

# **COMMON EVIDENTIARY ISSUES AND PROBLEMS**

**Austin Bar Association  
Ultimate Trial Notebook  
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**APPENDIX FOR SECTION IX.**

## COMMON EVIDENTIARY ISSUES AND PROBLEMS

### I. SCOPE OF PAPER

This paper is intended to be a brief discussion of some of the more common evidentiary issues that arise in civil trials. It will address specific evidentiary issues, outline the law regarding the issue, and then briefly discuss the practical application of the rules. This article is not meant to be a comprehensive study of the Texas or Federal Rules of Evidence, nor an exhaustive treatment of the specific issues covered. The paper is offered as a practical tool for the busy attorney who is looking for a quick primer on some common evidentiary issues.

### II. PURPOSE & CONSTRUCTION

#### A. Rule 102

Texas Rule of Evidence 102 states:

**These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.**

TEX. R. EV. 102

#### B. Discussion

The rationale of this Rule is clearly stated within its four corners -

- to secure fairness in administration;

- to eliminate unjustifiable expense and delay;
- to promote growth and development of the law of evidence;

so that –

- the truth may be ascertained and proceedings justly determined.

The big picture scope of this Rule sets the tone for all other Rules of Evidence. Thus, when a Trial Judge is facing the discoverability or tender of evidence, this rule can be employed to help interpret other Rules and their exceptions. Trial attorneys can liberally cite the purposes enunciated in Rule 102 in support of their position on whatever other rule is at issue.

### III. EVIDENCE OF INSURANCE

#### A. Rule 411

Texas Rule of Evidence 411 states:

**Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.**

TEX. R. EV. 411.

The rationale in support of the Rule is founded in the belief that the jury would be more apt to render judgment against a defendant and for a larger

amount if the jury knew that the defendant was insured. *AccuBanc Mortg. Corp. v. Drummonds*, 938 S.W.2d 135 (Tex. App. – Fort Worth 1996). It is debatable whether this belief is realistic when applied to today’s jurors. Some commentators and attorneys believe that the swelling anti-plaintiff bias created by the tort “reform” movement over the last two decades has changed how we should view evidence of insurance. They argue that the existence of liability insurance may actually make a juror find against a plaintiff or award less money because the juror may fear that a large verdict against an insurer will encourage more lawsuits and result in increased premiums to the juror.

A clear reading of Rule 411 makes it clear that the rule pertains only to “liability” insurance. Evidence of other types of insurance may be admissible depending upon the facts of the case. *See, Brownsville Pediatric Ass’n v. Reyes*, 68 S.W.3d 184 (Tex. App. – Corpus Christi 2002); *Thornhill v. Ronnie’s I-45 Truck Stop, Inc.*, 944 S.W.2d 780 (Tex. App. – Beaumont 1997).

Another important limitation included within the text of the Rule is that such evidence is only inadmissible “upon the issue whether the person acted negligently or otherwise wrongfully.” The Rule goes on to give examples of instances in which evidence of liability insurance may be admissible, such as to prove “agency, ownership or control, if disputed, or bias or prejudice of a witness.”

**i. Agency.** *Cage Bros v. Friedman*, 312 S.W.2d 532 (Tex. Civ. App. – San Antonio 1958)

(permissible to question whether employees were covered by employer’s worker’s compensation policy to establish employees were working for employer.

**ii. Ownership.** *Jacobini v. Hall*, 719 S.W.2d 396 (Tex. App. – Fort Worth 1986) (disputed issue was ownership of vehicle, therefore, evidence of insurance was admissible).

**iii. Control.** *Davis v. Stallones*, 750 S.W.2d 235 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1987) (control of wreckage was at issue so testimony about insurer’s control was admissible).

**iv. Bias or prejudice**  
If evidence of insurance would demonstrate bias or prejudice on the part of a party’s witness, such evidence may be admissible.

For cases discussing expert witnesses, compare the following: *Watson v. Isern*, 782 S.W.2d 546 (Tex. App. – Beaumont 1989) (evidence that expert’s fees were being paid by an insurance company was inflammatory). *United Cab Co., Ins. v. Mason*, 775 S.W.2d 783 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1989) (testimony that plaintiff’s physician had conducted independent medical exams for insurance companies was not reversible). *Mendoza v. Varon*, 563 S.W.2d 646 (Tex. Civ. App. – Dallas 1978) (proper to exclude evidence that defendant doctor and retained defense expert were both insured by same insurance company). *Shell Oil Co. v. Reinhart*, 371 S.W.2d 722 (Tex. Civ. App. – El Paso 1963) (plaintiff’s counsel’s comments that defense expert physician had examined

plaintiff at the specific request of an insurance company were error).

*Barton Plumbing Co. v. Johnson*, 285 S.W.2d 780 (Tex. Civ. App. – Galveston 1955) (evidence that defendants’ retained expert was a stockholder and director of defendant’s automobile liability insurer was admissible evidence of bias).

For cases discussing lay witnesses who were employed by the defendant’s insurer, see:

*Polk County Motor Co. v. Wright*, 523 S.W.2d 432 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1975) (plaintiff allowed to cross-examine defendant’s insurance adjuster regarding his employment with defendant’s insurer).

*Hammond v. Stricklen*, 498 S.W.2d 356 (Tex. Civ. App. – Tyler 1973) (permissible to cross-examine witness as to bias even though such examination may disclose that defendant is insured).

*South Texas Natural Gas Gathering Co. v. Guerra*, 469 S.W.2d 899 (Tex. Civ. App. – Corpus Christi 1971) (plaintiff’s counsel allowed to cross-examine defendant’s insurer’s investigator about his employment with insurer).

*Green v. Rudsenske*, 320 S.W.2d 228 (Tex. Civ. App. – San Antonio 1959) (fact that witness to collision was involved in insurance business was not injecting insurance into the case).

If evidence of insurance is injected into the trial, the proper action for the court is to either (1) grant a mistrial or (2) give a curative instruction and then await verdict before determining whether to grant a new trial. *Bennis v. Hulse*, 362 S.W.2d 308 (Tex. 1962). The court should not, however, specifically advise the jury whether or not there is insurance. *Id.*

To obtain relief on appeal for the improper introduction of insurance during trial, the appellant must show “(1) that the reference to insurance probably caused the rendition of an improper judgment in the case; and (2) that the probability that the mention of insurance caused harm exceeds the probability that the verdict was grounded on proper proceedings and evidence.” *University of Texas at Austin v. Hinton*, 822 S.W.2d 197 (Tex. App. – Austin 1991).

## **B. Discussion.**

Much of the case law regarding “evidence” of insurance does not involve the introduction of evidence at all, but rather, argument and *voir dire* examination by counsel. Over the years, attorneys have attempted many different, creative ways to push the envelope and imply to the jury that the defendant or plaintiff is insured or not. For example:

*Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1984) (referring to one of the defense counsel as defendant’s “personal counsel” was not improper).

