CUTTING EDGE EVIDENCE

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AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
OHIO CHAPTER
THIRTY-FOURTH ANNUAL HAROLD R. KEMP
FAMILY LAW SYMPOSIUM

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EDUCATION/LICENSE

- B.A., Texas Christian University, 1987
- J.D., Texas Tech University School of Law, 1995
- Board Certified – Family Law, Texas Board of Legal Specialization, December of 2000
- Re-Certified – Family Law, Texas Board of Legal Specialization 2005, 2010, 2015, 2020

PROFESSIONAL ACTIVITIES

- Director, Officer & President, Tarrant County Family Law Bar Association 1998-2003
- Director, Officer & President, Tarrant County Bar Association 2003-2010
- Director/Officer & President, Texas Academy of Family Law Specialists, 2003 to 2012
- Council Member, Officer & Chair, Family Law Council, State Bar of Texas, 2004 to 2017
- Fellow, American Academy of Matrimonial Lawyers, 2005 to Present
- Fellow, College of the State Bar of Texas, 1999 to Present
- Member, Tarrant County Young Lawyers Association, 1996 to 2002
- Director/Officer, Texas Family Law Foundation, 2017 to Present
- Board of Directors, Tarrant County Bar Foundation, 2017 to Present
- Member, Barrister, Master, President & Emeritus, Eldon B. Mahon Inn of Court, 1997-98, 2001-2005, 2007-2008, 2010 to 2011, 2017-Present
- Senior Counsel, American College of Barristers, 2001 to Present
- Fellow, Texas Bar Foundation 2002 to Present
- Lifetime Fellow, Texas Family Law Bar Foundation 2004 to Present
- Fellow, Tarrant County Bar Foundation 2004 to Present
- Lawyers of Distinction, 2018- Present

AWARDS/RECOGNITION

Friend of the Inn for outstanding contributions to Eldon B. Mahon Inn of Court, 2002
President's Certification of Outstanding Achievement from Tarrant Co. Bar Assoc., 2003
Texas Super Lawyer, *Texas Monthly Magazine* 2003 to Present
Who's Who in Executives and Professionals 2003
Top Attorneys featured in *Fort Worth, Texas Magazine* 2003 to Present
Top Fifty Female Attorneys in Texas, Texas Monthly Magazine 2004 to Present
Top Fifty Female Super Lawyers, *Texas Monthly Magazine* 2006 to Present
Top 100 Lawyers in Dallas Fort Worth, Texas Monthly Magazine 2006 to Present
Top 100 Lawyers in Texas, Texas Monthly Magazine 2014 to Present
The Best Lawyers in America 2007 to Present
Top Women Lawyers, *D Magazine*, 2010
Fort Worth Business Press Power Attorney 2014
Fort Worth Magazine Top Attorneys 2014 to Present
Top Attorney, 360 West Magazine, 2018- Present
State Bar of Texas Ovation Award 2017
Joseph W. McKnight Best Family Law CLE Article, 2017
Dan Price Award Recipient, 2017
TexasBarCLE Standing Ovation Award Recipient, 2017-2018
Texas Academy of Family Law Specialists- Sam Emison Award, 2018
[Singularly Selected as] *Lawyer of The Year in Family Law in Dallas/Fort Worth in 2022* by Best Lawyers

LAW RELATED SEMINAR PUBLICATIONS & PARTICIPATION

Author, *An Attorney Ad Litem Is Really A Lawyer*, Attorney Ad Litem Training Seminar 1997.
Author, *Trial Preparation & Planning*, "Nuts & Bolts" Protective Order Seminar 1997.
Author, *Challenging Characterization Issues: Characterizing Trusts, Employee Stock Options, Workman's Compensation Claims, And Intellectual Property*, Advanced Family Law Course 1997.
Author, *Some Changes In The Texas Family Code,* Blackstone Seminar 1998.
Author/Speaker, *Uncontested Divorce Outline*, Pro Bono Family Law Seminar 1998.
Author, *Factors Affecting Property Division & Alimony*, Family Law Basics From the Bench, Tarrant County Bar Association Brown Bag Seminar 1998.
Speaker, *Practice Tips On Procedures At The Courthouse and Communicating With Court Personnel*, Advanced Family Law Trial Skills Seminar 1998.
Author, *The Potential Effect of The New Texas Family Law Legislation Regarding Proportional Ownership, Equitable Interests, Division Under Special Circumstances, & A Look At New Legislative Provisions For Transmutation Agreements*, Advanced Family Law Course 1999.
Speaker, *Recent Cases in Child Support, Possession & Access*, 1999 Annual TADRO Conference 1999.
Speaker, *Filing Pleadings, Obtaining Settings, and Interacting With Court Coordinators and Clerks*, Family Law Trial Skills Seminar, West Texas Legal Services PAI Program, 1999.
Author, *Discovery In Property Cases Under The New Rules,* Advanced Family Law Course 1999.
Author/Speaker, *Drafting Family Law Pleadings: It's Almost All In The Manual*, "Nuts & Bolts" Family Law & Advanced Trial Law Trial Skills 2000.
Author, *Deciding When You Need A Jury & Conducting Voir Dire*, "Nuts & Bolts" Family Law & Advanced Trial Law Trial Skills 2000.
Author/Speaker, *Proper Drafting and Filing of Pleadings*, 26th Annual Advanced Family Law Course, Boot Camp 2000.
Author, *Discovery Gotta Haves: Essential Ideas for Discovery in Property and SAPCR's*, Marriage Dissolution Institute 2001.
Author, *Discovery*, Advanced Family Law Trial Skills, West Texas Legal Services PAI Program 2001.
Author/Trainer, "Proper Drafting and Filing of Pleadings", "Nuts & Bolts" Family Law Seminar, West Texas Legal Services PAI Program 2001.
Presenter, *Winning Trial Techniques in Property Cases*, Texas Academy of Family Law Specialists Annual Trial Institute 2002.
Author/Trainer, "Proper Drafting and Filing of Pleadings", 2002 Family Law Seminar, West Texas Legal Services PAI Program.
Author/Speaker, *Discovery & Mediation*, 28th Annual Advanced Family Law Course, Family Law Boot Camp 2002.
Panel Member, *Use and Abuse of Legal Assistants*, 28th Annual Advanced Family Law Course 2002.
Speaker, *Use and Abuse of Legal Assistants*, Panhandle Family Law Bar Association November Luncheon, 2002.
Author/Speaker, *Drafting Trial Documents With An Eye Toward Winning*, Advanced Family Law Drafting Course 2002.
Author/Speaker, *Discovery: Tools, Techniques & Timebombs*, Texas Academy of Family Law Specialists Annual Trial Institute 2003.
Author/Player, *Associate Judge Do's & Don't's*, Tarrant County Family Law Bar Association 2003.
Author/Speaker, *Evaluating A Custody Case*, 26th Annual Marriage Dissolution Institute 2003.
Co-Director, Family Law Boot Camp, 29th Annual Advanced Family Law Seminar 2003.
Author, *Discovery in Hard Places*, 29th Annual Advanced Family Law Seminar 2003.
Speaker, *Practicing Law For Fun & Profit*, 29th Annual Advanced Family Law Seminar 2003.
Author/Speaker, *Internet Searches for Financial & Personal Information Useful in Family Law Litigation*, Texas Academy of Family Law Specialists Annual Trial Institute 2004.
Moderator, Effective Courtroom Advocacy, Tarrant County Bench Bar Seminar 2004
Author/Speaker, *Internet Investigation of Personal Information & Assets*, Marriage Dissolution Institute 2004.
Director, Family Law Boot Camp, State Bar of Texas Annual Meeting 2004.
Author/Speaker, *Drafting 101, Basic Drafting of Pleadings,* Family Law Boot Camp, State Bar of Texas Annual Meeting 2004.
Author/Speaker, *Investigation of Personal Information & Assets*, Tarrant County Family Law Bar Association, Summer Bar Seminar 2004.
Author/Speaker, *Investigation of Personal Information & Assets*, State Bar College "Summer School" 2004.

Author, *The Life of a Grievance & The New Disciplinary Rules, What You Don't Know Can Hurt You*, 30th Annual Advanced Family Law Seminar 2004.
Director, Family Law Boot Camp, 30th Annual Advanced Family Law Seminar 2004.
Author/Speaker, *Drafting 101, Basic Drafting of Pleadings*, Family Law Boot Camp, 30th Annual Advanced Family Law Seminar 2004.
Author/Speaker, *Investigation of Personal Information & Assets*, Legal Assistant's University 2004
Author, *Advanced CYA For The Family Law Attorney*, Family Law Ultimate Trial Notebook 2004
Author/Speaker, *Divorce Planning*, Representing Small Business 2004
Assistant Director, Texas Academy of Family Law Specialists Annual Trial Institute 2005
Instructor, *Marital Property*, The People's Law School, Fort Worth 2005
Author/Speaker, *Marital Property 101*, State Bar of Texas Spring Training, Fort Worth 2005
Author/Speaker, *Effective Use of Psychologists and Psychistrists*, 28th Annual Marriage Dissolution Institute 2005.
Panelist/Moderator, Evidence and Discovery Workshop, 30th Annual Advanced Family Law Seminar, Dallas 2005
Author/Speaker, *Internet Investigation of Personal Information and Assets*, Tarrant County Bar Association September 2005 Luncheon.
Director, Texas Academy of Family Law Specialists Trial Institute 2006, Reno, Nevada
Author/Speaker, *Avoiding Divorce Disasters*, Representing Small Businesses, Dallas March 23-24, 2006
Panelist/Author, 29th Annual Marriage Dissolution Institute Bootcamp – Practical Aspects of Enhancing Your Practice, *How To Lose A Paralegal In 10 Days, or Keep One for 10 Years*, April 19, 2006, Austin.
Moderator, 29th Annual Marriage Dissolution Institute, *Electronic Evidence*, April 20-21, 2006, Austin.
Speaker, *Being A Family Law Attorney*, Tarrant County Bench-Bar, April 27, 2006, The Woodlands.
Speaker, *Ethics: Evidence, Discovery and Witnesses*, Tarrant County Bar Association Brown Bag Luncheon, June 23, 2006, Fort Worth.
Author/Speaker, *21st Century Issues Dealing with Nontraditional Relationships*, 31st Annual Advanced Family Law Seminar, August 14-17, 2006, San Antonio.
Speaker, UTCLE Parenting Plan Conference, *Effective Strategies For Reaching Parenting Plan Agreements*, October 13, 2006.
Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Navigating the Family Code*, October 20, 2006.
Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Helpful Appellate References*, October 20, 2006.
Moderator, Texas Academy of Family Law Specialists Trial Institute 2007, Sante Fe, New Mexico, Electronic Evidence Panel.
Moderator, 30th Annual Marriage Dissolution Institute, *Electronic Evidence*, May 10-11, 2007, El Paso.
Co-Speaker, *Interesting Appellate Cases*, Tarrant County Family Law Bar Luncheon, May 22, 2007.
Speaker/Author, UTCLE Family Law on the Front Lines, *Appellate Tips for Family Law Attorneys*, Galveston, Texas June 28-29, 2007.
Speaker/Author, *Evidence, Keeping in In and Keeping it Out,* 32nd Annual Advanced Family Law Seminar, San Antonio.
Speaker, *Appellate Considerations*, Texas Academy of Family Law Specialists Trial Institute 2008, Sante Fe, New Mexico.
Speaker, UTCLE 8th Annual Family Law on the Front Lines, *Justice Behind Closed Doors: Protecting the Record, Your Client and Yourself In Chambers*, Galveston, Texas June 19-20, 2008.
Speaker/Author, SBOT Advanced Family Law Drafting, *Discovery*, Austin, Texas, December 3-4, 2008.
Speaker/Author, UTCLE Parent-Child Relationships: *Critical Thinking for Critical Issues, Discovery and Evidence, A Primer for Family Law Attorneys*, Austin, Texas, January 29-30, 2009.
Speaker/Author, SBOT Representing Small Business, *Protecting Business Before Divorce: What Every Business Lawyer Must Know About Family Law*, Dallas, Texas, March 26-27, 2009.
Speaker, UTCLE, 9th Annual Family Law on the Front Lines, *Electronic Evidence and Discovery*, San Antonio, June 18-19, 2009.
Director, 35th Annual Advanced Family Law Seminar, Dallas, Texas, August 3-7, 2009.
Speaker/Author, SBOT The Ultimate Trial Notebook: Family Law, *Effective Use of Prior Testimony*, San Antonio, December 3-4, 2009.

Speaker/Author, UTCLE 2010 Parent-Child Relationships: Critical Thinking for Critical Issues, *Discovery and Evidentiary Issues in Substance Abuse Scenarios*, Austin, Texas January 28-29, 2010.
Speaker/Author, SBOT Essentials of Business Law, *Business Succession Planning: Protecting Business In Divorce*, Dallas, Texas, April 29-30, 2010.
Presiding Officer, UTCLE 10th Annual Family Law on the Front Lines, San Antonio, Texas, July 1-2, 2010.
Speaker/Author, 36th Annual Advanced Family Law Seminar, *Evidence: In or Out?* San Antonio, August 9-12, 2010.
Speaker/Panelist, New Frontiers in Marital Property Law, *Fiduciary Litigation and Other Financial Causes of Action*, Scottsdale, AZ, October 28-29.
Speaker/Panelist, American Bar Association Family Law Section Fall Meeting, *Tech Torts and Related Difficult Evidentiary Issues,* October 23, 2010, Fort Worth.
Speaker/Panelist, NBI Handling Divorce Cases from Start to Finish, *Exploring Custody, Visitation and Support Issues*, and *Ethical Perils In Divorce Practice*, November 7, 2010, Fort Worth.
Speaker, Tarrant County Court Coordinator's CLE, *Electronic Evidence and Social Networking*, February 23, 2011, Fort Worth.
Speaker, Tarrant County Bench Bar, *Family Law In A Nutshell*, April 2, 2011, Possum Kingdom.
Author/Speaker, *What Every Business Attorney Needs to Know About Family Law*, Essentials of Business Law, April 14-15, 2011, Houston.
Author/Speaker, *Modern Evidence,* 34th Annual Marriage Dissolution Institute, Austin, April 28-29, 2011.
Presiding Officer, Family Law on the Frontlines, June 16-17, 2011, Austin, Texas.
Author/Speaker, *Electronic Evidence Issues*, 2011 Family Law Seminar, Legal Aid of Northwest Texas Equal Justice Volunteer Program, July 21-22, 2011, Fort Worth.
Author/Speaker, 37th Annual Advanced Family Law Seminar, *Evidence*, San Antonio August 1-4, 2011.
Author/Speaker, Texas Advanced Paralegal Institute, *Social Networking*, Fort Worth, October 6-7, 2011.
Speaker, Tarrant County Court Coordinator's Luncheon, *Evidence and Social Networking*, Fort Worth, October 11, 2011.
Moderator/Panelist, New Frontiers in Marital Property Law, *Remedies in Property Cases*, San Diego, October 13-14, 2011.
Author/Speaker, *Drafting Family Law Discovery: Basic and Electronic*, Advanced Family Law Drafting 2011, December 8-9, 2011, Dallas, Texas.
Panelist, Introductory Notes, Lawyer Practice Notes and Panelist, *More than Sex, Drugs and Rock & Roll: Evaluating Your Custody Case from a Psychiatric, Psychological and Legal Perspective*, UTCLE, AAML, 2012 Innovations – Breaking Boundaries in Custody Litigation, January 19-20, 2012, Houston, Texas.
Author/Speaker, Attacking and Enforcing Mediated Settlement Agreements, 35th Annual Marriage Dissolution Institute, Dallas, April 26-27.
Faculty Member, Houston Family Law Trial Institute, South Texas College of Law, May 2012 to Present
Speaker, *Social Networking in Family Law and Electronic Evidence*, Legal Aid of Northwest Texas EJV Program 2012 Family Law Seminar, Fort Worth, July 12-13, 2012.
Speaker, A Sampling of Interesting Appellate Cases, Tarrant County Family Law Bar Luncheon, Fort Worth, July 21, 2012
Author/Panelist, *Discovery, Keeping It In, Keeping it Out; Facebook; Social Networking*, 38th Annual Advanced Family Law Seminar, Bootcamp, August 5, 2012.
Author/Speaker, *Evolving Evidentiary Issues in the 21st Century*, 38th Annual Advanced Family Law Seminar, August 6-9, 2012.
Speaker, *Social Networking in Family Law and Electronic Evidence*, Texas Advanced Paralegal Seminar, State Bar of Texas, Addision, October 3-5, 2012.
Moderator, *Identifying, Valuing and Characterizing Natural Resources*, 17th Annual New Frontiers in Marital Property Law, New Orleans, October 4-5, 2012.
Speaker, *Social Networking*, Texas Association of Court Administrators Annual Meeting, Fort Worth, Texas October 25, 2012.
Speaker/Co-Author, *Electronic Evidence Cases Every Family Lawyer Should Know*, SBOT Family Law Technology Course, Austin, Texas December 12-13, 2012.
Speaker/Author, *Evidence Cases Every Family Law Attorney Should Know*, Dallas Family Law Bench Bar, Dallas, Texas, February 8, 2013
Participant/Attorney, Texas Academy of Family Law Specialists Annual Trial Institute, Colorado Springs, Colorado,

February 15-16, 2013.
Speaker, Tarrant County Bar Association Court Coordinators Continuing Education, *Searching The Internet*, Fort Worth, Texas, April 4, 2013.
Author/Speaker, Tarrant County Bar Association Bench Bar, *Evidence Cases Every Attorney Should Know*, Possum Kingdom, Texas, April 12-13, 2013.
Author/Speaker, 35th Annual Marriage Dissolution Institute, Bootcamp, *Preparing the Client*, April 17-19, 2013, Galveston, Texas.
Author/Speaker, 39th Annual Advanced Family Law Seminar, Important Evidence Cases, as a part of the Discovery/Evidence Presentation, San Antonio, August 5-8, 2013.
Panelist, Unanswered and Unique Receivership/Bankruptcy Questions, 18th Annual New Frontiers in Marital Property Law, Napa Valley, October 4-5, 2013.
Author/Speaker, 36th Annual Marriage Dissolution Institute, *Settlement Agreements, MSA's, Etc...*, April 22-23, 2014, Austin, Texas.
Panelist, Innovations – Breaking Bounds in Custody Litigation, *You Don't Own Me- Alienation and Reunification*, Dallas, June 12, 2014.
Author/Speaker, State Bar Annual Meeting, *Evidence Cases Every Attorney Should Know*, Austin, June 26, 2014.
Author//Speaker, Legal Aid of Northwest, Texas, Texas A&M School of Law Family Law Seminar, Evidence: Authentication and Admissibility, Fort Worth, Texas, July 24, 2014.
Author/Speaker, Family Law 101 Course, *Evidence*, San Antonio, August 3, 2014.
Author/Speaker, 40th Annual Advanced Family Law Course, *Evidence-Update and Current Issues*, San Antonio August 5, 2014.
Co-Director, New Frontiers in Family Law, Lake Tahoe October 23-24, 2014.
Author/Speaker, *Texas Association of Domestic Relations Offices Annual Meeting*, Social Networking and Evidence, San Antonio October 29, 2014
Author/Speaker, TCFLBA 4th Annual CLE Family Law In Review, *Evidence*, Fort Worth, November 7, 2014.
Author/Speaker TCFLBA Monthly Luncheon, *Social Networking*, November 18, 2014.
Author/Speaker SBOT 9th Annual Fiduciary Litigation Course, Electronic Discovery and Electronic Evidence, Horseshoe Bay, December 4-5, 2014.
Author/Speaker, SBOT Family Law Technology 360, *Proving It Up, Email and Social Media Evidence/Predicates*, Austin, December 4-5, 2015
Witness, Texas Academy of Family Law Specialists Trial Institute, January 15-16, 2015.
Co-Speaker, *Finding and Proving Up Email & Social Media Evidence*, Extreme Family Law Makeover XIII, San Antonio, February 27, 2015.
Moderator/Co-Speaker/Co-Author, *Cradle to the Grave – The Impact of Family on the Business*, Essentials of Business Law Course 2015, Dallas, March 12-13, 2015.
Speaker/Author, *Pleading, Discovering and Arguing Marital Fraud, Waste & Reconstituted Estate*, 38th Annual Marriage Dissolution Institute, Dallas, April 9-10, 2015.
Speaker, *Oops, I Spoliated Again!*, Tarrant County Bench Bar, April 24-25, 2015.
Speaker/Author, *SAPCR Update*, Advanced Family Law 2015, San Antonio, August 3-6, 2015.
Speaker/Author, *Hearsay*, Advanced Family Law 2015 Judge's Track, San Antonio, August 3-6, 2015.
Speaker/Author, *Spoiliation of Evidence*, Texas Advanced Paralegal Seminar, Fort Worth, October 1, 2015
Panelist/Co-Speaker, *The Role of Experts in Characterizing and Tracing Property*, New Frontiers in Marital Property Law, Denver, October 15-16, 2015
Speaker/Author, *Everything a Business Lawyer Needs to Know About Characterization*, Advanced Business Law, Houston, November 20, 2015
Speaker/Author, *Waste Fraud and the Reconstituted Estate*, Advanced Family Law Drafting, Dallas, December 10-11, 2015
Participant/Attorney, 32nd Annual Texas Academy of Family Law Specialists Trial Institute, Charleston, South Carolina, January 14-17, 2016
Speaker/Author, *Technical Issues in Property Cases*, 2016 Family Justice Conference, Cedar Creek, Texas January 25, 2016
Speaker/Author, Ethical Considerations in Family Law, 22nd Annual Ethics Symposium, South Texas College of Law,

February 5, 2016
Speaker/Author, *Spoliation, Creation of Fraudulent Evidence*, 39th Annual Marriage Dissolution Institute, Galveston, April 7-8, 2016.
Speaker/Author, *Evidence*, State Bar of Texas Annual Meeting 2016, Fort Worth, Texas.
Speaker/Participant, Estate Planning for the Family Business Owner, Webinar, November 3, 2016
Speaker/Author, *Evidence Updates*, Tarrant County Family Bar Association "Advanced on a Shoestring" Seminar, Ft. Worth, Texas, November 10-11, 2016
Course Director/Speaker/Author, *HIPPA,* Family Law Technology Course, Austin, Texas, December 8-9, 2016
Speaker/Author, *Evidence- Knowing When to Hold Em' and When to Fold Em' in the Courtroom,* Extreme Family Law Makeover XV Seminar, San Antonio, Texas, February 24, 2017
Moderator, *Courtroom Evidence & Demonstration*, Marriage Dissolution, Austin, Texas, April 21, 2017
Participant/Attorney, 33rd Annual Texas Academy of Family Law Specialists Trial Institute, Houston, TX, May 22nd-26th, 2017
Speaker/Author, Evidence Update and Issues, Advanced Family Law Course, San Antonio, Texas, August 6, 2017
Speaker/Author, *Drafting with Litigation in Mind*, Advanced Family Law Drafting, Dallas, Texas, December 7, 2017
Speaker/Author, *Pending*, 34th Annual Texas Academy of Family Law Specialists Trial Institute, February 15-16, 2018
Speaker/Author, *Effective Evidence*, Nevada Family Law Conference, Bishop, CA, March 1-2, 2018
Speaker/Author, *Evidence Update and Issues*, Advanced Family Law Course, San Antonio, Texas, August 8, 2018
Speaker/Author, *Spoliation and Fraudulent Documents*, NTEC Bar, Colleyville, Texas, August 21, 2018
Speaker/Author, *Evidence Trial Skills: Getting It In & Keeping it Out*, Trial Skills for Family Lawyers, New Orleans, LA, December 13-14, 2018
Speaker/Author, *Preparing for Direct on your Way to the Courthouse and Preparing for Cross During Direct,* Galveston, TX, April 25-26, 2019
Speaker/Faculty, 35th Annual Texas Academy of Family Law Specialists Trial Institute, May 18-25, 2019 Speaker/Author, *Courtroom Examination in Family Law Cases*, Advanced Family Law Course, San Antonio, Texas, August 13, 2019
Speaker/Author, *Evidence Trial Skills- Getting It In and Keeping It Out,* Advanced Family Law Course, San Antonio, Texas, August 13, 2019
Speaker/Author, *Evidence in Family Court,* Annual Judicial Education Conference, San Antonio, Texas, September 3-6, 2019
Speaker, Oral Arguments Presentation, Texas A&M University School of Law, Fort Worth Texas, October 10, 2019
Speaker/Author, *Evidence*, Tarrant County Family Law Bar Association, Fort Worth, Texas, November 12,2019
Speaker/Author, *Defense Against the Dark Arts: Evidence*, South Carolina Bar Convention, Columbia, South Carolina, January 23, 2020
Speaker/Author, *I Know There's and Answer: Getting the Information You Need to Win*, Advanced Family Law, Webcast, Texas, August 4, 2020
Speaker/Author, *Evidence: Get it In, Keep it Out*, Dallas Minority Attorney Program, Webcast, Texas, September 18, 2020
Speaker/Author, *Evidence: Getting it In, Keeping it Out*, Tarrant County Family Law Bar Association CLE, Webcast October 2020
Speaker/Author, Effective Evidence, Indiana Family Law Bar Annual Meeting, Webcast October 2020
Speaker/Author, *Cutting Edge Evidence Issues*, American Academy of Matrimonial Lawyers Annual Meeting, Chicago, Webcast November 2020
Speaker/Author, *Top Ten Discovery Mistakes*, Fiduciary Duty Seminar, State Bar of Texas, Webcast December 2020
Speaker, *Spousal Privacy: Where it Begins and Where it Ends*, Webcast December 2020
Speaker/Author, *Evidence, I think I love you*, Back to Basics: Looks Like We Made It, Family Law Bar Association of San Antonio, Webcast February 2021.
Speaker/Author, *Basic Evidence in Family Law, Getting It In, Keeping It Out, And Dealing with Electronic Evidence*, Handling Your First (Or Next) Divorce Case, State Bar of Texas, Webcast February 23, 2021.
Speaker/Author, *Cutting Edge Evidence*, New Developments And Advanced Strategies In The Family Law Practice, The Oregon Chapter of the American Academy of Matrimonial Lawyers 9th Bi-Annual Continuing Legal Education Program, Webcast, April 16, 2021.
Speaker, *Preparing Your Uncooperative Client For Discovery*, 44th Annual Marriage Dissolution Institute, April 29-30, 2021.

Panelist/Speaker, *Direct and Cross Examination of a Child Custody Evaluator*, Innovations, Breaking Boundaries In Custody Litigation, State Bar of Texas/Texas Chapter American Academy of Matrimonial Lawyers, May 27-28, 2021.
Author/Speaker, *Evidence, Thirty Tips in Thirty Minutes*, State Bar of Texas Annual Meeting, June 17, 2021.
Author/Speaker, *Cutting Edge Evidence*, State Bar of Texas, Advanced Family Law Seminar, August 2-5, 2021, San Antonio.
Author/Speaker, *Courtroom Examination in Family Law Cases: Effective and Efficient Presentation*, ABA Family Law Section Fall Meeting, October 2021, Orlando, Florida.
Moderator/Panelist*, Exiting the Case: Creative Property Division And Other Remedies At Final Trial*, 26th Annual New Frontiers in Marital Property Law, October 14-15, 2021, Austin, Texas.
Author/Speaker, *Drafting For Yourself: Preparing Your Notes for Litigation, Depositions & Mediation*, Advanced Family Law Drafting, December 9-10, 2021, San Antonio.
Author/Speaker, *Drafting For Yourself: Preparing Your Notes for Litigation, Depositions & Mediation*, Houston Bar Association, Family Law Section, December 9-10, 2021, San Antonio.
Author/Speaker*, Cutting Edge Evidence*, Family Law Bar Association – San Antonio 3rd Annual Seminar: You're Still Muted!, February 25, 2022, Virtual.
Author/Speaker, *Cutting Edge Evidence*, State Bar of Texas, Advanced Trial Strategies, March 3-4, 2022, New Orleans.
Author/Speaker, *Cutting Edge Evidence*, AAML Webinar, recorded June 10, 2022.
Author/Speaker, *Innovative Evidence*, State Bar of Texas, Advanced Family Law Seminar, August 8-11, 2022, San Antonio.

LAW RELATED PERIODICAL/MAGAZINE PUBLICATIONS

Author, "Beating Out The Big Firms", *Texas Lawyer*, Vol. 18, No. 21, July 29, 2002.
Interviewed/Quoted "Divorce 101", *Fort Worth Magazine*, July 2003 edition.
Author, "Basic Internet Searches for Persons and Assets", *The College Bulletin, News for Members of the College of the State Bar of Texas*, Summer 2006
Author, "New Marital Estate in Divorce: Zombie Money", *Texas Lawye*r 2013
Author, "Killing the Messenger", *Texas Bar Journal*, September 2014, Vol. 77, No. 8, P712
Author, "How Courts and Litigators Are Dealing With Interpretation of Digital Wordless Communications", *ABA Law Practice Magazine*, January/February 2022.

Table of Contents

CUTTING EDGE EVIDENCE ISSUES

This paper is meant to be more of a reference tool than a story to read from beginning to end. The Rules of Evidence will be examined with citations to current case law and other rules and statutes as applicable. This paper was originally directed to a Texas audience. It has been reworked and updated to be applicable to a national audience, including citations to several state statutes and cases throughout. While most federal and state rules are substantively similar, there are differences from state to state, some large and some minor. This paper does not discuss the distinctions from state to state. It focuses on Federal Rules of Evidence and includes major cases from many states that will help the practitioner understand the Rules of Evidence, generally, including ideas and techniques to implement in trial. Your state may have nuances that are not addressed herein. Nevertheless, states routinely look to federal law or other states' laws when considering how to apply the rules of evidence, especially as technology continues to develop. Accordingly, the practitioner should draw from any source that could help admit or exclude evidence.

I. Cutting-Edge Evidence

A. Communicating through pictures

1. Emojis and emoticons

An "emoticon" is "a combination of typed keyboard characters used . . . to represent a stylized face meant to convey the writer's tone." *Ukwuachu v. State*, No. PD-0366-17, 2018 WL 2711167, at *6 n.12 (Tex. Crim. App. June 6, 2018) (Yeary, J., concurring) (quoting Garner's Modern English Usage 476 (4th ed. 2014)). An "emoji" is "an emoticon or other image in [a standardized] set." *Id.* Similar to these are the "likes," "loves," and other emotions available to show how one feels about a post on social media. Emoticons and emojis are now mainstream in society and are becoming more prevalent in the law, and cases are citing to them more often. *See, e.g.*, *United States v. Schweitzer*, No. ACM 39212, 2018 WL 3326645, at *2, *6 (A.F. Ct. Crim. App. May 18, 2018); *Ukwuachu*, 2018 WL 2711167, at *6. But be careful; emojis are not the same across all platforms. For some examples of how they can differ, see https://www.parallels.com/blogs/emojis-revisited/ (last visited June 13, 2022). Because of this, be sure to obtain both the sending and the receiving messages from the same devices that sent and received them through discovery to show whether any discrepancies exist. This could possibly raise an authentication problem because what was sent may not be the same as what was received, so the distinctive characteristics of the emoji/emoticon would not be the same. *See* Tex. R. Evid. 901(b)(4).

Some U.S. cases have directly held that emojis or emoticons themselves are statements such that they could fall under the hearsay rules. *See, e.g.*, *In re Shawe & Elting LLC*, C.A. Nos. 9661-CB, 9686-CB, 9700-CB, 10449-CB, 2015 WL 4874733, at *23 (Del. Ch. Aug. 13, 2015) (mem. op.) (finding that "smiley-face emoticon at the end of his text message suggests he was amused by yet another opportunity to harass Elting"); *Commonwealth v. Castano*, 82 N.E.3d 974, 982 (Mass. 2017) (holding that text message with "an emoji face with X's for eyes alongside the victim's nickname," along with other communications, "was irreconcilable with an accidental shooting"); *Ghanam v. Does*, 845 N.W.2d 128, 144–46 (Mich. App. 2014) (holding that tongue-sticking-out emoji ":P" meant sarcasm, so defendant's responses in online forum thread that public official was performing nefarious acts "cannot be taken as asserting fact," so they were not defamatory); *People v. Johnson*, 28 N.Y.S.3d 783, 795 (County Ct. N.Y. 2015) (holding that "likes" by victim of sexually suggestive posts were hearsay).

They have also been argued in some cases without being directly ruled on. *See* Brief for the Petitioner at 7–10, 18, 50, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983), 2014 WL 4101234, at *7–10, 18, 50 (arguing that tongue-sticking-out-emoticon indicated "jest"); Complaint, *Malek Media Grp. LLC v. Pfeiffer, et al.*, No. SC128419, 2017 WL 11319286, at ¶51 (Cal. Super. Nov. 17, 2017) (arguing that emojis showed consent); *Kinsey v. State*, No. 11-12-00102-CR, 2014 WL 2459690, at *4 (Tex. App.—Eastland May 22, 2014, no pet.) (defendant argued that "winkie face" emoticon in text message showed consent to sex) (mem. op.); Kristen Lambertsen, *Pair arrested after 'threatening' emojis sent on Facebook, deputies say*, https://www.wfla.com/news/pair-arrested-after-threatening-emojis-sent-on-facebook-deputies-say/ (last visited June 13, 2022) (two men arrested for sending emojis of a fist, hand pointing, and ambulance over Facebook, which was interpreted to be threat of assault).

Courts outside of the U.S. have also relied on emojis and emoticons as statements. *See, e.g.*, Chris Ceasar, *Frenchman sent to jail, fined after sending ex a gun emoji*, https://www.metro.us/frenchman-sent-to-jail-fined-after-sending-ex-a-gun-emoji/ (last visited June 13, 2022) (gun emoji was threat); *High Court: Sally Bercow's Lord McAlpine tweet was libel*, https://www.bbc.com/news/world-22652083 (last visited

June 13, 2022) (the phrase "*innocent face*," although not an emoji or emoticon itself, was read on Twitter as such and made the text it was written with libel); Ephrat Livni, *Emojis prove intent, a judge in Israel ruled*, https://qz.com/987032/emojis-prove-intent-a-judge-in-israel-ruled/ (last visited June 13, 2022) (a smiley, a bottle of champagne, dancing figures, and more, although not a binding contract, led to plaintiff's reliance on defendant's desire to rent apartment).

Under the definition of hearsay, a written verbal expression or nonverbal conduct is a statement. Tex. R. Evid. 801(a). Furthermore, drawings have been held to be admissible under hearsay exceptions. *See Mims v. State*, No. 03-13-00266-CR, 2015 WL 7166026, at *6 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication) (drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3)). Therefore, there is no reason why emoticons or emojis, computer images used to convey the writer's tone, the actual thing the emoji depicts, or a symbol representing something else, should not fall under the hearsay rules. When seeking to admit or object to evidence that contains emoticons, emojis, or similar graphics, make your argument specific and reference the emoticons or emojis accordingly.

Of course, emojis can mean different things to different people. *See* Hannah Miller, Jacob Thebault-Spieker, Shuo Chang, Isaac Johnson, Loren Terveen, and Brent Hecht. 2016. "Blissfully happy" or "ready to fight": Varying Interpretations of Emoji, *ICWSM'16*, Retrieved July 6, 2016 from http://www-users.cs.umn.edu/~bhecht/publications/ICWSM2016_emoji.pdf. Below is just a short sampling of some emojis and some of their alternative meanings:

- Avocado = "basic" or trendy;
- Beer mugs = testicles;
- Cherries = breasts or testicles;
- Clapping hands = emphasis;
- Dash = smoking or vaping;
- Eggplant = penis;
- Eyes = request for pictures;
- Goat = greatest of all time;
- Mailbox = sex;
- Maple leaf = marijuana or drugs, generally;
- Octopus = hug;
- Peach = butt;
- Pizza = I love you;
- Silent face = threat to not say anything;
- Snowflake = cocaine;
- Syringe = tattoo.

These and other emojis can stand alone or be combined to further mean other things. *See* Diana Bruk, *25 Secret Meanings of These Popular Emojis*, accessible at https://bestlifeonline.com/emoji-meanings/ (last visited June 13, 2022); Marissa Gainsburg, *The Ultimate Glossary Of Sexting Emojis*, accessible at https://www.womenshealthmag.com/sex-and-love/g28008142/sexting-emoji/ (last visited June 13, 2022); George Harrison, *SMILEY LIKE YOU MEAN IT: From the Love Hotel to the Splash… the hidden meanings behind the emojis your children are using*, accessible at https://www.thesun.co.uk/fabulous/4026934/sex-drug-symbols-hidden-meanings-emojis/ (last visited June 13, 2022); Katie Notopolous, *The Complete Guide To Emojis That Mean Dirty Words*, accessible at https://www.buzzfeednews.com/article/katienotopoulos/complete-dictionary-of-dirty-emojis (last visited June 13, 2022).

So, because attorneys are required to stay up to date on current technology, as discussed below in the section on ethics, be sure you know the latest trends and meanings of the emojis that are out there.

2. GIFs

"If, as it is often said, a picture is worth a thousand words, then a video is worth exponentially more." *Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 542 (Tex. 2018) (footnote omitted).

Graphics Interchange Format, or GIF (pronounced like the peanut butter brand, JIF, according to its creator), is an image file. *See* Doug Gross, *It's settled! Creator tells us how to pronounce 'GIF,'* May 2013, accessible at https://www.cnn.com/2013/05/22/tech/web/pronounce-gif/index.html (last visited June 13, 2022). It can be either a still image or, as discussed herein, animated images. "We say 'animated images' because GIFs aren't really videos. If anything, they're more like flipbooks. For one, they don't have sound (you probably noticed that). Also, the GIF format wasn't created for animations; that's just how things worked out. See, GIF files can hold multiple pictures at once, and people realized that these pictures could load sequentially (again, like a flipbook) if they're decoded a certain way.

"CompuServe published the GIF format in 1987, and it was last updated in 1989. In other words, GIF is older than about 35% of the US population, and it predates the World Wide Web by two years. It helped to define early

GeoCities websites, MySpace pages, and email chains (remember the dancing baby?), and it's still a large part of internet culture. In fact, the GIF format may be more popular now than ever before." Andrew Heinzman, *What is a GIF, and How Do You Use Them?*, September 2019, accessible at https://www.howtogeek.com/441185/what-is-a-gif-and-how-do-you-use-them/ (last visited, June 13, 2022).

Because GIFs are essentially just videos without sound, they can be authenticated the same as pictures, as discussed in more depth in the section on authentication below. A problem arises, however, because these pictures likely depict a scene or person that the proponent (or anyone else in the courtroom for that matter) has never before seen outside of that GIF or the source video from which the GIF is derived.

So, how do you authenticate a GIF? By virtue of what it is, the GIF must appear in an email, text message, website, etc., so you authenticate it the same way you authenticate the email, text message, website, etc. in which the GIF appears, which is all discussed in depth in the section on authentication below. You authenticate the communication, not each individual word used in it. Predicates for different kinds of communications can be found in the brand-new Predicates Manual 5.0, and one simply adds in the GIF where appropriate, also demonstrated in the Predicates Manual 5.0.

If that GIF is detrimental to your case, however, you can try objecting on technical grounds. Who created the GIF? How was it created? How does the Graphic Interchange Format decode these several images to portray this video-like depiction? But chances are that, because GIFs have been around for decades, although their popularity has recently resurfaced, the technical background will not be required to be proved up by an expert, just like photographs do not require an expert to prove how the film was developed or how the imaging sensor on a digital camera captured the light reflected onto it.

Moreover, the very reason GIFs are used underscores why they do not require a technical prove up—they simply convey a message or statement. For example, if someone is feeling surprised or excited about something that has happened, they may use a GIF of Andy Dwyer, portrayed by actor Chris Pratt, from NBC's Parks and Recreation looking into the camera with an excited face while the camera zooms in on his face. *See* "Andy Dwyer Shocked," accessible at https://imgur.com/gallery/Yixr3jv (last visited June 13, 2022); *see also* Parks and Recreation (NBC 2009–2015). No other explanation is needed because his look of surprise says it all. Is that look of surprise making a statement, though, such that it would be subject to the hearsay rules? Even if it were, would that not be an excited utterance?

