—San Antonio 2008, no pet.). Furthermore, a contract that cannot be performed without violating the law contravenes public policy and is void. *Lewis v. Davis*, 199 S.W.2d 146, 148–49 (Tex. 1947); *Merry Homes, Inc. v. Chi Hung Luu*, 312 S.W.3d 938, 945 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

In your final question, you ask to what extent chapter 36 of the Civil Practice and Remedies Code authorizes "a judge to refuse to enforce a judgment of a foreign court regarding a family law dispute where the judgment grants or denies payment of a sum of money to one of the parties." Request Letter at 3. Chapter 36 is the "Uniform Foreign Country Money-Judgment Recognition Act," and it authorizes a court to "refuse recognition of the foreign court judgment if the motions, affidavits, briefs, and other evidence before it establish grounds for nonrecognition as specified in Section 36.005, but the court may not, under any circumstances, review the foreign country judgment in relation to any matter not specified in Section 36.005." TEX. CIV. PRAC. & REM. CODE §§ 36.003, .0044(g). Relevant to your request, "foreign country judgment" is defined for purposes of chapter 36 to mean "a judgment of a foreign country granting or denying a sum of money," but it expressly excludes a judgment for "support in a matrimonial or family matter." *Id.* § 36.001(2)(B). Thus, chapter 36 will have limited applicability to family law disputes. To the extent that it applies, however, a court need not recognize a foreign-country money judgment if, among other grounds, "the defendant in the proceedings in the foreign country court did not receive notice of the proceedings in sufficient time to defend" or if "the cause of action on which the judgment is based is repugnant to the public policy of this state." *Id.* § 36.005(b)(1), (3).

SUMMARY

Under Texas law, a court is not required in family law disputes to enforce a foreign law if enforcement would be contrary to Texas public policy or if it would violate a party's basic right to due process.

Very truly yours,

Ken Paxton

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Chair, Opinion Committee

Rev. 10.2.17

Rule 308b. Determining the Enforceability of Judgments or Arbitration Awards Based on Foreign Law in Certain Suits Under the Family Code

(a) Applicability. Except as provided by Subsection (b), this rule applies to the enforcement of a judgment or arbitration award based on foreign law in a suit brought under the Family Code involving a marriage relationship or a parent-child relationship.

(b) Exceptions.

(1) This rule does not apply to an action brought under the Hague Convention on International Child Abduction, including the International Child Abduction Remedies Act (22 U.S.C. §§ 9001 et seq.).
(2) In the event of a conflict between this Rule and any federal or state law, the federal or state law will prevail.
(3) Rules 203(a) and (b), Texas Rules of Evidence, do not apply to an action to which this rule applies.

(c) Notice. A party who intends to seek enforcement of a judgment or arbitration award to which this rule applies must:
(1) provide written notice to the court and to each other party in the party's original pleading; and
(2) ~~state~~ describe the basis for the court's authority to enforce or decide to enforce the judgment or arbitration award.

(d) Objections. A party who intends to oppose the enforcement of a judgment or arbitration award to which this rule applies must:
(1) provide written notice to the court and to each other party of the party's objection within 30 days of receiving the notice required by Subsection (c); and
(2) ~~state~~ explain the basis for the party's opposition and whether the judgment or arbitration award violates constitutional rights or public policy.

(e) Translations.

(1) Except as provided by Subsections (2) and (3), a translation from a language other than English of a judgment or arbitration award to which this rule applies, and of any materials, documents or sources on which a party intends to rely that are not written in English, is subject to Rule 1009, Texas Rules of Evidence.

Commented [BB1]: I am concerned about this subsection because it allows a party to give no advance notice of foreign law materials or sources that are originally written or have subsequently been published in English. I also think this is contrary to the statute, which says the party must provide information required by Rule 203. If we just want to alter Rule 203's time limits, we should be clear about that. In addition, I find it confusing that we only reveal later that parts (c) and (d) of Rule 203 do apply. Suggest we deal with Rule 203 in one place.

Commented [BB2]: Let's use the statute's word.

Commented [BB3]: Statute's word

(2) A translation described by Rule 1009(a), Texas Rules of Evidence, that is offered by a party seeking to enforce a judgment or arbitration award to which this rule applies must be served upon each other party no later than 60 days after the party's original petition is filed.
(3) If a party contests the accuracy of another party's translation of a foreign language document, the party must serve an objection and a conflicting translation on each opposing party no later than 30 days after the party receives a translation described by Subsection (2).