*Harrison v. Harrison*, 597 S.W.2d 477 (Tex. Civ. App. – Tyler 1980) (arguing to jury that would like to inform them of certain facts, but can’t was not improper).

*Atchison, T. & S. F. Ry. Co. v. Acosta*, 435 S.W.2d 539 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1968) (plaintiff’s counsel continually referring to witness as “adjuster” even after objection was improper).

*Renegar v. Cramer*, 354 S.W.2d 663 (Tex. Civ. App. – Austin 1962) (permissible for counsel to argue that the jury should not speculate as to who will

pay a judgment or whether it will actually be paid).

*Montomery v. Vinzant*, 297 S.W.2d 350 (Tex. Civ. App. – Fort Worth 1956) (permissible in most situations to use the term “representative” or “investigator” when referring to defendant’s insurer’s agents).

*Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d (Tex. 1989) (permissible for plaintiff’s counsel to question prospective jurors on lawsuit crisis and liability insurance crisis).

*Nat’l Co. Mut. Fire Ins. Co. v. Howard*, 749 S.W.2d 618 (Tex. App. – Fort Worth 1988) (plaintiff’s counsel properly allowed to question prospective jurors about tort reform advertising and insurance crisis).

Often, the courts look to how the information concerning insurance was injected into the lawsuit in order to determine whether it was improper. For example, if a witness volunteers the information in response to a legitimate question not designed to elicit insurance information, then the courts are less inclined to declare mistrial. *El Rancho Restaurants, Inc. v. Garfield*, 440 S.W.2d 873 (Tex. Civ. App. – San Antonio 1969) (defense counsel elicited insurance information from one of plaintiff’s witnesses accidentally); *Travis v. Vandergriff*, 384 S.W.2d 936 (Tex. Civ. App. – Waco 1964) (defense counsel accidentally elicited insurance information from plaintiff during cross-examination); *Grossman v. Tiner*, 347 S.W.2d 627 (Tex. Civ. App. – Waco 1961) (defense counsel mistakenly elicited insurance information during cross-examination); *Southwestern Freight Lines v. McConnell*, 269 S.W.2d 427 (Tex. Civ. App. – El Paso 1954) (defense counsel elicited insurance

information on cross-examination). This is especially true if the movant’s own witness is the source of the information. *Flatt v. Hill*, 379 S.W.2d 926 (Tex. Civ. App. – Dallas 1964) (defendant’s own witness volunteered insurance information on cross-examination).

### C. Practical application.

Many practitioners and judges have operated, and continue to operate, under the mistaken belief that virtually any mention of the “I word” during trial is an automatic mistrial. Therefore, it is very important to know your judge before attempting to skirt the edges of insurance evidence admissibility. Depending on the circumstances, a mistrial can be a very expensive and harmful result to a party and its attorney.

When evaluating whether you want to discuss insurance during the trial, or whether you think opposing counsel may, you have to determine if it benefits or hurts your case. As mentioned at the beginning of this section, the existence of liability insurance may not necessarily harm defendants in every instance and some believe it may actually cause jurors to feel as though they have a personal stake in the outcome of the trial.

If you decide evidence of insurance would benefit your side of the case, you must then determine how to properly introduce such evidence considering the provisions of Rule 411. If you are a defendant and you want to introduce evidence that your client has insurance, there may be nothing preventing you from doing so. *See, University of Texas at Austin v. Hinton*, 822 S.W.2d 197 (Tex. App. – Austin

1991) (“We have found no authority, however, for the proposition that a party may not inform the jury of his or her own insurance coverage.”).

If you are a plaintiff desiring to introduce evidence of the defendant’s liability insurance, it will be very difficult unless the defendant unwittingly provides an opportunity. For example, the defendant could ask the plaintiff on cross-examination when she decided she was going to file a lawsuit. The plaintiff may answer that she was so insulted by the adjuster’s offers that she decided then to file suit. These were the facts in *Travis v. Vandergriff*, 384 S.W.2d 936 (Tex. Civ. App. – Waco 1964).

Or, defense counsel may ask the plaintiff on cross-examination why she did not sue other drivers involved in the collision. The plaintiff may answer that the other drivers did not have any insurance. These were the facts in *Grossman v. Tiner*, 347 S.W.2d 627 (Tex. Civ. App. – Waco 1961).

Finally, defense counsel may ask one of plaintiff’s medical providers whether he provided anyone a statement of the plaintiff’s condition. The witness may respond that they provided a statement to defendant’s insurance company. These were the facts in *Southwestern Freight Lines v. McConnell*, 269 S.W.2d 427 (Tex. Civ. App. – El Paso 1954).

Obviously, if you desire to keep evidence of liability insurance out, the first step is to make a motion *in limine* to prevent the other party, opposing counsel, or their witness from mentioning, directly or indirectly, the existence of liability insurance or the

fact that defendant will not actually be paying any judgment. Remember, a motion *in limine* does not preserve error and, should your opponent violate the order, you are still required to make a timely and proper objection on the record in order to preserve any error.

During the trial, you want to try to avoid giving the witnesses opportunities to volunteer information about insurance. The more you stray from the relevant facts of the case and delve into areas such as when and why the party retained counsel, the more you will be inviting the witness to discuss insurance.

If you believe that a witness will try to volunteer insurance information in spite of your carefully worded questions, be on alert to interrupt and shut the witness down before she is able to mention insurance. Curative instructions given after the witness has blurted out something about insurance are not nearly as effective on jurors as they are on appellate judges who are looking for a way to affirm.

#### **IV. COLLATERAL SOURCE**

##### **A. The Rule.**

The judicially created “collateral source rule” is both a rule of evidence as well as a rule of damages. *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2004). As a rule of evidence, it precludes the introduction of evidence that some of the plaintiff’s damages have been paid by a collateral source. The rationale for such a rule is much like the reasons supporting Rule of Evidence 411 discussed above: Whether a party has

received or will receive the protection of insurance is not relevant under most circumstances.

What is a collateral source? Generally speaking, it is a benefit conferred from a source other than the tortfeasor. It includes the following: **Insurance benefits.** *Brown v. American transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980).

**Fringe benefits.** *McLemore v. Broussard*, 670 S.W.2d 301 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1983).

**Gratuitous services.** *Oil Country Haulers, Inc. v. Griffin*, 668 S.W.2d 903 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1984).

**State provided services free of charge.** *Hall v. birchfield*, 718 S.W.2d 313 (Tex. App. – Texarkana 1986).

**Voluntary payment of wages by employer.** *Houston Belt & Terminal Ry v. Johansen*, 179 S.W. 853 (Tex. 1915).

**VA income and care benefits.** *Montandon v Colehour*, 469 S.W.2d 222 (Tex. Civ. App. – Fort Worth 1971).

**VA disability benefits.** *Gainer v. Walker*, 377 S.W.2d 613 (Tex. 1964).

**Social Security benefits.** *Tex. Gen. Indem. Co. v. Hamilton*, 420 S.W.2d 735 (Tex. Civ. App. – San Antonio 1967); *Traitors & General Ins. Co. v. Reed*, 376 S.W.2d 591 (Tex. Civ. App. – Corpus Christi 1964).

