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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 reoccur 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.