

## **EVIDENCE WITHOUT WITNESSES**

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## EVIDENCE WITHOUT WITNESSES

### I. SCOPE OF ARTICLE<sup>1</sup>

This article covers the use of various types of evidence that can be introduced in Texas courts without any witnesses. The topics covered include discovery materials, admissions, pleadings, judicial notice, and stipulations. This article is limited to Texas state court civil practice.

### II. DISCOVERY PRODUCTS

Discovery obtained pursuant to the Texas Rules of Civil Procedure and otherwise admissible under the Texas Rules of Evidence may be used as evidence at trial or in other proceedings without testimony from live witnesses.

#### A. Depositions

Deposition testimony taken in the same proceeding can be introduced into evidence as if the deponent were present on the stand and testifying.<sup>2</sup> TEX. R. CIV. P. 203.6(b). Whether a question or answer is admissible is determined by applying the rules of evidence as if the witness were present and testifying at trial. *Id.* The unavailability of the deponent is not a requirement for admissibility. *See* Section II.A.1.b.(1) and III.B, *infra*.

Rule 203.6(b) defines “same proceeding.” It includes proceeding in a different court over the same subject matter and the same parties or their representatives or successors in interest. TEX. R. CIV. P. 203.6(b).

Rule 203.6(b) also provides for the use of depositions against parties who are joined after the deposition is taken. A deposition may be admissible against such a party if (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, and (2) the party has had reasonable opportunity to redepose the witness and has failed to do so. *See* TEX. R. CIV. P. 203.6(b)(1)(2).

Deposition testimony is offered in evidence on the same footing as oral testimony, and the weight and probative force to be given such testimony is for determination by the trier of fact. *See England v. Pitts*, 56 S.W.2d 493, 499 (Tex. Civ. App. - Dallas 1933, writ dismissed w.o.j.) (on rehearing). Deposition testimony is subject to the same rules that govern credibility of live testimony. *See Smith v. Smith*, 720 S.W.2d 586, 599 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1986, no writ).

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<sup>1</sup> The author wishes to thank previous authors of articles on this topic for the University of Houston Law Center CLE Program. Their original source material served as the starting point for this paper. All mistakes, however, are this author's alone.

<sup>2</sup> The use of depositions and other testimony taken in different proceedings is discussed in Section III of this article.

## **1. Introducing deposition testimony**

A deposition does not become part of the record and is not entitled to any evidentiary weight unless and until the testimony is admitted into evidence. *See The Home Ins. Co. v. Cambric*, 906 S.W.2d 956, 960 (Tex. App. - Waco 1995, no writ). There are no magic words that must be used when offering deposition testimony. *See Robertson Truck Lines, Inc. v. Hogden*, 487 S.W.2d 401, 402 (Tex. Civ. App. - Beaumont 1972, writ ref'd n.r.e.).

### **a. Procedural rules governing the introduction of deposition technology**

The proper method of placing the deposition of a witness before the jury is for one person to read the question and another to read the answer from the witness stand. *Fenn v. Boxwell*, 312 S.W.2d 536, 546 (Tex. Civ. App. - Amarillo 1958, writ ref'd n.r.e.). Gestures and voice inflections have no place in the introduction of depositions. *See Liberty Mutual Ins. Co. v. Rodriguez*, 537 S.W.2d 522, 525 (Tex. Civ. App. - San Antonio 1976, no writ).

There is no rule preventing the introduction of a complete deposition as one piece of evidence if no objection is raised. *Fenn*, 312 S.W.2d at 546. However, TEX. R. CIV. P. 281 provides that depositions may not be taken into the jury room during deliberations. To do so after the deposition has already been read into evidence because it places undue emphasis on the deposition testimony over other testimony heard in the courtroom. *Id.* Such error, however, will not result in the reversal unless there is a showing that it probably caused the rendition of an improper judgment. *See Daniel v. Weiner*, 604 S.W.2d 494, 495 (Tex. App. - El Paso 1980, no writ).

#### **(1) Deposition testimony may be used in spite of the witness' presence in the courtroom**

Deposition testimony may be read in evidence at trial without the necessity of showing that the witness is unavailable or unable to testify. *See Spring Branch Bank v. Mengden*, 628 S.W.2d 130, 138 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1981, writ ref'd n.r.e.). It is immaterial whether the witness has been placed on the stand and has testified. *See Harwell & Harwell, Inc. v. Rodriguez*, 487 S.W.2d 388, 399 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.). The trial court can, however, exclude deposition testimony which is merely cumulative of the witness' live testimony. *See Donald v. Bennett*, 415 S.W.2d 450, 455 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.).

#### **(2) Abolishment of the "voucher" rule**

Prior to the adoption of the Texas Rules of Evidence, a party who introduced a portion of a deposition "vouched" for the portion offered, even if it contained unfavorable testimony. The result was that the party could not thereafter offer additional testimony to impeach the witness. This rule was changed by Rule 607 of the Texas Rules of Civil Evidence. Rule 607 provides that the credibility of a witness maybe attacked by any party, including the party calling the witness.

### **(3) Deposition on written questions**

Depositions on written questions may be introduced in evidence with the similar effect as oral depositions of witnesses. *See Molter v. Equitable Discount Corp.*, 418 S.W.2d 262, 264 (Tex. Civ. App. - San Antonio 1967, no writ).

#### **b. Objections to use of deposition testimony**

Objections which attack the competency and admissibility of tendered testimony may be raised when the deposition is read, and will be determined in accordance with the applicable rules used when a witness is testifying in person. *See Johnson v. Hermann Hosp.*, 659 S.W.2d 124, 125-26 (Tex. App. - Houston [14th Dist.] 1983, writ ref'd n.r.e.); *see also National Bankers Life Ins Co. v. Rosson*, 400 S.W.2d 366, 370-71 (Tex. Civ. App. - Dallas 1966, writ ref'd n.r.e.).

#### **(1) Rule of "optional completeness"**

The rule of optional completeness provides parties with a method for avoiding misleading testimony from the selective use of deposition testimony. Under Rule 106 of the Texas Rules of Evidence, an adverse party may at that time introduce any other part of the deposition which ought in fairness to be considered contemporaneously with the portion that was introduced.

#### **(2) Bill of exception required if deposition testimony is excluded**

If deposition testimony is excluded, the offering party must make a formal bill of exception in order to preserve error. *See McInnes v. Yamaha Motor Corp., U.S.A.*, 673 S.W.2d 185, 187 (Tex. 1984), *cert. denied*, 469 U.S. 1107 (1985). The bill of exceptions must be made before the case is submitted to the jury or error is not preserved. *See McKinney v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 747 S.W.2d 907, 909 (Tex. App. - Fort Worth 1988), *aff'd*, 772 S.W.2d 72 (Tex. 1989).

The fact that the deposition is on file in the trial court and accompanies the record on appeal does not constitute a sufficient bill of exceptions to preserve error. *See Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 137-38 (Tex. App. - San Antonio 1985, no writ). A reading of page and line numbers is insufficient. The proffered deposition testimony should be read into the record, because a designation of page and line numbers is inadequate where the testimony does not otherwise appear in the appellate record. *See Jordan v. Ortho Pharmaceuticals, Inc.*, 696 S.W.2d 228, 239-40 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.).

#### **B. Answers to Interrogatories**

Answers to interrogatories must be introduced into evidence in order to be of any probative value. *See Sammons Enterprises, Inc. v. Manley*, 540 S.W.2d 751, 757 (Tex. Civ. App.-Texarkana 1976, writ ref'd n.r.e.). The fact that answers to interrogatories are on file in a bench trial is

insufficient. *See id.* It is error for a trial court to consider answers to interrogatories which have not been offered and admitted into evidence. *See Barnwell v. Fox & Jacobs Constr. Co.*, 469 S.W.2d 199, 206 (Tex. Civ. App.-Dallas 1971, no writ).

**1. Answers to interrogatories may be used only against the party making them**

Answers to interrogatories may only be used against the party answering the interrogatories. TEX .R. CIV. P. 197.3. *But see Thalman v. Martin*, 635 S.W.2d 411, 414 (Tex. 1982) (deceased party's answers to interrogatories may be used against her heirs who succeed to her representation in the case). An objection to the use of interrogatory answers against a non-party may be waived if it is not timely or properly made. *See Champion Mobile Homes v. Rasmussen*, 553 S.W.2d 237, 239-40 (Tex. Civ. App. - Tyler 1977, writ ref'd n.r.e.); *see also Stanfield v. Kroll*, 484 S.W.2d 603, 608 (Tex. Civ. App.-Houston [1<sup>st</sup> Dist.] 1972, writ ref'd n.r.e.) (non-answering party against whom interrogatory answers are sought to be admitted should object as to the admissibility and obtain a proper limiting instruction).

An answering party may not use its own answers to interrogatories as evidence on its own behalf. *See Bergen, Johnson and Olson v. Verco Mfg. Co.*, 690 S.W.2d 115,118 (Tex. App. - El Paso 1985, writ ref'd n.r.e.); *Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.*, 880 S.W.2d 417, 420 (Tex. App. - Houston [14th Dist. ] 1993, writ denied) (the non-moving party to a motion for summary judgment may not rely on his own answers to the moving party's interrogatories to raise a material issue of fact). *But see Fisher v. Yates*, 953 S.W.2d 370 (Tex.App. - Texarkana 1997) (non-moving party to a motion for summary judgment may rely on its own answers to the moving party's interrogatories if the moving party incorporated the answers in its motion for summary judgement).

**2. Answering party may be impeached by change in answers**

A party who changes his answers to interrogatories may be impeached by the former answers, or any other prior inconsistent statement. *See Thomas v. Int'l Ins. Co.*, 527 S.W.2d 813, 820 (Tex. Civ. App. - Waco 1975, writ ref'd n.r.e.). However, if the change in answers is to interrogatories that inquire about matters described in Texas Rules of Civil Procedure 194.2(c) and (d) the change in neither admissible nor available for impeachment. TEX .R. CIV. P. 197.3.

