

**PREDICATES: DOCUMENTARY  
AND DEMONSTRATIVE EVIDENCE**

**I. ANATOMIC CHARTS AND DOLLS**

**A. PREDICATE:**

- 1) The chart or doll depicts a certain part(s) of the human body.
- 2) The witness is familiar with that body part(s) and explains the basis for his or her familiarity.
- 3) In the witness's opinion, the chart drawing or doll is an accurate depiction of the body part(s).

**B. EXCLUSION:**

- 1) The probative value of the chart or doll is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the chart or doll is substantially outweighed by the danger of confusion of the issues or misleading the jury; or
- 3) The probative value of the chart or doll is outweighed by danger that it will cause undue delay or needless presentation of cumulative evidence. Tex. R. Evid. 403.

**C. COMMENTARY:**

- Anatomically correct dolls can be used to assist minor complainants to convey the substance of their testimony. Zuniga v. State, 811 S.W.2d 177, 179-80 (Tex. App. – San Antonio 1991, no pet.). Sodorff v. State, 2003 WL 22770058, 2003 Tex.App.LEXIS 9974 (Tex. App. – Houston [14 Dist.] 2003); King v. State, 2003 WL 1884295, 2003 Tex.App.LEXIS 3319 (Tex. App. – Houston [14 Dist.] 2003); Cruz v. State, 2003 WL 22511505, 2003 Tex.App. LEXIS 9520 (Tex. App. – Houston [1 Dist.] 2003).
- It is proper in Texas to illustrate injuries by anatomic charts or outlines of the human body, and have witnesses mark on the charts the location and type of injuries the victim received. Stedman Fruit Co. v. Smith, 28 S.W.2d 622, 628 (Tex. Civ. App. - Beaumont, 1930), writ dismissed.; Pittman v. State, 434 S.W.2d 352, 358 (Tex.Crim.App. 1968) reh'g.den.
- The discretion of the judge controls the admissibility of this evidence. See Speier v. Webster College, 616 S.W.2d 617, 618-619 (Tex. 1981).
- See also 83 A.L.R.2d 1097 (1962); 3 Wharton's Criminal Evidence Sec. 16:27 (15<sup>th</sup> Ed. 1999); 58 A.L.R.2d 689 (1958); 29A Am.Jur.2d Evidence Sec. 995 (2003); 4 ATLA's Litigating Tort Cases Sec. 42:14 (2003).

**II. ARTIST'S SKETCH**

**A. PREDICATE:**

- 1) The sketch depicts a certain area, object, notation, scene, etc.
- 2) The witness is familiar with that area, object, notation, scene, etc. and explains the basis for his or her familiarity.

- 3) In the witness's opinion, the sketch is an accurate depiction of that area, object, notation, scene, etc.

**B. EXCLUSION:**

- 1) The probative value of the sketch is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the sketch is substantially outweighed by the danger of confusion of the issues or misleading the jury; or
- 3) The probative value of the sketch is substantially outweighed by danger that the chart will cause undue delay or needless presentation of cumulative evidence. Tex. R. Evid. 403.

**C. COMMENTARY:**

- Reproductions of artists' sketches of robbers contained in newspaper clippings may be admitted into evidence. Carter v. State, 550 S.W.2d 282, 284 (Tex. Crim. App. 1977), rev'd on other grounds; Shipman v. State, 604 S.W.2d 182 (Tex. Crim. App. 1980).
- A sketch may be admitted even though not drawn to scale; an objection based on sketch being inexact goes to weight rather than admissibility. Yates v. State, 509 S.W.2d 600, 603-604 (Tex. Crim. App. 1974) cert. den., 419 U.S. 996, 95 S.Ct. 310, 42 L.Ed.2d 270. But see Urban Renewal Agency of City of Austin v. Georgetown Savings and Loan Ass'n., 509 S.W.2d 419, 421 (Tex. Civ. App. – Austin 1974), writ. ref. n.r.e. (admission of sketches of proposed office building was objectionable as speculative).
- See also 7A Tex. Prac. Series Sec. 70.13 (2004) (pocket); 18 Tex. Jur.3d Criminal Law Sec. 269 (2004).
- The discretion of the judge controls the admissibility of this evidence. See Speier v. Webster College, 616 S.W.2d 617, 618-619 (Tex. 1981).
- S.D.G. v. State, 936 S.W.2d 371, 381 (Tex. App-Houston [14<sup>th</sup> Dist.] 1996, (writ denied).

**III. BLACKBOARDS**

**A. PREDICATE:**

- 1) The blackboard drawing depicts a certain area, object, or notation.
- 2) The witness is familiar with that area, object or notation and explains the basis for his or her familiarity.
- 3) In the witness's opinion, the blackboard drawing is an accurate depiction of that area, object, or notation.

B. **EXCLUSION:**

- 1) The probative value of the blackboard illustration is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the blackboard is substantially outweighed by the danger of confusion of the issues or misleading the jury; or
- 3) The probative value of the blackboard is substantially outweighed by danger that the blackboard will cause undue delay or needless presentation of cumulative evidence. Tex. R. Evid. 403.

C. **COMMENTARY:**

- Ordinarily, the permission or refusal of the use of a blackboard during counsel's argument is a matter within the sound discretion of the trial court. Haycock v. Christie, 249 F.2d 501, 502, 101 App. D.C. 409 (1957). See also Lewis v. State, 759 S.W.2d 773, 775-776 (Tex. App. – Beaumont 1988); 86 A.L.R.2d 239, Sec. 4, 9 (1962); 5 Am. Jur. Trials 577 (2003); 4 ATLA's Litigating Tort Cases Sec. 44:38 (2003); Am.L.Prod.Liab. 3d Sec. 76:24 (2004).
- Use of the blackboard, not only in jury argument, but to help illustrate and make more meaningful the testimony of a witness, is clearly permissible in Texas. Mid-Texas Development Co. v. McJunkin, 369 S.W.2d 788, 795 (Tex. Civ. App. – Dallas, 1963), no writ.
- The use of a blackboard to summarize future loss of earnings testimony has been allowed. Davis v. Haldeman, 150 F.Supp. 669, 673 (1958), aff'd, 253 F.2d 286, (3rd Cir. 1958).
- Blackboard exhibiting words and figures testified to by actuarial witness allowed. Southern Cement Co. v. Patterson, 271 Ala. 128, 122 So. 2d 386 (1960); Payne v. Jones, 284 Ala. 196, 201, 224 So.2d 230, 234 (Ala. 1969).
- Blackboard listing alleged medical expenses, loss of wages, and compensation for pain and suffering allowed. Kindler v. Edwards, 126 Ind. App. 261, 263-264, 130 N.E. 2d 491 (1955), cited with approval, Andrews v. State, 532 N.E.2d 1159, 1165 (Ind. 1989) reh'g.den.
- Chart on blackboard outlining argumentatively the plaintiff's claim for damages allowed. Nehi Bottling Co. v. Jefferson, 84 So. 2d 684, 686, 226 Miss. 586, 596 (1956), cited with approval, Heidelberg v. State, 584 So.2d 393, 396 (Miss. 1991).
- Note that several cases hold that the blackboard aid, when relating to damages, should not be exposed to the view of the jury except during the argument for which it is employed. See Haycock v. Christie, 249 F.2d 501, 502 (D.C. Cir. 1957); McLaney v. Turner, 267 Ala. 588, 597-598, 104 So. 2d 315, 322-323 (1958); Kindler v. Edwards, 126 Ind. App. 261, 130 N.E. 2d 491 (1955); Four-County Electric Power

Assoc. v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Cross v. Robert E. Lamb, Inc., 60 N.J. Super 53, 76,158 A. 2d 359, 371 (1960); Murphy v. National RR Passenger Corp. 547 F.2d 816, 818 (4<sup>th</sup> Cir. 1977); Ratner v. Arrington, 111 So.2d 82, 86-87 (Fla. 1959).

- One risk of blackboard usage is illustrated by the conflicting cases of Brossman v. Petteway, 501 S.W.2d 751 (Tex. Civ. App. – Houston [14 Dist.] 1973), no writ, and MacDonald v. Skinner, 347 S.W.2d 950 (Tex. Civ. App. – El Paso, 1961), dism'd. by agr. In both cases the blackboard sketches were used to illustrate the trial testimony, and were then erased and not included in the record on appeal. One case holds that the record is incomplete and the other holds that it is not. See also 5 Tex.Jur.3d Appellate Review, Sec. 389-390 (2004).
- To avoid this, counsel should ask the court ahead of time to order all counsel not to alter or erase blackboard drawings until the other side has a chance to photograph it and introduce the photograph into evidence. Counsel should routinely have a Polaroid camera as part of the trial kit in order to accomplish this. Separate blackboards may be designated for plaintiff and defendant when available.
- A blackboard drawing need not be an exact replica of the subject drawn to be admissible. Smith v. State, 626, S.W.2d 843, 844 (Tex. App. – Corpus Christi 1981). See also 3 Wharton's Criminal Evidence Sec. 16:24 (5<sup>th</sup> Ed. 2003).

IV. **BUSINESS RECORDS**A. **PREDICATE:**

- 1) Witness is custodian or other person with knowledge of the business's filing system.
- 2) The record was kept in the regular course of business.
- 3) The record was made at or near the time of the event in question.
- 4) In the regular course of business, a person with knowledge made the record or transmitted information for the record.
- 5) It was the regular practice of that business activity to make such a record. Tex. R. Evid. 803(6).

B. **SELF AUTHENTICATION:**

Tex. R. Evid. 902(10) Self Authentication.

- Extrinsic evidence as a condition precedent is not required with respect to business records accompanied by an affidavit. Instead of calling a custodian of records to the witness stand, you may submit an affidavit from that custodian, attached to the records, and offer the evidence for admission.
- Tex. R. Evid. 902(10) provides an example of the form of affidavit that should be used.
- The records sought to be introduced must

satisfy the business record predicates set forth in Tex. R. Evid. 803(6).

- The proponent must provide the opposing party with adequate notice of the use of the affidavit. This is accomplished by filing the records and affidavit with the clerk of the Court at least fourteen days prior to the trial date, and sending a copy to the opposing party.
- As long as the records sought to be admitted could meet the predicate required by the Tex. R. Evid. 803(6), and fourteen days' notice is given, they can be admitted by affidavit under the Tex. R. Evid. 902(10). This includes medical records and possibly even x-rays, if these are included in the records as part of the physician's or hospital's regular business practices. See Ziegler v. Tarrant County Child Welfare Unit, 680 S.W.2d 674, 680 (Tex. App. – Ft. Worth 1984), writ ref'd n.r.e.

