NUTS & BOLTS SEMINAR

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ESSENTIAL EVIDENCE

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There are important rules of evidence, and there are IMPORTANT rules of evidence. This paper focuses on the twenty -- more or less -- IMPORTANT rules of evidence that you must understand and be able to use if your are serious about being a criminal lawyer in Texas.

1.
RULE 103
Rulings on Evidence

A. Rule 103

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

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) *Record of Offer and Ruling*. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

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

(d) *Fundamental Error in Criminal Cases*. In a criminal case, nothing in these rules

precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

B. TEX. R. APP. PROC. Rule 33.1(a)

> (a) *In General*. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a).

C. Seminal Cases

1. "As regards *specificity*, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W. 2d 907, 909 (Tex. Crim. App. 1992)(emphasis supplied).

2. "The objection must be *timely*; that is, the defense must have objected to the evidence, if possible, before it was actually admitted. If this was not possible, the defense must have objected as soon as the objectionable nature of the evidence became apparent and must have moved to strike the evidence, that is, to have it removed from the body of evidence the jury is allowed to consider." *Ethington v. State*, 819 S.W. 2d 854, 858 (Tex. Crim. App. 1991)(emphasis supplied).

3. "[O]ur system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." The law of procedural default applies only to the last category. *Marin v. State*, 851 S.W. 2d 275, 280 (Tex. Crim. App. 1993).

4. Both rules 33.1 and 103 are "'judge-protecting' rules of error preservation." The party complaining on appeal must have done everything necessary at trial to bring to the trial court's attention the applicable rule of evidence and its proper application. In this case, appellant argued at trial that the evidence was admissible on hearsay grounds. On appeal, he argued that the Confrontation Clause required its admission. "An objection on hearsay does not preserve error on Confrontation Clause grounds." *Reyna v. State*, 168 S.W. 3d 173, 179 (Tex. Crim. App. 2005).

D. Exceptional Situations

1. Pre-trial motions.

If the court sets a pretrial hearing in compliance with article 28.01 of the Texas Code of Criminal Procedure, "any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters." TEX. CODE CRIM. PROC. ANN. art. 28.01(2).

2. Charging instrument error.

"If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregulariy and he may not raise the objection on appeal or in in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code." TEX. CODE CRIM. PROC. ANN. art. 1.14(b); *See also Cook v. State*, 902 S.W. 2d 471 (Tex. Crim. App. 1995)(indictment that did not name the defendant was fundamentally defective).

3. Jury charge error.

In *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1984), the court

held that two different standards apply to jury charge error, depending on whether the error was subject to objection. If there was a timely objection, the error is reversible if it caused appellant "some" harm. If no proper objection was made, the error is reversible only if the error caused appellant "egregious harm." *Id*. at 171.

4. Rule 103(d): Fundamental error.

> In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

TEX. R. EVID. 103(d).

5. Blue v. State.

a. In *Blue v. State*, four judges of the Court of Criminal Appeals relied on Rule 103(d) of the Texas Rules of Evidence and the *Marin* case to hold that comments of the trial judge that tainted appellant's presumption of innocence were fundamental error of constitutional dimension requiring no objection. 41 S.W. 3d 129, 131-32 (Tex. Crim. App. 2000). A fifth member of the Court – Judge Keasler – reached the same result, but relied, not on Rule 103(d), but instead on *Marin* to find that appellant was denied his right to an impartial judge. *Id*. at 138 (Keasler, J., concurring).

b. Is *Blue* binding precedent? *See Jasper v. State*, 61 S.W. 3d 413, 421 (Tex. Crim. App. 2001)(suggesting that the Court might not be bound to follow the plurality decision in *Blue*); *see also Rabago v. State*, 75 S.W. 3d 561, 563 (Tex. App.–San Antonio 2002, pet. ref'd)("Because there is no majority opinion in *Blue*, it is not binding precedent.").

E. Outside The Jury's Presence

1. Rule 103(a)(1) of the Texas Rules of Evidence provides that, if the court hears and rules on objections outside the presence of the jury, the objections need not be repeated in the jury's presence.

2. Appellant's complaint was not a motion in limine but was instead a timely and specific objection that was ruled on by the court outside the presence of the jury. Error was preserved under Rule 103(a). *Gueders v. State*, 115 S.W. 3d 11, 14 (Tex. Crim. App. 2003).