**3. A summary of a party's voluminous answers to interrogatories is admissible in evidence**

An exhibit summarizing an opposing party's voluminous answers to interrogatories is admissible. *Jones v. Mendez*, 590 S.W.2d 826, 828 (Tex. Civ. App. - Houston [14<sup>th</sup> Dist.] 1979, no writ) (rejecting hearsay objection because summary was based on opposing party's own interrogatories and opposing party testified that the summary was accurate and correct).

#### **4. How to introduce and object to interrogatory answers**

Interrogatory questions and answers should be read by counsel in the same manner as the introduction of deposition testimony. Objections contained in the answers should be read after opposing counsel reads the question. The court should rule on the objection before the answer is read. If answers to interrogatories are used to support motions for summary judgment, a responding party should point out in his response the inadmissible character and reasons therefor of any interrogatory answers relied on by the opposing party.

#### **C. Admissions Under Texas Rule of Civil Procedure 198**

##### **1. Conclusive effect of admissions**

Any matter admitted under Rule 198 is conclusively established as to the party making the admission unless the court, on motion, permits withdrawal of or amendment to the admission. The factual matters admitted or deemed admitted are established as a matter of law. *See Reyes v. Int'l Metals Supply Co.*, 666 S.W.2d 622, 624 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1984, no writ). Thus, matters deemed admitted cannot be controverted by live testimony, deposition testimony, or summary judgment affidavits. *See Taylor v. Taylor*, 747 S.W.2d 940, 946 (Tex. App.-Amarillo 1988, writ denied); *see also Red Top Taxi Co. v. Snow*, 452 S.W.2d 772, 776 (Tex. Civ. App.-Corpus Christi 1970, no writ). For judicial admission to exist and be conclusive against a party, it must be, among other things, deliberate, clear and unequivocal. *See Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991).

Requests for admissions may relate to statements or opinions of fact, the application of law to fact, or the genuineness of documents. *See Shaw v. National County Mut. Fire Ins. Co.*, 723 S.W.2d 236, 237 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1986, no writ) (deemed admission on ultimate fact issue supported instructed verdict without supporting evidence); *see also Laycox v. Jaroma, Inc.*, 709 S.W.2d 2, 4 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.) (deemed admissions that vessel was "seaworthy" and that defendants were "not negligent" supported motion for summary judgment in favor of defendants despite objection that they called for ultimate conclusions and opinions of fact and law).

Matters are deemed admitted without necessity of court order if the requests are not answered or objected to within the time limits prescribed by the Rules or the court. *See Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989). Admissions, once deemed admitted, are judicial admissions, and a party against whom admissions are deemed admitted may not then introduce evidence controverting testimony in any legal proceeding related to the action. *See Gonzales v. Surplus Ins. Services*, 863 S.W.2d 96, 99 (Tex. Civ. App.-Beaumont 1993, writ denied).

The court has broad discretion in permitting the withdrawal of or amendment to admissions. *See Rosenthal v. National Terrasso Tile & Marble, Inc.*, 742 S.W.2d 55, 57 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1987, no writ). In addition, the court must find that the parties relying on the responses and

deemed admissions will not be unduly prejudiced by a withdrawal or amendment and that presentation of the merits of the action will be subserved thereby. The responding party bears the burden of showing that “good cause” exists for the grant of a withdrawal or amendment to an admission. *See City of Houston v. Riner*, 896 S.W.2d 317,319-20 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1995, writ denied).

## **2. Admissions as evidence**

Admissions made pursuant to Rule 198 may be introduced and read into evidence against the party making the admission. *See Welch v. Gammage*, 545 S.W.2d 223, 226 (Tex. Civ. App.-Austin 1976, writ ref’d n.r.e.).

In the case of deemed admissions based on a party’s failure to respond timely to a request for admissions, the offering party must prove proper service of the request and the opposing party’s failure to respond. *See Ruiz v. Nicolas Trevino Forwarding Agency Inc.*, 888 S.W.2d 86, 88 (Tex. App. - San Antonio 1994, no writ). The trial court cannot take judicial notice of papers in a case file which evidence the service and default. *See Hyde v. Apple*, 209 S.W.2d 804, 806-07 (Tex. Civ. App.-Eastland 1948, no writ).

A party may not offer or rely on his own admissions or denials either at trial or in a summary judgment proceeding. *See Jeffrey v. Larry Plotnick Co. Inc.*, 532 S.W.2d 99,102 (Tex. Civ. App. - Dallas 1975, no writ).

## **3. Admissions binding only on answering party**

Admissions may be used only against the party who makes same. *See Thalman v. Martin*, 635 S.W.2d 411, 414 (Tex. 1982); *see also F.D.I.C. v. Moore*, 846 S.W.2d 492, 496 (Tex. App.-Corpus Christi, 1993, writ denied). Admissions of a party who is an agent of another party may bind the principal. *See Dodds v. Charles Jourdan Boutique. Inc.*, 648 S.W.2d 763,767 (Tex. App. - Corpus Christi 1983, no writ).

Deemed admissions, however, are not binding against a party’s successor in interest. *See Texas Supply Center v. Daon Corp.*, 641 S.W.2d 335, 337-38 (Tex. App. - Dallas 1982, writ ref’d n.r.e.). Deemed admissions are also not binding against an intervenor who was never served with a request for admissions. *See Irvin v. Smith*, 497 S.W.2d 796, 798 (Tex. Civ. App. - Beaumont 1973, no writ).

## **4. Party can be impeached by change in answers to requests for admission**

If an answering party is allowed to change his response to a request for admission with leave of court, he maybe impeached by a showing of the former answers, as well as the basis for changing the answers. *See Thomas v. International Ins. Co.*, 527 S.W.2d 813, 820 (Tex. Civ. App.-Waco 1975, writ ref’d n.r.e.).



## **5. Denials cannot be admitted into evidence**

“ [W]hen an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal.” *See Newman v. Utica Nat’l Ins. Co.*, 868 S.W.2d 5, 8 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1993, writ denied). *See American Communications Telecommunications, Inc. v. Commerce North Bank*, 691 S.W.2d 44,48 (Tex. App. - San Antonio 1985, writ ref’d n.r.e.). It is error to admit the denials or refusals into evidence. *Id.* An unresponsive explanation volunteered in any answer to a request for admission constitutes surplusage and is not binding against the requesting party even if the requesting party introduces it and reads it in evidence. *See Carbonit Houston, Inc. v. Exchange Bank*, 628 S.W.2d 826, 829 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1982, writ ref’d n.r.e.); *but see Womble v. Wiley*, 209 S.W.2d 201, 204 (Tex. Civ. App. - Dallas 1948, no writ) (plaintiff read defendant’s responses to requests for admissions into evidence, including explanatory responses to requests relating to defendant’s alleged willful and intentional acts, which defendant neither admitted nor denied; plaintiff was held to be bound by those responses, and by urging a motion for instructed verdict, plaintiff necessarily assumed as true all evidence favorable to defendant, including the content of the explanatory responses which conclusively established defendant’s good faith excuse).

### **D. Requests For Disclosure Under Texas Rule of Civil Procedure 194**

Requests for disclosure should be introduced in the same manner as interrogatories. Responses to requests for disclosure under Rule 194.2(c) and (d) that have been changed by an amended or supplemental response are not admissible and may not be used for impeachment. TEX. R. CIV. P. 194.6

## **III. FORMER TESTIMONY**

The use of depositions taken in a different proceeding or former testimony is governed by Texas Rule of Evidence 804(b)(1). *See* TEX. R. CIV. P. 203.6(c) (governing depositions taken in a different proceeding).

### **A. Text of Rule**

Under Rule 804(b)(1) of the Texas Rules of Evidence, former testimony may be offered into evidence if (1) the witness is shown to be unavailable at trial, and (2) the party against whom the testimony is now offered (or a person with a similar interest) had an opportunity to develop the testimony by direct, cross, or re-direct examination.

“Unavailability as a witness” includes the following situations:

1. the declarant is exempted from testifying by a court ruling on the ground of privilege concerning the subject matter of his statement;

2. the declarant persists in refusing to testify concerning the subject matter of his statement despite a court order to do so;
3. the declarant testifies to lack of memory of the subject matter of his statement;
4. the declarant is unable to be present or to testify because of death or then existing physical or mental illness or infirmity; or
5. the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

TEX. R. EVID. 804(a). *See also Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975).

A declarant is not unavailable, however, if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying. TEX. R. EVID. 804(a).

**B. Harmonization of Texas Rule of Evidence 804 with Texas Rule of Civil Procedure 203.6(b)**

Although the requirement of Texas Rule of Evidence 804(b)(1) that a witness be unavailable appears to conflict with the language of Texas Rule of Civil Procedure 203.6 that the witness need not be available, there is no inconsistency. *See Hall v. White*, 525 S.W.2d 860 (Tex. 1975). Under Texas Rule of Evidence 801(4)(3), depositions taken and offered in accordance with the Texas Rules of Civil Procedure are not hearsay. *Id.* The Texas Rules of Civil Procedure are said to be construed as to produce harmony rather than discord. *See Ex parte Godeke*, 355 S.W.2d 701, 704 (Tex. 1962). Thus, under accepted rules of construction, it appears that the provisions of Texas Rule of Evidence 804(b)(1) regarding the need to establish the unavailability of the witness before former testimony may be used, are of no effect with regard to former testimony given in depositions taken in the course of the same proceeding.