C. **EXCLUSION:**

1) Absence of a proper sponsor.

The Federal Rules of Evidence do not contain a provision for self-authentication of business records. Some state rules will waive extrinsic evidence as a condition precedent when business records are accompanied by an affidavit. As a general rule, affidavits will not support the admission of business records in federal court. The custodian, in the absence of a stipulated predicate, must appear for cross examination.

See generally, N.L.R.B. v. First Termite Control Co., 646 F.2d 424, 427 (9th Cir. 1981); Belber v. Lipson, 905 F.2d 549 (1st Cir. 1990); U.S. v. Selby, 33 F.3d 55 (6th Cir. 1994). See also 4 Federal Evidence Sec. 445 (S.W.2d Ed. (2003).

2) Records contain hearsay testimony.

- Where proper predicate was not shown for admissibility of sources of business records, the offered sources, which were offered to prove the acts, events, or conditions recorded in the original business records that the exhibits purported to summarize, were objectionable as hearsay. Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 90 (Tex. 1973); Xonu Intercontinental Industries v. Stauffer Chemical Co., 587 S.W.2d 757, 760 (Tex. Civ. App. – Corpus Christi (1979); Finn v. Finn, 658 S.W.2d 735, 745 (Tex. Civ. App. – Dallas 1983), writ ref. n.r.e.

3) Predicate is not fully developed.

- Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co., 703 S.W.2d 345, 349 (Tex.App. – San Antonio 1985), no writ (Certificate and affidavit of secretary that stock transfer had occurred held inadmissible because secretary not employed with company at time of purported stock transaction).

4) The underlying preparation of the records lacks trustworthiness. Factors to consider

include:

- a. Habits of precision of record keeping.
- b. Whether others rely on the records.
- c. Whether a duty exists to record accurately.
- d. Whether improper motivation for making the record existed.

5) The affidavit is defective.

Horn v. First Bank of Houston, 530 S.W.2d. 864, 865-866 (Tex. Civ. App. – Houston [14 Dist.] 1975), no writ; Land Liquidators of Texas, Inc. v. Houston Post Company, 630 S.W.2d 713, 714-715 (Tex. Civ. App. – Houston [14 Dist.] 1982); Fair Woman, Inc. v. Transland Management Corp., 766 S.W.2d 323, 323-324 (Tex. App. – Dallas 1989).

D. **COMMENTARY:**

- The source of information or the method or circumstances of preparation must not indicate a lack of trustworthiness.

- The burden is on the party against whom the evidence is offered to show lack of trustworthiness.

- The custodian's personal knowledge of the particular items or events that are the contents of the particular record is not required.

- This rule does not require that the records be prepared by the business which has custody of them.

- For a discussion of computer-generated business records, See Lory Dennis Warton, "Litigators Byte the Apple: Utilizing Computer-Generated Evidence at Trial," 41 Baylor L. Rev. 731 (1989); Fred Galves, Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance, 13 Harv. J.L. & Tech. 161 (Winter 2000).

V. **COMPUTER GRAPHICS/ANIMATION**

A. **PREDICATE:**

- 1) The computer graphic/animation depicts a certain area, object, notation, scene, etc.
- 2) The witness is familiar with that area, object, notation, scene, etc. and explains his or her familiarity with the source and accuracy of the input data.
- 3) In the witness's opinion, the computer graphic/animation is an accurate depiction of that area, object, notation, scene, etc. See Clark v. Cantrell, 529 S.E.2d 528 (S.C. 2000) (predicates for admissibility of computer animations based on S. Carolina rules of evidence, identical or similar to Texas Rules of Evidence).

B. **EXCLUSION:**

- 1) Input data is invalid.
- 2) The probative value of the computer graphic/animation is substantially outweighed by

the danger of unfair prejudice, danger of confusion of the issues or misleading the jury, or it will cause undue delay or needless presentation of cumulative evidence.

- 3) The computer graphic/animation is hearsay.
- 4) The underlying expert testimony illustrated by the computer graphic/animation is inadmissible.

C. PRE-TRIAL MOTION:

- 1) Proponent should give advance notice of their intent to use computer-generated evidence.

Comment, Guidelines for the Admissibility of Evidence Generated By Computer for Purposes of Litigation, 15 U. Cal. Davis L. J. 951, 961 (1982); Fred Galves, Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance, 13 Harv. J.L. & Tech. 161 (Winter 2000).

- 2) Proponent should advise the court in a legal brief or motion prior to an admissibility hearing as to the nature of the exhibits, the procedure, the background data, foundation material, the name and credentials of the expert who created it, and the applicable law.

D. COMMENTARY:

- Computer animations are merely illustrations of an expert's theory. The expert has developed a theory based on independent factors and a computer program is then used to create an animation which illustrates that theory. It is a form of demonstrative evidence used to illustrate the expert's conclusions and testimony.

- Note that once the underlying testimony is admitted into evidence, the computer animation that depicts the testimony and version of events may be admitted as demonstrative evidence that "summarizes" the testimony. Failure to object to the underlying testimony or opinion has been held to waive any objection to the video animation depicting the testimony or opinion. See North American Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 129-131 (Tex. App. – Beaumont 2001), reh'g overruled (2 pets.), rev. den. (2 pets.); 4 ATLA's Litigating Tort Cases, Sec. 42:7 (2003); 36 Tex.Jur.3d Evidence Sec. 472 (2004); TX Practice Guide, Personal Injury 2d, Ch. 12 VII (2004).

- Due to their multi-sensory impact and realism, computer-generated presentations can be very powerful tools in the courtroom. At the same time, they are also very susceptible to error and, if not created properly, can be inaccurate, misleading, and highly prejudicial. In today's technology-driven society, jurors often pay more attention to computer-generated slide shows, graphics and charts than to oral testimony. The graphics are created for demonstrative or

evidentiary purposes and burned onto a CD or DVD, or input into a slideshow presentation format such as Microsoft Powerpoint for use in every facet of trial.

- The most effective means of attacking computer-generated animation is by attacking the input data.

- Accordingly, when these graphics are being created, be certain that sufficient attention is given to verification of the data which is given to the computer operator to be used as the basis for generating the graphic.

- If the computer-generated animation is sought to be excluded on grounds of hearsay, the proponent might argue that it is demonstrative evidence illustrative of the witness's testimony and thus not offered to prove the truth of the matter asserted. See North American Van Lines, supra.

- The proponent might also argue that the computer animation is analogous to hypothetical questions in that they are made up of a combination of assumed or proven facts and circumstances and are stated in such a way that they constitute a coherent and specific situation upon which the opinion of an expert is asked.

- See Lory Dennis Warton, Litigators Byte the Apple: Utilizing Computer-Generated Evidence at Trial, 41 Baylor L. Rev. 731 (1989).

## VI. COMPUTER SIMULATIONS

### A. PREDICATE:

- 1) Expert qualified to establish the theory's validity and the reliability of the computer simulation software.
- 2) The underlying input data and the equations are reliable and accurate.
- 3) The computer simulation software was in good working condition, is generally accepted by the appropriate community of scientists and was used by an expert qualified to conduct and interpret the test results.
- 4) Witness used the proper procedures.
- 5) Witness states the test results.

### B. EXCLUSION:

- 1) Input data is invalid.
- 2) The computer simulation software is not recognized by the appropriate community of scientists.
- 3) The expert is not qualified to use the computer simulation software.
- 4) The probative value of the computer animation is substantially outweighed by the danger of unfair prejudice, danger of confusion of the issues or misleading the jury, or it will cause undue delay or needless presentation of cumulative evidence.

### C. PRE-TRIAL MOTION:

- 1) Proponent should give advance notice of their

intent to use computer-generated evidence. See citations in Computer Graphics section C.1) supra.

2) Proponent should advise the court in a legal brief or motion prior to an admissibility hearing as to the nature of the exhibits, the procedure, the background data, foundation material, the name and credentials of the expert who created it, and the applicable law.

D. COMMENTARY:

- With computer simulations, data is entered into the computer program and then the computer manipulates the data, performing pre-programmed calculations to produce a simulation. This is a form of substantive evidence which is used to illustrate the computer program's conclusions based on the expert's input of data.

- Unlike computer animation, computer simulation involves more elaborate authentication, i.e., the reliability and accuracy of the underlying data, the data input process, and the computer program itself. See, e.g., People v. Cauley, 32 P.3d 602, 607-08 (Colo.App.2001) (holding that since simulations "are dependent upon the application of scientific principles for the purpose of admissions, simulations are treated like other scientific tests," thereby requiring scientific reliability of both the simulation program and the scientific principles applied by the program.); Commercial Union Insurance Co. v. Boston Edison Co., 592 N.E.2d 165, (Mass. 1992).

- In Livingston v. Isuzu Motors, Ltd., 910 F.Supp. 1473 (D. Mont. 1995), the Court conducted a Daubert analysis and found that computer simulation of accident was admissible based on expert testimony by the person who prepared the simulation as to the software's development, peer review, accuracy, use and acceptance by the scientific community. See also Bray v. Bi-State Development Corp., 949 S.W.2d (Mo. App. 1997).

VII. "DAY IN THE LIFE" FILMS

A. PREDICATE:

1) Witness is familiar with the scene, etc. that is portrayed on the videotape and explains the basis for his or her familiarity.

2) Witness recognizes the scene, etc. that is portrayed on the videotape and testifies that the videotape is a "fair," "accurate," "true," or "good" portrayal of the persons, objects, devices, places, processes, etc. shown. See S.D.G. v. State, 936 S.W.2d 371, 381 (Tex. App. – Houston [14 Dist.] (1996) pet. den. (predicate for introduction of videotape is: 1) proof of its accuracy as a correct representation of the subject at a given time, and 2) its relevance to a

material issue.) See also Dunn v. Bank - TEC South, 2003 WL 22438710 (Tex. App. – Amarillo 2003)(publication pending; subject to revision or withdrawal.)

"Photographs" include all still photographs, X- rays, video tapes, and motion pictures. TRE 1001(b).

The predicate for introduction of a photograph and a videotape not accompanying a sound recording requires proof of (1) its accuracy as a correct representation of the subject at a given time and (2) its relevance to a material issue. S.D.G. v. State, 936 S.W.2d 371, 381 (Tex. App-Houston [14<sup>th</sup> Dist.] 1996, (writ denied).

B. EXCLUSION:

1) The probative value of the film is substantially outweighed by the danger of unfair prejudice, see Thomas v. C.G. Tate Construction Company, 465 F.Supp 566, 568-571 (D.S.C. 1979) (tape contained numerous audible and visual expressions of pain, including grunts and grimaces, and the plaintiff was available to testify); or

2) The probative value of the film is substantially outweighed by danger of confusion of the issues or misleading the jury; or

3) The probative value of the film is substantially outweighed by danger that the film will cause undue delay or needless presentation of cumulative evidence. Tex. R. Evid. 403.