3. "When a defendant challenges the admissibility of certain evidence in a hearing outside the presence of the jury, he need not renew his objection when the evidence is offered at trial in order to preserve his complaint for review. However, if at trial the defendant states he has 'no objection' when the evidence is offered, he waives his admissibility complaint." *Welch v. State*, 993 S.W. 2d 690, 694 (Tex. App.–San Antonio 1999, no pet.)(citations omitted).

F. The Running Objection

A "running objection," as long as it is timely and specific, and properly advises the court of what is being objected to, will also preserve error. *Ethington v. State*, 819 S.W. 2d 854, 859 (Tex. Crim. App. 1991).

2.
Rule 404(b)
Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) *Other Crimes, Wrongs or Acts*. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

A. What is extraneous?

a. "An extraneous offense is defined as any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers." *Rankin v. State*, 953 S.W. 2d 740, 741 (Tex. Crim. App. 1996).

b. Extraneous misconduct need not amount to criminal activity. "The analysis of the admissibility of extraneous conduct is the same whenever the extraneous conduct reflects adversely on the character of the defendant, regardless of whether that conduct might give rise to criminal liability." *Plante v. State*, 692 S.W. 2d 487, 490 n. 3 (Tex. Crim. App. 1985); *see also Bishop v. State*, 869 S.W. 2d 342, 345 (Tex. Crim. App. 1993)(Rule 404(b) "applies equally to evidence of extraneous acts or transactions as it does to evidence of extraneous offenses.").

B. The seminal case

Montgomery v. State, 810 S.W. 2d 372 (Tex. Crim. App. 1991)(the seminal case on Rules 404(b) and 403).

C. Why extraneous misconduct is generally inadmissible

a. "It is a fundamental tenet of our system of jurisprudence that an accused must only be tried for the offense of which he is charged and not for being a criminal in general." *Owens v. State*, 827 S.W. 2d 911, 914 (Tex. Crim. App. 1992).

b. "Evidence of a defendant's bad character traits possesses such a devastating impact on a jury's rational disposition towards other evidence, and is such poor evidence of guilt, that an independent mandatory rule was created expressly for its exclusion." *Mayes v. State*, 816 S.W. 2d 79, 86 (Tex. Crim. App. 1991).

c. "It is a well established and fundamental principle in our system of justice that an accused person must be tried only for the offense charged and not for being a criminal (or a bad person) generally. It is for this reason that Anglo-American jurisprudence has always shown a marked reluctance to admit evidence of extraneous offenses or prior misconduct. Such evidence carries with it the danger that a defendant in a criminal action may be convicted of an implied charge of having a propensity to commit crimes generally rather than the specific offense for which he is on trial." *Templin v. State*, 711 S.W. 2d 30, 32 (Tex. Crim. App. 1986)(citations omitted).

d. "Limitations on the admissibility of evidence of an accused's prior criminal conduct are imposed, not because such evidence is without legal relevance to the general issue of whether the accused committed the act charged, but because such evidence is inherently prejudicial, tends to confuse the issues in the case, and forces the accused to defend himself against charges which he had not been notified would be brought against him." *Albrecht v. State*, 486 S.W. 2d 97,100 (Tex. Crim. App. 1972).

D. Notice

a. *Espinosa v. State*, 853 S.W. 2d 36, 39 (Tex. Crim. App. 1993)("when a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule").

b. *Buchanan v. State*, 911 S.W. 2d 11 (Tex. Crim. App. 1995)(the state does

not satisfy its requirement to give the defendant notice of intent to offer extraneous misconduct evidence merely by opening its file); *but see Hayden v. State*, 66 S.W. 3d 269, 271-73 (Tex. Crim. App. 2001)(state's "act of delivering" to the defense witness statements which referred to extraneous misconduct may be sufficient conveyance of its intent to introduce such evidence and may therefore satisfy Rule 404(b) where it appears that the delivery comes shortly after the request for notice, and where the defense does not dispute actual notice).

c. *Simpson v. State*, 991 S.W. 2d 798, 801 (Tex. Crim. App. 1998)(appellant's motion requesting notice was not a self-executing request, and, because he did not obtain a ruling on it, the notice requirements of Rule 404(b) were not triggered).

d. *Umoja v. State*, 965 S.W. 2d 3, 7 (Tex. App.--Fort Worth 1997, no pet.)(notice given on the day of trial not reasonable under Rule 404(b); error harmless); *Hernandez v. State*, 914 S.W. 2d 226, 234 (Tex. App.--Waco 1996, no pet.)("notice given the Friday before trial on Monday is not reasonable; error harmless).