**Medicaid benefits.** *Martinez v. Vela*, 2000 WL 12968 (Tex. App. – Austin 2000) (unpublished).

**Reductions in medical expenses to those actually paid by Medicaid.** *Texarkana Memorial Hosp. v. Murdock*, 903 S.W.2d 868 (Tex. App. – Texarkana 1995).

**Medicare benefits and reductions.** *Wong v. Graham*, 2001 WL 123932 (Tex. App. – Austin 2001) (unpublished)

**Medical insurance.** *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1992).

**Worker's compensation benefits.** *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1992).

If, however, the benefits are actually provided by the tortfeasor, then the collateral source rule may not apply. This often arises in a situation when the defendant tortfeasor is the plaintiff's employer and the plaintiff received benefits under a benefit plan provided by the employer. If the plan is a fringe benefit for the employee, it is a collateral source. If, however, the plan is primarily to protect the employer, then it is not a collateral source. *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2004). “[I]t is the nature of the payments, not their source, which is determinative of the question of the applicability of the collateral source rule.” *Id.* at n. 41 *citing S. Pac. Transp. Co. v. Allen*, 525 S.W.2d 300 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 1975).

Just as with Rule 411, however, there are exceptions to the collateral source rule as it pertains to the admissibility of insurance evidence. If a party or a party's witness gives testimony that is inconsistent with the receipt of collateral source benefits, then they can be impeached.

For example, if the plaintiff injects the issue of his poverty into the case to explain why he has not obtained needed medical treatment, he may open the door to evidence of his entitlement to insurance benefits. Compare the following cases:

*General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. App. – Corpus Christi 1991) *reversed on other grounds*, 873 S.W.2d 353 (Tex. 1993) (plaintiff’s psychiatrist’s testimony about plaintiff’s mental anguish due to financial concerns did not open the door to evidence of plaintiff’s receipt of worker’s compensation benefits).

*Mundy v. Shippers, Inc.*, 783 S.W.2d 743 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990) (plaintiff and plaintiff’s witnesses claimed financial hardship due to injury and inability to continue to earn same money opened the door to evidence of receipt of collateral sources).

*Exxon Corp. v. Shuttlesworth*, 800 S.W.2d 902 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990) (plaintiff’s general comments about his poor financial situation did not allow impeachment with evidence of collateral sources).

*J.R. Beadel and Co. v. De La Garza*, 690 S.W.2d 71 (Tex. App. – Dallas 1985) (plaintiff’s testimony that he needed to work to support himself and the jobs he has worked since the injury paid less did not open the door to collateral source).

*Barrera v. E.I. DuPont De Nemours and Co., Inc.*, 653 F.2d 915 (5<sup>th</sup> Cir. (Tex.) 1981) (evidence regarding receipt of compensation and social security benefits was admissible to rebut plaintiff’s testimony that he did not have “a penny in his pocket.”).

*Johnson v. Reed*, 464 S.W.2d 689 (Tex. Civ. App. – Dallas 1971) (plaintiff who testified that she needed to work to support her daughter opened the door to collateral source evidence).

*Synar v. Union Pacific Railroad Co.*, 2001 WL 1263573 (Tex. App. – Tyler 2001) (unpublished) (plaintiff who described the mental and emotional effects of his injury including not having a job to go to or money to do anything

with did not open the door to collateral source evidence).

Even if the plaintiff does not inject poverty into the trial, collateral source evidence may still be admissible to impeach on a different basis. For example, if one of the plaintiff’s treating physicians testifies that treatment was necessary as a result of a bungled surgery, the defense could introduce evidence that he billed the worker’s compensation carrier as if the treatment was caused by the underlying work injury. *Macias v. Medtronic, Inc.*, 2000 WL 965040 (Tex. App. – El Paso 2000) (unpublished). Also, insurance documents describing plaintiff’s injuries may be introduced to impeach plaintiff’s description of his injuries. *Gothard v. Marr*, 581 S.W.2d 276 (Tex. Civ. App. – Waco 1979).

If evidence of collateral source is admitted for impeachment purposes, it is improper for counsel to argue that the jury should use the evidence for any other purposes. For example, when collateral source evidence has been introduced solely for impeachment, it is improper for the defense counsel to argue that the jury should not pay the plaintiff his medical expenses because they have already been paid. *Brown v. Hopkins*, 921 S.W.2d 306 (Tex. App. – Corpus Christi 1996).

As a rule of damages, the collateral source rule precludes the defendant from offsetting the judgment against any receipt of collateral sources by the plaintiff. The rule’s application to offsets comes from Restatement of Torts (Second) §920A which states, “[p]ayments made to or benefits conferred on the injured party from other

sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."

The rationale supporting the collateral source rule's treatment of offsets is that "a wrongdoer should not have the benefit of insurance independently procured by the injured party, and to which the wrongdoer was not privy." *Brown v. American Transfer & Storage Co.*, 602 S.W.2d 931 (Tex. 1980). If the plaintiff never paid anything for the benefit he received, application of the rule results in a windfall to the plaintiff. If the plaintiff paid insurance premiums for the benefit, and then had to pay back the benefits from his judgment to the insurance company, it is arguably a windfall to the insurance company since it contracted to cover medical expenses, collected the premiums, and then did not have to pay because the defendant paid.

## **B. TCPRC §41.0105**

House Bill 4 added §41.0105 to the Texas Civil Practice and Remedies code which pertains to the application of the collateral source rule. It reads:

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

TEX. CIV. PRACT. REM. CODE §41.0105. The language "actually paid or incurred by or on behalf of" is already causing significant discussion among civil litigators.

The arguments about how or whether §41.0105 should affect judgments and offsets are outside the scope of this paper. How the courts ultimately decide the issue, however, will have a significant impact on the collateral source rule as a rule of evidence. For example, if courts find that §41.0105 allows the tortfeasor to completely offset all medical expenses paid by a collateral source against the judgment, then that will, obviously, require the presentation of collateral source evidence in some manner to either the judge, jury, or both.

There are good reasons to believe that the Texas legislature did not intend to permanently obliterate or substantially modify the collateral source rule with the passage of §41.0105.<sup>1</sup> For example:

**i. Previous rejected versions of the statute.** The previous versions of the current §41.0105 which expressly repealed the collateral source rule, in whole or part, were rejected in favor of the current version;

**ii. The statute's language.** The language of §41.0105 expressly allows for recovery of "amounts paid OR incurred." The legislature could have simply said "amounts paid" had it wanted to limit a plaintiff's recovery to just the amount of expenses paid or to be paid by the collateral source.

