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COMMON EVIDENTIARY PROBLEMS SEEN BY A TRIAL JUDGE

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I recall my first day in evidence class in law school like it was yesterday. The professor posed the rhetorical question: "What is truth?"

Many of my fellow students leaped at the opportunity to demonstrate their intelligence. Recall that the late sixties and early seventies produced more than its fair share of college graduates who, having majored in philosophy, psychology, or some other esoteric major, found themselves unemployable at the end of four years with repayment of student loans on the horizon. Many of these scholars chose law school, and, therefore, were uniquely qualified to tackle the professor's questions.

I, on the other hand, was deeply disappointed. Preferring economics and business to philosophy, I had hoped that evidence would be a course offering useful legal tools that would become the mainstay of my practice as a trial lawyer. After indulging his audience for several minutes my professor allayed my fears.

The answer to the question was both simple and complete; "Truth is what is believed in a courtroom."

This profound statement not only illuminates the function of the law of evidence, but the realities of the entire trial as well. It also forms the basis for the thrust of this article. The purpose here is simply to identify particular issues in evidence that seem to occur or which are typically the source of some confusion in a civil district court.

ADMISSIONS

The strength and effect of admissions by a party opponent pursuant to Tex. R. Civ. Evid. 801(e)1 is frequently underestimated and misunderstood. Such evidence is not only useful for purposes of impeachment, but is a fertile source of substantive evidence as well.

Admissions are not subject to the general rules, or any rules for that matter, of "testimonial qualifications," in particular, personal knowledge.¹ In short, it is not necessary that the party declarant know what he is talking about. His statement can be based solely on hearsay.² The important inquiry is whether the statement is inconsistent with the position he is taking at trial. If so, the statement is admissible even though it may be a conclusion, opinion, or wholly devoid of personal knowledge or any other indicia of accuracy or truthfulness.

The rule was succinctly stated in *Cox v. Esso Shipping Co.*³ as follows:

"An admission, rightly understood but so often confused, in its classic proto type is merely — but significantly — a position taken by the adversary * * which is contrary to and inconsistent with the contention now being made in the litigation. It is that simple. It need not have been,

as is so often said, an admission against interest, nor is there a need to lay a predicate for its use. All that is needed is an authoritative statement by the adversary inconsistent with the contemporary litigation position."

The devastating effect of an admission was demonstrated in *McNeely v. Southwestern Settlement and Development Corp.*⁴ It seems that the plaintiff, George McNeely made the critical mistake of repeating something his wife told him. It cost him his claim of adverse possession.

Mr. McNeely was out of town when an "intruding use" occurred, which was later related to him by his wife. Nonetheless, McNeely acknowledged such intruding use as fact, even though he was not present when it occurred and had no personal knowledge of whether his wife's story was true. The court refused to exclude the testimony in the face of an objection that the statement was clearly hearsay to George and about which he had no personal knowledge. The statement was admissible both for impeachment purposes, and as substantive evidence of the intruding use which defeated his claim.⁵

EXPERTS

It is rare to find a civil case these days, that does not involve the testimony of experts. Typically, disputes arise as to what constitutes an expert and how far they can go in expressing their opinions.

The rule concerning qualifications of an expert is easy to state but often difficult to apply. The starting point is Tex. R. Civ. Evid. 702 which describes an expert as one who is qualified as such by virtue of "knowledge, skill, experience, training or education on an issue where scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. . . ." The determination of a witness's qualifications as an expert in a particular field or matter is left to the sound discretion of the court and will not be disturbed on appeal absent a clear abuse of that discretion.⁶

Generally stated, the witness must possess a higher degree of knowledge than an ordinary person, or the trier of fact, on the issue in question.⁷

Once the witness is qualified, the court must also determine the realm within which the witness may express an opinion. In this area two cases are instructive. In *Rogers*, the witness in question was a DPS officer who testified that he had been with the DPS and had been involved in accident investigation the entire time. He graduated from a four and one half month school conducted by the DPS office in Austin, which included training in accident investigation. He also attended one-week in-service refresher schooling in Austin every two years.