**C. Texas State Court Interpretations - Texas Rule of Evidence 804(b)(1)**

In *Smith v. Smith*, 720 S.W.2d 586 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1986, no writ), a party's deposition testimony given in a prior case was allowed to be read into evidence on the basis that it is not hearsay. *Id.*, at 599-600. The court noted that such deposition testimony also may be admissible by a party opponent under Texas Rule of Evidence 801(d)(2), or as former testimony under Texas Rule of Evidence 804(a)(1) and 804(b)(1). *See id.* at 599. The Court of Appeals held that Texas Rule of Evidence 804(b)(1) "apparently" does not require that former testimony involve substantially the same parties and issues as a condition to admissibility. *See id.*

**IV. ADMISSIONS IN PLEADINGS**

An often under-utilized source of non-testimonial factual support is an opponent's legal pleadings, including live and superseded pleadings in the case being tried, and pleadings filed in another lawsuit.

### **A. Judicial Admissions of Fact in Live Pleadings**

Assertions of fact contained in live pleadings of a party are regarded as formal judicial admissions. *See Houston First American Sav. v. Mustek*, 650 S.W.2d 764, 766 (Tex. 1983). A judicially admitted fact is conclusively established without the introduction of the pleadings or presentation of other evidence. *See id.* When a fact is judicially admitted, the fact finder is precluded from finding any contrary facts. *See Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.-El Paso 1985, writ dismissed w.o.j.); *see also Concrete Constr. Supply, Inc. v. M.F.C., Inc.*, 636 S.W.2d 475, 477-78 (Tex. App.-Dallas 1982, no writ). The party who makes a judicial admission is also barred from disputing it. *See Gevinson v. Manhattan Constr. Co. of Okl.*, 449 S.W.2d 458, 466 (Tex. 1969); *see also Shafer v. Bedard*, 761 S.W.2d 126, 129 (Tex. App.-Dallas 1988, no writ); *see also Kennesaw Life & Acc. Ins. Co. v. Goss*, 694 S.W.2d 115, 117 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1985, writ refused n.r.e.).

#### **1. Factors governing application of judicial admissions**

The doctrine of judicial admissions is applied with caution. *See Thomas v. St. Joseph Hospital*, 618 S.W.2d 791, 794 (Tex. Civ. App.-Houston [1<sup>st</sup> Dist.] 1981, writ refused n.r.e.). The five factors governing general application of the judicial admissions doctrine are follows: (1) "the declaration relied upon was made during the course of judicial proceeding"; (2) "the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony"; (3) "the statement was deliberate, clear and unequivocal"; (4) the giving of conclusive effect to the declaration will be consistent with public policy; and (5) "the testimony must be such as relates to a fact upon which a judgment for the opposing party may be raised." *Griffin v. Superior Ins. Co.*, 338 S.W.2d 415 (Tex. 1960).

Some cases invoking the judicial admission doctrine are cited here. *See, e.g., Hobbs v. Hobbs*, 691 S.W.2d 75, 76 (Tex. App. - Dallas 1985, writ dismissed w.o.j.) (pleading stating trial date and fact that the party had notice of trial date was judicial admission precluding later contention that notice was not received); *Dallas Bank & Trust Co. v. Commonwealth Development Corp.*, 686 S.W.2d 226, 233 (Tex. Civ. App. -Dallas 1984, writ refused n.r.e.) (admission that beneficiary had a valid claim to the proceeds of a letter of credit, made timely demand for draft, and complied with terms of letter of credit); *Wagner v. Alvarado Independent School Dist.*, 598 S.W.2d 51, 53 (Tex. Civ. App.-Waco 1980, writ refused n.r.e.) (Plaintiff's pleadings that defendants were acting within course and scope of their employment as agents, servants, and employees were judicial admissions); *Ford Motor Credit Co. v. Garcia*, 595 S.W.2d 602, 606-07 (Tex. Civ. App.-Waco 1980, no writ) (Plaintiff's pleadings as to amounts paid and owing on installment contract were sufficient to set up security interest and offset in favor of defendant and defendant did not need to affirmatively plead such defense); *O'Hara v. Hexter*, 584 S.W.2d 310, 312 (Tex. Civ. App.-Dallas 1979, no writ) (Defendant's acknowledgment that he received a letter with checks provided basis for admissibility

without a predicate for authentication of the documents); *Hewlett v. Texas Alcoholic Beverage Commission*, 492 S.W.2d 686,688 (Tex. Civ. App.-Waco 1973, writ ref'd n.r.e.) (Petition alleging four instances where ordinance had been in effect constituted an admission of the existence of the ordinance in question and things which the ordinance prohibited); *Arrington v. Loveless*, 486 S.W.2d 604,605-06 (Tex. Civ. App.-Fort Worth 1972, no writ) (When defendant admitted entering into and knowledge of the terms of a lease agreement with plaintiff, it was unnecessary to offer proof of the execution of the lease or its terms); *Neff v. Johnson*, 391 S.W.2d 760, 762 (Tex. Civ. App.-Houston 1965, no writ) (Mother's petition for child support alleging dates when children were born constituted admission that the son was over 18 years of age and thus ineligible for support).

Cases rejecting the doctrine are cited here. *See e.g. Hercules Exploration Inc. v. Halliburton Co.*, 658 S.W.2d 716, 720 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.) (Plaintiffs allegation that "this suit is founded on an oral or a written contract" did not constitute judicial admission that the suit was not wholly based upon a contract in writing); *Houston First American Sav. v. Musick*, 650 S.W.2d 764, 768 n.5 (Tex. 1983) (Use of the term "purported" meant statement was not so clear and unequivocal as to rise to a judicial admission that the company had, indeed, appointed the trustee on that date); *McCollum v. Parkdale State Bank*, 566 S.W.2d 670, 674 (Tex. Civ. App.-Corpus Christi 1978, no writ) (Borrower's statement that "she was unable to generate an income to meet her financial obligations set out in the promissory note and security agreement" held not to mean necessarily that she did not make her payments).

## **2. Judicially admitted facts are binding only on the pleader**

Judicial admissions in pleadings are binding only on the pleader. *See Grimes v. Jalco, Inc.*, 630 S.W.2d 282, 284 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1981, writ ref'd n.r.e.).

## **3. Use of judicial admission doctrine does not bind a party to unfavorable statements by other party**

A party may, without reading it as evidence, avail himself of whatever admissions made by his adversary's pleadings without being bound by any statements which are favorable to the pleader. *See O'Hara v. Hexter*, 584 S.W.2d 310, 312 (Tex. Civ. App.-Dallas 1979, no writ); *see also Donald v. Bennett*, 415 S.W.2d 450, 455 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.).

There is case authority supporting the proposition that where a party introduces a pleading of his opponent into evidence without limitation, all allegations contained therein are conclusively established. *See Booker Custom Packing Co. Inc. v. Caravan Refrigerated Cargo. Inc.*, 575 S.W.2d 329, 330 (Tex. Civ. App.-Dallas 1978, no writ). Partially contrary authority holds that the party who introduces an opponent's pleadings is not conclusively bound thereby and may introduce evidence to disprove factual allegations contained in the pleadings. *See Pope v. Darcey*, 667 S.W.2d 270,274 (Tex. App. Houston [14<sup>th</sup> Dist.] 1984, writ ref'd n.r.e.); *see also Hackney v. Johnson*, 601 S.W.2d 523, 526-27 (Tex. Civ. App.-El Paso 1980, writ ref'd n.r.e.).

## **4. Conclusive effect of judicial admissions may be waived**

Facts judicially admitted in an opponent's pleadings are waived when they are retracted and evidence to the contrary is presented. *See Industrial Disposal Supply Co. v. Perryman Brothers Trash Service, Inc.*, 664 S.W.2d 756, 765 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Such waiver may occur by a litigant's failure to contend at trial that the pleadings are conclusive, and by treating the matter as a disputed issue by introducing evidence relating to the judicially admitted facts. *See id.* It is crucial that the party relying on his opponent's pleadings as judicial admissions of fact protect the record by objecting to the introduction of contradicting evidence and by objecting to the submission of any issue bearing on the fact admitted. *See Houston First American Sav. v. Musick*, 650 S.W.2d 764, 769 (Tex. 1983).

## **B. Statements of Fact in Alternative Pleadings are Not Ordinarily Considered Judicial Admissions**

Rule 48 of the Texas Rules of Civil Procedure provides that a party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both. *See TEX. R. CIV. P. 48.*

### **1. Plaintiff's pleadings**

Plaintiff pled causes of action under DTPA and for common law fraud based on defendant's alleged false advertisement for sale of a distributorship which touted a "firm buy-back agreement" and stated that the investment was "completely secured." In the alternative, plaintiff pled that he was entitled to recover on a "firm buy-back agreement," if such was actually satisfied by the terms of his contract with the defendant which called for re-purchase of materials rather than the return of investment. Plaintiff's alternative pleadings was held a judicial admission as to the existence of a firm buy-back agreement which would estop him from bringing his action in fraud. *See Dowlin v. NADW Marketing, Inc.*, 631 S.W.2d 726, 729 (Tex. 1982).

Plaintiff, who was in lead automobile in a four-vehicle collision, pled that a vehicle, which was struck by a bus, stopped behind his with such force as to knock it forward into plaintiff's vehicle. In the alternative, he pled that the bus driver failed to apply his brakes and that at the same time a fourth vehicle struck the bus from behind, giving added impetus to the bus as it struck the vehicle behind plaintiff's car. Plaintiff's alternative pleading held not to be a judicial admission opposed to his first or main plea. *See Dallas Transit Co. v. Young*, 370 S.W.2d 6, 11 (Tex. Civ. App. - Dallas 1963, writ ref'd n.r.e.).