GIFs may also have writing in them, which should more clearly fall under the hearsay rules. For example, if Party A asks Party B for permission to do something, Party B may send a GIF of Chancelor Palpatine, played by actor Ian McDiarmid, from Stars Wars: Episode III - Revenge of the Sith telling Anakin Skywalker, played by actor Hayden Christensen, to kill Count Dooku, played by actor Christopher Lee, with Palpatine's words superimposed over the images: "Do it!" *See* "Palpatine Star Wars GIF," accessible at https://tenor.com/view/palpatine-star-wars-emperor-do-it-go-for-it-gif-17446081 (last visited June 13, 2022); *see also* Star Wars: Episode III - Revenge of the Sith (20th Century Fox 2005). The words "do it" would be hearsay, unless it is excepted from the hearsay rule because Party B is a party opponent and the permission to "do it" is being used against Party B. *See* Tex. R. Evid. 801(e)(2). One could also argue that this was an agreement and the words "do it" were simply an operative fact, but that is discussed in more depth below in the section on hearsay.

Whether your GIFs have words or not, you can use the same evidentiary rules to admit them as any other statements. You have to authenticate the communication and show that the statements, including any GIFs, are either not hearsay or are excepted from the hearsay rule. Depending on what the GIF shows, you may also need to show that it is relevant and that its probative value outweighs any unfair prejudice. *See* Tex. R. Evid. 401, 403.

Practice Note: GIFs are moving images, like videos. So, two things to remember. One, when requesting discovery, be sure to request the native format because a printout of an animated GIF will not be animated. Second, if the communication you want to show to the factfinder contains an animated GIF, be sure to have the proper technology to show the animation contained in the GIF. *See, e.g.*, *Siebenaler v. State*, 124 N.E.3d 61, 70 (Ind. CVt. App. 2019) (holding, in child pornography case, that GIFs of boys being depantsed were mere nudity while GIFs of boys being depantsed and skinny dipping were not mere nudity); *Robillard v. Opal Labs, Inc.*, 428 F.Supp.3d 412, 437 (D. Or. 2019) (holding that GIF of an older Steve Buscemi dressed as a high school student was not "direct evidence" of discriminatory animus in ageism case). Although one image from the GIF may be

important enough to have a screenshot, just like a screenshot of a video, the entire GIF will require showing the sequence images. And if the other side uses only a screenshot, Rules 106 and 107 can help get the rest of the GIF admitted under the rule of option completeness, as discussed further below in that section.

3. Internet memes

A meme is a "unit of cultural information spread by imitation. The term *meme* (from the Greek *mimema*, meaning 'imitated') was introduced in 1976 by British evolutionary biologist Richard Dawkins in his work *The Selfish Gene*. Dawkins conceived of memes as the cultural parallel to biological genes and considered them, in a manner similar to 'selfish' genes, as being in control of their own reproduction and thus serving their own ends. Understood in those terms, memes carry information, are replicated, and are transmitted from one person to another, and they have the ability to evolve, mutating at random and undergoing natural selection, with or without impacts on human fitness (reproduction and survival). . . .

"Within a culture, memes can take a variety of forms, such as an idea, a skill, a behaviour, a phrase, or a particular fashion. The replication and transmission of a meme occurs when one person copies a unit of cultural information comprising a meme from another person. The process of transmission is carried out primarily by means of verbal, visual, or electronic communication, ranging from books and conversation to television, e-mail, or the Internet. Those memes that are most successful in being copied and transmitted become the most prevalent within a culture. . . .

"In the early 21st century, Internet memes, or memes that emerge within the culture of the Internet, gained popularity, bringing renewed interest to the meme concept. Internet memes spread from person to person through imitation, typically by e-mail, social media, and various types of Web sites. They often take the form of pictures, videos, or other media containing cultural information that, rather than mutating randomly, have been deliberately altered by individuals. Their deliberate alteration, however, violates Dawkins's original conception of memes, and, for that reason, despite their fundamental similarity to other types of memes, Internet memes are considered by Dawkins and certain other scholars to be a different representation of the meme concept." Kara Rogers, "Meme," Encyclopedia Brittanica, Mar. 18, 2021, https://www.britannica.com/topic/meme (last visited June 13, 2022).

"Most common internet memes are image macros – photos with a bold caption written in Impact font. The text will usually be humorous or sarcastic. Aside from this familiar form, memes can also be a video, GIF, saying, an event or pretty much anything that can be copied or slightly changed and go viral across the web. . . .

"There are [a] few more reasons why memes are one of the go-to moves of the average social media user:

- They are eye-catching.
- They enable you to express complex ideas through a simple concept by relying on the meme context, origin and common use.
- They have a viral potential.
- They push you to paint your creative thoughts in more humorous colors.
- They are easy to create and are just too much fun! . . .

"The most vital part of using memes is to understand the context of the content you're sharing and to know how to leverage its full meaning." Chen Attias, *Memes 101: What They Are & How to Use Them*, accessible at https://www.wix.com/blog/2017/07/what-are-memes/ (last visited June 13, 2022).

Although internet memes are not quite the same as the original meme concept, understanding the original concept helps one to understand how to use internet memes. First, you have to know the culture, idea, etc. of the content used in the meme. That is part of what makes the meme more impactful to the viewers.

For instance, when something intense and suspenseful is being discussed in a text message, Facebook post, etc., someone may send or post a picture or GIF of the Mexican standoff scene from The Good, the Bad, and the Ugly where the three men are staring back and forth at each other. *See* The Good, the Bad, and the Ugly (United Artists 1966). Aside from looking intense, if the viewer does not understand the reference to that scene in the movie (or what a Mexican standoff is), the meme does not make much sense, aside from people staring at each other with guns ready to be drawn. That scene has now been edited to include other viral images of children or animals partaking in the staring. *See, e.g.*, "The Good The Bad The Ugly Clint GIF," accessible at https://tenor.com/view/the-good-the-bad-and-the-ugly-clint-east-wood-stare-down-cat-gif-5206183 (last visited June 13, 2022); "The Good The Bad And The Ugly Clint Eastwood GIF," accessible at https://tenor.com/view/the-

good-the-bad-and-the-ugly-clint-eastwood-meme-gif-14888762 (last visited June 13, 2022).

Or in response to the winter storm in Texas in February of this year, someone may post a picture of Jack Torrance, played by actor Jack Nicholson, frozen in the snow at the end of The Shining with the words "Move to Texas, They Said. You'll Enjoy the Weather, They Said." *See* The Shining (Warner Bros. 1980). The viewer would need to know about both the horrible winter storm that Texas had received and the contents of the movie to fully understand the meme. In fact, Jack Torrance's declaration, "Here's Johnny!" when he breaks through the door with an axe is a meme itself because he copied it from Ed McMahon's line on The Tonight Show Starring Johnny Carson. *See id.*; The Tonight Show Starring Johnny Carson (NBC 1962–1992).

Several examples of macro memes can be found at https://www.wix.com/blog/2017/07/what-are-memes/. Additional memes, their origins, and further examples can be found at https://knowyourmeme.com/.

You may be wondering, what is the difference between memes and GIFs? Ultimately, it does not matter. But: "The main difference between an animated gif and a meme is that memes tend to be static images that make a topical or pop culture reference and animated gifs are, more simply, moving images.

"You can find all the animated gif memes that your heart desires at website[s] such as Giphy and Awesome Gifs.

"As with most things, gifs and memes work better together. Grab an animated gif and stick some topical words on it et voilà, you have an animated meme." Edward Hyatt, *What is a GIF, who invented the image format, how is it pronounced and what's an animated meme?*, accessible at https://www.thesun.co.uk/tech/3800248/what-is-gif-how-pronounced-animated-memes/ (last visited June 13, 2022).

So, are memes evidence? Can you authenticate them like emojis and GIFs? Do they fall under the hearsay rules? Even if they do, are they ever relevant or have probative value? The answer, of course, is it depends. A meme should fall under the same authentication and hearsay rules as GIFs and emojis because they are used in websites, text messages, etc., and they convey a message, either through the image itself or the image with words on it. And if used in a conversation, it would hopefully be relevant to the conversation and not just a funny picture one party is sharing with the other. If the meme is a standalone post on Facebook or something similar, it could still be authenticated by authenticating the website or other medium it was posted on. It would still fall under the same hearsay rules. But its relevance or probative value may be in question. *See, e.g.*, *United States v. Alfred*, 982 F.3d 1273, 1282 (10th Cir. 2020) ("The maximum probative value of the memes was significant. As discussed, a jury could conclude from the memes that Mr. Alfred was branding himself as a pimp. . . . And while the fact they were posted years earlier might slightly diminish their probative value, the memes were available in real time to a visitor to Mr. Alfred's profile page with the click of a mouse."). This is where understanding the origin of the meme comes into play. And if not the true origin, then knowing why the poster posted it. What did it mean to them? What did it mean to those who viewed it? Had the poster ever posted something like this before, talked about this subject before? Does the message that the meme conveys relate to anything going on in the case, e.g., the intense stare down from The Good, the Bad, and the Ugly or chopping down a door to attack someone? These questions are all ripe for discovery requests or for questioning in a deposition.

Because memes can at the same time seem so innocent but have a deeper meaning to them based on the cultural piece from which they are copied, lawyers must stay on top of popular culture to best understand how to use memes when they show up in cases.

B. Disappearing messages

Certain types of evidence may no longer exist, or at least exist in a readily accessible format, which is discussed in more depth in the electronically-stored-information section below. If the evidence is truly gone, then perhaps a spoliation instruction is in order, as discussed in the section on presumptions and ethics below. But, just because evidence no longer exists does not mean you should just ignore it; it just means it will take some more digging to get to it, know what it was, and use it to your advantage or keep it out.

There are several different companies that offer "disappearing" messages. Just search in the App Store or Google Play for disappearing messages apps, and several results appear. Below are just a few:

1. Dust: "Dust automatically deletes all messages after 24 hours." *See* "Dust:," accessible at https://support.usedust.com/article/29-why-are-my-messages-gone (last visited June 13, 2022).

2. Wickr: "Auto-Destruct settings govern the time at which messages and/or attachments are securely destroyed. . . . So, for example, if 'Expiration' is set for 48-hours and 'Burn-on-read' is set for 5-minutes, the recipient of your message will have a full two days to receive the message but the content will no longer exist on their device 5-minutes after it is read." *See* "Auto-Destruction: Expiration and Burn-on-read (BOR)," accessible at https://support.wickr.com/hc/en-us/articles/115007397548-Auto-Destruction-Expiration-and-Burn-on-read-BOR- (last visited June 13, 2022).

3. Silent Circle: "Stored data is a security risk. Many providers keep as much data as possible 'just in case.' We keep as little data as possible. We don't track IP addresses or keep logs of calls and messages between users." *See* "Silent Phone," accessible at https://www.silentcircle.com/products-and-solutions/silent-phone/ (last visited June 13, 2022).

4. Snapchat: "If you leave the Friends screen before replaying a Snap, you won't be able to replay it again." *See* "View a Snap," accessible at https://support.snapchat.com/en-US/a/view-snaps (last visited June 13, 2022). "When you delete a Snap, we'll attempt to remove it from our servers and your friends' devices. This might not always work if someone has a bad internet connection, or is running an old version of Snapchat. In this case, the deleted Snap may still appear for a brief moment!" *See* "Send a Snap," accessible at https://support.snapchat.com/en-US/article/send-snap (last visited June 13, 2022).

5. Confide: "With encrypted, self-destructing, and screenshot-proof messages, Confide gives you the comfort of knowing that your private communication will now truly stay that way." *See* "Confide," accessible at https://getconfide.com/ (last visited June 13, 2022).

6. Signal: "Accidentally send a message to the wrong chat? Take backs are permitted. When deleting a recently sent message, you now have the option to **delete for everyone** in the chat." *See* "Delete for everyone," accessible at https://support.signal.org/hc/en-us/articles/360050426432-Delete-for-everyone (last visited June 13, 2022).

These types of apps come and go on a frequent basis. Be sure when requesting discovery or questioning a witness in a deposition or through interrogatories to include a catchall request, e.g. "or anything similar," that could include these types of apps in case you do not mention the specific one the witness has used.

The messages that are in these apps are just like the text messages, emails, and Facebook messages that have been authenticated for years. But these messages most likely no longer exist, so you do not need to worry about authenticating the message. Rather, you will need to worry about proving the message did exist at one time, that it has been deleted (either intentionally or by virtue of the app being used, which app could have been used intentionally so the message would disappear), and what the contents of the message are. The best evidence rule, discussed further below, will allow this type of evidence to still come in because no other evidence of the message exists. *See* Tex. R. Evid. 1002. When discussing the contents of the deleted messages, you will still need to use the hearsay rules to show how it is not hearsay or is excepted from the hearsay rule, as discussed further below.

C. Gaming/forum messages

Almost gone are the days of pulling out a deck of cards to play solitaire at home alone. Several games today are played online with other people either through phones, computers, or video game consoles (Nintendo Switch, Xbox, PS4, etc.). Many of these games allow for the players to communicate with each other while playing. Sometimes it is by speaking to each other through the use of microphones/headsets, e.g., Call of Duty and Fortnite, and sometimes it is through text and a chat log, e.g. League of Legends and Words With Friends.

Any live voice chats would not be retrievable unless the particular game was recorded. And even chat logs may be difficult to retrieve. Some games carry chat logs forward from previous games. You may need to first ask the witness whether they play any online or multiplayer games, find out what they play, and then request any recorded games (for the voice chats) or the chat logs. If the witness is unable to save the chat log, you may have to request screenshots of the chat logs. You could try to subpoena the owner/host of the online game, but chances are that the Stored Communications Act or similar laws, discussed further in the ethics section below, will prevent you from getting very far.

Another way to get to the content is to ask a witness to bring his or her phone (or computer/gaming device) to the deposition once you know what multiplayer games they are playing. Then, in the deposition, ask the witness to open up the game to access the content. That shows the

evidence exists and should be produced in discovery for compel purposes later, but you can go ahead and read it all into the deposition record if it is not a significant amount.

If you are able to get your hands on any live chat recordings, those will need to be proved up like any other voice recording, discussed below in the authentication section. Chat logs can be proved up like any other chat room content, also discussed below. Both will require you to get around any hearsay.

For any chats, voice or text, that are not available, you would have to go through that evidence the same as the disappearing messages above. Find out whether the evidence ever existed and then get into its contents.

Similar to games are online forums. This could be anything from a technical support forum where other users have the same issue and they share ideas on how to fix it, e.g. if you need to get your printer to connect to your computer, to Reddit. Other file sharing sites, like Tumblr, allow for comments where users can interact that way. Tumblr and similar sites have been described as a cross between social media and blogging, so be sure to tailor your discovery requests accordingly. *See* "Explainer: What is Tumblr?," accessible at https://www.webwise.ie/parents/explainer-what-is-tumblr-2/ (last visited June 13, 2022). The "chats" through these types of forums can be admitted the same as similar chat logs or social media messages, all described below.

D. Geolocation

Geolocation "refers to the geographical (latitudinal and longitudinal) location of an Internet-connected device. Not your location, mind you, but the location of whatever electronic medium is being used to access the Internet." *See* "What is Geolocation?," accessible at https://www.gravitatedesign.com/blog/what-is-geolocation/ (last visited June 13, 2022).

Your geolocation can be collected through your cell phone. "As long as location-based services are enabled and you have a GPS chip and a cell network signal, you can access (and be accessed by) these services for finding your *general* location through GPS-tower-device triangulation. Obviously, Internet services having access to this raises privacy issues. Therefore, for device-based data collection:

1. Users have to allow location detection on each device (and for each application).

2. Websites have to ask for a visitor's location.

3. As of Chrome 50, the HTML Geolocation API will work only over secure website connections (as denoted by *https*:// in the URL, instead of *http*://). . . .

"The other geolocation method uses server-based data collection tied to your device's IP address through a Wi-Fi or Ethernet connection. IP addresses are stored in databases where physical locations are associated with those IPs, mapped by years of data mining. This data is sold by third-party servicers, which means accuracy is only as good as the servicer's data. Whenever the value of the data is based on accuracy but the source of the data is based on availability, the integrity of the data becomes suspect. . . .

"What does that mean? If enough incorrect information is entered, or not enough information is available, the databases *guess*. So, that's it: IP geolocation accuracy is based on the amount of data (and supporting data) relating to a specific location, as well as the timeliness of that data acquisition through third-party servicer databases. This is why, when trying to determine the geolocation of Gravitate's office (based on my laptop's IP address over Wi-Fi), the results were different: Some servicers indicated Portland; others Vancouver.

"IP geolocation, for all intents and purposes, is more accurate the further out the data pointing goes. In the United States, IP geolocation is 90-something percent accurate (that number varies, depending on the source database) at the country level. At the city level, the accuracy drops to between 50 and 70 percent. Given this, IP geolocation is best used for broader location detection categories, like a website visitor's country. Naturally, if accuracy (and even data access) is less than 50 percent, privacy isn't a huge concern, which is why websites don't have to request permission for your location when using it.

"There are caveats to using either type of geolocation, of course. Naturally, you need visitors to give their permission if you are using device-based detection, which is the most accurate and the best suited for city-specific location information. Server-based detection, which is the least invasive and best suited for country-specific information, can return bypassed data if the visitor's IP address is routed through a proxy server (e.g., VPN). In this instance, the IP address is actually mapped to a location that's relative to the server's location, not the

visitor's. Therefore, because either type of data collection can fail, a website will sometimes incorporate both types as a fallback, considering *some* data better than none for providing the best user experience." *Id.*

So, when requesting discovery, tailor your requests to include this geolocation information. On phones, it can be embedded in iOS software or through Google on Androids. In iOS, go to Settings>Privacy>Location Services>System Services>Significant Locations and make sure it is turned on. On an Android, open Google>Settings>Google activity controls>Google Location History and select the device to turn it on. In iOS, this is where you can view the information, everywhere that iPhone has ever been since the Significant Locations feature was turned on. This may need to be screenshotted for production purposes. On Android, open Google Maps, go to the side navigation menu, and select "Your timeline." This information through Google is accessible from a computer also at google.com/maps/timeline and can be downloaded in its native format. Of course, if this feature is not turned on, then no data will be available, so you may need to first find out if this feature is on (maybe by surprise in a deposition) and then request the information. This information can be deleted also, so be sure to include this with your letter regarding evidence preservation.

Using this information as evidence may require some expert testimony, although that time may be fading because of how prevalent GPS is in our society today. The witness may not know how the technology works, but he knows that when the map pops up on his phone, the little blue, blinking dot is where he is, so it is accurate, which is half the battle. In *Gordon*, the children took the mother's phone to the father's house and took a picture of alleged drugs; the mother testified that it was her phone, that the children had it when they went to visit the father, and that she found the photo on her phone when the children returned the phone; the photo also showed the timestamp as the time the children were with the father and a geolocation of the father's house. *Gordon v. Martin*, No. 03-19-00241-CV, 2020 WL 1908316, at *3 (Tex. App.—Austin Apr. 17, 2020, no pet.) (mem. op.). The trial judge said that he would confer with the children in chambers to ask whether they took the photo. *Id.* The court held that the photo was cumulative of other evidence of drug use, "so any error in the admission of [the photo] would have been harmless and not reversable on appeal." *Id.*

In *Billingsley*, the defendant was convicted of multiple counts of sexual assault of a child. *Billingsley v. State*, Nos. 09-18-00282-CR, 09-18-00283-CR, & 09-18-00284-CR, 2019 WL 2111840, at *1 (Tex. App.—Beaumont May 15, 2019, no pet.) (mem. op.). Billingsley tried to admit GPS data from his phone to show where he was at certain times and on certain dates, but the trial court excluded the evidence because, on voir dire, Billingsley admitted that he obtained the information from the Google Maps app on his phone, that the information was from Google rather than Billingsley's personal knowledge, and Billingsley did not know how Google records the information. *Id.* at *2. Although Billingsley testified that the application was accurate, he agreed that he could turn off the GPS on his phone. *Id.* The State objected to hearsay and that it could not be authenticated through Billingsley. *Id.* The court of appeals only stated that, "[v]iewing the record as a whole," the trial court did not err. *Id.* at *3.

So, to be safe, obtain a business records affidavit from Google or Apple or whatever third party is tracking the information, and if that is not possible, then bring in an expert to explain how GPS and geolocation works by sending signals to and from the device, cellular towers, and triangulating the location or by using the devices IP address. If you cannot do that, be sure to go through how the witness knows that the information is accurate, e.g., establish the date and time and location and that the witness viewed the GPS on their phone and that it was accurate, and the more occurrences of that the better to prove accuracy (does anyone use maps on their phone to find directions and how long it will take and where to go when you get lost, etc.?). This should also show the personal knowledge of the witness. That person knows whether he or she was in that place at that time. Further, you can try authenticating it using the "silent witness" theory explained further below in the authentication section. Essentially, this is a process that produces an accurate result, so it can be authenticated that way.

As for the hearsay objection like in *Billingsley*, the business records affidavit would solve that, if it were actually a statement by a person. Geolocation, however, is simply a computer spitting out a date and time and geographical location. Like the timestamp from a fax machine, it is not a statement because a person is not making it. If, however, your judge or opposing counsel insist that it is hearsay, you could argue a few different things depending on the circumstances. You could argue that the party who produced the information (if you are using it against that party) has adopted that information by virtue of that party producing it as that party's geolocation information, so it is excepted from the hearsay rule. *See* Tex. R. Evid. 801(e)(2)(B). You could

also argue that it is present sense impression because it records the event at the time it is happening under 803(1), a then-existing physical condition (the condition of being in a certain place at a certain time) under 803(3), a recorded recollection under 803(5), or a statement in an ancient document (if the information is at least twenty years old, so maybe someday) under 803(16). All of these, and more, are discussed further below. Be sure to establish, however, that the device and the witness were in the same place at the same time. To try to keep it out, or impeach the witness or make the weight of the evidence less, bring out facts that show the witness and the device were not together.

E. Fake evidence

Because of the prevalence of photoshop, picture filters, fake text message creators, etc., some evidence that is presented may not be real. And aside from the nefarious, there are perfectly legitimate tools like Quicken that can spit out documents regularly used in family law cases.

One way to help know what is real is to request the native format of whatever electronic evidence you are asking for in discovery. The metadata of that evidence can help show where it originated and when. Metadata is explained in further detail below under the authentication section.

In *Bosyk*, an IP address associated with the defendant's house accessed a link in an online message board that described taking the person who clicked on it to a site with child pornography. *United States v. Bosyk*, 933 F.3d 319, 322 (4th Cir. 2019). Based on that fact, the government obtained a search warrant to search the defendant's home for evidence of child pornography. *Id.* The defendant argued that the government did not have reasonable probability to obtain the warrant, but the majority opinion concluded that it did because it was reasonably probable that the defendant accessed the link after seeing it on the online message board, which would mean that the defendant saw the description of where the link would lead to, i.e. child pornography. *Id.* at 325. The dissenting opinion criticized the majority's conclusion because its opinion "glosses over the myriad alternative paths of accessing the URL." *Id.* at 349 (Wynn, J., dissenting). Judge Wynn compared this to "rickrolling," a "humorous form of URL spoofing," "in which individuals click on a link 'expecting one thing' but are instead led to 'a video of Rick Astley singing 'Never Gonna Give You Up.'" *Id.* at 345 (quoting Abby Ohlheiser, *I Can't Believe This Is Why People Are Tweeting Fake Celebrity News*, Wash. Post (Oct. 18, 2018), https://www.washingtonpost.com/technology/2018/10/18/i-cant-believe-this-is-whypeople-are-tweeting-fake-celebrity-news/?utm_term=.e9c493b7234d, now available at https://www.washingtonpost.com/technology/2018/10/18/i-cant-believe-this-is-why-people-are-tweeting-fake-celebrity-news/).

In rickrolling, the link is the "fake" evidence. But looking at the metadata—the HTML coding for the link—would show that the URL is going somewhere other than where it says.

Other ways to expose fake evidence is to look at the details, i.e. the distinctive characteristics. *See* Tex. R. Evid. 901(b)(4). Compare previous bills, texts, emails, paystubs, etc. to see whether they are the same or not. In family law, paystubs are often important (and now required in certain family law cases under the recently updated Texas Rules of Civil Procedure). Subpoena the company for the paystubs instead of relying on the opposing party to produce them. Then you have a better assurance that they are real. As new paystubs continue to come out during the case, compare the ones you received directly from the company with any new ones the opposing party may produce. This can be done with most any documents that are not originally created by the parties.

The burden of authentication is very low, as discussed below. So, if the evidence comes in when you believe it is fake, then your job is to convince the factfinder to give little to no weight to it. First and foremost, object. The only way to preserve evidentiary error is to object, so let the judge know your concerns. Then, show how it is unreliable, how it does not match other documents portraying similar information. Ultimately, the factfinder can choose what to believe and is presumed to resolve all conflicts in the evidence, so do what you can to lead the factfinder to your desired conclusion.

II. FRE Article I. General Provisions

A. Scope and Applicability of the Rules

The Texas Rules of Evidence apply to Texas courts. Tex. R. Evid. 101(b). Similarly, the Federal Rules of Evidence apply to federal courts. Fed. R. Evid. 101(a), 1101. And other state rules will apply to those respective state courts. However, "[w]here the Federal Rules of Evidence are similar, [states] may look to federal case law for guidance in interpreting the [state] evidentiary rules." *See Reid Road Mun. Utility Dist. No. 2 v. Speedy Stop Food Stores,*

Ltd., 337 S.W.3d 846, 856 n.6 (Tex. 2011); *accord State v. Almanza*, 820 S.E.2d 1, 5 (Ga. 2018); *Phillips v. O'Neil*, 407 P.3d 71, 74 (Ariz. 2017). Reference to any kind of written material or any other medium includes electronically stored information. Fed. R. Evid. 101(b)(6).

B. Purpose

The purpose of the rules is to have fair proceedings, eliminate unjustifiable expense and delay, and promote the development of evidence law to ascertain the truth and secure just determinations. Tex. R. Evid. 102. As such, the trial court judge "must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Tex. R. Evid. 103(d).

C. Rulings on Evidence

A party may claim error in a ruling to admit or exclude evidence only if that error affected a substantial right of the party. Fed. R. Evid. 103(a). Similarly, that claim of error, if the ruling admitted evidence, must be timely made on the record with a motion to strike and state the specific ground, unless apparent from the context. Fed. R. Evid. 103(a)(1). If the ruling excluded evidence, an offer of proof must be made, unless the substance was apparent from the context. Fed. R. Evid. 103(a)(2). Rule 103 states that, "[o]nce the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Fed. R. Evid. 103(b). This will be discussed more below in the section on objections and preservation of error. "The court may make any statement about the character or form of the evidence, the objection made, and the ruling." Fed. R. Evid. 103(c). Additionally, the court may direct the offer of proof be made in a question-and-answer format. *Id.* The court may take notice of plain error affecting a substantial right, even if that error was not preserved. Fed. R. Evid. 103(e).

D. Preliminary Questions

The court is the gatekeeper for the admission of evidence. It must decide any preliminary questions concerning whether a witness is qualified to testify, privileges exist, or evidence is admissible, and is not bound by the rules of evidence in its decision, except for those applying to privileges. Fed. R. Evid. 104(a); *see, e.g.*, *Vela v. State*, 209 S.W.3d 128, 130–31 (Tex. Crim. App. 2006) (explaining that preliminary hearing under Rule 104(a) is used to determine whether expert is qualified under Rule 702 and relevant under Rules 401 and 402). This preliminary step, however, does not require that the trial court be persuaded that the proffered evidence is actually authentic; it only requires the proponent to produce sufficient evidence to support a finding that the evidence is authentic. *United States v. Sliker*, 751 F.2d 477, 499–500 (2nd Cir. 1984); *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). Authenticity will be discussed more in that section below.

If the relevance of a piece of evidence hinges on whether a fact exists, the proponent must provide sufficient evidence to support a finding that the fact does exist. Tex. R. Evid. 104(b). The court has discretion to admit the proposed evidence on condition that the proof be introduced later. *Id.* This is known as the doctrine of conditional relevance. *Fischer v. State*, 268 S.W.3d 552, 563 (Tex. Crim. App. 2008) (Price, J., concurring and dissenting). "Simply put, a trial judge cannot err in most cases by overruling a relevancy objection so long as the challenged evidence might be connected up before the end of trial. And it is not the judge's duty to notice whether the evidence is eventually connected up in fact. Instead, the objecting party must reurge his relevancy complaint after all the proof is in, ask that the offending evidence be stricken, and request that the jury be instructed to disregard it. Otherwise, his objection will be deemed forfeited on appeal." *Id.* at 563 n.8 (quoting *Fuller v. State*, 829 S.W.2d 191, 198–99 (Tex. Crim. App. 1992) (internal quotations omitted)); *accord United States v. Tony*, 948 F.3d 1259, 1263 (10th Cir. 2020); *but see Com. v. Bright*, 974 N.E.2d 1092, 1101 (Mass. 2012) ("questions of conditional relevance require no complex jury instructions and merge imperceptibly into the weight of the evidence. A jury would naturally disregard evidence they found not to be relevant to the case based on their determination of a predicate fact.") (citations and quotations omitted). A search of the case law shows that this doctrine is discussed far more often in criminal cases than in civil ones.

All hearings on preliminary questions must be conducted outside the presence of the jury if it would involve: (1) the admissibility of a confession in a criminal case; (2) a defendant in a criminal case is a witness and requests it; or (3) justice so requires. Tex. R. Evid. 104(c); *see Hampton v. State*, 843 S.E.2d 542, 549 (Ga. 2020); *Jonas v. Willman*, 930 N.W.2d 60, 73 (Neb. App. 2019). The defendant in a criminal case who testifies outside the jury's hearing on a preliminary question is not subject to cross-examination on other issues in the case. Tex. R. Evid. 104(d).

Preliminary questions, however, do not limit a party's right to introduce evidence that is relevant to the weight or credibility of other evidence. Tex. R. Evid. 104(e). But the proponent of the evidence must still show how that evidence is relevant to the weight or credibility of the other evidence. *See, e.g.*, *Izaguire v. Cox*, No. 10-07-00318-CV, 2008 WL 4427272, at *7 (Tex. App.—Waco Oct. 1, 2008, no pet.) (mem. op.) (holding no abuse of discretion by excluding new evidence that attacked the weight and credibility of other evidence because party introducing new evidence did not show how it was relevant).

E. Evidence that is not Admissible Against Other Parties or for Other Purposes

Evidence that is only admissible for certain purposes or against certain parties must, on request, be restricted to its proper scope with an instruction given to the jury accordingly. Tex. R. Evid. 105(a); *see also Russell v. Anderson*, 966 F.3d 711, 720 n.2 (8th Cir. 2020); *Marks v. State*, 94 So.3d 409, 413 (Ala. 2012). Error is preserved only if the party claiming error: (1) requested that the evidence be limited if the evidence was, in fact, admitted without limitation; or (2) limited the evidence to its proper scope when offering it, but the evidence was excluded altogether. Tex. R. Evid. 105(b); *see, e.g.*, *Estes v. State*, 487 S.W.3d 737, 761–62 (Tex. App.—Fort Worth 2016) (holding that appellant failed to preserve error because he did not renew request for a limiting instruction after testimony he had objected to in preliminary hearing was offered), *rev'd on other grounds*, No. PD-0429-16, 2018 WL 2126740 (Tex. Crim. App. May 9, 2018); *see Fry v. State*, 748 N.E.2d 369, 373 (Ind. 2001).

F. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a statement, written or recorded, any adverse party may introduce, at that time, any other part or statement that should be considered at the same time. Tex. R. Evid. 106; *Dolo v. State*, 942 N.W.2d 357, 364 (Minn. 2020) ("Rule 106 therefore addresses the *timing* of when certain additional material is admitted. . . . In making fairness determinations under Rule 106, district courts must consider whether the additional material must be admitted contemporaneously because, if not, the opposing party must wait until later in the trial to supply the evidence necessary to avoid misleading the jury. In other words, fairness requires that district courts consider whether the content of the admitted excerpt needs to be explained or clarified by admitting the additional material at that time to ensure an accurate understanding of the admitted excerpt and to avoid misleading the factfinder.") (citations and quotations omitted). In Texas, Rules 106 and 107 "comprise the rule of optional completeness, which was designed to guard against the possibility of confusion, distortion, or false impression that could rise from [the] use . . . of an act, writing, conversation, declaration, or transaction out of proper context." *Elmore v. State*, 116 S.W.3d 801, 807 (Tex. App.—Fort Worth 2003, pet. ref'd) (internal quotations omitted) (quoting *Livingston v. State*, 739 S.W.2d 311, 339 (Tex. Crim. App. 1987)).

G. Rule of Optional Completeness

Texas appears to be the only jurisdiction to include this Rule. If a party introduces part of an act, declaration, conversation, writing, or recorded statement, any adverse party may inquire into any other part on the same subject. Tex. R. Evid. 107. The adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement *necessary* to explain or help the factfinder fully understand that part offered by the opponent. *Id.* The rule of optional completeness is an exception to the hearsay rule in Texas. But Rule 107 is limited by Rule 403 if the additional evidence's probative value is substantially outweighed by its unfair prejudicial effect. Tex. R. Evid. 403; *Walters v. State*, 247 S.W.3d 204, 218 (Tex. Crim. App. 2007). Rule 403 is discussed in more detail below in the section on relevance. The Rule of Completeness under Rule 106 in other jurisdictions is not an exception to hearsay. *See, e.g.*, *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) ("Rule 106 does not compel admission of otherwise inadmissible hearsay evidence.") (quotations omitted).

III. FRE Article II. Judicial Notice

The Rules of Evidence provide a court with the ability to take judicial notice when the fact is generally known within the court's jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. The federal rules do not provide any specifics beyond the Rule, but some states specify certain facts that can be judicially noticed. *See, e.g.*, Cal. Evid. Code § 452 (e.g. laws of others states, legislative enactments, and court records from any state or federal court); Fla. Stat. Ann. § 90.202 (e.g. acts of Congress, laws of other states or nations, and official actions of legislative, executive, and judicial departments of U.S. or any state); Tex. R. Evid. 202–204 (e.g. other states' laws, foreign law, and municipal and county ordinances);

Practice Note: A court may not, however, take judicial notice of testimony from a previous trial or even testimony from a prior temporary orders hearing in the same case. *Lage v. Esterle*, 591 S.W.3d 416, 422 (Ken. App. 2019) ("Britney's testimony from the ECO hearing does not pass the indisputability test of KRE 201."); *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("In order for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence."); *but see In re M.H.*, No. 2-19-0595, 2019 WL 6313519, at *8 (Ill. App. Nov. 22, 2019) (explaining that court cannot take judicial notice of prior testimony contrary to rule against hearsay, unless witness is unavailable to testify). Similarly, that testimony may not be considered on appeal unless properly entered into evidence. *See, e.g.*, *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Practice Note: A trial court may take judicial notice of what is in its file, but it may not necessarily take judicial notice of the truth of those documents. *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied) ("A court may take judicial notice of its own file and the fact that a pleading has been filed in a case . . . . 'A court may not, however, take judicial notice of the truth of allegations in its records.' . . . Thus, unless a party's inventory and appraisal has been admitted into evidence, it may not be considered as evidence of a property's characterization of value."); *but cf. Vannerson v. Vannerson*, 857 S.W.2d 659, 671 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding that, because inventory was sworn to and filed with the trial court, even though inventory was not introduced into evidence, trial court could rely on inventory in its judgment; additionally, no harm occurred because properly offered trial exhibit contained same information as was in inventory); *see also Sosinsky v. Grant*, 8 Cal. Rptr. 2d 552, 561–62 (Cal. App. 1992) ("While we have no quarrel with the fact that a judge, after hearing a factual dispute between litigants A and B, may choose to believe A, and make a finding of fact in A's favor, and while we have no quarrel that at some subsequent time it may be proper to take judicial notice *that the judge did in fact make that particular finding* in favor of A, the taking of judicial notice that the judge *made* a particular factual finding is a far cry from the taking of judicial notice that the 'facts' found by the judge must necessarily be the true facts, i.e. must necessarily be 'the truth.'") (emphasis in original).

Practice Note: Your jurisdiction will determine whether a court may take judicial notice of scientific literature. *Compare Glockzin v. State*, 220 S.W.3d 140, 145–46 (Tex. App.—Waco 2007, pet. ref'd) (Texas courts hold that courts cannot take judicial notice of scientific literature), *with Jones v. United States*, 548 S.2d 35, 42 (D.C. App. 1988) (D.C. courts take judicial notice of scientific literature to rebut experts), *and United States v. Medina*, 749 F.Supp. 59, 61 (E.D.N.Y. 1990) (federal court should take judicial notice of scientific literature to "assist it in evaluating advances in scientific techniques.").

A. Adjudicative Facts

An adjudicative fact is any well settled fact, "one which is so well known by all reasonably intelligent people in the community or its existence is so easily determinable with certainty from sources considered reliable, that it would not be good sense to require formal proof." Ray, Law of Evidence, Judicial Notice, § 151 (1980); *accord Harper v. Killion*, 348 S.W.2d 521, 522 (Tex. 1961). A fact is not subject to reasonable dispute when: (1) it is generally known within the territorial jurisdiction of the trial court; or (2) it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Tex. R. Evid. 201(b).

When the above requirements are established, and a party requests it, the court must take judicial notice. Tex. R. Evid. 201(c)(2); *see Hernandez v. Hous. Lighting & Power Co.*, 795 S.W.2d 775, 776–77 (Tex. App.—Houston [14th Dist.] 1990, no writ). Even if the mandatory requirements are not asserted, a court has the discretion to take judicial notice, whether requested or not, at any stage of the proceeding. Tex. R. Evid. 201(c)(1), (d). Even the court of appeals may take judicial notice for the first time on appeal. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994).

The trial court has a duty to notify the parties that it has taken or will take judicial notice of something. Fed. R. Evid. 201(e); *Cobb v. State*, 835 S.W.2d 771, 773 (Tex. App.—Texarkana 1992), *rev'd on other grounds*, 851 S.W.2d 871 (Tex. Crim. App. 1993). A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Tex. R. Evid. 201(e). In the absence of prior notification, the request may be made after judicial notice has been taken. *Id.* The party opposing the trial court's action must be given an opportunity to be heard on the issue of propriety of the court's action and make a proper objection to preserve error. *See In re M.W.*, 959 S.W.2d 661, 664 (Tex. App.—Tyler 1997, writ denied).

The court must, in a civil case, instruct the jury as to the conclusiveness of a judicially noticed fact. Tex. R. Evid. 201(f).

IV. FRE Article III. Presumptions

"A presumption is a rule which draws a particular inference as to the existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved." *Beck v. Sheppard*, 566 S.W.2d 569, 570–571 (Tex. 1978) (internal quotations omitted). In civil cases, the party against whom a presumption is directed has the burden to rebut it, unless statute or rule provides otherwise. Fed. R. Evid. 301. The burden of persuasion does not shift. *Id.* Not all states have formally adopted rules of evidence related to presumptions.

A. Presumptions vs. Inferences

A presumption affects the duty of a party offering further testimony. *Strain v. Martin*, 183 S.W.2d 246, 247 (Tex. App.—Eastland 1944, no writ). An inference involves the weighing of evidence already produced. *Id.* Thus, inferences are based upon facts that are proved. Unrebutted presumptions may establish a fact in issue but only as an "artificial legal equivalent of the evidence otherwise necessary to do so." *Id.* Presumptions can be based upon inferences, but an inference based upon another inference is conjecture and does not prove anything. *Id.* at 247–48; *see also Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 135 (Tex. App.—San Antonio 1985, no writ) (citing *Rounsaville v. Bullard*, 276 S.W.2d 791, 794 (Tex. 1955)).

B. Rebuttable Presumptions

A presumption establishes a fact as proved when the fact from which it may be inferred is proved. *Lobley v. Gilbert*, 236 S.W.2d 121, 123–24 (Tex. 1951). The burden of proof remains on the party offering the fact that gives rise to the presumption, but in effect, it assumes that it has established the fact, prima facie. *Page v. Lockley*, 176 S.W.2d 991, 998 (Tex. App.—Eastland 1943), *rev'd on other grounds*, 180 S.W.2d 616 (Tex. 1944). When the adversely affected party introduces evidence contrary to the existence of the presumed fact, the presumption stops, leaving it to the trier of fact to weigh the bare inference against the evidence to the contrary. *Southland Life Ins. Co. v. Greenwade*, 159 S.W.2d 854, 858 (Tex. 1942).

