TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Topic:
Presenting an Effective Defense

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PRESENTING AN EFFECTIVE DEFENSE

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PRESENTING AN EFFECTIVE DEFENSE

DAVID L. BOTSFORD

I. INTRODUCTION

The right to present a defense is guaranteed by the Sixth Amendment to the Constitution of the United States and Article I, Section 10 of the Texas Constitution.[1] That right requires us to be effective; not just in the eyes of some appellate court under *Strickland* or *Cronic*, but in the eyes of our clients and those jurors who sit in judgment of our clients. To we criminal defense lawyers, the two word verdict is the penultimate phrase in the english language. And while none of us have heard that phrase often enough, when we do hear it, it recharges our batteries and reinforces our dedication to our trade. More importantly, that two word phrase defines our existence and feeds our self-respect, self-esteem and ego. None of us like to lose and some of us are damn poor losers. The pain of seeing our clients' chained and led away from the courtroom while the tears of agony flow from the eyes of their loved ones is painful and we all hate it. But, if we try enough cases, we are going to feel that pain and the agony of defeat. But if we can force ourselves to examine those losses, we learn valuable lessons: what "worked" in that case and what did not "work" in that case. More importantly, the reasons why something "worked" or did not "work" are perhaps just as important. Accordingly, my mission is to share with you what I have learned in the past 35 years, both from my personal experiences (painful as some of them have clearly been) and from far better lawyers than I. It is my hope that this paper will enable to you fight a more effective fight against the forces that seek to convict the innocent or incarcerate (for consistently more unreasonable periods of time than conceivably necessary) those who have been convicted.

Today, I want to talk about three different topics which, at least to me, go hand in hand in the presentation of an effective defense: direct examination, demonstrative evidence and expert testimony. While voir dire is arguably the most important part of any state case, it plays little or no role in federal court. While I am certainly not the person to speak with you about an effective voir dire, I learned a great deal from Cat Bennett and Robert Hirschorn back in the mid 1980's when I had the pleasure of learning so very much from them in their home in Galveston and, later, at the NCDC (National Criminal Defense College) in Macon, Georgia. But Dr. Sun Wolf, George Milner and Jeff Kearney will be talking about voir dire in different settings, so I leave the topic to them.

Why do I believe that direct examination, demonstrative evidence and expert testimony are the keys to an effective defense? Direct examination does not appear exciting. Normally, our "war" stories do not encompass our direct examinations. However, winning a criminal case is often times much more a function of our "direct examinations" than our "cross-examinations." Preparing for and presenting a direct examination is far more difficult, at least in my opinion, than preparing for and

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[1] *See Holmes v. South Carolina*, 547 U.S. 391 (2006); *Potier v. State*, 68 S.W.3d 657, 665 (Tex.Crim.App.2002). "Exclusions of evidence are unconstitutional only if they `significantly undermine fundamental elements of an accused's defense.'" *Id.* at 666 (quoting *United States v. Scheffer,* 523 U.S. 303 (1998)).

pulling off a good cross-examination. Why? First and foremost, because you can not lead the witness. Thus, preparing for and presenting a direct examination must be carefully planned and executed. It is akin to painting by the numbers: you must be detail oriented, carefully plan the direct, and work with the witness so that he or she knows exactly what your goals are and how you are going to get there.

And inherent in any direct examination is the use of demonstrative evidence (not that it also does not go hand in hand with cross-examination). Indeed, we can never be too responsive to the need to use demonstrative evidence since demonstrative evidence is unquestionably essential to the effective presentation of our version of the facts. We all know that empirical studies prove that jurors remember far more of what they see than what they hear. That empirical research merely affirms the old adage that a picture is worth a thousand words. Indeed, long ago an ABA study on "juror retention levels" concluded that jurors retain 100 percent more information when it is presented visually rather than orally. Roy Krieger, *Now Showing at a Courtroom Near You . . . ; Sophisticated Computer Graphics Come of Age – and Evidence Will Never be the Same*, A.B.A.J. Dec. 1992, at 93. The ABA's study established that jurors became bored, confused and frustrated with technical issues and complex fact patterns. Jurors also became overwhelmed by the volume of information conveyed at trial. Accordingly, jurors found it difficult to remember critical facts and important issues. Incredibly, when an oral presentation is coupled with a visual presentation (such as a computer animation to illustrate the oral testimony), there is a **six hundred fifty percent increase** in juror retention over presentation of oral testimony alone. *See Krieger*, *supra* note 9, at 93. "If audio or visual presentation is calculated to assist the jury, the court should not discourage the use of it . . . Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight." 1 J. Weinstein & M. Berger, *Weinstein's Evidence* § 403[5] at 403-488 (1992). However, we far too often neglect to remember this adage and integrate demonstrative evidence into our cases. How often do we fail to plan our demonstrative evidence far in advance of trial? How often do we fail to sit down and brainstorm about how we can utilize demonstrative evidence to help our clients? How often do we fail to seriously integrate demonstrative evidence in our quest to convince the citizens of our juries that the only proper verdict is a not guilty. We need to start planning our use of demonstrative evidence early in the case and we need to remember to always, repeat always, consider new and creative means to demonstrate our message.

Finally, direct examination and a meaningful utilization of demonstrative evidence also goes hand in hand with the increasing need to win the war of the experts. Not merely in the context of mental health, where experts are obviously necessary, but also in virtually all cases, whether those are DWI's, sexual assaults, murders etc. Whether it be cross-racial misidentification, a pure case of misidentification, a coerced and involuntary confession, blood splatter, fingerprints, DNA or whatever, the use of experts has become an increasingly necessary component of an effective defense (both from the standpoint of consulting witnesses and testifying witnesses).

Accordingly, these three topics -- direct examination, demonstrative evidence, and expert testimony form the core of what I believe are essential to the presentation of an effective defense.

II. LAW RELATING TO DIRECT EXAMINATION

Obviously, you must know the facts of your case before you can effectively analyze whether defensive evidence is necessary and/or appropriate to your defense. But equally important is knowledge of the law as it relates to direct examination. This paper is not the place for an in depth discussion of the law, but the following selected aspects of the law must be known and in your constant thought processes before you can plan and present an effective direct examination of any witness. Realizing that most of us have not been prosecutors and that we constantly lead witnesses on cross examination, pulling off an effective direct examination is not an easy task.

A. TEXAS RULES OF EVIDENCE

Article VI of the Texas Rules of Criminal Evidence is entitled "Witnesses". The rules within Article VI -- Rules 601 to 615 -- are important rules of which that everyone should be thoroughly familiar.

As affecting direct examination, the following rules have significance (what follows is a brief summary of these rules):

> Rule 607: Allows the credibility of a witness to be attacked by any party, including the party who called him.
>
> Rule 608: Allows the credibility of a witness to be attacked or supported by evidence in the form of opinion or reputation, but subject to the following limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Additionally, specific instances of conduct, for the purpose of supporting or attacking his credibility (other than a conviction of crime under Rule 609) may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.[2]
>
> Rule 609: Allows impeachment by conviction of crime.
>
> Rule 611: Sets forth the mode and order of interrogation of witnesses and states that leading questions should not be used on direct examination except as may be necessary to develop the witnesses testimony or when the witness is called as a hostile or adverse party. Cross-examination should normally be permitted by leading questions.[3]

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[2] The prohibition in Rule 608(b) regarding specific instances of conduct has an exception in that specific instances of conduct are admissible to expose bias, correct any affirmative misrepresentations made on direct examination, or demonstrate lack of capacity. *Lagrone v. State*, 942 S.W.2d 602, 613 (Tex.Cr.App. 1997).

[3] Rule 611 is a codification of the "use before the jury" rule which mandated that when the examining counsel uses a document before the jury with the witness, opposing counsel is entitled

Rule 612: Allows the production of documents used by a witness to refresh his or her memory and provides for in camera review, excising of portions of said writings and sanctions for non-production.

Rule 613: Addresses prior consistent and inconsistent statements of witnesses and how and when these can be used to impeach. It also addresses bias and interest of witnesses and how bias and interest can be utilized.

Rule 614: The "Rule" as we call it (exclusion of witnesses from the courtroom).

Rule 615: Addresses the production of statements of witnesses after they have been called, the production of said statements, excising statements, recesses for examination of statements, and sanctions for non-production of statements.

B. FEDERAL RULES OF EVIDENCE

Article VI of the Federal Rules of Criminal Evidence is also entitled "Witnesses". The rules within Article VI -- Rules 601 to 615 -- are similar to Texas' Rules of Evidence and are obviously equally important rules of which that everyone should be thoroughly familiar.

As affecting direct examination, the following rules have significance (what follows is a brief summary of these rules):

Rule 607: Identical to Texas Rule 607: Allows the credibility of a witness to be attacked by any party, including the party who called him.

Rule 608: Substantially identical to Texas Rule 608: Allows the credibility of a witness to be attacked or supported by evidence in the form of opinion or reputation, but subject to the following limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Additionally, specific instances of conduct, for the purpose of supporting or attacking his credibility (other than a conviction of crime under Rule 609) may not be proved by extrinsic evidence. However, cross-examination on this is discretionary. It specifically states that a witness does not waive his Fifth Amendment privilege when examined as to matters relating only to credibility.

Rule 609: Substantially identical to Texas Rule 609: Allows impeachment by conviction of crime, even if an appeal is pending (contrary to Texas Rule 609).

Rule 611: Similar to Texas Rule 611: Sets forth the mode and order of interrogation of witnesses and states that leading questions should not be used on direct examination except

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to inspect the document. *See Hoffpauir v. State*, 596 S.W.2d 139 (Tex.Cr.App.1980); *Mendoza v. State*, 552 S.W.2d 444 (Tex. Cr. App. 1977).

as may be necessary to develop the witnesses testimony or when the witness is called as a hostile or adverse party. Cross-examination should normally be permitted by leading questions. Scope of cross is limited to direct, but the Court can allow, as if on direct examination, cross on other topics to be conducted as if on direct.

Rule 612: Substantially identical to Texas Rule 612: Allows the production of documents used by a witness to refresh his or her memory and provides for in camera review, excising of portions of said writings and sanctions for non-production. Makes specific reference to the Jencks Act (18 U.S.C. Section 3500) which dispenses for need for a federal rule of evidence similar to Texas Rule 615. See also Rule 26.2, Federal Rules of Criminal Procedure, which has many similarities to Texas Rule 615.

Rule 613: Similar to Texas Rules 613: Addresses prior consistent and inconsistent statements of witnesses and how and when these can be used to impeach. Unlike Texas Rule 613, however, it does not address bias and interest of witnesses and how bias and interest can be utilized.

Rule 614: Dissimilar to Texas Rule 614: Addresses the fact that the Court can call *and* question witnesses, and deals with objections to the calling and questioning of witnesses by the Court.

C. POTENTIAL LEGAL RAMIFICATIONS OF DIRECT EXAMINATION

The decision to call a witness, regardless of whether the witness is an expert or a lay witness, can have legal ramifications. Below, I have attempted to alert you to the law regarding the most significant legal ramifications of putting a witness on the stand, which may or may not apply to your expert witnesses.

1. Direct Examination Opens Up The Witness To Cross-Examination: Be Aware Of The Lack Of Limitations On Cross-Examination Before You Call The Witness.

You better be fully aware of the relative lack of limitations on cross-examination when you put any witness, including an expert witness, on the stand. Cross-examination is the engine of truth and most state and federal judges will give a prosecutor a full (and often times more than "fair") opportunity to cross your witness.

2. You May Have To Produce Documents If You Put A Witness On The Stand.

As you know, when you call a witness on direct examination, an prior statement made by the witness (other than the defendant) may have to be produced to the government.

As to expert witnesses, they can be examined with their prior writings, learned treaties, any and all documents they have reviewed during the course of their preparation for testimony, and any

materials you have provided them during the scope of their engagement for you as an expert witness.

Accordingly, if you supply your expert with, for instance, your client's life history (reflecting, for instance, extrinsic offenses he or she may have committed as a youth, for example), that client's life history is going to have to be produced by your expert. In a recent state habeas, United States District Judge Sam Sparks ruled that not reviewing the materials supplied to the defense hired expert constituted deficient performance (in the context of the defense not trying to block pretrial discovery to the prosecutor of what the expert had reviewed). This ruling was affirmed by the Fifth Circuit. *See Ward v. Dretke*, 420 F.3d 479, 492-495 (5th Cir. 2005).

The bottom line: you need to have consulting experts and testifying experts, and limit what you are going to supply your testifying expert, as more fully discussed below. Indeed, due to the potential sanctions for non-production of documents and statements which witnesses have used to refresh their memories as well as the definitions of prior statements (which must be produced), you need to know the Rules of Evidence inside and out.

In this regard, look at the definitions of a "statement" as defined by Rule 26.2, Federal Rules of Criminal Procedure, Texas Rule 615(f), and as interpreted under the Jencks Act (18 U.S.C. Section 3500). Rule 615(f) of the Texas Rules of Evidence defines the term "statement" as follows:

> (1) a written statement made by the witness that is signed or otherwise adopted or approved by him;
>
> (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, made by a witness to a grand jury.

While the federal definition is slightly different under Rule 26.2, Federal Rules of Criminal Procedure as to oral statements, the bottom line is the same: production has to occur, or potential sanctions can result.

AS TO YOUR EXPERT WITNESS, HE OR SHE IS ALSO subject to having produce facts and data underlying HIS or HER OPINIONS under the authority of Rule 705 of the Texas Rules as well as Rule 705 of the Federal Rules.

However, there are limits on what can be produced. For instance, in *Skinner v. State*, 956 S.W.2d 532 (Tex. Crim. App. 1997), after a court appointed defense expert (Dr. Lowry) testified, the state asked for all materials that had been supplied to and reviewed by Dr. Lowry under the authority of Rule 705, TEX. R. CRIM. EVID.. Defense counsel had not maintained an exact set of what had been furnished to Dr. Lowry, so the court conducted an in camera inspection of the file. Contained within the file was a document which Dr. Lowry had prepared prior to his first meeting with defense counsel. That document, entitled "Comments and Questions" (ultimately marked at

Exhibit 15(a)) was supplied to the state and utilized by the state in its cross-examination of Dr. Lowry.

On appeal, the Court of Criminal Appeals held that this document was protected by the work product doctrine, citing *United States v. Nobles*, 442 U.S. 225, 238 (1975) and *Washington v. State*, 856 S.W.2d 184, 187 (Tex. Crim. App. 1993). The Court also held that since Dr. Lowry did not make testimonial use of the document, there was no waiver of the work product privilege. The Court also addressed whether the document was subject to production under Rule 705, TEX. R. CRIM. EVID.. Assuming without deciding that it was discoverable despite the privilege, the Court held that id did not call within the purview of Rule 705 because it did not constitute "facts or data" underlying Dr. Lowry's opinion. Rather, it was a series of questions and concerns written by Dr. Lowry prior to his first meeting with defense counsel.

3. Direct Examination Can Open The Door.

In *Fuentes v. State*, 991 S.W.2d 267 (Tex. Crim. App. 1999), the defendant asserted that the trial court had erred in refusing to allow him to rebut the testimony of a state's witness (Sandy Gaw) that the victim of the capital murder had never caused trouble at the Handi-Mart. During Gaw's testimony on direct examination, the following occurred:

(On direct examination by the DA):

DA: Operating the Handi Food Mart and also living in the area, did you come to know somebody by the name of Robert Tate?

Gaw: Yes, sir.

DA: Would you describe him as a friend of your family?

Gaw: Yes, sir.

DA: Is he particularly or was he particularly friendly with any of your brothers and sisters?

Gaw: He grew up with -- actually, when I was little, my older brothers used to play with him and sometimes I joined in.

DA: Would he ever help out at the store?

Gaw: Sometimes when he saw my mom carrying out some trash or carrying cases of stuff, he'd offer help.

DA: How often would you see him?

Gaw: When we were younger, he came by pretty often. And then as we got older, he would come by whenever he had a chance to.

DA: There's been some lawyer talk in this courtroom that he may have been misbehaving or trying to steal stuff from people at your parent's store. Had you ever seen him act like that?

Gaw: No, sir, never.

DA: Did you ever see him misbehave at all in or around your family's store?

Gaw: No, sir.

DA: Had you ever seen him cause trouble out there at the store?

Gaw: No, sir. (emphasis added)

On cross-examination, the defendant attempted to attempted to cross-examine Gaw about specific instances of misconduct by the victim on the basis that the State had opened the door by asking questions about the victim's good character.