**iii. Case law interpretation.** "Paid" and "incurred" have very

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<sup>1</sup> For an excellent and more comprehensive discussion of the intent and meaning of §41.0105, see Purdue, "Medical Damages After HB4," paper presented for the State Bar of Texas at its 2004 Advanced Personal Injury Law Course.

different meanings, not just in the dictionary, but in Texas jurisprudence. For example, in *Texarkana Memorial Hosp. v. Murdock*, 903 S.W.2d 868 (Tex. App. – Texarkana 1995) the jury awarded plaintiff \$500,000 in medical expenses “incurred by” plaintiff due to defendant’s negligence. Medicaid had a statutory assignment for \$352,784 in benefits it paid. The trial court granted a JNOV that plaintiff took nothing, awarded Medicaid \$352,784, and dropped the remaining \$147,216 out of the verdict.

The Court of Appeals reversed holding that plaintiff was entitled to the amount remaining after Medicaid’s assignment. The defendant argued that plaintiff was not personally liable for expenses in excess of the Medicaid assignment, but the court disagreed, holding that plaintiff would have been liable for all necessary medical expenses had Medicaid not paid. In other words, plaintiff had “incurred” all the medical expenses, regardless of the fact the Medicaid only “paid” a portion of them. *See also, Wong v. Graham*, 2001 WL 123932 (Tex. App. – Austin 2001) (unpublished); *Martinez v. Vela*, 2000 WL 12968 (Tex. App. – Austin 2000) (unpublished) (both cases excluded evidence of Medicaid reductions and benefits as collateral sources).

#### iv. Legislative history.

During Senate debates, Bill Ratliff, the Senate author of HB4, explained the intent behind §41.0105 by stating the following:

[I]t means that economic damages are limited to those actually *incurred*. You can’t

recover more than you’ve *actually paid or been charged* for your health care expenses in the past or what the evidence shows you will probably be *charged* in the future.

SENATE JOURNAL, 78<sup>th</sup> Legislature, Regular Session (June 1, 2003) page 5003-5008. Senator Ratliff draws the same distinction the *Murdock* court did between “incurred” or “charged” and “paid.” Knowing that these terms have different meanings, the legislature included them in §41.0105, and allowed for the recovery of either.

#### C. Practical Application.

If the courts interpret §41.0105 to allow for the introduction of collateral source evidence, it will essentially obliterate the collateral source rule as we know it today. For example, if the defense introduces evidence that the plaintiff had health insurance and, therefore, has not had to pay anything for his care, the plaintiff will be forced to present additional evidence regarding the collateral source to minimize the prejudice. The plaintiff may want to present expert testimony or testimony from his plan’s administrator to educate the jury about why the insurance company is given a preferential rate, how much the plaintiff has paid in premiums over the years for this benefit, and what subrogation interest exists. In essence, the parties will be forced to conduct a “trial within a trial” about what benefits were paid, why they were paid, and what benefits will have to be paid back.

On the other hand, there may be instances when the plaintiff may want to

introduce evidence of his receipt of collateral source benefits. This could arise if the plaintiff's counsel believes the jury will assume the existence of a collateral source in spite of no evidence such as when the client is a veteran or Medicare eligible. Counsel may believe that rather than have the jury assume the plaintiff is getting or will get benefits, he may want to explain whether such benefits will have to be paid back.

Also, if the plaintiff has inadvertently opened the door and allowed the defense to introduce evidence of collateral source, the plaintiff may also want to fully explain the collateral source, as well as any subrogation right, to minimize any damage. *University of Texas at Austin v. Hinton*, 822 S.W.2d 197 (Tex. App. – Austin 1991) (plaintiff's counsel permitted to discuss his client's arrangement with her insurance company); *Mundy v. Shippers, Inc.*, 783 S.W.2d 743 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990) (plaintiff's counsel explained subrogation after defense introduced evidence of collateral source).

If plaintiff's counsel attempts to rebut collateral source evidence by educating the jury about the collateral source and subrogation, she does not waive her right to appeal claiming that the court erred by allowing the defense to initially admit the collateral source evidence. *Padilla v. Sidney*, 2000 WL 1532847 (Tex. App. – San Antonio 2000) (unpublished) *citing* *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669 (Tex. App. – Amarillo 1991) (holding that a party is entitled to explain and rebut opponent's evidence without waiving proper and

timely objection) and *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986).

If, as is usually the case, the plaintiff wants to keep collateral source evidence out, he needs to take care not to open the door. As explained above, plaintiff's counsel should avoid injecting poverty into the lawsuit as an explanation for lack of continued treatment. It is also important for counsel on both sides to be intimately familiar with the content of any insurance documents so as to avoid or take advantage of any testimony that may contradict the documents.

## V. OFFERS OF COMPROMISE

### A. Rule 408

**Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.**

The rationale supporting Rule 408 is founded in the strong public policy in favor of the settlement of lawsuits. *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347 (Tex. 1968). It is thought that if parties' negotiations and/or agreements could be used against them later at trial, it would stifle their ability to communicate and eliminate the chances of resolution.

The burden is placed on the party seeking to exclude the evidence on the basis that it is part of settlement negotiations. *GTE Mobilnet of South Texas Ltd. Partnership v. Telecell Cellular, Inc.*, 955 S.W.2d 286 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1997); *Haney v. Purcell Co., Inc.*, 796 S.W.2d 782 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1990).

The trial court may exercise its discretion in determining whether certain communications constituted negotiations or agreements excludable from evidence. The trial court's ruling will not be disturbed on appeal absent a showing the court abused its discretion. *TCA Bldg. Co. v. Northwestern Resources Co.*, 922 S.W.2d 629 (Tex. App. - Waco 1996); *Tatum v. Progressive Polymers, Inc.*, 881 S.W.2d 835 (Tex. App. - Tyler 1994).

If it is determined that the trial court abused its discretion, then it must be determined whether the error amounted "to such a denial of appellant's rights that it was reasonably calculated to, and probably did cause the rendition of an improper judgment, or probably prevented appellant from making a proper presentation of the case" to the appellate court. *General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. App. – Corpus Christi 1991)

*reversed on other grounds* 873 S.W.2d 353 (Tex. 1993) *citing* TEX. R. APP. PROC. 81(b)(1).

If compromise evidence is admitted in error, such admission is usually curable by an instruction from the court to disregard. *Beutel v. Paul*, 741 S.W.2d 510 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1987).

## **B. Discussion.**

By its own terms, the rule is limited to instances involving the offer of or acceptance of "valuable consideration in compromising or attempting to compromise a claim." If a party simply offers to do or not do something, but does not demand consideration or a compromise from the other side, it will likely not be excluded under the rule. For example:

*Mieth v. Ranchquest, Inc.*, 2004 WL 1119670 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2004) (unpublished) (defendant's offer to purchase property was not a settlement offer as it did not ask the landowner plaintiffs to compromise their claim in any way).

*Stergiou v. General Motors Fabricating Corp.*, 123 S.W.3d 1 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2003) (exclusion of documents was error when they did not request plaintiff make any compromise whatsoever, in spite of defendant's purported subjective belief that they constituted a settlement offer).