### **2. Defendant's pleadings**

The general rule, as stated by the Texas Supreme Court, is that allegations in a defendant's answer which include a general denial may not be used by the plaintiff as an admission. *See Houston First Am. Savings v. Musick*, 650 S.W.2d 764, 769 n.5 (Tex. 1983). Thus, alternative pleadings or affirmative and inconsistent pleadings following the general denial may not be treated as judicial

admissions. *See Boswell v. Handley*, 397 S.W.2d 213, 216 (Tex. 1965). The reason for this rule is that under Rules 84 and 92 of the Texas Rules of Civil Procedure, a defendant has the right to file any number of special answers, even if they are conflicting. *See Hartford Acc. & Indem. Co. v. Spain*, 520 S.W.2d 853, 857 (Tex. Civ. App.-Tyler 1975, writ ref'd n.r.e.). If admissions contained in special answers could be taken as evidence of facts denied by defendants, then defendants would be denied this statutory right. *See id.*

However, statements in a counterclaim filed after a general denial can be held to constitute a judicial admission. *See Home Sav. Ass'n v. Guerra*, 720 S.W.2d 636, 640 (Tex. App.-San Antonio 1986), *modified on other grounds*, 733 S.W.2d 134 (Tex. 1987). Furthermore, "admissions" contained in a "cross-action" are formal judicial admissions and are not subject to the limitation that allegations in a defendant's answer in which a general denial is interposed may not be used as evidence to establish the plaintiffs case. *See City of College Station v. Seaback*, 594 S.W.2d 772, 777-78 (Tex. Civ. App.-Waco 1980, writ ref'd n.r.e.).

### **C. Live Pleadings Which Are Not Judicial Admissions May Be Introduced in Evidence**

It is well recognized that pleadings are not evidence. *See Davis v. Spraggins*, 449 S.W.2d 80, 83 (Tex. Civ. App.-Amarillo 1969, writ ref'd n.r.e.). However, a plaintiff's live pleadings which contain alleged "admissions," even if not so clear and unequivocal as to amount to judicial admissions, should be introduced into evidence if they are to be relied upon. *See Flintkote Supply Co. v. Thompson*, 607 S.W.2d 41, 43 (Tex. Civ. App.-Beaumont 1980, no writ). It has also been suggested that allegations in a defendant's live answer which follow a general denial may be introduced into evidence as ordinary admissions. *See Dallas Railway & Terminal Co. v. Hendricks*, 166 S.W.2d 116, 116-17 (Tex. 1942); *see also Galloway v. Nichols*, 269 S.W.2d 850, 851 (Tex. Civ. App.-Dallas 1954, no writ).

### **D. Admissions Against Interest in Abandoned or Superseded Pleadings**

When a pleading has been abandoned, superseded or amended, it ceases to be a judicial admission. *See Drake Ins. Co. Ltd. v. King*, 606 S.W.2d 812, 817 (Tex. 1980). The statements contained in such pleadings, however, can be introduced into evidence as admissions against the party on whose behalf it was filed. *See MBank Brenham, N.A. v. Barrera*, 721 S.W.2d 840, 842 (Tex. 1986).

Admissions by a party opponent are not hearsay. An admission in an abandoned pleading, when introduced into evidence, has the same legal effect as if the party making the admission had personally appeared and admitted the matters set forth therein. *See Lesikar v. Lesikar*, 251 S.W.2d 555, 558 (Tex. Civ. App.-Galveston 1952, writ ref'd n.r.e.). Like ordinary admissions, admissions in abandoned or superseded pleadings are open to explanation or contradiction by the party making them. *See Lunsford v. Sage, Inc. of Dallas*, 438 S.W.2d 615, 618-19 (Tex. Civ. App.-Houston [1<sup>st</sup> Dist.] 1969, writ ref'd n.r.e.). Admissions contained in abandoned or superseded pleadings cannot, however, be judicially noticed at trial or on appeal. *See Corsi v. Nolana Development Ass'n*, 674

S.W.2d 874, 878 (Tex. App.-Corpus Christi 1984), *rev'd on other grounds*, 682 S.W.2d 246 (Tex. 1984).

### **E. Opponent's Pleadings in Other Cases**

Pleadings in other actions which contain statements inconsistent with a party's present position are receivable as admissions. *See St. Paul Fire & Marine Ins. Co. v. Mprphree*, 357 S.W.2d 744, 747 (Tex. 1962); *see also Sell v. C. B. Smith Volkswagen, Inc.*, 611 S.W.2d 897, 901 (Tex. Civ. App.-Houston [14<sup>th</sup> Dist.] 1981, writ ref'd n.r.e.); *Wise v. Haes*, 103 S.W.2d 477, 482-83 (Tex. Civ. App.-Texarkana 1937, no writ) (affidavit attached and incorporated into pleadings because "admission[s] by adoption"). Such pleadings are otherwise inadmissible. *See Irwin v. Par-Oil Well Servicing Co.*, 349 S.W.2d 277, 278 (Tex. Civ. App.-Texarkana 1961, writ ref'd n.r.e.). They are also not evidence per se of the facts stated therein. *See Wood v. Paulus*, 524 S.W.2d 749, 759 (Tex. Civ. App.-Corpus Christi 1975, writ ref'd n.r.e.).

Before admissions contained in a pleading filed in another case are admitted into evidence, however, a showing must be made that: (1) the person who filed the pleading in question is the same person against whom the admissions are sought to be fled; and (2) that the pleading was filed in the other action by that party or by his authorized attorney or agent. *Wilson v. Armer Oil Co.*, 496 S.W.2d 702, 707 (Tex. Civ. App.-Fort Worth 1973, no writ). Such a predicate may be laid through affidavits, depositions, admissions or live testimony. Although certified copies of pleadings filed in other cases are admissible pursuant to Texas Rule of Evidence 902(4), a predicate establishing the identity of the parties or authorization for the filing of the pleadings must still be made.

## **VI. JUDICIAL NOTICE**

Judicial notice is based upon the theory that it is not expedient to require formal proof of a fact that is within the common knowledge of the community or that may be easily determined from reliable sources. *See Skinner v. HCC Credit Co. of Arlington, Inc.*, 498 S.W.2d 708, 711 (Tex. Civ. App.-Fort Worth 1973, no writ).

The Texas Rules of Evidence provide that "the court shall instruct the jury to accept as conclusive any fact judicially noticed." TEX. R. EVID. 201(g).

A fact is subject to judicial notice if it is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. "The proper test is whether the fact to be judicially noticed is verifiably certain." *Levit v. Adams*, 841 S.W.2d 478, 485 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1992), *rev'd on other grounds*, 850 S.W.2d 469 (Tex. 1993) (quoting *Eagle Trucking Co. v. Texas Bitulithic Co.*, 612 S.W.2d 503, 506 (1981)). The personal knowledge of a judge is not "judicial knowledge." *See Eagle Trucking Co. v. Texas Bitulithic Co.*, 612 S.W.2d 503, 506 (Tex. 1981) (court may not take notice of fact that an accident occurred outside a statutorily defined "business or residence district"). Therefore, under this test, a judge may personally know a fact of which he may not properly take judicial notice. Moreover, the fact that a matter is the subject of widespread publicity does not necessarily make it a proper subject of judicial notice. *See*

*United States v. Baker*, 641 F.2d 1311, 1316 (9th Cir.1981) (court refused to notice a party's knowledge of an injunction as the news media cannot be said to be "unquestionably accurate").

In taking judicial notice, a court may resort to any source it deems trustworthy, such as books, maps, calendars. Since such sources are not considered evidence of the fact established, they are not subject to the rules of evidence, and therefore, they need not be offered into evidence before they are considered by the court. *See Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 535 (Tex. Civ. App.-Amarillo 1980, writ ref'd n.r.e.).

Judicial notice is mandatory if requested by a party and [the court is] supplied with the necessary information." *Office of Public Utility Counsel v. Public Utility Com'n of Texas*, 878 S.W.2d 598, 600 (Tex. 1994) (quoting TEX. R. EVID. 201B(2)(d)). Further, a court may take judicial notice of a matter for the first time on appeal. *See Wright v. Wright*, 867 S.W.2d 807, 817 n.6 (Tex. App.-El Paso 1993, writ denied).

#### **A. Rule 201 - Judicial Notice of Adjudicative Facts**

Rule 201 governs only judicial notice of adjudicative facts. TEX. R. EVID. 201(a). "Adjudicative facts" are those facts which are developed in a particular case. *U.S. v. Bowers*, 660 F.2d 527, 531 (5<sup>th</sup> Cir.1981). Adjudicative facts relate to the parties, their activities, their properties, their businesses, etc. In order for an adjudicative fact to be judicially noticed, it cannot be "subject to reasonable dispute." TEX. R. EVID. 201(b). The "adjudicative fact" is the threshold issue in examining the propriety of judicial notice, thus, great care should be taken by the court in identifying the fact which the court is noticing as well as the setting forth of the court's justification in doing so. *See Colonial Leasing Co. of New England v. Logistics Control Group, Intern.* 762 F.2d 454, 459 (5<sup>th</sup> Cir.1985).

Conversely, "legislative facts" are "established truths, facts or pronouncements that do not change from case to case but apply universally...." *Bowers*, 660 F.2d at 531; *Usery v. Tamiami Trail Tours Inc.*, 531 F.2d 224, 244-45 n.52 (5<sup>th</sup> Cir. 1976) (Brown, J., concurring). Unlike with "adjudicative facts," a court cannot commit reversible error if it fails to instruct a jury on any "legislative fact." *See Bowers*, 660 F.2d at 531. While no state or federal rule deals with judicial notice of "legislative facts," the Advisory Committee on the Federal Rules of Evidence has suggested the omission of a specific evidentiary rule on "legislative facts" implies a different, more relaxed, standard applies for their notice. That is, the fact need not be within the common knowledge of the average community. *See* 56 F.R.D. 201.

While a court has the discretion to take judicial notice of legislative facts, it is not required to do so. *See Perkins v. State*, 905 S.W.2d 452, 453 (Tex. App.-El Paso 1995, writ ref'd).

#### **1. Standard for Judicial Notice**

A judicially noticed fact must be one which is not subject to reasonable dispute. It must be either: (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In other words, the proper test for judicial notice is: “Is the fact verifiably certain?” *Eagle Trucking Co. v. Texas Bitulithic Co.*, 612 S.W.2d 503, 506 (Tex. 1981).