The Court noted that Rule 107, TEX. R. CRIM. EVID. -- the rule of optional completeness -- addresses and encompasses the "opening the door" situation, and stated:

> It is well established that the evidence which is used to fully explain a matter opened up by the other party need not ordinarily be admissible. Thus, the necessity of completeness will justify the introduction, though the "open door," of extraneous offense evidence, hearsay, or other matter that would otherwise be incompetent. There are, however, two limitations to the scope of the completeness opening. One, only parts or items germane to the part or item offered ("on the same subject") become admissible. Two, the matter offered on the justification of completeness may be excluded under Rule 403 if its prejudicial effect substantially outweighs its probative value.

The Court concluded that the last three questions (highlighted above) clearly were questions about the victim's character. The Court noted that merely because the State had improperly elicited good character evidence did not mean that the trial court was outside the zone of reasonable disagreement by failing to exclude the proposed cross examination. The Court noted that the DA had focused upon the **victim's good character at the store** and that the victim's criminal history or character were not related to his activities at the store and that they may have confused the jury.

Opening the door and creating a false impression are similar if not identical doctrines. Under the doctrine of creating a false impression, for instance, if a defendant suggests on direct examination that he or she has never been in trouble with the law, the state is entitled to disclose the misrepresentation. This doctrine is not limited to evidence elicited solely during direct examination. *See Martinez v. State*, 728 S.W.2d 360 (Tex. Crim. App. 1987); *Lopez v. State*, 928 S.W.2d 528 (Tex. Crim. App. 1996). In *Martinez*, the defendant testified falsely on cross-examination that he was scared to call the police and when asked by the state why he was scared, he volunteered that this was

the first time that he had been busted. The state was then permitted to impeach the defendant with the fact that he had a prior arrest for aggravated sexual assault. Of course, if the state attempts to get the defendant to deny a prior arrest in order to impeach him with that prior arrest, that is improper under the doctrine of impeachment on a collateral matter. *See Shipman v. State*, 604 S.W.2d 182 (Tex. Crim. App. 1980); *Lopez v. State*, 928 S.W.2d 528 (Tex. Crim. App. 1996). Under the doctrine of impeachment on a collateral matter, the cross-examining party may not then contradict the witnesses answer. A matter is collateral if the cross-examining party would not be entitled to prove that matter as part of his case tending to establish his plea.

4. Direct Examination Can Cure The State's Evidentiary Problems: Curative Admissibility And Solving Legal Insufficiency.

The Court of Criminal Appeals has held that, when a defendant offers essentially the same evidence as that to which he previously objected, he waives his objection and loses his right to complain on appeal of erroneous admission of the evidence. *McGlothlin v. State*, 896 S.W.2d 183, 189 n.9 (Tex. Crim. App. 1995); *Thomas v. State*, 572 S.W.2d 507, 512 (Tex. Crim. App. 1976). This rule has come to be known as the rule of "curative admissibility." There are at least two exceptions (or corollaries) to this rule that permitted testimony concerning objected-to material without waiver: the "meet, destroy, or explain" corollary and the corollary announced in *Thomas*, *supra*, based upon *Harrison v. United States*, 392 U.S. 219 (1968). According to the first corollary, when the defendant offers testimony designed to "meet, destroy, or explain" the evidence at issue, waiver may not occur if the defendant does this through "presentation of other evidence which does not prove those facts erroneously admitted." *Thomas v. State*, 572 S.W.2d at 513; *Lovell v. State*, 525 S.W.2d 511 (Tex. Crim. App. 1975); *Nicolas v. State*, 502 S.W.2d 169, 174-75 (Tex. Crim. App. 1973); *Trollinger v. State*, 219 S.W.2d 1018 (1949); *McLaughlin v. State*, 4 S.W.2d 54 (1928). If the defendant in testifying or putting on evidence, however, "admits or confirms the truth of the facts or evidence objected to, even if attempting to create a defense based on or beyond those facts, a waiver of the objection does occur." *Thomas*, 572 S.W.2d at 513; *accord*, *McGlothlin*, 896 S.W.2d at 189 n.9 (quoting *Nicolas*, *supra*). The second corollary announced in *Thomas* holds that testimony explaining the objected-to evidence may be given without waiver if the State cannot show that the testimony was not impelled by the admission of the objected-to evidence. *Thomas*, 572 S.W.2d at 516. The impact of these two corollaries on the potential for waiver in putting on a defense must be considered.

The "meet, destroy, or explain" corollary survived the Court's announcement of a new corollary in *Thomas*, *infra*, as an independent guarantee against waiver. *Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993); *Clark v. State*, 627 S.W.2d 693, 696 (Tex. Crim. App. 1981); *Ebarb v. State*, 598 S.W.2d 842, 843 (Tex. Crim. App. 1979); *Maynard v. State*, 685 S.W.2d 60, 65 (Tex. Crim. App. 1985); *compare Sweeten v. State*, 693 S.W.2d 454, 456-57 (Tex. Crim. App. July 17, 1985) (suggesting in dicta that the corollary announced in *Thomas* supplanted the prior corollary). In *Sherlock v. State*, 632 S.W.2d 604, 607 (Tex. Crim. App. 1982), the Court of Criminal Appeals "expressly overrule[d] prior cases inconsistent with *Thomas*." These cases referred to were predominantly Fourth Amendment cases wherein the Court of Criminal Appeals had found waiver if the defendant admitted possession and then attempted to provide an exculpatory "explanation" for

it.[4] After *Thomas*, therefore, if a defendant introduced testimony or evidence admitting but trying to explain the objected-to evidence, the State has the burden to show that "its illegal action in obtaining and introducing the evidence did not impel the defendant's testimony." *Ehrman v. State*, 580 S.W.2d 581, 584 (Tex. Crim. App. 1979) (Odom, J., dissenting, noting that the State had not "discharge[d] its burden under *Thomas*). In harmony with this dominant *Thomas* corollary, however, the defendant's testimony or evidence always can be admitted without waiver under the old "meet, destroy, or explain" corollary where it applies.

An additional corollary of this doctrine has also been referred to as the DeGarmo doctrine based on *DeGarmo v. State*, 691 S.W.2d 657, 661 (Tex. Crim. App. 1985). Essentially, *DeGarmo* holds that when a defendant testifies at the punishment stage of the trial and judicially confesses to the offense or to all of the elements of the offense, he or she waives all errors that occurred at the guilt/innocence stage of the trial, including the legal and factual sufficiency. *See e.g.*, *Hoffman v. State*, 922 S.W.2d 633, 672 (Tex. App.--Waco 1996, pet. ref'd).

This doctrine was subsequently rejected by the Court of Criminal Appeals in *Leday v. State*, 983 S.W.2d 713 (Tex. Crim. App. 1998). This is a "must read" for all attorneys who practice criminal law.

5. A Witness Cannot Testify To His Opinion Of The Accuracy Of The Testimony Of Other Witnesses At The Trial.

A favorite cross-examination technique of good prosecutors is to confront the citizen accused with the truth as told by other witnesses in the trial. How many times have you hear a prosecutor confront a defendant with a question such as, "Mr. Defendant, you have heard Mr. Smith say you shot the deceased. Now tell the jury Mr. Defendant, who is lying, you or Mr. Smith? This is entirely objectionable.

Indeed, a witness cannot properly be asked, on direct or cross-examination, whether another witnesses version of events is true or false, or who is lying, the other witnesses who have already testified or the witness on the stand ("Are they lying or are you lying?). *Temple v. Duran*, 121 S.W. 253 (Tex. Civ. App. 1908); *Creech v. State*, 329 S.W. 240 (Tex. Cr. App. 1959). It is improper for the state to require the defendant to express his opinion as to the truth or falsity of testimony contradicting him. *Johnson v. State*, 614 S.W.2d 148, 154 n. 17 (Tex. Cr. App. 1981); *Williams v. State*, 112 Tex. Crim. 307, 17 S.W.2d 56, 58 (1929).

However, where a defendant is asked on direct examination whether a witnesses testimony contradicting the defendant is true or false, then the state can properly, under the doctrine of invited error, cross-examination the defendant about whether those witnesses are lying or telling the truth. *Raney v. State*, 958 S.W.2d 867, 879-80 (Tex. App.-- Waco 1997)(pet. dismissed as improvidently granted)

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[4] The Court specifically had in mind *Ehrman v. State*, 580 S.W.2d 581 (Tex. Cr. App. 1979), in which it had failed to apply the *Thomas* rule, an oversight duly noted by the *Ehrman* dissent. *Sherlock*, 632 S.W.2d at 607.

6. Non-Responsive Answers

Non-responsive answers are every attorney's nightmare. The motor mouth witness, the witness who has to get his or her two cents in, etc. only cause us problems. We must be alert to object (although, technically, the objection is probably only available to the attorney who is questioning the witness). In *Moore v. State*, 999 S.W.2d 385, 402-403 (Tex.Crim.App. 1999), the defense called the defendant's mother to testify at the punishment stage of the capital murder trial. During direct examination, Mrs. Moore became unresponsive and began berating the court with obscenities. Efforts to control Mrs. Moore's tirade proved futile and she was removed from the courtroom and order was restored to the courtroom. After order was restored, defense counsel moved for a mistrial, which was denied. Subsequently, defense counsel requested the court to instruct the jury to disregard Mrs. Moore's outburst. This request was denied. These errors were raised on appeal. The Court of Criminal Appeals noted that the DA had objected to Mrs. Moore's answers, including those which asserted that the police had lied, her son's confession had been beaten out of him, and that the jury was "full of bullshit." Because defense counsel had failed to object to his own witnesses non-responsive answers and failed to seek an instruction to disregard them until the end of her testimony, any error was waived.

D. PRACTICAL CONSIDERATIONS GOVERNING DIRECT EXAMINATION

What follows is a checklist of factors which I believe you should include in your consideration, preparation and presentation of any direct examination.

1. ASCERTAIN BEFORE TRIAL IF YOU ARE GOING TO PRESENT A DEFENSE.

ALWAYS PREPARE TO PUT ON A DEFENSE

ALWAYS CONSIDER A FULL DEFENSE

ALWAYS CONSIDER A PARTIAL DEFENSE

ALWAYS INVOLVE THE CLIENT IN THE DECISION-MAKING PROCESS

2. ALWAYS REASSESS NECESSITY OF PUTTING ON A DEFENSE: DURING TRIAL AND AFTER STATE CLOSES CASE-IN-CHIEF.

3. CONSIDERATIONS GOVERNING WHETHER TO PUT ON A DEFENSE (PARTIAL OR FULL).

HAS STATE PROVEN ITS CASE (LEGALLY, FACTUALLY & WILL JURY CONVICT GIVEN STATE'S PRESENTATION)

OPENING DOOR TO EXTRINSIC OFFENSES

OPENING DOOR TO REBUTTAL

POSSIBLE WAIVER OF APPELLATE ISSUES

4. CONSIDERATIONS REGARDING HAVING CLIENT TESTIFY.

CLIENT HAS ABSOLUTE RIGHT TO TESTIFY

RECOGNIZE THAT NOTHING IS MORE TERRIFYING TO MOST CLIENTS OTHER THAN BEING ARRESTED & GOING TO JAIL

EMBARRASSMENT IN A PUBLIC FORUM

FEAR OF PUBLIC SPEAKING

PROSECUTOR WILL NAIL HIM OR HER

IS THE STATE'S CASE STRONG OR WEAK?

DOES THE CLIENT HAVE A BELIEVABLE VERSION OF EVENTS

CAN YOU PUT ON THE DEFENSE THROUGH OTHER WITNESSES

PRIOR RECORD OF CLIENT & EXTRANEOUS OFFENSES

IS THE CLIENT THE MOST IMPORTANT WITNESS FOR THE DEFENSE?

DO YOU NEED THE EVIDENCE TO RAISE A LESSER-INCLUDED OFFENSE AND/OR FOR FINAL ARGUMENT?

CAN THE CLIENT WITHSTAND THE CROSS WITHOUT LOOKING LIKE A LIAR?

DOES THE CLIENT LOOK TRUTHFUL: VISUAL POLYGRAPH

5. CONSIDERATIONS REGARDING THE ORDER OF DEFENSIVE WITNESSES.

CLIENT MUST BE THE LAST DEFENSIVE FACT WITNESS

CHARACTER WITNESSES: CAN SANDWICH CLIENT WITH GOOD REPUTATION FOR TRUTH & VERACITY OR PEACEFUL & LAW-ABIDING

CHRONOLOGICAL PRESENTATION VERSES SPECIFIC AREAS

WITNESSES THAT REBUT PORTIONS OF STATE'S CASE

FACT WITNESSES TO DEFENSIVE POSITION

6. ESTABLISH THE GOAL FOR EACH WITNESS.

7. PREPARE WITNESS AND YOURSELF FOR THE DIRECT EXAMINATION.

TELL WITNESS HIS OR HER ROLE IN THE DEFENSE

PREPARE THE WITNESS FOR NON-VERBAL COMMUNICATION

PREPARE THE WITNESS FOR REAL AND DEMONSTRATIVE EVIDENCE

PREPARE THE WITNESS FOR AREAS TO STAY AWAY FROM

TALK TO THE WITNESS ABOUT EMOTION

TALK TO THE WITNESS ABOUT WHAT HE OR SHE WILL TAKE TO THE WITNESS STAND

GO OVER A FULL DIRECT WITH EACH WITNESS

HAVE AN ASSOCIATE DO A MOCK CROSS WITH EACH WITNESS

MAKE SURE THE WITNESS KNOWS TO ANSWER QUESTIONS ON CROSS IN THE SAME MANNER AND IN THE SAME TONE AS HE OR SHE ANSWERED THE QUESTIONS ON DIRECT

ALWAYS RECREATE THE CRITICAL MOMENT OF THE CASE WITH THE WITNESS

8. CONSIDERATIONS REGARDING YOUR DIRECT EXAMINATION.

COMMUNICATE WITH THE WITNESS

DON'T USE LAWYER WORDS

HUMANIZE THE WITNESS

BE YOURSELF

REMOVE BARRIERS

USE PERSUASIVE LANGUAGE

USE TRILOGIES

USE NON-LEADING QUESTIONS, EXCEPT WHERE YOU WANT TO LEAD (TRANSITIONS FROM ONE TOPIC TO ANOTHER, TO ALTER PACE AND VARIETY)

STRUCTURE YOUR DIRECT EXAMINATION

BEGINNING: HUMANIZE WITNESS, SHOW STABILITY & CREDIBILITY OF WITNESS

MIDDLE: SET SCENE: EITHER CHRONOLOGICAL OR TOPIC TO TOPIC

END: CONCLUDE WITH A HIGH NOTE OF DENIAL (CLIENT) OR A STRONG POINT

HAVE A CONVERSATION WITH THE WITNESS: FIRESIDE CHAT

USE LOOPING QUESTIONS

CONTROL THE WITNESS

PREPARATION

HAVE A RELATIONSHIP WITH THE WITNESS

USE PRECISE QUESTIONS

BLOCK TIME FRAMES & EVENTS

USE DEMONSTRATIVE EVIDENCE

FEELINGS & EMOTION

DO NOT INTERRUPT THE WITNESS

LISTEN TO THE WITNESS

WATCH THE WITNESS

DO NOT RELY UPON A SCRIPT

VARY TONE AND PITCH OF QUESTIONS

AVOID USING "OKAY", "UH HUH," & TALKING TO YOURSELF

CONTROL YOUR EMOTION & FEAR

9. ALWAYS USE DEMONSTRATIVE EVIDENCE

IDENTIFY KEY ISSUES IN CASE

ASCERTAIN HOW DEMONSTRATIVE EVIDENCE CAN BETTER DEMONSTRATE KEY ISSUES

ASCERTAIN HOW YOU CAN GET IT INTO EVIDENCE

ASCERTAIN WHO YOU WILL USE TO INTRODUCE IT

ASCERTAIN HOW DEMONSTRATIVE EVIDENCE CAN HURT STATE

CONSIDER APPROPRIATE LEVEL OF TECHNOLOGY (I.E., TYPE OF DEMONSTRATIVE EVIDENCE) GIVEN FACTS OF CASE AND LOCATION OF TRIAL

10. ALWAYS PRACTICE USING THE DEMONSTRATIVE EVIDENCE WITH THE WITNESS BEFORE YOU GET TO THE COURTROOM.

NEVER HAVE A WITNESS USE DEMONSTRATIVE EVIDENCE FOR FIRST TIME IN FRONT OF THE JURY

III. LAW RELATING TO DEMONSTRATIVE EVIDENCE

Before we can effectively plan to use demonstrative evidence, we must know if and how we can get it into evidence. There is no sense spending your client's scare resources preparing an awesome demonstrative exhibit and then fail to get it into evidence. What follows is designed to be a starting point for your legal research into these various topics.