4) Hearsay.

a. The defendant may object on the ground of hearsay, stating that the film presents assertions made out of court, offered in evidence to prove the truth of the matters contained therein.

b. An audio portion of a videotape depicting a mesothelioma victim in hospital four days prior to death was admissible under "then existing state of mind" exception to hearsay rule in asbestos products liability action.

Pittsburg Corning Corp. v. Walters, 1 S.W.3rd 759, 771 (Tex. App. – Corpus Christi 1999)(admitted under Tex. R. Evid. 803(3).)

c. In Grimes v. Employees Mutual Liability Ins. Co., 73 FRD 607, 610 (D. Alaska 1977) the Court held that,

although the film did contain elements of hearsay, it was admissible under the exception in FRE 807. The Court felt that the film permitted the jury to consider evidence which was more authoritative on the material issues of pain and suffering and loss of the enjoyment of life than any other evidence which the plaintiff could produce through reasonable efforts. The decision also held that the trustworthiness of the film was guaranteed by having the plaintiff and other witnesses present at trial so the defense could cross examine if it so desired. Further, Grimes made it clear that it was important to reveal the intention to offer the film sufficiently in advance of trial so defendants would not be surprised. **CAVEAT:** Federal Rule 807, on which the ruling in Grimes was based, is not incorporated into most state Rules of Evidence, including Texas, although sound reasoning should produce the same result. Note also that in Grimes, the court pointed out that liability was to be established prior to allowing the jury to view the film, and the court may have held differently if liability was yet an issue in the case. See Thomas v. C.G. Tate Const. Co., 465 F.Supp. 566, 569 (D.S.C. 1979).

C. **COMMENTARY:**

- Probative value has been held to outweigh prejudicial effect in very graphic "day in the life" films. See, e.g., Air Shields, Inc. v. Spears, 590 S.W.2d 574, 580 (Tex. Civ. App. – Waco 1979), writ ref'd n.r.e. (Court admitted film showing a blind minor plaintiff getting around in his house and yard, stating that "the pictures are factual and bear directly on questions concerning plaintiff's life as a blind person and in no way could be calculated to improperly influence the jury."); Apache Ready Mix Co. v. Creed, 653 S.W.2d 79 (Tex. Civ. App. – San Antonio 1983), writ dismissed. (Court admitted silent videotape film showing 11-year-old semicomatose, quadriplegic plaintiff during rehabilitation treatments, in hospital bed, in a wheelchair, and in other nursing care situations. Court stated that the shock of seeing the

plaintiff in person before the jury may have been greater than the "soundless sterility of the video screen" and that the film was not prejudicial).

- If, however, the tape does have a tendency to prejudice or inflame, the court will examine it with great care to determine whether its probative value exceeds its prejudicial effect. Pisel v. Stamford Hospital, 180 Conn. 314, 323-324, 430 A.2d 1, 8 (1980) (admitting videotape which, "while not pleasant viewing, fairly presented to the jury Miss Pisel's condition and the type of care she was required to receive"); Bannister v. Town of Noble, Oklahoma, 812 F.2d 1265, 1270 (10<sup>th</sup> Cir. 1987)(court should examine film outside the presence of jury to determine whether probative value outweighs prejudice - admission of film upheld).
- Prime candidates for exclusion are tapes which zoom in for close-up shots of agonized grimaces or tears or carry painful groans or screams on the sound track. Thomas v. C.G. Tate Construction Co., Inc., 465 F.Supp. 566, 568 (D.S.C. 1979).
- If the attempt to conjure sympathy results in an unrepresentative view of the plaintiff's condition for any reason, it will be excluded on that ground. Foster v. Crawford Shipping Co., Ltd., 496 F. 2d 788, 791 (3rd Cir. 1974). See also Transit Homes Inc. v. Bellamy, 282 Ark. 453, 671 S.W.2d 153, 158-159 (1984) overruled on other grounds, Peters v. Pierre, 858 S.W.2d 680 (1993) (excluding "day in the life" tape where pre-existing quadriplegic injuries were more pronounced than those received in the accident at issue).
- The fact that the tape depicts matters elsewhere covered in the medical or other testimony does not render it objectionable as cumulative. A tape, like photographic evidence in general, can be cumulative only of other photographic exhibits but not of testimony. See Ashley v. Nissan Motor Corp., 321 So. 2d 868, 872-873 (La. App. 1975) overruled on other grounds; see Case v. Arrow Trucking, 372 So.2d 670, 677 (1979); Grimes v. Employees Mutual Liability Ins. Co., supra; Jones v. City

of Los Angeles, 20 Cal. App. 4<sup>th</sup> 436, 445-446 (1993) (citing Grimes).

- The predicate for admitting a "day in the life" film is no different from the predicate for any other videotape. It must be shown to accurately depict the people and scenes shown.
- The trial court is given wide discretion in determining the admissibility of "day in the life" films. Air Shields, supra. The general rule is that "day in the life" films are admissible if relevant to any issue in the case.
- Careful consideration should be given to whether a "day in the life" film should be narrated or not. If narrated, the tape must be presented in open court by the narrator from the stand so as to afford the other side an opportunity to cross-examine. The tape can be done silently or with ambient sound and then narration dubbed in at a later time.
- Videotapes depicting "a day in the life" should only be admitted when, for some specific articulable reason, the tape conveys the observations of a witness to the jury more fully or accurately than the witness can convey to them through the medium of conventional, in-court examination. Bolstridge v. Central Main Power Co., 621 F.Supp. 1202, 1204 (D. Me. 1985). But see Ellingwood v. Stevens, 564 So.2d 932, 936 (Ala. 1990)(declining to adopt "inflexible rule" for admission of videotapes set forth in Bolstridge).
- Defendant cannot complain of allegedly improper "day in the life" film admitted into evidence where the defendant introduced evidence of a similar character, including a surveillance video of the plaintiff. Wal-Mart v. Hoke, 2001 WL 931658 (Tex. App. – Houston [14 Dist.]) (Not designated for publication, but may be cited with notation "not designated for publication." See Tx. R.A.P Rule 47.7).
- See also 29A Am.Jur.2d Evidence, Sections 980, 987 (2003); 32A C.J.S. Evidence Sec. 999 (2004); C.D. Varner & J.M. McGee, Worth a Thousand Words: The Admissibility of Day-In-The-Life Videos, 35 Tort & Ins. L.J. 175 (1999).

**VIII. DEMONSTRATIONS OR EXPERIMENTS (IN AND OUT OF THE COURTROOM)**

A. PREDICATE:

- 1) Establish the training, experience, and other qualifications of the witness in the field of the subject of the experiment.
- 2) Establish that all necessary facts regarding the conditions or occurrence in question are in fact already in evidence or will later be introduced with permission of the court.
- 3) Establish that the principle involved has received general scientific acceptance in the field to which it belongs, both as a general principle and as specifically applied to the subject of inquiry.
  - The judge may judicially notice a widely accepted principle upon a proper timely request by counsel.
- 4) The proposed experiment or demonstration must be calculated to aid the trier of fact in understanding, simplifying, or clarifying evidence or issues.
- 5) There must be a showing that such evidence is supplemental to and not cumulative of the testimony of other witnesses.
- 6) The proposed experiment or demonstration must meet the basic evidentiary tests of relevancy and materiality.
- 7) Most important, counsel must establish that the conditions under which the experiment or demonstration is made are substantially similar to those existing at the time in issue (e.g., the time of the cause of action) and have the witness explain any dissimilarities and make adjustments and corrections for any dissimilarities. Dissimilarities affect the weight of the evidence, not admissibility. Ramseyer v. General Motors Corp., 417 F.2d 859, 864 (8<sup>th</sup> Cir. 1969); see also 29A Am. Jur. 2d Evidence, Sec. 1003, (2003); 29A Am. Jur. 2d Evidence, Sec. 1013 (2003); University of Texas at Austin v. Hinton, 822 S.W.2d 197, 203 (Tex. App. – 1991); Pitcock v. B & W, Inc., 476 S.W.2d 83, 93 (Tex. Civ. App. – Houston [1 Dist.] 1971).
  - This does not mean that the tests must be performed under identical

circumstances, but any variation must be brought to the attention of the court. Robinson v. Morrison, 272 Ala. 552, 133 So. 2d 230 (1961) (admissibility of experimental evidence to show visibility or line of vision); Horn v. Hefner, 115 S.W.3d 255, 256 + (Tex. App. – Texarkana 2003) (experiment’s conditions should be substantially similar, but need not be identical to the actual event that is the subject of litigation).

8) If a testing device or other equipment is used, show that:

- a. the type of device used is reliable and/or accepted as dependable for such use by an appropriate body of scientific thought and by studies, experiments and field use;
- b. the method of operation of the device and the particular device used are of an accepted type and in good working order;
- c. the operator of the device was competent to use the device by training and experience; and
- d. that the particular test was

correctly done.

9) Where a physical substance is involved, connect the substance tested with the occurrence in question, e.g., explain chain of custody.

B. EXCLUSION:

- 1) The probative value of the demonstration or experiment is substantially outweighed by the danger of unfair prejudice;
- 2) The probative value of the demonstration or experiment is substantially outweighed by danger of confusion of the issues or misleading the jury or undue surprise; or
- 3) The probative value of the demonstration or experiment is substantially outweighed by danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.
- 4) An out-of-court experiment should be excluded if done outside the presence of the opposing party and there is not a substantial similarity between conditions existing at the time of the occurrence which gives rise to the litigation and those in existence at the time the experiment is conducted for demonstration purposes. Fort Worth & Denver Ry. Co. v. Williams, 375 S.W.2d 279,

281-283 (Tex. 1964).

- It would appear that some courts are not as strict regarding admissibility of in-court experiments due to the fact that opposing counsel is allowed opportunity to cross-examine regarding dissimilarities. See Hartford Fire Ins. Co. v. Christian, 395 S.W.2d 53 (Tex. Civ. App. – Corpus Christi 1965), writ ref’d n.r.e. (In action on a hurricane policy, a meteorologist was permitted to superimpose radar film on a map to track the path of hurricane Carla.) See also Tx. Jur. 3d Evidence Sec. 474.
- 5) If the jury conducts tests during deliberations, and these tests produce new evidence, the tests are improper. See 31 A.L.R. 4<sup>th</sup> 566 (2004).