~~(f) Adjustment of Time Limits.~~(4) On a party's motion and for good cause, the court may alter the time limits for submitting and objecting to translations.

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Commented [BB4]: Because this just relates to translations, I think it should be part (4) under (e).

(~~g~~f) ~~Determination~~ Hearing.

(1) The court must, after timely notice to the parties, conduct a hearing on the record at least 30 days before trial to determine whether the judgment or arbitration award based on foreign law may be enforced.
(2) The court's determination is subject to Rules 203(c) and (d), Texas Rules of Evidence.

Commented [BB5]: See comment above.

(3) The court must make the determination required by Subsection (1) no more than 10 days after the hearing.

(~~h~~g) ~~Written~~ Order. ~~After~~ Within 15 days of the ~~determination~~ hearing required by Subsection (~~g~~f), the court must issue a written order regarding its determination. The ~~written~~ order must ~~enumerate~~ include findings of fact and conclusions of law. The court may issue any orders necessary to preserve the principles of comity or the freedom to contract for arbitration while protecting against violations of constitutional rights and public policy. ~~The written order must be signed no later than 15 days after the hearing.~~

(~~i~~h) Hearings on Temporary Orders. Notwithstanding any other provision of this rule, the court may set filing deadlines and conduct the ~~determination~~ hearing to accommodate the circumstances of the case in connection with issuing temporary orders. The deadline for making a determination and signing a written order may not be altered absent urgent circumstances.

(~~j~~i) Definitions. As used in this Rule ----

(1) "Comity" means the recognition by a court of one jurisdiction of the laws and judicial decisions of another jurisdiction.

(2) "Foreign law" means a law, rule, or code of a jurisdiction outside of the states and territories of the United States.

Addition to Rule 203, Texas Rules of Evidence

Rule 203. Determining Foreign Law

(e) Suits Brought Under the Family Code Involving a Marriage Relationship or Parent-Child Relationship.
(1) Subsections (a) and (b) of this rule do not apply to an action in which a party seeks a determination of foreign law and to which Rule 308b, Texas Rules of Civil Procedure, applies.
~~(2) This rule does not apply to an action brought under the Hague Convention on International Child Abduction, including the International Child Abduction Remedies Act (22 U.S.C. §§ 9001 et seq.).~~

Commented [BB6]: The statute says a rule adopted under it is not applicable to ICARA actions. That does not describe either existing Rules 203 or 1009.

Addition to Rule 1009, Texas Rules of Evidence

Rule 1009. Translating a Foreign Language Document

(h) Suits Brought Under the Family Code Involving a Marriage Relationship or Parent-Child Relationship.
(1) Except as provided by Rule 308B, Texas Rules of Civil Procedure, this rule applies to a submitted translation of a foreign language document in a suit brought under the Family Code involving a marriage relationship or parent-child relationship.
~~(2) This rule does not apply to an action brought under the Hague Convention on International Child Abduction, including the International Child Abduction Remedies Act (22 U.S.C. §§ 9001 et seq.).~~

MEMORANDUM TO TSCAC
FROM JUDICIAL ADMINISTRATION SUBCOMMITTEE

Re: Revisions to Canon 3.B(8) of the Code of Judicial Conduct, Regarding Assistance to Court Patrons

Date: October 24, 2017

The proposals to be considered at the October 27 meeting are:

1. The proposed amendment to Canon 3.B(8), adding "and may make reasonable accommodations to afford litigants, including self-represented litigants, that right."

    - At a prior meeting, the TSCAC voted to recommend the revision, in concept.
    - The subcommittee recommends the current wording. *See* Attachment A.
    - The subcommittee recommends that the revision not apply in criminal cases. If that recommendation is adopted, this point will be clarified in the comment.
    - One variation for the full committee to consider: Should the new language appear instead as subsection (a) in the last sentence, to read as follows:

        - "This subsection does not prohibit: (a) making reasonable accommodations to afford litigants, including self-represented litigants, the right to be heard."

2. The proposed comment to Canon 3.B(8)—*see* Attachment B to this memorandum.

    - At a prior meeting, the TSCAC voted to recommend a comment, in concept.
    - The subcommittee recommends the current wording, subject to issues noted in Attachment B.[1]

[1] The comment that was earlier circulated to the TSCAC is at Attachment C.