## **2. Permissive Judicial Notice**

Rule 201(c) of the Texas Rules of Evidence provides that a court may take judicial notice whether requested to or not. However, the court must notify the parties that it has done so. *See McDaniel v. Hale*, 893 S.W.2d 652, 673 (Tex. App.-Amarillo 1994, writ denied). Whether a court properly exercises its discretion “depends on the nature of subject, the issue involved, and the apparent justice of the case.” *See State v. Arkansas Fuel Oil Co.*, 268 S.W.2d 311, 319 (Tex. Civ. App.-Austin 1954), *rev’d on other grounds*, 280 S.W.2d 723 (Tex. 1955).

## **3. Mandatory Judicial Notice**

“A court shall take judicial notice if requested by a party and supplied with the necessary information.” TEX. R. EVID. 201(d). Some information must be submitted to the court as a basis for taking judicial notice under Rule 201(d). *See Wagner & Brown v. E.W. Moran Drilling Co. Inc.*, 702 S.W.2d 760, 773 (Tex. App.-Fort Worth 1986, no writ).

The Rules do not specify a time for making a request for judicial notice. Texas Rule of Evidence 201(f) provides that judicial notice “may be taken at any stage of the proceeding,” however, one appellate court has held that appellate courts should be reluctant to take judicial notice when the trial court was not requested to do so and was not given the opportunity to examine the necessary source material. *See Trinity Universal Ins. Co. v. Cowan*, 906 S.W.2d 124,130 n.3 (Tex. App.-Austin 1995) (citing *Sparkman v. Maxwell*, 519 S.W.2d 852, 855 (Tex. 1976), *rev’d on other grounds*, 945 S.W.2d 819 (Tex. 1997)).

A ruling must be obtained on a request for judicial notice in order to preserve error for appeal. *See Lopez v. City Towing Assoc., Inc.*, 754 S.W.2d 254, 263 (Tex. App.-San Antonio 1988, writ denied).

## **4. Challenging Judicial Notice**

“A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.” TEX. R. EVID. 201(e). In the absence of prior notification, the request to be heard may be made after judicial notice has been taken.

Where a party has advance warning, but does not challenge the material offered for judicial notice, the trial court is correct in taking notice of the requested fact, provided it is a proper subject of such notice. *See Skinner v. HCC Credit Co.*, 498 S.W.2d 708, 711 (Tex. Civ. App. - Fort Worth 1973, no writ).

The only effect of taking judicial notice is to relieve one of the parties of the burden of introducing evidence. It does not prevent the other party from introducing evidence to dispute the noticed fact. *See Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 302 (1937); *see also Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc.*, 754 S.W.2d 764, 767 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1988, writ denied).

## 5. Examples of Facts Subject to Judicial Notice

The area of judicial notice is constantly expanding because of the general public's increased base of knowledge. Accordingly, some facts of which proof had been traditionally required in the past may now be the subject of judicial notice. *See Clement v. McNeil*, 328 S.W.2d 823, 824 (Tex. Civ. App.-Waco 1959, no writ). However, the following cases are representative of the types of facts, adjudicative or legislative, which have, and have not been, judicially noticed by Texas courts.

- a. **Pain and Suffering.** *See City of Austin v. Selter*, 415 S.W.2d 489, 501 (Tex. Civ. App.-Austin 1967, writ ref'd n.r.e.) (no need to prove pain and suffering which constitute the mental anguish of a drowning victim).
- b. **Bias.** *See Medina v. El Paso Mach. & Steel Works, Inc.*, 740 S.W.2d 99, 101 (Tex. App.-El Paso 1987, no writ) (Judicial notice can be taken of the fact that juries are more apt to render a verdict against a defendant for a large sum if they know that the verdict will ultimately be paid by an insurance company).
- c. **Economics.** *See Fisher v. Westinghouse Credit Corp.*, 760 S.W.2d 802, 806 (Tex. App.-Dallas 1988, no writ) (the interest rate ceilings issued by the Consumer Credit Commission); *Wagner & Brown v. E.W. Moran Drilling Co.*, 702 S.W.2d 760, 773 (Tex. App.-Fort Worth 1986, no writ) (reference to Federal Reserve Bulletins makes the discount rate on 90-day commercial paper a proper subject for judicial notice); *Robinson v. Robinson*, 694 S.W.2d 569, 572 (Tex. App.-Corpus Christi 1985, no writ) (common knowledge that the cost of supporting a child increases each year); *Fidelity & Cas. Co. of New York v. Central Bank of Houston*, 672 S.W.2d 641, 649 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1984, writ ref'd n.r.e.) (historic market interest rates are not a proper subject for judicial notice); *Jackman v. Jackman*, 533 S.W.2d 361, 364 (Tex. Civ. App.-San Antonio 1975, no writ) (emphasis added) (existence of spiraling inflation could be judicially noticed, but "the extent of such inflation may not be a proper subject of judicial notice."); *Hardison v. Beard*, 430 S.W.2d 53, 56 (Tex. Civ. App. - Dallas, 1968, writ ref'd n.r.e.) (increases in the cost of living); *In re Sleepy Valley Inc. v. Leisure Valley Inc.*, 93 B.R. 925, 931(W.D. Tex. 1988) (state of the economy in Texas);

*Floca v. Homecare Health Services Inc.*, 845 F.2d 108, 112 (5<sup>th</sup> Cir.1988) (availability of nursing jobs in a particular geographic area)

- d. **Qualities and properties of matter.** See *Atchison T. & S.F. Ry. Co. v. Denton*, 475 S.W.2d 821, 828 (Tex. Civ. App.-Amarillo 1971, writ ref'd n.r.e.) (judicial notice of the inherently dangerous nature of liquified petroleum gas); *State Highway Dept. v. Kloppenberg*, 371 S.W.2d 793, 795 (Tex. Civ. App.-Houston 1963, writ ref'd n.r.e.) (judicial notice of the fact that steel attracts lightning).
- e. **Scientific facts and principles.** See *Eikel v. Corry*, 687 S.W.2d 488, 489 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1985, writ ref'd n.r.e.) (reaction time may be properly noticed in an automobile accident case, but the correlation between minimum stopping distance and speed can not be judicially noticed); *Searcy v. Sellers*, 470 S.W.2d 103, 110 (Tex. Civ. App.-Amarillo 1971, writ ref'd n.r.e.) (judicial notice that skidding of an auto results in loss of control by the driver and it takes  $\frac{3}{4}$  of a second for a driver to react).
- f. **Geography.** See *Barber v. Intercoast Jobbers and Brokers*, 417 S.W.2d 154, 157 (Tex. 1967) (The fact that a city is located in a particular county can judicially noticed); *Humes v. Hallmark*, 895 S.W.2d 475, 478 (Tex. App.-Austin 1995, no writ) (judicial notice of the proximity of the location of personal property to cities in an adjoining county in determining that latter cities were within a reasonable area surrounding the precise location of the conversion for purposes of proving market value at the place of the conversion); *Wright v. Wright*, 867 S.W.2d 807, 817 (Tex. App.-El Paso 1993, writ denied) (judicial notice of the distance between a party's place of residence and the children's place of residence); *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770, 774 (Tex. App.-Beaumont 1992, writ denied) (judicial notice of the locations of cities, counties, boundaries, dimensions and distances because geographical facts such as these are readily ascertainable and verifiable); *Id.* (judicial notice of whether certain cities are "metropolitan areas"); *Apostolic Church v. American Honda Motor Co. Inc.*, 833 S.W.2d 553, 555 (Tex. App.-Tyler 1992, writ denied)(whether Highway 96 North links a City of Center, Texas and neighboring Shelby County's Community of Tahoka); *National Resort Communities, Inc. v. Cain*, 479 S.W.2d 341, 349 (Tex. Civ. App.-Austin 1972), *rev'd on other grounds*, 526 S.W.2d 510 (Tex. 1975) (A specific river can be judicially noticed as a recognized navigable stream. Courts may take judicial notice of the natural features of the state including the location, courses, and history of rivers). *But see Furr's Supermarket*,

*Inc. v. Williams*, 664 S.W.2d 154, 158 (Tex. App.-Amarillo 1983, no writ) (boundaries of a county can be judicially noticed, but courts cannot notice that a county market was property located on the county boundary).

- g. Census reports.** See *Hooten v. Enrriquez*, 863 S.W.2d 522, 530 n.11 (Tex. App.-El Paso 1993, no writ) (judicial notice of a county's population).
- h. Weather.** See *McDaniel v. Yarbrough*, 866 S.W.2d 665, 671 n.1 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1993), *reversed & remanded*, 898 S.W.2d 251(Tex.1995) (judicial notice that on March 4, 1992, the Houston area experienced some of the worst flooding in its history).
- i. Population.** See *Projects American Corp. v. Hilliard*, 711 S.W.2d 386, 388-89 (Tex. App.-Tyler 1986, no writ) (judicial notice of fact that a county had population of less than 190,000 inhabitants for purposes of determining extrajudicial authority of city within county); *State v. City of Denton*, 542 S.W.2d 224, 229 (Tex. Civ. App.-Fort Worth 1976, writ ref'd n.r.e.) (judicial notice that the population of Denton County as stated in the last Federal Census was considerably less than 1,500,000); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 506 (1989) (judicial notice that the vast majority of the minority population in Richmond, Virginia is black).
- j. Intoxication.** See *Malek v. Miller Brewing, Co.*, 749 S.W.2d 521, 524 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1988, writ denied) (It is common knowledge that beer is intoxicating and intoxicated persons are unfit to drive).
- k. Health.** See *Farm Services, Inc. v. Gonzales*, 756 S.W.2d 747, 754 (Tex. App.-Corpus Christi 1988, writ denied) (A court can take judicial notice that a 47-year-old man has a life expectancy of 27.7 years); *Carter v. Service Life & Casual Ins. Co.*, 703 S.W.2d 349, 351-52 (Tex. App.-Corpus Christi 1985, no writ) (A court cannot take judicial notice of "degrees of illness, disease, or impairment, probable effects of treatment, or likelihood of recovery."); *Travis Life Ins. Co. v. Rodriguez*, 326 S.W.2d 256, 258 (Tex. Civ. App.-Austin, writ ref'd n.r.e.)(per curiam) (It is a matter of common knowledge that a person suffering from leukemia is not in good health).
- l. Habits.** See *Wal-Mart Stores, Inc. v. Street*, 761 S.W.2d 587, 590 (Tex. App.-Fort Worth 1988, no writ) (judicial notice of the travel

habits of a witness when determining a convenient place for deposition questioned in dicta).