C. COMMENTARY:

- The court has wide discretion in allowing experiments, demonstrations, and tests, and the standard of review is abuse of discretion. Ramseyer v. General Motors Corp., 417 F. 2d 859, 864 (8th Cir. 1969); Garza v. Cole, 753 S.W.2d 245, 247 (Tex. App. – Houston [14 Dist.] 1987).

**IX. DESTRUCTIVE TESTING**

A. PREDICATE:

- 1) Adequate opportunity for the defendants to photograph or otherwise record the chattel's condition prior to the destructive testing.
- 2) Notice to the opposing party of the time, place and manner of the testing with reasonable opportunity for the opposing party and experts to observe the testing procedures.
- 3) The opposing party's right to conduct or participate in similar tests with the chattel.
- 4) Provision for discovery of the proponent's results.
- 5) Proper allocation of costs.

B. EXCLUSION:

- 1) The probative value of the destructive testing is substantially outweighed by danger of confusion of the issues, or misleading the jury, or undue surprise; or
- 2) The probative value of the destructive testing is substantially outweighed by danger that it will cause undue delay or needless presentation of cumulative evidence.



- C. Tex. R. Evid. 403.  
**COMMENTARY:**
- The court has wide discretion in allowing experiments, demonstrations, and tests, and the standard of review is abuse of discretion. General Motors Corp. v. Turner, 567 S.W.2d 812, 820-821 (Tex. Civ. App. – Beaumont 1978) rev'd on other grounds, 584 S.W.2d 844 (Tex. 1979); Ervay-Canton Apts. v. Hatterick, 239 S.W.2d 150, 152 (Tex. Civ. App. – Fort Worth 1951), writ ref'd n.r.e.
  - Courts have been granted wide discretion in ordering destructive testing. Cameron v. District Court of 1st Judicial Dist., 193 Colo. 286, 565 P. 2d 925 (1977) (propriety of discovery order permitting destructive testing of chattel).
  - Some reports of testing made in the regular course of business may be admissible. Midwestern Wholesale Drug, Inc. v. Gas Service Co., 442 F.2d 663, 665 (10<sup>th</sup> Cir 1971); Rosado v. Wyman, 322 F.Supp. 1173, 1180-1181 (1970), aff'd 437 F.2d 619 (2d Cir. 1971), aff'd, 402 U.S. 991, 29 L.Ed 2d 157, 91 S.Ct. 2169 (1971). (Admissibility as against reliability/hearsay objections). See also 5 New York Practice Series Sec. 9:20 (Fed. R. Evid. 901(B)(9)(2004).
  - Common law and the Uniform Business Records as Evidence Act may make independent test results admissible when a proper foundation is laid, providing a custodian or other qualified witness testifies to its identity and preparation. Weis v. Weis, 147 Ohio St. 416, 424-426, 34 Ohio Ops. 350, 72 NE2d 245 (1947). (Admissibility, as against hearsay objection, of hospital reports which included blood and urine tests performed by third parties.) See also Lambert v. Goodyear Tire and Rubber Co., 79 Ohio App. 3d 15, 26-27 (1992), appeal dismissed on joint application of parties, 594 NE 2d 625 (Table)(1992); Challoner v. Day & Zimmermann, Inc., 512 F.2d 77, 83-84, vacated on other grounds, 423 U.S. 3, 46 L.Ed.2d 3, 96 S.Ct. 167 (5<sup>th</sup> Cir. (Tex.) 1975); Day & Zimmermann v. Strickland, 483 S.W.2d 541, 544-546 (Tex. Civ. App. – Texarkana 1972), writ ref. n.r.e.; 19

A.L.R. 3d 1008, Sec. 4 (1968).

- X. DIAGRAMS, CHARTS, MAPS, DRAWINGS AND TIMELINES**
- A. **PREDICATE:**
- 1) The diagram, chart, map, drawing or timeline depicts a certain area, object, or notation.
  - 2) The witness is familiar with that area, object or notation and explains the basis for his or her familiarity.
  - 3) In the witness's opinion, the diagram, chart, map, drawing or timeline is an accurate depiction of that area, object, or notation.
- B. **EXCLUSION:**
- 1) The probative value is substantially outweighed by the danger of unfair prejudice; or
  - 2) The probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury; or
  - 3) The probative value is substantially outweighed by the danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.
- C. **COMMENTARY:**
- Admissibility of charts is within the trial court's discretion and will not be disturbed absent a showing of abuse of discretion. Speier v. Webster College, 616 S.W.2d 617, 619 (Tex. 1981).
  - The best evidence rule does not apply to diagrams and charts because admissibility rests upon its adoption by the witness. United States v. Feaster, 341 F.Supp. 524, 531-532 (S.D. - Ala. 1972); aff'd 494 F.2d 871 (5th Cir.) cert. den., 419 U.S. 1036 (1974).
  - Charts may be admissible or usable, even if they happen to summarize testimony. Speier v. Webster College, supra; Uniroyal Goodrich Tire Company v. Martinez, 977 S.W.2d 328, 342 (Tex. 1998) cert. den., 526 U.S. 1040, 119 S.Ct. 1336 (1999).
  - Maps, diagrams and drawings follow the same principles as photographs in that the item must be reasonably accurate and properly authenticated.
  - Drawings can be prepared by a witness during testimony to illustrate conditions, locations or directions.

MacDonald v. Skinner, 347 S.W.2d 950, 953 (Tex. Civ. App. – El Paso 1961), *dism'd. agr.*

- It is proper and legitimate to introduce documents, maps, plats and diagrams to explain and/or clarify a witness's testimony. Mayfield v. State, 848 S.W.2d 816, 819 (Tex. App. – Corpus Christi 1993), *pet. ref'd*; See also 9 A.L.R.2d 1044, Sec. 10 (1950); 18 Tex. Jur. 3d Criminal Law, Sec. 269, (2004).
- Timelines may be used by witnesses to clarify a sequence of events over the defendant's objection. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 342 (Tex. 1998), *cert. den.*, 526 U.S. 1040, 119 S.Ct. 1336 (1999). However, it must represent actual conditions reflecting your witness's testimony. Texas Co. v. Harrison, 193 Okla. 185, 141 P.2d 802 (1943); 9 A.L.R.2d 1044 Sec. 5 (1950).
- When a drawing is made by a person not testifying, the drawing is admissible if its accuracy meets the court's satisfaction. State v. Hartman, 256 N.W. 2d 131, 137 (S.D. 1977); See also State ex rel State Highway Dept. v. Kistler - Collister Co., 88 NM 221, 225-226, 539 P.2d 611 (1975).
- While the diagram may be made by counsel, it must not be used to lead the witness. Allely v. Fickel, 243 Iowa 105, 49 N.W. 2d 544, 545-546 (1951); 29 A Am. Jur. 2d Evidence Sec. 989 (2003); 9 A.L.R.2d 1044 Sec. 9+ (1950).
- Accident reports and other diagrams are admissible even when based on the descriptions of others or totally upon hearsay. J.M. Crom v. County of Cameron, 310 S.W. 2d 664, 667 (Tex. Civ. App. 1958): See also Pressley v. Jennings, 227 Ga. 366, 375-376, 180 S.E. 2d 896 (1971).

## XI. DOCUMENTS/HANDWRITING SUBMITTED FOR A COMPARISON

- A. PREDICATE:  
Tex. R. Evid. 901(b)(2) and (3), Requirement of Authentication or Identification.  
Admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims. This can be accomplished by:

- 1) Non-expert opinion on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- 2) Comparisons by trier or expert witness. As to a comparison by an expert witness who acquires knowledge of the handwriting for the purpose of litigation, the specimen document being introduced for a comparison as demonstrative evidence must itself "have been found by the Court to be genuine" before it may be admitted for purposes of the comparison (i.e., must be admitted or proven to be genuine). This comports with pre-statutory case law in Texas. See, e.g., Wade v. Galveston, H. & S. A. Ry. Co., 110 S.W. 84, 88 (Tex. Civ. App. – 1908), *writ ref'd*.

B. EXCLUSION:

- 1) The probative value of the demonstration of the documents/handwriting submitted for comparison is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the demonstration of the documents/handwriting submitted for comparison is substantially outweighed by danger that it will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the demonstration of the documents/handwriting submitted for comparison is substantially outweighed by the danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

C. COMMENTARY:

- 41 A.L.R. 2d 575 (mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with the disputed writing or signature).
- 72 A.L.R. 2d 1274 (competency, as standard of comparison to establish genuineness of handwriting, of writings made after controversy arose).
- 80 A.L.R. 2d 272 (propriety of

jury, or court sitting as trier of fact, making comparison of writing with standard produced witness).

- Lenamond v. North Shore Supply Co., 667 S.W.2d. 283, 285 (Tex. Civ. App. – Houston [14 Dist.] 1984), no writ (properly admitted a credit application on the basis of the testimony of a lay witness who showed a familiarity with the defendant's handwriting on the application); see also 31A Am.Jur.2d Sec. 131 (2003); Chance v. Chance, 911 S.W.2d 40, 67-69 (Tex. App. – Beaumont 1995), reh'g. overruled, writ den.

**XII. INJURIES**

A. PREDICATE:

- 1) Witness identifies the injured portion of the body.
- 2) Establish that the same injured part of the body was not injured prior to the time of the occurrence of the injury and has not been injured since the time of the occurrence of the injury.
- 3) Ask that witness exhibit the injury to the jury.

B. EXCLUSION:

- 1) The probative value of the demonstration of the injury is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the demonstration of the injury is substantially outweighed by danger that it will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the demonstration of the injury is outweighed by danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

C. COMMENTARY:

- Exhibition of an injury may not be turned into an inadmissible "demonstration" of the extent of an injury conducted to inflame the jury. Gray v. L-M Chevrolet Co., 368 S.W.2d 861, 865 (Tex. Civ. App. – El Paso 1963), writ ref'd n.r.e. (Denial of request for juror to feel plaintiff's "sunk-in" muscles was proper). See also 29A Am. Jur. 2d Evidence Sec. 953 (2003).
- The court may properly disallow proving an injury by demonstration

where such damages have been fully developed through testimony by doctors and other experts. Young v. Texas & Pacific Ry. Co., 347 S.W.2d 345, 350 (Tex. Civ. App. - El Paso 1961), no writ. See also 82 A.L.R. 4th 980, Sec. 9b (1990); 29A Am. Jur. 2d Evidence, Sec. 953 (2003); Tex. Prac. Guide Pers. Inj. 2d. Ch. 12 VII (2004).

