Answers to FAQs about our Annual Criminal & Civil Law Update

This time of year, we field lots of questions about our Annual Update, which is in Corpus Christi September 23–25. Here are a few answers to your burning questions.

Question: "The Omni Bayfront Hotel is sold out. Does TDCAA have any rooms or know when some will open up?"

Answer: No, but several prosecutor's offices scoop up dozens of rooms in advance, and this is the time of year they start to cancel the rooms they don't need. It's best to make a back-up reservation at another hotel and continue to check for availability at the Omni throughout the summer if you really want to stay there.

Q: "Our office has extra hotel rooms we reserved but that we're not planning on using. Do you want them?"

A: No, thank you. Please release them back to the hotel so other members can use them. TDCAA has our own block for staff and speakers.

Q: "I'm a speaker at the conference—do I need to make my own hotel reservation?"

A: No. TDCAA will send packets to all the speakers and will make hotel reservations for you once you fill out the travel request form and return it to us.

Q: "I'm on a TDCAA committee—do y'all make my hotel reservations for me, or do I need to?"

A: The only reservations TDCAA makes are for the parent board of directors and the foundation board. All other committees and boards should make their own.

Q: "I'd like to play in Wednesday's golf tournament."

A: Great! Please RSVP to Mike Waldman at michael.waldman@co.bell.tx.us.

Q: "Can I exhibit or be a vendor?"

A: Sure! Please email Patrick Kinghorn at patrick.kinghorn@tdcaa.com, and he will follow up. ❇

No, it's not just your imagination; the Texas Rules of Evidence *do* look different

Effective April 1, 2015,[1] the Texas Rules of Evidence are new and improved, incorporating many non-substantive, stylistic changes, as well as a few substantive amendments to Rules 511, 613, and 902(10).

In its order, "Final Approval of Amendments to the Texas Rules of Evidence," dated March 12, 2015, the Texas Court of Criminal Appeals explained that the rules were amended and generally reformatted for two reasons. First, to "make the rules more easily understood and to make the style and terminology consistent throughout." Second, to be as consistent as possible with the Federal Rules of Evidence—which were similarly restyled and amended, effective December 1, 2011—while avoiding major substantive change in Texas evidence law.

By Melissa Hervey
Assistant District Attorney in Harris County

What substantive amendments were made to the rules?

Only a few of the Texas Rules of Evidence have been substantively amended. First, intended to align Texas evidentiary law regarding the waiver of a privilege by voluntary disclosure with Federal Rule of Evidence 502—concerning the attorney-client privilege, work-product privilege, and limitations on waivers of those privileges—Texas Rule of Evidence 511 was substantively amended as shown on the opposite page. (To make the changes easier to see, the previous versions of the rules are in white boxes while the current, amended versions are in purple. The fonts are also different.)

Previous version of Rule 511

Rule 511. Waiver of Privilege by Voluntary Disclosure

A person upon whom these rules confer a privilege against disclosure waives the privilege if:
(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character train insofar as such communications are relevant to such character or character trait.

Current, amended version of Rule 511

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule
A person upon whom these rules confer a privilege against disclosure waives the privilege if:
(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character train insofar as such communications are relevant to such character or character trait.

(b) Lawyer-Client Privilege and Work Product; Limitations on Waiver.
Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.

(1) Disclosure Made in a Federal or State Proceeding or to a Federal or State Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or state proceeding of any state or to a federal office or agency or state office or agency of any state and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:
(A) the waiver is unintentional;
(B) the disclosed and undisclosed communications or information concern the same subject matter; and
(C) they ought in fairness to be considered together.

(2) Inadvertent Disclosure in State Civil Proceedings. When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d).

(3) Controlling Effect of a Court Order. A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(4) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

As indicated in the "Comment to 2015 Restyling" regarding these substantive amendments to Rule 511, it is clear that subsection (a) of restyled Rule 511 embodies the previous version of the rule, though now cast as the general rule of the provision, while new subsection (b) incorporates the tenets of Federal Rule of Evidence 502. Notably, though, as with Federal Rule of Evidence 502, subsection (b) of restyled Rule 511 pertains only to the disclosure of communications or information covered by the lawyer-client privilege or work-product protection—not to any other privileges enumerated in Article V of the Texas Rules of Evidence or to the waiver of those other privileges or protections.