- m. Language, words, phrases, and abbreviations.** *See Butts Retail Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770, 774 (Tex. App.-Beaumont 1992, writ denied) (In determining whether the term “metropolitan area” was sufficiently precise to uphold a covenant not to compete, the court of appeals would not take judicial notice that the cities of Beaumont, Port Arthur, and Orange, Texas, are in the same metropolitan area. “[A] judicially noticed fact must be one not subject to reasonable dispute.”); *Allied General Agency, Inc. v. Moody*, 788 S.W.2d 601, 607 (Tex. App.-Dallas, 1990, writ denied) (The definition of the word “promotion” as given in the Oxford, Webster, and Merriam dictionaries has been judicially noticed to determine whether a vehicle was used for “promotional purposes” as required by the insurance policy); *McBroome-Bennett Plumbing Inc. v. Villa France, Inc.*, 515 S.W.2d 32, 41 (Tex Civ. App.-Dallas 1974, writ ref’d n.r.e.) (Courts have noticed that the term “cross-action” is commonly used by Texas lawyers to designate the type of pleading formally termed a “counter-claim” by the Texas Rules of Civil Procedure Rule 197); *Hufstedler v. Sides*, 165 S.W.2d 1006, 1009 (Tex. Civ. App.-Amarillo 1942, writ ref’d) (Courts have judicially noticed that the term “vice-president” means an officer who performs the functions of the president if the latter cannot act).
- n. Time, days, and dates.** *See Higinbotham v. General Life & Accident Ins. Co.*, 796 S.W.2d 695, 696 (Tex. 1990) (The Texas Supreme Court held that a trial court could properly take judicial notice that 12:01 p.m. on March 18, 1986 was on a Tuesday that was not a statutory holiday); *City of Garland By and Through Mayor and City Council v. Louton*, 683 S.W.2d 725, 726 (Tex. App.-Dallas 1984), *rev’d on other grounds*, 691 S.W.2d 603 (Tex. 1985) (An appellate court took judicial notice that the City of Garland held a municipal election on January 21, 1984); *Rale v. Lile*, 861 S.W.2d 102, 105 (Tex. App.-Waco 1993, writ denied) (The court of appeals could take judicial notice that the Commissioners’ Court of Johnson County did not designate Columbus Day as an official county holiday in 1992, and that the courthouse was open for business on that day); *Sonics Intern Inc. v. Dorchester Enterprises, Inc.*, 593 S.W.2d 390, 394 (Tex. App.-Dallas 1980, no writ) (The court of appeals judicially noticed that juries are available in Dallas County forty-eight weeks in the year).

- o. **Weights, measures, and values.** *See Haden Co. Inc. v. Mixers, Inc.*, 667 S.W.2d 316, 318 (Tex. App.-Dallas 1984, no writ) (judicial notice that (‘) refers to feet and (“) refers to inches for purposes of determining whether a lien affidavit gave a meaningful description of materials furnished); *Gray v. Vandver*, 623 S.W.2d 172,174 (Tex. App.-Beaumont 1981, no writ) (It is common knowledge that land values have gone up in Texas since the days of the Republic).
  
- p. **Job duties.** *See Seaway Co., Inc. v. Attorney General*, 375 S.W.2d 923, 939 (Tex. Civ. App.-Houston 1964, writ ref’d n.r.e.) (Courts judicially know that surveyors can determine line of mean, low tide and vegetation line); *Wichita Coca-Cola Bottling Co. v. Tyler*, 288 S.W.2d 903, 905 (Tex. Civ. App.-Fort Worth 1956, writ ref’d n.r.e.) (Courts may take judicial notice that persons engaged in the soft drink business are not disposed to sabotage one another’s product); *Muniz v. Panhandle & Santa Fe Ry. Co.*, 285 S.W.2d 809, 816 (Tex. Civ. App.-Amarillo 1955, writ ref’d n.r.e.) (It is common knowledge that every railroad crossing in use is a place of danger).
  
- q. **Common industrial practices.** *See Dalon v. City of DeSoto*, 852 S.W.2d 530, 535 (Tex. App.-Dallas 1992, writ denied) (trial court within its discretion to take judicial notice of city charter provision); *Hernandez v. Houston Lighting & Power Co.*, 795 S.W.2d 775, 776-77 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1990, no writ) (A court took judicial notice of the National Electric Code in addressing the issue of compliance with the code’s standards); *Short v. W.T. Carter & Bro.*, 126 S.W.2d 953, 959 (Tex. 1938) (“Judicial notice may be taken of such uniform and continued practice of the head of an executive department of the state government in construing and administering a law which it is his duty to execute.”); *Tennant v. Dunn*, 110 S.W.2d 53, 58 (Tex. Comm. App. 1937) (common practice in an industry to pay royalties or other interests); *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1209 (5<sup>th</sup> Cir. 1988) (judicial notice of operating considerations unique to oil and gas wells).
  
- r. **Customary attorneys’ fees.** *See TEX. CIV. PRAC. & REM. CODE ANN. § 38.004* (Vernon 1997) (Judicial notice may be taken of usual and customary attorneys’ fees for a particular case); *Inwood Dad’s Club v. Aldine School Dist.*, 882 S.W.2d 532, 542 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1994, no writ) (a trial court was entitled to take judicial notice of the usual and customary attorney’s fees without additional evidence); *Cap Rock Elec. Co-op, Inc. v. Texas Utility Elec. Co.*, 874 S.W.2d 92,101 (Tex. App.-El Paso 1994, no writ) (A trial court may take judicial notice of the usual and

customary attorney's fees for the legal services provided by a movant's attorneys, even if no request is made for the trial court to do so and the trial court does not formally announce that it has done so. Further, the appellate court may presume that the trial court, in support of its judgment, took such judicial notice.); *Baker v. Kunzman*, 873 S.W.2d 753, 756 (Tex. App.-Tyler 1994, writ denied) (The trial court, even without request, is authorized by § 38.004 of the Civil Practice and Remedies Code to take judicial notice of the usual and customary fees, as well as the contents of the case file, in awarding attorney's fees); *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990) (In a non jury trial, "the trial court's own proceedings together with the fact that it may take judicial notice of usual and customary fees constitute some evidence to support the award of appellate attorney's fees."); *Hall Const. Co., Inc. v. Texas Industries, Inc.*, 748 S.W.2d 533, 538 (Tex. App.-Dallas 1988, no writ) (same); *Palmer v. Liles*, 677 S.W.2d 661, 666 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.) (court refused request to take judicial notice of reasonableness of attorneys' fees based solely on statement made in response to a summary judgment motion); *Bethel v. Butler Drilling Co.*, 635 S.W.2d 834, 840 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1982, writ ref'd n.r.e.) (Section 38.004 of the Texas Civil Practice and Remedies Code authorizes the trial court to take judicial notice of attorney's fees in a non jury trial, however, the taking of such judicial notice is not conclusive proof of the amount of fees if controverting evidence is presented); *Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc.*, 754 S.W.2d 764, 767 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1988, writ denied) (same).

- s. **Judicial proceedings.** See *Surgitek Inc. v. Adams*, 955 S.W.2d 884, 889 n.4 (Tex. App.-Corpus Christ 1997, no writ) (An appellate court must take judicial notice of pleadings in related federal multi-jurisdictional litigation, although such pleadings are not dispositive of the appellate courts' determination, if the requesting party provides the court copies of the pleadings); *Southwestern Gas Pipeline, Inc. v. Scaling*, 870 S.W.2d 180,186 (Tex. App.-Fort Worth 1994, writ denied) (An appellate court may take judicial notice of a pending bankruptcy case even though the trial court was not requested to do so, and even though the trial court did not announce that it had done so); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 695 (Tex. App.-Texarkana 1991, writ denied) (The trial court could take judicial notice of a non-party asbestos manufacturer's insolvency because its bankruptcy status was capable of accurate and ready determination by inquiry to the bankruptcy court); *Stowe v. State*, 745 S.W.2d 568, 570 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1988, no writ)

(statements made by prospective jurors during voir dire not transcribed and thus not part of appellate record); *but see Culverhouse v. State*, 755 S.W.2d 856, 962 (Tex. Crim. App. 1988), *cert. denied*, 488 U.S. 863 (1988) (trial judge took judicial notice of the conduct of a defendant in a prior trial before the same judge); *Traweek v. Larkin*, 708 S.W.2d 942, 946-47 (Tex. App. - Tyler 1986, writ ref'd n.r.e.) (A trial court cannot take judicial notice of testimony taken at a previous trial unless such testimony is admitted into evidence at the current trial).