The officer made a physical inspection of the accident scene and took statements from witnesses in arriving at his conclusions. The officer then testified that the defendant took all evasive action possible to avoid the collision with plaintiff's vehicle and that he found no physical evidence to indicate that the defendant was speeding. Basing his testimony on the statement of a witness, Victor Gonzales, the officer also stated that the plaintiff was attempting to flee from Mr. Gonzales when the plaintiff entered the intersection where the collision occurred.

The court held that a proper predicate had been laid for the officer's testimony concerning evasive actions taken by the defendant and the speed of the vehicle driven by the defendant. However, it was error to allow the officer to opine as to the reasons for plaintiff's entry into the intersection at a high rate of speed (to wit: to flee from Mr. Gonzales). Thus the expert had strayed beyond the limits of his "specialized knowledge." Likewise, in *East Texas Motor Freight Lines Inc. v. Neal*⁸ a DPS officer who had training as an accident investigator, (having investigated ten or twelve accidents a month), was properly prevented from testifying as to the position of the vehicles upon impact since it was not established that the officer had any training in a technical or scientific field requiring knowledge and experience in calculus, trigonometry, metallurgy or quantitative and qualitative analysis.

However, a recent Texas Supreme Court opinion has substantially broadened the permissible scope of an expert witness's testimony. In *Birchfield v. Texarkana Memorial Hospital*⁹ the Texas Supreme Court held for the first time that an expert may now testify as to mixed questions of law and fact. In doing so the Court stated:

"Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts."¹⁰

In *Birchfield*, the expert was allowed to testify that the defendant doctor's conduct constituted "negligence," "gross negligence," and "heedless and reckless conduct" and was the "proximate cause" of the injury to the plaintiff.¹¹ In so holding, the court has now given experts free rein in expressing opinions on the ultimate issues to be submitted to the jury.

PRIVILEGES

Article V of the Texas Rules of Civil Evidence concerns privileges and places certain restrictions in discovery to encourage and protect full communications between persons engaged in specific relationships. The party asserting the privilege always carries the burden of demonstrating that the evidence sought to be protected actually qualifies for the privilege as a matter of law¹² and the Court may not order a party to waive a privilege.¹³

The physician-patient privilege is one frequently litigated in Texas courts.¹⁴ However, the most common area of dispute concerns the question of whether the physician-patient relationship exists at all.

In *Tarrant County Hospital District v. Hughes*,¹⁵ the court defined a patient as one who actually consults or is seen by a physician. *Tarrant* was a wrongful death case, in which the plaintiff sought to compel discovery of the identity of blood donors in order to prove that he contracted AIDS (acquired immune deficiency syndrome) from obtaining blood transfusions at a Tarrant County hospital. The hospital claimed that the blood donors' identities were protected under the physician-patient privilege. The court disagreed, holding that the blood donors' identities were not privileged unless they were either consulted or seen by a physician.¹⁶

In addition to asserting privilege under Tex. R. Civ. Evid., hospitals in medical malpractice cases frequently assert a privilege under statutory authority, the relevant portion of which provides as follows:

"The records and proceedings of any committee or joint committee of a hospital . . . whether appointed on an ad hoc basis to conduct a specific investigation or established under state or federal law or regulations or under the by-laws, rules or regulations of such organization or institution, shall be confidential and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be public records and shall not be available for court subpoena; provided, however, that nothing herein shall apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, or extended care facility."¹⁷

The applicability and scope of this statute was considered by the Texas Supreme Court for the first time in *Texarkana Memorial Hospital Inc. v. Sonnes*¹⁸ wherein minutes of hospital committee meetings were held to be protected from discovery and the scope of the privilege defined as follows:

"Nothing that is said in the statute or in this opinion would prevent the proof or discovery of matters otherwise permitted over the objection that such evidence has been previously presented to the hospital committee. The presentation of evidence or opinion to a hospital committee during its deliberations does not thereby make that evidence or opinion privileged if offered or proved by means apart from the record of the committee. The effect of the statute is simply to prevent the discovery and use of the records and proceedings of the committee."¹⁹

In *Jordan v. Fourth Supreme Judicial District*²⁰ the Court examined the terms, "records and proceedings," and defined them as including:

". . . those documents generated by the committee in order to conduct open and thorough review. In general, this privilege extends to documents that have been prepared by or at the direction of the committee for committee purposes. Documents which are gratuitously submitted to a committee or which have been created without committee impetus and purpose are not pro-

tected. In addition, the privilege extends to minutes of committee meetings, correspondence between committee members relating to the deliberation process and any final committee product, such as recommendations."²¹

In *Barnes v. Whittington*²² the Court held that letters requesting confirmation on the credentials and experience of the defendant doctors were "routine administrative records prepared by the hospital in the ordinary course of business," and thus discoverable.²³ The Court further interpreted *Jordan* as holding that information is protected by the privilege only if "sought out or brought to the attention of the committee for purposes of an investigation, review, or other deliberative proceeding."²⁴

In *Doctor's Hospital v. West*²⁵ the Court applied the holdings of *Barnes* and *Jordan* to several different types of documents, finding only that a series of letters authored by members of various hospital committees or departments to doctors who were under review by such author's committee or department, to be privileged.

Those not entitled to protection by article 4447d §3 included (1) letters from various hospital administrators requesting background information from hospitals and doctors, concerning the defendant doc-

tors; (2) letters from doctors or hospital administrators in response to the letters in (1) above; (3) letters from hospital administrators to one of the defendant doctors seeking certain information; (4) a letter from another doctor to one of the defendant doctors concerning a case under review; (5) letters concerning certain medical procedures performed by a defendant doctor, and (6) a report to be presented by the hospital's former chief of staff to an "ad hoc committee."

CONCLUSION

Shortly after taking the bench, I sought the counsel of a good friend who had moved from a civil district court to the federal court, concerning the pitfalls of my new job. To ease my mind he explained that, after a while, things begin to repeat themselves, making most decisions familiar rather than matters of first impression. He was right, of course.

The evidentiary concepts discussed herein are not particularly complex, but are by far the ones most frequently REVISITED. Two of them, expert opinions and hospital committee privileges, have been the subject of recent cases which significantly expand and define their use in establishing that most important and elusive truth.

ENDNOTES

1. McCormick and Ray, Texas Law of Evidence 2nd Ed. §1125.
2. *Snyder v. Schill*, 388 S.W.2d 208, 213 (Tex. Civ. App. — Houston 1965, writ ref'd n.r.e.).
3. 247 F.2d 629, 632 (5th Cir. 1957).
4. 284 S.W.2d 167 (Tex. Civ. App. — Beaumont 1955, no writ).
5. *Id.* at 167-168.
6. *Rogers v. Gonzales*, 654 S.W.2d 509 (Tex. App. — Corpus Christi 1983, writ ref'd n.r.e.).
7. *Rogers v. Gonzales*, *supra* at 513; *International Security Life Insurance Co. v. Beauchamp*, 464 S.W.2d 679, 681 (Tex. Civ. App. — Amarillo 1971, no writ).
8. 443 S.W.2d 318, 326 (Tex. Civ. App. — Texarkana 1969, writ ref'd n.r.e.).
9. 747 S.W.2d 361 (Tex. 1987).
10. *Id.* at 365.
11. *Id.*
12. *Barnes v. Whittington*, 751 S.W.2d 493, 494 (Tex. 1988) and *Peeples v. Fourth Supreme Judicial District*, 701 S.W.2d 635 (Tex. 1985).
13. *Mutler v. Wood*, 744 S.W.2d 600 (Tex. 1988). In *Mutler*, a writ of mandamus was conditionally granted by the Supreme Court where the trial court ordered the plaintiff to sign a written authorization waiving any and all physician-patient privileges.
14. Tex. R. Civ. Evid. 509.
15. 734 S.W.2d 675 (Tex. App. — Fort Worth 1987, no writ).
16. *Id.* at p. 677.
17. Article 4447d, 83, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1988).
18. 551 S.W.2d 33 (Tex. 1977).
19. *Id.* at 36.
20. 701 S.W.2d 644 (Tex. 1985).
21. *Id.* at 647-48.
22. 751 S.W.2d 493 (Tex. 1988).
23. *Id.* at 496.
24. *Id.*
25. 765 S.W.2d 812 (Tex. App. — Houston, 1988, no writ).