The second Texas Rule of Evidence that was substantively amended by the rules-restyling project is Rule 613, as illustrated by the following comparison between the previous and the amended versions of the rule (see page 40):

Continued from page 39

Previous version of Rule 613

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).

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

(c) Prior Consistent Statements of Witnesses. A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in 801(e)(1)(B).

Current, amended version of Rule 613

Rule 613. Witness's Prior Statement and Bias or Interest

(a) Witness's Prior Inconsistent Statement

(1) Foundation Requirement. When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:

(A) the contents of the statement;
(B) the time and place of the statement; and
(C) the person to whom the witness made the statement.

(2) Need Not Show Written Statement. If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(4) Extrinsic Evidence. Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.

(5) Opposing Party's Statement. This subdivision (a) does not apply to an opposing party's statement under Rule 801(e)(2).

(b) Witness's Bias or Interest

(1) Foundation Requirement. When examining a witness about the witness's bias or interest, a party must first tell the witness the circumstances or statements that tend to show the witness's bias or interest. If examining a witness about a statement—whether written or oral—to prove the witness's bias or interest, a party must tell the witness:

(A) the contents of the statement;
(B) the time and place of the statement; and
(C) the person to whom the statement was made.

(2) Need Not Show Written Statement. If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

(4) Extrinsic Evidence. Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it.

(c) Witness's Prior Consistent Statement

Unless Rule 801(e)(1)(B) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility.

As noted by the Comment to 2015 Restyling accompanying the amended version of Rule 613, the revised rule retains the requirement from the previous version that a witness be given an opportunity to explain or deny the witness's prior inconsistent statement or the circumstances or statement that tend to show the witness's bias or interest. However, unlike the previous variant of the rule, amended Rule 613 does not require the attorney seeking to impeach the witness to afford the witness that opportunity; rather, the impeaching attorney may simply cross-examine the witness regarding the witness's prior inconsistent statement or the circumstances or statement that tend to show the witness's bias or interest and then leave it to the witness's proponent to provide the witness with the opportunity, during redirect examination, to explain the statement or circumstances.

Importantly, though, amended Rule 613 still prohibits the impeaching attorney from introducing extrinsic evidence of the witness's prior inconsistent statement or of the witness's bias or interest unless the witness has first been examined about the statement and has failed to unequivocally admit making the statement or having the bias or interest. Apart from these substantive amendments, all other structural and textual changes to Rule 613 are intended to be purely stylistic.

Finally, Texas Rule of Evidence 902(10), regarding self-authenticating business records accompanied by affidavit, is also substantively changed from its earlier version. Rule 902(10) was actually amended before the restyling of the other evidentiary rules had been announced, and its new, altered version has been effective since September 1, 2014. However, the current, updated edition of Rule 902(10) has been wholly incorporated into the newly restyled rules and, when compared with its previous version, demonstrates the following substantive alterations:

Previous version of Rule 902(10)

Rule 902. Self-Authentication

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

(10) Business Records Accompanied by Affidavit:

(a) Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavits were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties, or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to the commencement of trial in said cause.

(b) Form of affidavit. A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit [see page 42 for the sample form]:

Continued from page 41

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	
v.	§	COUNTY IN AND FOR
John Roe	§	
(Name of Defendant)	§	_____ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows: My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated: I am the custodian of the records of _____. Attached hereto are ___ pages of records from _____. These said ___ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicate of the original.

_____ Affiant

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

_____

Notary Public, State of Texas

Notary's printed name:_____ My commission expires:_____

(c) **Medical expenses affidavit.** A party may make *prima facie* proof of medical expenses by affidavit that substantially complies with the following form:

Affidavit of Records Custodian of _____

STATE OF TEXAS § COUNTY OF _____

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows: My name is _____. I am of sound mind and capable of making this affidavit, and personally acquainted with the facts herein stated.

