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The Texas Rules of Evidence: Something Old, Something New, and Something Changed

By David A. Schlueter

San Antonio Lawyer **10** May-June 2015

On November 19, 2014, the Texas Supreme Court issued an Order amending all of the Texas Rules of Evidence, effective April 1, 2015. In its Order, the Court explained that the amendments were part of an effort to “restyle” the Rules, to make them as consistent as possible with the Federal Rules of Evidence, and to make them easier to understand.

In the process of restyling the Rules, the Court made a number of significant changes in how the Rules look and, to a lesser extent, in the way the Rules are used. This article addresses those changes.

THE “STYLE” CHANGES

The 2015 amendments reflect a trend that started in 1991, when the late Judge Robert Keeton, chair of the Federal Judicial Conference’s Committee on the Rules of Practice and Procedure, launched a project to restyle all of the Federal Rules of Procedure and Evidence. He was supported in that move by the late Charles Alan Wright, then a member of that committee.¹ The purpose of the project was to remedy decades of piecemeal amendments, which had resulted in sometimes mangled language and inconsistencies in language and style. They presented their ideas to Chief Justice William Rehnquist, who agreed that the Rules needed repair but declined to approve any style changes to the Federal Rules of Evidence—noting that judges and lawyers were very familiar with the Rules of Evidence, and that it would not be wise to tinker with them. Following style changes to the Federal Appellate Rules in 1998, the Criminal Rules in 2001, and the Civil Rules of Procedure in 2007, the restyled Federal Rules of Evidence were approved by the Supreme Court (now under the leadership of Chief Justice John Roberts, who before his appointment as Chief Justice had served as a member of the Appellate Rules Advisory Committee). Ultimately, Congress approved the restyled Federal Rules on December 1, 2011.

Throughout the lengthy federal restyling project, the Committee Members of the various Federal Advisory Committees ex-

¹ See Jeremy Counsellor, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L. REV. 519, 525-27 (2009) (detailing roles of Judge Keeton and Professor Wright in leading the restyling efforts of the federal Rules); Carol Ann Mooney, *SIMPLIFICATION OF THE APPELLATE RULES OF CIVIL PROCEDURE*, 105 DICK. L. REV. 237 (2001) (noting that Judge Keeton and Professor Wright were the moving force for restyling the federal rules and that restyling of Appellate Rules took five years).

pressed great concern that even the simplest “style” change could result in a “substantive” change to how the Rules operated. Thus, in every Committee Note accompanying the changes, the Committee noted that, unless otherwise stated, the amendments to the Rules were intended to be “stylistic” only.

After the Federal Rules of Evidence were restyled in 2011, a similar restyling project was initiated for the Texas Rules of Evidence. The Drafters of the restyled Texas rules followed the style conventions set out in Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). The Texas Supreme Court shared the Federal Drafters’ concerns that amendments to the Rules would be erroneously construed as substantive changes. Thus, in paragraph 2 of its Order of November 14, 2014, the Texas Supreme Court stated:

Except for the amendments to Rules 511 and 613, which are addressed separately below, these amendments comprise a general restyling of the Texas Rules of Evidence. They seek to make the rules more easily understood and to make style and terminology consistent throughout. The restyling changes are intended to be stylistic only.

The substantive changes to Rule 511, which addresses waiver of the attorney-client privilege and work product protection, and Rule 613, which deals with impeaching a witness with a prior inconsistent statement or bias, are discussed, below.

Formatting Changes

As the Supreme Court’s Order states, many of the amendments to the Rules of Evidence resulted in formatting and language changes. The Court explained:

Many of the changes in the restyled rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

Examples of Improved Formatting

An example of the benefits of reformatting the Rules is in Rule 404, which generally excludes evidence of a person’s character, subject to several exceptions. One exception is for character evidence regarding “victims.” Formerly, Rule 404(a)(2) stated:

(2) Character of victim. In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same.

The “constituent parts” of that Rule were hard to separate and apply. Following the 2015 amendments, Rule 404(a)(3) (note the change in numbering of the subdivisions in the Rule) now provides:

(3) *Exceptions for a Victim.*

(A) In a criminal case, subject to the limitations in Rule 412, a defendant may offer evidence of a victim’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a homicide case, the prosecutor may offer evidence of the victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.