PROPOSED AMENDMENT TO
THE CODE OF JUDICIAL CONDUCT

Current Canon 3.B(8)

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

Proposed Amendments to Canon 3.B(8)

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law and may make reasonable accommodations to afford litigants, including self-represented litigants, that right. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

Attachment A

ATTACHMENT B: Proposed Comment to Canon 3.B(8)

Proposed Comment Language	Committee Comments
A judge does not violate the duty to remain impartial by making reasonable accommodations to ensure litigants the right to be heard.	
By way of illustration, a judge may (either directly or through court personnel subject to the judge's direction and control):	Some subcommittee members would delete the parenthetical because of concerns regarding unauthorized practice of law.
(1) construe pleadings to facilitate consideration of the issues raised;	
(2) provide information about the proceeding and procedural requirements;	Some subcommittee members expressed the concern that this provision might be detrimental to judicial neutrality.
(3) attempt to make legal concepts understandable;	
(4) ask neutral questions to elicit or clarify information;	Some subcommittee members expressed the concern that this provision might be detrimental to judicial neutrality.
(5) modify the mode and order of evidence as permitted by the rules of evidence, including allowance of narrative testimony;	
(6) refrain from using legal jargon by explaining legal concepts in everyday language;	
(7) explain the basis for a ruling;	
(8) make referrals to any resources, such as legal services or interpretation and translation services, available to assist the litigant in the preparation of the case;	Some subcommittee members expressed the concern that this provision might be detrimental to judicial neutrality.
(9) invite or appoint an amicus curiae to present a particular issue in accordance with Canon 3.B(8)(c); and/or	Some subcommittee members expressed the concern that this provision might be detrimental to judicial neutrality.
(10) inform litigants what will be happening next in the case and what is expected of them.	Some subcommittee members expressed the concern that this provision might be detrimental to judicial neutrality.
In making reasonable accommodations to afford a litigant the right to be heard, the judge may consider many factors, including the type of case, the nature of the proceeding, the stage of the proceeding, and the training, skill, knowledge and experience of the persons involved.	

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

COMMENT

When pro se litigants appear in court, they should comply with the rules and orders of the court and should be held to the same standards as litigants with counsel. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005). It is not a violation of a judge's duty to remain impartial for a judge to make reasonable accommodations to ensure all litigants the opportunity to have their matters fairly heard. By way of illustration, a judge may (either directly or through court personnel subject to the judge's discretion and control): (1) construe pleadings to facilitate consideration of the issues raised;[1] (2) provide information about the proceeding and evidentiary and foundational requirements;[2] (3) attempt to make legal concepts understandable;[3] (4) ask neutral questions to elicit or clarify information;[4] (5) modify the traditional manner of taking evidence;[5] (6) permit narrative testimony;[6] (7) allow litigants to adopt their pleadings as their sworn testimony;[7] (8) refrain from using legal jargon by explaining legal concepts in everyday language;[8] (9) explain the basis for a ruling;[9] (10) make referrals to any resources, such as legal services or interpretation and translation services, available to assist the litigant in the preparation of the case;[10] (11) invite or appoint an amicus curiae to present a particular issue;[11] and/or (12) inform litigants what will be happening next in the case and what is expected of them.[12]

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[1] CO, MA, MT, WI

[2] LA, OH, DC, CO, IA, MA, MT, WI. *See also* ME (explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed).

[3] CO, MA, MT

[4] LA, DC, MA, MT, WI

[5] OH, DC, CO, IA, MA, MT, WI

[6] WI

[7] WI

[8] LA, OH, DC, IA, MT, WI

[9] LA, OH, DC, CO, IA, MA, MT

[10] LA, OH, DC, CO, IA, MA, MT, WI. *See also* ME (inform unrepresented persons of free legal aid and similar assistance that is available in the courthouse or otherwise).

[11] *See Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000).

[12] WI

October 23, 2017
Report of the Rules 15-165a Subcommittee

Modernizing TRCP 99, Issuance and Form of Citation

On July 5, 2017, Chief Justice Hecht referred to the Supreme Court Advisory Committee the prospect of modernizing the language of TRCP 99.

Chief Justice Hecht's referral letter says:

> Texas Rule of Civil Procedure 99, subsections (b) and (c), set the deadline for filing an answer as "10:00 a.m. on the Monday next after the expiration of twenty days after the date of service." The Court asks the Committee to consider whether the deadline should be simplified and to draft any recommended amendments.
>
> Subsection (d) states: "The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies." The advent of e-filing has rendered this language outdated. Filers want to avoid paying additional fees for service copies of the petition by printing out the copies themselves and having the clerk return the citation by email. But some trial court clerks refuse to provide a citation by email. The Court asks the Committee to consider what changes to Rule 99 are needed to update the process for issuing a citation on an e-filed petition and to draft any recommended amendments. The Committee should consider whether the rule should instruct the clerk to return a citation on an efiled petition by email.
>
> The Court asks the Committee to consider whether any other changes are necessary to conform the text of Rule 99 to modern practice.