A. OVERVIEW

Texas courts have **not** treated demonstrative evidence, whether it be a map, model, drawing, chart, or diagram, as inadmissible hearsay, regardless of whether it was prepared in court or out of court. *See Pierce v. State*, 777 S.W. 2d 399, 413 (Tex. Cr. App. 1989)(upholding exclusion of defense expert's drawings of the lineup during which defendant was identified on the grounds that he had not personally observed the lineup and had created the drawing on the basis of police reports which he could not verify as accurate); *Clay v. State*, 592 S.W.2d 609, 613 (Tex. Cr. App. 1980)(upholding admission of chart drawn on blackboard by state summarizing 24 cash shortages, the date, department and amount of each such shortage as a visual aid to illustrate the testimony of the state's witness); *Mayfield v. State*, 848 S.W.2d 816, 819 (Tex. App.-- Corpus Christi 1993, pet. ref'd)(upholding admission of diagram drawn by prosecutor out of court, but testified to in court by the sponsoring witness); *Vollbaum v. State*, 833 S.W.2d 652, 657 (Tex. App.--Waco 1992, pet. ref'd)(upholding admission of a styrofoam model of a woman's head during the testimony of the state's medical examiner); *Strong v. State*, 805 S.W.2d 478, 485 (Tex. App.--Tyler 1990, pet. ref'd)(upholding creation by prosecutor of charts summarizing testimony as to various defendants, including telephone conversations, notebook entries or surveillance observations, which charts were not offered or admitted, but which were used during by state during jury argument);[5] *Smith v. State*, 626 S.W.2d 843, 844 (Tex. App.--Corpus Christi 1991, no pet)(upholding diagram of scene of offense, even though not totally complete).

Rather, visual, real or demonstrative evidence has historically been found to be admissible if it tends to solve some issue in and is relevant to the case. Documentary evidence such as maps, diagrams and charts are material as aids to the understanding of other material evidence. McCormick, Evidence Sec. 185 (3rd ed. 1984); *Mayes v. State*, 816 S.W.2d 79, 87 (Tex. Cr. App. 1991).

In order for demonstrative evidence to be admitted as evidence, the proponent of the item must be able to prove it is an accurate representation of what it purports to depict. *Pierce v. State*, *supra* at 413. In other words, the required authentication or identification for admissibility is satisfied by evidence that supports a finding that the matter in question is what its proponent claims, as mandated by Rule 901(a), TEX. R. CRIM. EVID. *Mayfield v. State*, *supra* at 819.

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[5] A trial court has discretion to allow an attorney to use visual aids, including charts, in summarizing the evidence during final argument. *Bobo v. State*, 757 S.W.2d 58, 64 (Tex. App.--Houston [14st Dist.] 1988, pet. ref'd); *Vera v. State*, 709 S.W.2d 681, 687 (Tex. App.--San Antonio 1986, pet. ref'd).

The Court of Criminal Appeals has seldom addressed documentary evidence on appeal. Nevertheless, two older cases from the 1990's are revealing: *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Cr. App. 1994) and *Ramirez v. State*, 815 S.W.2d 636 (Tex. Cr. App. 1991), although the Texas Supreme Court has also addressed the topic (and, given that the use of demonstrative evidence is so prevalent in civil cases, that makes a lot of sense).

In *Ramirez v. State*, *supra* at 647-648, defense counsel was prevented, during his final argument, from demonstrating what it was like to eat a mayonnaise and bread sandwich and from demonstrating how his client had sniffed paint, both of which he contended were relevant to the special issues submitted at this capital case. On appeal, the Court held that the trial court had not committed error as follows: (1) as to the proposed mayonnaise and bread demonstration, although there was evidence that the defendant had eaten only mayonnaise and bread, there had been no demonstrative evidence at the time that testimony had been introduced, defense counsel did not clearly indicate what he wanted to demonstrate, thus negating any potential error; and (2) as to the paint sniffing, since there had been no testimony describing it, it would be improper for defense counsel to explain and show how it had been done.

In *Wheatfall v. State*, *supra* at 838-840, the Court addressed purported summaries offered by the State under the authority of Rule 1006 and noted, in passing, that the summaries were not used as demonstrative evidence, but as actual proof. Because the summaries were not compiled in conformity with Rule 1006, they were inadmissible, whereas, had then been offered as demonstrative evidence, there might not have been error.

In *Speier v. Webster College*, 616 S.W.2d 617, 618-619 (Tex.1981), the Supreme Court addressed the issue of whether a chart, complied during the testimony of each of the eleven plaintiff's testimony (listing each policeman's name and inserting the testimony of each of the eleven as to six different amounts of damages) was properly introduced. The issue of whether the chart was properly taken by the jury to the jury room was not raised, although the Court indicated in a footnote that this was appropriate. The Court noted that "charts and diagrams designed to summarize or perhaps emphasize" the testimony of witnesses are, within the discretion of the trial court, admissible into evidence. Citing *Manges v. Willoughby*, 505 S.W.2d 379, 383 (Tex. Civ. App.-- San Antonio 1974, n.r.e.), the Court noted that such summaries are useful and oftentimes essential to expedite trials and to aid juries in recalling the testimony of witnesses.

You cannot forget the rule of *Speier*, *supra*: even if a demonstrative exhibit is not admissible (and hence an exhibit that the jury can take to the jury room during its deliberations), it can still be displayed before the jury and utilized during, e.g., direct, cross or argument. For instance, even if a "summary chart" is not properly a summary under Rule 1006, it can still be used for demonstrative purposes only (with the jury being instructed that the chart is not evidence, but was utilized for demonstrative purposes only). *See also Gulley v. State*, 1999 WL 994022 (Tex. App. - Dallas).

B. SPECIFIC TYPES OF DEMONSTRATIVE EVIDENCE

Although there are no specific rules of criminal evidence regarding demonstrative evidence, you must be familiar with Rules 901 (authentication) and 1001 *et seq*. if you are going to be using demonstrative evidence. These rules often times come into consideration regarding different types of demonstrative evidence. Again, what follows below is designed to be a starting point for your legal research regarding these different types of demonstrative evidence.

1. Photographs

In *Erazo v. State*, 2004 WL 1353463 (Tex. Crim. App. June 16, 2004), the Court stated the following regarding the admissibility of photographs as demonstrative evidence:

> A picture is worth a thousand words. Yet those words, in the context of a criminal trial, must be the right words. Otherwise, the picture from whence the words flow is inadmissible. A photograph is inadmissible under Rule of Evidence 403 if it is substantially more prejudicial than probative. In this case, the trial court admitted a photograph of the victim's unborn child. [FN1] We hold that, under the circumstances of this case, the photograph was substantially more prejudicial than probative. We reverse the judgment of the Court of Appeals.
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> * * *
>
> Although we have reviewed the admission of photographs in many cases, we have not tied our authorities together to form a policy that will clearly assist trial courts in determining what photographs are admissible during criminal trials. What we can glean from a thorough review of the relevant authorities is that a photograph must be relevant, thus, it must be *helpful* to the jury. Like other demonstrative evidence, photographs should assist the jury with its decision, whether that be deciding guilt or punishment. A photograph should add something that is relevant, legitimate, and logical to the testimony that accompanies it and that assists the jury in its decision-making duties. Sometimes this will, incidentally, include elements that are emotional and prejudicial. Our case law is clear on this point: If there are elements of a photograph that are genuinely helpful to the jury in making its decision, the photograph is inadmissible only if the emotional and prejudicial aspects substantially outweigh the helpful aspects. With this in mind, we will apply this framework to the photograph in this case.

Your basic limitation on photographs is thus the balancing test embodied within Rule 403 of the Texas Rules of Evidence.

Moreover, even enlargements of photographs can be admissible. For instance, in *Jimenez v. State*, 2002 WL 228794 (Tex. App.-Corpus Christi 2002)(not designated for publication), the Court addressed the admissibility of enlargements of previously-admitted exhibits. Understandably, enlargements are admissible. According to the Corpus Christi Court of Appeals:

> In his seventeenth point, Jimenez argues the trial court erred in admitting enlargements of previously-admitted exhibits of Jimenez's fingerprints. The record reflects that the complained-of exhibits were photographic enlargements showing particular areas of previously-admitted exhibits. Officer Rieger told the trial court that the enlargements would be helpful in explaining her testimony to the jury. The trial court admitted the enlargements "for demonstrative purposes only." **A party should be allowed to make its case in the most persuasive manner possible by presenting evidence in a form which enhances its effectiveness.** *See Alvarado v. State,* 912 S.W.2d 199, 212 (Tex.Crim.App.1995). We hold the trial court did not abuse its discretion in admitting the enlargements. We overrule Jimenez's seventeenth point of error. (emphasis added)

2. Diagrams

In *Moore v. State*, 999 S.W.2d 385 (Tex. Cr. App. 1999), the State offered a diagram which showed the location of the vehicle of Officer Dominquez's in relation to the vehicle of the offenders. The defendant objected and asserted that the diagram was inaccurate and misleading. The Court noted that since the contents of the diagram were established by the testimony of other offers who testified without objection, both before and after the diagram was offered by the State, the admission of the same evidence from another source waived the objection (even though the format of the evidence was different).

3. "Same As" Weapons Or Objects

Often times, the actual murder weapon, or the assaultive weapon used in the robbery or aggravated sexual assault, are not recovered by law enforcement an thus, the state must attempt to introduce a "same as", "similar" or "comparable to" weapon. Exhibits which are consistent with a witnesses description of a weapon, even though not the identical weapon used, are admissible. *Simmons v. State*, 622 S.W.2d 111 (Tex. Cr. App. 1981). In *Simmons*, *supra*, the Court revised the line of cases allowing the introduction of such exhibits. In reaffirming that line of cases, the Court stated:

> Visual, real, or demonstrative evidence, regardless of which term is applied, is admissible upon the trial of a criminal case if it tends to solve some issue in the case and is relevant to the cause that is, if it has evidentiary value, i.e., if it sheds light on the subject at hand.
>
> Of necessity, such rule contemplates that the article sought to be exhibited to the jury must be shown to be properly identified, as against any idea of speculation, conjecture, or presumption of what the exhibit represents. (citation omitted) However, a certain amount of discretion as to (its) receipt in evidence must rest in the trial court. *Washburn v. State*, 167 Tex. Cr. R. 125, 318 S.W.2d 627, 635 (1958).
>
> We hold today that an object, such as a knife, that is not an exact replica or duplicate of the original is admissible if it is relevant and material to an issue in the trial and is not overly inflammatory, and the original, if available, would have been admissible at trial.

* * *

> Necessarily, a determination of the admissibility of "a similar type" weapon or instrument used in the commission of an offense is made upon the same basis as a decision is made on the admissibility of other types of evidence, and this decision must rest largely in the discretion of the trial judge. (citation omitted)
>
> The lack of positive identification of a weapon or instrumentality used during the commission of a crime affects its weight rather than its admissibility. A weapon or instrumentality that is described as "like," "similar to," "much the same," "pretty much the same," "more or less the same," "something like," "not unlike," "comparable," "resembles," "closely resembles," "Close," "same but not the exact one," or described by the use of comparable words or phrases as these, is admissible as an aid to the jury in interpreting and understanding the oral testimony adduced at trial. The only limitation on this general rule is that if the weapon or instrumentality depicted as a replica or duplicate of the original is not an exact replica or duplicate, but is merely "similar to" the original, then its admissibility is subject to the abuse of discretion rule, even where the original would have been admissible.

Virtually every case addressing this topic since *Simmons* has relied upon *Simmons*. *See e.g.*, *Posey v. State*, 763 S.W.2d 872, 875 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd); *Fletcher v. State*, 902 S.W.2d 165, 166 (Tex. App.--Houston[1st Dist.] 1995, pet. ref'd) and the cases cited below.

Under *Miskis v. State*, 756 S.W.2d 350, 352 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd), where a "similar" weapon or "object" is introduced, the jury should be instructed that it is not the actual weapon or object used in the commission of the alleged offense and is to be considered by the jury solely as evidence that demonstrates or illustrates what the weapon used in the alleged offense looks like.[6] The failure of defense counsel to request such a cautionary instruction waives any error if the jury is not properly instructed. *Fletcher v. State*, 902 S.W.2d 165, 166 (Tex. App.--Houston [1st Dist.] 1995, pet. ref'd). In *Singletary v. State*, 1991 Tex. App. LEXIS 1631 (Tex. App - Houston [14th] 1991)[7], a gun was introduced that was "similar to" the weapon described by the victim, although the victim pointed out one dissimilarity (i.e., the handle and barrel of the gun used in the robbery were not quite as long as the gun the state showed her and ultimately introduced as State's Exhibit 3). After concluding that the gun was properly admissible under *Simmons v. State*, 622 S.W.2d 111 (Tex. Cr. App. 1981), and noting that the gun was relevant under Rule 401, TEX. R. CRIM. EVID., and not subject to exclusion under Rule 403, TEX. R. CRIM. EVID., the Court

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[6] *Miskis* is an excellent opinion holding that the introduction of a hammer was improper because it was not the same size, weight, length, color or material as the hammer allegedly used during the offense. However, there the error was harmless since the evidence was overwhelming as to defendant's guilt, among other factors.

[7] *Singletary* is an unpublished case and pursuant to former Rule 90(i) of the Texas Rules of Appellate Procedure, it should not be cited as authority by counsel or a court. The prohibition on citation to unpublished cases remains alive and well under current Rule 47.7, Texas Rules of Appellate Procedure.

addressed the following instruction which had been given to the jury at the time the gun was admitted:

> Ladies and gentlemen of the jury, by being admitted as demonstrative evidence, that means it is similar to and not the actual weapon used. You are to give it whatever weight you deem appropriate at the appropriate time.

The Court noted that although this was not an ideal limiting instruction, it was sufficient because it told the jury that State's Exhibit 3 as demonstrative evidence "means it is similar to and not the actual weapon used." *Cf. Miskis v. State*, 756 S.W.2d 350, 352 (Tex. App.--Houston[14th Dist.] 1988, pet. ref'd).

In *Torres v. State*, 116 S.W.3d 208, 213-15 (Tex. App.-El Paso, 2003), the Court was confronted with a rather unusual situation. There, the defendant asserted that the trial court erred in permitting a medical doctor to utilize a broken chicken bone for purposes of demonstrating a spiral fracture for the jury. The Court stated the following as applicable to the situation:

> During Dr. Crespo's testimony about the difference between an ordinary fracture and a spiral fracture, the parties approached the bench and the prosecutor informed the court that he intended to ask Dr. Crespo to demonstrate a spiral fracture on a chicken bone. The prosecutor stated that the x-rays of Jonathan's leg had been destroyed before the State attempted to subpoena them. Appellant objected to any demonstration of the bone being broken. The trial court required that the chicken bone be broken by the doctor outside the presence of the jury, but he admitted the bone over Appellant's objections based on relevance and Tex.R.Evid. 403. The court specifically found that the bone had probative value since the State did not have the x-rays of Jonathan's leg and it would be a helpful piece of **demonstrative evidence** for the jury. In the jury's presence, Dr. Crespo testified that a chicken bone could show a spiral fracture in the same manner as a human bone. A spiral fracture, such as the one Dr. Crespo had inflicted on the chicken bone, could only occur from counter rotary traction. Dr. Crespo informed the jury that the radiologist who interpreted Jonathan's x-rays also diagnosed a spiral fracture of the left femur.
>
> **Standard of Review**
>
> The trial court has broad discretion in determining the admissibility of evidence, and its ruling will not be reversed on appeal absent a clear abuse of discretion. *Allridge v. State,* 850 S.W.2d 471, 492 (Tex.Crim.App.1991), *cert. denied,* 510 U.S. 831, 114 S.Ct. 101, 126 L.Ed.2d 68 (1993); *Arzaga v. State,* 86 S.W.3d 767, 773-74 (Tex.App.-El Paso 2002, no pet.). As long as the trial court's ruling was at least within the zone of reasonable disagreement, we will not intercede. *Montgomery v. State,* 810 S.W.2d 372, 391 (Tex.Crim.App.1990)(opinion on reh'g); *Arzaga,* 86 S.W.3d at 774.

Demonstrative Evidence

Demonstrative or illustrative evidence is an object which replicates or is similar to the real thing but which is admittedly not the very thing itself. *See* HERASIMCHUK, TEXAS RULES OF EVIDENCE HANDBOOK, Rules 401-403 at 239 (4th ed.2001). Such evidence has no independent relevance to the case but it is offered to help explain or summarize the witness's testimony or to put events and conditions into a better perspective. *Id.* at 239. To establish the relevancy of demonstrative evidence, the proponent must first authenticate it. *Id.* at 241. The proponent is then required to establish that the evidence is fair and accurate and that it helps the witness to demonstrate or illustrate his testimony. *Id.* at 241; *see also Simmons v. State,* 622 S.W.2d 111, 113 (Tex.Crim.App.1981)(demonstrative evidence is admissible if it tends to solve some issue in the case and is relevant, that is, if it sheds light on the subject at hand). An item of demonstrative evidence must be properly identified by showing that the item in question is what its proponent claims as opposed to any idea of speculation, conjecture, or presumption of what the exhibit represents. *Vollbaum v. State,* 833 S.W.2d 652, 657 (Tex.App.-Waco 1992, pet. ref'd). Demonstrative evidence has no probative force beyond that which is lent to it by the credibility of the witness whose testimony it is used to explain. HERASIMCHUK, at 241. The trial court may exclude demonstrative evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Tex.R.Evid. 403.