(C) In a civil case, a party accused of assaultive conduct may offer evidence of the victim’s trait of violence to prove self-defense, and if the evidence is admitted, the accusing party may offer evidence of the victim’s trait of peacefulness.

The reorganization makes Rule 404 easier to read and apply.

Another example is in Rule 803(6), which sets out the familiar hearsay exception for business records. Before the 2015 amendments, the Rule listed the foundational elements for that exception in one very long paragraph, in horizontal fashion. It now reads:

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

“Business” as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

Although the Drafters’ Comments do not address the point, new Rule 803(6)(E) clears up a potential ambiguity that had existed in the Rule. That provision now clearly states that the burden of showing that the record in question is untrustworthy is on the opponent.

Problems Created By Re-Formatting

In its November 2014 Order, the Texas Supreme Court also explained that in reformatting the Rules, it had maintained the numbering of the Rules but that some subdivisions within the Rules had been renumbered or reorganized. Renumbering the subdivisions in a Rule may lead to problems with conducting electronic legal research on a particular provision. For example, someone looking for cases interpreting Rule 404(a)(2), which covers the ability of a criminal defendant to introduce character evidence of his or

her good character, will probably find cases dealing with character evidence concerning victims, not defendants. The reason is that the 2015 amendments renumbered the subdivisions in Rule 404(a).

Further, there is some confusion because the numbering of the subdivisions is not always consistent throughout the Rules. For example, the style conventions indicate that numbers should not follow numbers. Thus, the first subdivision in a Rule is a letter, as in Rule 404(a). That approach resulted in the subdivisions in Article 10 of the Rules (the Best Evidence Rule) being changed from numbers to letters. But the Drafters retained the numbering of the subdivisions in Rules 803 and 804 for the various hearsay exceptions, thus avoiding the problem of referring to the hearsay exception for business records, which is Rule 803(6), *supra*, as Rule 803(f).²

While the reformatted Rules may be easier to read, the downside is that they may be confusing, at least in the foreseeable future, for those reading and applying cases which cite the original subdivisions.

LANGUAGE CHANGES

In General

In restyling the Rules, the Drafters attempted to minimize the use of ambiguous terms. Chief among those terms is the use of the word “shall.” It has been replaced throughout the Rules with the words “must,” “may,” or “should,” depending on the context of their use and the interpretation in the Rules. For example, Rule 603 originally provided that “every witness *shall* be required to give an oath” Now, the Rule provides that “a witness *must* give an oath or affirmation.” As the Texas Supreme Court’s November 2014 Order points out, the potential confusion in continuing to use the word “shall” in the Rules is that the term is generally no longer used in clearly written or spoken English.

Party Admissions Are Now Statements by an Opposing Party

One of the most significant language changes in the 2015 restyling amendments is in Rule 801(e)(2). Formerly, that Rule governed the use of admissions by a party-opponent—i.e., party admissions. The Texas Rule now refers to a statement by a party as an “opposing party’s statement.” The Drafters’ Comment explains that the change was made because “[t]he term ‘admissions’ is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it ‘admitted’ nothing and was not against the party’s interest when made.” The Comment also notes that the term “admissions” is confusing with regard to the hearsay exception for statements against interest in Rule 803(24). Changing the terminology after all these years because of a technical reading of the term “admissions” is not the best argument for changing the Texas Rule. The better argument is that a similar change was made to Federal Rule 801 in 2011, and it makes perfect sense to match the Federal and Texas language. Indeed, the Drafters’ Comment for Rule 801 follows very closely the language of the Committee Note accompanying the 2011 amendments to the Federal Rules of Evidence.

The term “admissions” can be confusing. But given the fact that the term “party admissions” has become deeply embedded in Texas practice and easily rolls off the tongue, it may be some time before the bench and bar become comfortable using the longer and more cumbersome language “an opposing party’s statement” or “statement by a party opponent.”

LANGUAGE DELETIONS

In a number of the Rules, the Drafters eliminated language which they believed was confusing or no longer necessary. In Rule 101, for example, the Drafters eliminated Rule 101(c), which had covered the subject of “hierarchical governance” in criminal cases. The Drafters’ Comment explains that, in civil cases as well, the courts recognize that the Rules of Evidence may be trumped by constitutional and statutory provisions.