*Gorges Foodservice, Inc. v. Huerta*, 964 S.W.2d 656 (Tex. App. – Corpus Christi 1997) (employee claiming discrimination was allowed to introduce employer's offer to take him back because such offer did not require

employee to drop lawsuit or make any concession).

*Tatum v. Progressive Polymers, Inc.*, 881 S.W.2d 835 (Tex. App. - Tyler 1994) (employer's offer to re-hire was admissible).

Another limitation included within the text of the rule is that compromise evidence is only excluded when offered "to prove liability for or invalidity of the claim or its amount." Therefore, evidence of negotiations and agreements will be admissible if offered to:

**i. show "bias or prejudice."** *Robertson Tank Lines, Inc. v. Watson*, 491 S.W.2d 706 (Tex. Civ. App. - Beaumont 1973) (plaintiff allowed to introduce evidence that defendant voluntarily paid for other plaintiff's property damage from automobile collision to impeach defendant and show interest, bias, or prejudice, in spite of fact offer was a settlement agreement).

*Hyde v. Marks*, 138 S.W.2d 619 (Tex. Civ. App. - Fort Worth 1940) (plaintiff was allowed to cross-examine defense witnesses with fact that they settled their cases with defendant before offering to testify).

**ii. prove "interest of a witness or a party."**

**iii. rebut "a contention of undue delay"**

**iv. prove "an effort to obstruct a criminal investigation or prosecution."** *L.M.W. v. State*, 891 S.W.2d 754 (Tex. App. - Fort Worth 1994) (defendant's former husband's offer to influence criminal proceedings

favorably for defendant in exchange for concessions in divorce case were admissible under this exception to the general rule of exclusion).

**v. impeach witnesses' or parties' testimony or contentions.**

*Tarrant County v. English*, 989 S.W.2d 368 (Tex. App. - Fort Worth 1998) (landowner claiming county misled him about contamination of property could admit settlement letter from county regarding contamination).

*General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. App. - Corpus Christi 1991) *reversed on other grounds* 873 S.W.2d 353 (Tex. 1993) (it was harmless error for trial court to exclude evidence that one defendant had settled with the plaintiff, therefore, his testimony was not against his interest as it might have appeared).

*Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532 (Tex. App. - Corpus Christi 1985) *overruled on other grounds* 968 S.W.2d 319 (Tex. 1998) (evidence of settlement negotiations was admissible to show statements which were alleged to be misrepresentations).

*Kansas City Southern Ry. Co. v. Carter*, 778 S.W.2d 911 (Tex. App. - Texarkana 1989) (plaintiff allowed to introduce evidence that defendant railroad had acknowledged liability and paid damages in other instances in county to rebut railroad's claim that it did not operate in county).

*C & H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1991) ("Mary Carter agreements" where settling co-defendant retains a financial interest in plaintiff's recovery against other defendants are admissible to show the true alignment of the parties).

*Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1987) (excluding admission of “Mary Carter agreement” because defendant was not a party to the agreement and there was no evidence defendant had any interest in plaintiff’s case).

*Spiritas v. Robinowitz*, 544 S.W.2d 710 (Tex. Civ. App. – Dallas 1976) (an admission of liability is admissible even though it is made in the context of settlement negotiations and will be excluded only if it is so entwined with the compromise offer that the court is unable to ascertain whether it was made as a statement of fact or a concession for purposes of negotiation).

*Charter Oak Fire Ins. Co. v. Adams*, 488 S.W.2d 548 (Tex. Civ. App. – Dallas 1972) (worker’s compensation carriers previous description of plaintiff’s condition as permanent partial disability was admissible to rebut its position at trial even if made in the course of compromise negotiations).

### **C. Practical application.**

Much like with evidence of insurance, many practitioners and judges operate under the mistaken belief that any mention of settlement discussions or agreements is prohibited. The language of Rule 408 and the case law cited above demonstrates that there are many instances when compromise evidence is admissible.

One of the more common defense themes in use today is that the plaintiff is an “opportunist” attempting to take advantage of a simple accident by fabricating or exaggerating her injuries. An interesting question that has not yet been directly answered by the courts is whether a plaintiff or plaintiff’s

counsel can introduce evidence to rebut such a defense theory. For example, when the defendant testifies the plaintiff is simply trying to get money for nothing, can the plaintiff’s counsel cross-examine him regarding the fact that the plaintiff was willing to settle for the cost of her medical bills, but defendant’s “representatives” would not offer more than \$500? Or, if a defendant argues or implies that the plaintiff is attempting to get rich off of the lawsuit, will it open the door to rebuttal evidence of (1) previous offers or (2) the fact that plaintiff must pay expenses and attorney fees out of the verdict and only a portion of any judgment will actually go to the plaintiff?

On the other hand, what if a plaintiff argues that the defendant has failed, or is refusing, to take responsibility for his actions? Will a defendant be able to rebut such an assertion with evidence that he did, in fact, accept liability during settlement negotiations and offer to pay the plaintiff’s medical bills? Again, whether such tactics fall within the exceptions to Rule 408 has not been directly answered by the cases.

Regardless of which side of the case you fall on, you probably do not want to cause a mistrial under most circumstances. Therefore, if you think compromise evidence is admissible, you typically would want to approach the bench and inform the judge of your intentions before introducing such evidence in front of the jury.

If you are concerned about opening the door to settlement negotiations or agreements, you should make sure to label any documents

containing negotiations as being for purposes of settlement. You should also take care to require a concession of some sort from the other side in exchange for any offer you make. Lastly, you should carefully select your theory of the case so that you do not open the door to rebuttal evidence including compromise evidence.

If evidence of settlement negotiations or agreements is improperly admitted, the objecting party is allowed to then rebut the evidence with additional evidence regarding negotiations or agreements and will not be deemed to have waived the previous objection. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1987) citing *State v. Chavers*, 454 S.W.2d 395 (Tex. 1970) and *Roosth and Genecov Production Co. v. White*, 262 S.W.2d 99 (Tex. 1953). So, if your opponent introduces compromise evidence, you should ensure the jury knows the entire story and not just their side.

## **VI. IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENT**

### **A. Rule 613(a)**

**(a) Examining Witness Concerning Prior Inconsistent Statement. In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If**

**written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).**

The rule providing for admissibility of inconsistent statements should be liberally construed to allow for any evidence that gives promise of exposing falsehood. *Joseph v. State*, 960 S.W.2d 363 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1998).

### **B. Discussion.**

The attorney seeking to impeach the witness must lay the proper predicate before admitting evidence of the prior inconsistent statement. As the Rule states, the attorney must inform the witness of the “contents of such statement and the time and place and the person to whom it was made.” The attorney must also give the witness “an opportunity to explain or deny such statement.”