Appellant contends that the chicken bone is irrelevant and substantially more prejudicial than probative. He also complains that the trial court failed to give an instruction to assist the jury in understanding the significance of the evidence. In support of his argument, he directs our attention to *Miskis v. State,* 756 S.W.2d 350 (Tex.App.-Houston [14th Dist.] 1988, pet. ref'd). There, the defendant committed an aggravated robbery by striking the complainant with a yellow, hard plastic or fiberglass ball peen hammer during the course of a robbery. *Id.* at 351. Police recovered a ball peen hammer from the defendant's vehicle but it had a wooden handle and a metal head. *Id.* They did not find the yellow one used during the robbery. *Id.* At trial, the State sought to introduce the ball peen hammer found in the defendant's vehicle. *Id.* Overruling the defendant's objections based on relevance and lack of similarity, the trial court admitted the evidence. *Id.* The court of appeals determined that the admissibility of demonstrative evidence is governed by Rule 403. *Id.* at 352. Creating an elaborate test for admission, the court concluded that an object which is not an exact replica of the original used in the commission of a crime may be admissible if:

> (1) the original is not available;
> (2) if available, the original would be admissible;
> (3) if it is relevant and material to an issue in the controversy;
> (4) its probative value outweighs any inflammatory effect; and
> (5) the jury is instructed that the object is not the object used in the

> commission of the crime, and is to be considered by the jury solely as evidence that demonstrates or illustrates the appearance of the object used in the offense.

Id. at 352. The court additionally observed that the substitute object should have "no inflammatory attributes." *Id.* Applying this test to the admission of the ball peen hammer, the court found the admission of the hammer erroneous because it had little probative value since it was made of different materials than the original, it was inflammatory in nature, and the trial court failed to give a limiting instruction. *Id.*

Miskis has been roundly criticized for several reasons. First, the opinion cites Rule 403 but ignores the fact that all relevant evidence is admissible under the rule unless its probative value is *substantially* outweighed by unfair prejudice. HERASIMCHUK, at 241 n. 317. Second, the opinion does not consider that evidence may be material even when offered upon a fact that is not in dispute. *Id.* Third, the opinion cites no precedent and expresses no logical rationale for the requirement that demonstrative evidence is admissible only if the real evidence is "unavailable." *Id.* (Noting that the real wrecked car might be available, but if a reasonably accurate drawing of it will help a witness explain his testimony, the illustrative drawing should not be excluded merely because the proponent could have produced the car itself.). We agree with these observations. Additionally, we note that the court of appeals found the evidence inadmissible under Rule 403 without mentioning whether the defendant had raised a Rule 403 objection in the trial court. Similarly, the appellate court faulted the trial court for its failure to give a limiting instruction without indicating whether a limiting instruction was even requested. We respectfully decline to follow *Miskis* for all of these reasons.

Dr. Crespo utilized the chicken bone to demonstrate how a spiral fracture occurs. He explained that the exhibit accurately demonstrated a spiral fracture as it would appear in a human bone. The trial court minimized any inflammatory impact the evidence might have had by not permitting Dr. Crespo to break the bone in front of the jury. We find no abuse of discretion in the trial court's determination that the broken chicken bone aided the jury in understanding Dr. Crespo's testimony about the spiral fracture and that its probative value was not substantially outweighed by unfair prejudice. *See Vollbaum,* 833 S.W.2d at 657 (styrofoam model of a woman's head was admissible in homicide prosecution arising from fatal shooting of defendant's wife; trial court could determine that model would assist jury in understanding testimony of medical examiner relating to positions of gun and victim when gun was fired). Moreover, Appellant has waived his complaint that the trial court erred in failing to give a limiting instruction by failing to request one at trial. *See* Tex.R.Evid. 105(a)("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request,* shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal."). Issue

> Two is overruled. Having overruled both issues, we affirm the judgment of the trial court.

Obviously, the Court's analysis in *Torres* tends to cast doubt over the continued viability of the analysis from *Miskis*. Torres also has application to the area of in court demonstrations, even though Dr. Crespo was prohibited by the trial court in *Torres* from breaking the chicken bone in the presence of the jury.

4. In Court Demonstrations

As the O.J. Simpson trial proves, in court demonstrations by either the state or the defendant can be powerful. O.J.'s effort to put the glove on his hand at the request of the prosecution may have been the most powerful piece of demonstrative evidence in the entire trial (since the glove clearly did not fit O.J.). Obviously there are perils and pitfalls to in court demonstrations, so beware.

In Texas, a trial court has broad discretion whether to permit an experiment or demonstration in court. *Cantu v. State*, 738 S.W.2d 249, 255 (Tex. Cr. App. 1987). Essentially, the proposed experiment should be conducted under substantially the same circumstances s the event to be duplicated. *Ginther v. State*, 672 S.W.2d 475, 477 (Tex. Cr. App. 1984); *Brown v. State*, 657 S.W.2d 143 (Tex. Cr. App. 1984). The conditions need not be identical as dissimilarities affect the weight and not the admissibility of the evidence. *Aliff v. State*, 627 S.W.2d 166 (Tex. Cr. App. 1982). When the "facts presented affirmatively show that the proposed experiment was conducted under substantially similar circumstances and conditions, the court abuses its discretion in excluding the evidence. *Cantu v. State*, *supra* (excluding attempt by defense to have courtroom lights turned out to demonstrate degree of darkness at time of shooting since courtroom was in no manner similar to the environment where shooting occurred since size of room and color of walls were not the same).[8]

In *Kaldis v. State*, 926 S.W.2d 771 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd), a Texas Alcoholic Beverage Commission agent entered the Fuego Fuego Club at 2:30 a.m. and ordered a rum and coke. The club did not have a permit to sell any alcoholic beverages after 2:00 a.m. The TABC officers arrested the defendant (the club's owner) and three employees and seized 54 glasses that they determined by taste and smell to contain alcohol. The glasses were photographed and the seized liquids destroyed. No scientific tests were performed on the seized liquids and no liquids were preserved as evidence. The TABC officers conducted a thorough search of the club, the employees vehicles and the trash bin outside the club, but they found no empty alcohol bottles or any other evidence of alcohol.

At trial, the defendant testified that the seized liquids were nonalcoholic mixtures of sugarcane, vanilla, honey, honeysuckle, fruit juices, soda, grenadine, vinegar, and sweet and sour mix. He prepared mixtures which he claimed were identical to the seized liquids and offered them at trial as demonstrative evidence, but the state's objection to allowing the contents being actually

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[8] In *Cantu*, when the State attempted to do the same thing that defense counsel had wanted to do, only with a higher wattage bulb, defense counsel objected. Undoubtedly, this had an affect upon the appellate court's determination of the issue.

distributed and tested among the jury panel was sustained. The judge would not admit the exhibits without a scientific analysis showing that they had not been tainted by run or some kind of rum extract in order to induce such a smell.[9] However, the judge allowed the defendant to testify and actually allowed the jury to see three bottles that the defendant had prepared, but did not allow the jury to smell or taste them.

On appeal, the defendant asserted that the containers should have been admitted as demonstrative evidence under *Miskis v. State*, 756 S.W.2d 350, 352 (Tex. App.--Houston [14th Dist.] 1988 pet. ref'd). This was done in this case, but the defendant also asserted that the liquids he mixed up should have been admitted as an experiment.The Court of Appeals held that the experiment was properly excluded because the Court of Criminal Appeals had long prohibited the state from passing to the jury a part of the liquor that was involved in a prosecution and having them smell or taste it. *Smith v. State*, 152 Tex. Crim. 399, 214 S.W.2d 471, 472 (Tex. Cr. App. 1948); *accord Smith v. State*, 153 Tex. Crim. 193, 218 S.W.2d 851, 852 (Tex. Crim. App. 1949).

In *Reyna v. State*, 797 S.W.2d 189 (Tex. App.--Corpus Christi 1990 no pet), the state used anatomically correct dolls during the prosecution of the defendant for aggravated sexual assault and indecency. Defendant objected to the use of the dolls. He relied upon the "Kelly-Frye" test of scientific acceptance. The Court, however, found that the dolls were not used as a scientific method of proof, but merely as a tool to aid the jury with the witness' testimony, in the same manner as a map, sketch or diagram. The Court also noted that the dolls were used in a neutral, non-suggestive manner and therefore, the defendant's objections were properly overruled by the trial court.

In *Lopez v. State*, 1998 Tex. App. LEXIS 4829 (Tex. App - Houston [14th Dist.] 1998, no pet),[10] the prosecutor asked the victim of the aggravated robbery to reenact, during the punishment stage of the trial, the force of the blow of the gun to his head by hitting a book. The defendant objected that the demonstration was "inflammatory (which was sufficient to require the trial court to conduct a balancing test under Rule 403, TEX. R. CRIM. EVID.), the Court found that there was nothing in the record to reflect that the trial court had not done so.[11] Although the Court noted that the trial court had not questioned the parties about their respective need for, or opposition to, the victim's demonstrative testimony, the Court held that it is presumed that the trial court performed the balancing test and thus there was no error.

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[9] Scientific analysis was unnecessary to prove that a liquid contains alcohol and a non-expert witness can testify to such facts. *Thompson v. State*, 115 S.W. Tex. Crim. 519, 28 S.W.2d 151, 152 (Tex.Cr.App. 1930); *Kellum v. State*, 102 Tex. Crim. 537, 278 S.W. 434, 435 (Tex. Cr. App. 1926); *Hannon v. State*, 96 Tex. Crim. 660, 259 S.W. 1083, 1084 (Tex. Cr. App. 1924).

[10] *Lopez* is an unpublished case and pursuant Rule 47.7 of the Texas Rules of Appellate Procedure, it should not be cited as authority by counsel or a court. It is presented so that you know what the 14th District in Houston has done with this type of situation.

[11] The defendant should have requested the trial court to articulate the prejudice/probative value balancing factors on the record to ensure adequate appellate review. *See Montgomery v. State*, 810 S.W.2d 372, 390-391 (Tex.Crim.App. 1991)(op. on reh'g).

In *Sorensen v. State*, 856 S.W.2d 792 (Tex. App.--Beaumont, 1993), the defendant was arrested for DWI. The arresting officer testified to the defendant's inability to perform field sobriety tests and tests on videotape. The defendant also blew twice in excess of .1. On direct examination, the defendant testified that he was not intoxicated and that his inability to do field sobriety tests and the tests on videotape was a result of a severe leg and foot injury. He attempted to show the jury the extent of his injuries, but the trial court sustained the state's objection. On appeal, the Court concluded that the physical display of the defendant's foot and leg injuries should have been allowed. However, according to the Court, the error was harmless because the defendant had testified to the injuries and they were not contested by the State.

In *Baker v. State*, 879 S.W.2d 218 (Tex. App.--Houston[14th] 1994), Gary Trichter and Kim De La Garz represented the defendant charged with DWI. After the videotape had been played and the state had rested, they called upon their client to read a random selection from a newspaper and do certain "field sobriety" tests in the presence of the court (this was a TBC). However, the client was not sworn as a witness and upon the completion of the tests, the state asked to cross-examine the defendant. Counsel objected on the basis that the defendant had performed non-testimonial acts and was not sworn. The court excluded the in court demonstrations by the defendant. The Court of Appeals affirmed the exclusion, but the point remains that this was a good example of demonstrative evidence, which might have worked had he been sworn and agreed to testify.

In *Jones v. State*, 962 S.W.2d 158 (Tex.App.--Ft.Worth 1998), the defendant was charged with possession of controlled substances found in the police vehicle in which he was transported. Defendant asserted that he was searched twice by officers before he got into the vehicle and no drugs were found. The state had one of the officers demonstrate a pat down search for weapons, which is what the two searches were all about. This was effectively utilized by the state to overcome the problem and again represents a creative manner in which to use demonstrative evidence to overcome an impression with the jury. After all, being searched twice by officers, officers trained to search people and who search in a professional manner would never miss a bag of powder (meth or coke), right? Well, the in court demonstration was the way to overcome that impression.

In *Grunsfeld v. State*, 813 S.W.2d 158 (Tex. App. --Dallas 1991), the victim had testified that she was assaulted with a stun gun and described what she had seen and felt, including electricity. Subsequently, a police investigator was allowed to demonstrate the "spark" on a stun gun that had been seized from the defendant's mother's home eleven months after the offense had been committed. The police investigator was allowed to do so both with the battery that was found in the stun gun when it was seized and a new battery. This in court demonstration was entirely acceptable to the Court of Appeals. The defendant, it should be noted, only objected to the demonstration with the new battery on the grounds that the circumstances were different from the alleged offense.

In *Waters v. State*, 743 S.W.2d 753, 757 (Tex. App.--San Antonio, no pet), the victim of the robbery testified that the defendant protruded what appeared to be a gun from the pocket of a wind breaker and actually demonstrated that to the jury. It was made clear to the jury that neither the gun nor the wind breaker were being represented as the actual articles used in the robbery, but were only similar in appearance. The Court upheld this in court demonstration under the authority of *Simmons v. State*, 622 S.W. 2d 111 (Tex. Cr. App. 1981) and further noted that the defendant failed to request

a limiting instruction, failed to move for a mistrial, and subsequently withdrew his objection.

Unfortunately, while we all believed that the Susan Wright appeal in Houston District Court would provide more insight into the limits of in court reenactments, that did not occur. *See Wright v. State*, 178 S.W.3d 905 (Tex.App.-Houston [14th Dist.], 2005, pet. ref'd). There, a dramatically inclined prosecutor had a bed brought into the courtroom and tied a police officer to it. She then reenacted the crime, as she thought it had been committed, to overcome the defensive theory of self-defense. Before the actual reenactment, defense counsel objected on the basis of *Lopez v. State*, 651 S.W.2d 413, 414-15 (Tex.App. --Fort Worth, 1983) and *Miller v. State*, 741 S.W.2d 382, 388 (Tex.Crim.App. 1987), but the trial court overruled the objections [both under Rule 602, Texas Rules of Evidence (speculation and lack of personal knowledge) and Rule 403, Texas Rules of Evidence (prejudicial effect substantially outweighed probative value)]. Luckily, the trial was being broadcast and thus, a DVD of the entire direct and cross-examination relating to this in court reenactment was preserved for appellate review. Thus, many of us had anticipated that when the appeal was argued, the appellate court would get to see first hand the female prosecutor's reenactment of a murder not unlike the blockbuster "*Basic Instinct*," although the prosecutor was fully clothed (unlike Sharon Stone in "*Basic Instinct*"). Unfortunately, the Court of Appeals in Wright declined to view the video, as it was not formally introduced into the record and was not filmed by court authorities. The Court of Appeals did assess the twenty plus pages of descriptions of the reenactment and held that since it was supported by the evidence (and reasonable deductions therefrom, it was properly admitted.

There is grave danger to the defense in this type of situation, because an in court reenactment can impress jurors in irrational but nevertheless indelible ways. *See e.g., Carson v. Polley*, 689 F.2d 562, 579 (5th Cir. 1982)(stating "since such proof is often taken into the jury room it continues to `speak' long after the witnesses have departed. Even the most unbelievable statements tend to take on an air of verity when they are connected to a tangible object."). *See also Salazar v. State*, 90 S.W.3d 330, 337 (Tex.Crim.App. 2002)(State's need for 17 minute video tape depicting murder victim's life set to music from the movie Titanic during punishment stage of trial minimal where it had other evidence available to establish this fact of consequence). As defense counsel, we must seize upon the opportunity, but be ever vigilant to efforts by the prosecution.

5. Out Of Court Inspections Of Evidence Or Crime Scene By The Jury

From time to time, there is a real need to have the jury visit the scene of the crime or inspect a piece of potential evidence that cannot be brought into the courtroom. We know from the O.J. Simpson trial that this can be an important part of an attorney's strategy, regardless of whether the state or the defense requests it.

In *Hernandez v. State*, 1999 Tex. App. LEXIS 100 (Tex. App - Corpus Christi 1999),[12] the defendant requested the court to allow the jury to physically inspect a Ford Explorer which he contended was critical to the jury's determination of whether he was physically able to have transported seized money. He moved for the introduction of the Ford Explorer into evidence and the

[12] *Hernandez* is also an unpublished case and pursuant Rule 47.7 of the Texas Rules of Appellate Procedure, it should not be cited as authority by counsel or a court.

court sustained the state's objection. The defendant then asked the court to allow the jury to directly view it, as opposed to merely the photographs and videotapes of the Explorer. This was denied and the Court of Appeals held that the trial court did not abuse its discretion by refusing to remove the jury from the courtroom for the purpose of viewing the vehicle directly.