Here is the current language of TRCP 99. The language about when an answer is due is in **bold**.

SECTION 5. CITATION

RULE 99. ISSUANCE AND FORM OF CITATION

a. Issuance. Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a

copy of the petition. Upon request, separate or additional citations shall be issued by the clerk. The clerk must retain a copy of the citation in the court's file.

b. Form. The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, **(10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation**, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file and answer, judgment by default may be rendered for the relief demanded in the petition. **The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.** The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

DISCUSSION

From a review of randomly selected jurisdictions, it appears that TRCP 99 is not terribly out of synch with other jurisdictions, but it is clear that Rule 99 could benefit by being simplified and clarified. Here is a random selection of rules from other jurisdictions. The language setting the deadline for a response is bolded.

Here is the description in Fed. Rule Civ. Proc. 4 regarding the summons.

Rule 4 - Summons

(a) Contents; Amendments.

(1) Contents. A summons must:

(A) name the court and the parties;
(B) be directed to the defendant;
(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;
(D) state the time within which the defendant must appear and defend;
(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;
(F) be signed by the clerk; and
(G) bear the court's seal.

(2) Amendments. The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons-or a copy of a summons that is addressed to multiple defendants-must be issued for each defendant to be served.

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

Here is Fed. Rule Civ. P. 12 about responding to a summons:

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or
(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

[The rest of Fed. R. Civ. Proc. 12 omitted]

Here is the way answer day is described by the U.S. District Court, Southern District of New York, Pro Se office.

An answer is a formal written response to the plaintiff's complaint in which the defendant responds to all of the allegations in the complaint and sets forth any defenses to all or part of plaintiff's claims. An answer is filed by the defendant after s/he has been served with a copy of the complaint. **If you have been served with a summons and complaint, you have twenty-one (21) days to file an answer.** The United States government, its agencies, and employees have sixty (60) days to file an answer. See Rule 12 of the Federal Rules of Civil Procedure. If you have waived formal service of the summons and complaint by completing a waiver of service form sent to you by the plaintiff, you have sixty (60) days from when the waiver was sent to you to file an answer (or ninety (90)

days if the defendant was sent the waiver outside of the United States). See Rule 4(d) of the Federal Rules of Civil Procedure. If you do not file an answer within the required time period, you may be in default, and the plaintiff may be able to obtain a default judgment against you.

http://www.nysd.uscourts.gov/file/forms_instructions/answer-and-notice-of-appearance

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Here is the way California describes their summons (equivalent to our citation):

California Code, Code of Civil Procedure - C.P. § 412.20

(a) Except as otherwise required by statute, a summons shall be directed to the defendant, signed by the clerk and issued under the seal of the court in which the action is pending, and it shall contain:

(1) The title of the court in which the action is pending.

(2) The names of the parties to the action.

(3) A direction that the defendant file with the court a written pleading in response to the complaint within 30 days after summons is served on him or her.

(4) A notice that, unless the defendant so responds, his or her default will be entered upon application by the plaintiff, and the plaintiff may apply to the court for the relief demanded in the complaint, which could result in garnishment of wages, taking of money or property, or other relief.

(5) The following statement in boldface type: “You may seek the advice of an attorney in any matter connected with the complaint or this summons. Such attorney should be consulted promptly so that your pleading may be filed or entered within the time required by this summons.”

(6) The following introductory legend at the top of the summons above all other matter, in boldface type, in English and Spanish:

“Notice! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read information below.”

(b) Each county may, by ordinance, require that the legend contained in paragraph (6) of subdivision (a) be set forth in every summons issued out of the courts of that county in any additional foreign language, if the legend in the additional foreign language is set forth in the summons in the same manner as required in that paragraph.

(c) A summons in a form approved by the Judicial Council is deemed to comply with this section.

Here is the way Indiana describes the summons and answer.

Indiana Rules of Trial Procedure, Rule 4. Process

(A) Jurisdiction Over Parties or Persons--In General. The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

(B) Preparation of summons and praecipe. Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary. The clerk shall examine, date, sign, and affix his seal to the summons and thereupon issue and deliver the papers to the appropriate person for service. Affidavits, requests, and any other information relating to the summons and its service as required or permitted by these rules shall be included in a praecipe attached to or entered upon the summons. Such praecipe shall be deemed to be a part of the summons for purposes of these rules. Separate or additional summons shall, as provided by these rules, be issued by the clerk at any time upon proper request of the person seeking service or his attorney.