- However, in most cases, the court will allow a demonstration to show the effect of an injury in an action for bodily injury, including demonstration to show lack of skin sensation or limitation in movement. See Fravel v. Burlington N.R.R., 671 S.W. 2d 339, 342-343, (Mo. App. 1984) cert. den., 469 U.S. 1159. (Plaintiff entitled to show jury his injured hip and its restricted mobility by having physician move the hips and by Plaintiff walking before jury while physician pointed out tilted hip, attending scars, and restricted movement in the leg). See also "DEMONSTRATIONS" on pg. 6.
- See also 82 A.L.R. 4th 980 (1990), supra; 66 A.L.R. 2d 1334, (1959m), supra; 29A Am. Jur. 2d Evidence Sec. 953 (2003), supra; CJS Evidence, Sections 798, 799 (2003); Mayfield v. State, 803 S.W.2d 859, 862-863 (Tex. App. – Corpus Christi 1991)(trial court did not abuse its discretion in allowing jury to see victim's 12 to 13 inch abdominal scar since scar was not ugly, ghastly, or revolting.); Phillips v. State, 770 S.W.2d 824 (Tex. App. – El Paso 1988)(it was appropriate to show victim's gunshot wounds as relevant to show intent and power, effect, and force of weapon used).

**XIII. MAPS, PLANS, AND PLATS**

A. PREDICATE:

- 1) The map, plan, or plat depicts a certain area.
- 2) Witness is familiar with the area depicted and explains the basis for his or her familiarity.
- 3) Witness recognizes the area depicted and testifies that the map, plan, or plat is a fair, accurate, true, or good depiction of what it purports to be at the relevant time.

B. EXCLUSION:

- 1) The probative value of the

demonstration of the map, plan, or plat is substantially outweighed by the danger of unfair prejudice; or  
 2) The probative value of the demonstration of the map, plan, or plat is substantially outweighed by danger that it will cause confusion of the issues or will mislead the jury; or  
 3) The probative value of the demonstration of the map, plan, or plat is substantially outweighed by danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

C. **COMMENTARY:**

- The basic predicate is much the same as for photographs. Dallas Ry. Terminal Company v. Durkee, 193 S.W.2d. 222, 226-227 (Tex. Civ. App. – Dallas 1946), writ ref'd. n.r.e.
- They should be properly identified by the witness. Jarbert Company v. Hengst, 260 S.W.2d. 88, 94 (Tex. Civ. App. – Austin 1953), no writ. See also Prince v. Flukinger, 381 S.W. 2d 75, 77 (Tex. Civ. App. – Texarkana 1964); 44 Am. Jur. Proof of Facts 2d 707; Bunting v. McConnell, 545 S.W.2d 30, 32-33 (Tex. Civ. App. – Houston [1 Dist.] 1976).
- When illustrated by the testimony of the witness, maps, plans, and plats are all admissible. Capitol Hotel Company v. Rittenberry, 41 S.W.2d. 697, 709 (Tex. Civ. App. – Amarillo 1931), writ dism'd.
- Maps, plans and plats, even if they are rough sketches, must be shown to be substantially accurate on the points sought to be illustrated. They are then admissible if they illustrate the witness's testimony and make it more understandable for the jury. Jackson-Stickland Transport Company v. Seyler, 123 S.W.2d. 928, 931 (Tex. Civ. App. – Ft. Worth 1938), writ dism'd. by agr.; 9 A.L.R.2d 1044 (1950).
- It is sufficient if the witness testifies that the lines and markings are substantially accurate, even though he did not make the map, plan, or plat. Griffith v. Rife, 12 S.W. 168, 169 (Tex. 1888).
- Map made and identified by witness as showing physical facts observed at place of automobile

accident shortly after accident happened did not constitute hearsay evidence and was not inflammatory or prejudicial. Jackson-Stickland Transport Company v. Seyler, supra.

- Plats showing hypothetical subdivisions are not admissible to prove market value in condemnation cases. See State v. Harrison, 97 S.W.3d 810, 817-818 (Tex. App. – Texarkana 2003); City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177, 187-188 (Tex. 2001), mod. den. (concurring opinion).

**XIV. MEDICAL ILLUSTRATIONS**

A. **PREDICATE:**

- 1) The illustration depicts a certain body part(s), etc.
- 2) The witness is familiar with that body part(s) and explains the basis for his or her familiarity.
- 3) In the witness's opinion, the illustration is an accurate depiction of that body part(s).

B. **EXCLUSION:**

- 1) The probative value of the demonstration of the medical illustration is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the demonstration of the medical illustration is substantially outweighed by danger that it will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the demonstration of the medical illustration is substantially outweighed by danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

**XV. MEDICAL MODELS**

A. **PREDICATE:**

- 1) Model will aid the witness in explaining his or her testimony to the judge and jury.
- 2) Witness is familiar with the object depicted and explains the basis of his or her familiarity.
- 3) Witness testifies that, in his or her opinion, the model is a true, accurate, good or fair model of the object depicted. (It is best if the model is an exact replica except with respect to size).

- 4) If the model was prepared according to scale, the witness testifies as to what scale has been utilized.
- 5) Witness explains how the original measurements for the model were taken, whether the original measurements were compared against the model, and how they were compared.

B. EXCLUSION:

- 1) The medical model's probative value is substantially outweighed by the danger of unfair prejudice; or
- 2) The medical model will cause confusion of the issues or mislead the jury; or
- 3) The medical model will cause undue delay or needless presentation of cumulative evidence; or
- 4) Part of the model is not to scale; or
- 5) The disparity in size between the model and the original is so great that it distorts the evidence and reduces the probative value of the model.

C. COMMENTARY:

- Courts are given very wide discretion concerning the admissibility of models.
- Traders and General Ins. Co. v. Stone, 258 S.W.2d 409, 411 (Tex. Civ. App. – Galveston 1953), no writ. (The use by a doctor of a spine from a human skeleton was allowed). See also 58 A.L.R.2d 689, Sec. 1 (1958).

**XVI. MODELS**

A. PREDICATE:

- 1) Witness needs the visual aid to explain his or her testimony.
- 2) Model will assist the judge and jury to understand complex issues.
- 3) Model depicts a certain scene or object with which witness is familiar and witness explains the basis of his or her familiarity.
- 4) Witness testifies that, in his or her opinion, the model is a true, accurate, good or fair model of the scene or object. (It is best if the model is an exact replica except with respect to size).
- 5) Witness testifies how the original measurements for the model were taken as well as the comparison between the original measurements and the model.
  - Whether a model must be to scale depends on the purpose for which it is

being used. In a geographical model where distances, grading, curves, or embankments are essential factors, scale accuracy would probably be required. Otherwise, as long as a model gives some benefit to the trier of fact without distorting important conditions, it need not be to scale.

- Where a model is scaled and accuracy is important to some issue in the case, a civil engineer or surveyor, after being qualified, should offer testimony that the model not only would help the witness testify, but also would aid the trier of fact in understanding the testimony. In addition, the witness should verify and explain:

- 1) How the original measurements for the model were taken and what was done with the original measurements;
- 2) Whether the original measurements were compared against the model and how such measurements were compared;
- 3) Whether the measurements compared accurately;
- 4) What scale has been utilized;
- 5) Whether the witness has an opinion as to whether the model truly and accurately represents the object or condition which it purports to represent; and
- 6) What that opinion is.

B. EXCLUSION:

- 1) The probative value of the model is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the model is substantially outweighed by danger that the model will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the model is substantially outweighed by danger that the model will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403; or
- 4) Part of the model is not to scale; or
- 5) There is a great disparity in size between the model and the original, so as to distort important data; or
- 6) The model is not authenticated by testimony.

C. COMMENTARY:

- Courts are given very wide discretion concerning the admissibility of models. Martindale

v. Mountain View, 208 Col. App. 2d 109, 120, 25 Cal. Rptr. 148 (1962)(relying on Cal. Code Civ. Pro., Section 1954, repealed, 1967. See Cal. Evid. Code Sections 140, 210, 351, 352).

See Chicago, R.I. & G Ry. Co. v. Harris, 28 S.W.2d 611, 616-617 (Tex. Civ. App. – Ft. Worth 1930), writ dismissed. (Jury was permitted to view model of railroad car). See also 29A Am.Jur. 2d Evidence Section 993 (2003); 36 Tex. Jur. 3d Evidence Sec. 472 (2004).

Traders & General Ins. Co. v. Stone, 258 S.W.2d 409 (Tex. Civ. App. – Galveston 1953), no writ. (Physician was allowed to illustrate his testimony with a spine from a human skeleton and a chart which illustrated the nerve distribution in the spinal column).

- The model should be similar in both operation and function to the object at issue and must be so authenticated by testimony. McKeon v. Proctor & Gamble Mfg. Co., 162 App. Div., 784, 147 NYS 1012 (1914). See also Ann. 2003 ATLA Convention Reference Material 2233, Nuts and Bolts: Demonstrative Evidence in Automobile and Premises Cases (2003).

- While representation may differ from the original, such dissimilarities must be explained to the jury so that it will not be misled. Arkansas State Highway Comm'r v. Rhodes, 240 Ark 565, 401 S.W.2d. 558, 559 (1966). See also 23 A.L.R. 3d 825, Sec. 11 + (1969).

- In instances where scale is important and critical portions of the model are not to scale, the court may properly exclude the model. However, slight changes not affecting the ultimate issue should not alter the model's admissibility. Page v. Unterreiner, 106 S.W. 2d 528, 532 (Tex. 1937). (Court allowed Plaintiff to introduce in evidence a golf ball of a brand other than that which struck Plaintiff). See also 95 A.L.R.2d 681, Sec. 10 (1964); 69 A.L.R.2d 424, Sec. 5+ (1960).

- Some federal courts have allowed expenses of producing a model to be taxed as costs. See, e.g., W.F. & John Barnes Co. v. International

Harvester Co., 145 F.2d 915, 918-919 (7th Cir. 1944). cert. den., 324 U.S. 850, 89 L.Ed. 1410 (1945). (A model should be taxed as costs if it was "reasonably necessary" for a proper understanding of the controversy.) See also Wahl v. Carrier Mfg. Co. Inc., 511 F.2d 209 (7th Cir. 1975). However, the circuits are not in agreement about whether costs for charts and models may be taxed. See Phillips v. Cameron Tool Corp., 131 F.R.D. 151, 154-155 (S.D.Ind. 1990). The key appears to be whether the circuit has interpreted 28 U.S.C. Section 1920 to include this type of demonstrative evidence, so that the statutory authority to tax costs required by Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) exists. See, e.g., Maxwell v. Hapag-Lloyd Aktiengesellschaft, Hamburg, 862 F.2d. 767, 770 (9th Cir. 1988). See also 97 A.L.R. 2d 138 (1964). The Fifth Circuit has held that there is no statutory basis for taxing costs. Johns-Manville Corp. v. Cement Asbestos Products Co., 428 F.2d 1381, 1385 (5th Cir. 1970), overruled insofar as holding allowed taxing costs without a statutory basis. See EEOC v. W & O, Inc. 213 F.3d 600, 622-623 (11th Cir. 2000)(relying on Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987)); see also Arcadian Fertilizer v. MPW Industrial Services, Inc., 249 F.3d 1293, 1297-1298 (11th Cir. 2001).