In *Mauricio v. State*, 153 S.W.3d 389 (Tex. Crim. App. 2005), the Court of Criminal Appeals was confronted with this issue. There, an officer had arrested the defendant and transported him to jail. After the defendant was booked, the officer searched the back of his patrol car and located six small pages of cocaine. After the officer testified to the foregoing at trial, the prosecutor asked the trial court to permit the officer to demonstrate how he searched his patrol car. Over the defendant's objections, the judge, attorneys and twelve jurors went to he parking lot (along with a court reporter) and the officer demonstrated how he searched, while undergoing questioning from the prosecutor. Everyone then returned to the courtroom. On direct appeal, the Court of Appeals held that the trial court erred by permitting the jury view, but held the error harmless. On PDR, the Court held that this was a "jury view" and that it did not abuse its discretion in allowing it to occur. The Court, relying in part on its opinion in *Jones v. State*, 843 S.W.2d 487, 499 (Tex. Crim. App. 1992), stated that in exercising its discretion to grant or deny a request for a jury view:

> "...must consider the totality of the circumstances of the case, including but not limited to, the timing of the request for the jury view, the difficulty and expense of arranging it, the importance of the information to be gained by it, the extent to which that information has been or could be secured from more convenient sources (e.g., photographs, videotapes, maps, or diagrams), and the extent to which the place or object to be viewed may have changed in appearance since the controversy began....[and] must give opposing counsel an opportunity to be heard on the question."

The Court went on to note that once a jury view has been granted,

> "....the court must implement appropriate procedural safeguards to ensure fundamental fairness to the accused as well as to protect the trial's truth-finding functions. (citations omitted). What procedural safeguards are appropriate in any given case will depend on the particular circumstances of that case...."

6. Out Of Court Experiments

Out of court experiments conducted in the absence of the opposing party are admissible if there is a substantial similarity between the conditions existing at the time of the event at issue and the conditions existing at the time of the experiment. *City of Dallas v. Cox*, 793 S.W.2d 801, 734 (Tex. App.--Dallas 1990, no writ). The conditions do not have to be identical. *Fort Worth & Denver Ry. v. William*, 375 S.W.2d 279, 281-282 (Tex. 1964); *Garza v. Cole*, 753 S.W.2d 245, 247 (Tex. App. -- Houston [14th Dist.] 1987, writ ref'd n.r.e.). When there is a dissimilarity in the conditions, admission of the experiment is within the trial court's discretion if the differences are minor or subject to explanation. *Id*. Thus, out of court ballistics tests and other experiments can be conducted and the results provided to the jury.

7. Videotape Reenactments Of The Crime/Computer Animations

Video tape and computer animation is powerful evidence because Americans are visual and retain much more of what they see than what they hear. Moreover, today's computers project animations from multiple angles and levels which give the finder of fact a better understanding of the subject matter being presented. David W. Muir, *Debunking the Myths about Computer Animation*, 444 P.L.I. Lit. 591, 595 (1992). We should not be afraid of computer animation; we should embrace it and utilize it.

In *Lopez v. State*, 651 S.W.2d 413 (Tex. App.--Ft. Worth, 1983), reversed on other grounds, *Lopez v. State*, 664 S.W.2d 85 (Tex. Cr. App. 1984), the Court of Appeals reversed a conviction because the trial court had allowed the state to introduce a videotape reenactment of the offense utilizing actors with interjected comments from a police officer from time to time (describing what was occurring).

In *Lopez v. Foremost Paving, Inc.*, 796 S.W.2d 473, 479 (Tex. App. – San Antonio 1990), *writ dism'd*, the Court observed:

> The powerful effect of videotape on jurors has been recognized. *See* Misko, *Videotape for Litigation*, 26 So.TEX.L.J. 485 (1985). Pictures can "transmit a message far better than any human witness." See *Hannewacker v. City of Jacksonville Beach*, 419 So.2d 308 (Fla. 1982). The average person learns more effectively by seeing rather than hearing. *Misko* at 485. Videotape makes a more lasting and intense impression on jurors than other forms of proof:
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> > [It] is a convincing means of demonstrative evidence because we live in the age of television. There is something about television and the videotape that has an unspoken credibility about it. They start the day in the morning watching "Good Morning, America" and wind up at night with the 11:00 news, if not something worse, and they are accustomed to it, and they accept it ... Witke, Higgins and Babcock, "*Video Tape is Worth a Thousand Words": Use of Demonstrative Evidence in the Defense of a Product Liability Case*, 50 Ins.Counsel J. 94, 97 (1983).[13]

In *Burleson v. State*, 802 S.W.2d 429 (Tex. App.-Ft. Worth 1991 pet. ref'd), the defendant was charged with harmful access to a computer. The defendant, a senior computer programmer/analyst, was fired from his company. After he was fired, it was discovered that a large number of the records necessary to compile a certain report were missing. A history log produced by the computer reflected that between 3:00 a.m. and 3:48 a.m. on a certain date, the computer

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[13] The *Lopez* Court also held that the "[c]ourts' wariness of accident reenactment films stems from the fact that when films do not duplicate accident conditions with accuracy, juror confusion can result." *Lopez*, 796 S.W.2d at 480.

terminals at various locations had been turned on, including the defendant's former terminal and the terminal of other employees. The other employees all testified that they had not been in the building between the hours in question.

During trial, an employee of the defendant's former employer testified based upon computer-generated displays and computer generated printouts. The computer-generated displays and printouts showed the number of missing records. The trial court overruled all of the defendant's objections to these items. On appeal, the Court held that the computer-generated display was not hearsay and was merely a snapshot of the computer at the time in question. As to authentication of the computer system, this was established under Rule 901, TEX. R. CRIM. EVID. And as to the reliability of the technology behind the computer system, there was ample evidence that it was trustworthy, reliable and standard to the computer industry and thus the trial court did not abuse its discretion under Rule 104, TEX. R. CRIM. EVID.

As to the computer generated displays and printouts, the Court essentially endorsed a wholesale approach to admissibility due to the failure of the defendant to sufficiently articulate his objections. This is a must read for anyone who is either attempting to introduce or exclude computer generated documents and testimony relating thereto.

In *North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 129 (Tex. App.-Beaumont, 2001), the Court stated the following regarding computer animations of the testimony of an expert witness:

> NAVL and NaTex contend that the trial court abused its discretion in admitting a **computer animation** through the testimony of Carl Savage, an engineer who testified on behalf of Ford. While Savage's credentials as a crash worthiness expert are substantial, appellants contend that a computer animation illustrating his testimony did not meet *Robinson* standards of scientific reliability, and that admission of the evidence caused the rendition of an improper verdict. *See E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549 (Tex.1995). We find that NAVL and NaTex waived their objections to this evidence.
>
> NAVL and NaTex claim the Ford Bronco seat was defective and the defect contributed to Emmons' injuries. Savage believes that during the first few seconds, the rear seat struck Emmons in the back of the head and neck, but he opined that the collapse or "yielding" of Emmons' seat occurred after the spinal fracture and did not contribute to Emmons' injuries. Savage disclosed this opinion during pre-trial deposition testimony, and the trial court denied NAVL's motion to exclude his testimony. At trial, Savage was asked for, and gave, this opinion without timely objection. However, appellants did object to the admission of two computer-generated animations and still pictures of the computer animation--all intended to depict Savage's testimony and version of events. The trial court admitted them all. NAVL contends that the animation gave exaggerated emphasis to an educated guess on Savage's part, in violation of the Supreme Court's holding that expert testimony cannot rely on "possibility, speculation and surmise." *See Merrell Dow*

Pharmaceuticals v. Havner, 953 S.W.2d 706, 711 (Tex.1997) (citing *Schaefer v. Texas Employers' Ins. Ass'n,* 612 S.W.2d 199, 204 (Tex.1980)).

The problem with NAVL's argument is that Savage was allowed to express his underlying opinion without objection when the testimony was presented to the jury. **Since the animation was a graphic depiction of the opinion admitted into evidence without objection, NAVL's trial objection to the video depiction of that opinion was waived. Video animation and other demonstrative evidence that "summarize, or perhaps emphasize, testimony are admissible if the underlying testimony has been admitted into evidence, or is subsequently admitted into evidence**." *See Uniroyal Goodrich Tire Co.,* 977 S.W.2d at 342; *Speier v. Webster College,* 616 S.W.2d 617, 618 (Tex.1981). (emphasis added, footnote omitted)

Courts have sanctioned the admissibility of videotape re-enactments and computer-generated simulations or animations where they are based on a "fit" to the facts introduced during trial. *See e.g.*, *Szeliga v. General Motors Corporation*, 728 F.2d 566 (1st Cir. 1984)(on issue of whether car went off road because of careless driving and that the wheel was torn off when the left front of the car hit the cement culvert as opposed to negligent assembly or defective design, motion picture film showing wheel attached to an axle with the standard lug and nut arrangement, mounted on a wagon and propelled along a track at high speed until the wheel was peeled off the axle over the lug nuts after striking a concrete block barrier, admissible); *Datskow v. Teledyne Continental Motors*, 826 F.Supp. 677 (W.D.N.Y. 1993) (videotaped computer-generated animation allowed "to help jury understand the expert's opinion as to what happened and it's not meant to be a re-creation. It's some visualization to allow the jury to conceptualize and appreciate the expert's opinion as to what happened here"); *Robinson v. Missouri Pacific Railroad*, 16 F.3d 1083 (10th Cir. 1994)(admitting portion of videotape illustrating collision between train and car, on assumption that car had moved around closed intersection crossing arm, to explain expert opinion on final resting position of car not abuse of discretion because admitted for illustrative purposes and not accident re-creation; additionally, allowing expert testimony without factual foundation in support of opinion that crossing gates did not operate properly on the night in question harmless in light of unexplained disparity between train speed on crossing recording device and actual speed testified to by engineer, and overall weakness of disputed testimony); *Edwards v. ATRO SpA*, 891 F.Supp. 1085 (E.D.N.C. 1995)(video demonstration by plaintiff's opinion witness dealing with contact-only activation of nail gun was relevant, although conditions of demonstration were different from those existing at time of accident); *Dorsett v. American Isuzu Motors*, 805 F.Supp. 1212 (E.D.Pa. 1992), *aff'd*, 977 F.2d 567 (3d Cir. 1992)(differences between videotape demonstration and accident were so obvious that there was no danger of confusing the jury); *Alice Leasing Corp. v. Castillo*, 53 S.W.3d 433 (Tex. App. – San Antonio 2001)(videotape of simulated accident respecting whether safety screen would have prevented trucker's death admissible since it was a fair demonstration of effectiveness of safety device that, if installed, would have prevented block assembly fragment from reaching driver/operator of gin pole truck); *University of Texas at Austin v. Hinton*, 822 S.W.2d 197 (Tex. App. – Austin 1992)(out-of-court videotape showing plywood falling on the head of a dummy (representing plaintiff), as opposed to plastic grate, substantially similar to actual event and, therefore, admissible); *Sosa by and through Grant v. Koshy*, 961 S.W.2d 420 (Tex. App. – Houston [1st Dist.] 1997)(although defendant's video reconstruction of auto-pedestrian accident was made on

sunny day while accident occurred on overcast day, and video showed white-pickup whereas defendant was driving car, such went to weight of evidence and not admissibility); *Veliz v. Crown Lift Trucks*, 714 F.Supp. 49 (E.D.N.Y. 1989)(live demonstration of the operation of lift truck that was substantially similar, but not identical, to the truck operated by plaintiff at the time he sustained his injuries, and videotapes depicting a lift truck carrying loads of varying weights to demonstrate the physical and mechanical principles involved are both admissible; any dissimilarities affect weight, not admissibility).

To allay any perceived confusion from the admission of this type of demonstrative evidence, the trial court is entitled to give the jury a limiting instruction. *See Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996)("although there is a fine line between a recreation and illustration, the practical distinction 'is the difference between the jury believing that they are seeing a repeat of the actual event and a jury understanding that they are seeing an illustration of someone else's opinion of what happened.' *Datskow v. Teledyne Continental Motors Aircraft Prods.,* 826 F.Supp. 677, 687 (W.D.N.Y. 1993).

The bottom line is that we can and must consider video tapes and computer animations as viable tools in the criminal courtroom.

8. Emails

Electronic mail -- emails -- might not appear to be what most people would consider demonstrative evidence. At the same time, it seems only appropriate to address the admissibility of email in this paper. There is a veritable dearth of case law on the topic. In *Massimo v. State*, 144 S.W.3d 210, 215 (Tex.App.-Fort Worth 2004, no pet), the Court addressed the admissibility of emails sent by the defendant. The Court stated:

> Texas Rule of Evidence 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims," while subsection (b) of the rule illustrates examples of authentication or identification meeting the requirements of the rule, including "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Tex.R. Evid. 901(a), (b)(4). There is a paucity of case law applying the evidentiary rule to e-mails, but one federal court, applying identical Federal Rule of Evidence 901(a) and (b)(4), found that a district court had not abused its discretion in admitting e-mail evidence by applying Federal Rule 901(b)(4), utilizing characteristic evidence such as: (1) consistency with the e-mail address on another e-mail sent by the defendant; (2) the author's awareness through the e-mail of the details of defendant's conduct; (3) the e-mail's inclusion of similar requests that the defendant had made by phone during the time period; and (4) the e-mail's reference to the author by the defendant's nickname. *United States v. Siddiqui,* 235 F.3d 1318, 1322-23 (11th Cir.2000), *cert. denied,* 533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed.2d 737 (2001).

Distinctive internal characteristics have also served to authenticate documents in other contexts. For example, typewritten documents found in a briefcase belonging to an alleged conspirator of a murder defendant were authenticated by their contents, which included specific details about the alarm code and gate code to the victim's house, an outline of the murder plot, and post-crime events and actions that tended to connect the defendant with the murder. *See Angleton v. State,* 955 S.W.2d 655, 658 (Tex.App.-Houston [14th Dist.] 1997), *rev'd on other grounds,* 971 S.W.2d 65 (Tex.Crim.App.1998). Documents found in trash discarded outside a drug defendant's home were also authenticated by characteristic evidence, such as the defendant's address found on the documents. *See United States v. Baker,* 855 F.2d 1353, 1359 (8th Cir.1988), *cert. denied,* 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989).

A review of the characteristic evidence concerning Massimo's purported Exhibit 1 e-mail yields the following: (1) Exhibit 1 was sent to Taylor's e-mail address shortly after she and Massimo had a physical altercation, and the e-mail referenced that altercation; (2) Taylor recognized Massimo's e-mail account address since she had received e-mails from Massimo previously from this e-mail address; (3) Taylor testified that Massimo usually used the e-mail account babycol20@yahoo.com and that both she and Massimo utilized Yahoo personal accounts; (4) Taylor testified that only Massimo and a few other people knew about things discussed in State's Exhibit 1; (5) Taylor testified that the contents of the e-mails and the way the e-mails were written were the way in which Massimo would communicate; (6) Kreshak testified that she witnessed Massimo send a similar life-threatening e-mail to Taylor using the same vulgarities which appeared in State's Exhibit 1, albeit from a different e-mail address; and (7) Massimo told Kreshak that she was sending the threatening e-mail because she and Taylor did not like each other, which attitude is also reflected in State's Exhibit 1. Based on all of the foregoing and reviewing the requirements of Rule 901 of the Texas Rules of Evidence, we cannot say that the trial court's decision to admit State's Exhibit 1 over a lack-of-authentication objection was so unreasonable as to constitute an abuse of discretion.

Likewise, the characteristic evidence concerning State's Exhibit 6, purported e-mails sent from Massimo to Sparby, yields the following: (1) the e-mails were signed "Amanda," Massimo's given name, and were sent from an e-mail address Taylor recognized as belonging to Massimo, babycol20@yahoo.com; (2) the e-mails exchanged between Massimo and Sparby are consistent with Sparby's testimony that Massimo was not responding to her efforts to talk to her and was uncooperative; (3) the author of the e-mails knew the subject of the investigation, harassing e-mails, before Sparby revealed that to her; and (4) the November 16 e-mail threatened to report Sparby for harassment, and was sent the same day that Massimo appeared at the police station in person to file harassment charges against Sparby. While Massimo asserted defensively that someone was impersonating her and sending the e-mails on her behalf, she introduced no evidence to support this assertion, and Taylor specifically denied such action. Again, in reviewing the admission of evidence

under Texas Rules of Evidence 901, and under the abuse of discretion standard, we cannot say that the trial court abused its discretion in admitting State's Exhibit 6 over a lack-of-authentication objection.