(C) Form of summons. The summons shall contain:

(1) The name and address of the person on whom the service is to be effected;

(2) The name, street address, and telephone number of the court and the cause number assigned to the case;

(3) The title of the case as shown by the complaint, but, if there are multiple parties, the title may be shortened to include only the first named plaintiff and defendant with an appropriate indication that there are additional parties;

(4) The name, address, and telephone number of the attorney for the person seeking service;

(5) The time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint.

The summons may also contain any additional information which will facilitate proper service.

(D) Designation of Manner of Service. The person seeking service or his attorney may designate the manner of service upon the summons. If not so designated, the clerk shall cause service to be made by mail or other public means provided the mailing address of the person to be served is indicated in the summons or can be determined. If a mailing address is not furnished or cannot be determined or if service by mail or other public means is returned without acceptance, the complaint and summons shall promptly be delivered to the sheriff or his deputy who, unless otherwise directed, shall serve the summons.

(E) Summons and Complaint Served Together--Exceptions. The summons and complaint shall be served together unless otherwise ordered by the court. When service of summons is made by publication, the complaint shall not be published. When jurisdiction over a party is dependent upon service of process by publication or by his appearance, summons and complaint shall be deemed to have been served at the end of the day of last required publication in the case of service by publication, and at the time of appearance in jurisdiction acquired by appearance. Whenever the summons and complaint are not served or published together, the summons shall contain the full, unabbreviated title of the case.

Indiana Rules of Trial Procedure, Rule 6(C) Service of pleadings and Rule 12 motions.

A responsive pleading required under these rules, shall be served within twenty [20] days after service of the prior pleading. Unless the court specifies otherwise, a reply shall be served within twenty [20] days after entry of an order

requiring it. The service of a motion permitted under Rule 12 alters the time for service of responsive pleadings as follows, unless a different time is fixed by the court:

(1) if the court does not grant the motion, the responsive pleading shall be served in ten [10] days after notice of the court's action;

(2) if the court grants the motion and the corrective action is allowed to be taken, it shall be taken within ten [10] days, and the responsive pleading shall be served within ten [10] days thereafter.

Michigan Court Rules 2.102 describes a summons in that state.

Rule 2.101 Form and Commencement of Action

(A) Form of Action. There is one form of action known as a "civil action."

(B) Commencement of Action. A civil action is commenced by filing a complaint with a court.

Rule 2.102 Summons; Expiration of Summons; Dismissal of Action for Failure to Serve

(A) Issuance. On the filing of a complaint, the court clerk shall issue a summons to be served as provided in MCR 2.103 and 2.105. A separate summons may issue against a particular defendant or group of defendants. A duplicate summons may be issued from time to time and is as valid as the original summons.

(B) Form. A summons must be issued "In the name of the people of the State of Michigan," under the seal of the court that issued it. It must be directed to the defendant, and include

(1) the name and address of the court,
(2) the names of the parties,
(3) the file number,
(4) the name and address of the plaintiff's attorney or the address of a plaintiff appearing without an attorney,
(5) the defendant's address, if known,
(6) the name of the court clerk,

(7) the date on which the summons was issued,
(8) the last date on which the summons is valid,
(9) a statement that the summons is invalid unless served on or before the last date on which it is valid,
(10) the time within which the defendant is required to answer or take other action, and
(11) a notice that if the defendant fails to answer or take other action within the time allowed, judgment may be entered against the defendant for the relief demanded in the complaint.

[Remainder of Rule 2.102 omitted]

Rule 2.108 Time

(A) Time for Service and Filing of Pleadings.

(1) **A defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint** in Michigan in the manner provided in MCR 2.105(A)(1).

(2) If service of the summons and a copy of the complaint is made outside Michigan, or if the manner of service used requires the summons and a copy of the complaint to be sent by registered mail addressed to the defendant, the defendant must serve and file an answer or take other action permitted by law or these rules within 28 days after service.

(3) When service is made in accordance with MCR 2.106, the court shall allow a reasonable time for the defendant to answer or take other action permitted by law or these rules, but may not prescribe a time less than 28 days after publication or posting is completed.

(4) A party served with a pleading stating a cross-claim or counterclaim against that party must serve and file an answer or take other action permitted by law or these rules within 21 days after service.