While Rule 607, allows any party to impeach any witness, even their own, a party may not call a witness for the sole purpose of impeaching them with a prior inconsistent statement as subterfuge to get inadmissible hearsay before the jury. *Pruitt v. State*, 770 S.W.2d 909 (Tex. App. – Fort Worth 1989) (state should not have been allowed to call a witness whom it knew had recanted just to impeach witness and admit prior inconsistent statement).

The Rule also states that if a witness admits to the content of the prior inconsistent statement, no extrinsic evidence is admissible to prove up the prior statement. *McGary v. State*, 750 S.W.2d 782 (Tex. Crim. App. – 1988). If, however, the witness denies, or only partially or qualifiedly admits to, making the prior inconsistent statement, then the impeaching attorney may introduce extrinsic evidence to prove the prior statement. *Staley v. State*, 888 S.W.2d 45 (Tex. App. – Tyler 1994); *Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 506 (Tex. App. – Corpus Christi 1993).

Admission of evidence under this rule is for impeachment only and is not substantive evidence. *Miranda v. State*, 813 S.W.2d 724 (Tex. App. – San Antonio 1991); *Pope v. Stephenson*, 774 S.W.2d 743 (Tex. App. – El Paso 1989). If the attorney is allowed to introduce extrinsic evidence of the prior inconsistent statement, such extrinsic evidence will also be admitted only as evidence of impeachment, however, and not as substantive evidence. If, however, there is another basis for admitting the statement, such as the statement is a declaration against interest, then the statement can be admitted as substantive evidence. *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243 (Tex. App. – Beaumont 1994).

Impeachment evidence, whether from prior inconsistent statements or otherwise, is improper if on an immaterial or collateral matter. *Delamora v. State*, 128 S.W.3d 344 (Tex. App. – Austin 2004); *Garza v. State*, 18 S.W.3d 813 (Tex. App. - 2000). “The test of admissibility of evidence which contradicts the

testimony of a witness is whether the fact which contradicts the testimony would have been admissible for any purpose independent of mere contradiction.” *Chagas v. West Bros., Inc.*, 589 S.W.2d 185, 186 (Tex. Civ. App. – Fort Worth 1979).

If a witness has been impeached by evidence of prior inconsistent statements, the opponent may introduce rebuttal evidence of prior consistent statements. *Pryne v. State*, 881 S.W.2d 593 (Tex. App. – Beaumont 1994); TEX. R. EVID. 613(c), 801(e)(1)(B).

Some courts have found that allegations and statements by a party’s attorney are that party’s statements. Therefore, a party’s pleadings in a current case, and possibly other cases, which contain statements that are inconsistent with the party’s present position, may be admissible as admissions against interest. See the following:

*Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707 (Tex. App. – Austin 2000) (evidence that defendant claimed in separate civil suit pleadings that, due to its advertising, it had one of the most distinctive trademarks in Texas was admissible to rebut defendant’s claim in current suit that it never advertised in Texas).

*Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243 (Tex. App. – Beaumont 1994) (permitted impeachment with a pleading that was subsequently amended).

*Bigby v. State*, 892 S.W.2d 864 (Tex. Crim. App. 1994) (pleadings in prior civil suit not signed by witness were not prior inconsistent statements on which witness could be cross-examined).

*Crest Const., Inc. v. Murray*, 888 S.W.2d 931 (Tex. App. – Beaumont 1994) *reversed on other grounds* 900 S.W.2d 342 (Tex. 1995) (allowing impeachment with non-current, superseded pleading).

### C. Practical application.

In this author's experience, the formalities of Rule 613 are rarely observed by attorneys or courts in civil cases. Often, attorneys do not bother to lay a proper predicate, but rather, simply cut straight to the impeachment and ask the witness, "Isn't it true you told us at your deposition that . . ."

Many times, the opposing attorney will not object to the lack of predicate because it is not material to the case and would accomplish nothing other than to frustrate the jury and possibly keep his witness on the stand enduring cross-examination even longer.

One of the instances in which an opposing counsel should object to improper impeachment is when the impeaching attorney repeatedly asks the witness what they may have stated to someone earlier, without first asking them the question directly during trial. It typically goes something like this:

Q: When you first saw the defendant's car, it was stopped at the stop sign.

A: Yes, Sir.

Q: Now, you told Officer Smith at the scene that day that you were about 50 feet from the defendant's car when you first saw it start to pull out.

A: Yes, Sir.

Q: And, you also told Officer Smith that when you saw that the defendant was pulling out, the plaintiff's vehicle turn to the left.

A: Yes, Sir.

Q: And you said that the two vehicles collided in the middle lane of 1<sup>st</sup> Street.

A: Yes, Sir.

The "impeaching" attorney is really not impeaching anyone. The attorney is not giving the witness the opportunity to say anything inconsistent with the previous statement because the attorney is only asking about the previous statement. Rather than asking the witness what she saw, the attorney is asking her what she said. While it is true that the witness is on the stand available for cross-examination, this is not proper technique.

This method of examining witnesses can have two negative effects of which the opposing counsel should be aware. Firstly, depending upon how the questions are delivered, it can leave the jury with the impression that the witness is being impeached with a prior statement, even though she is not.

Secondly, it can cause the witness to be lulled into a pattern of answering the attorney's questions affirmatively without thinking. The witness may assume that the attorney knows every detail of her previous statement, therefore, whenever the attorney starts out the question, "and you also said..." the witness automatically answers, "Yes." To prevent this from happening, opposing counsel should educate their witnesses as well as make timely objections.

Counsel should also be careful as to what factual assertions or arguments they include in correspondence and pleadings. As described above, some courts will allow parties to be impeached with previous inconsistent statements and arguments made by their attorneys. If a party adds or changes allegations, they need to be prepared to explain why in case opposing counsel is allowed to ask. This can sometimes be a dangerous question to ask a prepared witness because they may use it as an opportunity to comment on their opponent's conduct (i.e., I didn't allege your client was speeding because I had no way of knowing that until you finally produced the photographs of the scene and gave us access to the vehicle a year later....).

Counsel on both sides should ensure that a prior statement can actually be attributed to the witness before the witness can be impeached with it. Many times, an impeaching attorney will attempt to use a medical record, employment record, or other document drafted by a third party to impeach the witness. Often, these records are factual summaries or conclusions by the third party and not recitations of what the witness told them. The records, therefore, often not prior statements by the witness and, therefore, Rule 613 cannot be used as the basis for their admission.

Opposing counsel should prepare their witnesses for such tactics before trial. If there is no other basis for the admission of the record, opposing counsel should make a timely proper objection at trial.

The impeaching attorney should be careful if employing the above tactic. A prepared witness could make it look as though the attorney is trying to put other peoples' words in the witness's mouth.

Lastly, opposing counsel should be aware of the case law that prohibits impeachment on a collateral matter. Often, a cross-examining attorney will pick at a witness impeaching them with every immaterial, inconsequential variation between their trial testimony and prior statements. While such a cross-examination strategy is ill-advised and usually accomplishes nothing more than frustrating the judge and jury, opposing counsel may want to object. Objecting to a long, tedious cross-examination on seemingly irrelevant details can win counsel friends with the judge and jury. Moreover, the objection highlights and confirms what the jury is thinking – that these questions are stupid.