## **XVII. MOTION PICTURES**

### **A. PREDICATE:**

- 1) The operator was qualified to take a motion picture film.
- 2) The operator used certain equipment in good working order to film the activity.
- 3) The operator used proper procedures to film the activity.
- 4) The operator accounts for the custody of the film and the developed movie.
- 5) The developed movie was a good reproduction of the activity.

### **B. EXCLUSION:**

- 1) The probative value of the motion picture is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the motion

picture is substantially outweighed by danger that the motion picture will cause confusion of the issues or will mislead the jury; or  
 3) The probative value of the motion picture is substantially outweighed by danger that the motion picture will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

C. **COMMENTARY:**

- Motion pictures, whether in color or black and white, and whether with or without sound, are admissible and are said to be treated the same as pictures and x-rays. Fort Worth & Denver Ry. v. Williams, 375 S.W.2d 279, 282 (Tex. 1964); Horn v. Hefner, supra; 8A Tex. Jur. 3d Automobiles Sec. 754 (2004).
- However, the predicate for motion pictures is more akin to x-rays than still photographs because the competency of the operator and machine must be established.
- Some trial attorneys prefer to present very detailed testimony about the equipment, especially the lens used and such technical matters as the speed of the film and the lens aperture. A general description of the equipment is sufficient.
- “Photographs” include all still photographs, X-rays, video tapes, and motion pictures. TRE 1001(b).

**XVIII. OVERHEAD PRESENTATION**

A. **PREDICATE:**

“Writings” and “recordings” consist of letters, words, or numbers or their equivalent set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other forms of data compilation. TRE 1001(a).

- 1) The presentation depicts a certain area, object, or notation.
- 2) The witness is familiar with that area, object, or notation and explains the basis of his or her familiarity.
- 3) In the witness’s opinion, the presentation is an accurate depiction of that area, object, or notation.

B. **EXCLUSION:**

- 1) The probative value of the

demonstration of the overhead presentation is substantially outweighed by the danger of unfair prejudice; or  
 2) The probative value of the demonstration of the overhead presentation is substantially outweighed by danger that it will cause confusion of the issues or will mislead the jury; or  
 3) The probative value of the demonstration of the overhead presentation is substantially outweighed by danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

**XIX. PHOTOGRAPHS**

A. **PREDICATE:**

- 1) Witness is familiar with the object, scene, etc. that is depicted in the photograph and explains the basis for his or her familiarity.
- 2) Witness recognizes the object, scene, etc. that is depicted and testifies that the photograph is a fair, accurate, true, or good depiction of what it purports to be at the relevant time.

See Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312 (Tex. 1987).

- The predicate is laid by "yes" answers to these questions where conditions have not been materially changed between the time of the event in question and the time of the photograph. Ft. Worth & D.C. Ry. Co. v. Kiel, 195 S.W.2d 405, 195 S.W.2d 405, 411 (Tex. Civ. App. – Ft. Worth, 1946), writ ref'd n.r.e.; Duff v. Yelin, 721 S.W.2d 365, 373 (Tex. App. – Houston [1 Dist.] 1986) aff'd, 751 S.W.2d 174 (1988); 29A Am.Jur.2d Evidence Sec. 965-966 (2003); 9 A.L.R. 2d 899 (1950), superseded in part by 41 A.L.R. 4th 812, superseded in part by 41 A.L.R. 4th 877.

If the photograph is taken long after the events in question, a further precedent may be necessary in showing either:

- 1) That there has been no substantial change over time; or
- 2) Explaining and identifying the changes. McKee v. Chase, 73 Idaho 491, 501 253 P2d 787, 792 (1953); Fisch v. Transcontinental Ins. Co.,

356 S.W.2d 186, 191 (Tex. Civ. App. – Houston 1962), writ ref.; Texas Emp. Ins. Ass'n. v. Agan, 252 S.W.2d 743, 748 (Tex. Civ. App. – Eastland 1952), writ ref.; Briones v. Levine's Dept. Store, Inc., 435 S.W.2d 876, 882 (Tex. Civ. App. – Austin 1968), aff'd, 446 S.W.2d 7 (1969); 29 A Am. Jur.2d Evidence, Sec. 968 (2003).

The differences must be identified and the testimony must identify the parts of the photograph which are irrelevant to the case. Southeastern Eng'r and Mfg. Co. v. Lyda, 100 Ga. App. 208, 209-210, 110 S.E. 2d 550 (1959). Remoteness in time alone, without changed conditions, does not affect admissibility.

B. EXCLUSION:

1) The probative value of the photograph is substantially outweighed by the danger of unfair prejudice; or  
 2) The probative value of the photograph is substantially outweighed by danger that the photograph will cause confusion of the issues or will mislead the jury; or  
 3) The probative value of the photograph is substantially outweighed by danger that the photograph will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

- The decision to admit or exclude photographic evidence is within the broad discretion of the trial judge. Duff v. Yelin, *supra*.

- If a photograph is merely calculated to arouse passion or create prejudice, it should be excluded. See Heddin v. Delhi Gas Pipeline Co., 522 S.W.2d 886, 889-890 (Tex. 1975). (In condemnation case, posed photograph showing carcasses of dead animals resulting from a pipeline rupture had little relevance or probative force and was inadmissible.)

C. COMMENTARY:

- The foundation witness, in addition to testimony regarding accuracy, must state what the photograph depicts. Conflict as to the photograph's accuracy in showing

what is stated do not render the photograph inadmissible because correctness becomes a jury question. Dofner v. Branard, 236 S.W.2d 544, 547 (Tex. Civ. App. – San Antonio 1951), writ ref n.r.e.; Jenkins v. Associated Transport, Inc., 330 F.2d 706, 710 (6th Cir. 1964).

- Whitley v. State, 635 S.W.2d 791 (Tex. App. – Tyler 1982), no writ (photograph depicting inside of skull admitted to clarify a pathologist's description of cause of death).
- Long delays simply go to the weight, not the admissibility, of the photograph if the changes are fairly explained. McCasland vs. Henwood, 213 S.W.2d 555, 558 (Tex. Civ. App. – Texarkana 1948), writ ref'd n.r.e.; Dallas Ry. & Terminal Co. vs. Durkee, 193 S.W.2d 222, 226-227 (Tex. Civ. App. – Dallas 1946), writ ref'd n.r.e. See also 29A Am.Jur. 2d Evidence Sec. 968 (2003).

- Photographs of a "substantially similar" object, scene, or condition are admissible if the differences are explained. Miller v. Patterson, 537 S.W.2d 360, 363-364 (Tex. Civ. App. – Fort Worth 1976), no writ.

- The witness need not have been present and need not have taken the photograph. Dofner vs. Branard, 236 S.W.2d 544, 546-547 (Tex. Civ. App. – San Antonio 1951), writ ref'd n.r.e.; Southwestern Bell Telephone Co. v. Griffith, 575 S.W.2d 92, 100-101 (Tex. Civ. App. – Corpus Christi 1978), writ ref'd n.r.e.; Higgins v. Arizona Sat. & Loan Assoc., 90 Ariz. 55, 66, 365 P2d 476, 484 (1961).

- Additional problems arise with posed photographs, i.e., where places and objects have been placed in position. If a photograph merely portrays people's positions as determined from testimony, they may be admissible. This, of course, places them in the category of illustrations and most courts follow a restrictive view of photographs which merely conform to the proponent's witness testimony. Lynch v. Missouri-K-T-Ry. Co., 333 Mo. 89, 96, 61 S.W. 2d 918, 921 (1933).

- An "original" of a photograph includes the negative or any print made from it. Tex. R. Evid. 1001(c).
- Digital photographs should have



the same foundation as non-digital photographs. See, e.g. Almond v. State, 553 S.E.2d 803, 805 (Ga. 2001) (“We are aware of no authority ... for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera.”).

- The mere fact that a photograph has been digitally enhanced should not cause it to be inadmissible. Commonwealth v. Auker, 681 A.2d 1305, 1313 & n.2 (Pa. 1996) (when referring to the use of digital image enhancement to improve the quality of an ATM surveillance tape, the court stated that “[t]he enhancement did not add or take away from the subject matter of the picture; rather, it lightened or darkened the field of the picture.”).

- “An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it.” Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 561 (D.Md. 2007). “There is no requirement that the witness took the photo, saw it taken or was present when it was taken. Any witness who observed the object or scene depicted in the photograph may lay the predicate.” Kelly v. State, 22 S.W.3d 642, 644 (Tex.App.—Waco 2000, pet. ref’d).

**XX. PHYSICAL EVIDENCE:**

**ARTICLES AND OBJECTS**

A. PREDICATE:

- 1) The object has a unique characteristic.
- 2) The witness observed the characteristic on a previous occasion and identifies the exhibit as the object.
- 3) As best as he or she can tell, the object is in the same condition as it was when he or she initially observed the object.

B. CHAIN OF CUSTODY:

The foundation for chain of custody must be laid during the testimony of each link in the chain:

- 1) The witness initially received the object at a certain time and place.

- 2) The witness safeguarded the object; the witness testifies to circumstances making it unlikely that substitution or tampering occurred.

- 3) The witness ultimately disposed of the object (retention, destruction, or transfer to another person).

- 4) As best as he or she can tell, the exhibit is the object he or she previously handled and is in the same condition as it was when he or she initially received it. See Avila v. State, 18 S.W.3d 736, 739-740 (Tex. App. – San Antonio 2000).

Note that any gap in the chain of custody or care of the evidence goes to the weight to be given the evidence, not to its admissibility. Wortham v. State, 903 S.W.2d 897, 900 (Tex. App. – Beaumont 1995) rev. den.

C. EXCLUSION:

- 1) The probative value of the article or object is substantially outweighed by the danger of unfair prejudice; or

- 2) The probative value of the article or object is substantially outweighed by danger that the article or object will cause confusion of the issues or will mislead the jury; or

- 3) The probative value of the article or object is substantially outweighed by danger that the article or object will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403; or

- 4) The article or object is not in the same condition as it was when the witness initially received it, a chain of custody cannot be established, and it is likely that substitution or tampering occurred.