- t. **Judicial records.** *See Harris v. Borne*, 933 S.W.2d 535, 537 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1995, no writ) (appellate court may take judicial notice of its own practice); *Sledge v. Mullin*, 927 S.W.2d 89, 93 (Tex. App.-Fort Worth 1996, no writ) (On review of a summary judgment, court of appeals can take judicial notice of its own unpublished opinion from a prior appeal on the same basic issue); *Medeles v. Nunez*, 923 S.W.2d 659, 661 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1996, writ denied) (court can take judicial notice of a return of service), *overruled on other grounds, Barker CATV Const., Inc. v. Ampro, Inc.*, 989 S.W.2d 789 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1999); *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App. - Austin 1994, no writ) (“court may take judicial notice that a pleading has been filed in the cause ... or of the law of another jurisdiction,....” A court may not, “however, take judicial notice of the truth of allegations in its records.”); *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1993, writ denied) (trial court may take judicial notice of its files); *Hanners v. State Bar of Texas*, 860 S.W.2d 903, 908 (Tex. App. - Dallas 1993, no writ) (trial court can take judicial notice of a notice letter in their files informing a party of the trial date); *Vannerson v. Vannerson*, 857 S.W.2d 659, 670 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1993, writ denied) (when the inventory was filed and included in the papers before the trial court, court could take judicial notice of what was contained in the file, and did not err in relying upon it in reaching its conclusions of law); *Hartley v. Coker*, 843 S.W.2d 743, 746 (Tex. App.-Corpus Christ 1992, no writ) (Appellate courts may take judicial notice of facts judicially known to trial courts); *Langdale v. Villamil*, 813 S.W.2d 187,190 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1991, no writ) (“appellate court may take notice of facts not noticed by a trial court.”); *Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.-Dallas 1988, writ denied) (trial court can take judicial notice of the contents of its file with or without the request of a party); *Klein v. Dimock*, 705 S.W.2d 408, 410-11 (Tex. App.-Fort Worth 1986, writ ref'd n.r.e.) (Same); *McCurry v. Aetna Cas. and Sur. Co.*, 742 S.W.2d 863, 867 (Tex. App.-Corpus Christi

1987, writ denied) (trial court cannot take judicial notice of the record or judgment in another case previously tried by it, except where the case involved the same subject matter between the same or practically the same parties); *Kay v. Sandler*, 718 S.W.2d 872, 873-74 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1986, writ ref'd n.r.e.) (appellate court can take judicial knowledge of its own records and judgments rendered in cases involving the same subject matter); *Muller v. Leyendecker*, 697 S.W.2d 668, 675 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.) (Same); *Gardner v. Martin*, 345 S.W.2d 274, 276 (Tex. 1961) (trial court may judicially notice records of its own court in a case involving same subject matter and between same or practically same parties); *Garber v. Sir Speedy, Inc.*, 930 F.Supp. 267, 272 (N.D. Tex. 1995, *aff'd* by *Garber v. Sir Speedy, Inc.* 91 F.3d 137 (5<sup>th</sup> Cir. 1996)) (court can take judicial notice of the fact that an arbitrable dispute was never resolved). *But see Bethel v. Norman Furniture Co. Inc.*, 756 S.W.2d 6, 9 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1988, no writ) (court may not judicially notice records of another court); *Fajkus v. First Nat'l Bank of Giddings*, 735 S.W.2d 882, 887 (Tex. App.-Austin 1987, writ denied) (same); *National County Mut. Fire Ins. Co. v. Hood*, 693 S.W.2d 638,639 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1985, no writ) (same); *Culver v. Pickens*, 176 S.W.2d 167,171 (Tex. 1943) (same).

## **B. Rule 202 - Judicial Notice of Laws of Other States**

Rule 202 of the Texas Rules of Evidence governs the taking of judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions and common law of every other state, territory or jurisdiction of the United States. The failure to plead sister-state law does not preclude a court from judicially noticing that law.<sup>3</sup> Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary. *See* TEX. R. EVID. 202.

### **1. When judicial notice is mandatory and when it is discretionary**

Any party requesting that judicial notice be taken of the laws of other states must furnish the court with sufficient information to enable it to comply with the request. A broad, general request to take judicial notice of the common law, public statutes, and court decisions of another state is insufficient. *See Knops v. Knops*, 763 S.W.2d 864, 867, (Tex. App.-San Antonio 1988, no writ); *see also Ewing v. Ewing*, 739 S.W.2d 470,472 (Tex. App.-Corpus Christi 1987, no writ). In addition,

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<sup>3</sup> Although, in the absence of proof to the contrary, the laws of a foreign country, or of another state, are presumed to be the same as the laws of Texas. *See Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.-Austin 1984, writ ref'd n.r.e.).

the requesting party shall give all other parties such notice, if any, as the court deems necessary to enable the adverse parties to respond to the request. *See* TEX. R. EVID. 202.

Rule 202 provides that a court “may” take judicial notice of the laws of other states “upon its own motion.” However, the trial court “shall” take judicial notice of the laws of other states if the moving party furnishes the court with “sufficient information” to enable it to comply with the request. TEX. R. EVID. 202; *see also Holden v. Capri Lighting, Inc.*, 960 S.W.2d 831, 833 (Tex. App.-Amarillo 1997, no writ).

## **2. Opportunity to be heard, time for taking judicial notice, effect**

Upon a timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice. TEX. R. EVID. 202. In the absence of prior notification, such request may be made after judicial notice has been taken. Judicial notice of the law of other states may be taken at any stage of the proceeding, and the court’s determination is subject to review as a ruling on a question of law.

## **3. Court interpretations**

Texas Rule of Evidence 202 has been interpreted to allow an appellate court to go beyond the trial court record for “evidence” of the laws of a sister state, and on its own motion, ascertain such laws from readily available and easily accessible sources. *See Nubine v. State*, 721 S.W.2d 430, 434 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1986, pet. ref’d).

A court may take judicial notice of federal law but this is not mandatory. *See Dauherty v. Southern Pacific Transp. Co.*, 772 S.W.2d 81, 83 (Tex. 1989). Rule 202 has also been cited for the proposition that a trial court, on its own motion, may take judicial notice of court decisions of any jurisdiction of the United States. *See Life Ins. Co. of Southwest v. Brister*, 722 S.W.2d 764, 777 n.5 (Tex. App. - Fort Worth 1986, no writ).

### **C. Rule 203 - Judicial Notice of the Laws of Foreign Countries**

A party intending to raise an issue concerning the law of a foreign country must give notice in pleadings or other reasonable written notice to the other party. TEX. R. EVID. 203; *see Trailways, Inc. v. Clark*, 794 S.W.2d 479, 484 (Tex. App.-Corpus Christi 1990, writ denied) (filing of letter from Mexican attorney on Mexican law put court and opposing party on notice of use of Mexican law). In addition, the requesting party must furnish all parties with copies of any written materials or sources that party intends to use as proof of the foreign law at least 30 days prior to trial. If such materials are originally written in a language other than English, the party must furnish all parties with a copy of the foreign language text and an English translation. The court, in determining foreign law, may consider any material or source whether submitted by a party and whether it is admissible under the Rules of Evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, all parties are

entitled to notice and a reasonable opportunity to comment on the sources and to submit further materials.

The court, and not a jury, determines the laws of foreign countries. *See Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 525 (Tex. App.-Texarkana 1993, writ denied). “In Texas, questions of foreign law are mixed questions of law and fact. Rule 203 of the Rules of Evidence is a hybrid rule, which ultimately the court decides as a matter of law.” *Gardner v. Best Western Intern Inc.*, 929 S.W.2d 474,483 (Tex. App.-Texarkana 1996, writ denied). Rule 203 provides that in determining the laws of a foreign country, the court can consider any material or source, whether submitted by a party or whether admissible under the rules of evidence, including affidavits, testimony, briefs, and treaties. *See Dankowski v. Dankowski*, 922 S.W.2d 298 (Tex. App.-Fort Worth, 1996, writ denied) (using an attorney’s affidavit establishing that the parties were not validly divorced in Taiwan in a subsequent Texas divorce action).

Failing to object to the application of foreign law at any time during the proceeding constitutes a waiver of any complaint about the trial court’s use of the foreign law. *See Keene Corp. v. Rogers*, 863 S.W.2d 168,175 (Tex. App.-Texarkana 1993, no writ).

#### **D. Rule 204 - Judicial Notice of Texas City and County Ordinances**

Rule 204 states that judicial notice “may” be taken of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Like Rule 202 of the Texas Rules of Evidence, Rule 204 provides that the party requesting judicial notice shall furnish the court with sufficient information to enable it to comply with the request, and the party shall further give all other parties such notice as the court may deem necessary to enable them to fairly meet the request. Other parties are entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice. In the absence of prior notification, the request to be heard may be made after judicial notice has been taken. Such a determination is, of course, considered a ruling on a question of law.

Rule 204 has been interpreted to allow the appellate court, on its own motion, to take judicial notice of a provision of a municipal zoning ordinance even though it was not introduced into evidence at trial. *See State v. Sungrowth VI, Cal. Ltd.*, 713 S.W.2d 175,178 n.2 (Tex. App.-Austin 1986, writ ref’d n.r.e.).

#### **E. Texas Statutes with Judicial Notice Provisions**

A number of Texas statutes specifically discuss judicial notice. The following is a partial list:

**I. TEX. ALCOHOLIC BEV. CODE ANN. § 251.71(c) (Vernon 1995):** “All trial courts of this state shall take judicial notice of the wet or dry status of an area in a criminal prosecution.”

2. **TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1986):** “The court may take judicial notice of usual and customary attorney’s fees and the contents of case file without receiving further evidence in: 1) a proceeding before the court; or 2) a jury case in which amount submitted to the court by agreement.” However, it should be noted judicial notice is not applicable to claims under DTPA. *See Smith v. Smith*, 757 S.W.2d 422, 428 (Tex. App.-Dallas 1988, writ denied). Thus, § 38.004 only applies to certain types of claims under § 38.001.

3. **TEX. FIN. CODE ANN. § 303.308 (Vernon 1998):** “A court may take judicial notice of information published in the Texas Register under Section 303.007.”

4. **TEX. FIN. CODE ANN. § 304.007 (Vernon 1998):** A court of this state shall take judicial notice of a published judgment interest rate.

5. **TEX. LOC. GOVT CODE ANN. § 281.052 (Vernon 1988):** Texas courts must take judicial notice of the establishment of a civic center authority.