In Rule 408, the Drafters eliminated the word “liability” to make the language flow better and because the term “liability” is included within the term “validity.” Also, the Drafters eliminated the language “otherwise discoverable” as being superfluous. The Drafters’ Comment notes that, even without the language, the Rule cannot be read to protect pre-existing information simply because it was presented during compromise negotiations.

In Rule 504(b)(1), the Drafters eliminated the sentence which read, “A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 611(b).” The Comment to the amendment explains that the sentence was originally included in former Rule of Criminal Evidence 504 to overturn the limitation that had existed in Texas practice before the Rule was adopted: if a spouse testified on behalf of his or her spouse, the State was only able to cross-examine the spouse about matters raised on direct examination. The Comment explains that, after twenty-five years, it is clear that a spouse who testifies for or against a spouse can be cross-examined about any matter.

In Rules 509 and 510, the Drafters eliminated language which reflected retroactive application of physician-patient communications and records and mental health information, even if it predated legislative enactments covering those privileges. The Drafters’ Comments to those two Rules note that “[b]ecause more than thirty years have now passed, it is no longer necessary to burden the text of [the Rules] with a statement regarding the privilege’s retroactive application.”

The Drafters dramatically streamlined the “Dead Man’s Rule” in Rule 601(b). The amendments resulted in the deletion of several phrases. First, the language in former Rule 601(b)—which required the trial court to instruct the jury that the Rule “prohibits an interested party or witness from testifying”—was changed to “prohibits a party from testifying. . . .” The Comment to the amendments explains that the Rule prevents only a party from testifying and that, although there is some case law reflecting that another person may be prohibited from testifying, those cases actually focused on the definition of “party.” The Comment further notes that removing the reference to an interested witness is not intended to change Texas practice. Second, the Drafters eliminated the sentence in former Rule 601(b) that states: “Except

² Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1452-53 (2012) (noting that Advisory Committee rejected proposal to follow style convention that would have renumbered, for example, Rule 803(1) as Rule 803(a) because it would have “disrupted electronic searches” and would “disrupt expectations of all the parties that are applying this on a day-to-day basis”).

for the foregoing, a witness is not precluded from giving evidence . . . because the witness is a party to the action” The Comment explains that the Drafters considered that language surplusage; if the testimony is not excluded by the Rule, its admissibility will be governed by the other Rules of Evidence.

In Rules 701, 703, and 705, the word “inference” was eliminated. The Drafters point out in their Comments to those Rules that the term was eliminated to make the language flow better and because the term is covered by the broader term “opinion.”

Finally, in Rule 801 the Drafters completely deleted former Rule 801(e)(1)(D), which cross-referenced Article 38.071 of the Texas Code of Criminal Procedure. The Rule created a hearsay exemption that covered videotaped or filmed statements by child victims, if the statements complied with the statutory provision. In a lengthy Comment on the change, the Drafters explain that, because of changes to the statute, including reference to it in the Rule was no longer appropriate. As originally promulgated, the statute required that the child victim be available as a witness, but that requirement was later eliminated. Because the hearsay exemptions in Rule 801(e)(1) apply only when the hearsay declarant testifies at trial about his or her prior statement, cross-referencing a statute which no longer requires availability as a witness did not make sense. Further, the Comment continues, Article 38.071 is only one of several statutory provisions that mandate admission of hearsay statements and that, because those provisions trump the general rule excluding hearsay in Rule 802, there was no apparent reason for including only a reference to Article 38.071.