I am a custodian of records for _____. Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that _____ provided to _____ on _____.

The attached records are a part of this affidavit. The attached records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the service provided, to make the record or to transmit information to be included in the record. The records were made in the regular course of business at or near the time or reasonably soon after the time the service was provided. The records are the original or a duplicate of the original.

The services provided were necessary and the amount charged for the services was reasonable at the time and place that the services were provided. The total amount paid for the services was $_____ and the amount currently unpaid but which _____ has a right to be paid after any adjustments or credits is $_____.

_____ Affiant

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

_____ _____

Notary Public, State of Texas Notary's printed name

My commission expires:_____

Current, amended version of Rule 902(10)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: ...

(10) Business Records Accompanied by Affidavit.

The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law, and the record and affidavit are served in accordance with subparagraph (A). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with subparagraph (A).

(A) Service Requirement. The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14 days before trial. The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a.

(B) Form of Affidavit. An affidavit is sufficient if it includes the following language, but this form is not exclusive. The proponent may use an unsworn declaration made by penalty of perjury in place of an affidavit:

1. I am the custodian of records [or I am an employee or owner] of _____ and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.
2. Attached are ___ pages of records. These are the original records or exact duplicates of the original records.
3. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. [or It is the regular practice of _____ to make this type of record at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record.]
4. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. [or It is the regular practice of _____ for this type of record to be made by, or from information transmitted by, persons with knowledge of the matters set forth in them.]
5. The records were kept in the course of regularly conducted business activity. [or It is the regular practice of _____ to keep this type of record in the course of regularly conducted business activity.]
6. It is the regular practice of the business activity to make the records.

As the Comment to the 2014 amendment to Rule 902(10) explains, the most notable change to the rule is that the requirement in the previous version, that business records and their accompanying affidavit be filed with the clerk of the court before trial, was removed at the direction of the Texas Legislature.[2] In lieu of that obligation, amended Rule 902(10) now imposes a pretrial service requirement—meaning that it is no longer sufficient to simply file business records and their accompanying affidavit with the trial court clerk and then notify the attorney for the opposing party of that fact; rather, the proponent of the business records must now serve the records and their accompanying affidavit on the opposing party at least 14 days before trial via any method authorized by Texas Rule of Civil Procedure 21a.[3] Somewhat less noteworthy, amended Rule 902(10) also omits subsection (c) of the previous version of the rule, the medical expenses affidavit form, which was removed as unnecessary.[4]

Non-substantive amendments

Non-substantively, the rules were amended in two general ways. First, the rules were structurally reformatted to make them easier to read and understand. To do this, previously cumbersome rules were broken down into shorter, more concise sections, using progressively indented subsections and clear subsection headings. Further, many of the horizontal lists in the rules were eliminated and replaced with vertical lists, which are more discernible. For an example of this structural reformatting, compare the previous and amended versions of Rule 202 (on page 44):

Continued from page 43

Previous version of Rule 202

Rule 202. Determination of Law of Other States

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Current, amended version of Rule 202

Rule 202. Judicial Notice of Other State's Law

(a) Scope. This rule governs judicial notice of another state's, territory's, or federal jurisdiction's:

- Constitution;
- public statutes;
- rules;
- regulations;
- ordinances;
- court decisions; and
- common law.

(b) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(c) Notice and Opportunity to Be Heard.

(1) Notice. The court may require a party requesting judicial notice to notify all other parties of the request so they may respond to it.

(2) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Determination and Review. The court—not the jury—must determine that law of another state, territory, or federal jurisdiction. The court's determination must be treated as a ruling on a question of law.