## **VII. OPTIONAL COMPLETENESS**

### **A. Rule 107**

Texas Rule of Evidence 107 states:

**When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the**

**same subject between the same parties may be given. “Writing or recorded statement” includes depositions.**

TEX. R. EV. 107

### **B. Discussion**

The rationale behind Rule 107 is to allow completeness in order to correct any misleading impressions left with the jury by the introduction of only a portion of the evidence. *Lomax v. State*, 16 S.W.3<sup>rd</sup> 448 (Tex. Civ. App. – Waco 2000). It is meant to guard against confusion, distortion or false impressions that may arise from introduction of part of the evidence out of context. *Patel v. State*, 856 S.W.2d 486 (Tex. App – Houston [1<sup>st</sup> Dist.], 1993).

Evidence Rule 107 formerly appeared only in the Criminal Rules, but was later made applicable to civil cases as well because it accurately reflected the common law rule of optional completeness for civil cases. Even today, virtually all of the case citations for Ev. Rule 107 are from criminal trials.

### **C. Practical Applications**

In civil trials, the optional completeness rule is primarily invoked at two stages of trial: (1) during pre-trial in deciding upon the deposition excerpts to either be read or shown by video to the jury; and (2) as documentary evidence or text references are used in examining witness. To invoke the rule, one needs to request the Court to allow an interruption of the opposition’s presentation for the purpose of optional completeness and offer the portion deleted. Numerous cases have held that

once only a portion of the evidence (i.e., a letter, affidavit, statement, text reference, etc.) has been introduced, the party seeking optional completeness may then offer the remainder or missing portion of the evidence or may introduce (at the discretion of the Trial Court) the whole document. *Sontag v. State*, 841 S.W.2d 889 (Tex. Civ. App.-Corpus Christi 1992).

The Rule is not to be utilized to bring in otherwise inadmissible evidence, but to the extent hearsay may be required to complete a document or communication, the Trial Court has the discretion to allow the otherwise hearsay evidence in to prevent the jury from forming a false impression. See *Elmore v. State*, 116 S.W.3<sup>rd</sup> 809 (Tex. Civ. App.-Fort Worth 2003) (a letter written in response to the letter introduced should not have been excluded).

## **VIII. PAYMENT OF MEDICAL & SIMILAR EXPENSES**

### **A. Rule 409**

Evidence Rule 409 states:

**Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.**

### **B. Discussion.**

The rationale for Ev. Rule 409 is much the same as discussed above for Ev. Rules 408 and 410. Under Rule 409, any evidence of advance payment of damages (i.e., payment of medical bills, repair of automobile, workers

compensation benefits, etc.) is not admissible to prove liability for the injury. However, if there are other valid reasons for the evidence to be admissible, the trial court can be justified in allowing the evidence to be admitted. (See *Phipps v. Miller*, 597 S.W.2d 458 (Tex. Civ. App. - Dallas 1980, ref. n.r.e.) (advance payment admitted to establish tolling of statute of limitations); *Port Neches Independent School Dist. v. Soignier*, 702 S.W.2d 756 (Tex. App. – Beaumont 1986 ref. n.r.e.) (letter acknowledging coverage admitted as an admission of coverage).

In health care liability cases, there were formerly specific provisions allowing for advance payments of medical expenses without any concession or admission of liability; however, Ev. Rule 409 repealed and replaced those provisions (Article 4590i, Secs 9.01 and 9.02) effective September 1, 1983. The Health Care Liability Act, Article 4590i, which remains effective for cases filed prior to September 1, 2003, still contains the following additional provisions applicable to health care cases:

### **Sec. 9.03 Adjustments for Advance Payments**

The advance payment shall inure to the exclusive benefit of the defendant or his or its carrier making the advance payment, and in the event the advance payment exceeds the pro rata liability of the defendant or the carrier making the payment, the trial judge shall order any adjustment necessary to equalize the amount which each defendant is obligated to pay under this subchapter, exclusive of costs.

### **Sec. 9.04 Certain Advance Payments Exempt from Repayment**

In no case shall an advance payment in excess of an award be repayable by the person receiving it.

#### **C. Practical Application.**

The limitations of this Rule do not preclude claimants from proving the amount and identity of the medical bills included within the claim so long as all references to whether they have been paid by defendant or its insurer are eliminated prior to offering bills as exhibits. *Davis v. Snider Industries* 604 S.W.2d 341 (Tex. Civ. App. - Texarkana 1980, ref. n.r.e.)

In cases of fairly clear liability, parties on both sides may be incentivized to engage in the advanced payment of medical and/or other expenses, utilizing Ev. Rule 409's protections that it will not be admissible in the case. Defense counsel will especially want to evaluate whether there is any reason – other than proof of liability – for which the evidence of advanced payments might become admissible in spite of the limitations of Ev. Rule 409.

In this author's opinion, it would be wise to obtain a written agreement between counsel, at the time of deciding whether to advance payments or not, limiting the use of the evidence of advance payments for any reason during the subsequent trial.

## **IX. PHYSICIAN – PATIENT PRIVILEGE**

### **A. Rule 509**

Evidence Rule 509 states:

**(a) Definitions. As used in this rule:**

**(1) A “patient” means any person who consults or is seen by a physician to receive medical care.**

**(2) A “physician” means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.**

**(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient’s family.**

**(b) Limited Privilege in Criminal Proceedings. There is no physician – patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.**

**(c) General Rule of Privilege in Civil Proceedings. In a civil proceeding:**

**(1) Confidential communications between a physician and a patient, relative to or in connection**

**with any professional services rendered by a physician to the patient are privileged and may not be disclosed.**

**(2) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.**

**(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. art. 4590i.**

**(d) Who May Claim the Privilege in a Civil Proceeding. In a civil proceeding:**

**(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient’s behalf.**

**(2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.**

**(e) Exceptions in a Civil Proceeding. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:**

**(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness**

and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, Tex. Rev. Civ. Stat. art. 4495b\*, or of a registered nurse under or pursuant to Tex. Rev. Civ. Stat. arts. 4525\*\*, 4527a\*\*, 4527b\*\*, and 4527c\*\*, provided that the board shall protect the identify of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);

(6) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under Tex. Health & Safety Code ch. 462; tit. 7, subtit. C; and tit. 7, subtit. D;

(7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

(f) Consent.

(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as authorized by Tex. Health & Safety Code tit. 7, subtit. C and D; Tex. Prob. Code ch. V; and Tex. Fam. Code §107.011; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw consent of the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

**(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.**

**\* Now Occupations Code, title 3, subtitle B-C.**

**\*\* Now Occupations Code, chapter 301.**

### **B. Discussion.**

The discussion of Evidence Rule 509 herein will be limited to civil proceedings only, although the Rule also has application in criminal proceedings as stated above.