C. Irrebuttable or Conclusive Presumptions

There are very few presumptions that are legally conclusive as to the fact(s) stated or proved. Most presumptions, whether based on statute or case law, are rebuttable. During a marriage, absent very unusual circumstances, there is an irrebuttable presumption that a fiduciary relationship exists between a husband and wife. *Miller v. Miller*, 700 S.W.2d 941, 946–47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

D. Purpose of Presumptions

The reasons for and purposes of presumptions are numerous. They include the following:

"1. To permit instruction to the jury on the relationship between certain facts;

2. To promote convenience or to bring out the real issues in dispute;

3. To save the court's time by favoring a finding consonant with the balance of probability;

4. To correct an imbalance resulting from one party's greater access to proof concerning the presumed fact;

5. To avoid an impasse and its consequent unfairness;

6. To serve a social or economic policy that favors a contention by giving such contention the benefit of the presumptions; and

7. To provide a shorthand description of the initial assignment of the burdens of persuasion and of going forward with the evidence on an issue." Murl A. Larkin & Cathleen C. Herasimchuk, *Article III: Presumptions*, 30 Hous. L. Rev. 241, 243–44 (1993) (internal citations omitted).

E. Presumptions - To Instruct or not to Instruct

1. Directed Verdicts

The genuine importance of presumptions is realized only after the party bearing the burden has rested. A true presumption operates to invoke a rule of law that compels the jury to reach a conclusion in the absence of evidence to the contrary. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 756–57 (Tex. 1975), *abrogated on other grounds*, *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978). If the party with the burden of producing evidence of a particular fact fails to meet that burden, it is proper

for the court to direct a verdict against that party on the issue not proved. The reverse is also true. If the burden has been satisfied and no controverting evidence has been admitted, the producing party can be favored with a directed verdict because there is no decision for the jury on that issue. *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. App.—Amarillo 1979, writ ref'd. n.r.e.).

2. Jury Instructions

Not all states allow for jury trials in divorce or parent-child cases. If your state allows for them, then be sure to understand how presumptions can affect the jury. There is some question as to how the court should instruct the jury regarding presumptions. An instruction, which recites verbatim a presumption, risks reversal on appeal. *See Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) ("The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. That determination requires careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.") (citations omitted). The complaints range from a comment on the evidence to a misplaced burden of persuasion. *See, e.g.*, *Tex. A & M Univ. v. Chambers*, 31 S.W.3d 780, 785 (Tex. App.—Austin 2000, pet. denied) ("Including a presumption in the jury charge which has been rebutted by controverting facts is an improper comment on the weight of the evidence."); *Hailes v. Gentry*, 520 S.W.2d 555, 558–59 (Tex. App.—El Paso 1975, no writ) ("[Presumptions] are not evidence of something to be weighed along with the evidence.").

3. Spoliation Presumption

One area where a jury instruction regarding a presumption can be appropriate is in cases of spoliation of evidence. One of the most severe penalties for spoliation is a rebuttable presumption that the evidence was damaging to the spoliating party, combined with a shift in the burden of proof so that the spoliating party must prove the evidence was not damaging. Several states allow for spoliation instructions, but the procedure and burden vary. Invariably, however, the evidence must have existed and must have been destroyed—the definition of spoliation. *See, e.g.*, *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, 2011 WL 2062393, at *6 (2011) ("We hold that under Arkansas law, a circuit court is not required to make a specific finding of bad faith on the part of the spoliator prior to instructing the jury with AMI 106, and we decline to adopt the Eighth Circuit's standard requiring the circuit court to do so."); *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004) ("(1) the evidence was 'in existence'; (2) the evidence was 'in the possession of or under control of the party' charged with its destruction; (3) the evidence 'would have been admissible at trial'; and (4) 'the party responsible for its destruction did so intentionally.'); *Trevino v. Ortega*, 969 SW2d 950, 954–55, 960 (Tex. 1998) (trial court should first determine whether duty to preserve evidence existed; second, whether spoliating party breached that duty; and third, whether spoliation prejudiced the non-spoliating party).

F. Burden of Proof

The common meaning of this term among litigators is the amount of evidence required to establish the facts pleaded, as well as a sufficient amount of evidence necessary to convince the trier of fact to find in the offering party's favor. While simplistic in usage, an academic examination reveals that there are two separate and distinct burdens that are interdependent for a valid judgment.

1. Burden of Producing Evidence

This burden is based on the premise that the proponent must produce satisfactory evidence to the judge of a particular fact to be proved. 1 Roy R. Ray, Texas Practice, Law of Evidence § 336 (1972). Absent a presumption of the facts to be proved, if the party with that responsibility does not produce the requisite evidence, the results will be an adverse ruling, i.e., a directed verdict. This burden of producing evidence rests initially on the party who pleads the existence of a particular fact. When the initial burden to produce evidence has been met, the burden shifts to the opposing party.

2. Burden of Persuasion

The burden of persuasion comes only after the proponent has met its burden of producing evidence sufficient to prove the contested issue. Simply stated, it is the task of convincing the trier of fact, after producing satisfactory evidence, that the alleged facts are true. If the advocate is successful in meeting the burden of evidence and in persuading the factfinder, the ultimate outcome is a favorable verdict. Unlike the burden of producing evidence, the burden of persuasion seldom shifts from one party to the other. It remains with the party who seeks any affirmative relief.

G. Standard of Proof (Burden of Persuasion)

Though referred to as the burden of proof in practice, a more accurate term would be the standard of proof required in persuading the judge or jury. The standard of proof represents the persuasive boundaries set by the court. In jury cases, the boundaries are affixed in the court's charge.

1. Persuading by a Preponderance of the Evidence

With few exceptions, this is the most common standard utilized in family law cases. The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced and admitted in this case.

2. Persuading by Clear and Convincing Evidence

The exception to the usual preponderance standard in most family law cases is the burden to persuade by clear and convincing evidence. Less than beyond a reasonable doubt and more than a preponderance, this burden is the measure or degree of proof that will produce in the minds of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *See, e.g.*, Tex. Fam. Code Ann. § 101.007.

Practice Note: Topics related to family law that must meet the higher burden of clear and convincing may vary from state to state, but the Supreme Court of the United States has required at least clear and convincing evidence to terminate the parent child relationship, leaving it to the state to determine exactly what burden to use. *See* ; *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982).

V. FRE Article IV. Relevance and Its Limits

A. Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Tex. R. Evid. 401; *PPC Transp. v. Metcalf*, 254 S.W.3d 636, 642 (Tex. App.—Tyler 2008, no pet.).

If there is some logical connection, either directly or by inference, between the evidence and a fact to be proved, the evidence is relevant. *PPC Transp.*, 254 S.W.3d at 642. In practice, this is a test of logic and common sense. There are no degrees of relevancy—a piece of evidence either is or is not relevant. All relevant evidence is admissible unless it is shown that the evidence should be excluded for some other reason. Tex. R. Evid. 402.

B. Exclusion of Relevant Evidence

In deciding whether to exclude relevant evidence, a court must weigh the probative value of the evidence against its potential for unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence, and must examine the necessity and probative effect of the evidence. Tex. R. Evid. 403; *Goodson v. Castellanos*, 214 S.W.3d 741, 754 (Tex. App.—Austin 2007, pet. denied). "Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *In re K.Y.*, 273 S.W.3d 703, 710 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Because the guiding principle in a suit affecting the parent-child relationship is the best interest of the child, Rule 403 provides for an extraordinary remedy and should be used "sparingly." *Goodson*, 214 S.W.3d at 754.

1. Unfair Prejudice

Prejudice as applied under this section refers to emotional, irrational, or other similarly improper grounds on which to base a decision. *United States v. Looking*, 419 F.3d 781, 785 (8th Cir. 2005) ("Evidence is not unfairly prejudicial because it tends to prove guilt, but because it tends to encourage the jury to find guilt from improper reasoning. Whether there was unfair prejudice depends on whether there was an undue tendency to suggest decision on an improper basis.") (quotations omitted); *Roberts v. Dall. Ry. & Terminal*, 276 S.W.2d 575, 577–78 (Tex. App.—El Paso 1953, writ ref'd n.r.e.). For example, "relevant photographic evidence is admissible unless it is merely calculated to arouse sympathy, prejudice or passion of the jury where the photographs do not serve to illustrate disputed issues or aid in understanding the case." *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998) (internal quotations omitted).

If an attorney trying to keep a piece of evidence out has failed to block the evidence based on relevance, authenticity, hearsay, or the original writing rule, the final step is the requirement to balance the evidence's probative value against the potential for unfair prejudice, or other harm, under Rule 403. Although Rule 403 may be used in combination with any other rule of evidence to assess the admissibility of electronic evidence, courts are particularly likely to consider whether the admission of electronic evidence would be unduly prejudicial in the

following circumstances: offensive language, computer animations, summaries, and reliability or accuracy. *See Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994) (language); *Friend v. Time Mfg. Co.*, No. 03-343-TUC-CKJ, 2006 WL 2135807, at *7 (D. Ariz. July 28, 2006) (animations); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774–75 (S.D. Tex. 1999) (reliability); 5 McLaughlin, Weinstein, & Berger, Weinstein's Federal Evidence § 1006.08[3] (2d ed. 1998) (summaries).

2. Confusing the Issues

Confusing the issues refers to situations where evidence confuses or distracts the jury from the main issues of the case. *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007). This includes evidence that may take an inordinate amount of time to present. *Id.*

3. Misleading the Jury

Misleading the jury, on the other hand, refers to situations where the jury will give undue weight to evidence "on other than emotional grounds." *Id.*

4. Undue Delay

If the admission of evidence creates undue delay, outweighing the probative value of the evidence, the court may exclude it. *Mo., K. & T. Ry. v. Bailey*, 115 S.W. 601, 607–08 (Tex. App.—Dallas 1908, writ ref'd).

5. Needlessly Presenting Cumulative Evidence

If the evidence offered is merely cumulative of other evidence already admitted, the court may exclude it. *R.R. Comm'n v. Shell*, 369 S.W.2d 363, 373 (Tex. App.—Austin 1963), *aff'd*, 380 S.W.2d 556 (Tex. 1964). However, visual evidence is generally not cumulative of testimony on the same subject because it has significant probative value apart from testimonial evidence. *In re K.Y.*, 273 S.W.3d at 710.

C. Character Evidence

While the use of character evidence in civil cases is limited by the rules of evidence, in family law, several important exceptions make the use of character evidence relevant and commonly used.

Evidence about prior instances of conduct used to show that a person acted in conformity on a particular occasion is generally inadmissible. Tex. R. Evid. 404(a); *but see* Tex. R. Evid 405(b) (specific instances of conduct to prove character or trait admissible if character is an essential element of a charge, claim, or defense). However, under Rule 404(b), such evidence may be admissible for other purposes, such as showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex. R. Evid. 404(b)(2). Further, evidence of a person's habit or routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit or routine practice. Tex. R. Evid. 406. Although evidence of specific acts is limited, character evidence through testimony of a person's reputation or by testimony in the form of an opinion is admissible. Tex. R. Evid. 405(a)(1). If reputation or opinion testimony is admitted, evidence of specific instances of conduct is permitted on cross-examination. *Id.*

Similarly, offers or acceptances of consideration, along with conduct or statements made during compromise negotiations, is inadmissible, unless it is used to prove a person's bias, prejudice, or interest. Tex. R. Evid. 408. And any offer or promise to pay for anything related to an injury is inadmissible to prove liability. Tex. R. Evid. 409.

Family law often overlaps with criminal law, as family violence or sexual abuse can instigate both types of cases. But a guilty plea that is later withdrawn, a nolo contendere plea, or a statement made during proceedings for either of those pleas or made during plea discussions with the prosecuting authority, if those discussions did not result in a guilty plea or resulted in a later-withdrawn guilty plea, are not admissible against the defendant who made the plea or participated in those discussions. Tex. R. Evid. 410(a). The only exception to this falls under Rules 106 and 107, when part of the discussion is introduced and the rest of the discussion should be introduced for fairness. Tex. R. Evid. 410(c); *see also* Tex. R. Evid. 106, 107.

Practice Note: In custody cases, evidence of the prior conduct of a parent is regularly presented to show that future behavior is likely to be in conformity. One termination case has drawn a relevant distinction: "The evidence regarding [father's] prior criminal behavior, convictions, and imprisonment was not offered to prove conduct in conformity or to impeach his credibility as a witness. Instead, it was relevant and probative to whether he engaged in a course of conduct that endangered [the child]." *In re J.T.G.*, 121 S.W.3d 117, 133 (Tex. App.—Fort Worth 2003, no pet.) (internal citations omitted). A

modification case held that, "[w]hile evidence of past misconduct or neglect may not of itself be sufficient to show present unfitness in a suit affecting the parent-child relationship, such evidence is permissible as an inference that a person's future conduct may be measured by her past conduct as related to the same or similar situation." *Kirby v. Chapman*, 917 S.W.2d 902, 911 (Tex. App.—Fort Worth 1996, no writ); *accord Green v. Beaumaster*, No. C1-01-1026, 2001 WL 1606830, at *3 (Minn. App. 2001); *cf. Shioji v. Shioji*, 712 P.2d 197, 205 n.3 (Utah 1985) ("[P]ast conduct is relevant in custody proceedings only if it is indicative of harm to the children or predictive of future detrimental conduct") (citing *In re Custody of Saloga*, 421 N.E.2d 991, 996 (Ill. App. 1981)). Another modification case held that a parent's prior conduct can give rise to a material and substantial change in circumstances of the child. *In re A.L.E.*, 279 S.W.3d 424, 429–30 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

VI. FRE Article V. Privileges

Our rules of privilege stem from the common law notion that certain relationships are so important that they ought to be afforded a degree of protection. Unless protected under a privilege, or other constitutional or statutory authority, no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from doing any of those. Tex. R. Evid. 501, 502 (required reports privileged by statute). If the law governing a report does not require the report be made, any reports that are made in accordance with that law are not privileged. *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109, 111 (Tex. App.—Fort Worth 1990, no writ). Although federal rules only cover the attorney-client privilege and work-product privilege, Texas, and many other states, cover a multitude of privileges. The privileges below are directly from the Texas Rules of Evidence.

A. Lawyer-Client Privilege

The recognition of the lawyer-client privilege dates back to common law and is designed to protect confidential communications between attorney and client, which are made to facilitate the rendition of legal services. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (orig. proceeding), *superseded on other grounds by* Tex. R. Civ. P. 192.3(g). The purpose of the lawyer-client privilege is to promote unrestrained communication between attorney and client by eliminating the fear that the attorney will disclose confidential information in any legal proceeding. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Although not all communications between attorney and client are privileged, those communications which fall within the lawyer-client privilege are protected from disclosure. *Sanford v. State*, 21 S.W.3d 337, 342 (Tex. App.—El Paso 2000, no pet.), *abrogated on other grounds by Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002). The court in *Sanford* noted: "Underlying this privilege is an attorney's need to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* (quoting *Strong v. State*, 773 S.W.2d 543, 547 (Tex. Crim. App. 1989)). Thus, the aspirational purpose of the privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed. *Strong*, 773 S.W.2d at 547; *Sanford*, 21 S.W.3d at 342; *cf. Costco Wholsale Corp. v. Superior Court*, 219 P.3d 736, 740–41 (Cal. 2009).

1. Three-Part Test

A three-part test must be met before the lawyer-client privilege may attach to protect information. First, the communication must be between those individuals included in Rule 503(b) of the Texas Rules of Evidence. *See* Tex. R. Evid. 503(b). Second, the communication sought to be protected must be "confidential." Tex. R. Evid. 503(a)(5). Third, the communication sought to be protected must have been made to facilitate the rendition of legal services to the client. Tex. R. Evid. 503(b)(1).

a) Individuals Included

Rule 503(b)(1) of the Texas Rules of Evidence provides protection for communications between the following individuals:

(1) Lawyer and Client

To determine the applicability of the lawyer-client privilege under Rule 503 of the Texas Rules of Evidence, an individual is considered a "client" of the attorney if he "is rendered professional legal services by a lawyer" or "consults a lawyer with a view to obtaining professional legal services from that lawyer." Tex. R. Evid. 503 (a)(1). A client may be a person, public officer, or corporation, association, or other organization or entity, and may be either public or private. *Id.* If a professional relationship exists between the attorney and client wherein the attorney provides professional legal services to the client, communications made for the purpose of rendering legal services are protected from disclosure by the lawyer-client privilege. *In re Ford Motor Co*., 988 S.W.2d 714, 719 (Tex. 1998) (orig. proceeding). As long as a

professional relationship exists in which professional legal services are provided by the lawyer to the client, litigation need not be pending in order for the lawyer-client privilege to apply. *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996) (orig. proceeding). Actual employment of the attorney is not required for the applicability of the lawyer-client privilege. Communications between the lawyer and the client during an initial consultation are privileged if the communication takes place in the attorney's capacity of rendering professional legal services and if the communication is related to the client's legal problems. Tex. R. Evid. 503 (a)(1); *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App.—Austin 2000, pet. denied). The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention. *Braun v. Valley Ear, Nose, and Throat Specialists*, 611 S.W.2d 470, 472–73 (Tex. App.—Corpus Christi 1980, no writ). All that is required under Texas law is that the parties, either explicitly or by their conduct, manifest an intention to create the lawyer-client relationship. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). Furthermore, payment of a fee to the attorney is not required to give rise to the lawyer-client relationship. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

(2) Representatives of the Lawyer

The protection afforded to communications between the lawyer and client is extended to protect communications with "representatives" of the attorney. Tex. R. Evid. 503(b)(1)(A)–(B). A lawyer's representatives include those employed by the lawyer to assist in the rendition of professional legal services to the client and specifically include accountants who provide services that are reasonably necessary to the lawyer's rendition of professional legal services. Tex. R. Evid. 503(a)(4)(A)–(B). Communications with legal assistants, secretaries, and investigators also fall within the protection provided by the lawyer-client privilege. Tex. R. Evid. 503(a)(4)(A); *Bearden v. Boone*, 693 S.W.2d 25, 27–28 (Tex. App.—Amarillo 1985, orig. proceeding). One caveat, however, is that images of underlying facts (e.g., a private investigator's photos) are excepted from work product protection. Tex. R. Civ. P. 192.5(c)(4). It is also important to note that the attorney's "representative" must be hired by, or at the direction or request of, the attorney. Once the lawyer-client relationship exists and the "representative" is hired by or at the direction of the attorney, the client's direct payment to the representative is immaterial. *See, e.g.*, *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197–98 (Tex. 1993) (orig. proceeding).

(3) Representatives of the Client

Communications with a client's representative also fall within the protections provided by the lawyer-client privilege. Tex. R. Evid. 503(b)(1). An individual is a client's representative for purposes of the lawyer-client privilege if that person is authorized to obtain or act upon professional legal services on behalf of the client, or if that person, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client. Tex. R. Evid. 503(a)(2).

b) Confidential Communications Protected

Only confidential communications are protected from disclosure by the lawyer-client privilege. Tex. R. Evid. 503(b); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding); *see also People v. Miles*, 464 P.3d 611, 668 (Cal. 2020); *State v. Ogle*, 670 P.2d 222, 223 (Or. App. 1983) (holding that, because trial date is matter of public record, lawyer's telling client of trial date was not confidential). Whether a communication is confidential is largely determined by the client's intent. A communication is confidential if the client communicates it to the attorney or his representative and the client does not intend that the information be disclosed to third persons, other than to those in furtherance of the rendition of legal services to the client or to those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5); *Ates v. State*, 21 S.W.3d 384, 394 (Tex. App.—Tyler 2000, no pet.). A communication between attorney and client in the presence of a third party who is not the attorney's representative is not confidential and, therefore, is unprotected by the lawyer-client privilege. *Ledisco Fin. Servs., Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. App.—Texarkana 1976, no writ).

Practice Note: When a client wishes to discuss issues relevant to the representation of the client while a third party is present, the attorney should advise the client that the presence of the third party waives the lawyer-client privilege and that the third party's testimony regarding the contents of the discussion may be required or compelled.

(1) Lawyer-client Privilege Protects Entire Contents of Confidential Communication

If the requirements for the lawyer-client privilege are met,

the lawyer-client privilege will protect the contents of the complete communication. *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.—El Paso 2006, orig. proceeding). For example, once the lawyer-client privilege protects the disclosure of a particular statement within a document, the entire document is protected from disclosure. *In re Valero Energy Corp*., 973 S.W.2d 453, 457–58 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding).

(2) Confidential Information Protected from Eavesdroppers

Because the lawyer-client privilege is defined by the intent of the client, the privilege is not destroyed by an eavesdropper who overhears the confidential communications between attorney and client. Tex. R. Evid. 503(a)(5); *Ates*, 21 S.W.3d at 393–94; *but see Clark v. State*, 261 S.W.2d 339, 342–43 (Tex. Crim. App. 1953) (holding that, because client did not take precautions to avoid eavesdroppers, communication was properly admitted). Therefore, if a communication that was overheard by a third party was not intended to be heard by or disclosed to a third party, the lawyer-client privilege may remain intact. *See In re Small*, 346 S.W.3d 657, 662–63 (Tex. App.—El Paso 2009, orig. proceeding).

Practice Note: If documents or other evidence is intended to be confidential, those communications should be preserved and maintained as confidential; otherwise, any privilege that may have existed could be forfeited. *See Burnett v. State*, 642 S.W.2d 765, 777 (Tex. Crim. App. 1982) (en banc) (Dally, J., dissenting).

(3) Contracts for Representation and Attorney's Fees

Evidence relating to the retention or employment of an attorney and the attorney's fees paid is not protected by the lawyer-client privilege. *Duval Cty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634–35 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). One exception exists, however: evidence showing the retention or employment of an attorney is protected from disclosure if disclosure of the lawyer-client relationship would tend to implicate the client in the commission of a crime. *Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. App.—Eastland 1979, no writ).

c) Communications Made for the Purpose of Providing Legal Assistance

The third requirement for protection of a communication by the lawyer-client privilege is that it must have been in the context of providing legal services to the client. Specifically, Rule 503 provides protection for confidential communications made to facilitate "the rendition of professional legal services to the client." Tex. R. Evid. 503(a)(5), (b)(1). Although the scope of the lawyer-client privilege is broad, a material fact may not be concealed under the lawyer-client privilege merely because it is disclosed to an attorney. *Huie*, 922 S.W.2d at 923. The lawyer-client privilege will not apply to protect communications made if the attorney is not acting in his capacity as attorney. *In re Tex. Farmers Ins*., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding). For example, if an attorney acts as an accountant, the communications between the attorney and client in relation to the accounting services provided are not protected under the lawyer-client privilege. *Harlandale Indep. Sch. Dist.*, 25 S.W.3d at 332.

2. Asserting the Lawyer-client Privilege

a) Who May Assert the Lawyer-client Privilege?

The lawyer-client privilege belongs to the client. *In re XL Specialty Ins. Co.*, 373 S.W.3d at 49; *Chance v. Chance*, 911 S.W.2d 40, 63 (Tex. App.—Beaumont 1995, writ denied). The lawyer-client privilege may be claimed or invoked only by the client or the client's representative. Tex. R. Evid. 503(c). Specifically, Rule 503(c) allows "the client; the client's guardian or conservator; a deceased client's personal representative; or the successor, trustee, or similar representative of a corporation, association, or other organization" to assert the lawyer-client privilege on behalf of the client. *Id.* The client's attorney is presumed under Rule 503(c) to have the authority to invoke the attorney client privilege; however, the attorney may only do so on behalf of the client. *Id.* The attorney may not invoke the lawyer-client privilege on his own behalf. *Turner v. Montgomery*, 836 S.W.2d 848, 850 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The lawyer's representative also has the authority to claim the lawyer-client privilege on behalf of the client. *Bearden*, 693 S.W.2d at 28. In *Bearden*, the court of appeals held that a private investigator, as a representative of the attorney, had the authority to claim the lawyer-client privilege on behalf of the client and that the information he acquired through his investigation was protected from disclosure under the lawyer-client privilege. *Id.*

b) When Must the Privilege Be Asserted?

The lawyer-client privilege must be asserted at the time the response to the question requesting the privileged information is due.

c) Evidence Presented to Support the Assertion of Privilege

Evidence to support the assertion of the lawyer-client privilege may be required. For example, documents are not afforded the protections of the lawyer-client privilege without some evidence supporting the assertion of privilege. *Eckermann v. Williams*, 740 S.W.2d 23, 25 (Tex. App.—Austin 1987, orig. proceeding). The test for determining whether a communication is confidential looks to the nature of the communication, not the subject matter. *Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). A party makes a prima facie claim of privilege by pleading that a communication is confidential, supported by attorney affidavits and detailed privilege logs, and possibly submitting the documents for in-camera review. *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 591 (Tex. App.—Dallas 1994, orig. proceeding). The burden of proof then shifts to the opposing party to refute the claim. *Id.*

Practice Note: When the privileged documents themselves are the only evidence that the privilege exists, you must request that the court perform an in-camera review and produce the documents to the court for the court to make its determination. *See Tilton v. Moye*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding); *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding). The court of appeals, in an original proceeding, may perform an in-camera review of these documents to make that determination as well. *See, e.g.*, *In re Fairway Methanol LLC*, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

d) Duration of the Lawyer-client Privilege

The lawyer-client privilege continues even after the conclusion of the lawsuit or the employment of the attorney and will protect disclosure of confidential information for as long as the client asserts the privilege. *Bearden*, 693 S.W.2d at 28. The lawyer-client privilege even continues after the death of the client. Tex. R. Evid. 503(c)(3). The privilege may be claimed or waived by "the client; the client's guardian or conservator; a deceased client's personal representative; or the successor, trustee, or similar representative of a corporation, association, or other organization or entity--whether or not in existence." *Id.*

3. Exceptions to the Lawyer-client Privilege

Rule 503(d) of the Texas Rules of Evidence provides the exclusive list of exceptions to the lawyer-client privilege. This rule provides that no lawyer-client privilege exists in the following circumstances:

1. When the attorney's services were sought or obtained in order to enable crime or fraud.

2. When the communication is relevant to an issue between parties who assert claims through the same deceased client.

3. When a client sues a lawyer for breach of duty by the lawyer to the client.

4. When a lawyer acts as attesting witness to a document, no lawyer-client privilege exists as to communications relevant to an issue concerning the attested document.

5. In litigation where one attorney represents two or more clients, no lawyer-client privilege exists as to matters that are of mutual interest between or among the clients.

4. Lawyer-client Privilege Distinguished from Attorney Work-Product

Although the lawyer-client privilege and the attorney work-product privilege may, many times, protect the same material, it is important for the practitioner to distinguish one from the other so that each may be properly asserted. The lawyer-client privilege protects confidential client communications from disclosure. Tex. R. Evid. 503. The attorney-work-product privilege protects the material prepared and mental impressions developed in anticipation of litigation. Tex. R. Civ. P. 192.5; *see* Fed. R. Evid. 502(g)(2).

While the lawyer-client privilege belongs to and protects the client, the work-product protection belongs to and protects the attorney. *Pope v. State*, 207 S.W.3d 352, 257–58 (Tex. Crim. App. 2006). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). "The privilege continues indefinitely, beyond the litigation for which the materials were originally prepared." *In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007) (orig. proceeding).

The attorney work-product privilege acts as a limitation to the scope of discovery. Work product is defined in Rule 192.5(a) of the Texas Rules of Civil Procedure as "material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents." Tex. R. Civ. P. 192.5(a). "Core" work product, which consists of work product of an attorney or an attorney's representative containing the mental impressions, opinions, conclusions, or legal theories of the attorney or attorney's representative, is not discoverable. Tex. R. Civ. P. 192.5(b)(1). Other work product not qualifying as "core" work product is protected from discovery unless the party requesting the discovery shows substantial need for the discovery in the preparations of the case. Tex. R. Civ. P. 192.5(b)(2).

5. Ethical Duty of Attorneys not to Disclose Client Confidences

The ethical duty of the lawyer not to disclose confidences of the client should be distinguished from the lawyer-client privilege not to disclose confidential information. An attorney owes the client a professional duty not to disclose client "confidences" and "secrets." Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(b); *cf.* Model Rules of Prof'l Conduct R. 1.6. The ethical duty of the attorney under the Rules of Professional Conduct is much broader and prohibits the attorney from disclosing any information gained about the client without the client's consent, except under the specific circumstances provided in the rules.

B. Husband-Wife Privileges

In Texas, two privileges arising out of the marital relationship exist; many other states have similar husband-wife privileges. *See* Tex. R. Evid. 504; *see, e.g.*, Fla. Stat. Ann. § 90.504; Ky. R. Evid. 504; N.D. R. Evid. 504; Wis. Stat. Ann. § 905.05. First, a husband and wife have the privilege of refusing to disclose, and to prevent the disclosure of, confidential communications. Tex. R. Evid. 504(a). Second, spouses have the right to refuse to testify against each other in a criminal case. Tex. R. Evid. 504(b).

1. Confidential-Communications Privilege

Communications made privately between spouses during the marriage, which were not intended for disclosure to any third party, are protected from disclosure. Tex. R. Evid. 504(a). This spousal privilege belongs to the communicating spouse and may be asserted by that spouse or by the non-communicating spouse on behalf of the communicating spouse. Tex. R. Evid. 504(a)(3). The protection from disclosure of communications made during the marriage survives the divorce of the spouses or the death of the communicating spouse. Tex. R. Evid. 504(a)(2).

a) Communications Protected

The marital-communications privilege protects verbal and written communications. *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App.—Houston [1st Dist.] 1990, no writ). A spouse has no privilege to refuse to disclose the actions or conduct of the other spouse. *Id.* (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954)). Communications between spouses in front of third parties are not protected. *Bear v. State*, 612 S.W.2d 931, 932 (Tex. Crim. App. 1981). It should be noted that, in civil cases, the confidential-communications privilege permits a spouse to refuse to testify regarding the contents of a confidential communication made between husband and wife during the marriage; however, it may not be asserted by a spouse to avoid being called by the opposing party as a witness. Tex. R. Evid. 504; *see also Marshall v. Ryder Sys., Inc.*, 928 S.W.2d 190, 195 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("Only in criminal cases is there a broad, general privilege protecting a person from being a witness against his or her spouse.").

b) Exceptions to the Husband Wife Confidential Communications Privilege.

The exceptions to the husband-wife communications privilege are located in Rule 504(a)(4). Of particular relevance to the family law practitioner are the exceptions permitting disclosure of confidential marital communications in proceedings between spouses in civil cases and in proceedings in which a spouse is accused of committing a crime against the other spouse, any minor child, or a member of either spouse's household. Tex. R. Evid. 504(a)(4)(B), (C). Certainly, such exceptions substantially eliminate the husband-wife confidential communications privilege in family law matters, and in fact, noted practitioners have commented that the confidential communications privilege has no application in the area of family law. *See* Warren Cole, Sally H. Emerson, and Linda B. Thomas, "Evidence: Predicates,

Presumptions, and Privileges" p. S-33, Advanced Family Law Course 1996. Statements between spouses relating to the present dispute between them are an additional exception to the husband-wife confidential communications privilege. In *Earthman's Inc. v. Earthman*, the Houston First Court of Appeals held that the admission of evidence as to communications between spouses, made prior to the parties' divorce, was permissible to the extent that the communications related to the controversy that gave rise to the lawsuit between them. 526 S.W.2d 192, 206 (Tex. App.—Houston [1st Dist.] 1975, no writ).

2. Privilege not to Testify in Criminal Proceedings against Spouse

The spouse of the accused in a criminal proceeding has a right to refuse to testify as a witness for the state. Tex. R. Evid. 504(b)(1). The privilege belongs to the spouse of the accused only and may not be asserted by the accused to prevent the other spouse from acting as a witness. Tex. R. Evid. 504(b)(3). The spouse of the accused may not refuse to testify in proceedings in which the accused is charged with a crime against that spouse, against any minor, or against a member of either spouse's household. Tex. R. Evid. 504(b)(4)(A); *Huddleston v. State*, 997 S.W.2d 319, 320–21 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that the husband-wife privilege did not apply to prevent defendant's spouse from testifying in prosecution for sexual assault and kidnapping of a minor who was unrelated to the husband and the wife).

C. Communications to Members of the Clergy

1. Clergy Privilege is Broad in Scope

Every state has enacted some form of clergy privilege. *See* Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. 1015, 1020 n.21 (2017) (collecting statutes). Review your state's statute or rule to determine how broad the privilege is. The clergy privilege in Texas is quite broad in scope. Rule 505 provides no exceptions to the clergy privilege. Tex. R. Evid. 505. The privilege protects confidential communications made to a member of the clergy who is acting in his capacity as a "spiritual advisor." *Id.* Communications made to a member of the clergy acting in a capacity other than spiritual advisor, such as administrator, are not privileged. *Kos v. State*, 15 S.W.3d 633, 639 n.4 (Tex. App.—Dallas 2000, pet. ref'd). The privilege is not limited only to penitent communications, however. *Easley v. State*, 837 S.W.2d 854, 856 (Tex. App.—Austin 1992, no writ). If communications to a member of the clergy are made with a reasonable expectation of confidentiality, the privilege will apply, even if the statements were made in the presence of third parties. *Nicholson v. Wiitig*, 832 S.W.2d 681, 685 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding); *cf.* Cal. Evid. Code § 1032 (". . . in the presence of no third person so far as the penitent is aware . . . ."). Even the identity of one who has communicated with a member of the clergy is privileged. *Simpson v. Tennant*, 871 S.W.2d 301, 308–09 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The clergy privilege may be claimed by the person who communicated to the clergy, the communicant's guardian or conservator, or the clergy member on behalf of the communicant. Tex. R. Evid. 505(c).

2. Exception in Cases of Neglect or Abuse of Child

The Texas Rules of Evidence provide no exceptions to the clergy privilege, but Section 261.202 of the Texas Family Code states that privileged communications, except those between attorney and client, "may not be excluded" in a proceeding involving the abuse or neglect of a child. Tex. Fam. Code Ann. § 261.202; *Gonzalez v. State*, 45 S.W.3d 101, 107 (Tex. Crim. App. 2001). Additionally, as required by Section 261.101 of the Texas Family Code, members of the clergy have an affirmative duty to report any cause to believe that a child's welfare has been adversely affected by abuse or neglect. Tex. Fam. Code Ann. § 261.101; *Gonzalez*, 45 S.W.3d at 107 n.12.

Not every state, however, waives the privilege in cases of child abuse. Review your state's laws to determine whether the privilege remains in place. *See* Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. at 1073–74 n.288 (twenty states make clergy mandatory reporters), n.289 (seventeen states require anyone who suspects child abuse to report), n.290 (states that deny privilege), n.291 (states that allow privilege despite reporting requirements).

3. Waiver of Privilege in Custody Cases

In a suit for conservatorship, where the character of the conservators is necessarily at issue, a spouse who communicated confidential information to a member of the clergy waives the privilege by calling the clergy member as a character witness. Tex. R. Evid. 511(a)(2). Therefore, on cross-examination of the clergy member by the other spouse, confidential communications to the clergy member will not be protected from disclosure by the privilege. *Gonzalez*, 45 S.W.3d at 107.

D. Physician-Patient Privilege

In civil proceedings, unless an exception applies, confidential communications between a patient and physician, which are not intended to be disclosed to third persons who were not present or participating in the diagnosis and treatment, are privileged from disclosure. Tex. R. Evid. 509(a); *see also, e.g.*, Colo. Rev. Stat. Ann. § 13-19-107(d); Iowa Code Ann. § 622.10; Mich. Comp. Laws Ann. § 600.2157. The privilege serves to encourage full disclosure to facilitate the rendition of professional services by the physician and to prevent unnecessary disclosure of highly personal information. *Ex Parte Abell*, 613 S.W.2d 255, 262–63 (Tex. 1981). Texas courts, among others around the nation, have held that medical records also fall within the zone of privacy protected by the United States Constitution. *See, e.g.*, *In re Columbia Valley Reg'l Med. Ctr.*, 41 S.W.3d 797, 802–03 (Tex. App.—Corpus Christi 2001, orig. proceeding); *In re Xeller*, 6 S.W.3d 618, 625 (Tex. App.—Houston 1999, orig. proceeding). The physician-patient privilege does not exist under the Federal Rules of Evidence. *Perkins v. United States*, 877 F.Supp. 330, 332 (E.D. Tex. 1995); *see, generally*, Fed. R. Evid. 501. The physician-patient privilege is similar to the lawyer-client privilege to the extent that the determination of whether the communication is confidential is largely determined by the communicator's intent. Tex. R. Evid. 509(a)(3). The physician-patient privilege may be invoked by the patient, the patient's representative, or the patient's physician on behalf of the patient. Tex. R. Evid. 509(d). However, there are a number of exceptions to the physician-patient privilege, which are contained in Rule 509(e).

Practice Note: Read this privilege together with the hearsay exception of statements for the purpose of medical diagnosis or treatment. It is interesting to consider that the hearsay exception includes statements made to third parties in the hopes that they would assist with diagnosis or treatment, while the privilege does not.

1. Releases

One of the exceptions to the privilege, often relevant in family law proceedings, is the waiver or release of confidential information by the written consent of the patient or representative of the patient. Tex. R. Evid. 509(f).

The consent must be in writing and signed by the patient, or representative of the patient, and must be drafted to specify the information or records to be covered by the release, the purpose for the release, and the person to whom the information is to be released. Tex. R. Evid. 509(f)(1)–(2). There is no requirement that the release cover all the information or records in the physician's file. *See, generally*, Tex. R. Evid. 509. The release should be narrowly drawn to permit release of only the relevant information. The exceptions to the medical and mental health privileges apply when the pleadings sufficiently show (1) the records sought to be discovered are relevant to the condition in issue and (2) the condition is relied upon as part of a party's claim or defense. Tex R. Evid. 509(e)(4), 510(d)(5); *R.K. v. Ramirez*, 887 S.W.2d 836, 842–43 (Tex. 1994) (orig. proceeding).

2. Patient-Litigant Exception

The court in *R.K.* discusses the exception to the physician-patient privilege when the condition is part of a claim or defense: "The patient-litigant exception to the privileges applies when a party's condition relates in a significant way to a party's claim or defense." *R.K.*, 887 S.W.2d at 842–43 (citing Tex. R. Evid. 509(d)(4)); *see also, e.g.*, La. Code Evid. art. 510(B)(2)(d); Utah R. Evid 506(d)(1). Patient-litigant communications and patient records should not be subject to discovery if the patient's condition is simply an evidentiary, intermediary, or tangential issue of fact, rather than an "ultimate" or "central" issue for a claim or defense. *R.K.*, 887 S.W.2d at 842. "The scope of the exception should be tied in a meaningful way to the legal consequences of the claim or defense. This is accomplished . . . by requiring that the patient's condition, to be a 'part' of a claim or defense, must itself be a fact to which the substantive law assigns significance." *Id.* The court provided the example of alleging a testator to be incompetent, which would be an allegation of a mental "condition," and incompetence, if found, is a factual determination to which legal consequences attach, i.e. the testator's will is no longer valid. *Id.* at 842–43. "This approach is consistent with the language of the patient- litigant exception because a party cannot truly be said to 'rely' upon a patient's condition, as a legal matter, unless some consequence flows from the existence or non-existence of the condition." *Id.* at 843.

If the trial court, after reviewing documents submitted in camera, finds that this first step is satisfied, it must ensure that the production of documents, if any, is no broader than necessary by considering the competing interests at stake. *Id.* The exception only allows for the discovery of records "relevant to an issue of the . . . condition of a patient." *Id.* Therefore, even though a condition may be part of a claim or defense, patient records should only be

disclosed to the extent necessary for relevant evidence relating to the condition alleged. *Id.* Thus, courts that review claims of privilege and inspect records in camera should confirm that both the request for records and the records themselves are closely related in time and scope to the claims made to avoid unnecessary intrusions into private matters. *Id.* "Even when a document includes some information meeting this standard, any information not meeting this standard remains privileged and must be redacted or otherwise protected." *Id.*

This approach has several advantages: most importantly, some protection of a patient's privacy interest will remain intact. *Id.* Access to the medical and mental health information will be disclosed only if the patient's condition itself is a fact issue with legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party. *Id.*

"To summarize, the exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Even then, when requested, the trial court must perform an in-camera inspection of the documents produced to assure that the proper balancing of interests . . . occurs before production is ordered." *Id.*

3. HIPAA

The court in *Collins* discusses the impact of federal HIPAA legislation on the use of medical records at trial: "Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. The development of national standards for electronic medical records management was central to the goal of simplification. Envisioning increasing privacy concerns associated with the move toward electronic record-keeping, Congress simultaneously authorized the secretary of the United States Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical records. The privacy rules HHS enacted strike a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. The privacy rules prohibit the disclosure of protected health information except in specified circumstances. A person who discloses protected health information in violation of the privacy rule is subject to a fine of up to $50,000, and imprisonment of no more than a year, or both. Health information means any information, whether oral or recorded in any form or medium. With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules. A requirement is contrary if it would be impossible for a covered entity to comply with both the state law requirement and the HIPAA privacy rules, or if the requirement would undermine HIPAA's purposes.