Second, apart from structural reformatting, the text of the rules was also amended in four different but non-substantive ways to make them more straightforward:

1) the restyled text reduces the use of inconsistent terms that convey the same meaning in different ways—e.g., the rules no longer arbitrarily switch between "accused" and "defendant"; between "party opponent" and "opposing party"; or between "action," "case," and "proceeding," and the various formulations of civil and criminal cases;

2) the restyled text minimizes the use of inherently ambiguous words—e.g., the rules replace "shall" with the clearer words of "must," "may," or "should," depending on which of those words is most correct in light of the context and established interpretation of the rule at issue;

3) the amended text lessens the use of redundant "intensifiers," expressions that were originally intended to add emphasis, but instead "state[d] the obvious" and tended to create negative implications for other evidentiary rules—e.g., the text of Rule 602, regarding the requirement that a witness have personal knowledge of the matter to which he is attesting, was amended from, "Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness" to "Evidence to prove personal knowledge may consist of the witness's own testimony," eliminating the repetitive intensifier "but need

not" and simplifying the rule; and

4) the restyled rules also omit words and concepts that are archaic or repetitive.

Despite these structural and textual changes, it is important to note that the rules' numbers were not changed during the amendments. That being said, the subsections of some of the rules were reorganized, and the titles and subheadings of some of the rules were changed for purposes of simplification and clarity. For instance, if you compare the previous and amended versions of Rule 901(b)(1)–(10), you will see that the subheadings for the examples of evidence that may satisfy the authentication or identification requirement of Rule 901 are modified but more descriptive in the restyled version of the rule.

What do the amendments to the rules mean?

Although there are few substantive amendments to the Texas Rules of Evidence, we should be aware of and must adhere to those changes going forward, given that the rules of evidence in effect at the time of trial will control. Cases tried before the April 1, 2015, revisions went into effect, however, will be reviewed on appeal with consideration of only the previous version of the rules that were in effect at the time of trial.[5]

Regarding the structural reformatting and text simplification changes to the evidentiary rules, recall that the Court of Criminal Appeals has emphasized that the non-substantive "restyling changes are intended to be stylistic only." Thus, it is apparent that the court did not intend the reformatting or diction amendments to alter the way in which practitioners and courts interpret or apply the rules. Instead, let's hope that the alterations will simply clarify the rules and make them easier for us to read and use.

So while we may not get 33 percent more free with the freshly restyled Texas Rules of Evidence, at least we've now got a new-and-improved version of the rules that we can construe and wield more easily. Oh, and we also have the satisfaction of knowing that we're not just seeing things—the rules look, and actually are, a little different. ❇

Endnotes

1 The amended version of Rule 902(10) has actually been in effect since September 1, 2014.

2 See Act of May 17, 2013, 83rd Leg. R.S., ch. 560 § 3, 2013 Tex. Gen. Laws 1509, 1510 (SB 679).

3 Rule of Civil Procedure 21a(a) states that documents filed electronically must be served on an opposing party through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. Alternatively, if the email address of the party or attorney to be served is not on file with the electronic filing manager, or if the document at issue is not filed electronically, the proponent of the document may serve the document in person, by mail, by commercial delivery service, by fax, by email, or by any other method the court in its discretion may direct. Rule 21a(b) provides the following regarding when service is complete: (1) if service is by mail or commercial delivery service, when the document is deposited, postpaid, and properly addressed, in the mail or with the commercial delivery service; (2) if service is by fax, when the document is received, except that if the document is received after 5:00 p.m. local time at the recipient's location, service is deemed to have occurred on the following day; or (3) if service is electronic, when the document is transmitted to the serving party's electronic filing service provider.

4 The medical expenses affidavit form that appeared in the prior version of Rule 902(10)(c) is still available in §18.002(b-1) of the Texas Civil Practices and Remedies Code.

5 See, e.g., *Rahim v. State*, No. 06-14-00147-CR, 2015 WL 2437509, at *1-2 n.1 (Tex. App.—Texarkana May 22, 2015, no pet. h.) (mem. op., not designated for publication); see also *Kesterson v. State*, 997 S.W.2d 290, 293 n.1 (Tex. App.—Dallas, no pet.) ("We analyze the case under the evidentiary rules in effect at the time of trial").