E. No mudwrestling allowed

Burrow v. State, 668 S.W. 2d 441, 443 (Text App.--El Paso 1984, no pet.)(so much extraneous misconduct came in during the trial"that the original DWI charge became a minor sideshow," and "the trial turned from *Wigmore* to mudwrestling").

3.
RULE 403
Exclusion of Relevant Evidence on Special Grounds

A. Rule 403

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

B. Cases

1. In general

"Rule 403 is an evidentiary rule. Whether evidence is admissible pursuant to Rule 403 does not resolve the greater constitutional question of whether the evidence is

testimonial and therefore subjects the defendant to cross-examination. We have concluded that a voice exemplar is not testimonial. As a result, a defendant who offers one does not waive the privilege and is not subject to cross-examination. Rule 403 does not change this result." *Williams v. State*, 116 S.W. 3d 788, 792-93 (Tex. Crim. App. 2003).

2. Seminal

a. *Montgomery v. State*, 810 S.W. 2d 372 (Tex. Crim. App. 1991).

b. *Albrecht v. State*, 486 S.W. 2d 97 (Tex. Crim. App. 1972).

3. Favorable to the defense

a. *Templin v. State*, 711 S.W. 2d 30, 33-34 (Tex. Crim. App. 1986)(evidence that appellant, when he was a child, had electrocuted animals, was relevant, but unfairly prejudicial, and therefore inadmissible under Rule 403).

b. In *Reese v. State*, the Court of Criminal Appeals set out the appropriate test for balancing the probative and prejudicial values of an item of evidence. At least four factors must be considered: "(1) how probative is the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." 33 S.W. 3d 238, 240-41 (Tex. Crim. App. 2000).

c. *Erazo v. State*, 144 S.W. 3d 487, 496 (Tex. Crim. App. 2004)(photos of unborn child were unfairly prejudicial).

4. Favorable to the state

a. *State v. Mechler*, 153 S.W. 3d 435, 442 (Tex. Crim. App. 2005)(trial court abused its discretion when it excluded intoxilyzer test under Rule 403)

4.
Rule 609
Impeachment by Evidence of Conviction of Crime

(a) *General Rule*. For the purpose of attacking the credibility of a witness, evidence that

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

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

(c) *Effect of Pardon, Annulment, or Certificate of Rehabilitation*. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) *Juvenile Adjudications*. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

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

(f) *Notice*. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

A. Moral Turpitude

1. "Generally, moral turpitude means something that is inherently immoral or dishonest." *Hutson v. State*, 843 S.W. 2d 106, 107 (Tex. App.--Texarkana 1992, no pet.); *see also Hardeman v. State*, 868 S.W. 2d 404, 405 (Tex. App.--Austin 1993), *pet. dism'd*, 891 S.W. 2d 960 (Tex. Crim. App. 1995)("the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita"); *Searcy v. State Bar of Texas*, 604 S.W. 2d 256, 258 (Tex. Civ. App.--San Antonio 1980, writ ref'd n.r.e.)(acts which are base, vile or depraved).

2. "Moral turpitude has been defined as: (1) the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita; (2) conduct that is base, vile, or depraved; and (3) something that is inherently immoral or dishonest." *Ludwig v. State*, 969 S.W. 2d 22, 28 (Tex. App.--Fort Worth 1998, pet. ref'd).

B. The Balancing Test

The proponent of prior conviction evidence "has the burden of demonstrating that the probative value of a conviction outweighs its prejudicial effect." *Theus v. State*, 845 S.W. 2d 874, 880 (Tex. Crim. App. 1992). The court listed five factors helpful in performing the balancing exercise mandated by Rule 609: the impeachment value of the particular crime; temporal proximity; similarity; importance of defendant's testimony; and, credibility. *Id*. at 880-81. The court went on to reverse appellant's conviction, even though four of the five factors favored admissibility. *Id*. at 881. Important was that the arson conviction had so little probative value on the question of appellant's credibility and had much prejudicial effect, and that the trial court did not dispel the prejudice when it had the chance. *Id*. at 881-82; *see Cryan v. State*, 798 S.W. 2d 333, 336 (Tex. App.--Beaumont 1990, no pet.); *cf., Gaffney v. State*, 937 S.W. 2d 540, 543 (Tex. App.--Texarkana 1996)(admissible because appellant presented alibi defense).