Massimo further argues that State's Exhibit 6 is hearsay and is not a statement against interest, because there is no exposure of the defendant to criminal liability and there is no showing or trustworthiness of the statements, citing *Rose v. State,* No. 2-02-272-CR, 2003 WL 22725583, at *3 (Tex.App.-Fort Worth Nov. 20, 2003, no pet.) (not designated for publication).

According to Texas Rule of Evidence 801, a statement is not hearsay if it is a written verbal expression offered against the party and is the party's own statement in their individual capacity. Tex.R. Evid. 801(a), (e)(2)(A). State's Exhibit 6 contains written verbal expressions for which there was evidence that the statements were made by Massimo as previously discussed, who was a party, and was offered against Massimo in the sense that Massimo would not admit she sent State's Exhibits 1 and 6. It verified her e-mail address, contained her language pattern, and demonstrated she knew about the harassing e-mails to Taylor before being told by Sparby who had only stated it was about "harassment", the subject of her investigation. Further, the e-mail threats subject to prosecution were not contained in State's Exhibit 6, but in State's Exhibit 1. Therefore, the admission of State's Exhibit 6, if erroneous, was harmless. Massimo's points three and four are overruled. (footnotes omitted).

In *Shea v. State*, 167 S.W.3d 98 (Tex.App.-Waco 2005, pet. ref'd), the Court essentially adopted the analysis from *Massimo* and upheld the admission of emails as properly authenticated. *See also Garcia v. State*, 246 S.W.3d 121, 136 (Tex.App.-San Antonio, 2007)(holding error in excluding emails, if any, was harmless).

C. PRACTICAL CONSIDERATIONS GOVERNING DEMONSTRATIVE EVIDENCE

1. Overview

As Rod Stewart proclaimed, "every picture tells a story." And we all know that one picture is worth one hundred words. And we all know that people remember only a small fraction of what they hear, but that they remember a far greater percentage of what they see. These three truisms are the driving force behind why we all should use demonstrative evidence. What prosecutor would want to try a murder case without photographs of the deceased? What defense attorney would not want to try any murder case if there were no photographs of the deceased? It is incumbent upon us, as advocates for our clients, to maximize the odds that the jury will see what we are saying, remember what we are showing them and telling them, and hence elevate our client's chances of obtaining the freedom he or she has paid us to obtain.

Accordingly, I have two basic rules. First, always consider and utilize demonstrative evidence whenever and wherever you believe it can be used effectively. A corollary of that rule is do not use demonstrative evidence unless you can use it effectively. The second rule is never, repeat never, utilize demonstrative evidence in front of the jury without a trial run prior to trial. A corollary of this rule is that unless the witness or you know how to use the demonstrative evidence, you will screw it up and hurt yourselves in front of the jury. Marcia Clark can tell us about a world of hurt on this topic!

But what kind of demonstrative evidence should you use. That is not just a function of the facts of your case and your client's pocketbook, but also of the community in which you are trying the lawsuit. Obviously, your level of technology in a major metropolitan community might be rejected as "too slick" in a smaller, rural community (but not necessarily so). You must know your audience (the jury) before you can truly ascertain what demonstrative evidence will be accepted. I suggest that you include in your voir dire open ended questions about technology and what the jurors expect in the courtroom from attorneys. In the movie "My Cousin Vinny," the hero used demonstrative evidence very effectively, but the technology was very minimal (photographs and a tape measure). Most lawyer shows on television and or on videos/movies do not utilize the degree of technology currently available. Acquaint yourselves with what the jury expects and will accept and use it.

2. Analytical Approach To Developing Demonstrative Evidence

When you can use demonstrative evidence? I suggest you can use it at every stage of the trial: from jury selection to closing argument (at both stages, guilt/innocence and punishment). You are limited only by your creativity, the rules of evidence, your ability to convince the judge that even if not admissible, a demonstrative exhibit should be allowed to be displayed to the jury, and the relevant budgetary constraints.

The approach I suggest you consider (and improve upon, as no doubt you can) is as follows (this approach applies not just to direct examination of your witnesses, but throughout the trial):

Step 1: You must identify the key issues in your case, as to each stage of the trial: voir dire, opening statement, cross-examination of the State's witnesses, direct examination of your witnesses, and final argument. Identification of key issues is a never ending process. In other words, a key issue after indictment and before trial may dissipate after the State's voir dire or opening statement. The key issues may be constantly changing and hence, I suggest you make a list of them and continuously review and revise that list.

Key issues should also include the basic premises of what you can do to hurt the state, not just help your defense. These two concepts (assisting your case and hurting the state's case) may at first blush appear to be the same, but clearly they are not. For instance, you can attack the credibility of the prosecutor without it necessarily helping the factual or legal merit of your defense, even though it undermines the strength of the prosecutor's case. Stated otherwise, you should consider an offensive use of demonstrative evidence and a defensive use of demonstrative evidence.

Finally, you must always reconstruct the critical moment of the case and figure out how you can best demonstrate that for the jury. For example, in the Ruth Bullock case, Herman Gotcher and I were confronted with the situation where an off-duty APD Officer, who chased and apprehended a thief from a neighborhood Tom Thumb, had managed to shoot the thief in the back. By reconstructing the critical struggle on the ground when she caught up to the thief as he was fleeing, we were able to ascertain that Ruth had dropped her service revolver on the ground and then picked it back up, using it as a pressure point in the thief's back (in order to subdue him). Unfortunately the gun went off. When we had Ruth reenact this event, she physically dropped the gun to the ground and then picked it back up. It is virtually impossible for anyone to pick up a pistol without putting his or her finger inside the trigger guard. Thus, she unknowingly had her finger on the trigger (which she never did when she pulled her pistol from her holster) when she picked the pistol up. This is why the pistol discharged without her voluntarily engaging in any conduct.

Step 2: Once you identify key issues, as I have used that term above in Step 1, you should ascertain how demonstrative evidence can better illustrate the point or points you intend to demonstrate to the jury. Obviously, no hard and fast rules apply: it is a matter of what you believe can be effective. Obviously, you can bounce demonstrative evidence off a friend, relative, associate or partner and fine tune what will work and what might not work. Here, you should consider the relative technology level of the jury, your budget, and a lot of common sense. Although high-tech tools abound which can be used (everything from computer graphics, powerpoint, etc), I am a firm believer in the KISS principle. Keeping it simply is always easier and involves less of a risk that the demonstrative exhibit will have a beneficial effect.

Step 3: Ascertain whether your demonstrative exhibit will be introduced into evidence or merely used as a demonstrative matter for the jury. It is extremely important to make sure which way you want to proceed, because if it is not introduced into evidence, the jury will not have it during its deliberations.

Step 4: Assuming you want to introduce the demonstrative exhibit into evidence, ascertain how it is admissible and which witness it will be introduced through. If you do not intend to introduce the demonstrative exhibit into evidence, you must still plan and calculate how and when

you are going to utilize the demonstrative exhibit.

3. Selected Examples During Direct Examination

You want and need your direct examination to be powerful and memorable. Demonstrative evidence is the key. Again, any and all of the types of items discussed below are just the tip of the iceberg.

a. Use A Calendar

In a complicated case, you can elicit testimony from your key witness or witnesses (or client) and summarize the events in question on a monthly calendar. This monthly calendar, whether introduced or not, visually depicts the sequence of events in the jury's presence and can be used for final argument, etc.[14]

b. Use A Chronology

A slight variation of the calendar is a basic chronology or time line. A chronology can put everything in perspective for the jury and reflect glaring inconsistencies between the state's witnesses and your witnesses (and/or client). Your imagination is the limit.

c. Get The Witness Off The Witness Stand

Any way you can get your witnesses (fact witness, expert witness and/or client) off the witness stand and closer to the jury -- whether it be to show the jury a map, a diagram, to demonstrate a point -- is a good thing. Generally speaking, removing barriers between the jury and the witness will enhance the witness' credibility and the jury's likelihood of belief in the witness' version of events.

d. Use A Flip Chart

A flip chart (a large tablet of paper on a tripod) can be an effective tool to summarize the key points your witnesses make during his or her direct examination. Once the witness has testified to the key point (which you had previously prepared the witness to make), you can simply write the witnesses name at the top of the page and then list each point with a bullet or a number. This can also be an effective tool during final argument, as you can take the jury back through the key points each of your witnesses made. Obviously, you can use the same flip chart (or a different flip chart) to make a list of the key points you elicit from each of the State's witnesses on cross-examination, and similarly use that flip chart during final argument.

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[14] This same type of tool can be used on cross examination. If you have two or three witnesses that will testify for the government relating to key events and you build a calendar during cross-examination, you will probably find that the versions of events by the government witnesses do not coincide. You then have a built in impeachment tool to display during final argument, highlighting on the calendars those events and dates that do not coincide.

e. Blow Up The Critical Document

In a documents case, consider "blowing up" (4 feet by 6 feet) the critical page of the critical exhibit. Blow up five or ten of the critical documents. Use demonstrative items to highlight the situation.

f. Use Photographs

How many times have you had to "eat" those nasty, bloody 8 by 10 color glossy photographs during the State's direct examination? We have all endured that slow death. Well, try turning the tables on the State. Find the most prejudicial photo and embrace it; or better still, find the photo which hurts the State the most and use it through your expert, fact witness or client.

g. Use A List Of Character Witnesses

In some cases, you will have put on "bad reputation" testimony as to the key witness(es) called by the State and/or elicited "good reputation" for truth and veracity as to your client. In this situation, make a chart showing the name of the State's key witness(es) and the names of those witnesses who testified that they had a bad reputation (for truth and veracity or peaceful and law abiding) and a similar chart for the good reputation witnesses for your client. Then, you have a visual comparison. In a rape case where "consent" is the defensive issue, this can be powerful evidence if, for example, you have elicited evidence from 4 or 5 witnesses that your client has a good reputation for truth and veracity and the State has not elicited the same type of evidence to buttress the alleged "victim." The visual comparison of who is a "truth teller" can be amazing!

IV. EXPERT TESTIMONY

It is now generally accepted that innocent people have been convicted, incarcerated and possibly even executed.[15] We have seen exoneration after exoneration after exoneration, not merely in Texas, but around the United States and elsewhere. The causes of wrongful convictions include "junk" science, eyewitness misidentifications, and false confessions. If you have seen "Incendiary" (on DVD), you have seen a powerful documentary on "junk" science in the field of arson and the apparent execution of an innocent man (Cameron Todd Willingham). And of course, the creation of the Texas Forensic Science Commission has certainly been a step in the right direction (despite the apparent counterproductive efforts of Governor Perry and former Chairperson John Bradly). But the problem is larger and more widespread than that noble commission can ever address. Indeed, we have had serious problems for decades. For instance, purported forensic experts Fred Zain (forensic serologist, first in West Virgina and then in Bexar County) and Ralph Erdmann (forensic pathologist in Lubbock) show the need for "gatekeeping". Other scandals throughout the country have also been appalling, including, for instance, the North Carolina State Bureau of Investigation Blood Serology Unit (230 total cases of misrepresentation of blood serology tests) and Debbie Madden (a technician engaged in drug testing in the San Francisco Police Department Crime Laboratory (who had been skimming cocaine evidence from the laboratory for personal use). The Houston Police Department crime lab and more recently, the announced problem with DPS forensic scientist Jonathan Salvador leads me to believe that we should never fail to challenge any state sponsored forensic testimony. At the same time, these problems on the state's side of the expert witness equation means that we, on the defense side, need to be ensure that we do not fight the battle of the experts with "junk" science (and/or "junk" experts) ourselves.[16] ASCLA-Lab. Junk science has been a problem in this

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[15] *See e.g.*, The Innocence Project, www.innocenceproject.org. *See also* Jim Dwyer et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongfully Convicted (2000); Convicting the Innocent (Donald S. Connery ed., 1996); Hugo A. Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987); Karen Christian, "And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence, 62 Ohio St. L.J. 1195 (2001); David De Foore, Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted, 33 Tex. Tech. L. Rev. 491 (2002); Keith A. Findley, Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions, 38 Cal. W. L. Rev. 333 (2002); Lissa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 Am. U. Int'l L. Rev. 1241 (2001); Elizabeth V. Lafollette, State v. Hunt and Exculpatory DNA Evidence: When Is a New Trial Warranted?, 74 N.C. L. Rev. 1295 (1996); Richard A. Leo & Richard J. Ofshe, The Consequences of False Confession: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429 at notes 1-4 (1998); Arye Rattner, Convicted but Innocent: Wrongful Conviction and the Criminal Justice System, 12 Law & Hum. Behav. 283 (1988); Boaz Sangero, Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession, 28 Cardozo L. Rev. 2791, 2792-94 (2007).

[16] The March 25, 2011, letter from Marvin E. Schecher, Esq., to the members of the New York State Commission of Forensic Science regarding ASCLD/Lab and Forensic Laboratory Accreditation is well worth reading. In a nutshell, it concludes that ASCLD (American Society of Criminal Law

state for well over twenty years. Accordingly, what follows is designed to assist us to better understand "junk" science and how we can utilize experts to combat experts proffered by the state, not merely to win the "battle of the experts," but to ensure that we too do not sponsor or attempt to sponsor "junk" science or utilize "fraudulent forensic scientists."

We all know that the "general acceptance" standard of *Frye v. United States*, 293 F.1013 (D.C. 1923) no longer controls the admissibility of expert testimony. In the early 1990's, the Supreme Court handed down its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (hereinafter referred to as *Daubert*). *Daubert*, its successor, *Kumho Tire Co., v. Carmichael*, 526 U.S. 137 (1999) (hereinafter referred to as *Kumho Tire*), and Federal Rule of Evidence 702 set the standard in federal court. In Texas, *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), its progeny (including, *inter alia*, *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), overruled on other grounds, *State v. Terrazas*, 4 S.W.2d 720 (Tex.Crim. App. 1999) and Texas Rule of Evidence 702 set the standard (to the extent that there is any difference between *Daubert* and *Kelly*). Working knowledge of these cases is a prerequisite to the consideration of expert testimony via direct examination.

A. ADMISSIBILITY OF EXPERT TESTIMONY

1. Rule 702

Rule 702 of the Texas Rules of Evidence is **NOT** identical to Rule 702 of the Federal Rules of Evidence. They are both quoted below:

> **Texas Rule 702**: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

> **Federal Rule 702**: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliability to the facts of the case.

Directors) and ASCLD/LAB (American Society off Criminal Laboratory Directors -- Laboratory Accreditation Board) are not performing the duties that they are required to do and that, merely because a lab is ASCLAD accredited does not mean that fraudulent forensic science is not being performed at that lab. Indeed, the letter outlines examples of how fraudulent forensic science was being conducted at more than one lab during the actual period of time that ASCLD/LAB was investigating the particular lab in question.

While the current version of the rules are slightly different, Texas Rule 702 as it currently exists is identical to the version of Federal Rule 702 that was discussed and decided in *Daubert* and *Kumho Tire*. The last clause of the current version of Federal Rule 702 was added in 2000, and is essentially a codification of the holding in *Daubert*. As you will see below, the two systems and requirements of each are extremely similar, although there are some slight differences.

B. CHRONOLOGICAL DEVELOPMENT OF STANDARDS

1. 1992: *Kelly*

In chronological sequence, the key cases are as follows. First, in 1992, the Court of Criminal Appeals decided *Kelly*. In *Kelly*, Judge Campbell, writing for the Court, held that RFLP DNA evidence was properly admitted under what was then Texas Rule of Criminal Evidence 702 (which was identical to the current version of Texas Rule 702 and hence identical to the version of Federal Rule 702 addressed in *Daubert* and *Kumho Tire*). In so doing, Judge Campbell rejected the *Frye* standard and essentially held that the admissibility of expert testimony regarding **novel scientific evidence** must be determined in the first instance by the trial court, outside the presence of the jury, using a number of steps, **with the burden on the proponent of the evidence to prove the requirements by clear and convincing evidence**.

Step #1: Is The Evidence Reliable And Hence Relevant?

In order to satisfy this first step, the proponent must prove that:

(1) The underlying scientific theory must be valid;

(2) The technique applying the scientific theory must be valid; and

(3) The scientific technique must have been properly applied in the instant case.

Judge Campbell identified seven non-exhaustive factors which could affect a trial court's determination of reliability as to novel scientific testimony:

> (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;
>
> (2) the qualifications of the expert(s) testifying;
>
> (3) the existence of literature supporting or rejecting the underlying scientific theory and technique;
>
> (4) the potential error rate of the technique;
>
> (5) the availability of other experts to test and evaluate the technique;

(6) the clarity with which the underlying scientific theory and technique can be explained to the court; and

(7) the experience and skill of the person(s) who applied the technique on the occasion in question.

If the three requirements of reliability are met, the evidence is therefore probative and relevant under Rule 401.

Step #2: Is the Reliable And Relevant Expert Testimony Helpful To The Trier Of Fact?