(5) A party served with a pleading to which a reply is required or permitted may serve and file a reply within 21 days after service of the pleading to which it is directed.

(6) In an action alleging medical malpractice filed on or after October 1, 1986, unless the defendant has responded as provided in subrule (A)(1) or (2), the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2912d.

(B) Time for Filing Motion in Response to Pleading. A motion raising a defense or an objection to a pleading must be served and filed within the time for filing the responsive pleading or, if no responsive pleading is required, within 21 days after service of the pleading to which the motion is directed.

[The rest of Rule 2.108 is omitted]

The Subcommittee's recommendations:

1. Change answer day to 21 days after the date of service. If that is a Saturday, Sunday, or legal holiday, then it would go to the next day that is not a Saturday, Sunday or legal holiday.

2. Delete the description of what should be in a citation, and instead promulgate a form citation that clerk's must follow. The citation should contain plain language advising the defendant that he, she, it has been served with notice of a lawsuit, and that a written answer must be filed by [the deadline] or a default judgment may be taken. The back side of the petition should say the same thing in Spanish.

Current TRCP 99.c requires a simply-stated notice that could be altered as follows:

"You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the twenty-first (21st) day after you were served with this citation and petition, a default judgment may be taken against you. If the twenty-first (21st) day is a Saturday, Sunday,[1] or legal holiday, your written answer is due on the next day that is not a Saturday, Sunday, or a legal holiday."

3. The requirement in Subsection (d), that the plaintiff to provide "a sufficient number of copies" of the pleading, should be deleted for efilers.

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[1]TRCP 6 prohibits service of process on a Sunday except for suits of injunction, attachment, garnishment, sequestration, or distress proceedings.

4. Rule 99 should require the clerk to email to the filing party a citation issued on an efiled petition.

Richard R. Orsinger
Subcommittee Chair

Walker, Marti

From: Richard Orsinger <richard@ondafamilylaw.com>
Sent: Sunday, October 22, 2017 7:06 PM
To: Walker, Marti; 'aalbright@law.utexas.edu'; 'adawson@beckredden.com'; Babcock, Chip; 'brett.busby@txcourts.gov'; 'cristina.rodriguez@hoganlovells.com'; 'd.b.jackson@att.net'; 'dpeeples@bexar.org'; 'ecarlson@stcl.edu'; 'errodriguez@atlashall.com'; 'esteveza@pottercscd.org'; 'evan.young@bakerbotts.com'; 'evansdavidl@msn.com'; 'fgilstrap@hillgilstrap.com'; 'fuller@namanhowell.com'; 'harvey.brown@txcourts.gov'; 'Honorable Robert H. Pemberton'; 'jane.bland@txcourts.gov'; 'jperduejr@perdueandkidd.com'; Sullivan, Kent; 'kvoth@obt.com'; 'LJefferson@JeffersonCano.com'; 'lbenton@levibenton.com'; 'lhoffman@central.uh.edu'; 'Linda Riley'; 'lisa@kuhnhobbs.com'; 'martha.newton@txcourts.gov'; 'mgreer@adjtlaw.com'; 'nathan.hecht@txcourts.gov'; 'nina.cortell@haynesboone.com'; 'och@atlashall.com'; 'pkelly@texasappeals.com'; 'psbaron@baroncounsel.com'; 'pschenkkan@gdhm.com'; 'rhardin@rustyhardin.com'; 'rhughes@adamsgraham.com'; 'rhwallace@tarrantcounty.com'; 'richard@ondafamilylaw.com'; 'rmeadows@kslaw.com'; 'rmun@scotthulse.com'; 'robert.l.levy@exxonmobil.com'; 'shanna.dawson@txcourts.gov'; 'stephen.yelenosky@co.travis.tx.us'; 'tom.gray@txcourts.gov'; 'tracy.christopher@txcourts.gov'; 'triney@rineymayfield.com'; 'wdorsane@mail.smu.edu'; 'coliden@lockelord.com'; 'wshelton@shelton-valadez.com'; 'Justice Boyd; 'Elaine Carlson; 'Viator, Mary; 'bill.boyce@txcourts.gov'; Sharon Tabbert (Assistant to B. Dorsaneo; judgebillboyce@gmail.com; Dee Dee Jones; Lisa Verm; kwooten@scottdoug.com; arodriguez@hillgilstrap.com; scott@appellatehub.com; david.newell@txcourts.gov; crwatson@dgclaw.com; Holly.Taylor@txcourts.gov; mike@carousel-books.net
Subject: SCAC--possible elimination of the Civil Case Information Sheet. Texas Rule of Civil Procedure 78a.
Attachments: Appendix A Case Information Sheet.pdf