Rule 509 generally imposes confidentiality for communications between a physician and a patient. Protected by the Rule are not only conversation, but also the records of the patient which are created and maintained by the physician. The privilege may be fully claimed by the patient (or the patient's representative), but may only be claimed by the physician on behalf of the patient. Thus, a physician could not claim the privilege of confidentiality and shield his records on the patient from the patient himself.

Exceptions to the rule of confidentiality arise in several ways:

- by a medical malpractice lawsuit against a physician where disclosure is relevant to either the claim or the defense of the physician;

- where proceedings have been instituted against the physician's license and the patient is a complaining witness;
- where consent for disclosure is given by the patient or someone authorized to consent on behalf of the patient;
- where collection is being sought on medical expenses;
- others as set forth in (e)(5) – (7) above.

[Note: Numerous other laws deal with the issue of who, other than the patient, may consent for the release of medical records. It is not within the scope of this paper to cover those laws. However, for a non-exhaustive list of references, see the Texas Health & Safety Code, Chapters 181, 241, 572; Chapter 32 of the Texas Family Code; Article 6701; Texas Occupations Code, Chs. 154, 159 and Government Code, Ch. 418 for some of the major Texas provisions.]

[Note further: The new §74.052 Civ. Prac. & Rem. Code now requires a notice of a health care liability claim to be accompanied by a specific medical authorization for the release of protected health information – see attached Appendix 1.]

The general purposes of the physician – patient privilege has been enunciated as (1) to encourage full disclosure by the patient as needed for effective medical treatment, and (2) to prevent unnecessary disclosure of highly personal information in order to maintain patient privacy. *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. Sup.

1994). The physician – patient relationship can be created in numerous situations, even where an unconscious detainee is being examined at the request of jail personnel (*Garay v. County of Bexar*, 810 S.W.2d 760 (Tex. App – San Antonio 1991, writ denied). It has been held not to apply where a patient is examined by court order for temporary commitment for mental health services (*State ex rel. L.W.*, 2003 WL 22411201 (Civ. App. – Tyler 2003) (unreported).

The “offensive use doctrine” is independent from and unrelated to the privilege exceptions under Ev. Rule 509. But where a plaintiff invokes the jurisdiction of the court seeking affirmative relief, and then invokes the privileges to deny defendant the benefit of evidence that would materially weaken or defeat plaintiff’s claims, this is an offensive use of the privilege and lies outside the intended scope of the privilege. *Ginsberg v. Fifth Court of Appeals*, 686 S.W. 2d 105 (Tex. 1985). In such an instance the privilege is being used as a sword rather than as a shield. *Republic Ins. Co. v. Davis*, 856 S.W. 2d 158 (Tex. 1993). However, an offensive use waiver should not be lightly found. *Id.* For the doctrine to apply, three factors must exist: (1) the party asserting the privilege must be seeking affirmative relief, such as seeking damages; (2) the privileged information must be of such character that if believed by the fact finder, in all probability it would be outcome determinative, i.e., it must go to the very heart of the relief sought; and (3) disclosure of the confidential information must be the only means by which the aggrieved party may obtain the evidence. *Id.* *Bristol-Meyers Squibb Co. v. Hancock*, 921 S.W.2d 917 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1996).

The record deemed to be confidential must be that created and maintained by the physician. In a recent medical malpractice case, plaintiffs sought hospital “face sheets” used for admitting patients, seeking the names and fact sheets of all infants (and their parents) who received the recalled vitamin supplement E-Ferol while a patient at Cooks Children’s Medical Center in Fort Worth. The trial court granted the request, directing that the information be given to an appointed guardian ad litem (so that he could inform non-party parents that their child may be suffering from E-Ferol toxicity). The Fort Worth Court of Appeals conditionally granted mandamus holding that (1) the hospital lacked standing to assert the physician/patient privilege, and (2) that the face sheets were not shown to be privileged under Ev. Rule 509(c)(2) because there was no proof that these records were “created or maintained by a physician.” In re *Fort Worth Children’s Hospital d/b/a Cook Children’s Medical Center*, 100 S.W.3<sup>rd</sup> 582, (Tex. App. – Fort Worth, 2003) (orig. proceeding-mandamus dismissed). (Note: Though the hospital argued that it had its own privilege, the Court held there was no such privilege. Citing 241.152 of the Health and Safety Code, the Court held that rather than a privilege, there was an imposed liability upon a Hospital for an unauthorized disclosure, and one of the exceptions permitted disclosure pursuant to Court order.)

### C. Practical Application.

In my experience, litigants generally recognize that when a law suit is brought against a health care provider, or when the health care provider must

bring a collection action, their otherwise protected health information becomes “fair game” for disclosure and possible admissibility at trial. The major exceptions occur in the mental health area where courts are quick to protect sensitive records that are not outcome determinative to the litigation.

The new provisions of §74.052, Civ. Prac. & Rem. code – passed as part of the 2003 tort reforms – will now not only require a litigant to disclose the identity of his/her physicians and other health care providers who have examined, evaluated and treated him/her in connection with the injuries arising from the claim and authorize release of those records, but also identify treaters within the prior five years and either authorize release or exclude specific ones. Exclusion must be on the basis of relevancy. Finally, it is important to note that the §74.052 authorization includes both written and verbal information and therefore seemingly authorizes *ex parte* communications between the defendant and the plaintiff’s health care providers.

## **X. ORIGINALS, DUPLICATES AND SUMMARIES**

### **A. The Rules.**

Evidence Rule 1002 provides:

**To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law.**

Evidence Rule 1003 provides:

**A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.**

Evidence Rule 1006 provides:

**The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.**

### **B. Discussion.**

Normally, originals are required as the best evidence to prove the content of a writing, recording, or photograph. However, with the technological advances seen in this author’s career, either photocopies or duplicates may be used so long as there is no question as to the authenticity of the original or the circumstances surrounding admitting the duplicate in lieu of the original. An objection is to be lodged at the time the copy or duplicate is sought to be used at trial. If there is some question of alteration of a photocopy, the photocopy can be kept out of evidence and the original can be required.

For voluminous documents, which are otherwise admissible, a chart or summary may be used instead. However, the originals or duplicates

must be made available for examination and/or copying and the originals can be required to be in court. *C.M. Asfahl Agency v. Tensor, Inc.*, 2004 WL 169 737 (Tex. Civ. – Houston, [1<sup>st</sup> Dist.] 2004 (one page exhibit admissible summarizing 87 pages of supporting data).

### **C. Practical Application.**

To be able to use a summary, list or chart, counsel would be well advised to disclose the summary, list or chart to opposing counsel well in advance of its intended use. Depending upon how voluminous and what the underlying documents are, if the summary, list or chart is sprung on opposing counsel at trial and without sufficient time to test its accuracy, the trial judge may rightfully deny its use.