CHANGES IN PRACTICE

Changed Rule Concerning Impeachment of Witness

Some of the 2015 amendments will change the way evidence is admitted or excluded. An example is Rule 613, a Rule dealing with impeaching a witness with a prior inconsistent statement or evidence of bias. Before the 2015 amendments,

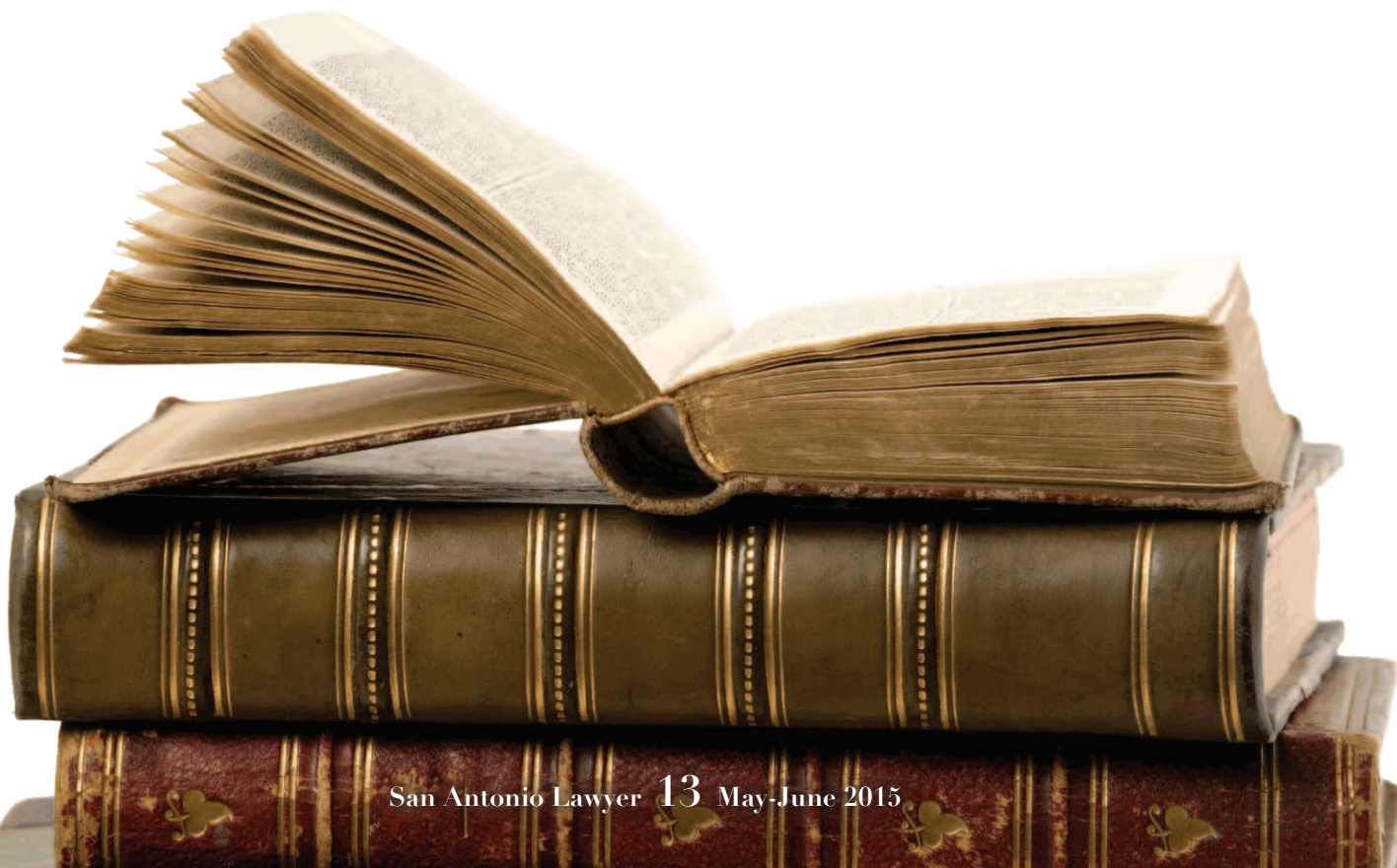
examining counsel was required, as an element of the foundation, to provide the witness with an opportunity to deny or explain that statement or the circumstances that demonstrated bias. If the witness admitted making the statement or the circumstances showing bias, the impeachment was complete, and counsel was not permitted to introduce extrinsic evidence of the statement or the circumstances. The 2015 amendments changed that. Although the amended Rule retains the reference to the opportunity to deny or explain, it is no longer part of the foundation needed before introducing extrinsic evidence. Although the amended Rule states that the witness is still entitled to the right to explain or deny the statement, it does not state who must provide that opportunity, and the Drafters’ Comment on the amendment does not address that point. Presumably, the requirement can be met if the opposing counsel provides that opportunity, for example, on redirect examination of the witness.