D. COMMENTARY:

- The trial court has considerable discretion regarding the degree to which "chain of custody" must be established. Garcia v. Sky Climber, Inc., 470 S.W.2d 261, 266-267 (Tex. Civ. App. – Houston [1 Dist.] 1971), writ ref’d n.r.e.

- If there is not evidence that an offered object is either in the same state or in a state substantially similar to the condition it was in at the time of the event in question, then the predicate may include a "chain of custody" and a showing of lack of opportunity for abuse, changes, etc. Imperial Cas. & Indemn. Co. of

Omaha, Neb. v. Terry, 451 S.W.2d 303, 307 (Tex. Civ. App. – Tyler 1970), no writ.

- When objects or articles can be brought into court and exhibited, it is more satisfactory than a mere description of them by witnesses who have inspected them outside of court. Hays v. Gainesville St. Ry. Co., 8 S.W. 491, 494 (Tex. 1888); Imperial Cas. & Indem. Co. of Omaha v. Terry, 451 S.W.2d 303, 306 (Tex. Civ. App. – Tyler, 1970), no writ.

- The introduction of an object submitted as similar to the one used in an incident is admissible as demonstrative evidence to aid the jury in understanding the oral testimony deduced at trial. See Simmons v. State, 622 S.W.2d 111, 113-14 (Tex. Crim. App. [panel op.] 1981); Posey v. State, 763 S.W.2d 872, 875 (Tex. App. – Houston [14 Dist.] 1988), rev. den.; Fletcher v. State, 902 S.W.2d 165, 167 (Tex. App. – Houston [1 Dist.] 1995) rev. den.; Orrick v. State, 36 S.W.3d 622, 625-626 (Tex. App. – Fort Worth 2000); 29 A Am. Jur. 2d Evidence, Sec. 994 (2003).

## XXI. SCIENTIFIC EVIDENCE

### A. PREDICATE:

- 1) Witness qualified to establish the theory's validity and the instrument's reliability.
- 2) The underlying theory is reliable and/or is generally accepted as valid and reliable.
- 3) Instrument was in good working condition and was used by witness qualified to conduct and interpret the test results.
- 4) Witness used the proper procedures.
- 5) Witness states the test results.

### B. EXCLUSION:

- 1) The probative value of the scientific evidence is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the scientific evidence is substantially outweighed by danger that the scientific evidence will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the scientific evidence is substantially outweighed by danger that the

scientific evidence will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

### C. COMMENTARY:

- If the theory and instrument are accepted, the judge will judicially notice those elements of the foundation upon a proper timely request by counsel.
- The foundation will often require two witnesses: an expert to establish the theory's validity and the instrument's reliability, and a technician qualified to conduct and interpret the test results.
- The practitioner should be aware of the Texas Supreme Court's most recent decisions interpreting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed. 2d 469 (1993) and its progeny. See E.I. duPont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 556-557 (Tex. 1995)(adopting Daubert test and adding additional factors); see also, e.g., DeLarue v. State, 102 S.W.3d 388 (Tex. App. – Houston [14 Dist.] 2003), rev. ref.; Perez v. State, 113 S.W.3d 819 (Tex. App. – Austin 2003), rev. ref.; 90 A.L.R. 5<sup>th</sup> 453, Sec. 24 (2001); 18 Tex. Jur. 3d Criminal Law Sec. 265 (2004). For a more thorough discussion of the procedural issues involved in admitting scientific evidence, please see Judge Harvey Brown, Procedural Issues Under Daubert, 36 Hous. L. Rev. 1133 (1999).

## XXII. SOUND SPECTROGRAMS/VOICEPRINTS

### A. PREDICATE:

- 1) The tape recordings used to produce the spectrograms are authentic. See predicate for tape recordings, p. 16.
- 2) The witness has the qualifications to explain sound spectrography's underlying premises and to conduct the test.
- 3) The underlying premises of sound spectrography are interspeaker variability and invariant speech.
- 4) Those premises are generally

- accepted as valid in the relevant scientific circles.
- 5) The instrument is the sound spectrograph and it is generally accepted as valid in the relevant scientific circles.
- 6) At a particular time and place, the witness conducted a voiceprint examination using the tape recordings mentioned in element #1.
- 7) The witness excerpted the cue words from both tapes and used a spectrograph to analyze the tapes of the cue words.
- 8) The spectrograph was in good working condition at the time.
- 9) The witness used the proper procedures.
- 10) The analysis produced two spectrograms which the witness identifies.
- 11) There are several points of similarity between the two spectrograms, and in the witness's opinion, the same voice produced the two spectrograms.

B. EXCLUSION:

- 1) The probative value of the sound spectrograms/voiceprints is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the sound spectrograms/voiceprints is substantially outweighed by danger that the sound spectrograms/voiceprints will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the sound spectrograms/voiceprints is substantially outweighed by danger that the sound spectrograms/voiceprints will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403; or
- 4) The witness is not qualified under Daubert and its progeny to offer expert testimony on sound spectrograms and voiceprints.

C. COMMENTARY:

- The practitioner should be aware of the Texas Supreme Court's most recent decisions interpreting Daubert v. Merrell Dow Pharmaceuticals, Inc., supra and its progeny. See Sec. XX, supra. For a more thorough discussion of the procedural issues involved in admitting scientific evidence, please

see Judge Harvey Brown, Procedural Issues Under Daubert, 36 Hous. L.Rev. 1133 (1999) supra.

- For a list of publications regarding whether voiceprint identification is admissible, see Pope v. State, 756 S.W.2d 401, 409, n. 3 (Tex. App. – Dallas 1988), pet. ref. (applying Frye standard, superseded by Daubert); see also Jones v. State, 716 S.W.2d 142, 147 + (Tex. App. – Austin 1986) pet. ref. (also applying pre-Daubert standard).

**XXIII. SUMMARIES**

A. PREDICATE:

- 1) The proof involves the contents of "voluminous writings, recordings, or photographs" which "cannot collectively be examined in court."
- 2) The originals, or duplicates, are made available to opposing counsel for examination at a reasonable time and place.
- 3) The person who prepared the chart or summary should be available in court to testify or explain it.
- 4) There should be a reasonable guarantee of the accuracy of any summaries or charts.

B. EXCLUSION:

- 1) The summary is not an accurate representation of its underlying documents.
- 2) The titles of the summaries should not themselves be prejudicial or connote an independent meaning.

C. COMMENTARY:

- Under Rule 1006, the summaries themselves and not the underlying documents, be they in chart form or otherwise, are the evidence which the trier of fact may consider. United States v. Skalicky, 615 F.2d 1117, 1120-1121 fn.5 (5th Cir. 1980), cert. den., 449 U.S. 832, 66 L.Ed. 2d 37. Thus, so long as the summaries are based upon admissible documents which have been previously made available on reasonable terms, the underlying documents themselves need not be offered into evidence. See also 50 A.L.R. Fed 319, Sec. 3 (1980); 5 Federal Evidence Sec. 584 (2d ed.)(2004).
- Counsel should disclose, not only underlying documents, but copies of all summaries/charts sufficiently in advance in order to obtain stipulations

regarding accuracy and admissibility or to allow for a pretrial examination and rulings by the court.

- Lloyd v. United States, 226 F.2d 9, 16-17 (5th Cir. 1955) (In tax litigation, the use of the terms "overstated," "unreported" and "unpaid" in summary chart captions were questioned as conclusionary where the issue involved whether income was overstated, unreported, or unpaid.) See also 20A Fed. Proc., L.Ed. Sec. 48:1624 (2003); 35A Am.Jur.2d Federal Tax Enforcement Sec. 1245 (2003).
- The admissibility of summaries is a matter within the discretion of the court. Baines v. United States, 426 F.2d 833, 840 (5th Cir. 1970).
- One-page summary of Defendants' 87 pages of sales records offered by Plaintiff was admissible as non-hearsay admission by party opponent. C.M. Asfahl Agency v. Tensor, Inc., 2004 WL 169737 (Tex. App. – Houston [1 Dist.] 2004)(permanent publication pending; subject to revision or withdrawal)(discussing Tex. R. Evid. 1006).

#### XXIV. TAPE RECORDINGS

##### A. MODERN PREDICATE:

- 1) Witness is familiar with the object, scene, or sound that is depicted in the recording and explains the basis for his or her familiarity.
- 2) Witness recognizes the object, scene or sound that is depicted and testifies that the recording is a fair, accurate, true, or good depiction of what it purports to be at the relevant time.

Tex. R. Evid. 901

##### B. TRADITIONAL PREDICATE:

Tape recordings which are a fair representation of a transaction, conversation or occurrence are admissible. A fair representation may be shown by these elements:

- 1) Show that the recording device is capable of taking testimony.
- 2) Show that the operator of the device is competent.
- 3) Establish the authenticity of the correctness of the recording.
- 4) Show that changes, additions or deletions have not been made.
- 5) Show the manner of the preservation of the recording.

6) Identify the speakers.

7) Show that the testimony elicited was voluntarily made without any kind of inducement.

**NOTE:** The federal courts and Texas criminal courts have acknowledged that the traditional 7-prong approach has been superseded by Rule 901 of the Rules of Evidence. However, some civil courts in Texas may still require the traditional seven-prong approach to the authentication of video and audio recordings.

See, e.g., Brown v. State, 2005 Tex. App. LEXIS 1253 (Tex. App.

Houston–14th Dist. 2005); Leos v. State, 883 S.W.2d 209, 211-12 (Tex. Crim. App. 1994); United States v. Lance, 853 F.2d 1177, 1181-1182 (5th Cir. 1988) (holding that 7-prong test superseded by Rule 901).

See also Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex. 1980). But see Larson v. Family Violence and Sexual Assault, 64 S.W. 3d 506, 511 (Tex. App. – Corpus Christi 2001), reh'g. overruled, rev. den (holding that the 7-prong test is unnecessary, based on plain language of Tex. R. Evid. 901).

##### C. EXCLUSION:

- 1) The probative value of the tape recording is substantially outweighed by the danger of unfair prejudice; or
  - 2) The probative value of the tape recording is substantially outweighed by danger that the tape recording will cause confusion of the issues or will mislead the jury; or
  - 3) The probative value of the tape recording is substantially outweighed by danger that the tape recording will cause undue delay, or needless presentation of cumulative evidence.
- Tex. R. Evid. 403.

##### D. COMMENTARY:

- The Texas Supreme Court has held that some of the elements may be inferred and need not be shown in detail. The Court also held that specific objections are required to preserve error in admitting recordings improperly. Seymour v. R. L. Gillespie, 608 S.W.2d 897, 898 (Tex. 1980). See also Hinote v. Oil Chemical and Atomic Workers, 777 S.W.2d 134, 146-147 (Tex. App. –

Houston [14 Dist.] 1989), writ den; reh'g overruled.