Dear SCAC member:

In Chief Justice Hecht's letter of July 5, 2017, Chief Justice Hecht asked the SCAC to make a recommendation about the following:

> **Civil Case Information Sheet.** Texas Rule of Civil Procedure 78a requires the filing of a civil case information with a petition that initiates a new civil lawsuit or requests modification or enforcement of an order in a family-law case. Appendix A to the Rules of Civil Procedure contains a form for the civil case information sheet. The Office of Court Administration has reported to the Court that all the information required by the civil case information sheet is captured independently by the e-filing system when a petition is e-filed. The Court asks the Committee's advice whether Rule 78a and Appendix A should be repealed or amended to apply to a smaller subset of cases.

The matter was referred to the Subcommittee on Rules 15-165a.

Here is TRCP 78a, regarding the Case Information Sheet, added in 2010. A copy of the sample case information sheet is attached to this email.

RULE 78a. CASE INFORMATION SHEET

(a) *Requirement.* A civil case information sheet, in the form promulgated by the Supreme Court of Texas, must accompany the filing of:

(1) an original petition or application; and
(2) a post-judgment petition for modification or motion for enforcement in a case arising under the Family Code.

(b) *Signature.* The civil case information sheet must be signed by the attorney for the party filing the pleading or by the party.

(c) *Enforcement.* The court and clerk must take appropriate measures to enforce this rule. But the clerk may not reject a pleading because the pleading is not accompanied by a civil case information sheet.

(d) *Limitation on Use.* The civil case information sheet is for data collection for statistical and administrative purposes and does not affect any substantive right.

(e) *Applicability.* The civil case information sheet is not required in cases filed in justice courts or small-claims courts, or in cases arising under Title 3 of the Family Code.

Comment: Rule 78a is added to require the submission of a civil case information sheet to collect data for statistical and administrative purposes, see, e.g., TEX. GOV'T CODE § 71.035. A civil case information sheet is not a pleading. Rule 78a is placed with other rules regarding pleadings because civil case information sheets must accompany pleadings.

Justice Hecht asks whether the requirement in Rule 78a should be eliminated, now that the very same information is captured in the electronic filing system. Or should the case information sheet be limited to initial pleadings that are not electronically filed?

Subcommittee's recommendation:

That TRCP 78a be amended to require a Case Information Sheet only where the original pleading, application, or motion for enforcement is not electronically filed.

The following revisions could be used:

RULE 78a. CASE INFORMATION SHEET

(f) *Requirement.* A civil case information sheet, in the form promulgated by the Supreme Court of Texas, must accompany ~~the~~ a non-electronically-filed ~~filing of~~:

(1) ~~an~~ original petition or application; and
(2) ~~a~~ post-judgment petition for modification or motion for enforcement in a case arising under the Family Code.

(g) *Signature.* The civil case information sheet must be signed by the attorney for the party filing the pleading or by the party.

(h) *Enforcement.* The court and clerk must take appropriate measures to enforce this rule. But the clerk may not reject a pleading because the pleading is not accompanied by a civil case information sheet.

(i) *Limitation on Use.* The civil case information sheet is for data collection for statistical and administrative purposes and does not affect any substantive right.

(j) *Applicability.* A civil case information sheet is not to be filed if the petition, application, or motion described in Subsection (f) is electronically filed. The civil case information sheet is not required in cases filed in justice courts or small-claims courts, or in cases arising under Title 3 of the Family Code.

Comment: Rule 78a is added to require the submission of a civil case information sheet to collect data for statistical and administrative purposes, see, e.g., TEX. GOV'T CODE § 71.035. A civil case information sheet is not a pleading. Rule 78a is placed with other rules regarding pleadings because civil case information sheets must accompany pleadings. The 2017 amendment eliminates the requirement of a case information sheet where the petition, application, or motion is filed electronically.

CIVIL CASE INFORMATION SHEET

CAUSE NUMBER *(FOR CLERK USE ONLY)*: _____ COURT *(FOR CLERK USE ONLY)*: _____

STYLED _____
(e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the Matter of the Estate of George Jackson)

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment motion for modification or enforcement is filed in a family law case. The information should be the best available at the time of filing. This sheet, approved by the Texas Judicial Council, is intended to collect information that will be used for statistical purposes only. It neither replaces nor supplements the filings or service of pleading or other documents as required by law or rule. The sheet does not constitute a discovery request, response, or supplementation, and it is not admissible at trial.