"While the rules strongly favor the protection of individual health information, they permit disclosure of health information in a number of circumstances. In a judicial proceeding, protected information may be disclosed in response to a court order. It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. A health care provider receives satisfactory assurances when the requestor provides a written statement and documentation demonstrating that the requestor has made a good faith attempt to notify the subject of the request, and the subject has been given an opportunity to object. Alternatively, the requestor may provide satisfactory assurances that reasonable efforts have been made to obtain a qualified protective order limiting the use of the information to the legal proceeding and providing for its return or destruction. Finally, health care information may be disclosed if the patient has executed a valid written authorization. Any disclosure the health care provider makes in reliance on a written authorization must be consistent with its terms." *In re Collins*, 286 S.W.3d 911, 917–18 (Tex. 2009) (orig. proceeding) (internal citations and quotations omitted).

HIPAA does not provide for a private right of action. Any violations may be reported to HHS, which is the only party authorized to investigate and penalize violations.

E. Privilege Relating to Mental-Health Information

Any communication or records between a patient and a professional relating to the identity, diagnosis, evaluation, or treatment of a patient's mental and emotional condition or disorder is privileged and exempt from disclosure in civil proceedings. Tex. R. Evid. 510(a)–(b); *see also, e.g.*, Ga. Code Ann. § 24-5-501(a)(5), (6); 740 Ill. Comp. Stat. Ann. § 110/3; 50 Pa. Stat. Ann. § 7111. The purpose behind such a rule is to encourage "the full communication necessary for effective treatment." *R.K.*, 887 S.W.2d at 840. The Supreme Court of the United

States held that the mental health privilege is necessary in order to ensure effective psychotherapy, which "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

1. SAPCR

The comment to the current Rule 510 of the Texas Rules of Evidence points out that the omission of the specific exception to the mental-health privilege from the rule does not eliminate the application of the mental-health privilege in a SAPCR case. Tex. R. Evid. 510 cmt. to 1998 change. Rather, the comment notes that the applicability of the mental-health privilege is determined under Rule 510(d)(5), which provides an exception to the privilege when a party relies upon the condition of the patient's mental health as part of the party's claim or defense, and under the requirements set forth by the Texas Supreme Court in *R.K. v. Ramirez*. *Id.*; *see R.K.*, 887 S.W.2d at 842–43. In *R.K.*, the Supreme Court of Texas held that mental-health information of a party to a suit affecting the parent-child relationship is not protected by privilege if the fact finder must make a factual determination concerning the condition itself. *R.K.*, 887 S.W.2d at 843; *cf.* Fla. Stat. Ann. § 90.503(4)(c); 740 Ill. Comp. Stat. Ann. § 110/10; Utah R. Evid. 506(d)(1)(A). The court explained, however, that the exception to the mental-health privilege is not without limits and held that, in applying the exception, the court must balance the need for the information with the privacy interests protected by the privilege. *R.K.*, 887 S.W.2d at 843. A more recent case, *Garza*, has applied *R.K.* as follows: "Generally, the diagnosis of a patient by a physician and the communications between a patient and physician are privileged. Likewise, with regard to a person's mental health, the diagnosis of the patient and communications between the patient and a mental-health professional are privileged. However, these privileges are not absolute. An exception to both privileges applies to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." *Garza v. Garza*, 217 S.W.3d 538, 554–55 (Tex. App.—San Antonio 2006, no pet.). In *Garza*, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her as sole managing conservator was in her children's best interests. *Id.* at 555. Both parties' medical and mental conditions were relevant to the determination of which party should be named as the conservator. *Id.* No abuse of discretion occurred when the trial court allowed that information into evidence, especially where the trial court did not allow all of mother's medical and mental-health records in evidence, but instead took care to exclude references that predated the marriage. *Id.*

2. Court-Ordered Evaluations

Under Rule 510(d)(4), communications regarding a patient's mental or emotional health to a mental-health professional appointed by the court to perform an examination are not privileged as long as the patient had been previously informed that the communications would not be privileged. *Subia v. Tex. Dep't of Human Servs.*, 750 S.W.2d 827, 830 (Tex. App.—El Paso 1988, no writ), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), (trial court erred in admitting testimony of court-appointed psychologist when neither the court nor the psychologist informed the mother that the communications between the mother and the psychologist would not be privileged).

3. Disclosure of Child's Mental-Health Records to Parent

Although the Supreme Court of Texas did not directly address the issue of the assertion of the mental-health privilege in *Abrams v. Jones*, that case deserves discussion due to its support for protecting the mental-health records of a minor from disclosure. 35 S.W.3d 620 (Tex. 2000). In *Abrams*, when the father-joint-managing conservator was denied access to the notes taken by the daughter's psychologist during therapy sessions, he filed suit against the psychologist seeking to compel the release of the psychologist's notes. *Id.* at 623. The father, who had been granted a right of access to the psychological records under the parties divorce decree in accordance with Section 153.073 of the Texas Family Code, alleged that such a right granted him a greater right of access to mental health records than parents generally have under Chapter 611 of the Texas Health and Safety Code. *Id.* at 624. Specifically, the father argued that the right of access to mental health records under Section 153.073(a)(3), granted to him in the parties' divorce decree, permitted him access to all the child's psychological records at all times. *Id.* The Supreme Court of Texas held that the right of access to psychological records of the child under Section 153.073(a)(3) provides no greater right of access than is granted to parents who are not divorced and that Section 153.073 merely ensures that the right of access of divorced parents appointed as managing conservators is the same as that of non-divorced parents. *Id.*

Accordingly, the court held that the determination of whether the records should be ordered to be released is governed by Chapter 611 of the Texas Health and Safety Code. *Id.* The court held that the applicable sections of Chapter 611 of the Texas Health and Safety Code do not provide parents unrestricted access to mental health records of their children. *Id.* at 626. The court recognized that the purpose behind Chapter 611 is to "closely guard a patient's communications with a mental-health professional." *Id.* (quoting *Thapar v. Zezulka*, 994 S.W.2d 635, 638 (Tex. 1999)). Furthermore, although many times it is necessary for a parent to have access to the child's records, unrestrained access to all the child's mental-health records would act as an obstacle to full disclosure by the patient, thereby preventing the goals of therapy from being met. *Id.* In its analysis, the court discussed the protections afforded to both the child and the parent under Chapter 611 and specifically addressed the fact that the rights of the parent are protected by Chapter 611 of the Texas Health and Safety Code by providing recourse to a parent who is denied access to his child's mental health records. *Id.*; Tex. Health & Safety Code Ann. §§ 611.0045(e), 611.005(a). Obviously, this holding may have a significant impact upon the family law practitioner's ability to obtain access to the psychological records of children the subject of a lawsuit. Although your state may not have similar statutes in place regarding mental health records or a parent's right to a child's mental health records, the *Abrams* case provides a useful overview of the importance of protecting mental-health records and balancing a parent's right to access, which you can use as a sword or a shield in your particular situation.

4. Alcohol and Drug Rehabilitation Records

Federal regulations provide that records of alcohol and drug rehabilitation treatment are confidential. *See* 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records; *see also In re K.C.P.*, 142 S.W.3d 574, 582 (Tex. App.—Texarkana 2004, no pet.). The regulations, however, apply to information held by a treatment center, so discovery directed at a patient may still be effective. Section 2.64 of Title 42 of the Code of Federal Regulations requires confidentiality of records of facilities that are "federally assisted," meaning that they are "being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States." 42 C.F.R. §§ 2.12(a)(ii), (b)(2), 2.64(a). Applicable records may be disclosed if requested with an opportunity for the patient to respond and after a hearing and determination that (1) other ways of obtaining the information are not available or would not be effective, and (2) the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the treatment services. 42 C.F.R. § 2.64(a), (b), (c), (d). The order disclosing the records must provide for their protection from unnecessary disclosure. 42 C.F.R. § 2.64(e). Furthermore, Section 2.63 authorizes disclosure of patient statements if it is "necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse or neglect." 42 C.F.R. § 2.63(a)(1).

F. Privilege against Self Incrimination in Civil Cases

The *Speer* case gives an excellent summary of the application of the privilege against self-incrimination in civil cases. *In re Speer*, 965 S.W.2d 41, 45–47 (Tex. App.—Fort Worth 1998, orig. proceeding).

1. The Rule

"Both the United States Constitution and the Texas Constitution guarantee an accused the right not to be compelled to testify or give evidence against himself. A party does not lose this fundamental constitutional right in a civil suit. Thus, the privilege against self-incrimination may be asserted in civil cases wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 45 (internal citations and quotations omitted). Because the United States Constitution protects a witness, the witness should answer each question accordingly: "On the advice of counsel, I decline to answer the question pursuant to the Fifth Amendment of the United States Constitution." If your state's constitution contains a similar privilege against self-incrimination, then your client should also include that provision as part of the answer. A party or witness retains his privilege against self-incrimination and has the right to assert the privilege to avoid civil discovery if he reasonably fears the answers would tend to incriminate him. *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995); *Ex parte Butler*, 522 S.W.2d 196, 197–98 (Tex. 1975). However, the privilege covers only statements or information that may lead to criminal prosecution; information which may lead to civil liability is not protected. *Butler*, 522 S.W.2d at 198. Non-compelled testimonial communications are not protected by the privilege. *Wielgosz v. Millard*, 679 S.W.2d 163, 166–67 (Tex. App.—Houston [14th Dist.] 1984, no writ). One invoking the privilege need not show that the disclosure of the information sought to be protected alone will support conviction. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Rather, if the potentially-

incriminating information or documents would provide a link to the incrimination of the one claiming the privilege, the Fifth Amendment privilege will protect the information from disclosure. *Id.*; *see also People v. Houar*, 850 N.E.2d 327, 333–34 (Ill. App. 2006); *DeSiena v. DeSiena*, 91 N.Y.S.3d 175, 177 (N.Y. Sup. 2018); *U.S. Steel & Carnegie Pension Fund v. Decatur*, 528 A.2d 165, 166–67 (Penn. 1987). Further, there is no requirement that any criminal charges be pending if the threat or hazard of criminal prosecution is "real and appreciable" if the potentially incriminating evidence were disclosed. *State v. Boyd*, 2 S.W.3d 752, 755 (Tex. App.—Houston [14th Dist.] 1999), *rev'd on other grounds*, 38 S.W.3d 155 (Tex. Crim. App. 2001); *accord United States v. Doe*, 465 U.S. 605, 614 n.13 (1984); *Hoffman*, 341 U.S. at 486. If the individual asserting the privilege has been granted immunity from, acquitted of, or pardoned of the criminal conduct at issue, the state may compel testimony in a civil proceeding. *In re Verbois*, 10 S.W.3d 825, 829 (Tex. App.—Waco 2000, orig. proceeding). If the party continues to assert the privilege, however, that silence does not preclude an adverse inference, and ruling based on that inference, in a civil proceeding. *Id.* But it is important to note that if the acquittal, immunity, or pardon granted is not complete, or if possible liability exists for a related crime, the privilege will still apply. *Kastigar v. United States*, 406 U.S. 441, 448–49 (1972). The privilege against self-incrimination provides the right of testimonial silence. U.S. Const. amend. V. In a civil case, however, it does not allow a witness to refuse to be called as a witness. *Butler*, 522 S.W.2d at 197–98.

2. The Test

In a civil suit, the witness's decision to invoke the privilege against self-incrimination is not absolute. Instead, the trial court is entitled to determine whether assertion of the privilege appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. *Id.* at 198. The court's inquiry is necessarily limited, though, because the witness need only show that a response is likely to be hazardous to him. *Id.* The witness cannot be required to disclose the very information that the privilege protects. *Id.* Before the trial court may compel the witness to answer, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate." *Id.* (quoting *Hoffman*, 341 U.S. at 487).

Thus, the court must study each question for which the privilege is claimed and forecast whether an answer to the question could tend to incriminate the witness in a crime. *Warford v. Beard*, 653 S.W.2d 908, 911 (Tex. App.—Amarillo 1983, no writ). Some cases have apparent ramifications from answering; others, though, are not so apparent. *Id.* The latter situation presents a difficult problem because the witness must reveal enough to demonstrate danger without revealing the very information he or she seeks to conceal. *Id.* After the witness has given the reasons for refusing to answer, the judge must then evaluate those reasons by the high standard of review stated previously. *Id.* It is the trial court's duty to consider the witness's evidence and argument on each individual question and determine whether the privilege against self-incrimination is meritorious. *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 1988, no writ).

3. Assertion and Waiver

The privilege is applied differently in civil and criminal cases. When a criminal defendant voluntarily testifies on his own behalf, he is subject to the same rules of cross-examination as any other witness. In that situation, if a criminal defendant voluntarily states a part of the testimony, he waives his right against self-incrimination and cannot afterwards assert the privilege to suppress other testimony, even if that testimony would incriminate him.

The same reasoning does not apply in civil cases. Because of the difference between the civil and criminal context, the Supreme Court of the United States allows juries in civil cases to make negative inferences based upon the assertion of the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). And as previously discussed, the civil witness, unlike the defendant in a criminal case, is not the exclusive arbiter of his right to exercise the privilege. *Warford*, 653 S.W.2d at 911. Furthermore, the assertion of the privilege against self-incrimination must be raised in response to each specific inquiry or it is waived. *Tex. Dep't of Pub. Safety v. Sanchez*, 82 S.W.3d 506, 513 (Tex. App.—San Antonio 2002, no pet.). Each assertion of the privilege rests on its own circumstances and blanket assertions of the privilege are not allowed. *Id.* Thus, a civil defendant can be forced to choose between asserting his privilege against self-incrimination or losing his civil suit. *See Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, orig. proceeding).

4. Pretrial Privilege

Because the privilege against self-incrimination must be asserted selectively in civil litigation, it follows that selective assertion of the privilege does not result in

waiver. *Id.* For example, filing a verified denial does not constitute waiver of a civil defendant's right to subsequently assert the privilege against self-incrimination in response to interrogatories. *Burton*, 749 S.W.2d at 508. Answering all deposition questions but one does not constitute waiver of a civil defendant's right to assert the privilege. *Butler*, 522 S.W.2d at 198–99. Likewise, answering some interrogatories does not result in waiver of the right to assert the privilege against self-incrimination in response to other interrogatories. *Speer*, 965 S.W.2d at 46. The privilege must be asserted prior to or at the time the response is due per the rules of discovery. *See, e.g.*, Tex. R. Civ. P. 193.3, 196.2, 197.2. Denying requests for admissions also does not result in waiver of the privilege against self- incrimination. *See, e.g.*, Tex. R. Civ. P. 198.2. Some states do not allow a party to assert the privilege in refusing to answer requests for admissions. *See, e.g.*, *Katin v. City of Lubbock*, 655 S.W.2d 360, 363 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (citing to previous version of current TRCP 198.3). While others allow the factfinder to make a negative inference on the refusal to answer the admissions. *See, e.g.*, *Wilson v. Misko*, 508 N.W.2d 238, 253 (Neb. 1993).

5. Document Production

The privilege against self-incrimination also applies to documentary evidence: "The seizure of a man's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself." *Warford*, 653 S.W.2d at 908 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)) (internal quotations omitted). However, in order to be privileged, the incriminating documents must have a strong personal connection to the witness, i.e., documents "which he himself wrote or which were written under his immediate supervision." *Id.* at 912. It follows then that documents that belong to or were prepared by others are not protected, even if they contain incriminating matters. *Id.* The court may order the disputed documents to be produced in camera for an inspection. *Speer*, 965 S.W.2d at 47.

G. Trade Secret Privilege

The court in *Cooper Tire* discusses the trade-secret privilege in depth: "A trade secret is any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it. Rule 507 of the Texas Rules of Evidence provides for the protection of trade secrets: A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

"The trade secret privilege seeks to accommodate two competing interests. First, it recognizes that trade secrets are an important property interest, worthy of protection. Second, it recognizes the importance placed on fair adjudication of lawsuits. Rule 507 accommodates both interests by requiring a party to disclose a trade secret only if necessary to prevent fraud or injustice. Disclosure is required only if necessary for a fair adjudication of the requesting party's claims or defenses.

"The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. If the resisting party meets its burden, the burden shifts to the party seeking the trade secret discovery to establish that the information is necessary for a fair adjudication of its claim. It is an abuse of discretion for the trial court to order production once trade secret status is proven if the party seeking production has not shown necessity for the requested materials.

"To determine whether a trade secret exists, the following six factors are weighed in the context of the surrounding circumstances: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

"The party claiming a trade secret is not required to satisfy all six factors because trade secrets do not fit neatly into each factor every time.

"The Texas Supreme Court has not stated conclusively what would or would not be considered necessary for a fair adjudication; instead, the application depends on the circumstances presented. The degree to which information is necessary depends on the nature of the information and the context of the case. However, . . . the test cannot be satisfied merely by general assertions of

unfairness. Just as a party who claims the trade secret privilege cannot do so generally but must provide detailed information in support of the claim, so a party seeking such information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 914–15 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (internal citations and quotations omitted); *cf. Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal. Rptr. 4th 1384, 1390–93 (Cal. App. 1992); *Bright House Networks, LLC v. Cassidy*, 129 So. 501, 505–06 (Fla. App. 2014); *Pincheira v. Allstate Ins. Co.*, 164 P.3d 982, 991 (N.M. App. 2007).

H. Waiver of Privileges

Once a privilege is waived, it is waived "for all times and all purposes." *Lucas v. Wright*, 370 S.W.2d 924, 927 (Tex. App.—Beaumont 1963, no writ). If confidential information is disclosed inadvertently, the party asserting the privilege has the burden of proving that no waiver occurred. *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985) (orig. proceeding).

1. Disclosure to Third Parties

An individual seeking to avoid disclosure based upon the assertion of a privilege waives such privilege if he or she voluntarily discloses or consents to the disclosure of the privileged information. Tex. R. Evid. 511(a)(1); *see also, e.g.*, Wis. Stat. Ann. § 905.11; *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (en banc).

2. Waiver by Calling Witness for Character Testimony

When a party to a suit calls as a character witness a person to whom privileged communications have been made, any privileges arising from the communications relevant to the character of the party are waived. Tex. R. Evid. 511(a)(2); *see also Beckette v. State*, 355 A.2d 515, 521 (Md. Ct. Spec. App. 1976). For example, the communications to clergy privilege is waived if the party who made confidential communications to a member of the clergy calls the clergy-member as a character witness at trial. *Gonzalez*, 45 S.W.3d at 107.

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

One does not waive his or her claim of privilege by providing disclosure of information or documents under order of the court compelling such disclosure. Tex. R. Evid. 512(a). Additionally, a privilege is not waived by disclosure if the disclosure was made without opportunity to claim the privilege. Tex. R. Evid. 512(b).

4. Offensive Use of Privilege Waives Privilege

A party seeking affirmative relief from the court cannot use a privilege to conceal information that forms the basis of that party's request for relief. *Denton*, 897 S.W.2d at 761; *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107–08 (Tex. 1985) (orig. proceeding). In *Ginsberg*, the Texas Supreme Court held that an offensive use of privilege is impermissible and explained that when a party asserts a claim for affirmative relief, that party cannot restrict access, by the assertion of privilege, to information that would otherwise be pertinent and relevant to that party's ability to maintain the cause of action. *Ginsberg*, 686 S.W.2d at 108. The Court further reasoned that although a party may have an absolute right to assert a privilege, that party may be forced to choose between maintaining the assertion of privilege or maintaining his cause of action. *Id.* at 107.

VII. FRE Article VI. Witnesses

A. Competency

Generally, every person is competent to testify, unless the rules provide otherwise. *See, e.g.*, Fed. R. Evid. 601; Del. R. Evid. 601; Tex. R. Evid. 601 (also defining who is incompetent). This includes children that possess sufficient intellect to truthfully relate transactions with respect to which they are questioned. *See, e.g.*, Tex. R. Evid. 601(a)(2); *State v. Buesco*, 137 A.3d 516, 527 (N.J. 2016); *Tamblyn v. State*, 465 P.3d 440, 450 (Wyo. 2020)

Practice Note: Rule 601 creates a presumption of competence, so if a child or other person who may not have sufficient intellect testifies, it is the burden of the party opposing that witness to show the court that the witness is incompetent, and a finding that a person has sufficient intellect is reviewed for an abuse of discretion. *Hollinger v. State*, 911 S.W.2d 35, 38–39 (Tex. App.—Tyler 1995, pet. ref'd).

B. Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Tex. R. Evid. 602.

If the witness is not testifying as an expert, discussed further below in the section on experts, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Tex. R. Evid. 701.

C. Mode and Order of Interrogation/Presentation

The court has wide discretion in controlling the ebb and flow of questioning and is charged with exercising reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. Tex. R. Evid. 611(a).

D. Leading Questions

Leading questions are ordinarily permissible on cross and, to the extent necessary to develop the witness's testimony, also on direct examination. Tex. R. Evid. 611(c). When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. *Id.* This Rule has not changed the long-standing proposition that the trial court has discretion to allow leading questions and that no abuse of discretion exists unless the objecting party can show that he or she was unduly prejudiced by the questions. *Newsome v. State*, 829 S.W.2d 260, 270 (Tex. App.—Dallas 1992, no pet.).

The exceptions to the rule against leading include:

1. When the questions relate to acts not controverted, "or where the point sought to be established is already proven and in these questions the established facts may be recapitulated";

2. When the witness is hostile and unwilling to give the evidence;

3. To refresh the witness's memory when the purpose of justice requires it;

4. To arrive at facts when modesty or delicacy prevents a full answer to a general interrogatory;

5. When the witness is confused or agitated;

6. When questioning an individual who is slow in understanding, has a limited vocabulary, or is ignorant;

7. When the witness is a child; and

8. When the witness has given an ambiguous answer, and a leading question may clarify the attested to facts or circumstances. *Carter v. State*, 127 S.W. 215, 217 (Tex. Crim. App. 1910); *accord Holbert v. State*, 457 S.W.2d 286, 289 (Tex. Crim. App. 1970) ("It is within the sound discretion of the trial court to permit the counsel for the state on direct examination to ask leading questions to a hostile witness or to refresh a witness's memory."); *Davis v. State*, 272 S.W. 480, 482 (Tex. Crim. App. 1925) (explaining that leading questions admissible "where persons are hard of hearing, or deaf, or illiterate or stupid; they are also admissible where the witness' vocabulary is limited"); *Bishop v. State*, 160 S.W. 705, 706 (Tex. Crim. App. 1913) ("witness was unlettered and unable to understand and was a reluctant witness"); *Clark v. State*, 952 S.W.2d 882, 886 (Tex. App.—Beaumont 1997, no pet.) (leading questions permitted for "troubled young girl" who had been in state custody for over two years); *Trevino v. State*, 783 S.W.2d 731, 733 (Tex. App.—San Antonio 1989, no pet.) (leading questions allowed where victim was fifteen at the time of trial, attended special education classes, had difficulty communicating in English, and had difficulties with memory recall).

Under the Federal Rules of Evidence advisory committee notes, leading questions were broadened to include not only adverse parties but those associated with them, as well as hostile witnesses. Fed. R. Evid. 611(c), advisory committee notes. Witnesses identified with an adverse party include:

1. an employee, *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1478 (11th Cir. 1984). (Leading questions should have been allowed because they were directed at a nurse who was an employee of the defendants/doctors.);

2. a past employee, *Stahl v. Sun Microsystems, Inc.*, 775 F.Supp. 1397 (D. Colo. 1991);

3. a paramour, *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir. 1984);

4. co-workers, *Ellis v. City of Chicago*, 667 F.2d 606 (7th Cir. 1981);

5. members of the same association, *N.L.R.B. v. Sw. Colo. Contractors Ass'n*, 379 F.2d 360 (10th Cir. 1967);

6. close friends, *United States v. Brown*, 603 F.2d 1022 (1st Cir. 1979); and

7. witnesses whose testimony changes during trial, *United States v. DeBose*, 410 F.2d 1273 (6th Cir. 1969). Texas follows this same rule. *Bryant v. State*, 282 S.W.3d 156, 169 (Tex. App.—Texarkana 2009, pet. ref'd) ("If the trial court faces a situation in which (1) a party has called a witness to testify, (2) that witness's testimony has surprised the sponsoring party, and (3) that testimony is otherwise injurious to the sponsoring party's cause, then the trial court has the discretion to permit the sponsoring party to treat the witness as hostile.").

E. Writing Used to Refresh Memory

If a witness's memory fails, a writing may be used to refresh the witness's memory. Tex. R. Evid. 612. There is often confusion about the difference between a recorded recollection under the hearsay exception of Rule 803(5) and a writing used to refresh memory under Rule 612. The court in *Welch* discusses the distinction: "A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing a memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded." *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979); *accord Aquamarine Assocs. v. Burton Shipyard, Inc.*, 659 S.W.2d 820, 822 (Tex. 1983) (Robertson, J., dissenting). "Where the memorandum, statement or writing is used to refresh the present recollection of the witness and it does, then the memorandum does not become part of the evidence, for *it is not the paper that is evidence*, but the recollection of the witness." *Wood v. State*, 511 S.W.2d 37, 43 (Tex. Crim. App. 1974) (emphasis added); *accord Aquamarine Assocs.*, 659 S.W.2d at 822.

However, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions that relate to the testimony of the witness. Tex. R. Evid. 612(b).

Practice Note: Use of an otherwise privileged writing to refresh a party's memory, while testifying, will constitute a waiver of that privilege. *City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.—Dallas 1986, orig. proceeding). Note, however, that in a civil case, when a witness reviews material before testifying, the trial court has the discretion to decide whether to grant the adverse party the "certain options" stated in subsection (b) "if . . . justice requires" it. Tex. R. Evid. 612.

F. The Rule - Exclusion of Witnesses from the Courtroom

"The Rule" refers to Federal Rule of Evidence 615 (or your state's equivalent); some rules of civil procedure also include this rule. *See, e.g.* Tex. R. Civ. P. 267(a). The *Drilex* case provides a discussion of the Rule: "Sequestration minimizes witnesses' tailoring their testimony in response to that of other witnesses and prevents collusion among witnesses testifying for the same side. The expediency of sequestration as a mechanism for preventing and detecting fabrication has been recognized for centuries. English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law. Today, most jurisdictions have expressly provided for witness sequestration by statute or rule.

"In Texas, sequestration in civil litigation is governed by Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267. These rules provide that, at the request of any party, the witnesses on both sides shall be removed from the courtroom to some place where they cannot hear the testimony delivered by any other witness in the cause. Certain classes of prospective witnesses, however, are exempt from exclusion from the courtroom, including: (1) a party who is a natural person or his or her spouse; (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of the cause.

"When the Rule is invoked, all parties should request the court to exempt any prospective witnesses whose presence is essential to the presentation of the cause. The burden rests with the party seeking to exempt an expert witness from the Rule's exclusion requirement to establish that the witness's presence is essential. Witnesses found to be exempt by the trial court are not placed under the Rule.

"Once the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the

courtroom. Before being excluded, these witnesses must be sworn and admonished that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Thus, witnesses under the Rule generally may not discuss the case with anyone other than the attorneys in the case.

"Witnesses exempt from exclusion under [the Rule] need not be sworn or admonished. . . . A violation of the Rule occurs when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony. When the Rule is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt." *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 116–17 (Tex. 1999) (internal citations, quotations, and footnotes omitted).

G. Impeachment

Rule 607 permits the impeachment of any witness, including by the party calling the witness. Tex. R. Evid. 607. Prior inconsistent statements can impeach a witness, but some states hold that that evidence may not be considered for probative or substantive value. *Compare Willover v. State*, 70 S.W.3d 841, 846 n.8 (Tex. Crim. App. 2002) (explaining that prior inconsistent statements are hearsay and allowed for impeachment purposes only, unless an exception to the hearsay rule applies), *with State v. Copeland*, 300 S.E.2d 63, 69 (S.C. 1982) (relying on *Gibbons v. State*, 286 S.E.2d 717, 721 (Ga. 1982), and explaining that prior statements are closer in time to event and, thus, more reliable). Prior inconsistent statements offered solely to impeach the witness's credibility, however, would not constitute hearsay because they are not offered for the truth of the matter asserted. *Del Carmen Hernandez v. State*, 273 S.W.3d 685, 688 (Tex. Crim. App. 2008).

The court in *Michael* gives an excellent summary of the means of impeachment: "There are five major forms of impeachment: two are specific, and three are nonspecific. The two specific forms of impeachment are impeachment by prior inconsistent statements . . . and impeachment by another witness. The three non-specific forms of impeachment are impeachment through bias or motive or interest, impeachment by highlighting testimonial defects, and impeachment by general credibility or lack of truthfulness. Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truthteller, but she is wrong about X), while non-specific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X)." *Michael v. State*, 235 S.W.3d 723, 725–26 (Tex. Crim. App. 2007).

1. Character for Truthfulness

Character evidence is raised under Rules 404–406, as explained above in the section on relevance. Similar rules also exist under Article VI that deal with impeachment.

a) Rehabilitation by Character Evidence

The court in *Michael* discusses when impeachment by a prior inconsistent statement permits rehabilitative evidence of character for truthfulness: "Impeaching a witness with a prior inconsistent statement is not necessarily an attack on credibility that would allow rehabilitative evidence of character for truthfulness under Rule of Evidence 608(a). Although rehabilitation may be permitted under 608(a), it is not automatic. . . .

"At the outset, every witness is assumed to have a truthful character. If that character is attacked, Rule 608(a) allows the presentation of evidence of that witness's good character. . . . When a witness's credibility has been attacked . . ., the sponsoring party may rehabilitate the witness only in direct response to the attack. The wall attacked at one point may not be fortified at another and distinct point. Generally, a witness's character for truthfulness may be rehabilitated with good character witnesses only when the witness's general character for truthfulness has been attacked.

"Impeachment by a prior inconsistent statement . . . is normally just an attack on the witness's accuracy, not his character for truthfulness. As Wigmore explained: The exposure of an error of a witness on one material point by his own self-contradictory statements is a recognized mode of impeachment. It serves as a basis for further inference that he is capable of having made errors on other points. This possibility of other errors, however, is not attributable to any specific defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character. Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause.

"There are circumstances, however, where the cross-examiner's intent and method clearly demonstrate that he is not merely attacking the conflict in the witness's testimony between one or more specific facts, but mounting a wholesale attack on the general credibility of the witness. If the inconsistent statement is used to show that the witness is of dishonest character, then it follows that the opposing party should be allowed to rehabilitate this witness through testimony explaining that witness's character for truthfulness. Alternatively, if this testimony is used to show some other defect, then such evidence should not be allowed. . . .

"Prior to the adoption of the Texas Rules of Evidence, case law held that impeachment with prior inconsistent statements was an attack on credibility, allowing character evidence to rehabilitate a witness. In *O'Bryan v. State*, the defendant impeached a State's witness's testimony with his prior sworn testimony concerning dates, times, and descriptions of the defendant's clothing. In rebuttal the State presented evidence of the witness's reputation for truth and veracity. The Court likened impeachment by self-contradiction to an attack on a witness's 'veracity character,' and held that the testimony was permissible. The Court did not explain, however, why this form of impeachment necessarily impugned a witness's character for truthfulness.

"The Federal Rules of Evidence modified the common-law position held by some states, including Texas, that allowed rehabilitation evidence of truthful character when the witness was impeached by self-contradiction. Although the text of Federal Rule 608(a) does not make an explicit delineation between impeachment by self-contradiction and other forms of impeachment, the advisory committee notes state: Whether evidence in the form of contradiction is an attack upon the character of a witness must depend in part upon the circumstances. Texas Rule 608(a) is identical to Federal Rule 608(a). . . .

"Some courts had held that rehabilitation should be permitted when the witness is subject to a slashing cross-examination. [However,] the question should not be whether the cross-examination is slashing but whether the overall tone and tenor of the cross-examination implied that the witness is a liar.

"It may be quite obvious that a witness's character for truthfulness has been attacked directly, as by a question such as, 'Were you lying then or are you lying now?' or another witness's testimony that the witness is a liar or is untruthful. When a party uses prior inconsistent statements to impeach someone, the cross-examiner's intent may not be as clear. . . . [T]here are several reasons why one's statements may be inconsistent, and most of them do not imply dishonest character.

"[T]he question . . . is whether a reasonable juror would believe that a witness's character for truthfulness has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements)." *Michael*, 235 S.W.3d at 725, 726–28.

b) Impeachment by Evidence of a Criminal Conviction

A witness's character for truthfulness may also be attacked by introducing evidence of a conviction of a felony or crime of moral turpitude, if the probative value outweighs the prejudicial effect to a party, and it is elicited from the witness or established by a public record. Tex. R. Evid. 609(a); *see Smith v. State*, 439 S.W.3d 451, 457–58 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Crimes of moral turpitude involve a grave infringement of the moral sentiment of the community or show a moral indifference to the opinion of the good and respectable members of the community.") (internal citations and quotations omitted), *abrogated on other grounds*, *Meadows v. State*, 455 S.W.3d 166 (Tex. Crim. App. 2015). If the conviction or release from confinement for it is more than ten years old, the conviction is admissible for impeachment only if its probative value substantially outweighs its prejudicial effect. Tex. R. Evid. 609(b). No evidence of a conviction is admissible if that conviction has been pardoned, annulled, certified rehabilitated, or the equivalent, or if probation has been satisfactorily completed with no further convictions for a felony or crime of moral turpitude. Tex. R. Evid. 609(c). If an appeal is pending, jurisdictions conflict whether the conviction is admissible. *Compare* Mich. R. Evid. 609(f) (conviction currently on appeal is inadmissible), *and* Tex. R. Evid. 609(e) (same), *and St. Clair v. Commonwealth*, 140 S.W.3d 510, 564 (Ky. 2004) (same), *with* Fed. R. Evid. 609(e) (conviction currently on appeal admissible, including pendency), Miss. R. Evid. 609(e) (same); N.C. R. Evid. 609(e) (same). Notice must be given of the intent to use the conviction. Tex. R. Evid. 609(f).

c) Religious Beliefs

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced. Tex. R. Evid. 610. This may not

preclude, however, the questioning of the witness regarding church affiliation for purpose of establishing bias or prejudice. *See id.*

2. Prior Inconsistent Statement

In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and *before* further cross-examination concerning, or extrinsic evidence of such statement, may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. Tex. R. Evid. 613(a)(1), (3), (4), and cmt. to 2015 Restyling. If written, the writing need not be shown to the witness at that time, but on request, the same shall be shown to opposing counsel. Tex. R. Evid. 613(a)(2). If the witness unequivocally admits having made such statement, extrinsic evidence of the same shall not be admitted. Tex. R. Evid. 613(a)(4). This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2). Tex. R. Evid. 613(a)(5); *see* Tex. R. Evid. 801(e)(2). If a proper predicate is not laid, the inconsistent statement may be excluded and further cross-examination on the subject blocked. *Alvarez-Mason v. State*, 801 S.W.2d 592, 595 (Tex. App.—Corpus Christi 1990, no pet.).

H. In-Chambers Interviews of Children

A majority of jurisdictions around the country allow for in-chambers interviews of children and have at least some case law related to it. Judge Dean Rucker and Sally Pretorius have considered this issue in depth in their paper: Kids Say the Darndest Things—An Academic and Demonstrative Look at the In Chambers Conference. State B. Tex., 41st Annual Advanced Family Law ch. 15 (2015). Several portions of their paper have been used herein and updated. The authors express their thanks for permission to use Judge Rucker's and Sally's paper. Each state will have their own procedure for requesting and conducting in-chambers interviews. The below focuses on Texas' procedure, although the strategy and ethical dilemmas could apply to most jurisdictions. *See also, e.g.*, Colo. Rev. Stat. Ann. § 14-10-126; Ind. Code Ann. § 31-17-2-9; Ky. Rev. Stat. § 403.290; Mo. Ann. Stat. § 452.385; Mont. Code Ann. § 40-4-214; N.D. R. Ct. 8.13.

1. Initial Determination

Section 153.009 of the Texas Family Code sets forth the procedure of requesting and conducting in-chambers interviews of children in Texas custody cases. Tex. Fam. Code Ann. § 153.009.

Before requesting an in-chambers interview, the practitioner must first consider what information the child will discuss with the judge and whether a jury will decide that issue. The court may request an in-chambers interview for any of the purposes identified in Section 153.009, discussed below. Tex. Fam. Code Ann. § 153.009(a). The interview may even occur after a child has testified in open court. *Fettig v. Fettig*, 619 S.W.2d 262, 268 (Tex. App.—Tyler 1981, no writ).

2. What Can Be Discussed?

In nonjury trials or hearings, a party, amicus, or attorney ad litem can request an in-chambers interview regarding the child's choice of who will have the exclusive right to determine the child's primary residence. *Id.* If the child is twelve years or older, the judge ***shall*** interview the child. *Id.* If the child is under twelve years, the judge ***may*** interview the child. *Id.* If the purpose is for the child to tell the judge his or her wishes regarding possession, access, or any other issue in the case, then the judge ***may*** interview the child, regardless of the child's age. *Id.* § 153.009(b). This interview does not diminish the judge's discretion in determining any of these issues based on the best interest of the child. *Id.* § 153.009(c).

In a jury trial, the judge may not interview the child in chambers regarding any issue that the jury will decide. *Id.* § 153.009(d). A party is entitled to a jury verdict in a custody case on:

1. the appointment of a sole managing conservator;

2. the appointment of joint managing conservators;

3. the appointment of a possessory conservator;

4. the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;

5. the determination of whether to impose a geographic restriction for the child's primary residence; and

6. if a geographic restriction is imposed, the determination of the geographic area within which the child's primary residence must be. *Id.* § 105.002(c)(1).

Accordingly, issues other than those listed above can be discussed in an in-chambers interview. *Id.* § 153.009(d).

One court has held that asking the child what happens in each parents' home is allowable. *Turner v. Turner*, 47 S.W.3d 761, 764 (Tex. App.—Houston [1st Dist.] 2001, no pet.). At least one court, however, has held that the interview should not be used to determine whether it is in the best interest of a child to testify. *Callicott v. Callicott*, 364 S.W.2d 455, 458 (Tex. App.—Houston 1963, writ ref'd n.r.e.) (relying on *Cline v. May*, 287 S.W.2d 226, 228 (Tex. App.—Amarillo 1956, no writ) (holding that trial court has no discretion to refuse to allow competent child to testify)).

A party is not entitled to a jury verdict on child support, terms or conditions of possession and access, or rights and duties other than determining the child's primary residence. *Id.* § 105.002(c)(2). Moreover, a party cannot even demand a jury trial regarding adoption or parental adjudication. *Id.* § 105.002(b).

3. Who Can Attend?

The trial court has discretion to allow an attorney for a party, the amicus attorney, the guardian ad litem for the child, or the attorney ad litem for the child to be present at the interview. *Id.* § 153.009(e). The court has discretion to refuse to interview a child (1) under the age of twelve regarding primary residence, or (2) of any age regarding any other issue. *In re Marriage of Stockett*, 570 S.W.2d 151, 153 (Tex. App.—Amarillo 1978, no writ).

4. Making a Record

If a child is twelve years or older, and a party, the amicus attorney, the attorney ad litem for the child, or the court requests that a record be made of the interview, the court shall cause that a record is made. *Id.* § 153.009(f). The record of the interview shall be part of the record in the case. *Id.* A trial court abuses its discretion by sealing the record and not allowing the parties access to it, contrary to statute. *Glud v. Glud*, 641 S.W.2d 688, 689–90 (Tex. App.—Waco 1982, no writ). The party's lack of access to the record denies that party the ability to present his case on appeal. *Id.*; *see* Tex. R. App. P. 44.1(a)(2). But any error is harmless if the party fails to request the record initially. *Wilkinson v. Evans*, 515 S.W.2d 734, 737 (Tex. App.—Dallas 1974, writ ref'd n.r.e.)