- The rule of optional completeness applies to tape recordings introduced during trial. This rule provides that the adverse party may at any time introduce any other part or any other recorded statement which ought in fairness to be considered contemporaneously with it. Tex. R. Evid. 106 & 107

**XXV. TELEVISION TAPES**

A. PREDICATE:

- 1) Witness is familiar with the scene, etc. that is portrayed on the television tape.
- 2) Witness explains the basis for his or her familiarity.
- 3) Witness recognizes the scene, etc. that is portrayed on the television tape.
- 4) Witness testifies that the tape is a "fair," "accurate," "true," or "good" portrayal of the persons, objects, devices, places, processes, etc. shown.

B. EXCLUSION:

- 1) The probative value of the television tape is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the television tape is substantially outweighed by danger that the television tape will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the television tape is substantially outweighed by danger that the television tape will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

C. COMMENTARY:

- Where an issue exists as to whether the tape was broadcast, and perhaps the extent of broadcast, it is necessary to present the testimony of a witness with knowledge as to these matters. See Pritchard v. Downie, 326 F.2d 323, 326 (8th Cir. 1964).
- Where the fact of broadcast is irrelevant to the proponent. (e.g., the tape is offered because it depicts a relevant scene) then authenticating testimony can be provided by any

witness with knowledge as to the fairness and accuracy of the depiction. See 41 A.L.R. 4<sup>th</sup> 812 (1985).

- See also Larson v. Family Violence and Sexual Assault, 64 S.W.3d 506, 511 (Tex. App. – Corpus Christi 2001) reh'g. overruled, rev. den. (video of newscasts); Phillips v. State, 770 S.W.2s 824, 825-826 (Tex. App. – El Paso 1988).

**XXVI. THERMOGRAMS**

A. PREDICATE:

The foundational elements are as follows:

- 1) The operator was a qualified thermography technician.
- 2) The operator filmed a certain part of the person's body at a certain time and place.
- 3) The thermogram is of the person claimed.
- 4) The equipment used in preparing the thermogram was in sound working order and met all state-of-the-art industry standards.
- 5) Witness with knowledge (doctor or technician) testifies that the thermogram fairly and accurately reflects the condition of the patient's body which it purports to show.

B. EXCLUSION:

- 1) The probative value of the thermogram is substantially outweighed by the danger of unfair prejudice; or
- 2) The probative value of the thermogram is substantially outweighed by danger that the thermogram will cause confusion of the issues or will mislead the jury; or
- 3) The probative value of the thermogram is substantially outweighed by danger that the thermogram will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

**XXVII. VIDEOTAPES**

A. PREDICATE:

- 1) Witness is familiar with the scene, etc. that is portrayed on the videotape and explains the basis for his or her familiarity.
- 2) Witness recognizes the scene, etc. that is portrayed on the videotape and testifies that the videotape is a fair,

accurate, true, or good portrayal of the persons, objects, devices, places, processes, etc. shown.

- B. **EXCLUSION:**
- 1) The probative value of the videotape is substantially outweighed by the danger of unfair prejudice; or
  - 2) The probative value of the videotape is substantially outweighed by danger that the videotape will cause confusion of the issues or will mislead the jury; or
  - 3) The probative value of the videotape is substantially outweighed by danger that the videotape will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.
- C. **COMMENTARY:**
- The term "videotape" is included within the term "photograph" in Tex. R. Evid. 1001. Therefore, the predicate for admission is the same.

#### **XXVIII. VIDEOTAPE DEPOSITIONS**

- A. **PREDICATE:**
- 1) Witness is familiar with the scene, etc. that is portrayed on the videotape and explains the basis for his or her familiarity.
  - 2) Witness recognizes the scene, etc. that is portrayed on the videotape and testifies that the videotape is a fair, accurate, true, or good portrayal of the persons, objects, devices, places, processes, etc. shown.
- B. **EXCLUSION:**
- 1) The probative value of the demonstration of the videotape deposition is substantially outweighed by the danger of unfair prejudice; or
  - 2) The probative value of the demonstration of the videotape deposition is substantially outweighed by danger that it will cause confusion of the issues or will mislead the jury; or
  - 3) The probative value of the demonstration of the videotape deposition is substantially outweighed by danger that it will cause undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.
- C. **COMMENTARY:**
- In relation to videotaped depositions, chain of custody is not a necessary element to establish a

foundation for admissibility as it is with other videotapes because the stenographic records tends to prove the verity of the videotape.

- 66 A.L.R. 3d 637 (Use of videotape to take depositions for presentation at civil trial in state court).

#### **XXIX. VIEWS**

- A. **PREDICATE:**
- 1) Witness is familiar with the place or object, the subject of the view, and explains his or her familiarity.
  - 2) Witness recognizes the place or object, the subject of the view, and testifies that the scene or object, the subject of the view is a place or object in issue and is what it purports to be.
  - 3) The place or object, the subject of the view, must currently be in the same or substantially similar condition as it was at the relevant time.
  - 4) The view must be relevant to an issue in the case.
- B. **EXCLUSION:**
- 1) The trial judge should control the ultimate decision of allowing or disallowing the view. The judge has broad discretion to allow or disallow the view even where all parties consent to the view. However, the judicially-created rule in Texas is that if one party objects, the trial court must deny the view. Taylor v. American Fabritech, Inc., 2004 WL 555681, fn. 27 (Tex. App. – Houston [14 Dist.] 2004)(permanent publication pending; subject to revision or withdrawal); City of Pearland v. Alexander, 468 S.W.2d 917, 926 (Tex. Civ. App. – Houston [1 Dist.] 1971), rev'd on other grounds, 483 S.W.2d 244 (Tex. 1972) (noting that while the Texas Supreme Court has not directly passed on the matter since 1941, it is generally considered the rule in Texas that a view is permissible at the discretion of the trial judge "only with consent of all parties to the suit").
  - 2) It should be noted that there is a line of authority which holds that there is simply no right to have a jury view in this state. One court has even held that it is a reversible error for counsel to request a view while in the

jury's presence. Davis v. Huey 608 S.W.2d 944, 954 (Tex. Civ. App. – Austin 1980) rev'd on other grounds 620 S.W.2d 561 (Tex. 1981); See also Bradshaw v. White, 294 S.W.2d 736, 739-740 (Tex. Civ. App. – Austin 1956), writ refused n.r.e.; 76 A.L.R. 2d 766 (1961); 4 McDonald & Carlson Tex. Civ. Prac. Sec. 21:43 (1<sup>st</sup> ed. 2003); 71 Tex. Jur. 3d Sec. 110 (2004).

3) City of Pearland, supra (Court properly refused jury view of tract taken for sewage disposal plant in eminent domain proceeding, where party objected to view.)

**XXX. VOICEPRINTS**

See Sound Spectrograms, P. 15

**XXXI. X-RAYS**

**A. PREDICATE:**

For purposes of admission, x-rays are treated as photographs. Jones v. State, 111 S.W. 3d 600, 606 (Tex. App. – Dallas 2003) rev. ref. Generally, proof may include:

- 1) The operator was a qualified x-ray technician.
- 2) The operator filmed a certain part of the person's body at a certain time and place.
- 3) Proof that the X-ray is of the person, a part of that person, or an object lodged in the anatomy of that person.
- 4) Absence of significant change in the subject and proof that the person X-rayed or his or her condition was the same when the X-ray was taken as it was at the time the injury occurred.
- 5) Technical testimony concerning reliability of the equipment and proper operation thereof.

**B. EXCLUSION:**

The Best Evidence Rule (Tex. R. Evid. 1002) is made applicable to x-rays because of the definition of the term "photograph" in Tex. R. Evid. 1001(b). However, other rules limit this application. For example, under Tex. R. Evid. 703, an expert can give an opinion on matters not in evidence if the matters are of a type reasonably relied upon by experts in the field. Additionally, Tex. R. Evid. 803(6) provides that opinions and diagnoses contained in records of regularly conducted activity, such as hospital

records, are admissible.

**C. COMMENTARY:**

- Today, it is not ordinarily necessary to prove that the X-ray procedure is accurate.
- This testimony is ordinarily obtained from a qualified expert such as a physician who testifies in court or by deposition.
- Remoteness in time does not affect the evidentiary value of an X-ray as long as testimony indicates that the condition portrayed was essentially unchanged from the time of injury to the time of the X-rays.
- Your sponsoring witness must still be able to positively testify that the x-ray is of the particular body member which it purports to show because the self-authenticating affidavit will not contain that information.
- Tex. R. Evid. 902(10)(b) provides a recommended affidavit to be used as follows:

AFFIDAVIT FORM:

No. \_\_\_\_\_

J. DOE § IN

THE

§

v. §

COURT IN AND FOR §

J. ROE §

\_\_\_ 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 duplicates of the original.*

\_\_\_\_\_  
Affiant

SWORN TO AND SUBSCRIBED before me on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public, State of Texas

Notary's printed name:

My commission expires: \_\_\_\_\_

**XXXII. Social Media and Electronic Communications**

In order to admit social media and electronic communications as evidence under the Texas

Rules of Evidence, a three-part predicate test must first be established. The three part test is:

Relevancy

Authenticity

Not subject to any exclusion.

First, relevancy is defined as “relevant evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” TRE 401-402. Second, the evidence must be authenticated in that the evidence must be what the proponent claims the evidence to be. TRE 901 (a). Third, the evidence must not be subject to exclusion such as improper character evidence or inadmissible hearsay. TRE 404(a) and TRE 802.

In making a determination as to whether the social media evidence is relevant, the trial court should consider whether a reasonable person with some experience would find the evidence helpful in determining the truth or any fact of consequence. *Hernandez v. State*, 327 S.W.3d 200, 206 (Tex.App.—San Antonio 2010, pet. ref’d). The trial court should look to the purpose for which the evidence is being offered and determine whether there is a direct connection evidence being offered and the proposed use. *Reed v. State*, 59 S.W.3d 278, 281 (Tex.App.—Fort Worth 2001, pet. ref’d).

In a recent Texas Appellate Court case, photographs from the social media website MySpace were admitting into evidence. *Tienda v. State*, No. 05–09–00553–CR, 2010 WL 5129722, at \*4–5 (Tex.App.-Dallas Dec. 17, 2010) (not designated for publication). Over the defense objections, the court admitted the photographs after the prosecution laid the proper predicate. Circumstantial evidence was also used to authenticate the photographs. This evidence was also authenticated by the introduction of the user’s commonly known nickname, username, registered email address, user identification number, stated physical location, and numerous other photographs identified by time and date stamps. *Id.*

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