If the trial judge determines that the proffered expert scientific testimony is reliable, the judge must next decide, on balance, whether the testimony is helpful or unhelpful, because Rule 702 incorporates Rules 402 and 403 analysis. Thus, the proponent must demonstrate by **clear and convincing evidence** that the proposed expert scientific testimony is not cumulative, will not confuse or mislead the jury, will not consume an inordinate amount of trial time or otherwise be subject to exclusion under Rule 403.

2. 1993: *DAUBERT*

Daubert held that the "general acceptance" test of *Frye* was not encompassed within Federal Rule of Evidence 702 as it then existed (identical to the Texas version addressed in *Kelly*). The Supreme Court held that the Federal Rules of Evidence, and in particular Rule 702, place appropriate limits on the admissibility of purported scientific evidence by assigning the trial judge with the task of ensuring that: (1) an expert's testimony rests upon (a) a reliable foundation, and (b) is relevant to the task at hand. In other words, it is the trial judge who is the "**gatekeeper**".

Thus, under Federal Rule 104(a), a trial judge, faced with a proffer of expert scientific testimony, must determine whether the expert is proposing to testify to:

(1) scientific knowledge that

(2) will assist the trier of fact to understand or determine a fact in issue.

This requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Factors the Court identified (no definitive checklist was provided) were as follows:

(1) Whether a "theory or technique...can be (and has been) tested";

(2) Whether it "has been subjected to peer review and publication";

(3) Whether, in respect to a particular technique, there is a high "known or potential

> rate of error" and whether there are "standards controlling the technique's operation"; and
>
> (4) Whether the theory or technique enjoys "`general acceptance"' within a "`relevant scientific community.'"

The Court emphasized that in fulfilling his or her "gatekeeping" function, a trial judge must be given flexibility. The Court also noted that other rules impacted upon the "gatekeeping" function, including Rule 703 (dealing with expert opinions based on otherwise inadmissible hearsay), Rule 706 (allowing a court to obtain an expert of its own choosing), and Rule 403 (permitting the exclusion of relevant evidence for a number of factors).

Daubert cited Rule 104(a) of the Federal Rules for application of the appropriate standard: "preponderance of evidence" (citing *Bourjaily v. United States*, 493 U.S. 171 (1987)). As noted above, *Kelly* imposed a more onerous burden: "clear and convincing evidence."

3. 1996: *JORDAN*

In 1996, the Court of Criminal Appeals held that the test established in 1992 in *Kelly* was substantially identical to the inquiry mandated by the Supreme Court in *Daubert*. *Jordan v. State*, 928 S.W.2d 550, 554 (Tex. Crim. App. 1996). Thus, the *Kelly* analysis is the functional equivalent of *Daubert*, although it is couched in different terminology.

4. 1997: *HARTMAN*

In 1997, the Court of Criminal Appeals held that the test established in 1992 in *Kelly* was applicable to **all** scientific evidence, not merely **"novel"** scientific evidence. *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997).

5. 1998: *NENNO*

The Court of Criminal Appeals extended the holding of *Kelly* to **non-scientific** (i.e., "soft" sciences) expert testimony in *Nenno v. State*, 970 S.W.2d 549 (Tex.Crim.App. 1998) overruled on other grounds, *State v. Terrazas*, 4 S.W.2d 720 (Tex.Crim.App. 1999). The Court stated:

> When addressing fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method, *Kelly's* requirement of reliability applies but with less rigor than to the hard sciences. To speak of the validity of a "theory" or "technique" in these fields may be roughly accurate but somewhat misleading. The appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. These questions are merely an appropriately tailored translation of the *Kelly* test to areas outside of hard science. And hard science methods of

validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences. *Id*. at 561.

6. 1999: *KUMHO TIRE*

The Supreme Court similarly extended *Daubert* to **all** expert testimony in *Kumho Tire*, *supra*. In so doing, the Court again stressed the flexibility that a trial judge must be afforded in his or her "gatekeeping" role.

7. 2000 Amendment To Federal Rule 702

As noted above, Federal Rule 702 was amended in 2000, post-*Daubert/Kumho Tire*. As reflected by the Advisory Committee Notes, the amendment was intended to affirm the trial court's role as "gatekeeper" and provides some general standards that the trial court must use to assess the reliability and helpfulness of the proffered expert testimony. Thus, in federal court, the admissibility of all expert testimony is governed by Rule 702. The Advisory Committee notes also pointed out a list of factors not mentioned in *Daubert*, including:

> Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997);
>
> Whether the expert has adequately accounted for obviously alternative explanations, citing *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) and *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996); and
>
> Whether the expert "is being as careful as he would be in his regulator professional work outside his paid litigation consulting", citing *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940 (7th Cir. 1997).

8. Judicial Notice Of *Daubert/Kelly* Reliability Factors

The Court of Criminal Appeals has held that a trial court can take judicial notice of the *Daubert/Kelly* reliability factors. *See Hernandez v. State*, 116 S.W.3d 26, 28-29 (Tex. Crim. App. 2003), where the Court of Criminal Appeals stated:

> "A party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the *Kelly* test. It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly.* Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert*/*Kelly* hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings. [FN4]

> FN4. *See Weatherred v. State,* 15 S.W.3d 540, 542 n. 4 (Tex.Crim.App.2000) ("once a particular type of scientific evidence is well established as reliable, a court may take judicial notice of that fact, thereby relieving the proponent of the burden of producing evidence on that question"); *Emerson v. State,* 880 S.W.2d 759, 764 (Tex.Crim.App.1994); *see also United States v. Jakobetz,* 955 F.2d 786, 798-800 (2d Cir.1992) (upholding admission of results of DNA profiling analysis after eight full days of hearings on the reliability of the RFLP analysis, the fixed-bin analysis, and the statistical interpretation of the proffered results; encouraging courts facing a similar issue in the future to take judicial notice of the general theories and specific techniques involved in DNA profiling). *See generally* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 353 at 663 (2d ed.1994). Professors Mueller and Kirkpatrick note that:
>
> > Commentators argued for years that the general acceptance standard [of *Frye*] is better suited to the situation where a technique, approach, or body of knowledge is so well-established that courts can safely take judicial notice of its validity on the basis of widely disseminated information and precedent. Sometimes the track record in litigation of various kinds of scientific evidence also suffices to enable courts to take judicial notice that testimony in other suits demonstrates or undermines validity of the process or technique.
>
> *Id.* (footnotes omitted); *see also* 1 MCCORMICK, EVIDENCE § 203 (Strong ed.1992) (general acceptance is "a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence").

Similarly, once some courts have, through a *Daubert*/*Kelly* "gatekeeping" hearing, determined the scientific reliability and validity of a specific methodology to implement or test the particular scientific theory, other courts may take judicial notice of the reliability (or unreliability) of that particular methodology."

Hernandez v. State, *supra* at 28-29.[17]

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[17] *See also Russeau v. State*, 171 S.W.3d 871, 883 n.4 (Tex.Crim.App.2005) and *Weatherred v. State,* 15 S.W.3d 540, 542 n.4 (Tex.Crim.App.2000) regarding the ability of trial court and/or an appellate court to take judicial notice. You should always be prepared to prove the scientific reliability and validity of a specific methodology to implement or test the particular scientific theory.

In addition to *United States v. Jakobetz,* 955 F.2d 786, 798-800 (2d Cir.1992), cited above in *Hernandez*, *supra*, the Eighth Circuit has, post-*Daubert*, made it clear that lower courts and appellate courts can appropriately take judicial notice of the reliability of DNA testing. *See United States v. Beazley*, 102 F.3d 1440, 1448 (stating that "we believe that the reliability of the PCR method of DNA analysis is sufficiently well established to permit the courts of this circuit to take judicial notice of it in future cases. In every case, of course the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the appropriate protocols, and the like."); *United States v. Boswell*, 270 F.3d 1200,1204-05 (8th Cir. 2001).

The ability and propriety of taking judicial notice of the reliability of the science is entirely consistent with the Court's comments in *Kuhmo Tire*, where the Court noted that a trial judge has the discretion:

> ..."both to avoid unnecessary `reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."

Kuhmo Tire at 526 U.S. 137 at 152).

9. Current Framework And Selected Cases

Since *Kelly*, the Court of Criminal Appeals has slightly refined Judge Campbell's framework. Currently, the Texas Rules of Evidence set out three separate conditions regarding admissibility of expert testimony.

> **First**, Tex.R.Evid. 104(a) requires that "[p]reliminary questions concerning the qualification of a person to be a witness ... be determined by the court...."
>
> **Second**, Tex.R.Evid. 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."
>
> **Third**, Tex.R.Evid. 401 and 402 render testimony admissible if there is "any tendency" "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Vela v. State*, 209 S.W.3d 128, 130-131 (Tex.Crim.App.2006); *Jackson v. State,* 17 S.W.3d 664, 670 (Tex. Crim.App.2000).

These rules require a trial judge to make three[18] separate inquiries: (1) **qualification** – the witness must qualify as an expert by reason of his knowledge, skill, experience, training, or education; (2) **reliability** -- the subject matter of the testimony is an appropriate one for expert testimony;[19] and (3) **relevance** -- the expert testimony will actually assist the fact-finder in deciding the case. *See Vela*, *supra* at 131.

Importantly, an appellate court reviews a trial court's ruling on the admissibility of scientific evidence under an abuse-of-discretion standard. *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008); *Vela v. State*, 209 S.W.3d 128, 130 (Tex. Crim. App. 2006); *Russeau v. State*, 171 S.W.3d 871, 881 (Tex.Crim.App.2005); *Weatherred v. State,* 15 S.W.3d 540, 542 (Tex.Crim.App.2000). The trial court is the sole judge of the weight and credibility of the evidence. *Weatherred*, *supra* at 542. An appellate court must consider the trial court's ruling in light of the evidence presented as of time of the trial court's ruling.[20] *Weatherred, supra* at 542; *Ramirez v. State,* 104 S.W.3d 549, 551 n. 9 (Tex.Crim.App. 2003). Under an abuse of discretion standard, an appellate court should not disturb the trial court's decision if the ruling was within the zone of reasonable disagreement. *Russeau*, *supra*; *Weatherred*, *supra*; *Hinojosa v. State,* 4 S.W.3d 240, 250–251 (Tex.Crim.App.1999) (*citing Griffith v. State,* 983 S.W.2d 282, 287 (Tex.Crim.App.1998)). An appellate court should consider whether the trial court acted without reference to guiding rules or principles or whether the trial court acted arbitrarily or unreasonably in so ruling. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex.Crim.App.1990) (op. on reh'g).

Some of the more provocative and/or interesting cases decided by the Court of Criminal Appeals include: (1) *Ross v. State*, 133 S.W.3d 618, 626 (Tex.Crim.App.2004), where the Court

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[18] A **fourth** inquiry -- whether the evidence might otherwise be subject to exclusion under, *inter alia*, Rule 403, -- is sometimes necessary. *See Montgomery v. State*, 810 S.W.2d 372, 375-376, 380 (Tex.Crim.App.1990)(op. on reh'g).

[19] Under *Kelly*, the proponent of novel scientific evidence must demonstrate through clear and convincing evidence that the evidence is reliable. *Kelly*, *supra* at 573; *Hernandez*, *supra* at 30. The proponent of the evidence must satisfy three criteria to demonstrate reliability: (1) the underlying scientific theory is valid; (2) the technique applying the theory is valid; and (3) the technique was properly applied on the occasion in question. *Kelly*, *supra* at 573. And, as noted above, the *Kelly* Court also noted that other factors could affect a trial court's determination of reliability, including (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained, (2) the qualifications of the expert testifying, (3) the existence of literature supporting or rejecting the underlying scientific theory and technique, (4) the potential rate of error of the technique, (5) the availability of other experts to test and evaluate the technique, (6) the clarity with which the underlying scientific theory and technique can be explained to the court, and (7) the experience and skill of the person who applied the technique on the occasion in question. *Kelly*, *supra* at 573.

[20] *But see Hernandez v. State*, 116 S.W.3d 26, 28-29 (Tex.Crim.App.2003); *Russeau*, *supra* at 883 n. 4; and *Weatherred*, *supra* at 542 n. 4, regarding the ability of trial court and/or an appellate court to take judicial notice.

upheld the trial court's exclusion of polygraph examination results, taking judicial notice that "there is simply no consensus that polygraph evidence is reliable";[21] (2) *Vela, supra*, where the Court upheld the trial court's exclusion of the testimony of a certified legal nurse consultant that no rape occurred because there was no DNA evidence or physical evidence linking defendant to alleged rape;[22] (3) *Hernandez*, *supra*, where the Court could not uphold the trial court's admission of the results of a drug test of the defendant's urine utilizing an Adx analyzer because the State had "failed to offer **any** testimony, **any** scientific material, or **any** published judicial opinions" from which the trial court could have taken judicial notice of the scientific reliability of the Adx analyzer, (4) *Cobble v. State*, 330 S.W.3d 253 (Tex.Crim.App. 2010), where the Court reversed the trial court's admission of Dr. Coons' testimony on future dangerousness because "specific problems and omissions" reflected that the State did not satisfy its burden of proving the scientific reliability of his methodology for predicting future dangerousness; (5) *Winfrey v. State*, 323 S.W.3d 875 (Tex.Crim.App.2010), where the admission of questionably unreliable "dog scent line up" testimony was not challenged in the trial court or the court of appeals, but nevertheless excluded; and (6) *Tillman v. State*, 354 S.W.3d 425 (Tex.Crim.App. 2011), where the Court allowed expert testimony on the reliability of eyewitness identifications.

The implications are fairly obvious: the Court is attempting to keep "junk" science away from jurors because of the powerful impact that expert testimony can have on jurors. While certain types of scientific and non-scientific evidence are clearly reliable allowing for the trial court to take judicial notice of the underlying scientific theory and the methodology/technique in applying that scientific theory (for instance RFLP or PCR DNA testing[23]), we must be on top of the law and well

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[21] The *Ross* Court judicially noticed this lack of consensus, quoting *United States v. Scheffer*, 523 U.S. 303 (1998), under the authority of *Hernandez v. State*, *supra* at 32. Of course, in March 2012, the Court of Criminal Appeals allowed the use of polygraph results in the context of a motion to revoke the defendant's community supervision. *Leonard v. State*, ___S.W.3d ___, 2012 WL 71598 (No. PD-0551-10; delivered March 7, 2012). The Court specifically upheld the trial court's action in allowing psychotherapist to rely on the defendant's five failed polygraph examinations as a basis for his expert opinion that the defendant should have been discharged from the sex offender treatment program because he was being dishonest. Of course, the Court also noted that this was an administrative proceeding and not a criminal or civil trial where polygraph results would not be admissible.

[22] Judge Cochran's concurring opinion in *Vela* noted that "when an expert offers an opinion which is so outside the general mainstream of a particular scientific field as to be extraordinary, the proponent of that expertise must provide a greater-than-usual foundation for its reliability." *Id.* at 136.

[23] In addition to *Kelly* (RFLP), the Court of Criminal Appeals has upheld PCR as reliable in *Fuller v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992) and *Campbell v. State*, 910 S.W.2d 475 (Tex. Crim. App. 1995). Even prior to *Kelly*, DNA evidence had been held admissible. *Mandujano v. State*, 799 S.W.2d 318, 321-322 (Tex.App.-Houston [1st Dist.] 1990, no pet.); *Glover v. State*, 787 S.W.2d 544, 547 (Tex. App.-Dallas 1990), *aff'd* 825 S.W.2d 127, 128 (Tex. Crim. App. 1992). Recently, in *Jessop v. State*, __S.W.3d __ (Tex. App.-Austin)(No. 03-10-00078, delivered April 19,

prepared in the trial court if we are going to get our experts past the state's objections and the trial court's "gatekeeping function" so that the jury can hear their opinions. Of course, we also need to prove that the expert testimony is helpful to the trier of fact and otherwise lay the proper foundation for our experts to testify. On these additional items, the burden would still be on the proponent to prove that the scientific technique was properly applied in the instant case, by either a preponderance (in federal court) or by clear and convincing evidence (in state court). As a matter of tactics and preparation, unless you obtain a binding pre-trial commitment from the trial judge that he or she will take judicial notice of the first two prongs of the "reliability/relevancy" step, you should be fully prepared to present evidence. More importantly, since you are going to want to educate your jurors and your expert will be able to prove what you would otherwise be seeking judicial notice of, you might as well plan to cover this with your expert.

Regardless of the area of expert testimony, we have to research the law in anticipation of the trial and ensure that our expert is truly an expert (a basic "no brainer," but you do need to ascertain that your expert is currently licensed and check the TCDLA and TDCAA websites to see what materials are available to impeach/bolster the expert[24]), and that you can get past a gatekeeping hearing. Imagine conducting voir dire on a specific area of expert testimony and then giving the jury an overview of your anticipated expert testimony during opening statement, only to have that evidence excluded by the trial court pursuant to the State's objections! Not an idea way to present an effective defense.[25]

2012), the Third Court of Appeals upheld the admission of DNA paternity evidence.