5. Waiving Error

If no one requests that a record be made or that anyone in particular attend the interview, any error for failing to make a record or that a particular person did not attend is waived. *In re S.E.K.*, 294 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied); *Voros v. Turnage*, 856 S.W.2d 759, 763 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Fettig*, 619 S.W.2d at 268; *Kimery v. Blackstock*, 538 S.W.2d 503, 504 (Tex. App.—Waco 1976, no writ). Furthermore, the trial court has no duty to announce what portions of the interview it deemed relevant or important, such that counsel has the opportunity to rebut the child's testimony. *Fettig*, 619 S.W.2d at 268. These provisions do not relate to a fundamental right, so they are waivable. *Wilkinson*, 515 S.W.2d at 737.

Although the court may interview children after the close of evidence, *Fettig*, 619 S.W.2d at 268, a motion for new trial is too late to request such interview for the first time, *Hamilton v. Hamilton*, 592 S.W.2d 87, 87–88 (Tex. App.—Fort Worth 1979, no writ). Moreover, an oral suggestion that the court may want to interview the children does not qualify as an application under the statute, such that the interview is mandatory for children 12 and older regarding primary residence. *Hamilton*, 592 S.W.2d at 88.

6. Using the Interview as Evidence

What the child tells the judge is evidence that the judge may consider and that can support the judgment. *Long v. Long*, 144 S.W.3d 64, 69 (Tex. App.—El Paso 2004, no pet.); *Voros*, 856 S.W.2d at 763. Accordingly, if a judge refuses to interview a child under 12 regarding primary residence, or any child regarding any other matter, an offer of proof or bill of exception is required to show that the child is competent to testify and what the child would have told the judge. *O. v. P.*, 560 S.W.2d 122, 125 (Tex. App.—Fort Worth 1977, no writ).

If no record exists when an interview occurs, the reviewing court on appeal must presume facts existed that support the trial court's judgment. *Ohendalski v. Ohendalski*, 203 S.W.3d 910, 916 (Tex. App.—Beaumont 2006, no pet.); *Long*, 144 S.W.3d at 69. The Supreme Court of Texas, however, has clarified this presumption and explained that it only applies when the interview is required—i.e., when the child is 12 or older and tells the judge his or her wishes regarding primary residence. *Forbes v. Wettman*, 598 S.W.2d 231, 232 (Tex. 1980) (orig. proceeding). In *Forbes*, an order gave father possession of the children, but mother refused to return the children to father. *Id.* Father filed a petition for writ of habeas corpus, wherein the trial court interviewed the children, who were under 12, but did not make a record. *Id.* The trial court refused the habeas corpus, and mother argued that the record was incomplete, so the court had to presume the facts from the missing portion supported the

trial court's judgment. *Id.* The supreme court disagreed and held that, because the interview was not mandatory, the record was not incomplete, such that the presumption existed. *Id.*

7. Effect on the Child

The attorney, and probably more-so the parent, needs to consider the effect that an in-chambers interview will have on the child. Experts have posited both the positive and negative effects an interview may have.

a) The Positive

One positive effect is the ability to empower the child by giving the child a voice in his or her future. In her article, *The Child's Voice*, Justice Debra H. Lehrmann cites to research by Judith Wallerstein in *The Unexpected Legacy of Divorce*, wherein she sets forth:

"[C]hildren feel distress over visitation schedules that keep them from having input as to how they spend their free time. . . . Involving the child in the process of developing an access schedule and parenting plan may give the child a sense of empowerment over his or her life. Although involving the children in this way will not give them more control over their schedules on a day-to-day basis, it may make adherence to the schedule more palatable, since it gives them input in the decision making process." Justice Debra Lehrmann, *The Child's Voice--An Analysis of the Methodology Used to Involve Children in Custody Litigation* at 885 (Texas Bar Journal, November 2002) (citations omitted).

Although an interview can empower a child, Justice Lehrmann cautions "not to take psychological research indicating that children should be involved in the process of reorganizing the family to mean that children should be brought into the lawsuit without forethought. Attention must remain focused on reliable data that indicates that children must not become embroiled in their parent's conflict." *Id.*

b) Alienation

Alienation is always a concern with the in-chambers interview, although it does not exist in every case. This can most likely occur by a parent trying to coach a child prior to the interview to try to make the other parent look bad or to tell the judge what the coaching parent wants the child to say. This may even occur without specific coaching for the interview itself. If a child has been living with a parent who regularly talks bad about the other parent, that can stay with the child long-term.

If alienation is an issue, an expert may be necessary to determine whether the child has been alienated and to what degree. If alienation has occurred, the judge should be made aware of it because the child's statements may be biased, rather than showing what the child actually desires. The interview may allow the judge a better glimpse into the degree of alienation as well.

c) Manipulation

Alienation is related to manipulation. Jonathan Gould, Ph.D, ABPP states:

"A corollary is a parent who manipulates a child to express a preference to live with him or her when that parent may not have presented the child with all the available and necessary information to make a responsible decision. There are two alternative concerns that may come from a parent's manipulation through providing limited and biased information that the child uses as the basis for his or her decision. One outcome is that the child learns later in life that s/he has been manipulated by the parent and focused his/her anger at being manipulated toward that parent. The second outcome is that the child feels a sense of guilt and remorse over rejecting the other parent based upon biased or incomplete information provided by the custodial parent. A third outcome is that the child learns not to trust the previously trusted parent and reaches out to the other parent to find that the other parent is unwilling or unable to repair the damage done by the earlier decision." Jonathan Gould & David Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. Am. Acad. Matrim. Law. 303, 310 (2009).

d) The "Fun" Parent

A child will also often be influenced by who the child sees as the "fun" parent, as opposed to the parent who has rules and guidelines for the child. Those rules may make the child see that parent as mean or restrictive and express a desire to the judge that the child does not want to live with that parent. This factor must be understood and addressed if necessary, and judges should be sensitive to it. Thoughtful questions by the judge can help to reveal this factor if it exists.

e) Clash of Personalities

If a child and parent have an extreme difference in personalities, it should be considered whether the child being with that parent, and for how much time, is best for the child. For instance, if a child and a parent constantly yell and argue in front of other children, if violence erupts during the periods of possession, or if the child constantly runs away from home while in the possession of the parent, what is truly in the child's best interest? While this behavior should not be rewarded, it may be attributable to puberty or events that have occurred during the child's life and is something that must be considered when conducting an in-chambers conference because the child may be the only credible source of this information.

f) Maturity of the Child

Although Texas sets the limit for mandatory interviews at 12 regarding primary residence, the parties, attorneys, and judge should still consider the maturity of the child. The court may want to start the in-chambers interview with some questions to determine the child's maturity level and ability to tell and understand the truth. Basically, the competency and reliability of the child. Parties know their children and should discuss with their attorneys how the child might come off in the interview with the judge. Similarly, the judge needs to be cautious that a child's maturity may be best ascertained over an extensive period of time and not in brief time that is set aside for the in-chambers interview.

"Another reason for not including children's participation in the decision making about their custodial placement is that children's decisions are . . . how do we say this delicately . . . often unreliable, spur of the moment, emotion-driven, short sighted, and generally misinformed. That is, children are not often rational or objective in their decision making. Perhaps a fairer way to frame the concern is that on any given day a pre-adolescent child may be rational, objective and consider the long term effects of his or her decision making, and the next day may be impulsive, emotion-drive and short sighted." *Id.* at 310–311.

g) First Impressions

An in-chambers interview is often a child's first interaction with the judicial system. There is likely an impact associated with talking to a judge about life decisions that should be considered before requesting an in-chambers interview. If this experience is a negative one, this may impact how children view judges and lawyers for the rest of their lives. We often hear stories from clients about how their parents' divorce affected them and their future relationships. Attorneys, the parties, and the courts should be cognizant that the children's experience from the moment that they walk into the courthouse, going through security, waiting in the halls of the courthouse, talking to the attorneys, missing school, and talking to the judge may have a significant impact on them for the rest of their lives.

h) Lost in Translation

Co-existent with being cognizant of the maturity of the child is accurately interpreting what the child is really saying—not just listening to the words that come out of the child's mouth. For instance, if the child is saying that he or she "just wants to spend more time with Mom/Dad," but can cite to no specific reason, one should consider whether the child is really saying that he or she is going through issues that are gender specific or is hiding some underlying issue such as mental, physical, or sexual abuse at the other parent's house. It is imperative when there is a question about the child's motives that other resources be marshalled to ascertain what the child is truly saying. For instance, a mental health professional may be recommended and/or ordered to counsel with the child and ascertain any motives or reasons for the child's preferences. Another option may be obtaining a social study or the appointment of an amicus attorney to probe into the child's home life and provide the court with a clearer view of the situation at hand.

In an older article in the Louisiana Law Review entitled *Child Custody: The Judicial Interview of the Child* by Lisa Carol Rogers, Rogers identifies the more common strategies and possible interpretations of the child's behavior:

"1. Reunion strategy: The child will praise both parents, and the parent 'at fault,' hoping they will respond to the praise by the reuniting. The judge should be alert to descriptions of the parents that sound too good to be true.

"2. Pain reduction strategy: The parents may both claim that the child refuses to leave one to visit the other. The child is probably just trying to reduce the pain he feels each time he leaves one parent by refusing to leave, which does not indicate a preference for one parent over the other.

"3. Tension detonation strategy: The child may seem very hostile toward one or both parents. It is possible that he is trying to get them to direct their anger toward him instead of each other, and to detonate the tension between them by having them strike out at him.

"4. Loyalty proving strategy: The child may pick the parent that seems the most likely to keep him around and sacrifice the other parent to show his loyalty.

"5. Fairness strategy: The child will repress his own needs in order to make sure each parent gets equal treatment. He will probably refuse to state a preference, and will exhaust himself trying to divide his time and affection equally between his parents.

"6. Permissive living strategy: The child will give up trying to reunite his parents and will repress his pain. He may appear to his own best advantage. Older adolescents are more likely to use this strategy consciously. Younger children are more likely to use it innocently, as when they express a natural preference for the parent who buys nicer presents or who has had custody during vacations." Lisa Carol Rogers, *Child Custody: The Judicial Interview of the Child*, 47 La. L. Rev. 559, 580 (1987).

i) Putting the Child in the Middle

The child should never be put in the middle of litigation. If a child is forced to speak with a judge and talk about the child's preferences for possession and access or with whom the child primarily resides, it will likely have an adverse impact on the child, manifested in several ways. First, if a record is made, there is forever a writing that memorializes what was said to the judge and a parent will be able to read it and have first-hand knowledge of what the child said. This is very likely to impact the relationship of the parent with the child. It may lead to alienation or feelings of being slighted. These feelings will then impact both the child and the parent for a very long time—maybe even a lifetime. If a record is not made, and the judge makes a ruling that takes away rights or possession and access time of one parent, the slighted parent may assume that it is because of what the child told the judge and lead to the same repercussions as if a record was made.

In short, we are all human, and feeling slighted or "un-preferred" by someone we love and would do anything for is going to lead to feelings that are not easily concealed, and these feelings may have a long-term impact on the child.

Practice note: When you are not having a jury determine a specific issue, the child has expressed desires regarding that issue, and you want the judge to interview the child, be sure to file a motion requesting the interview prior to the close of evidence and to include in your request who you want to be present and whether you want to make a record of the interview. For appellate purposes, a record is needed, but you should weigh the psychological effect that the interview will have on the child and whether that effect may be prolonged by having a written record of it. And if the court denies any of it, object to the interview if you do not want it to happen, object to the interview not happening if you want it to happen, and make an offer of proof or bill of exception to preserve the error regarding what the child would have testified.

8. Interview Framework

"Among the most relevant factors to examine when talking with children about their experiences in a divorced family are:

"1. Physical space refers to the practical issues of getting from one place to another. Physical space includes examining concerns that the child has about organizing clothes, toys, and schoolwork. It entails letting children's friends know where they are and letting children voice concerns that they have about remembering where to be at certain times.

"2. Emotional space refers to different emotional climates that exist at each parent's home. Children are moving not only from one physical home to another but also from one emotional landscape to another. Children may react to changes in emotional climate between mother's and father's home. Children also may feel differently at different homes. Smart found that the geographic distance between parental homes can create an emotional distance between child and parent. Interestingly, Smart noted that even children who are equally happy to be with either parent or equally happy to be in either parent's home experienced transitions between homes as an emotional journey requiring regular emotional adjustment.

"3. Psychological space refers to differences in household structure, organization, and functions. There may be changes between homes in routines, codes of behavior, expectations, standards of living, and other functional differences. Children may find it difficult to adjust to a home that does not fit the psychological narrative in their heads about who they are and where they are supposed to live.

"4. Equal time refers to parents', judges', and attorneys' tendency to think about parenting time in exact amounts of time. Whether children spend one week with one parent and another week with the other parent or whether

children are on a '4 day with one parent and 3 day with the other parent' schedule, the inflexibility of time share schedules often affect children's need for elasticity in the scheduling of their transitions between homes. For example, Smart found that if a child was scheduled with her father but needed to spend time with her mother on a particular day, the rigidity of the access schedule became a more important decision-making element than the child's needs. If it was Tuesday, the child had to be at dad's house. Smart reported that children felt frustrated with the rigidness of their access schedules and they were reluctant to talk about these frustrations with their parents. Children were aware of their parent's competing needs for the children's time and, as a result, they did not want to disappoint either parent nor did they want to cause tension because of their discontent. The result was that children did not talk about their feelings and often experienced the unbending nature of the parenting schedule as oppressive.

"5. Time apart refers to children's time away from one parent. Some children did not like time away from a particular parent and, other children did not like feeling that they were forced to spend time with a parent. Still other children liked the time away from the residential parent because it provided them with opportunities to gain some perspective on the non-residential parent. Smart referred to this time away from the residential parent as a 'sabbatical.'

"Some children worried about one parent when they were with the other parent. Children worried when their parents remained single and had no romantic partner. These children felt that time away from a single parent meant that the parent was lonely. Some children reported that time passed more slowly at one parent's home than at the other's, usually because one parent was less available, less involved, or had a home with fewer creature comforts.

"6. Time to oneself refers to children's lack of private time. Children of divorce felt that their time was always scheduled. They felt that they had less time for themselves and that they had less time to spend with their friends.

"7. Time and hurting refers to an experience of a subgroup of children who had to deal with waiting for the nonresidential parent to come to visit them or wait for the nonresidential parent to take them out. These children often felt powerless and they often viewed time spent waiting for the parent to show up as a measure of how much that parent cared.

"8. Time and sharing refers to those situations where both parents enjoyed plenty of time with their children and where each parent was on good terms with the other parent. Sharing parenting time became a way of continuing family life. Children felt happy with time-sharing arrangements because of the quality of their relationship with each parent. Children felt that the most important issues were sustaining and managing their relationships with parents." Gould & Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. Am. Acad. Matrim. Law. at 312–13.

VIII. FRE Article VII. Opinions and Expert Testimony

A. Lay Witness Opinion

Rule 701 states that any person who is not testifying as an expert may state that person's opinion if the opinion is rationally based on the witness's perception and helps the factfinder understand the witness's testimony or determine a fact in issue. Tex. R. Evid. 701; *cf.* Fed. R. Evid. 701(c) (adding third element that lay opinion cannot be based on scientific, technical, or other specialized knowledge that would fall under Rule 702). The first requirement is a two-part test: "First, the witness must establish personal knowledge of the events from which his opinion is drawn and, second, the opinion drawn must be rationally based on that knowledge." *Hartwell v. State*, 476 S.W.3d 523, 536 (Tex. App.—Corpus Christi 2016, pet. ref'd) (quoting *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997)); *see also, e.g.*, *Ackles v. Hartford Underwriters Ins. Corp.*, 699 N.E.2d 740, 743 (Ind. App. 1998); *Marks v. State*, 289 S.W.3d 923, 927 (Ark. 2008). Lay opinions are elicited and given in almost every family law case, and as is often the case in family law, facts and opinions are often intertwined and impossible to separate.

Practice Note: Unless the proffered lay opinion testimony is damaging the case, it is probably not worth the objection. The practitioner will find that, many times, such lay opinions present the cross examiner with fodder to neutralize any potential harm.

B. Admission of Expert Testimony

Rule 702 of the Texas Rules of Evidence predicates the admission of expert testimony on three basic factors:

1. The witness must be qualified in the area of expertise for which the evidence is proffered;

2. The expert's testimony must be grounded in the

scientific, technical, or other specialized knowledge in that particular area of expertise; and

3. The testimony must assist the trier of fact.

Tex. R. Evid. 702; *cf.* Fed R. Evid. 702 (requiring expert's specialized knowledge be helpful to factfinder, testimony is based on sufficient facts or data, testimony is product of reliable principles and methods, and expert has reliably applied those principles and methods).

Example Predicate:

You were requested to provide expert witness services in this case?
Does the person who has asked you to perform those services affect your professional opinions in this matter?
What was your assignment in this matter?
Did you do work to complete that assignment?
Did you use your training and experience to complete your work in this matter?
Please tell the court what education you have received that you believe qualified you to perform this assignment? (if objected to: Please tell the court your education, including specialized professional college education, after high school.)
Have you attended any professional educational programs within the last five years (to emphasize recent knowledge)?
Please tell the court what those professional educational programs were and when you attended them. (compound; break down if objected to)
Were there other professional education programs you have attended?
Are those other professional educational programs you have attended set forth on your CV?
Have you taught any professional educational programs within the last five years?
Please tell the court the professional educational programs you have taught and when you taught them.
Were there other professional educational programs you have taught?
Are those other professional educational programs you have taught set forth on your CV?
Have you written any professional books, articles, or other similar materials within the last five years?
Please tell the court about those professional books, articles, or other materials.
Were there other professional books, articles, or materials you have written?
Are those other professional books, articles, or materials you have written set forth on your CV?
I am handing you what has been marked as Exhibit 1 for identification purposes; do you recognize that document? What is it? (My CV)
Does it set forth most of your educational information to which you have not specifically testified?
If I asked you about each item set forth on Exhibit 1 for identification, would you testify as set forth on Exhibit 1 for identification?
I offer Exhibit 1 into evidence.
I request the Court to declare/recognize the witness as a qualified expert.

C. Qualification of the Expert is Discretionary

Whether the expert is qualified to testify and render an opinion lies within the discretion of the trial court. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996) ; *see also, e.g.*, *Dollar Gen. Corp. v. Elder*, 600 S.W.3d 597, 606 (Ark. 2020); *A.J.C. ex rel. J.D.C. v. K.R.H.*, 602 S.W.3d 857, 865 (Mo. App. 2020). A reviewing court will review the trial court's determination to admit expert testimony for abuse of discretion. *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

D. Bases of Expert Testimony and Opinions

The proponent of the proffered testimony bears the burden of demonstrating the admissibility of the expert testimony if the other side objects to it. *Id.*

1. Hard Science

To overcome the objection, the proponent must demonstrate that: (1) the expert is qualified, and (2) the expert's testimony is relevant and reliable. *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 348 (Tex. 2015). The non-exclusive factors that can be considered in the reliability of scientific evidence are:

1. The extent to which the theory has been or can be tested;

2. The extent to which the technique relies upon the subjective interpretation of the expert;

3. Whether the theory has been subjected to peer review and/or publication;

4. The technique's potential rate of error;

5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

6. The non-judicial uses which have been made of the theory or technique. *Id.* at 348 n.8.

2. Soft Science

Different jurisdictions treat "soft sciences" differently. *See, e.g.*, Fed. R. Evid. 702 cmt. ("Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."); *State v. Hungerford*, 697 A.2d 916, 925 (N.H. 1997) (for recovered memories, looking to *Daubert* elements as well as age of witness, length of time between event and recovery, presence of objective evidence, attendant circumstances); *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) (applying similar standards as comments to Federal Rule 702), *overruled on other grounds*, *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

3. Factors Relied Upon

The general rule is that, once properly qualified, an expert can base his or her opinion on just about anything remotely relevant to the issue about which he or she is called to testify. Rule 703 permits an expert to rely on the following to base his opinion:

1. Personal Knowledge. This would include such observations as statements made by the parties, testing results, etc.

2. Facts/Data Made Known to the Expert at or Before the Hearing. Many mental health professionals rely and may rely on evidence presented by others, deposition testimony, and reports of other experts.

3. Inadmissible Evidence, if Relied on by Others. Some jurisdictions require the probative value in helping the jury substantially outweigh the prejudicial effect for inadmissible evidence to be admitted. *See, e.g.*, Fed. R. Evid. 703 (requiring probative value to outweigh prejudice); *but see In re Amey*, 40 A.3d 902, 913–14 (D.C. App. 2012) (holding opposite).

Even where inadmissible evidence is readily admissible if it is relied on by experts in the field, the reliance on tests, trade journals, other medical reports, etc., has not created much controversy concerning expert opinions. *See Gharda USA*, 464 S.W.3d at 352. A problem may arise, however, when the expert begins to recount a hearsay conversation he has had with another. Rule 703 implies that this type of testimony is permissible, but some jurisdictions have limits. A trial court may permit the expert to state that his or her opinion was based, in part, on what another had related but should not permit the expert to disclose what was actually said. *People v. Sanchez*, 374 P.3d 320, 334 (Cal. 2016) (the expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."); *Beavers ex rel. Beavers v. Northrop Worldwide Aircraft Servs., Inc.*, 821 S.W.2d 669, 674 (Tex. App.—Amarillo 1991, writ denied); *but see In re C.K.*, 391 P.3d 735, 739–40 (Mon. 2017) ("Rule 703 thus contemplates that a testifying expert may refer to otherwise inadmissible hearsay upon a foundational showing that the expert relied on the otherwise inadmissible evidence in forming the expert's opinion and the information is of a type reasonably relied upon by experts in the field of expertise. . . . By application of Rule 801(c), Rule 703 circumvents the general prohibition of Rule 802 by repurposing otherwise inadmissible hearsay as definitional non-hearsay. . . . Alternatively, Rule 703 is also amenable to construction as an implicit exception to the hearsay rule. This view recognizes that the otherwise inadmissible hearsay cannot serve its limited Rule 703 purpose of aiding assessment of the credibility and reliability of the expert's opinion unless the finder of fact takes it as true.").

4. Experts and Custody Cases

The testimony of mental health experts is often critical to the outcome of a conservatorship proceeding. Courts have placed limits on expert testimony in jury cases. For example, in *Ochs*, the court held that a psychologist in a child abuse case was not permitted to testify before a jury as to the propensity of the child complainant to tell the truth regarding the alleged abuse. *Ochs v. Martinez*, 789 S.W.2d 949, 957 (Tex. App.—San Antonio 1990, writ denied); *see also, e.g.*, *Hoglund v. State*, 962 N.E.2d 1230, 1234–35 (Ind. 2012) (collecting cases holding one witness cannot testify about credibility of another witness); *cf. Gregg v. State*, 411 S.E.2d 65, 68 (Ga. 1991)

(setting forth ten factors to determine reliability of child victim's statement). The court reasoned that such testimony invaded the province of the jury concerning judging the credibility of the witness. *Ochs*, 789 S.W.2d at 957. While social workers assigned to custody cases are almost always permitted to testify, the extent of their testimony should also be closely monitored. If the testimony is admitted over objection, a limiting instruction should be requested at the time the objection is made and in the charge to preserve error and avoid the invited error trap. *See In re Commitment of Polk*, 187 S.W.3d 550, 554–55 (Tex. App.—Beaumont 2006, no pet.); *see also State v. Hargrove*, 293 P.3d 787, 795 (Kan. App. 2013) ("The invited error rule effectively binds trial counsel to strategic decisions inducing judicial rulings with the purpose of obtaining favorable judgments for their clients—not guilty verdicts or, in some cases, convictions on lesser charges for criminal defendants. The rule also defeats a disreputable strategy aimed at requesting that a judge act in a particular way to salt the record with error as an end in itself, thereby providing potential grounds for reversal of an adverse judgment.") (citations omitted).

Under the Uniform Parentage Act, however, where no presumed, acknowledged, or adjudicated father exists, a report of a genetic testing expert is admissible as evidence of the truth of the facts asserted in the report. Tex. Fam. Code Ann. § 160.621(a); *see also, e.g.*, N.M. Stat. Ann. § 40-11A-621; Okl. Stat. Ann. § 7700-621; Utah Code Ann. § 78B-15-613. Admissibility is only affected if a presumed, acknowledged, or adjudicated father exists, unless the testing was performed with consent of both the mother and presumed/acknowledged/adjudicated father, or by court order. Tex. Fam. Code Ann. § 160.621(c).

Example Predicate:

(This predicate may be used with an expert in almost any field)

Please tell the court what your assignment was in this case.
Were you able to formulate an opinion in regards to that assignment?
In connection with your work in this matter, did you apply/use any tests/procedures in reaching your opinion?
Please tell the court what the tests/procedures are that you used in reaching your opinions and conclusions in this matter.
*As to each test/procedure, one at a time:
Please describe what that test/procedure is.
Why did you use that test/procedure?
As a result of using that test/procedure, did you obtain information that you used in your work in this case?
What information did you obtain that you used in your work in this case?
Why did you think that information was important?
How did you use that information in formulating your opinions or conclusions in this case?
(Then go to the next test/procedure and repeat*)
What opinion or conclusion did you reach as a result of the work you did in this case?

E. Use of Treatises

1. Only through Expert Testimony

As discussed below, under a hearsay exception, treatises may be used only through expert testimony. Tex. R. Evid. 803(18); *see also, e.g.*, Fla. Stat. Ann. § 90.706; Nev. Rev. Stat. Ann. § 51.255; Va. S. Ct. R. 2:706. A proponent cannot have his expert read from the treatise on direct but can have the treatise qualified as a reliable authority. If the witness is asked to read from it on cross, then clarifying excerpts can subsequently be read on redirect. If admitted, the statements may be read into evidence, but the treatise may not be received as an exhibit. Tex. R. Evid. 803(18).

2. Using a Treatise on Cross-Examination

The questioning attorney can have the opposing expert acknowledge that the treatise in question is authoritative and relied upon in that particular field. Even if the witness does not commit to such a position, the attorney has established that the treatise is a published work and that the opposing expert is aware of it. The proponent's expert can then qualify the writing as authoritative at a later time. *King v. Bauer*, 767 S.W.2d 197, 199–200 (Tex. App.—Corpus Christi 1989, writ denied).

Example Predicate:

You have heard of Fishman and Pratt's book: Guide to Business Valuations?
Fishman and Pratt are respected in the business valuation community?
Their book is respected in the business valuation community?
Their book has guidelines on how to perform business valuations?
Were you aware that their book states that a cap rate should be between 11% and 20%?
You set the cap rate for your valuation at 4%?

F. Disclosure of Underlying Facts/Data

Per Rule 705, an expert may disclose all data he has relied on in arriving at his opinion, thus abolishing the need to ask hypothetical questions. Tex. R. Evid. 705; *cf. Jordan v. State*, 928 S.W.2d 550, 556 n.8 (Tex. Crim. App. 1996). But remember that hearsay conversations with third parties may not be admissible as discussed above regarding Rule 703. *See* Tex. R. Evid. 705(d).

G. Opinion of Law and Fact

Rule 704 allows an expert to give an opinion that embraces an ultimate issue. Tex. R. Evid. 704; *but see Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir.) ("That said, an expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law.") (quotations omitted). As such, an expert may state an opinion on a mixed question of law and fact, so long as the opinion is confined to the relevant issues and is based on proper legal concepts. *Birchfield*, 747 S.W.2d at 365.

H. Opinion as to Understanding of the Law

Even though an expert may not be permitted to testify as to his or her understanding of the law, the expert is entitled to apply legal terms in his testimony as to the factual issues. *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 119, 149 n.7 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding); *Welder v. Welder*, 794 S.W.2d 420, 423 (Tex. App.—Corpus Christi 1990, no writ); *see, e.g.*, *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 95 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that former Supreme Court of Texas justice could not testify to his understanding of the law); *see also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (collecting cases and providing exception for foreign law). For example, in a divorce case involving tracing of separate funds, summaries of checking account records were held to be admissible even though the testifying CPA made characterizations as to the separate and community nature of the money. *Welder*, 794 S.W.2d at 428–29.

I. Opinion Evidence does not Establish Fact

The effect of opinion evidence does not establish material facts as a matter of law. *McGuffin v. Terrell*, 732 S.W.2d 425, 428 (Tex. App.—Fort Worth 1987, no writ); *see also, e.g.*, *Int'l Ass'n of Firefighters Local No. 2287, Montpelier v. City of Montpelier*, 332 A.2d 795, 797 (Vt. 1975).

J. Jury Trials

Courts have also placed limits on expert testimony in jury cases. For example, the *Ochs* case, discussed above, where the expert could not opine on the truthfulness of a witness. *Ochs*, 789 S.W.2d at 957. Also, social studies are generally inadmissible hearsay before a jury, although the expert who put the study together is competent to testify as a witness. *Taylor*, 160 S.W.3d at 649 n.9. A court should not exclude the testimony of a social worker merely because that witness was not court-appointed. *Davis v. Davis*, 801 S.W.2d 22, 23 (Tex. App.—Corpus Christi 1990, no writ).

VIII. FRE Article VIII. Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d); *see* "Non-assertive Statement," below, for a discussion of whether testimony is even a "statement" at all. Hearsay is normally excluded because it is evidence that cannot be tested; thus, it is more susceptible to being unreliable or untrustworthy. *See* 2 McCormick on Evid. §§ 244–45. A "statement" includes any spoken or written words or any nonverbal conduct intended as a substitute for such words. Tex. R. Evid. 801(a); *see also, e.g.*, Fed. R. Evid. 801(a); Ga. Code Ann. § 24-8-801(a); Or. Evid. Code 801(1). The statement offered at trial need not be a direct quote to violate the hearsay rules. *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999); *see also Harris v. Wainwright*, 760 F.2d 1148, 1152 (11th Cir. 1985); *State v. Agundis*, 903 P.2d 752, 761 (Id. App. 1995). While the federal rules, and several other jurisdictions, do not explicitly define "matter asserted" within the rules, Texas has defined it as including any matter explicitly asserted and any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter. Tex. R. Evid. 801(c); *cf.* Fed. R. Evid. 801. Hearsay is inadmissible unless otherwise permitted by the rules or by statute. Tex. R. Evid. 802. Put more simply, any out-of-court statement, except non-hearsay statements, whether by the witness or another person, is inadmissible to support the truth of the statement, unless permitted by another rule or statute. In some jurisdictions, however, otherwise inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay. Tex. R. Evid. 802; *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980); *Commonwealth v. Foreman*, 797 A.2d 1005, 1012 (Pa. Super. 2002); *but see Gehin v. Wis. Grp. Ins. Bd.*, 692 N.W.2d 572, 588 (Wis. 2005) (relying on *Ga.-Pac. Corp.*

v. McLaurin, 370 So.2d 1359, 1362 (Miss. 1979)). If it can be shown that a statement is non-hearsay or that it falls within a hearsay exception, the statement is admissible as probative evidence. *See Routier v. State*, 112 S.W.3d 554, 591 (Tex. Crim. App. 2003).

A. Statements that are not Hearsay

Evidence constitutes hearsay only if it is (1) an assertive statement (2) by an out-of-court declarant (3) offered to prove the truth of the assertion. Tex. R. Evid. 801(d); *see also* Fed. R. Evid. 801(c). A non-statement or a statement *not* offered to prove the truth of the matter asserted is not hearsay. Further, certain types of statements are defined as non-hearsay by statute or by the rules of evidence.

1. Non-assertive Statement

A "statement" includes verbal or non-verbal assertions, for example pointing, nodding, or a headshake. Tex. R. Evid. 801(a); *see, e.g.*, *Clabon v. State*, 111 S.W.3d 805, 808 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding that hand gesture was hearsay). However, a purely contextual out-of-court statement that is nothing more than a question is not hearsay. *See, e.g.*, *United States v. Safavian*, 435 F.Supp.2d 36,44 (D.D.C. 2006); *McNeil v. State*, 452 S.W.3d 408, 418–19 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *but see United States v. Torres*, 794 F.3d 1053 (9th Cir. 2015) (holding that, because defendant third party asked defendant, on three separate occasions within a week, to use defendant's vehicle, third party's intent was clear: he wanted control of defendant's vehicle on U.S. side of the border; explaining that third party intended the implied assertion rather than the express one and that defendant used the questions for the truth of the matter impliedly asserted.). "Imperative sentences giving orders, exclamatory sentences, and interrogatory sentences posing questions usually fall outside the hearsay definition; if these sentences are relevant at all, it is usually relevant simply that the sentences were uttered." Edward J. Imwinkelried, Evidentiary Foundations 423 (8th ed. 2012). The predicate for offering non-assertive statements as non-hearsay usually includes the following evidence:

1. Where and when the statement was made;

2. Who was present;

3. The tenor of the statement;

4. In an offer of proof outside the presence of the jury, that the tenor of the statement is non-assertive; and

5. In the same offer of proof, that the non-assertive statement is logically relevant to the material facts of consequence in the case. *Id.*

2. Statement not Offered by a Person

In family law cases, this usually comes up in the context of electronic evidence, which is discussed below, but could also come up with animals or other non-humans. For example, a dog trained to detect drugs can indicate whether it has detected drugs. The indication made by the dog, however, is not a "statement" because it was not made by a person and is, therefore, not hearsay.

3. Statement not offered for its Truth

"Even if the statement is assertive, the statement is not hearsay unless the proponent offers the statement to prove the truth of the assertion." *Id.* at 428–29. When arguing that a statement is not being offered for its truth, an attorney is arguing that the fact *of* the statement is relevant and that the truth of the facts *in* the statement is irrelevant. *Id.* at 429. Evidence is hearsay when its probative value depends in whole or in part on the credibility or competency of a person other than the person by whom it is sought to be produced. *Chandler v. Chandler*, 842 S.W.2d 829, 831 (Tex. App.—El Paso 1992, writ denied). For example, a declarant's credibility is an issue with statements offered for their truth, and an opponent needs to cross-examine the out-of-court declarant to test the evidence. Imwinkelried, *Evidentiary Foundations* at 421. In contrast, if a proponent is not offering a statement for its truth, the opponent does not need to have the declarant available for cross-examination. *Id.*

a) State of Mind

Rule 803(3) provides an exception to the hearsay rule for statements regarding one's then-existing state of mind, emotion, sensation, or physical condition. Tex. R. Evid. 803(3). "Normally, statements admitted under this exception are spontaneous remarks about pain or some other sensation, made by the declarant while the sensation, not readily observable by a third party, is being experienced." *Chandler*, 842 S.W.2d at 831. When this exception does not apply, offering the statement, not for the truth of the statement, but rather, to show the knowledge or belief of the person who communicated or received the statement, will provide an exemption and bring the evidence out of being hearsay altogether. *Id.* (citing *Thrailkill v. Montgomery Ward & Co.*, 670 S.W.2d 382, 386 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd

n.r.e.)). Moreover, where the question is whether a party has acted prudently, wisely, or in good faith, information on which the party acted is original and material evidence, which is not hearsay. *Id.* For example, when a party testified that a Mexican judge told her that she was divorced, the statement was not offered to prove that she was in fact divorced. *Id.* "Rather, it was offered to show that she believed she was divorced. Moreover, the probative force of the statement does not depend on the competency or credibility of the Mexican judge. Therefore, it is not hearsay." *Id.*

b) Impeachment by Prior Inconsistent Statement

Any witness may be impeached by showing that on a prior occasion he made a material statement inconsistent with his trial testimony. Such a statement can be taken from many sources, including prior testimony, affidavits, discovery responses, or pleadings. The purpose of impeachment evidence is to attack the credibility of a witness, not to show the truth of the matter asserted. Evidence used solely to impeach a witness cannot provide probative value to support a judgment. *Labonte v. State*, 99 S.W.3d 801, 807 (Tex. App.—Beaumont 2003, pet. ref'd). As such, any impeaching evidence warrants a limiting instruction. *Id.* But impeaching evidence may also have probative value independent of the impeachment purpose. *See State v. Van Dyke*, 825 A2d 1163, 1172 (N.J. Super. 2003).

c) Operative Facts

Operative facts are facts leading to the ultimate issue. If the making of an out-of-court statement has legal significance, regardless of its truthfulness, then evidence that the statement was made is not hearsay because it is not offered to prove the truth of the matter asserted. *Jazayeri v. Mao*, 94 Cal. Rptr. 198, 211 (Cal. App. 2009); *Brown v. Daly*, 968 S.W.2d 814, 817–18 (Tenn. App. 1997); *Lozano v. State*, 359 S.W.3d 790, 820 (Tex. App.—Fort Worth 2012, pet. ref'd); *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 782 (Tex. App.—Dallas 2005, pet. denied). This is most obvious when the statement constitutes a necessary part of the cause of action or defense, the ultimate issue. *Case Corp.*, 184 S.W.3d at 782. Operative facts are admissible as evidence to prove that an utterance was made and not to establish the truth of the contents of such a statement. *Id.* For example, a statement would be an operative fact if the mere making of the statement were the basis of a fraud claim. Another example is words or writings that constitute offer, acceptance, or terms of a contract. *See, e.g.*, *Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902, 906 (Tex. App.—Eastland 1978, writ ref'd n.r.e.).

4. Extrajudicial Admissions

Extrajudicial admissions are exceptions to the hearsay rule generally based on the notion of estoppel as it applies to prior and often contradictory statements. The court in *Regal* discussed extrajudicial admissions as follows: A statement in an affidavit may not amount to a judicial admission if it is not deliberate, clear, and unequivocal. *Regal Constr. Co. v. Hansel*, 596 S.W.2d 150, 154 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). In such cases, the statement may be considered an extra-judicial admission. Such an admission "is not conclusive but is merely evidence to be given such weight as the trier of facts may see fit to accord it." *Id.*; *accord Douglas Oil Tools, Inc. v. Demesnil*, 552 So.2d 77, 80 (La. App. 1989).

5. Prior Statement

Certain prior statements by witnesses are defined by the rules as non-hearsay. In order for a prior statement by the witness to be admissible as probative evidence, the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement. Fed. R. Evid. 801(d)(1). The three types of prior statements defined as non-hearsay are:

a) Prior Inconsistent Statement

A statement that is inconsistent with the declarant's testimony and, in a civil case, was given under penalty of perjury at a trial, hearing, other proceeding, or in a deposition. Fed. R. Evid. 801(d)(1)(A).

b) Prior Consistent Statement to Rebut

A statement that is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d)(1)(B). Bolstering a witness's credibility by attempting to introduce prior consistent statements, solely for the purpose of bolstering and not in connection with Rule 801(d)(1)(B), is not permitted in some jurisdictions. *See* Tex. R. Evid. 613(c). However, while a witness' prior consistent statements would normally be inadmissible hearsay, Rule 801 defines prior consistent statements offered to rebut charges of fabrication or improper influence or motive as non-hearsay. Fed. R. Evid. 801(d)(1)(B). If even an implied charge is made against a witness, then prior consistent statements by the

testifying witness are not hearsay and are, therefore, admissible as substantive evidence to rebut the charges. However, a prior consistent statement would only be admissible to rebut a charge of fabrication if the statement was made before the motive to fabricate arose. *Goldtrap v. State*, 115 So.3d 1025, 1028 (Fla. App. 2013); *Hammons v. State*, 239 S.W.3d 798, 804–05 (Tex. Crim. App. 2007).

c) Statement of Identification

A prior statement of identification of a person made after perceiving the person. Fed. R. Evid. 801(d)(1)(C); *see, e.g.*, *Hill v. State*, 392 S.W.3d 850, 858 (Tex. App.—Amarillo 2013, pet. ref'd).

6. Admissions by a Party-Opponent

The statement is offered against the opposing party and is: (A) that party's own statement in either an individual or representative capacity; (B) a statement that the party manifested an adoption or belief in its truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; (D) a statement by the party's agent or employee concerning a matter within the scope of that relationship and while it existed; *or* (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2); Tex. R. Evid. 801(e)(2); *see Saavedra v. State*, 297 S.W.3d 342, 346 (Tex. Crim. App. 2009 (holding interpreter's statements at trial, although interpreted incorrectly, were adopted admissions because interpreter was agent of witness and, thus, not hearsay).