1. Contact information for person completing case information sheet:

Name: _____ Email: _____

Address: _____ Telephone: _____

City/State/Zip: _____ Fax: _____

Signature: _____ State Bar No: _____

Names of parties in case:

Plaintiff(s)/Petitioner(s): _____

Defendant(s)/Respondent(s): _____

[Attach additional page as necessary to list all parties]

Person or entity completing sheet is:

- ☐ Attorney for Plaintiff/Petitioner
- ☐ *Pro Se* Plaintiff/Petitioner
- ☐ Title IV-D Agency
- ☐ Other: _____

Additional Parties in Child Support Case:

Custodial Parent: _____

Non-Custodial Parent: _____

Presumed Father: _____

2. Indicate case type, or identify the most important issue in the case *(select only 1)*:

Civil

Contract

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity—Expedited
- ☐ Other Foreclosure

- ☐ Franchise
- ☐ Insurance
- ☐ Landlord/Tenant
- ☐ Non-Competition
- ☐ Partnership
- ☐ Other Contract: _____

Injury or Damage

- ☐ Assault/Battery
- ☐ Construction
- ☐ Defamation

Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

- ☐ Motor Vehicle Accident
- ☐ Premises

Product Liability
- ☐ Asbestos/Silica
- ☐ Other Product Liability List Product: _____

- ☐ Other Injury or Damage: _____

Real Property

- ☐ Eminent Domain/ Condemnation
- ☐ Partition
- ☐ Quiet Title
- ☐ Trespass to Try Title
- ☐ Other Property: _____

Related to Criminal Matters

- ☐ Expunction
- ☐ Judgment Nisi
- ☐ Non-Disclosure
- ☐ Seizure/Forfeiture
- ☐ Writ of Habeas Corpus—Pre-indictment
- ☐ Other: _____

Employment

- ☐ Discrimination
- ☐ Retaliation
- ☐ Termination
- ☐ Workers' Compensation
- ☐ Other Employment: _____

Other Civil

- ☐ Administrative Appeal
- ☐ Antitrust/Unfair Competition
- ☐ Code Violations
- ☐ Foreign Judgment
- ☐ Intellectual Property
- ☐ Lawyer Discipline
- ☐ Perpetuate Testimony
- ☐ Securities/Stock
- ☐ Tortious Interference
- ☐ Other: _____

Tax

- ☐ Tax Appraisal
- ☐ Tax Delinquency
- ☐ Other Tax

Family Law

Marriage Relationship

- ☐ Annulment
- ☐ Declare Marriage Void

Divorce
- ☐ With Children
- ☐ No Children

Post-judgment Actions (non-Title IV-D)

- ☐ Enforcement
- ☐ Modification—Custody
- ☐ Modification—Other

Title IV-D

- ☐ Enforcement/Modification
- ☐ Paternity
- ☐ Reciprocals (UIFSA)
- ☐ Support Order

Other Family Law

- ☐ Enforce Foreign Judgment
- ☐ Habeas Corpus
- ☐ Name Change
- ☐ Protective Order
- ☐ Removal of Disabilities of Minority
- ☐ Other: _____

Parent-Child Relationship

- ☐ Adoption/Adoption with Termination
- ☐ Child Protection
- ☐ Child Support
- ☐ Custody or Visitation
- ☐ Gestational Parenting
- ☐ Grandparent Access
- ☐ Parentage/Paternity
- ☐ Termination of Parental Rights
- ☐ Other Parent-Child: _____

Probate & Mental Health

Probate/Wills/Intestate Administration
- ☐ Dependent Administration
- ☐ Independent Administration
- ☐ Other Estate Proceedings

- ☐ Guardianship—Adult
- ☐ Guardianship—Minor
- ☐ Mental Health
- ☐ Other: _____

3. Indicate procedure or remedy, if applicable *(may select more than 1)*:

- ☐ Appeal from Municipal or Justice Court
- ☐ Arbitration-related
- ☐ Attachment
- ☐ Bill of Review
- ☐ Certiorari
- ☐ Class Action
- ☐ Declaratory Judgment
- ☐ Garnishment
- ☐ Interpleader
- ☐ License
- ☐ Mandamus
- ☐ Post-judgment
- ☐ Prejudgment Remedy
- ☐ Protective Order
- ☐ Receiver
- ☐ Sequestration
- ☐ Temporary Restraining Order/Injunction
- ☐ Turnover