C. Deferred Adjudication

1. A witness may not be impeached under Rule 609 for being on deferred adjudication, since this is not a conviction. *Jones v. State*, 843 S.W.2d 487, 496 (Tex. Crim. App. 1992); *Moreno v. State*, 944 S.W. 2d 685, 689 (Tex. App.--Houston [14th Dist.] 1997, pet. granted); *Soliz v. State*, 809 S.W. 2d 257, 257-58 (Tex. App.--San Antonio 1991, pet. ref'd); Green v. State, 663 S.W. 2d 145, 146 (Tex. App.--Houston 1983, pet. ref'd).

2. Although one on deferred adjudication has not been convicted, a *defendant* may impeach should be allowed to impeach a state's witness who is on deferred to show his potential bias or motive or interest in testifying for the prosecution. *Maxwell v. State*, 48 S.W. 39 196, 200 (Tex. Crim. App. 2001).

3. The trial court abused its discretion when it admitted evidence that the testifying defendant was on deferred adjudication. Although the fact that a conviction in the instant case could lead to his adjudication, the probative value of this evidence is substantially outweighed by its potential for prejudice, making it inadmissible under Rule 403. *Moreno v. State*, 22 S.W. 3d 482, 489 (Tex. Crim. App. 1999).

D. Juveniles

1. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court held that the defendant should have been allowed to prove that the state's identification witness was on juvenile probation at the time of trial and at the time of the events he testified to. This evidence was admissible, not to generally impeach the witness's character as a truthful person, but rather to show the existence of possible bias and prejudice causing the witness to misidentify the defendant because of his vulnerable status as a probationer. *Id*. at 317-18.

5.
Rule 615
Production of Statements of Witnesses in Criminal Cases

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

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

(c) *Production of Excised Statement*. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter

concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of appeal.

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

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

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

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

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

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

A. Rule 612

See also TEX. R. EVID. 612("If a witness uses a writing to refresh memory for the purpose of testifying either (1) while testifying; (2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or (3) before testifying, in criminal cases; an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."* * *).

B. Possession Of The State

See Jenkins v. State, 912 S.W.2d 793 (Tex. Crim. App. 1993)(state need only produce statements in its possession, and record did not establish that investigator was part of the prosecutorial arm of the government).

6.
Rule 702
Testimony By Experts

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

A. Rule 701

See also TEX. R. EVID. 701("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.").

B. Cases

See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Hartman v.* State, 946 S.W. 2d 60 (Tex. Crim. App. 1997); *Kelly v. State*, 824 S.W. 2d 568 (Tex. Crim. App. 1992).

7.
Rule 705(b)
Disclosure Of Facts Or Data
Underlying Expert Opinion

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

A. Cases

See Alba v. State, 905 S.W. 2d 581, 588 (Tex. Crim. App. 1995), *cert. denied*, 116 S. Ct. 783 (1996)(Rule 705(b) is mandatory and the trial court would err if it refused to

permit voir dire)

8.
Rule 801(d)
Definitions

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

A. Cases

See also Schaffer v. State, 777 S.W. 2d 111 (Tex. Crim. App. 1989)(good discussion of backdoor hearsay).

9.
Rule 803(2), (4), (6), (8) & (18)
Hearsay Exceptions;
Availability Of Declarant Immaterial

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

* * * * *

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

* * * * *

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

* * * * *

(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(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

* * * * *

(8) *Public Records and Reports*. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

* * * * *

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

10.
Rule 401
Definition of "Relevant Evidence"

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

A. Rule 402

See also TEX. R. EVID. 402("All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.").

B. Cases

1. In *Haley v. State*, 173 S.W. 3d 510, 518 (Tex. Crim. App. 2005), the court held that victim impact testimony from the mother of a murder victim was irrelevant and inadmissible at the punishment phase of a trial where the indictment did not identify a victim, and charged only the possession of cocaine.

2. *Blackburn v. State*, 820 S.W. 2d 824, (Tex. App.--Waco 1991, pet. ref'd).