Statements in discovery responses or pleadings from the present or other proceedings may be used to impeach a witness's credibility. If they are admissions by a party, they may also be admissible as substantive evidence. Allegations and statements made by a party's attorney in such responses or pleadings are that party's statements. *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.*, 323 S.W.3d 322, 337 (Tex. App.—Beaumont 2010, pet. denied). Even pleadings of a party in other cases that contain statements that are inconsistent with that party's present position may be admissible as admissions. *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243, 252 (Tex. App.—Beaumont 1994, no writ). Superseded pleadings, even if they are not verified or file-marked, are no longer judicial admissions but can be introduced into evidence as other admissions, although they are not conclusive. *Quick v. Plastic Sols. of Tex., Inc.*, 270 S.W.3d 173, 185 (Tex. App.—El Paso 2008, no pet.); *Huff v. Harrell*, 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ denied).

7. Depositions

A deposition taken in the same proceeding. Tex. R. Evid. 801(e)(3). Unavailability of the deponent is not a requirement for admissibility. *Id.* While some jurisdictions include deposition testimony in the non-hearsay definition, and thus unavailability is not required, other jurisdictions require the witness to be unavailable under Rule 804. *See, e.g.*, Mich. R. Evid. 804(b)(5); *United States v. Salim*, 855 F.2d 944, 952 (2d Cir. 1988).

Practice Note: This rule means only that deposition testimony is *non-hearsay*. The deposition testimony may still be objectionable under other rules of evidence, such as relevance, etc. Remember, during a deposition, a majority of objections and evidentiary issues are deferred to final trial.

8. Judicial Admissions

A judicial admission is an assertion of fact, not pleaded in the alternative, in the live pleadings of a party. *Elliott v. Industrial Comm'n of Ill.*, 707 N.E.2d 228, 230 (Ill. App. 1999); *John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 831 A.2d 696, 712 (Penn. Super. 2003); *Holy Cross Church of Christ in God v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). "A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." *Holy Cross Church of Christ in God*, 44 S.W.3d at 568. The most common examples of judicial admissions are factual statements made in live pleadings, confession of judgment, and evidence of a guilty plea in a criminal case. An unanswered request for admission is automatically deemed admitted unless the court, on motion, permits its withdrawal or amendment. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *see also Alexander v. C.I.R.*, 926 F.2d 197, 199 (2d Cir. 1991); *Williams v. Cooper*, 926 So.2d 571, 574–75 (La. App. 2006). In Texas, at least, an admitted admission, deemed or otherwise, is a judicial admission, and that party may not subsequently introduce testimony to controvert it. *Marshall*, 767 S.W.2d at 700. Similarly in Texas, a sworn inventory filed in a divorce case constitutes a judicial admission. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd); *but see Rivera v. Hernandez*, 441 S.W.3d 413, 420–21 (Tex. App.—El Paso 2014, pet. denied) (considering *Roosevelt* and holding that H's inventory did not constitute admission because (1) that argument was not raised at trial, (2) trial court did not find inventory

constituted admission, (3) trial court did not take judicial notice of inventory that was not filed or admitted into evidence, (4) trial court allowed H to amend inventory). A party alleging a material and substantial change in order to support a motion to modify cannot then deny that a material and substantial change has occurred for the purposes of the opposing party's motion to modify because the moving party judicially admitted the change in the original motion. *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex. App.—Fort Worth 2013, no pet.).

Practice Note: While abandoned or superseded pleadings may be admissible as a party admission or declaration against interest, they do not qualify as a judicial admission. *Quick*, 270 S.W.3d at 185.

Practice Note: In light of *Rivera*, trial counsel should seek to notify the trial court of statements that are admissions, have the trial court find the statements are admissions, admit them as admissions, and object to any amendments or withdrawals of the admissions. *See Rivera*, 441 S.W.3d at 420–21.

Practice Note: In Texas, parties must prove a material and substantial change in modification cases to overcome res judicata. Be sure that the judicial admission concerns the same subject matter you are using it for. In a recent case out of Dallas, mother petitioned to modify conservatorship, while father petitioned to modify child support; father argued that mother's pleadings contained judicial admissions that circumstances had changed; the Dallas Court of Appeals held that, even though mother pleaded that a change in circumstances had occurred, mother's petition was to modify conservatorship, so she made no judicial admission as to a change in circumstances concerning child support. *In re J.C.J.*, No. 05-14-01449-CV, 2016 WL 345942 (Tex. App.—Dallas Jan. 28, 2016, no pet.) (mem. op.); *cf. In re R.M.*, No. 02-18-00367-CV, 2019 WL 2635566, at *3 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem. op.) (holding that mother's counterpetition in suit to modify child support was judicial admission of material and substantial change in finances of parties or child). Another case out of Houston held that the parties judicially admitted the "change in circumstances" element, even though they were requesting different relief. *Obernhoff v. Nelson*, No. 01-17-00816-CV, 2019 WL 4065017, at *20 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, no pet.) (mem. op.).

B. Exceptions to the Hearsay Rule - Availability of Declarant Immaterial

The hearsay exceptions listed in Federal Rule 803 (which most jurisdictions follow to a large degree) may be roughly categorized into (i) unreflective statements, (ii) reliable documents, and (iii) reputation evidence. *Fischer v. State*, 252 S.W.3d 375, 379 (Tex. Crim. App. 2008). "The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy." *Id.* However, all hearsay exceptions require a showing of trustworthiness. *Robinson v. Harkins & Co.*, 711 S.W.2d 619, 621 (Tex. 1986); *see, generally*, Fed. R. Evid. 803; Tex. R. Evid. 803.

1. Present Sense Impression

A statement describing or explaining an event or condition made *while* the declarant was perceiving the event or *immediately* thereafter. Fed. R. Evid. 803(1); *see also Jones v. State*, 780 N.E.2d 373 (Ind. 2002); *State v. Washington*, 818 S.E.2d 459 (S.C. App. 2018). Unlike the excited-utterance exception, the rationale for this exception stems from the statement's contemporaneity, not its spontaneity. *Fischer*, 252 S.W.3d at 380. The present sense impression exception to the hearsay rule is based upon the premise that the contemporaneity of the event and the declaration ensures reliability of the statement. The rationale underlying the present sense impression is that: (1) the statement is safe from any error of the defect of memory of the declarant because of its contemporaneous nature, (2) there is little or no time for a calculated misstatement, and (3) the statement will usually be made to another (the witness who reports it) who would have an equal opportunity to observe and therefore check a misstatement. *Id.* (quoting *Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 2008)). The court in *Fischer* stated the following: "The rule is predicated on the notion that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. It is instinctive, rather than deliberate. If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule.

"Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-it-through statements enter the picture, the present sense impression exception no longer allows their admission. Thinking about it destroys the unreflective nature required of a present sense impression." *Id.* at 381 (internal quotations and citations omitted).

Example Predicate:

Where is your classroom located?
What time of day was it?
What are the children usually doing in school at the beginning of the day?
Did you see little Susie getting dropped off?
What did you see?
What happened when Susie got out of the car?
Could you see the exchange between her and her mother?
What did you see?
What did you see after that?
How did Susie appear to you?
Did you say anything to her?
What did you say?
In her response, did she describe what happened?
What was her response?

2. Excited Utterance

A statement relating to a startling event or condition made while the declarant was under stress or excitement caused by the event or condition. Fed. R. Evid. 803(2); *see also Funches v. State*, 381 P.3d 613, at *1 (Nev. 2012) (holding that text messages were excited utterance, even though declarant had slept for two hours after seeing crime, because declarant was still under stress of seeing gory activity). The excited-utterance exception is broader than the present-sense-impression exception. *McCarty v. State*, 257 S.W.3d 238, 240 (Tex. Crim. App. 2008). While a present-sense-impression statement must be made while the declarant was perceiving the event or condition, or immediately thereafter, under the excited-utterance exception, the startling event may trigger a spontaneous statement that relates to a much earlier incident. *Id.* No independent evidence of that earlier incident need exist; the trial court decides whether sufficient evidence exists of the event and may consider the excited utterance itself to make that determination. *Coble v. State*, 330 S.W.3d 253, 294–95 (Tex. Crim. App. 2010).

The court in *Goodman* stated the following: "For the excited-utterance exception to apply, three conditions must be met: (1) the statement must be a product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous and unreflecting, (2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent, and (3) the statement must relate to the circumstances of the occurrence preceding it. The critical factor in determining when a statement is an excited utterance under Rule 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. The time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement. That the declaration was a response to questions is likewise only one factor to be considered and does not alone render the statement inadmissible." *Goodman v. State*, 302 S.W.3d 462, 471–72 (Tex. App.—Texarkana 2009, pet. ref'd) (internal quotations and citations omitted).

Practice Note: "The critical determination is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time of the statement. . . . [But] we are constrained to hold that the long pauses in S.D.'s responses . . . preclude a determination that her statements resulted from impulse rather than reason and reflection." *Tienda v. State*, 479 S.W.3d 863, 877–878 (Tex. App.—Eastland 2015, no pet.) (internal quotations and citations omitted) (quoting *Zuliani v. State*, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003)).

Example Predicate:

What classroom did little Susie come into?
Where is your classroom located?
What time of day was it?
What are the children usually doing in school at the beginning of the day?
Do you ever watch the children get dropped off?
Did you see little Susie getting dropped off?
What did you see?
What happened when Susie got out of the car?
Could you hear the exchange between she and her mother?
Did Susie come running into your room after getting dropped off?
How did Susie appear to you?
Did she appear upset or excited?
Did you ask her what had just happened?
In her response, did she describe what happened?
What was her response?

3. Then-Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, mental feeling, pain, or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Fed. R. Evid. 803(3). Statements that go

beyond the declarant's emotional state to describe past acts do not fit within this exception to the hearsay rule. *Camm v. State*, 908 N.E.2d 215, 227 (Ind. 2009); *Menefee v. State*, 211 S.W.3d 893, 905 (Tex. App.—Texarkana 2006, pet. ref'd). The type of statement anticipated by this rule includes a statement that, on its face, expresses or exemplifies the declarant's state of mind—such as fear, hate, love, and pain. *Garcia v. State*, 246 S.W.3d 121, 132 (Tex. App.—San Antonio 2007, pet. ref'd). For example, a person's statement regarding her emotional response to a particular person qualifies as a statement of then-existing state of emotion. *Id.* However, a statement is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed. Tex. R. Evid. 803(3). "Case law makes it clear that a witness may testify to a declarant saying 'I am scared,' but not 'I am scared because the defendant threatened me.' The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase 'because the defendant threatened me' is expressly outside the state-of-mind exception because the explanation for the fear expresses a belief different from the state of mind of being afraid." *State v. Daise*, 807 S.E.2d 710, 719 (S.C. App. 2017); *Delapaz v. State*, 228 S.W.3d 183, 207 (Tex. App.—Dallas 2007, pet. ref'd) (quoting *United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005), *abrogation on other grounds recognized by United States v. Little*, 829 F.3d 1177, 1181–82 (10th Cir. 2016)).

Practice Note: Drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3). *Mims v. State*, No. 03-13-00266-CR, 2015 WL 7166026, at *6 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication).

Example Predicate:

What classroom did little Susie come into?
Where is your classroom located?
What time of day was it?
What are the children usually doing in school at the beginning of the day?
Do you ever watch the children get dropped off?
Did you see little Susie getting dropped off?
What did you see?
What happened when Susie got out of the car?
Could you hear the exchange between she and her mother?
Did Susie come running into your room after getting dropped off?
How did Susie appear to you?
Did she seem upset or angry?
Was she crying?
Did she say anything that caused you to believe she had a specific physical condition?
What did she say?

4. Statements Made for Medical Diagnosis or Treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, sensations, or the inception or general cause thereof insofar as reasonably pertinent to diagnosis or treatment. Fed. R. Evid. 803(4). The *Taylor* case provides a thorough discussion of this exception, and key points are as follows:

The rationale behind this exception "focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says." *Taylor v. State*, 268 S.W.3d 571, 580 (Tex. Crim. App. 2008) (quoting *United States v. Iron Shell*, 633 F.2d 77, 83–84 (8th Cir. 1980)). Further, it is reasonable that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription." *Id.* "A two-part test flows naturally from this dual rationale: first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the witness to rely on the information for purposes of diagnosis or treatment." *Id.*; *accord State v. Velasquez*, 944 N.E.2d 34, 41 (Ind. Ct. App. 2011).

It is not required that the witness be a physician or have medical qualifications. *Taylor*, 268 S.W.3d at 587. Out-of-court statements to psychologists, therapists, licensed professional counselors, social workers, hospital attendants, ambulance drivers, or even members of the family might be included under Rule 803(4). *Id.* "The essential qualification expressed in the rule is that the declarant believe that the information he conveys will ultimately be utilized in diagnosis or treatment of a condition from which the declarant is suffering, so that his selfish motive for truthfulness can be trusted. That the witness may be a medical professional, or somehow associated with a medical professional, is no more than a circumstance tending to demonstrate that the declarant's purpose was in fact to obtain medical help for himself. A declarant's statement made to a non-medical professional under circumstances that show he expects or hopes it will be relayed to a medical professional as pertinent to the declarant's diagnosis or treatment would be admissible

under the rule, even though the direct recipient of the statement is not a medical professional." *Id.*

Breaking the two-part test down, the first part involves a second two-part test to determine reliability of the statement. The proponent of the evidence must first show that the declarant was aware that the statements were made for the purpose of a medical diagnosis or treatment. *Id.* at 588–89. Second, the proponent must show that a proper diagnosis or treatment depends upon the truthfulness of the statements. *Id.*; *see State v. Simmons*, 816 S.E.2d 566 (S.C. 2018) (holding that, in assault cases, the identity of the perpetrator is not covered by the exception and would still be excluded). That a diagnosis has been given or treatment has begun does not preclude the declarant's self-interested motive to tell the truth. *Taylor*, 268 S.W.3d at 589. And for purposes of appellate review, especially in cases involving a child-declarant, the proponent of the hearsay must "make the record reflect both 1) that truth-telling was a vital component of the particular course of therapy or treatment involved, and 2) that it is readily apparent that the child-declarant was aware that this was the case." *Id.* at 590. The second part of the original two-part test boils down to whether the particular statements proffered are pertinent to treatment. *Id.* at 591.

Practice Note: The Austin Court of Appeals held in *Mata* that, even though the proponent of the hearsay did not explicitly state that the child-declarant knew she had to be truthful when talking to the doctor, the record was absent of any evidence that would negate such a finding, and the evidence was such that the court could infer the finding. *Mata v. State*, No. 03-15-00220-CR, 2016 WL 859037, at *5 (Tex. App.—Austin Mar. 4, 2016, no pet.) (mem. op., not designated for publication).

Practice Note: Medical doctors and mental-health doctors are treated differently in this context. Courts will look "for any evidence that would *negate*" an awareness that the patient must tell the truth to a medical doctor, but the record must reflect that that awareness is present when the patient seeks mental-health treatment. *Taylor*, 268 S.W.3d at 589.

Practice Note: The declarant does not have to be the patient, so long as it is reasonable for the treating professional to rely on the statements and the statements are pertinent to treatment. *Rangel v. State*, No. 05-15-00609-CR, 2016 WL 3031378 (Tex. App.—Dallas May 19, 2016, pet. ref'd) (mem. op., not designated for publication). Therefore, a parent's statements, or someone else that takes a child to the doctor, are excepted from the hearsay rule.

Example Predicate:

Did you go with your daughter to the doctor?
What was the date of the visit to the doctor?
Did you go in the room with your daughter to see the doctor?
Did you notice any physical symptoms that would lead you to believe your daughter was not feeling well?
What did you see?
Was your daughter rubbing her forehead?
Did the doctor ask your daughter what was wrong?
What did she say?

5. Recorded Recollection

A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. Fed. R. Evid. 803(5). If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. *Id.* For a statement to be admissible under Rule 803(5): (1) the witness must have had firsthand knowledge of the event, (2) the statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum. *Johnson v. State*, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998); *Priester v. State*, 478 S.W.3d 826, 836 (Tex. App.—El Paso 2015, no pet.); *see also United States v. Patterson*, 678 F.2d 774, 778 (9th Cir. 1982). To meet the fourth element, "the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters accurately or to check them for accuracy. At the extreme, it is even sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time." *Johnson*, 967 S.W.2d at 416.

Example Predicate:

Are you familiar with Susie?
Have you provided her counseling?
Do you recall providing her counseling on March 1, 2014?
I'm going to hand you what has been previously marked as Petitioner's Exhibit 2.
Do you recognize this as your counseling notes?
Did you make these notes yourself?
Do you normally make notes when you interview children?
Have you had a chance to review the notes?
Do these notes accurately reflect your knowledge of what occurred in that counseling session?

6. Records of Regularly Conducted Activity

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902 for these types of records, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Fed. R. Evid. 803(6). "'Business' as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not." Tex. R. Evid. 803(6)(e); *accord* Fed. R. Evid. 803(6)(B). For example, if a spouse keeps financial records as part of a regularly organized activity, the records can be admitted under this exception with the spouse as the sponsoring witness, without a business records affidavit. For example, courts have admitted check registers, medical bills and receipts, and cancelled checks, among other things, in this way. *See, e.g.*, *Sabatino v. Curtiss Nat'l Bank of Miami Springs*, 415 F.2d 632, 634 (5th Cir. 1969); *In re M.M.S.*, 256 S.W.3d 470, 477 (Tex. App.—Dallas 2008, no pet.). The predicate for admissibility under the business records exception is satisfied if the party offering the evidence establishes that the records were generated pursuant to a course of regularly conducted business activity and that the records were created by or from information transmitted by a person with knowledge, at or near the time of the event. *Thomas v. State*, 967 P.2d 1111, 1124 (Nev. 1998). Business records that have been created by one entity but have become another entity's primary record of the underlying transaction may be admissible under this rule. *Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 130 (Tex. App.—Dallas 2014, no pet.); *Martinez v. Midland Credit Management, Inc.*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet). Although the sponsoring witness need not be the record's creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared. *Barnhart v. Morales*, 459 S.W.3d 733, 744 (Tex. App.—Houston [14th Dist.] 2015, no pet.). In order for a compilation of records to be admitted, there must be a showing that the authenticating witness or another person compiling the records had personal knowledge of the accuracy of the statements in the documents. *In re E.A.K.*, 192 S.W.3d 133, 143 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). However, documents written in preparation of litigation indicate a lack of trustworthiness and do not qualify as business records under the above rule. *Wi-LAN Inc. v. Sharp Elec. Corp.*, 362 F.Supp.3d 226, 232 (D.Del. 2019); *Campos v. State*, 317 S.W.3d 768, 778 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

Example Predicate - Business:

Mr. Jones, what is your position with the company?
How long have you been employed?
What are your responsibilities?
Do your responsibilities include bookkeeping?
Are you familiar with the bookkeeping practices of the company?
Let me show you what I have marked as Exhibit 1.
What is this?
What information do these documents reflect?
When were these documents prepared?
Who prepared those documents?
Do you have personal knowledge regarding the preparation of these documents?
Was the preparation of these documents a regularly conducted business activity of the business?
Was it the regular practice of the business to make these records in this way?

Example Predicate - Individual:

John, as part of your business do you download your bank account information on a weekly basis?
And does that cause you to deal with banks almost daily?
As part of your business, do you go online and make online financial transactions through your accounts?
And you have a username and password to those accounts?
And as part of your business do your print out those bank account statements for your file?

For the purposes of tracking the money you transfer from account to account each week?
And I have handed you what I have marked as Exhibit 2, are those some of those bank statements?
And is it in the normal course of business for you to print the documents in relation to the financial accounts and the business you transact each week?
And is it in the normal course of business for you to keep the documents in the manner they are presented here today?
And you have personal knowledge of these documents?
Because these are your bank statements?

7. Absence of a Record of a Regularly Conducted Activity

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of 803(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. Fed. R. Evid. 803(7). For example, testimony about what is not documented in medical records is admissible under Rule 803(7). *Azle Manor, Inc. v. Vaden*, No. 2-08-115-CV, 2008 WL 4831408, at *6–7 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.), *disapproved of on other grounds*, *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013). It is first necessary to show that records were kept in accordance with Rule 803(6) before introducing testimony under 803(7) that records are missing. *Coleman v. United Sav. Ass'n of Tex.*, 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ).

8. Public Records

Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth: (A) the activities of the office or agency; (B) matters observed while under a legal duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or (C) in civil cases, factual findings resulting from a legally authorized investigation; unless the sources of information or other circumstances indicate lack of trustworthiness. Fed. R. Evid. 803(8). The court in *Cole* stated: "A number of courts have drawn a distinction for purposes of Rule 803(8)(B) between law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation." *Cole v. State*, 839 S.W.2d 798, 803 (Tex. Crim. App. 1990) (internal citations omitted) (quoting *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985)). "Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation. In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter, . . . such records are, like other public documents, inherently reliable." *Id.* at 804.

In contrast, adversarial, investigative, or third-party statements do not fall under this exception. Classic examples would be witness statements in police reports or statements by third parties in CPS caseworker narratives. Such statements, even if contained within a public report, would be hearsay-within-hearsay and only admissible if another hearsay exception was applicable. However, records prepared solely for litigation may be admitted so long as they are the result of an investigation made pursuant to authority granted by law and as long as they are properly authenticated. *See, e.g.*, *F-Star Socorro, L.P. v. City of El Paso*, 281 S.W.3d 103, 106 (Tex. App.—El Paso 2008, no pet.) (holding that delinquent-tax records, made for the sole purpose of litigation, were prepared as a result of a tax assessor-collector's lawful investigation, and were admissible because self-authenticating).

Practice Note: It is the burden of the party opposing the document to point out what statements within it are untrustworthy and, thus, excluded from the exception. *Zeus Enters., Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 241 (4th Cir. 1999); *Corrales v. Dep't of Family & Protective Servs.*, 155 S.W.3d 478, 486–87 (Tex. App.—El Paso 2004, no pet.) (holding that, although police report contained witness statements that did not fall within 803(8) exception, opposing party only objected on grounds that those witnesses were not at trial and did not specifically indicate which statements were untrustworthy, so entire report was admitted).

9. Public Records of Vital Statistics

Records of births, deaths, or marriages, if reported to a public office in accordance with a legal duty. Fed. R. Evid. 803(9); *compare Tex. Workers' Comp. Comm'n v. Wausau Underwriters Ins.*, 127 S.W.3d 50, 61 (Tex.

App.—Houston [1st Dist.] 2003, pet. denied) (explaining that, while death certificate itself was automatically admissible under 803(9), contents of death certificate constitute hearsay within hearsay and must be examined separately), *with Birkhead v. State*, 57 So.3d 1223, 1231–32 (Miss. 2011) (holding that 803(9) admitted death certificate with no exceptions). The contents of a record of vital statistics are not automatically admissible pursuant to Rule 803(9) if it is alleged that the record contains hearsay statements. *See Tex. Workers' Comp. Comm'n*, 127 S.W.3d at 61; *but see Martinez v. State*, No. 05-92-02176-CR, 1996 WL 179370, at *1 (Tex. App.—Dallas Apr. 16, 1996, no writ) (not designated for publication). Except for birth and death records, further allegations of hearsay within a record must be examined separately. *See Tex. Workers' Comp. Comm'n*, 127 S.W.3d at 61; *see, e.g.*, Tex. Health & Safety Code Ann. § 191.052 ("A copy of a birth, death, or fetal death record registered under this title that is certified by the *state* registrar is prima facie evidence of the facts stated in the record.") (emphasis added).

10. Absence of a Public Record

To prove the absence of a public record or statement or the nonoccurrence or nonexistence of a matter of which a public record or statement was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the public record or statement. Fed. R. Evid. 803(10). The best evidence rule cannot be an objection to testimony about the absence of a record because it does not apply to testimony that written records have been examined and found not to contain a certain matter. *United States v. Valdovinos-Mendez*, 641F.3d 1031, 1035 (9th Cir. 2011); *Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 311–12 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Further, "a nonexistent document or document entry, by definition, cannot be authenticated; it does not exist, and no authentication is required." *Mega Child Care, Inc.*, 29 S.W.3d at 311–12.

11. Records of Religious Organizations Concerning Personal or Family History

Statements of births, legitimacy, ancestry, marriages, divorces, deaths, relationships by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. Fed. R. Evid. 803(11). These types of records do not require the same foundation as business records if they are not offered under that exception. *Jessop v. State*, 368 S.W.3d 653, 683 (Tex. App.—Austin 2012, no pet.). Nor does this rule depend upon the personal views or religious beliefs of the person making the records or the popularity or acceptance of the religious organization in question. *Id.* at 684. There is also literature on how this rule shows bias against oral tradition evidence, especially as it relates to Native American culture in America. *See Pueblo of Jemez v. United States*, 430 F.Supp.3d 943, 1169 n.204 (D.N.M. 2019).

12. Certificates of Marriage, Baptism, or Similar Ceremonies

Statements of fact, contained in a certificate that is made by a person who is authorized by a religious organization or by law to perform the act certified, that attest that the person performed a marriage or similar ceremony or administered a sacrament and that purports to have been issued at the time of the act or within a reasonable time after it. Fed. R. Evid. 803(12).

13. Family Records

Statements of fact concerning personal or family history contained in a family record, such as Bibles, genealogies, charts, engravings on rings, inscriptions on portraits, or engravings on urns or other burial markers. Fed. R. Evid. 803(13); *see, e.g.*, *In re Egbert's Estate*, 306 N.W.2d 525, 527 (Mich. App. 1981) (admitting family photograph with handwritten note on back); *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *24 (Tex. Crim. App. Oct. 28, 2015) (not designated for publication) (holding that Bible study certificates did not qualify as family records because they did not concern personal or family history nor were they contained in any of the documents listed in 803(13)).

14. Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property as proof of the content of the originally recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is kept in a public office and an applicable statute authorizes the recording of documents of that kind in that office. Fed. R. Evid. 803(14). This hearsay exception should be construed to relate to recitals or statements made in deeds, leases, mortgages, and other such documents affecting an interest in property and not to affidavits of heirship which more properly fall within the hearsay exception stated under Rule 804(b)(3).

Compton v. WWV Enters., 679 S.W.2d 668, 671 (Tex. App.—Eastland 1984, no writ). 803(14) could include:

- a power of attorney, *Champion v. Robinson*, 392 S.W.3d 118, 128 n.17 (Tex. App.—Texarkana 2012, pet. denied);
- translated documents, *Kerlin v. Arias*, 274 S.W.3d 666, 667 (Tex. 2008);
- an assignment of mortgage, *U.S. Bank Nat'l Ass'n v. Huggins*, No. 24963, 2012 WL 3871431, at *4–5 (Ohio App. Sep. 7, 2012);
- previous judgments, *United States v. Boulware*, 384 F.3d 794, 806–07 (9th Cir. 2004);
- but not a letter from a CPA without a public office and not filed in a public office, *In re Bay Vista of Va., Inc.*, 428 B.R. 197, 216–17 (Bank. E.D. Va. 2010).

15. Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. Fed. R. Evid 803(15); *Maui Land & Pineapple Co. v. Infiesto*, 879 P.2d 507, 511–12 (Haw. 1994); *McGuire v. Walker*, 423 S.E.2d 617, 618–19 (W.Va. 1992). This rule is similar to 803(14) but relates to statements in unrecorded documents affecting an interest in property. Although attorneys tend to think of real property when applying this exception, it can apply to personal property as well. *See, e.g.*, *United States v. Weinstock*, 863 F.Supp. 1529, 1535 (D.Utah 1994) (holding that affidavit regarding ownership of shares of stock should not be excluded in motion in limine); *Guidry v. State*, 9 S.W.3d 133, 146–47 (Tex. Crim. App. 1999) (holding that wife's inventory from divorce proceeding stating she had an interest in a Jeep, which was to be the appellant's remuneration for killing her, fell under 803(15) exception); *Madden v. State*, 799 S.W.2d 683, 698 (Tex. Crim. App. 1990) (holding that handwritten list of victim's weapons with corresponding serial numbers found among victim's personal papers after death fell under 803(15) exception). Be aware, however, that some courts require the document to have some sort of official or formal nature, even though it is not recorded. *See, e.g.*, *Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 451 (Tex. App.—Fort Worth 2005, pet. denied) (noting that Texas Court of Criminal Appeals has been more liberal but holding that unsigned letters do not fall under 803(15) exception).

16. Statements in Ancient Documents

Jurisdictions vary on a time or date limit for how old a document must be to be considered "ancient." *See, e.g.*, Fed. R. Evid. 803(16) (prepared before January 1, 1998); Ind. R. Evid. 803(16) (at least thirty years old); Tex. R. Evid. 803(16) (at least twenty years old). But, generally, statements in a document that qualifies as an ancient document and whose authenticity is established is excepted from the hearsay rule. Fed. R. Evid. 803(16); *Cave Buttes, L.L.C. v. Comm'r of Internal Revenue*, 147 T.C. 338, 360–62 (2016) (holding that images of maps digitally converted and posted on government website were ancient documents under 803(16) because maps were authenticated ancient documents). Although all hearsay exceptions require a showing of trustworthiness, the justification for this exception is, in part, circumstantial indicia of trustworthiness. *Walton v. Watchtower*, No. 10-05-00190-CV, 2007 WL 64442, at *3 (Tex. App.—Waco Jan. 10, 2007, no pet.) (mem. op.). "Fraud and forgery are unlikely to be perpetrated so patiently, to bear fruit so many years after a document's creation. Fair appearance and proper location, therefore, are sufficient additional circumstances to justify admissibility of an ancient document." *Id.* Grounds for excluding evidence include that the document was: (1) not produced in an admissible form, (2) unreliable, (3) found and produced under suspicious circumstances, or (4) not found where it should have been found. *Aguillera v. John G. & Marie Stella Kennedy Mem. Found.*, 162 S.W.3d 689, 695 (Tex. App.—Corpus Christi 2005, pet. denied); *see also* Fed. R. Evid. 901(b)(8) (authenticating ancient documents).

Example Predicate (to be used for authentication also):

I'm handing you what has been marked as Exhibit 1; what is that?
When was it created?
Is that more than 20 years ago?
Where was it found?
Is that an unusual place to find it?
Is there anything suspicious about its condition for being so old?
What does it say?

17. Market Reports and Similar Commercial Publications

Market quotations, lists, directories, or other compilations generally relied upon by the public or by persons in

particular occupations. Fed. R. Evid. 803(17). "Where it is proven that publications of market prices or statistical compilations are generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged, such publications are admissible for the truth of the matter published." *Patel v. Kuciemba*, 82 S.W.3d 589, 594 (Tex. App.—Corpus Christi 2002, pet. denied); *accord Dugan v. Gotsopoulos*, 22 P.3d 205, 207 (Nev. 2001) (admitting Kelley Blue Book values). This exception also applies to drug labels if there is sufficient reliability that the drugs had not been changed since the date of packaging. *Reemer v. State*, 835 N.E.2d 1005, 1007–09 (Ind. 2005); *Shaffer v. State*, 184 S.W.3d 353, 362 (Tex. App.—Fort Worth 2006, pet. ref'd). For a discussion of the difference between this exception and the learned treatise exception, see immediately below.

18. Statements in Learned Treatises, Periodicals, or Pamphlets

To the extent called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, statements contained in published treatises, periodicals, or pamphlets established as reliable authority by the testimony or admission of the expert or by another expert or by judicial notice. Fed. R. Evid. 803(18); *Jacober v. St. Peter's Med. Ctr.*, 608 A.2d 304, 312 (N.J. Super. 1992) (collecting states that have adopted learned treatise hearsay exception and comparing differences). If admitted, the statements may be read into evidence but may not be received as exhibits. *Id.* The market report exception is different from the learned treatise exception in significant ways, as discussed in the *Kahanek* case: "A market report or commercial publication is received for the truth of the matter asserted, which permits the jury to take the document into the jury room. A learned treatise, on the other hand, is admissible only in conjunction with an expert's testimony and may not be taken into the jury room." *Kahanek v. Rogers*, 12 S.W.3d 501, 504 (Tex. App.—San Antonio 1999, pet. denied). The market report exception is for information that is readily ascertainable and about which there can be no real dispute. *Id.* The exception relates to objective facts furnished under a business duty to transmit. *Id.* Acceptance of these criteria can be seen in several examples in case law—growth charts of turkeys, daily stock price quote sheets, newspaper publications of the market prices of chickens, a baseball guide admitted to show the beginning and ending dates of the baseball season, and a travel guide admitted to show railroad timetables. *Id.* On the other hand, the compilation of drug information embodied by the Physicians' Desk Reference (PDR) goes beyond objective information to items on which learned professionals could disagree in good faith. *Id.* Therefore, the PDR is better classified as a learned treatise rather than a compilation of market material. *Id.* The predicate for cross-examining an expert on a learned treatise is found above in the section on experts. From that predicate, simply read into the record what you want the judge or jury to hear from the treatise.

19. Reputation Concerning Personal or Family History

Reputation among members of a person's family by blood or adoption or marriage, among a person's associates, or in the community, concerning a person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood or adoption or marriage, or other similar facts of personal or family history. Fed. R. Evid. 803(19); *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 98–101 (3d Cir. 1999) (providing in-depth background to rule). Hearsay exceptions 803(19) and (20) arise from necessity and are founded on the general reliability of statements by family members about family affairs when the statements by deceased persons regarding family history were made at a time when no pecuniary interest or other biased reason for the statements were present. *Akers v. Stevenson*, 54 S.W.3d 880, 885 (Tex. App.—Beaumont 2001, pet. denied). For example, "certain witnesses may provide hearsay evidence regarding a person's age. In order to give such evidence, the witness must be a close family associate who is familiar with the family history." *Jones v. State*, 950 S.W.2d 386, 388 (Tex. App.—Fort Worth 1997, pet. ref'd, untimely filed).

20. Reputation Concerning Boundaries or General History

Reputation in a community, arising before the controversy, concerning boundaries of or customs affecting lands in the community or concerning general historical events important to the community, state, or nation in which they are located. Fed. R. Evid. 803(20); *Pueblo of Jemez v. United States*, 366 F.Supp.3d 1234, 1267 (D.N.M. 2018) (allowing oral tradition in if it related to an event and boundaries but not stories, legends, or myth). However, proposed testimony related to an individual's family assertion of an easement without any indication of the community's interest in or knowledge of the family's claim to access the property or any indication of a general reputation within the community of his right of access is not admissible. *Roberts v. Allison*, 836 S.W.2d 185, 191 (Tex. App.—Tyler 1992, writ denied);

see also Roser v. Silvers, 698 N.E.2d 860, 864 (Ind. 1998) (comparing different jurisdictions' application of rule).

21. Reputation Concerning Character

Reputation of a person's character among that person's associates or in the community. Fed. R. Evid. 803(21). "Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay rule." *Moore v. State*, 663 S.W.2d 497, 500 (Tex. App.—Dallas 1983, no pet.). A character witness is not required to reside or work in the same "community" as the one about whom the testimony is related. *Siverand v. State*, 89 S.W.3d 216, 221 (Tex. App.—Corpus Christi 2002, no pet.). For example, the testimony of a witness who knew defendant's reputation in Dallas, where the defendant worked, was admissible even though the witness did not know the defendant's reputation in Richardson, where the defendant lived. *Jordan v. State*, 290 S.W.2d 666, 667 (Tex. Crim. App. 1956); *cf. United States v. Oliver*, 492 F.2d 943, 944 (8th Cir. 1974) (allowing reputation within "college community," even though not "general community").

22. Judgment of Previous Conviction

In civil cases, evidence of a final judgment of conviction, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction, while no appeal of the conviction is pending. Fed. R. Evid. 803(22)(A). See Fed. R. Evid. 803(22)(B) if offering in a criminal case. If the judgment is used for a purpose other than a fact sustaining the judgment, Rule 803(22) does not apply. *Olsen v. Correiro*, 189 F.3d 52, 63 (1st Cir. 1999) (holding that, because judgment was being used to show defendant had been punished in a way related to his claim for incarceration-related damages, Rule 803(22) did not apply).

According to the *McCormick* case, a person may be prevented from explaining the circumstances of his previous conviction: "Where (i) the issue at stake was identical to that in the criminal case, (ii) the issue had been actually litigated, and (iii) determination of the issue was a critical and necessary part of the prior judgment, the judgment is established by offensive collateral estoppel and is within the hearsay exception of [803(22)]. When the requirements are satisfied, a party is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict." *McCormick v. Tex. Commerce Bank Nat'l Ass'n*, 751 S.W.2d 887, 890 (Tex. App.—Houston [14th Dist.] 1988, writ denied). A trial court does not err in refusing to permit a party to explain the circumstances of his criminal conviction under these circumstances. *Id.* To allow a party to present evidence of inadequate representation by counsel, for example, would impugn the validity of the judgment and be impermissible under the doctrine of collateral estoppel. *Id.* It would also allow for an impermissible collateral attack.

23. Judgments Involving Personal, Family, or General History, or a Boundary

Judgments as proof of matters of personal, family, or general history, or boundaries that were essential to the judgment, if the same could be proved by evidence of reputation. Fed. R. Evid. 803(23); *In re Estate of Mask*, 703 So.2d 852, 858 (Miss. 1997) (holding that judgment regarding conservatorship of ward was not admissible because ward's inability to handle his own affairs did not concern history of which no bias or passion would exist).

24. Residual Exception

Even if a statement does not fall under Rules 803 or 804, it can still overcome the hearsay rule if the statement is supported by sufficient guarantees of trustworthiness and it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. Fed. R. Evid. 807(a). But, the statement is only admissible if the proponent gives reasonable notice in writing prior to the trial or hearing, or at the trial or hearing if good cause excuses the lack of earlier notice, of its intent to offer the statement so that its opponent has a fair opportunity to meet it. Fed. R. Evid. 807(b). Several states have similar residual rules, which all draw from the same principle discussed initially: hearsay is normally excluded because it cannot be tested and is, therefore, more susceptible to being unreliable or untrustworthy. *See* 2 McCormick on Evid. §§ 244–45. Thus, if that untrustworthiness is overcome, there is no reason to exclude it.

C. Exceptions to the Hearsay Rule - Declarant Unavailable

1. "Unavailable" Defined

A declarant is considered unavailable if the declarant: (1) is exempted, by ruling of the court on the ground of privilege, from testifying concerning the subject matter of the declarant's statement; (2) refuses to testify concerning the subject matter despite a court order to do so; (3)

testifies to not remembering the subject matter; (4) is unable to be present or to testify at the hearing because of death or a then-existing infirmity or physical or mental illness; or (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. Fed. R. Evid. 804(a). These do not apply if the proponent of the statement wrongfully caused the declarant's unavailability. *Id.* In other words, unavailability of a witness means that the witness is dead, has become insane, is physically unable to testify, is beyond the jurisdiction of the court, is unable to be found after a diligent search, or has been kept away from the trial by the adverse party. *Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975); *cf. People v. Duncan*, 835 N.W.2d 399, 406 (Mich. 2013) ("The phrase 'then existing' specifically limits the temporal scope within which a witness's availability under MRE 804(a)(4) may be assessed; the only relevant reference point is the point at which the witness takes the stand. As a result, the declarant need not suffer from a permanent illness or infirmity. Thus, the fact that RS was competent and available to testify at two preliminary examinations does not affect the determination whether she was mentally capable or infirm for purposes of MRE 804(a)(4) at the time her testimony was sought at trial. Rather, the only relevant inquiry is her condition at the time she was called to testify."). The party offering a statement under a hearsay exception must prove the unavailability of the declarant. *Hall*, 525 S.W.2d at 862.

The court in *Fuller* discussed situations that do not satisfy the unavailability requirement. *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914 (Tex. App.—Beaumont 1998, pet. dism'd, judgment set aside Sep. 16, 1999). Although the *Fuller* opinion has been set aside, it raises concerns that lawyers must be diligent in procuring an available declarant. The court in *Fuller* stated that, although the declarant, who was 92, uncooperative, too ill to attend the original trial, and lived in California, was unavailable at the date of trial, that did not mean that he was not or would not be available at another point or in another way, such as a deposition in his home state. *Id.* at 921.