New Rule Concerning Waiver of Attorney-Client Privilege and Work Product Protection

Another change is the new Rule 511(b). Rule 511 deals with voluntary waiver of a privilege, and the 2015 amendments added Rule 511(b), which parallels Federal Rule of Evidence 502. The Rule sets out specific guidance on waiving the attorney-client privilege and work product protection. The Drafters’ Comment for the new provision states that the intent was to conform Texas practice to Federal practice.

An attorney who intentionally discloses privileged information can be justifiably concerned that a Court will treat that waiver in a very broad fashion and, using the “subject matter” test, require disclosure of other privileged information. Rule 511(b)(1) provides some but not complete protection. The Rule provides that if the attorney-client privilege and work product protection are waived by disclosing the information (1) in a federal proceed-

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ing, (2) in a state proceeding, (3) to a federal office or agency, or (4) to a state office or agency, the waiver extends to undisclosed communications and information only if certain conditions are met. First, the waiver must have been intentional. Thus, inadvertent disclosures or disclosures ordered by a court would normally not be considered intentional waivers. Second, the disclosed and undisclosed information or communications must concern the same subject matter. Third, the disclosed and undisclosed information should, in fairness, be considered together. This reflects the same approach that exists in Rule 106.

Rule 511 recognizes that if a party voluntarily discloses privileged information, courts normally consider the party to have waived the privilege. Some counsel have argued, however, that disclosure of privileged information to a government agency, for example, should not act as a waiver of the privilege in any later litigation. The issue was addressed in *In re Fisher & Paykel Appliances, Inc.*,³ a wrongful death suit involving a defective clothes dryer. In that case, the court addressed the question of whether the manufacturer's disclosure of privileged information to the Consumer Product Safety Commission also operated as a waiver of the work product privilege in the subsequent wrongful death case. The court concluded that the weight of authority did not favor adopting the non-waiver doctrine in Texas. The court offered two reasons for its conclusion. First, the court concluded that a party submitting communications to a government agency is in an adverse relationship with that agency and, thus, is not protected by either the attorney-client or work product privilege. Second, the court concluded that submitting materials to a governmental agency does not transform ordinary business documents into work product.⁴

Although the Drafters' Comment for Texas Rule 511 is silent on this point, the Advisory Committee in its accompanying Explanatory Note for Federal Rule 502 states that a subject matter waiver occurs if a party has intentionally used protected

information in the litigation in a "selective, misleading, or unfair manner."⁵

Rule 511(b)(2), which applies only in civil cases, provides that an inadvertent disclosure made in a Texas state proceeding is not considered a waiver if the holder of the privilege followed the procedures outlined in Texas Rule of Civil Procedure 193.3(d). The new rule makes no reference to inadvertent disclosures in criminal cases.

Rule 511(b)(3) follows Federal Rule of Evidence 502(c) and recognizes the ability of a court to enter an order declaring that a disclosure is not to be considered waiver in another proceeding.

Finally, Rule 511(b)(4) recognizes that the parties may enter into an agreement to limit the effects of a waiver of the attorney-client privilege and work product protections. However, those agreements are only binding on the parties to the agreement, unless the agreement is incorporated into a court order, a topic discussed in Rule 511(b)(3).

CONCLUSION

The 2015 amendments to the Texas Rules of Evidence are a commendable step toward making the Rules more user-friendly. It is clear to even the casual reader that the reformatting of the Rules, using consistent and clearer language, will make the Rules easier to understand and apply. As with any major amendments to Rules of procedure and evidence, though, it is very possible that problems of interpretation and application of the new "style" changes will arise as lawyers and judges struggle with using the new Rules.



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³ 420 S.W.3d 842 (Tex. App.—Dallas 2014, orig. proceeding).

⁴ *Id.* at 851-52.

⁵ 2 Saltzburg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL, § 502.04[1] (10th ed. 2011)—Explanatory Note accompanying Congressional adoption of Rule 502.