[24] And in today's world of social media, that also means ascertaining what is out on the internet about your expert.

[25] We should all recognize that in the area of child sexual abuse cases, there appears to be an entirely different set of rules (or at least, that is my personal opinion). "[E]xpert testimony that a particular witness is truthful is inadmissible under Rule 702." *Yount v. State,* 872 S.W.2d 706, 711 (Tex.Crim.App.1993). An expert may not offer a direct opinion on the truthfulness of a child complainant's allegations. *Schutz v. State,* 957 S.W.2d 52, 59 (Tex.Crim.App.1997). Moreover, an expert is not permitted to give an opinion that the complainant or class of persons to which the complainant belongs (such as child sexual assault victims) is truthful. *Yount,* 872 S.W.2d at 712; *cf. Schutz,* 957 S.W.2d at 70 (testimony about children's ability to accurately perceive or remember is allowable, but not a particular child's *tendency* to do these things). This is because experts on child sexual abuse "are not human lie detectors. Nor are they clairvoyant." *Yount,* 872 S.W.2d at 710 (quoting John E.B. Meyers[,] et al., *Expert Testimony in Child Sexual Abuse Litigation,* 68 Neb. L. Rev. 1, 121 (1989)). Instead of experts, it is jurors who must draw "conclusions concerning the credibility of the parties in issue." *Yount,* 872 S.W.2d at 710. *See also Sessums v.State*, 129 S.W.3d 242, 247 (Tex. App. -Texarkana 2004, pet. ref'd). Simply put, this type of expert testimony does not assist the jury and is inadmissible. *See e.g.*, Tex.R. Evid. 702; *Edwards v. State,* 107 S.W.3d 107, 116 (Tex.App.-Texarkana 2003, pet. ref'd); *Wilson v. State,* 90 S.W.3d 391, 393 (Tex.App.-Dallas 2002, no pet.) (also finding court erred by allowing testimony about percentage of children who lie about being sexually assaulted). The observations made by the experts in their testimony in sex abuse cases are all of the type that can and should be judged and determined by a jury without the help of

C. OTHER EVIDENCE RULES RELATING TO EXPERTS

In addition to Rule 702 of the state and federal rules of evidence, the following rules have application. You should be well acquainted with them.

1. Texas Rules

Rule 703, entitled "Bases Of Opinion Testimony By Experts," states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704, entitled "Opinion On Ultimate Issue," states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705, entitled "Disclosure of Facts or Data Underlying Expert Opinion", states:

> (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
>
> (b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
>
> (c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.
>
> (d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a

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an expert.

limiting instruction by the court shall be given upon request.

2. Federal Rules

Rule 703, entitled "Bases Of Opinion Testimony By Experts," states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Obviously, this rule is somewhat different from the Texas counterpart. The last clause was inserted to keep out inadmissible facts unless the proponent can demonstrate that the probative value of the inadmissible facts substantially outweighs any prejudicial effect. This should be compared with Texas Rules 705(d), quoted below, which employs a balancing test exactly opposite the balancing test contained in Federal Rule 703.

Rule 704, entitled "Opinion On Ultimate Issue," states:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Obviously, this rule is significantly different from the Texas counterpart.

Rule 705, entitled "Disclosure of Facts or Data Underlying Expert Opinion", states:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Again, the federal rule is significantly different from the Texas counterpart, although it

should be considered in conjunction with Federal Rule 703.

> Rule 16, Federal Rules of Criminal Procedure provides a procedure, far more extensive than the notice requires of Article 39.14(b) of the Texas Code of Criminal Procedure, whereby you can be required to have your expert prepare a written report in order to provide the same to the government in discovery. Of course, this reciprocal discovery obligation is triggered only if you have first requested notice under Rule 16 of any expert reports and bases for opinions. However you should be aware of this obligation, as well as the notice provisions of Article 39.14(b), C.C.P.

3. Laying The Foundation For Your Expert To Testify

In both state and federal court, before an expert can offer an opinion, certain requirements must be met, as follows:

a. The witness must be competent and qualified to testify; and

b. The subject must be one upon which the aid of an expert's opinion will be of assistance to the jury.

See e.g., Cobble v. State, 330 S.W.3d 253 (Tex.Crim.App.2010); *Sattiewhite v. State*, 786 S.W.2d 271, 291 (Tex.Crim.App. 1989).

Typically speaking, competency to testify is not a serious issue. *See* Federal and State Rule 601. Your expert should clearly be competent, unless he or she is a child or insane.

Qualification as an expert is an entirely different matter. Knowledge, skill, experience, training or education can suffice to demonstrate that the witness is qualified to render an expert opinion. *See e.g., Penry v. State*, 903 S.W.2d 715, 762 (Tex. Crim. App. 1995); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 246 (5th Cir. 2002)(discussing Advisory Committee notes to Rule 702 and stating: "Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education --may not provide sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.").

Recently, the Court of Criminal Appeals has on at least two occasions revisited, on its own motion, prior denials of writs of habeas corpus that had been based on *Atkins* claims where the State's expert on the successor writs had been Dr. George Denkowski. This action by the Court was prompted by the fact that in 2011, Denkowski entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists in which his license was "reprimanded." The Court noted that pursuant to this Settlement Agreement, Denkowski agreed to not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings. Because of that Settlement Agreement, the Court exercised its own authority to reconsider these cases on its own initiative. *See Ex parte Escobedo*,

2012 WL 982907 (March 21, 2012); *Ex parte Maldonado*, 2012 WL 1439056 (April 25, 2012).

4. Manner Of Expert Testimony

Under both Federal and State Rule 702, an expert may testify:

a. Based on personal knowledge;

b. "Otherwise" (i.e., to the theory and principles related to the field in which he is an expert); and

c. To an opinion.

D. PRACTICAL CONSIDERATIONS GOVERNING SELECTION AND PREPARATION OF YOUR EXPERT WITNESSES

What follows is a checklist of factors which I believe you should consider as perhaps appropriate to consider in your preparation and presentation of any direct examination.

1. Educate Yourself On The Law

It goes without saying that we must be an expert on the requirements of *Daubert/Kelly/Nenno* as well as the rules of evidence and procedure regarding experts. While the framework now appears to be well settled, we must update our legal research as the courts are issuing opinions on expert testimony with increasing frequency.

2. Educate Yourself On Substantive Area Of Law Books Treaties Etc.

We all must educate ourselves on the substantive area upon which we are seeking to use an expert. Otherwise, we cannot intelligently select an expert, let alone understand what he or she is going to try to teach us (and the jury).

3. Selection Of Expert(s)

The selection of our expert witness(es) is obviously critical. Whether we want and/or feel we need more than one expert is obviously a function of the facts of our case. Regardless, we should not hesitate to use the TCDLA and NACDL list serves for input on the selection of our expert(s). Additionally, we should always check the TDCAA (Texas District and County Attorneys Association) website (http://www.tdcaa.com) to see if our proposed experts are listed there, as that will be a sure sign that the prosecutor may be loaded for bear! We obviously want to use the "best" expert possible, but the "best" expert possible for the case will be a function of our "goal" or what we want to accomplish and prove with the expert. However, our "best" expert may well be someone who the State (or the Feds) have not encountered previously. We need to be creative in our search for experts and use the internet and social media in our selection process. Additionally, we can often times obtain transcripts of the prior testimony of our experts in order to see how he or she has

performed on direct and cross (although a cold record is not necessarily indicative of his or her performance).

Often times, it is advisable to "take out" a potential State's expert by consulting with him or her as rapidly as possible. It is also often advisable to quickly retain the best local expert, regardless of whether we are going to use him or her as a "testifying" expert or a "consulting" expert. Depriving the State of a local "resource" can increase the cost of litigation and occasionally assist in the plea bargaining process.

4. Number Of Experts/Types Of Experts

I believe that it is sometimes better to have two or three experts, as opposed to one expert. The situation will vary, obviously, given the topic upon which the expert will testify as well as whether the State or Feds will be presenting expert testimony on the same or related topics. The number of experts can also be a function of whether you are looking to retain a "consulting" expert in addition to a "testifying" expert. The difference lies with whether you intend to call the expert to the witness stand, since a "testifying" expert may well have to produce **all** the materials you have supplied to him or her, whereas a "consulting" expert will not have to produce anything. I personally like to have a consulting expert so that he or she can see everything and advise me regarding who I should select as a "testifying" expert and assist me in the selection of materials to supply to the "testifying" expert.

5. Gather All Materials Remotely Relevant To Your Client's Position/Topic Of Expert Testimony

It goes without saying that the more relevant materials we can accumulate (at least to our consulting expert), the more reliable/accurate our consulting expert can be. This in turn can seriously impact upon the reliability of the testimony of our testifying expert. Investigators can and should be used, as should the internet, social media sources, and any and all other available resources. The key here is to get as much as possible -- hopefully more than the state/feds -- so that our expert(s) will have a better basis in fact upon which to testify. Obviously, this is impacted by the nature of the expert testimony: DNA as opposed to eyewitness identification is an easy example, as with DNA, your expert will operate from (presumably) the same sample the State is using, whereas with eyewitness identification, the expert will need to work with case specific facts in order to "fit" the principles to the facts of the case.[26]

[26] *See Tillman v. State*, 354 S.W.3d 425 (Tex.Crim.App. 2011)(holding that psychologist's proffered expert testimony relating to the reliability of eyewitness identification procedures was sufficiently reliable and relevant).

6. Ascertain Which Materials Each Expert Will Receive

We should never blindly give our testifying expert all of the materials we have accumulated. A quick review of *Ward v. Dretke*, 420 F.3d 479, 492-495 (5th Cir. 2005) will demonstrate that doing so can render us ineffective. There, defense counsel provided his expert with materials including the client's "write up" of his life, which included ten year old extraneous offenses. When defense counsel notified the State of his expert, the State asked for and received all of the materials which had been supplied to the expert, with defense counsel making no effort to even attempt to limit the materials which the State obtained from his expert. This led to the use of 10 year old extraneous offenses, including drug dealings, that were not relevant and/or subject to exclusion under Rule 403. However, defense counsel did not object to the State's utilization of those extraneous offenses. Judge Sparks held defend counsel's failures in this regard deficient and prejudicial. The Fifth Circuit found the conduct deficient, but not prejudicial because the defendant received a sentence of 65 years and believed that at a retrial, he could receive even more. Accordingly, Ward demonstrates the need to intelligently assess the available materials and input from a consulting witness should be utilized before a decision is made on what to provide to a potential testifying expert witness.

7. Spend Quality Time With Your Experts

Obviously, we are going to be painting by the numbers with our expert. We have a large number of topics to cover, from the prerequisites of the expert's background, qualifications, etc., to the relevant *Daubert/Kelly/Nenno* requirements, etc. We must learn from our expert witnesses (testifying and consulting experts) how to structure our direct examination to make it most effective. Only by spending sufficient time with our experts can we develop rapport and tempo regarding how we ask questions and how the expert answers them.

Additionally, since we can not lead our expert on direct examination (other than as to qualifications etc.), we both need to have a firm command on where we are going and how we are getting there. Additionally, we need to listen to the expert; really listen. We need to put aside our preconceived notions of how to conduct a direct examination and listen to what our expert says on how to best accomplish our goals.

8. Make Sure Your Experts Spend Time With One Another

Although egos can clash and it can consume a large amount of time, in those cases where I have more than one testifying witness on any given topic, I like to have the witnesses spend time with each other and me. Group meetings can be very productive and refine the opinions. And, as noted below, it can be very important to ensure that the "best" direct possible will be conducted. Ensuring that there are not conflicts between our experts -- or if there are conflicts, that they are understood by the experts and can be explained by the experts -- requires time together.

9. Plan Your Direct Examination

It goes without saying that our direct examinations must be very carefully planned. In doing

so, I suggest that you:

a. Establish your ultimate objective/goal as to each expert. This objective/goal may differ as to two or more experts even if they are testifying on the same topic. For instance, in a DNA case, you might call one expert to explain the science and methodology to the jury, and another to explain the procedures used in the instant case and the results therefrom.

b. Establish the titles of the chapters your expert will cover with the jury (i.e., introduction, education, training, experience, publications, prior testimony (and who for); materials reviewed, people interviewed, etc.). Obviously, the type of expert will dictate your chapters.

c. Go over your proposed direct examination with your expert, chapter by chapter, seeking constant input from your expert.

d. Go over your proposed direct with your expert in the presence of your other testifying expert(s) and/or consulting experts to obtain their input and suggestions. You have to ensure that each of them know what the other is going to testify to so that they do not inadvertently "step on each others toes" or otherwise detract from the testimony of one another. While their testimony should not be entirely identical, there must be a significant degree of overlap: i.e., that their testimony is **concentric** (i.e., having a common center as circles or spheres one within another).

e. As to each expert, you must plan your demonstrative evidence. It is essential that each expert have input into the preparation of the demonstrative evidence they are going to use in the presence of the jury. Obviously, you must know it inside and out before you get to the courtroom, as should your expert. Moreover, the demonstrative evidence used with your first expert should be totally known by your second expert on the same topic, lest the prosecutor use the demonstrative evidence from expert #1 and muddy it up with expert #2 or vice versa.

10. Consider The Order Of Your Experts

Where you have more than one expert witness on a given topic, you need to consider who will testify first/second, and where in your defensive presentation they will appear. There are no hard and fast rules here, but it is important to consider and plan where in the order of defensive witnesses you want them to testify. The nature of the expert testimony will often times dictate this, as well as whether your client will or will not be testifying.

11. Prepare The Expert For Direct Examination

This is merely a variation on the theme, as most experts may understand this. But essentially, I try to do the following with any witness, including an expert:

a. Tell the expert his or her role in the defense;

b. Prepare the expert for non-verbal communication;

c. Prepare the expert for real and demonstrative evidence;

d. Prepare the expert for areas to stay away from;

e. Prepare the expert about the use of emotion;

f. Prepare the expert for what he or she will take to the witness stand;

g. Do an actual direct of the expert, in the presence of your consulting and/or other testifying experts;

h. Have an associate or friend do a mock cross with each expert;

i. Make sure the expert understands that he or she should answer questions in the same manner on cross as when on direct and treats the prosecutor as nicely as he or she treats you;

j. Make sure the expert understands the big picture, as well as how he or she is going to paint by the numbers to educate the jury.

12. Considerations Regarding Your Direct Examination

a. Communicate with the expert witness;

b. Do not use "lawyer" words;

c. Humanize your expert witness;

d. Suppress your ego; let the expert be the "star";

e. Remove barriers between the expert and yourself;

f. Use persuasive language in your non-leading questions;

g. Use trilogies if possible in your direct of your expert;

h. Use non-leading questions, except where you want to lead the expert to the next chapter of the book (i.e., a transition from one topic or chapter to another);

i. Structure your direct:

1. Beginning: humanize witness; show stability, credibility and qualifications of your expert;

2. Set scene: chronological or topic by topic;

3. End on a high note: your goal/objective;

j. Have a fireside chat with your expert: let him or her explain to the jury, in terms they can understand, what he is talking about, using demonstrative evidence;

k. Use looping questions;

l. Control the expert without the jury knowing it;

m. Let the jury know you have a relationship with the witness;

n. Use precise but open ended questions;

o. Use feeling and emotion where appropriate;

p. Listen to the witness/do not interrupt;

q. Get away from the expert: he or she is the star;

r. Watch the expert witness & how the jury reacts to him or her;

s. Do not rely on a "script," but obviously have one;

t. Vary tone and pitch of your questions;

u. Avoid using stupid works ("okay", "uh" and talking to yourself);

v. Control your emotion and fear;

13. Always use demonstrative evidence and practice with it and your experts long before you get to the courtroom.

V. CONCLUSION

Winning a case is often the function of our ability to paint a detailed picture for the jury that is persuasive and memorable. In my opinion, direct examination with demonstrative evidence -- whether the witness is a fact witness, an expert witness or your client -- is the key to the presentation of an effective defense. Painting by the numbers is not always going to produce results, but it is typically an effective manner by which to present your client's defensive position or the picture you need to convey to get those citizens to return the two word verdict. While direct examination is not exciting and does not yield many "war stories", it is here that we can prevail over the prosecutor. And to etch the painting into the jury's mind so that they remember it and do not get overwhelmed, demonstrative evidence must be utilized. Demonstrative evidence is equally important in the context of presenting expert testimony essential to an effective defense. While experts can explain key concepts applicable to our cases, we must implant in the jury's memories that which they need to remember to achieve a two word verdict. We must carefully plan and consider our painting: finger painting just does not cut it, most of the time. Good luck and keep the faith.