2. Former Testimony

Former testimony is not excluded if the declarant is unavailable as a witness if the testimony was given by the declarant as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Fed. R. Evid. 804(b)(1). Basically, if the opposing party, or one with a similar interest and motive, had the opportunity to examine the declarant at another point in time about the same testimony, the declarant need not be available for examination by that party at the present hearing. *See United States v. Salerno*, 505 U.S. 317, 321–22 (1992) (holding that similar motive to develop testimony must exist in party against whom former testimony is offered). Different jurisdictions treat depositions differently, as discussed above. Former testimony from a previous hearing or trial, whether or not it is in the same proceeding, must be properly admitted into evidence at the current hearing before the factfinder, or the reviewing court may not consider it. *Bos v. Smith*, 492 S.W.3d 361, 378 (Tex. App.—Corpus Christi 2016), *rev'd in part on other grounds*, 556 S.W.3d 293 (Tex. 2018); *Moreno v. Perez*, 363 S.W.3d 725, 735–36 (Tex. App.—Houston [1st Dist.] 2011, no pet.). While a trial court may take judicial notice of its own file, it may not "take judicial notice of the truth of [the] allegations in its records." *Barnard*, 133 S.W.3d at 789. To properly admit previously admitted testimony, a party must authenticate the evidence and lay the proper predicate as though offering it for the first time. *See Guyton*, 332 S.W.3d at 693. Evidence not properly before the factfinder amounts to no evidence. *Id.*

3. Dying Declaration

A statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of the death. Fed. R. Evid. 804(b)(2). The court in *Gardner* discusses this exception: "Under Texas common law, the proponent of a dying declaration was required to establish that it was made (1) when the declarant was conscious of approaching death and had no hope of recovery, (2) voluntarily, (3) without persuasion or influence from leading questions, and (4) when the declarant was of sound mind. This predicate could be established by either direct or circumstantial evidence, and it was not essential that the declarant actually say that he was conscious of impending death or without hope of recovery. Each case depends upon its particular circumstances, but sometimes the declarant's conduct and the nature of his wounds would suffice. Under the modern-day Rule 804(b)(2), the common-law requirement that there was no hope of recovery was abrogated, and the focus turned more to the severity of the injuries than the declarant's explicit words indicating knowledge of imminent death. All that the rule requires is sufficient evidence, direct or circumstantial, that

demonstrates that the declarant must have realized that he was at death's door at the time that he spoke. It is both (1) the solemnity of the occasion—the speaker peering over the abyss into the eternal—which substitutes for the witness oath, and (2) the necessity principle—since the witness had died, there was a necessity for taking his only available trustworthy statements—that provide the underpinning for the doctrine. As with the admission of all evidence, the trial judge has great discretion in deciding whether a statement qualifies as a dying declaration." *Gardner v. State*, 306 S.W.3d 274, 289–91 (Tex. Crim. App. 2009); *cf. Berry v. State*, 611 So.2d 924, 927 (Miss. 1992) (holding that declarant's consciousness of impending death could be inferred by fact that his body had over twenty shotgun pellets in it, every organ was damaged, major artery was severed, and chest was injured). Suicide notes have been held to not meet the dying declaration elements. *See United States v. Angleton*, 269 F.Supp.2d 878, 886 (S.D.Tex. 2003); *Garza v. Delta Tau Delta Fraternity Nat'l*, 948 So.2d 84, 86 (La. 2006)

4. Statement against Interest

A statement that was, at the time of its making, so contrary to the declarant's pecuniary or proprietary interest, or had so great a tendency to invalidate the declarant's claim against someone else or expose the declarant to civil or criminal liability or make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. Fed. R. Evid. 804(b)(3)(A). In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Fed. R. Evid. 804(b)(3)(B). However, only those specific statements that were actually against penal interest are admissible, not the entire conversation. *Williamson v. United States*, 512 U.S. 594, 600 (1994). Self-inculpatory statements and "blame-sharing" or neutral collateral statements are admissible, but self-exculpatory statements that shift blame to another must be excluded. *Walter v. State*, 267 S.W.3d 883, 886, 894 (Tex. Crim. App. 2008). And remember that the statement must involve the *declarant's* interest or liability and not the interest or liability of another. *Williamson*, 512 U.S. at 601. Not all jurisdictions require the declarant to be unavailable for this exception to apply. *See, e.g.*, Tex. R. Evid. 803(24).

5. Statement of Personal or Family History

A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or adoption or marriage, or other similar facts of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or a statement concerning the foregoing matters, including death, of another person, if the declarant was related to the person by blood or adoption or marriage, or was so intimately associated with the person's family as to be likely to have accurate information concerning the matter stated. Fed. R. Evid. 804(b)(3). This rule is similar to 803(19), which allows *reputation* testimony regarding personal or family history. *See* Fed. R. Evid. 803(19). This rule rests on the assumption that the type of declarant specified by the rule will not a make a statement, such as a date of a marriage or the existence of a ceremony, unless it is trustworthy. *Henderson v. State*, 77 S.W.3d 321, 326 (Tex. App.—Fort Worth 2002, no pet.). Rule 804(b)(3) does not apply when the matter asserted by the declarant involves non-trustworthy facts, such as state of mind. *Id.*

D. Hearsay within Hearsay

Hearsay within hearsay is admissible only if each offered portion fits a rule or exception. Fed. R. Evid. 805. Trial advocates commonly face this problem regarding statements contained within business and medical records. Like all hearsay, however, if an opponent does not object to hearsay-within-hearsay, the testimony may be probative evidence. *Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 126 (Tex. App.—Eastland 2001, pet. denied). Similarly, if evidence contains both inadmissible hearsay and other admissible evidence, the objection must be specific enough to point out the inadmissible evidence, or else it may all come in. *State v. Thomas*, 932 N.W.2d 713, 726 (Neb. 2019); *Foster v. S.C. Dep't of Highways and Pub. Transp.*, 413 S.E.2d 31, 34 (S.C. 1992); *Sunl Grp., Inc. v. Zhejiang Top Imp. & Exp. Co., Ltd.*, 394 S.W.3d 812, 816 (Tex. App.—Dallas 2013, no pet.).

Practice Note: A recent case out of California held that, although an expert may rely on hearsay to form an opinion, the expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." *People v. Sanchez*, 374 P.3d 320, 334 (Cal. 2016). The court adopted the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being

admitted for their truth." *Id.* This would then extend to an expert's report, like a custody evaluation. If the evaluator relied on collaterals in forming an opinion, and the evaluator's report contains those collaterals' statements, the opponent should object on the grounds of hearsay (for the report) and hearsay within hearsay (for each statement made by a collateral). The proponent of the report should call each of those collaterals to testify so that the collateral can be cross-examined. But note that the Confrontation Clause, generally, does not apply to civil cases, should the court deny your request that each collateral be called to testify before admitting the report. *Am. Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999); *In re S.P.*, 168 S.W.3d 197, 206 (Tex. 2005). One possible way around this, however, is that cross-examination is fundamental to due process. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) ("We have recognized that our due course of law provision at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. . . . This right [to be heard] also includes an opportunity to cross-examine witnesses, to produce witnesses, and to be heard on questions of law."); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) ("Due process requires an opportunity to confront and cross-examine adverse witnesses.").

E. Impeaching Hearsay Statements

Rule 806 provides that when a hearsay statement, or a non-hearsay statement defined by Rule 801(d), has been admitted in evidence, the credibility of the out-of-court declarant may be attacked. Fed. R. Evid. 806. Evidence of a statement or conduct by the declarant at any time may be offered to impeach the out-of-court declarant. *Id.* There is no requirement that the declarant be afforded an opportunity to deny or explain. *Id.* If the credibility of the out-of-court declarant is attacked, it may be supported by any evidence that would be admissible if the declarant had testified as a witness. *Id.* If the party against whom a hearsay statement has been admitted subsequently calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if on cross-examination. *Id.*

F. Hearsay Issues with Electronic Evidence

Electronic evidence and non-electronic evidence follow the same underlying rules: they both must (1) be relevant, (2) be authentic, (3) fall within a hearsay exception or not be hearsay, (4) be an original or duplicate, and (5) have probative value that is not outweighed by its unfair prejudice. The predicates may be lengthier or more complicated for electronic evidence to prove each of those things, but do not forget, it is still just evidence. As such, this sub-section will only discuss issues directly related to electronic evidence and hearsay, relying on the discussions above of each individual hearsay rule. Electronic evidence, generally, will be discussed in more depth in the next section on authentication.

1. Unreflective Statements

Evidence obtained from email, text messaging, or social networking sites, such as Facebook, MySpace, or Twitter, is often relevant in family law cases. The evidence may be non-hearsay to the extent that it is an admission by a party-opponent, but there may be times where statements by others are relevant. Of the hearsay exceptions, 803(1)-(3) can be especially useful in admitting these types of statements. Those are the exceptions for present sense impression, excited utterance, and then-existing condition, as discussed above. Electronic communication is particularly prone to candid statements of the declarant's state of mind, feelings, emotions, and motives. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 570 (D.Md. 2007) (mem. op.). Further, such messages are often sent while events are unfolding (e.g., live tweeting), thus providing an additional argument for lack of reflection. The logic of the existing exceptions can be applied to admit even new forms of communication. *See* Fed. R. Evid. 803(1)–(3).

2. Reliable Documents

The second category of hearsay exceptions, reliable documents, can also include a variety of computer- or internet-stored data. Anything from online flight schedules, to personal financial records, to emails could potentially be admitted under these existing hearsay exceptions. *See* Fed. R. Evid. 803(5)–(18).

3. Statements that are not Hearsay

a) Computer-Generated "Statements"

"Cases involving electronic evidence often raise the issue of whether electronic writings constitute statements under Rule 801(a). Where the writings are non-assertive, or not made by a 'person,' courts have held that they do not constitute hearsay, as they are not 'statements.'" *Lorraine*, 241 F.R.D. at 564. This refers to computer-

generated statements made by an internal operation of the computer, such as the date and time that a hotel-room card reader reads a card key or the self-generated print out from an intoxilyzer instrument, rather than data that was entered by a person and subsequently printed out. *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (fax header); *Stevenson v. State*, 920 S.W.2d 342, 343–44 (Tex. App.—Dallas 1996, no pet.) (intoxilyzer); *Murray v. State*, 804 S.W.2d 279, 283–84 (Tex. App.—Fort Worth 1991, pet. ref'd) (hotel-room card reader); *but see Smith v. State*, 168 So.3d 992, 1000–01 (Miss. App. 2013)), aff'd in part, vacated in part, 136 So.3d 424 (Miss. 2014) (holding that automatically generated email that included both notification of Facebook message and contents of Facebook message was computer-generated and not hearsay). Even though these statements may be computer-generated, evidence must still support that the computer process is accurate and reliable. *See U. S. v. Rollins*, No. ACM34515, 2004 WL 26780, at *9 (A.F. Ct. Crim. App. 2003) ("[T]he admissibility of the computer tracing system record should be measured by the reliability of the system itself, relative to its proper functioning and accuracy."), *rev'd on other grounds*, 61 M.J. 338 (C.A.A.F. 2005); *Baker v. State*, 117 A.3d 676, 683–84 (Md. 2015) (phone records were inadmissible because, even though not hearsay, no evidence that they were accurate and reliable); *Miller v. State*, 208 S.W.3d 554, 562–64 (Tex. App.—Austin 2006, pet. ref'd) (holding that because no evidence was admitted that self-generated phone bill or process to create such bill was accurate, trial court erred by admitting phone bill over hearsay objection).

b) Metadata

Metadata is the computer-generated data about a file, including date, time, past saves, edit information, etc. It would likely be considered a non-statement under the above logic, and therefore non-hearsay. It remains important to properly satisfy authentication requirements. A higher authentication standard may apply because it is computer-processed data, rather than merely computer-stored data.

However, because metadata is normally hidden and usually not intended to be reviewed, at least ten states have issued ethics opinions concluding that it is unethical to mine inadvertently-produced metadata. *See, e.g.*, Miss. Bar Ethics Comm., Op. 259 (2012); N.C. State Bar Ethics Comm., 2009 Formal Ethics Op. 1 (2010); Me. Bd. of Overseers, Op. 196 (2008). At least Seven states, including the American Bar Association, have issued opinions stating that mining metadata is not unethical, some including the caveat "as long as special software is not used." *See, e.g.*, Or. State Bar Legal Ethics Comm., Op. 2011-187 (2015); Co. Bar Ass'n Ethics Comm., Op. 119 (2008); Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Op. 06-442 (2006). Minnesota and Pennsylvania have each issued opinions that state it must be determined on a case-by-case basis. *See* Minn. Lawyers Prof'l Responsibility Board, Op. 22 (2010); Penn. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Op. 2009-100 (2009).

Texas issued an ethics opinion at the end of 2016 about metadata. Prof'l Ethics Comm. for the State Bar of Tex., Op. 665 (2016). While it does not directly address mining for metadata, it does instruct that attorneys have a duty to be competent when dealing with electronic documents and to scrub metadata so that a client's confidential information will not be inadvertently disseminated to opposing counsel. *Id.* It also states that, while lawyers have no duty to tell the sending lawyer that metadata containing confidential information was received, lawyers must continue to follow other ethical rules by not misleading the court. *Id.* Thus, if a lawyer makes a proposition to the court that would not be misleading without the knowledge of the confidential information, but would be misleading with the knowledge of the confidential information, the lawyer cannot make that proposition if the lawyer knew the confidential information, whether the lawyer inadvertently saw it or mined for it. *Id.*

c) Admissions by a Party-Opponent

The exemption for admissions by a party-opponent is extremely useful in overcoming a hearsay objection to texts, emails, Facebook wall posts, etc. Electronic evidence will meet this hearsay exemption if it is properly authenticated to have been written/posted/created/etc. by the party against whom it is used. *See, e.g.*, *United States v. Johnson*, 280 F.Supp.3d 772, 773 (D. Maryland 2017) ("Every day millions of individuals post the statements of others—in video, audio, and written form—to their own social media accounts. One need not look far to find examples where such actions do not constitute an endorsement of the statement, let alone a full-fledged adoption of the statement sufficient to justify its admission at trial against the individual who posted it . . . . Nor is there any indication from the message allegedly posted by [defendant] that he authored or adopted the video as a whole—including its production, effects, and the statements of others."); *Cook v. State*, 460 S.W.3d 703, 713 (Tex. App.—Eastland 2015, no pet.) (text

messages); *Massimo v. State*, 144 S.W.3d 210, 215–17 (Tex. App.—Fort Worth 2004, no pet.) (emails).

Similarly, "liking" something on social media could be an adoption of a statement, making it an admission by a party opponent. In *Bland*, an employee of the incumbent sheriff "liked" the opposing candidate's social media campaign page and was terminated. *Bland v. Roberts*, 730 F.3d 368, 372 (4th Cir. 2013). The 4th Circuit held that "liking a political candidate's campaign page . . . is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech." *Id.* at 386. Although this case did not directly address whether "liking" a social media page or post could be hearsay, holding that it is substantive speech certainly opens the door to that argument. And depending on who "liked" something and who is offering the "like," it could be an admission by a party opponent.

d) Emojis/Emoticons

An "emoticon" is "a combination of typed keyboard characters used . . . to represent a stylized face meant to convey the writer's tone." *Ukwuachu v. State*, No. PD-0366-17, 2018 WL 2711167, at *6 n.12 (Tex. Crim. App. June 6, 2018) (Yeary, J., concurring) (quoting Garner's Modern English Usage 476 (4th ed. 2014)). An "emoji" is "an emoticon or other image in [a standardized] set." *Id.* Emoticons and emojis are now mainstream in society and are becoming more prevalent in the law, and cases are beginning to cite to them more often. *See, e.g.*, *United States v. Schweitzer*, No. ACM 39212, 2018 WL 3326645, at *2, *6 (A.F. Ct. Crim. App. May 18, 2018); *Ukwuachu*, 2018 WL 2711167, at *6. Not many cases have directly held whether emojis or emoticons themselves are statements such that they would fall under the hearsay rules. *See, e.g.*, *Ghanam v. Does*, 845 N.W.2d 128, 144–46 (Mich. App. 2014) (holding in defamation case that tongue-sticking-out emoji ":P" meant sarcasm, so defendant's responses in online forum thread that public official was performing nefarious acts "cannot be taken as asserting fact," so they were not defamatory); *People v. Johnson*, 28 N.Y.S.3d 783, 795 (County Ct. N.Y. 2015) (holding that "likes" by victim of sexually suggestive posts were hearsay). But under the definition of hearsay, a written verbal expression or nonverbal conduct is a statement. Fed. R. Evid. 801(a). Furthermore, drawings have been held to be admissible under hearsay exceptions. *See Mims*, 2015 WL 7166026, at *6 (drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3)).

Therefore, there is no reason why emoticons or emojis, computer images used to convey the writer's tone or the actual thing the emoji depicts, should not fall under the hearsay rules. When seeking to admit or object to evidence that contains emoticons or emojis, make your argument specific and include the emoticons or emojis accordingly.

G. Rule of Optional Completeness

In Texas, Rule 107 allows for the admission of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter opened up by the adverse party. Tex. R. Evid. 107; *Bezerra v. State*, 485 S.W.3d 133, 142–43 (Tex. App.—Amarillo 2016, pet. ref'd) (holding no abuse of discretion in admitting videotaped interviews, over hearsay exception, that more fully and fairly explained the matters about which police officer testified per Rule 107) (citing *Walters*, 247 S.W.3d at 214–18). The omitted portion or other evidence that the proponent attempts to admit must be on the same subject and must be necessary to make it fully understood. *Id.* (quoting *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004)). No other jurisdiction appears to include Rule 107, and Federal Rule 106, which matches Texas Rule 106 and is similar to Texas Rule 107, is not an exception to the hearsay rule, as discussed above.

X. FRE Article IX. Authentication and Identification

The requirement of authentication or identification is one of the first conditions precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Fed. R. Evid. 901(a). If the evidence is not what the proponent claims it is, then it cannot be relevant. *Tienda*, 358 S.W.3d at 638. A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. Unless the evidence sought to be admitted is self-authenticating under Rule 902, extrinsic evidence must be adduced prior to its admission. Fed. R. Evid. 902. Rule 901(b) contains a non-exclusive list of illustrations of authentication that comply with the rule. Fed. R. Evid. 901(b).

The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to test the reliability of evidence, subject to later review by an opponent's cross-examination. Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge. Obviously, there is no "one size fits

all" approach that can be taken when authenticating electronic evidence, partly because technology changes so rapidly that it is often new to many judges.

Before you step into the courtroom, you should already know what evidence you have that you want the factfinder to consider. You can then find the predicates and law necessary to authenticate and admit that evidence. Whether the evidence is electronic or not, the same rules of evidence apply, and the same unreliability must be overcome. *See In re F.P.*, 878 A.2d 91, 95 (Penn. 2005) (explaining that same rules of evidence apply to new technology and that same problem of unreliability can exist in traditional forms of evidence). While attorneys are right to be skeptical of electronic evidence, attorneys may forget that the same concerns are present with any type of evidence.

A. Non-electronic evidence

Non-electronic, physical evidence still exists, e.g. drawings, letters or writings, public records, tickets (sporting or other events, travel, etc.), deeds, judgments or convictions, bills, tax records, and wills. Except for those items that fall under 902, these items must be authenticated by laying the proper predicate to show that they are what the proponent claims they are.

Physical evidence has two basic methods of identification, which can authenticate the physical evidence and make it admissible: ready identifiability and chain of custody. Imwinkelried, Evidentiary Foundations at 138. Ready identifiability usually consists of distinctive characteristics or other attributes that a witness has experienced with the senses, thereby having personal knowledge, and can then identify again at trial, for example: a letter with an identifiable signature, a photograph, a voice, or an email. *See, e.g.*, *Angleton v. State*, 971 S.W.2d 65, 68 (Tex. Crim. App. 1998) (voice); *Manuel v. State*, 357 S.W.3d 66, 75 (Tex. App.—Tyler 2011, pet. ref'd) (email); *Garza v. Guerrero*, 993 S.W.2d 137, 142 (Tex. App.—San Antonio 1999, no pet.) (letter); *Kessler v. Fanning*, 953 S.W.2d 515, 522 (Tex. App.—Fort Worth 1997, no pet.) (photograph). The same identifiable characteristics can apply to both physical evidence and electronic evidence.

Example Predicate:

When have you seen/heard/experienced/etc. _____?
What characteristics did you see/hear/experience/etc.?
I am handing you what has been marked as Exhibit 1 for identification purposes; can you identify Exhibit 1?
What is it? (The same _____ I saw/heard/experienced/etc. before)
How can you identify Exhibit 1? *[distinctive characteristics test]*
Are those the same characteristics you saw/heard/experienced/etc. previously?
Are you basing your identification on your previous experience?
Is Exhibit 1 in the same condition as you previously experienced it?

Chain of custody is necessary when an object has no readily identifiable characteristics, yet the proponent wants to prove that the object is the same object that is connected to the case. Imwinkelried, Evidentiary Foundations at 138. This is most apparent in criminal cases involving substances that are collected at the crime scene, sent for testing, and sent back and presented at the trial. But beware, with the ever-increasing amount of "fake" evidence that can be produced today, some evidence in family law cases may require the chain of custody to be established also. To do so, the proponent must call each link (person who handled the evidence) to the stand and show that link's receipt of the object, ultimate disposition of the object, and safekeeping of the object. *Id.* at 139. Note, however, that the chain-of-custody requirements in civil cases are usually less stringent than in criminal cases. *See, e.g.*, *In re K.C.P.*, 142 S.W.3d at 579–80.

Example Predicate:

When did you receive _____?
Where did you receive _____?
What condition was _____ in when you received it at that time and place?
What did you do with _____ when you received it?
Did you safeguard _____?
How? or What did you do to prevent any tampering?
What did you do when your work with _____ was complete? (retain, destroy, or transfer)
Explain the process of retain/destroy/transfer.
If not destroyed:
I am handing you what has been marked as Exhibit 1 for identification purposes; can you identify Exhibit 1?
What is it?
Aside from anything you did to _____, is Exhibit 1 in the same condition as _____ when you initially received it?
Do you believe _____ and Exhibit 1 are the same object?

B. Electronically Stored Information (ESI)

Remember, evidence is evidence. Whether electronic or not, the proponent must adduce sufficient evidence to show that it is what its proponent claims.

1. What is ESI?

Family law cases typically involve four different categories of electronic data: (1) voice transmissions such as audio recordings, cell phone transmissions, and voice mail; (2) computer-generated data such as spreadsheets, computer simulations, information downloaded from a GPS device, emails, and website information (such as social networking sites); (3) information from personal data devices and cell phones including calendars, text messages (SMS/MMS), notes, digital photos, and address books; and (4) video transmissions.

Each of those four categories can be stored as data in different ways. The court, in the landmark case of *Zubulake*, listed five different types of storage:

1. Active/Online Data. This includes data files that are currently-in-use and works-in-progress such as word processing documents, spreadsheets, electronic calendars, address books, and all of the items contained on the computer's hard drive. This is considered the most accessible data;

2. Near-line Data. This includes the data contained on robotic storage devices. Although retrieval time can range between a few milliseconds to several minutes, this data is still considered very accessible;

3. Archival or Offline Data. This includes the information copied to removable media and stored in a location other than on the computer. The accessibility time of this data can range from minutes to days, depending on where the data is stored;

4. Backup Tapes. This is the imaging of the computer's system to a tape drive for archival reasons. Restoration of backup tapes is more time-consuming and usually very costly. The court in *Zubulake* considered this type of data inaccessible;

5. Erased or Damaged Data. This includes deleted files and fragments of files that are randomly placed throughout the disk. This is the least accessible form of ESI, and the court in *Zubulake* considered this type of data inaccessible. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 318–19 (S.D.N.Y. 2003).

Each of these types of storage can be found in a variety of forms, such as desktop and laptop computers, hard drives, removable media drives (i.e. floppy disks, tapes, CDs, DVDs), handheld devices and cell phones, optical disks, network hard disks, remote internet storage or the "cloud," and iPods/iPads and other MP3 players. Many newer forms of media/apps, such as Snapchat, purportedly send a message that is erased after a set amount of time. But some of these apps actually store those messages on the phone, which can be retrieved.

2. Stored versus Processed Data

"Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers." *Lorraine*, 241 F.R.D. at 556. The least complex admissibility issues are associated with electronically stored records. "In general, electronic documents or records that are merely *stored* in a computer raise no computer-specific authentication issues. If a computer *processes* data rather than merely storing it, authentication issues may arise. The need for authentication and an explanation of the computer's processing will depend on the complexity and novelty of the computer processing. There are many stages in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can also happen when defective software programs are used or stored-data media become corrupted or damaged." *Lorraine*, 241 F.R.D. at 543 (quoting Weinstein's Federal Evidence § 900.06[3]); *see, e.g.*, *Burleson v. State*, 802 S.W.2d 429, 440 (Tex. App.—Fort Worth 1991, pet. ref'd) (holding that computer-generated display, and system that produced display, was properly authenticated).

That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional "hard copy" records. Two cases illustrate the contrast between the more lenient approach to admissibility of computer records and the more demanding one:

In *United States v. Meienberg*, the defendant challenged on appeal the admission into evidence of printouts of computerized records of the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. 263 F.3d 1177, 1180–81 (10th Cir. 2001). The

Tenth Circuit disagreed, stating, "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility." *Id.* at 1181 (quoting *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988)).

In contrast, in the case of *In re Vee Vinhnee*, the bankruptcy appellate panel upheld the trial ruling of a bankruptcy judge excluding electronic business records of the credit card issuer of a Chapter 7 debtor for failing to authenticate them. 336 B.R. 437, 445 (9th Cir. BAP 2005). The court noted, "it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground." *Id.* The court also observed, "The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created. . . . Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." *Id.* at 444. That is similar to chain of custody. The court reasoned that, for paperless electronic records, "The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity's policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation." *Id.* at 445. In order to meet the heightened demands for authenticating electronic business records, the court adopted, with some modification, an eleven-step foundation proposed by Professor Edward Imwinkelried, viewing electronic records as a form of scientific evidence:

1. The business uses a computer.

2. The computer is reliable.

3. The business has developed a procedure for inserting data into the computer.

4. The procedure has built-in safeguards to ensure accuracy and identify errors.

5. The business keeps the computer in a good state of repair.

6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.

8. The computer was in working order at the time the witness obtained the readout.

9. The witness recognizes the exhibit as the readout.

10. The witness explains how he or she recognizes the readout.

11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact. *Id.* at 446; *cf. State v. Dunn*, 7 S.W.3d 427, 432 (Mo. Ct. App. 2000) (admissibility of computer-generated records "should be determined on the basis of the reliability and accuracy of the process involved"); *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998) ("[T]he admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.").

As the foregoing cases illustrate, there is a wide disparity between the most lenient positions courts have taken in accepting electronic records as authentic and the most demanding requirements that have been imposed. Further, it would not be surprising to find that, to date, more courts have tended towards the lenient rather than the demanding approach. However, it also is plain that commentators and courts increasingly recognize the special characteristics of electronically stored records, and there appears to be a growing awareness, as expressed in the Manual for Complex Litigation, that courts should "consider the accuracy and reliability of computerized evidence" in ruling on its admissibility. Manual for Complex Litigation, Fourth, § 11.447. Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although "it may be better to be lucky than good," as the saying

goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer-stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

Practice Note: The Texas Court of Criminal Appeals stated, in 2007, "in this modern era of computer-stored data, electronic files, and paperless court records, the day may come in which written judgments are largely obsolete. For this reason, Rule 902 of the Texas Rules of Evidence explicitly allows for the self-authentication of certified copies of public records, including data compilations in any form certified as correct by their custodian. A computer-generated compilation of information setting out the specifics of a criminal conviction that is certified as correct by the county or district clerk of the court in which the conviction was obtained is admissible under Rule 902." *Flowers v. State*, 220 S.W.3d 919, 922–23 (Tex. Crim. App. 2007) (internal quotations and citations omitted).

3. *Tienda v. State*

The Texas Court of Criminal Appeals released a 2012 opinion that dealt extensively with authenticating social media evidence. *See Tienda*, 358 S.W.3d at 633. While this case is not the first case to address internet evidence, it is the first from a court of last resort in Texas and goes into great depth on the subject, drawing from jurisdictions nationwide. *Id.*

The court in *Tienda* explained that there is no specific procedure for authenticating each piece of electronic evidence; rather the means of authentication will depend on the facts of the case. *Tienda*, 358 S.W.3d at 638–39. The court reviewed the case law from other jurisdictions to list some methods by which electronic evidence had been authenticated. *Id.* at 639 n.23. The court also acknowledged that some courts have held electronic evidence to a higher standard of authentication than other forms of evidence. *Id.* at 641–42. The court acknowledged the possibility that someone could have forged the pages to frame the defendant but held that that issue was one for the factfinder, not for the court as an authentication prerequisite. *Id.* at 645–46.

Practice Note: While case law on authenticating and admitting electronic evidence is still developing, practitioners may need to rely on cases from other jurisdictions. However, a practitioner should always attempt to admit the evidence, even if case law from other jurisdictions appears to be against it. Jurisdictions from around the country have sometimes followed, but sometimes distinguished, federal law and the law of other states, so there is nothing to lose by at least attempting to authenticate the evidence using as much circumstantial evidence as possible. Remember, the same rules of evidence apply to all evidence.

4. Reply-Letter Doctrine

"It is an accepted rule of evidence that a letter received in due course through the mails in response to a letter sent by the receiver is presumed to be the letter of the person whose name is signed to it and is thus self-authenticating." *United States v. Wolfson*, 322 F.Supp. 798, 812 (D. Del. 1971) (citing *Scofield v. Parlin & Orendorff Co.*, 61 F. 804, 806 (7th Cir. 1894)); *accord Black v. Callahan*, 876 F.Supp. 131, 132 (W.D. Tex. 1995) (citing *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985)). But the original letter must still be authenticated under traditional rules. *Wolfson*, 322 F.Supp. at 812.

Some jurisdictions have applied this same rule to electronic communications, including emails and text messages, although some courts have held that it is a rule of admissibility under 901, rather than a self-authenticating rule. *People v. Pierre*, 838 N.Y.S.2d 546, 548–49 (N.Y. App. Div. 2007) (text messages); *Butler v. State*, 459 S.W.3d 595, 602 n.6 (Tex. Crim. App. 2015) (text messages, letters, emails, instant messages, "and other similar written forms of communications"); *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex. App.—El Paso 2008, pet. ref'd) (emails).

5. Voice Transmissions

Rule 901(b)(5) provides that a voice recording may be identified by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. Fed. R. Evid. 901(b)(5). Voice transmissions may be authenticated by a witness with knowledge, opinion based upon hearing a voice under circumstances that connect it with the alleged speaker, or self-identification coupled with the context, content, and timing of the call. *See McCallister v. State*, 91 N.E.3d 554, 565 (Ind. 2018); *Emil v. State*, 784 P.2d 956, 958–59 (Nev. 1989); *State v. Thompson*, 803 S.E.2d 44, 50–51 (S.C. App. 2017); *Thornton v. State*, 994 S.W.2d 845, 855 (Tex. App.—Fort Worth 1999, pet. ref'd). One Texas court has held that a voicemail was not properly authenticated, even though a witness testified that she recognized the voice as the defendant's, because no

evidence before the jury identified the recording or explained the circumstances in which it was made. *Miller*, 208 S.W.3d at 566. However, a recording can be properly authenticated even when the witness cannot identify every voice in the recording, so long as those unknown voices are not pertinent to the case. *See, e.g.*, *Escalona v. State*, No. 05-12-01418-CR, 2014 WL 1022330, at *10 (Tex. App.—Dallas Feb. 20, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that "[i]t was not necessary to identify both voices on the phone call recordings in order for the State to prove that the recordings were what the State claimed them to be.") (citing *Banargent v. State*, 228 S.W.3d 393, 401 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), and *Jones v. State*, 80 S.W.3d 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.)).

Practice Note: A video is typically authenticated by a witness who can testify either that the scene is accurately depicted or that the recording was made by a reliable method. However, if your witness merely recognizes the people in the video but cannot testify about the scene or how the video was made, you may try admitting solely the audio portion. Your witness can testify that she recognizes some or all of the voices, and the other requirements for authenticating a video would not apply.

6. Computer-generated Data

a) Email

There are many ways in which email evidence may be authenticated. The distinctive characteristics of email include the sender's email address, its contents, substance, and internal patterns. *Lorraine*, 241 F.R.D. at 554 (quoting Weinstein's Federal Evidence § 900.07[3][c]). "Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness." *Id.*; *cf. United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000) (holding that email can be authenticated by circumstantial evidence, including distinctive characteristics); *Safavian*, 435 F.Supp.2d at 40 (holding that emails can be authenticated by distinctive characteristics or by comparison of exemplars with other emails that have already been authenticated under 901(b)(3)); *Rambus, Inc. v. Infineon Techs. AG*, 348 F.Supp. 2d 698, 707 (E.D. Va. 2004) (emails that qualify as business records may be self-authenticating); *State v. Robinson*, 363 P.3d 875, 1024–26 (Kan. 2015) (although unredacted copies presented at trial, unredacted copies were produced in discovery, and the witness testified that the redacted copies were true and accurate copies of the original emails; holding emails were properly authenticated), *disapproved on other grounds*, *State v. Cheever*, 402 P.3d 1126 (Kan. 2017); *Johnson v. State*, 137 A.3d 253, 271–74 (Md. Ct. Spec. App. 2016) (holding emails properly authenticated because defendant admitted the email addresses belonged to him, distinctive characteristics within the emails, and the IP address from where the emails were sent was linked to defendant's mother's home). The reply-letter doctrine applies to emails as discussed above.

Practice Note: An email can be authenticated by testimony that the witness was familiar with the sender's email address and that the witness had received the emails in question from the sender. *Sennett v. State*, 406 S.W.3d 661, 669 (Tex. App.—Eastland 2013, no pet.). Other courts have enumerated several characteristics to consider when determining whether an e-mail has been properly authenticated, including:

1. Consistency with the email address on another email sent by the defendant;

2. The author's awareness through the email of the details of defendant's conduct;

3. The email's inclusion of similar requests that the defendant had made by phone during the time period; and

4. The email's reference to the author by the defendant's nickname. *See Manuel*, 357 S.W.3d at 75; *Shea v. State*, 167 S.W.3d 98, 105 (Tex. App.—Waco 2005, pet. ref'd); *Massimo*, 144 S.W.3d at 215.

Example Predicate:

Is this a print-out of an email?
Do you recognize the email address following the word "To"?
Whose email address is that?
Do you recognize the email address following the word "From"?
Are you familiar with that email address?
Do you receive emails from that email address often?
Do you communicate with _____ on a normal basis using that email address?
How long have you been communicating with _____ using that email address?
To your knowledge, has anyone else ever sent you an email from _____'s email address?
Do you have any reason to believe this particular message is from someone other than _____?

Why do you say that? *[FRE 901(b)(4) distinctive characteristics]*
Is the print-out of the email a fair and accurate depiction of the conversation that took place that day?
Have you changed or deleted any portions of the conversation?
*If emojis are included:
Is there anything in the messages aside from letters, numbers, and punctuation?
What emojis/emoticons/symbols appear?
Did your spouse use those emojis before?
In what context would your spouse use them?
What do those emojis mean to you when your spouse uses them?

b) Websites, Including Social Media

When determining the admissibility of exhibits containing representations of the contents of website postings of a party, the issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting. *Lorraine*, 241 F.R.D. at 555–56.

"One commentator has observed in applying the authentication standard to website evidence, there are three questions that must be answered explicitly or implicitly. (1) What was actually on the website? (2) Does the exhibit or testimony accurately reflect it? (3) If so, is it attributable to the owner of the site? The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

"The length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations); whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; whether the data has been republished by others who identify the source of the data as the website in question?

"Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation." *Id.* at 555–56 (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 Prac. Litigator (Mar. 2002), *reprinted in* 5 Stephen A. Saltzburg et el., Federal Rules of Evidence Manual, Part 4 at 22 (9th ed. 2006)); *see also United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (excluding website postings because proponent failed to show that sponsoring witness actually posted the statements, rather than third party); *State v. Eleck*, 23 A.3d 818, 824 (Conn. App. Ct. Aug. 9, 2011) (holding insufficient fact that messages came from certain Facebook account without further "foundational proof"); *Commonwealth v. Purdy*, 945 N.E.2d 372, 380–82 (Mass. 2011) (holding that email sent from Facebook account bearing defendant's name not sufficiently authenticated without additional "confirming circumstances"); *In re Adoption of Nash*, 50 N.E.2d 2019, at *3 (Mass. App. 2016) (holding that Facebook messages not authenticated because, after mother and adoptive parents were no longer friends on Facebook, messages' metadata showed that they came from an unknown source); *State v. Green*, 830 S.E.2d 711, 714–16 (S.C. App. 2019) (holding Facebook messages properly authenticated because contained co-defendant's screen name, reference to co-defendant's sister, co-defendant's invitation to co-defendant's address, co-defendant's real name, timing of messages, and fact that victim disappeared after invitation to co-defendant's home, where victim's blood was found); *State v. Burns*, No. M2014-00357-CCA-R3-CD, 2015 WL 2105543, at *10–12 (Tenn. Crim. App. May 5, 2015) (holding Facebook messages authenticated because victim's computer and defendant's computer had same messages, emails also existed between defendant and victim, defendant's email was linked to Facebook account, same email was linked to defendant's cell phone and resume, and same pictures were found on both defendant's computer and cell phone); *Campbell v. State*, 382 S.W.3d 545, 551–52 (Tex. App.—Austin 2012, no pet.) (holding that Facebook messages authenticated because only two parties who had access to the account were victim and defendant, defendant admitted he had a Facebook account, and victim admitted to receiving messages from the defendant's Facebook account).

7. Information from Personal Data Devices

a) Text Messages

Text messages can be authenticated by applying the same factors as emails. *Manuel*, 357 S.W.3d at 76–77; *see also State v. Damper*, 225 P.3d 1148, 1152–53 (Ariz. App. 2010) (authenticated because witness and victim regularly texted, victim's phone number saved in witness's phone, text on morning of shooting came from victim's phone, victim's phone found next to her body after shooting,

defendant failed to provide evidence that anyone other than victim could have had used victim's phone that morning); *State v. Koch*, 334 P.3d 280, 288 (Idaho 2014) ("[E]stablishing the identity of the author of a text message or email through the use of corroborating evidence is critical to satisfy the authentication requirement for admissibility."); *Boyd v. State*, 175 So.3d 1, 6 (Miss. 2015) (authenticated because defendant was arrested at the time and place of the meeting set up through the messages, he was alone when arrested with a cell phone that contained victim's phone number, and victim's phone had sent messages to that cell phone); *Rodriguez v. State*, 273 P.3d 845, 848 (Nev. 2012) (texts not authenticated because state did not demonstrate that defendant was author of texts); *State v. Thompson*, 777 N.W.2d 617, 626 (N.D. 2010) (holding texts authenticated because defendant demanded money via text and in person from victim, victim explained circumstances and testified of defendant's phone number and signature on text); *Butler*, 459 S.W.3d at 605 (holding that Rule 901 does not require court to determine credibility of sponsoring witness, who had been impeached); *Joseph v. State*, No. 14-11-00776, 2013 WL 2149779 (Tex. App.—Houston [14th Dist.] May 16, 2013, no pet.) (memo. op.) (appellant's verbal messages to witness were so similar to purported texts that they could be properly authenticated as coming from appellant); *State v. Otkovic*, 322 P.3d 746, 752 (Utah 2014) (authenticated because sufficient evidence showed that texts came from defendant's cell phone and that defendant was in possession of same cell phone at time texts were sent).

Example Predicate:

Is this a print-out of a text message?
Do you recognize it?
How do you recognize it?
Do you recognize the name at the top of the print-out?
Regarding the printout, what cell phone number is that name attached to in your cell phone contacts?
How did you obtain _____'s cell phone number?
Have you received text messages from _____ before?
Is text messaging a normal way that you communicate with _____?
How long have you been text messaging with _____?
To your knowledge, has anyone else ever sent you a text message from _____'s cell phone?
Do you have any reason to believe this particular text message is from someone other than _____?
Why do you say that? *[FRE 901(b)(4) distinctive characteristics]*
Did you and _____ discuss the events that occurred earlier in the day? *[FRE 901(b)(4) distinctive characteristics]*
Is the print-out of the text message a fair and accurate depiction of the conversation that took place?
Have you changed or deleted any portions of the conversation?

b) Chat Room Content

"Many of the same foundational issues encountered when authenticating website evidence apply with equal force to internet chat room content; however, the fact that chat room messages are posted by third parties, often using 'screen names' means that it cannot be assumed that the content found in chat rooms was posted with the knowledge or authority of the website host." *Lorraine*, 241 F.R.D. at 556; *but see United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (holding testimony of witness who had participated in chats was sufficient to authenticate chat log). "One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

"(1) evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);

"(2) evidence that, when a meeting with the person using the screen name was arranged, the individual showed up;

"(3) evidence that the person using the screen name identified himself as the person in the chat room conversation;

"[(4)] evidence that the individual had in his possession information given to the person using the screen name; or

"(5) evidence from the hard drive of the individual's computer showing use of the same screen name." *Lorraine*, 241 F.R.D. at 556 (quoting 1 Saltzburg, Federal Rules of Evidence Manual, § 901.02[12]).