11.
Rule 104(d)
Preliminary Questions

(d) *Testimony by Accused Out of the Hearing of the Jury*. The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

A. Cases

See also Simmons v. United States, 390 U.S. 377 (1968).

12.
Rule 105
Limited Admissibility

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

(b) *Offering Evidence for Limited Purpose*. When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its

offer to the party against whom it is admissible.

A. Cases

1. *Rankin v. State*, 974 S.W. 2d 707, 713 (Tex. Crim. App. 1998)(Rule 105 requires a limiting instruction, upon proper request, when evidence is admitted).

2. If a defendant fails to request a limiting instruction at the time the evidence is admitted, the evidence is admitted for all purposes; therefore, a limiting instruction after the evidence has closed in the jury instruction is not warranted. *Hammock v. State*, 46 S.W. 3d 889, 895 (Tex. Crim. App. 2001).

13.
Rule 107
Rule of Optional Completeness

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

A. Rule 106

See also TEX. R. EVID. 106.

B. Cases

See Reece v. State, 772 S.W. 2d 198 (Tex. App.--Houston [14th Dist.] 1989, no pet.).

14.
Rule 613
Prior Statements of Witnesses: Impeachment and Support

(a) *Examining Witness Concerning Prior Inconsistent Statement.* In examining a witness concerning a prior inconsistent statement made by 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. 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. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party- opponent as defined in Rule 801(e)(2).

15.
Rule 405
Character Evidence

(a) *Reputation or Opinion*. In all cases in which evidence of a person's character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

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

16.
Rule 412
Rape-Shield

(a) *Reputation or Opinion Evidence*. In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) *Evidence of Specific Instances*. In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:
(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) *Procedure for Offering Evidence*. If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) *Record Sealed*. The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) *Sexual Conduct of Child as Defense*. This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

A. Cases

Rule 412, on its face, does not apply to indecency with a child. *Reyna v. State*, 168

S.W. 3d 173, 176 (Tex. Crim. App. 2005).

17.
Rule 503(b)
Lawyer-Client Privilege

(b) *Rules of Privilege.*

(1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) *Special rule of privilege in criminal cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

A. Article 38.38

"Evidence that a person has contacted or retained an attorney is not admissible on the issue of whether the person committed a criminal offense. In a criminal case, neither the judge nor the attorney representing the state may comment on the fact that the defendant has contacted or retained an attorney in the case." TEX. CODE CRIM. PROC. ANN. art. 38.38.

18.

Rule 509(b)
Physician-Patient Privilege

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

A. Cases

See Skinner v. State, 956 S.W. 2d 532, 538 (Tex. Crim. App. 1997)("An expert appointed pursuant to *Ake* . . . is an agent of defense counsel for purposes of the work product doctrine.").

19.
Rule 504
Husband-Wife Privileges

(a) Confidential Communication Privilege.

(1) *Definition*. A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.

(2) *Rule of privilege*. A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.

(3) *Who may claim the privilege*. The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do so is presumed.

(4) *Exceptions*. There is no confidential communication privilege:

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

(B) Proceeding between spouses in civil cases. In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving

spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by inter vivos transaction.

(C) Crime against spouse or minor child. In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse.

(D) Commitment or similar proceeding. In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

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

(b) Privilege not to Testify in Criminal Case.

(1) *Rule of privilege*. In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 611(b).
(2) *Failure to call as witness*. Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(3) *Who may claim the privilege*. The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(4) *Exceptions*. The privilege of a person's spouse not to be called as a witness for the state does not apply:

(A) Certain criminal proceedings. In any proceeding in which the person is charged with a crime against the person's spouse, a member of the household of either spouse, or any minor.

(B) Matters occurring prior to marriage. As to matters occurring prior to the marriage.

20.
Rule 508
Informers

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

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

(c) Exceptions.

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

(2) *Testimony on merits*. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case to which the public entity is a party, or on guilt or innocence in a criminal case, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, the court in a civil case may make any order that justice requires, and in a criminal case shall, on motion of the defendant, and may, on the court's own motion, dismiss the charges as to which the testimony would relate. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) *Legality of obtaining evidence*. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court

shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

A. Cases

See Bodin v. State, 807 S.W. 2d 313 (Tex. Crim. App. 1991).