Courts also have recognized that exhibits of chat room conversations may be authenticated circumstantially. *See United States v. Tank*, 200 F.3d 627, 629–31 (9th Cir. 2000) (despite certain portions of messages being deleted, circumstantial evidence connecting defendant to chat room, including use of defendant's screen name in messages, authenticated messages); *United States v. Simpson*, 152 F.3d 1241, 1249 (10th Cir. 1998) (use of email name of defendant, presence of the defendant's correct address in messages, and notes seized at defendant's home containing address, email address, and

telephone number given by undercover officer, all authenticated messages); *In re F.P.*, 878 A.2d at 93–94 (holding that circumstantial evidence, such as use of defendant's screen name in text message, use of the defendant's first name, and subject matter of the messages all could authenticate the transcripts).

c) Digital Photographs

"Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene. Calling the photographer or offering [expert] testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be enhanced. Digital image enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change." *Lorraine*, 241 F.R.D. at 561 (quoting Edward J. Imwinkelried, *Can this Photo be Trusted?*, Trial, Oct. 2005, at 48).

"Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs: Suppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant's name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an improved, digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise . . . never would have seen." *Id.* (quoting Imwinkelried, *Can this Photo be Trusted?* at 49).

Three distinct types of digital photographs should be considered with respect to authentication analysis: original digital images, digitally converted images, and digitally enhanced images. *Id.*

(1) Original Digital Photograph

"An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201." *Id.*

Further, even if no witness can testify from personal knowledge that the photo accurately depicts the scene, the "silent witness" analysis allows a photo to be authenticated by showing a process or system that produces an accurate result. Fed. R. Evid. 901(b)(9); *United States v. Greska*, 65 M.J. 835, 844 (A.F. Ct. Crim. App. 2007); *Reavis v. State*, 84 S.W.3d 716, 719 (Tex. App.—Fort Worth 2002, no pet.) (citing *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001)). Testimony that shows how the storage device was put in the camera, how the camera was activated, the removal of the storage device immediately after the offense, the chain of custody, and how the film was developed/photograph was printed, is sufficient to support a trial court's decision to admit evidence. *See Reavis*, 84 S.W.3d at 719 (citing *United States v. Taylor*, 530 F.2d 639, 641–42 (5th Cir. 1976)). The D.C. Circuit has held that photos taken by an ATM were properly authenticated on even less evidence—mere testimony of a bank employee familiar with the operation of the camera and the fact that the time and date were indicated on the evidence were sufficient to authenticate the photos. *Id.* at 719–20 (citing *United States v. Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994)).

(2) Digitally Converted Images

"For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)—the latter rule implicating expert testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify to the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion." *Lorraine*, 241 F.R.D. at 561. If further testimony is required to explain the process, then the predicate laid out above in the expert witness section would be used to show the procedures used to convert the film image to a digital

format, along with the witness's personal knowledge that the process produces an accurate and reliable digital version of the photograph.

(3) Digitally Enhanced Images

"For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which delves into the realm of scientific or technical evidence under Rule 702. Recently, one state court has given particular scrutiny to how this should be done. In *State v. Swinton*, the defendant was convicted of murder in part based on evidence of computer enhanced images prepared using the Adobe Photoshop software. The images showed a superimposition of the [defendant's] teeth over digital photographs of bite marks taken from the victim's body. At trial, the state called the forensic odontologist (bite mark expert) to testify that the defendant was the source of the bite marks on the victim. However, the defendant testified that he was not familiar with how the Adobe Photoshop made the overlay photographs, which involved a multi-step process in which a wax mold of the defendant's teeth was digitally photographed and scanned into the computer to then be superimposed on the photo of the victim. The trial court admitted the exhibits over objection, but the state appellate court reversed, finding that the defendant had not been afforded a chance to challenge the scientific or technical process by which the exhibits had been prepared. The court stated that to authenticate the exhibits would require a sponsoring witness who could testify, adequately and truthfully, as to exactly what the jury was looking at, and the defendant had a right to cross-examine the witness concerning the evidence. Because the witness called by the state to authenticate the exhibits lacked the computer expertise to do so, the defendant was deprived of the right to cross examine him.

"Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9): (1) The witness is an expert in digital photography; (2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them; (3) the witness testifies that the processes used are valid; (4) the witness testifies that there has been adequate research into the specific application of image enhancement technology involved in the case; (5) the witness testifies that the software used was developed from the research; (6) the witness received a film photograph; (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer; (8) the witness can identify the trial exhibit as the product of the enhancement process he or she performed. The author recognized that this is an extensive foundation, and whether it will be adopted by courts in the future remains to be seen. However, it is probable that courts will require authentication of digitally enhanced photographs by adequate testimony that it is the product of a system or process that produces accurate and reliable results." *Id.* at 561–62.

The eight steps above can lay the predicate for digitally enhanced images. But because Photoshop is so widely used today, and image enhancements are easy to come by, the same predicate laid out in the section on expert witnesses concerning the tests and procedures they use could be used here. The witness must first be proved up as an expert on digital photo enhancements, though.

Example Predicate:

Do you use Instagram?
Do you have an Instagram account?
Did you create your own Instagram page?
When did you create it?
Did you create the username and password?
Does anyone else have access to that username and password that you created?
Has anyone else ever had access to that username and password that you created?
Do you have friends/followers on Instagram?
Do you either accept friends/followers or request friends/followers on Instagram?
Have you ever de-friended/un-followed anyone on your Instagram page?
When was that/Who was that [as relevant]?
Did you create your Instagram profile page?
Have you posted photos to your Instagram page?
When you posted those photos, did you utilize any of the photography filters available on Instagram?
What filters did you utilize (if applicable)?
Other than providing a filter on the photograph, did you make any other edits or changes to the photograph?
When did you last modify your profile on Instagram?
Have you ever noticed anything about your Instagram page that would lead you to believe that someone else has had access to your Instagram account?

What is your username?
What is your password?
Is this a fair and accurate depiction of your page?
Does it appear that anything has been deleted or changed?

8. Video Transmissions

Videos can be authenticated the same way as photographs, and the same "silent witness" principle applies as well. *See State v. Luke*, 464 P.3d 914, 928–29 (Haw. App. 2020); *People v. Tetter*, 144 N.E.3d 664, 668 (Ill. App. 2019); *Reavis*, 84 S.W.3d at 719; *see, e.g.*, *Thierry v. State*, 288 S.W.3d 80, 88–89 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (holding that, even though sponsoring witness was not present when the video was made, sponsoring witness knew the intricacies of the recording and computer systems and detailed how he was able to link the encoding on the receipts to the time and date in question, to the transaction in question, to the cashier, to the terminal, and finally to the video camera that recorded the transaction; he also testified that he personally copied the relevant recording to the videotape, viewed it on the recording system and the videotape the same day he made the tape, and viewed it on the day prior to his testimony, and that it fairly and accurately represented what it purported to show and that no alterations or deletions had been made; thus, videotape was properly authenticated); *see also Fowler v. State*, 544 S.W.3d 844, 848–49 (Tex. Crim. App. 2018) (holding that "yes, it is possible" for the proponent of a video to sufficiently prove its authenticity without testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device; using distinctive characteristics test to determine that the trial court was within the zone of reasonable disagreement when admitting the video).

Example Predicate:

Were you present when Husband struck Wife that day?
Were you able to see him when he struck her?
What were you doing when he struck her?
I am handing you what has been marked as Exhibit 1 for identification purposes; do you recognize that?
What is it?
Since making that video, have you watched it?
Does the video recording, marked as Exhibit 1, fairly and accurately show what you saw that day when Husband struck Wife?
Is the recording complete?
Has it been edited in any way?

C. Self-Authenticating Evidence

Rule 902 sets forth fourteen different types of evidence that are self-authenticating, meaning that no extrinsic evidence of authenticity is required before they are admissible. Fed. R. Evid. 902. Each subsection of Rule 902 lays out the predicate necessary to self-authenticate each type of evidence.

1. Domestic Public Documents that are Sealed and Signed

Any document that bears a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; along with a signature purporting to be an execution or attestation. Fed. R. Evid. 902(1); *see, e.g.*, *United States v. Alvirez*, 831 F.3d 1115, 1123 (9th Cir. 2016) (holding that only entities listed in rule can issue self-authenticating documents); *Waworsky v. Fast Grp. Hous. Inc.*, No. 01-13-00466-CV, 2015 WL 730819, at *4 (Tex. App.—Houston [1st Dist.] Feb. 17, 2015, no pet.) (mem. op.) (holding that, because Texas Workforce Commission's "Appeal Tribunal Decision" contained seal of TWC and signature of hearing officer, decision was properly self-authenticated).

2. Domestic Public Documents that are not Sealed but are Signed and Certified

Any document that bears no seal but bears the signature of an officer or employee of an entity named in 902(1) and another public officer, who has a seal and official duties within that same entity, certifies under seal, or its equivalent, that the signer has the official capacity and that the signature is genuine. Fed. R. Evid. 902(2). These documents can often be authenticated under Rule 902(4) as well. *See, e.g.*, *United States v. Weiland*, 420 F.3d 1062, 1072 (9th Cir. 2005); *Williams v. State*, No. 03-07-00398-CR, 2008 WL 820919, at *3 (Tex. App.—Austin Mar. 28, 2008, pet. ref'd) (mem. op., not designated for publication) (holding that pen packets had more ways to be authenticated than just 902(1) and 902(2)); *Hooker v. Tex. Dep't of Public Safety*, No. 09-07-125 CV, 2007 WL 4722931, at *1 (Tex. App.—Beaumont Jan. 17, 2008, pet. denied) (mem. op.) (holding that sworn reports of police officer were properly authenticated under 902(4), so appellant's issue of proper authentication under 902(2) was irrelevant).

3. Foreign Public Documents

Any document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. Fed. R. Evid. 902(3); *see United States v. Deverso*, 518 F.3d 1250, 1255–56 (11th Cir. 2008). The document must also have a final certification as to the genuineness of the signature and the official position of the signer, and this must be signed by a secretary of the United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. *Id.* If all of the parties have had a reasonable opportunity to investigate the authenticity of the document, the court may order that the document be treated as presumptively authentic without a final certification or allow it to be evidenced by an attested summary with or without a final certification. *Id.*

The Texas Court of Criminal Appeals has recently examined this rule in depth. *Bruton v. State*, 428 S.W.3d 865, 873–81 (Tex. Crim. App. 2014). The appellant had been convicted in the district court of aggravated sexual assault of a child and indecency with a child by contact. *Id.* at 869 n.8. During the punishment phase, the State attempted to introduce exhibits containing several certificates of conviction from the United Kingdom. *Id.* at 868. The court looked first at the difference between obtaining originals or copies. *Id.* at 874–76. Rule 902(3) applies to originals, and originals that purport to be originals executed by someone with authority to execute them satisfy the execution/attestation requirement of Rule 902(3). *Id.* at 874–76. It then turned to the final certification that must accompany such documents, including who must make the certification. *Id.* at 877–79. A final certification must directly or indirectly vouch for the genuineness of the signature and official position of the signer. *Id.* at 877. Only those positions listed in 902(3) may sign such certification. *Id.* at 877–78. And finally, it looked at the good cause determination when no final certification is available. *Id.* 879–81. Good cause is measured partly by whether the document is authentic despite the absence of a final certification. *Id.* at 880. But the weight goes toward whether good cause exists as to why the party did not obtain a final certification. *Id.* at 880–81.

4. Certified Copies of Public Records

Any copy of an official record if the copy is certified as correct by the custodian or another person authorized to make the certification or a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed under statutory authority. Fed. R. Evid. 902(4); *see, e.g.*, *Nolan v. Billings Clinic*, 467 P.3d 545, 548 (Mon. 2020) (holding that weather report was self-authenticating because it was certified by its custodian); *In re Marriage of Dalton*, 348 S.W.3d 290, 295 (Tex. App.—Tyler 2011, no pet.) (holding that certified copy of Oklahoma order was properly filed in Texas and properly authenticated foreign judgment).

5. Official Publications

Any book, pamphlet, or other publication purporting to be issued by a public authority. Fed. R. Evid. 902(5); *see Williams v. Long*, 585 F.Supp.2d 679, 686 (D.Md. 2008) (including same list of entities in 902(1) as "public authority"). Because such documents are self-authenticating, it is proper to take judicial notice of documents on government websites. *Shook v. Pirkin Cty. Bd. of Cty. Comm'rs*, 411 P.3d 158, 161 n.4 (Col. App. 2015) (taking judicial notice of self-authenticating government webpage from a particular date); *In re Poirier*, 346 B.R. 585, 588–89 (Bankr.D.Mass. 2006) (taking judicial notice of fact that Department of Education maintains a website, but noting that website is not fixed, so not taking judicial notice of facts on website); *Williams Farms Produce Sales, Inc. v. R.&G Produce, Co.*, 443 S.W.3d 250, 259 (Tex. App.—Corpus Christi 2014, no pet.) (holding in turnover suit that court could rely on docket sheet printed from federal court website to show that separate entity owned cause of action to be turned over).

6. Newspapers and Periodicals

Any printed materials purporting to be a newspaper or periodical. Fed. R. Evid. 902(6); *see, e.g.*, *United States Ec. & Exch. Comm'n v. Berrettini*, No. 10-cv-1614, 2015 WL 5159746, at *6 (N.D.Ill. Sep. 1, 2015) (mem. op. & order) (holding document not self-authenticating as article from Wall Street Journal's website because document contained no URL or other information indicating article was obtained from WSJ website or where or when it was obtained); *Crofton v. Amoco Chemical Co.*, No. 14-98-01412-CV, 1999 WL 1122999, at *3 (Tex. App.—Houston [14th Dist.] Dec. 9, 1999, pet. denied) (not designated for publication) (holding that newspaper articles were self-authenticating).

7. Trade Inscriptions

Any inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control. Fed. R. Evid. 902(7); *see, e.g.*, *United States v. Burdulis*, 753 F.3d 255, 263 (1st Cir.

2014) (holding that thumb drive with "Made in China" stamped on it was self-authenticating evidence that showed that thumb drive had travelled in interstate commerce).

8. Acknowledged Documents

Any document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments. Fed. R. Evid. 902(8). Although affidavits may be authenticated under this Rule, they may still be inadmissible as hearsay. *See Ortega v. Cach, LLC*, 396 S.W.3d 622, 630 (Tex. App.—Houston [14th Dist.] 2013, no pet.). But if the acknowledged document is the statement of an opposing party, it would be self-authenticating and not be hearsay. *See* Fed. R. Evid. 801(d)(2), 902(8).

9. Commercial Paper

Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law. Fed. R. Evid. 902(9); *United States v. Varner*, 13 F.3d 1503, 1510 (11th Cir. 1994) ("The language of Fed.R.Evid. 902(9) encompasses a broader range of self-authenticating documents than does Article 3 of the UCC."); *Ethridge v. State*, No. 12-09-00190-CR, 2012 WL 1379648, at *19 (Tex. App.—Tyler April 18, 2012, no pet.) (mem. op., not designated for publication) (holding that photocopy of checks in forgery case were self-authenticating).

10. Presumptions Under a Federal Statute

A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic. Fed. R. Evid. 902(10); *Jangula v. N.D. Dep't of Transp.*, 881 N.W.2d 639, 645 (N.D. 2016) (under similar state rule, blood analysis report was prima facie genuine under state statute and, thus, self-authenticating).

11. Certified Domestic Records of a Regularly Conducted Activity

The original or a copy of a domestic record that was made at or near the time of the act by a person with knowledge and was kept in the regular course of business, which is a regular practice of that business, if the record is accompanied by a certification of the custodian or other qualified person. Fed. R. Evid. 902(11). Reasonable notice must be given of the intent to offer the record prior to trial. *Id.* The affidavit should include such information as: the affiant is the custodian of the record, the affiant is familiar with the manner in which the records are maintained, how many pages of records are attached, the records are originals or exact duplicates, the records were made at or near the time of the act or that it is regular practice to make them at or near the time of the act, the records were made by a person with knowledge of the matters set forth or that it is the regular practice for this type of record to be made by a person with knowledge, and it is the regular practice of the business to make that type of record. *See United States v. Kassimu*, 188 Fed. Appx. 264, at *1 (5th Cir. 2006) (holding that only witness qualified to explain record keeping system of organization to confirm that requirements of 803(6) had been met was required to authenticate computer records; inability of witness to verify accuracy of information entered into computer did not preclude admissibility).

Business records that originate with one entity but subsequently become another entity's primary record of information about an underlying transaction are admissible as business records of that subsequent entity. *Riddle v. Unifund CCR Partners*, 298 S.W.3d 780, 782 (Tex. App.—El Paso 2009, no pet.). Furthermore, one business' documents may comprise the records of a second business if that second business determines the accuracy of the information generated by the first business. *Id.*

12. Certified Foreign Records of a Regularly Conducted Activity

The original or a copy of a foreign record that meets the criteria of 902(11), but the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. Fed. R. Evid. 902(12). The same notice as 902(11) is required. *Id.*

13. Certified Records Generated by an Electronic Process or System

A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11) or (12). Fed. R. Evid. 902(13). This rule was added to reduce the expense and inconvenience of producing a witness to authenticate electronic evidence. *Id.* cmt. to 2017 amendment. *See United States v. Bondars*, No. 1:16-cr-228, 2018 WL 9755074, at *2 (E.D.Va. Aug. 20, 2018) (slip copy)

(holding that internet screenshots accompanied with certificate of custodian were self-authenticating).

14. Certified Data Copied from an Electronic Device, Storage Medium, or File

Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11) or (12). Fed. R. Evid. 902(14). "Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology." *Id.* cmt. to 2017 amendment.

15. Genetic Testing Results

Under the Uniform Parentage Act, a report of the results of genetic testing is self-authenticating if it is: (1) in a record and signed under penalty of perjury; and (2) accompanied by documentation from the testing laboratory that includes (a) the name and photograph of each individual whose specimens have been taken; (b) the name of each individual who collected the specimens; (c) the places in which the specimens were collected and the date of each collection; (d) the name of each individual who received the specimens in the testing laboratory; and (e) the dates the specimens were received. *See, e.g.*, N.M. Stat. Ann. § 40-11A-621; Okl. Stat. Ann. § 7700-504; Tex. Fam. Code Ann. § 160.504; Utah Code Ann. § 78B-15-504. Per the UPA, these requirements provide a sufficiently reliable chain of custody.

XI. FRE Article X. Contents of Writings, Recordings, and Photographs

Writings and recordings consist of letters, words, numbers, or their equivalent, set down in any form or recorded in any manner. Fed. R. Evid. 1001(a), (b). Originals of writings and recordings are the writings or recordings themselves or any counterpart intended to have the same effect by the person who executed or issued them. Fed. R. Evid. 1001(d). Photographs are photographic images or their equivalent stored in any form. Fed. R. Evid. 1001(c). Originals of photographs include their negatives or prints therefrom. Fed. R. Evid. 1001(d).

Originals of electronically stored information include any printout or other output readable by sight if the printout or output accurately reflects the information. *Id.* Duplicates are counterparts that are produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original. Fed. R. Evid. 1001(e).

Rule 1002 is commonly known as the best evidence rule. The best evidence rule states that, to prove the content of a writing, recording, or photograph, the *original* writing, recording, or photograph is required except as otherwise provided. Fed. R. Evid. 1002. "The purpose of the best evidence rule is to produce the best obtainable evidence, and if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused." *Jurek v. Couch-Jurek*, 296 S.W.3d 864, 871 (Tex. App.—El Paso 2009, no pet.). In the predicate for introducing a computer printout, asking whether the exhibit reflects the data accurately may help to overcome an objection under the best evidence rule. The rule generally precludes admission of parol evidence to prove the contents of a document. *Id.*

A. When is Original Not Required?

The rule does not normally require the use of the singular, originally created source document. The only time a copy would not be admissible to the same extent as the original is if the party opposing the evidence raises a question as to the authenticity of the original or shows that it would be unfair to admit the duplicate in lieu of the original. Fed. R. Evid. 1003. The rules also list several potentially far-reaching exceptions to the rule. *See* Fed. R. Evid. 1004–1005. If any of the following exceptions apply, then other evidence, such as witness testimony, can be used to prove the contents of the document.

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

2. No original can be obtained by any available judicial process;

3. The party against whom the original would be offered had control of the original, was on notice at that time that the original would be a subject of proof at the trial, and failed to produce the original at the trial;

4. The writing, recording, or photograph is not closely related to a controlling issue; or

5. The proponent wants to prove the content of an official record or document that was recorded or filed in a public office as authorized by law, but no such copy can be obtained by reasonable diligence. Fed. R. Evid. 1004 (exceptions 1–4), 1005 (exception 5).

B. Summaries

The contents of voluminous writings, recordings, or photographs can be presented in a summary, chart, or calculation if it is not convenient to examine the records in court. Fed. R. Evid. 1006. The rule requires that the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place and that the court may order the proponent to produce them in court. *Id.* A proper predicate for introducing summaries includes demonstrating that the underlying records are voluminous, were made available to the opposing party for inspection and use in cross-examination, and are admissible. *Aquamarine Assocs.*, 659 S.W.2d at 821. In *Aquamarine*, the Supreme Court of Texas held a summary to be inadmissible hearsay because the underlying business records upon which it was based were never shown to be admissible. *Id.* at 822 (holding that records were hearsay, which under former rules of evidence, would not support a judgment, even though unobjected to).

C. Testimony or Statement of a Party to Prove Content

The proponent of the evidence may prove the content of the writing, recording, or photograph through testimony, deposition, or written statement of the party against whom the evidence is offered. Fed. R. Evid. 1007. The basic concept is similar to the admissions by a party opponent exemption to the hearsay rule, though it accepts all opposing party statements in the form of testimony, deposition, or written statement. *Lorrain*, 241 F.R.D. at 581–82; *see, e.g.*, *Commonwealth v. Haywood*, 95 N.E.3d 300, at *2 (Mass. App. 2017) (holding that copy of letter written by defendant was admissible as exception to hearsay rule and, because letter was written by defendant, no accounting of original was required).

D. Functions of the Court and Jury

The court normally determines whether a party has fulfilled the factual conditions to admit other evidence of the content of a writing, recording, or photograph under Rules 1004 or 1005. Fed. R. Evid. 1008. However, if a jury is acting as the factfinder, then the jury, pursuant to Rule 104(b), will decide issues concerning whether an asserted writing, recording, or photograph ever existed; another one produced at the trial is the original; or other evidence of content accurately reflects the content. *Id.*

XII. Ethical Concerns

A. ESI and Discovery

1. The New Federal Rules of Civil Procedure

The Supreme Court of the United States amended the Federal Rules of Civil Procedure in 2006 to address the discovery of electronically stored information. *See* Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, August 2006, accessible at http://ccbjournal.com/articles/7217/2006-discovery-amendments-federal-rules-civil-procedure (last visited, Aug. 22, 2020). The changes specifically amended Rules 16, 26, 33, 34, 37, and 45. *Id.*, *see* Fed. R. Civ. P. 16; 26; 33; 34; 37; 45. In 2015, the Supreme Court again amended the rules, including amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84. *See* Joseph F. Marinelli, *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, February 2016, accessible at https://www.americanbar.org/groups/business_law/publications/blt/2016/02/07_marinelli/ (last visited Aug. 22, 2020). While there are many changes in the 2015 amendments, the most relevant to this paper are in Rule 37 about preservation of ESI, spoliation, and sanctions. *See* Fed. R. Civ. P. 37; *Thomas v. Butkiewicus*, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *7 (D. Conn. Apr. 29, 2016) (discussing the change in rules). The rules now guide the court in determining when the court can take action for lost ESI and what actions the court may take. These are important for state jurisprudence because, while discovery issues concerning ESI occur in each state, state case law is usually guided by federal case law.

2. Federal Case Law

Judge Scheindlin, of the Southern District of New York, announced in a series of opinions, culminating in what is commonly referred to as *Zubulake I*, *III*, *IV*, and *V*, what have become significant protocols in the world of electronic discovery. *Zubulake I*, 217 F.R.D. at 312. The holdings of the *Zubulake* opinions addressing electronic discovery are significant, even though many states had released opinions prior to *Zubulake*.

a) *Zubulake I and III*

In *Zubulake I*, released in 2003, Laura Zubulake, plaintiff, requested all documents regarding communications between herself and the defendant, UBS. *Id.* UBS produced emails and live data, but it failed to search its backup tapes, archives, or servers for documents responsive to the request. *Id.* at 313. Laura requested UBS do so, to which UBS objected, arguing that the cost of searching and retrieving the data was unreasonably high, approximately $175,000, and that Laura's request of the electronic data should be denied. *Id.* Judge Scheindlin, after considering the arguments of both parties, held that electronic documents are as equally subject to discovery as paper documents. *Id.* at 317.

The court analyzed the cost of discovery based on the accessibility of the data to be retrieved and held that fragmented, erased, and damaged data, as well as data held on backup tapes, was inaccessible, and thus a cost-shifting analysis must be considered to determine which party would pay for the production of the inaccessible data. *Id.* Judge Scheindlin created a then-new seven-factor balancing test:

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information. *Id.* at 322.

Judge Scheindlin ordered UBS to produce all of the electronic information on its servers and backup tapes that Laura requested and to pay one-hundred percent of the costs associated with the production. *Id.* The court, upon review and application of the seven-factor balancing test, determined that Laura would be responsible for 25% of the remaining production costs, while UBS would pay for the other 75%. *Id.*

b) *Zubulake IV and V*

Judge Scheindlin handed down *Zubulake IV* in 2003, and both parties learned that relevant ESI, created after litigation had commenced, had been destroyed and were only available on UBS' backup tapes. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). The court held that UBS violated its duty to preserve the evidence because it should have known the evidence would be relevant to future litigation. *Id.* at 219. In *Zubulake V*, the court subsequently addressed the responsibility of counsel regarding electronic discovery and evidence and provided steps that counsel should take to create a "litigation hold" on ESI. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). This litigation hold to prevent the spoliation of evidence is discussed in more detail below.

3. Other Considerations

a) Model Orders

Several courts are now adopting model orders to promote the just and speedy production of ESI because it has become such a major player in discovery issues and is constantly the topic of pretrial discussions. For example, the Eastern District of Texas has adopted its own model order regarding e-discovery in patent law cases. *See* model order at http://pdfserver.amlaw.com/legaltechnology/Model_E-Discovery_Patent_Order_w_Commentary.pdf (last visited Aug. 22, 2020). Notable highlights of the model order include:

1. "A party's meaningful compliance" with the model order and "efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations";

2. ESI Production requests shall not include metadata without a showing of good cause or compliance with a mandatory disclosure order;

3. "Each electronic document shall be produced in . . . 'TIFF' . . . format";

4. "Absent a showing of good cause, no party need restore any form of media upon which backup data is maintained in a party's normal or allowed processes, including but not limited to backup tapes, disks, SAN, and other forms of media";

5. "Absent a showing of good cause, voice-mails, PDAs and mobile phones are deemed not reasonably accessible and need not be collected and preserved"; and

6. General ESI requests "shall not include e-mail," as a specific request must be made for email. http://pdfserver.amlaw.com/legaltechnology/Model_E-Discovery_Patent_Order_w_Commentary.pdf.

b) The Sedona Guidelines

Shortly before *Zubulake I* came down, the Sedona Conference, a working group of lawyers, consultants, academics, and jurists, began a public comment draft on the best practices regarding electronic evidence. *See* The Sedona Conference Publications page, https://thesedonaconference.org/publications (last visited Aug. 22, 2020). The Sedona Conference has since published several articles regarding the management, best practice, discovery, and production of ESI. *See id.* Mainly intended for organizations, the Sedona Conference has published the following guidelines for managing electronic information and records:

1. An organization should have reasonable policies and procedures for managing its ESI;

2. An organization's ESI management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization;

3. An organization does not need to retain all ESI ever generated or received;

4. An organization adopting an ESI management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of ESI;

5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit. The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age, iv-v (Charles R. Ragan et al. eds., The Sedona Conference 2005).

The Sedona Conference has also created the following guidelines to help determine whether litigation should be reasonably anticipated and whether a duty to take affirmative steps to preserve relevant information exists:

1. "A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conference J. 265, 269 (2010) [hereinafter *Commentary on Legal Holds*].

2. "Adopting and consistently following a policy or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith." *Id.*

3. "Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith." *Id.*

4. "Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances." *Id.* at 270.

5. "Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made." *Id.*

5. The Social Network

When lawyers have been unable to obtain the ESI regarding a website or social networking site directly from the party, many have resorted to sending civil subpoenas directly to the websites or companies themselves in search of the information. Unfortunately, however, federal laws and regulations seem to protect websites such as Facebook, Google, and Myspace from having to release such information.

a) Stored Communications Act

The Stored Communications Act ("SCA") essentially protects privacy interests in personal information that is stored on the internet. 18 U.S.C. §§ 2701—2712. Its essential purpose is to limit the government's ability to compel disclosure of an internet user's information contained on the internet and held by a third party.

More case law is coming out every year discussing whether internet sites such as Google, Facebook, and Myspace are protected under the SCA. *See, e.g.*, *Lucas v. Jolin*, No. 1:15-cv-108, 2016 WL 2853576, at *5 (S.D. Ohio May 16, 2016) (order granting motion to quash civil subpoena except as modified), and cases cited therein. The court in *Lucas* explained that, under Section 2702 of the SCA, the contents of communications only includes the information concerning the substance, purport, or meaning of those communications, and as such, the court modified the motion to quash and ordered Google to produce the "to/from fields and time/date fields" for any communications between two separate defendants. *Id.* at *9. In *In re Facebook, Inc.*, the Northern District of California quashed a subpoena for Facebook information, citing several cases dealing with subpoena's for email and other online services. 923 F.Supp.2d 1204, 1206 (N.D. Cal. 2012).

In contrast to *Lucas* and *In re Facebook*, in *Romano v. Steelcase, Inc.*, a New York court compelled a party to sign an authorization form to allow access to "Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information . . . in all respects." 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). The defendant argued that the plaintiff's social media sites contained information inconsistent with her claims in her personal injury action against the defendant. *Id.* at 651.

b) Sending out the Subpoenas

Notwithstanding the SCA, you may still be able to obtain vital information by attempting to subpoena information from a social media site. Each website and social media site, such as Facebook, Myspace, AOL, Yahoo, Ebay, Twitter, and Craigslist, to name a few, have their own policies and procedures for requesting personal information regarding their users. In fact, some sites, such as Facebook, simply have electronic request forms rather than subpoenas that a party may use. Electronic Frontier Foundation (EFF.com) has produced a "Social Network Law Enforcement Guides" that sets forth the policies and procedures for sending out a subpoena or request for information to multiple websites. EFF Social Network Law Enforcement Guides, https://www.eff.org/document/eff-social-network-law-enforcement-guides-spreadsheet-pdf (last visited, Aug. 22, 2020). In addition, many of these sites allow users to download their own information into "archives." This is especially important to remember when drafting your requests for production to the other side.

c) Obtaining Information from the Social Network

Considering the availability of social media via a subpoena as described above, below are some of the practical ways to obtain discovery of social media without the use of a subpoena. As these websites continually update, the information below may not be exactly how the webpages are set up, but the process is usually very similar:

1. Facebook: On a desktop or laptop computer, click on the down arrow in the top right corner, at the far-right end of the blue bar at the top. Click on "Settings." Click on "Download a copy of your Facebook data." Facebook then begins the process of gathering your information and saving your Facebook archive. You will receive an email that a request has been made, and once the archive is complete, you will receive an email indicating that your Facebook download is complete, along with a link to allow you to download your Facebook data in .zip format. The link will remain active for only a few days.

2. Twitter: Like Facebook, a user can easily download his or her Twitter archive with the click of a button. On a desktop or laptop computer, click on the "Profile and settings" button at the top right, which is the square button of your profile picture. Click on "Settings." Towards the bottom of the page, under "Content," will be "Your Twitter archive" along with a button to "Request your archive." Click on "Request your archive." Again, like Facebook, Twitter will send you an email to download your Twitter archive in .zip format. The archive will include a list of all tweets, along with a date and time stamp for each message. In addition, if the Twitter feed is public, you can access a Twitter user's tweets without requesting to download the user's archive. Consider using a website such as AllMyTweets.net to assist you in searching for available public tweets.

3. Google: Your Google account is linked to all of Google's products, forty-six total. Once logged in to any Google connected product, click on the settings link at the top right, which should be your profile picture (and where you click to logout). Click on "Manage your Google Account" On that page, click on "Data &

personalization" on the left side of the page. Scroll down to the "Download, delete, or make a plan for your data" section. Click on "Download your data." You can select which Google Product you want to download archived information for. They are each automatically selected and show a "check." Click on any you do not want to download. Click on "Next step" at the bottom of the list. You can select what format to download your data in, although .zip is the most widely available, already being on most computers. You can also select whether to receive a download link through email, or add it to your Google Drive, Dropbox, or OneDrive account. Files larger than 2 GB will be split into multiple .zip files. Any content from Google Play Music is not included and must be downloaded through Google Play Music Manager. Additionally, past searches are not included but may be generated under the "Web & App Activity" page, which link is available on the archive download page, or can be accessed under the "Activity controls" section above the "Control your content" section on the "Personal info & privacy" page.

B. Spoliation and the Duty to Preserve

1. *Zubulake* Guidelines

As stated above, *Zubulake V* regards an attorney's responsibility concerning electronic discovery and evidence. *Zubulake V*, 229 F.R.D. at 422. One of the main duties the *Zubulake* opinions address is the duty to preserve ESI when a party reasonably anticipates litigation. *See id.*; *Commentary on Legal Holds*, *supra*, at 268. *Zubulake V* offers three steps attorneys should take to maintain compliance with a party's preservation obligation:

1. Counsel must issue a "litigation hold" at the beginning of litigation or whenever litigation is reasonably anticipated. The hold should be re-issued periodically so that new employees are aware of it and all employees are reminded of their duties.

2. Counsel should communicate directly with "key players" in the litigation (i.e. people identified in a party's initial disclosure and any supplemental disclosure).

3. Counsel should instruct all employees to produce electronic copies of their relevant active files and make sure that all backup media which the party has a duty to retain is identified and stored in a safe place. *Zubulake V*, 229 F.R.D. at 422.

A litigation hold notice should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations. Case law has made it clear that no duty exists to preserve information if that information is not relevant. *Zubulake IV*, 220 F.R.D. at 217.

2. *Pension Committee*

In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, another opinion that Judge Scheindlin released, Judge Scheindlin revisited the *Zubulake* issues and clarified many of them concerning discovery abuse. 685 F.Supp.2d 456 (S.D.N.Y. 2010), *abrogated by Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012). Following are some of the key points from the opinion:

1. Negligence, gross negligence, and willfulness involved in discovery issues are all addressed on a case-by-case basis. However, Judge Scheindlin set forth a list of what constitutes negligence, gross negligence, and willful conduct, although the list is not exhaustive:

a. Gross Negligence: The failure to issue a written litigation hold, to identify all of the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

b. Willful Actions: The failure to collect records from key players identified during the process, and the intentional destruction of relevant paper or electronic email or records, including backup tapes.

c. Negligent Actions: The failure to collect information and data from employees, even if they are not key players as identified in the process, and the failure to assess the accuracy and validity of selected search terms.

2. The duty to preserve evidence arises when a party reasonably anticipates litigation. Thereafter, a party must put a "litigation hold" in place to preserve the relevant documents. Many times, the plaintiff's duty to preserve is triggered before the defendant's.

3. The party claiming spoliation must prove 1) the spoliating party had control over the evidence and an obligation to preserve at the time of the destruction or loss; 2) acted with a culpable state of mind upon destroying or losing the evidence; and 3) that the missing evidence is relevant to the innocent party's claim or defense. Relevance and prejudice may be presumed when the spoliating party acts in bad faith or a grossly negligent manner. *Id.* at 466, 471.

C. The Duty to Advise Clients

Lawyers must advise their clients about evidentiary issues. In state court, an attorney is held to the reasonably prudent attorney standard of care concerning spoliation, which means that a reasonably prudent attorney, familiar with spoliation laws, who has been retained by a client who has been sued in state court, would have: (1) determined that a duty exists to preserve evidence that is material and relevant to the dispute, (2) advised the client of the duty immediately and that the client must take reasonable measures to safeguard that evidence, and (3) inform the client that the deliberate destruction of that evidence can lead to sanctions. *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003); *Trevino*, 969 S.W.2d at 957. The federal standard of care, however, is based on federal law, rather than state law, at least in diversity suits. *Condrey v. Sun Trust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005).

Lawyers must also advise their clients about how to obtain evidence, even from their spouses. In *Miller v. Talley Dunn Gallery LLC*, husband took photographs of text messages on wife's cell phone between her and another individual. No. 05-15-00444-CV, 2016 WL 836775, at *1 (Tex. App.—Dallas Mar. 3, 2016, no pet.) (mem. op.). Husband also placed a recording device in wife's car and at home and recorded conversations she had in the car and also between him and her at their home. *Id.* About a year later, wife filed for divorce. *Id.* Just before wife filed for divorce, the art gallery that she owned sued husband for using confidential information that he accessed on wife's cell phone, claiming that he was using it to interfere with the business. *Id.* at 2. Husband claimed that photographs were not accessing the phone and, further, that wife's cell phone was community property that he had consent to use. *Id.* at 11. The court of appeals held that the photographs themselves did not violate the Harmful Access by Computer Act (HACA) but that retrieving the text messages did. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 143.001(a); Tex. Penal Code Ann. § 33.01(1)). The court reasoned that, because the cell phone belonged to wife, she used it on a daily basis, it was the only way to reach her, she had the right to password protect it, and restricted access to it by password protection, husband had no rightful access to the phone, and HACA makes no distinction between community and separate property. *Id.* Furthermore, the recordings in the car, which husband was not a party to, violated the Interception of Communication Act (ICA) because wife did not consent to those recordings. *Id.* at *9 (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 123.001–123.002). The court of appeals also held that the other recordings husband made between him and wife at their home invaded wife's privacy under that common-law cause of action, even though the recordings did not violate the ICA. *Id.* at 10–11.

Accordingly, lawyers must inform their clients to not seek out information by accessing their spouses' cell phones or other electronic devices that could reasonably be considered a computer. Also, recording conversations that one is not a party to not only imposes civil liabilities, it also violates state and federal wiretapping laws. And further, one spouse can violate the privacy of another spouse, even while they are together.

Practice Note: Facebook and other social media accounts can be deleted, which would violate the spoliation rules. Inform your clients that, rather than delete those accounts, simply deactivate them. This is usually done under the settings or security page of the particular website.

D. The Lawyer's Responsibility to Learn

ESI is commonplace in litigation today. Some states are taking steps to ensure that lawyers stay up to date in knowing rules concerning ESI, discovery, and spoliation. Several states have also adopted Comment 8 to the Model Rules of Professional Conduct, which states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (Am. Bar Ass'n 2016). California issued an ethics opinion in 2015 that states that attorneys who are not familiar with the benefits and risks associated with the technology relevant to their case, and cannot acquire sufficient learning and skill before performance is required, must decline representation or associate with or consult competent counsel or technical experts familiar with that technology. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Op. 2015-193 (2015); *see also* Erin Corken, Director of Legal Technology, U.S.

Legal Support, *Ethical Issues that Arise in Preservation and Collection* (April 29, 2016). The opinion laid out nine skills that attorneys should be able to do: (1) initially assess e-discovery needs and issues, if any; (2) implement or cause to implement appropriate ESI preservation procedures; (3) analyze and understand a client's ESI systems and storage; (4) advise the client on available options for collection and preservation of ESI; (5) identify custodians of potentially relevant ESI; (6) meet and confer with opposing counsel concerning an e-discovery plan; (7) perform data searches; (8) collect responsive ESI in a manner that preserves the integrity of that ESI; and (9) produce responsive non-privileged ESI in a recognized and appropriate manner. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Op. 2015-193; Corken, *supra*. While this specific standard has not been adopted by all states, it is worthwhile for attorneys to be up-to-date on their knowledge of and ability to perform such skills, as mentioned in the comments to the Model Rules, because sanctions can be steep, both against the attorney and the client.