6. **TEX. WATER CODE ANN. § 62.078(b) (Vernon 1988):** navigation districts; and **TEX. WATER CODE ANN. § 55.244 (Vernon 1972):** The courts shall take judicial notice of rules and regulations made and adopted by water improvement districts.

## VII. STIPULATIONS

### A. Definition and Purpose

A “stipulation” is an agreement, admission, or concession made in a judicial proceeding by the parties or their representative attorneys relating to matters incident to the proceedings. *See First Nat’l Bank in Dallas v. Kinabrew*, 589 S.W.2d 137,142 (Tex. Civ. App. - Tyler 1979, writ ref’d n.r.e.).

Stipulations enjoy equal dignity with judicial admissions. *See Menendez v. Texas Commerce Bank McAllen, N.A.*, 730 S.W.2d 14, 15 (Tex. App.-Corpus Christ 1987, no writ) (a stipulation is a judicial admission that cannot be challenged on appeal).

### B. Specific Requirements of a Binding Stipulation

Texas courts view a stipulation as a binding contract. *See Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 886 (Tex. App.-El Paso 1993, no writ); *see also Penick v. Penick*, 750 S.W.2d 247, 249 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1988), *rev’d on other grounds*, 783 S.W.2d 194 (Tex. 1988). General rules for interpreting ordinary contracts are applied in construing stipulations. *See First Nat’l Bank*, 589 S.W.2d at 143. As with contracts, the use of stipulations may be limited to only a part of the proceedings. *See Kinner Transp. & Enterprises, Inc. v. State*, 614 S.W.2d 188,189-90 (Tex. Civ. App.-Eastland 1981, no writ) (stipulation to be considered “upon a trial on the merits of this case” did not constitute summary judgment proof). As contracts, stipulations are subject to judicial interpretation and construction. *See Lumbermens Mut. Cas. Co. v. Garcia*, 758

S.W.2d 893, 895 (Tex. App.-Corpus Christi 1988, writ denied). To be effective, a stipulation must possess the essential characteristics of a valid contract. *See U.S. Fire Ins. Co. v. Carter*, 468 S.W.2d 151, 154 (Tex. Civ. App.-Dallas 1971, writ ref'd n.r.e.). These include:

### **1. Mutual assent**

It is elementary that a valid stipulation requires the voluntary, mutual assent of all parties who are intended to be bound by such stipulation. A court must determine the intention of the parties in a trial stipulation from the language used in the entire agreement in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues. The trial court should disregard the stipulation if it is ambiguous and uncertain in its terms.

Where there is a stipulation as to a settlement agreement, consent must exist at the time the agreed judgment is rendered. *See Kennedy*, 682 S.W.2d at 528; *see also Buffalo Bag Co. v. Joachim*, 704 S.W.2d 482, 483 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1986, writ ref'd n.r.e.).

To have a binding, open-court stipulation, the parties must dictate into the record all material terms of the agreement and their assent thereto. *See Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.-Corpus Christi 1994, writ denied). A party may revoke his consent at any time before a judgment is rendered, notwithstanding the existence of an agreement between counsel that complies with Texas Rule of Civil Procedure 11. *See Buffalo Bay*, 704 S.W.2d at 483. However, withdrawal of consent to a judgment based on settlement agreement does not render the settlement agreement unenforceable. *See Webb v. Webb*, 602 S.W.2d 127,128-29 (Tex. Civ. App.-Austin 1980, no writ).

### **2. Consideration**

Texas case law requires that a stipulation be supported by consideration. The consideration for the stipulation may not be illegal, improper or otherwise against public policy. *See Montgomery v. Browder*, 930 S.W.2d 772, 778 (Tex. App.-Amarillo 1996, writ denied).

It appears that a mutual agreement to be bound constitutes sufficient consideration for enforcement of a stipulation. *See Texas Gas Utilities Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970).

### **3. Authority of counsel**

Attorneys have the authority to bind their clients by entering into agreements or stipulations which relate to the ordinary handling of a case. *See Dehnert v. Dehnert*, 705 S.W.2d 849, 850 (Tex.

App.-Beaumont 1986, no writ). Thus, actual knowledge by the client of a stipulation made by his counsel is unnecessary. *See McConkey v. McCankey*, 187 S.W.1100, 1106 (Tex. Civ. App.-Fort Worth 1916, writ dismissed w.o.j.). An attorney cannot, however, enter into a stipulation that surrenders substantial rights of his client. *See Early v. Burns*, 142 S.W.2d 260, 265 (Tex. Civ. App.-Beaumont 1940, writ refused). A stipulation formerly entered into by an attorney at a preliminary hearing on behalf of his client is also admissible at a second hearing despite a request to the contrary by the client's new counsel. *See Leach v. Brown*, 251 S.W.2d 553, 554 (Tex. Civ. App.-San Antonio 1952, writ refused).

If a stipulation relates to a matter which counsel is deemed to have authority to stipulate to, and is otherwise enforceable, it will be enforced despite the client's contention that he did not specifically authorize counsel to make the stipulation. *See Sone v. Braunig*, 469 S.W.2d 605, 611 (Tex. Civ. App.-Beaumont 1971, writ refused n.r.e.).

#### **4. Certainty**

In order for a stipulation to be binding, its terms must be set forth with reasonable certainty. The court may disregard a stipulation that is ambiguous, contradictory, or otherwise unclear. *See Austin v. Austin*, 603 S.W.2d 204, 207 (Tex. 1980).

#### **5. Estoppel**

A party will not be allowed to denounce an agreement once he has received some benefit. *See Dehnert v. Dehnert*, 705 S.W.2d 849, 851 (Tex. App.-Beaumont 1986, no writ) (citing *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950)). A party is bound by principles of estoppel from contesting the validity of a stipulation if it has acted thereon and received the benefits contemplated thereby.

### **C. Judicial Interpretation of Stipulations**

The parties' intent should be determined from the language used in the stipulation. *See Discovery Operating, Inc. v. Baskin*, 855 S.W. 2d 884, 886 (Tex. App.-El Paso 1993, no writ). A stipulation should be given no more force than the parties intended it to have. *See Austin*, 603 S.W.2d at 207. Courts should construe stipulations to effectuate the intent of the parties but cannot stipulate to appellate jurisdiction. *See Welder v. Fritz*, 750 S.W.2d 930, 932 (Tex. App.--Corpus Christi 1988, no writ). A stipulation should be interpreted in light of the subject matter of the controversy, the surrounding circumstances, the pleadings, and the intent of the parties. *See Discovery Operating, Inc.*, 855 S.W.2d at 886.

It has been stated that stipulations are to be liberally construed. *See Firestone Tire & Rubber Co. v. Chipman*, 194 S.W.2d 609, 610 (Tex. Civ. App.-San Antonio 1946, no writ).

If the stipulation is ambiguous, the controversy must be resolved in favor of the party whose interest the stipulation was made and against the party conceding the stipulation. *See St. Paul Guardian Ins. Co. v. Luker*, 801 S.W.2d 614, 620 (Tex. App.-Texarkana 1990, no writ).

#### **D. Appellate Review**

When stipulations comprise the record of the trial court, they will be observed and they are binding on the reviewing court. *See Perry v. Brooks*, 808 S.W.2d 227, 229 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1991, no writ).

#### **E. Conclusive effect of stipulations**

Stipulations are conclusive as to the facts stipulated and as to all matters necessarily included therein. *See Travelers Ins. Co. v. Medi-Rents, Inc.*, 687 S.W.2d 499, 501 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1985, no writ).

When a valid stipulation is made, no proof of the facts contained therein is necessary. *See First Nat'l Bank in Dallas v. Kinabrew*, 589 S.W.2d 137, 142 (Tex. Civ. App.-Tyler 1979, writ ref'd n.r.e.). Thus, evidence which conflicts with an agreed stipulation is inadmissible at trial, and must be excluded unless the offering party seeks relief from the stipulation. *See Allen v. Allen*, 704 S.W.2d 600, 605 (Tex. App.-Fort Worth 1986, no writ).

“Stipulations comprising the record will be observed and the reviewing court is bound by the stipulation.” *Guerrero v. Smith*, 864 S.W.2d 797, 801 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1993, no writ).

However, a stipulation is effectively waived and will not be given effect to limit issues on appeal if the parties, during trial, fail to rely on it and act as if it did not exist by treating matters subject to the stipulation as disputed issues of fact. *See First Nat'l Bank*, 589 S.W.2d at 143. Furthermore, a trial court has the power to modify or set aside a stipulation. If the stipulation is not set aside, it is conclusive as to facts stipulated and all matters necessarily included. *See Guerrero*, 864 S.W.2d at 801.

In addition, a stipulation should not be given greater effect than intended, and should not be construed as an admission of a fact intended to be controverted. *See Austin v. Austin*, 603 S.W.2d 204, 207 (Tex. 1980).

Stipulations are binding in a subsequent action pertaining to the same subject matter. *See Patino v. Patino*, 687 S.W.2d 799, 802 (Tex. App.-San Antonio 1985, no writ). A valid stipulation is binding on the parties and the court at the second trial of the same case. *See Combest v. Wall*, 115 S.W. 354, 358 (Tex. Civ. App. 1908, writ ref'd). Furthermore, a stipulation is binding even when the stipulation was made by an attorney that no longer represented the party at the second trial. *See Leach v. Brown*, 251 S.W.2d 553, 554 (Tex. Civ. App.-San Antonio 1952, writ ref'd). Moreover, a stipulation of facts in one case may be received into evidence as an admission by a party at the trial

of another case involving a different subject matter. *See National Life & Accident Ins. Co. v. Casas*, 36 S.W.2d 323, 324 (Tex. Civ. App.-El Paso 1931, no writ).

## **F. Rule 11 Agreements as Stipulations**

Rule 11 of the Texas Rules of Civil Procedure states, in part, “[u]nless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.” TEX. R. CIV. P.11.

### **1. Requirements of Rule 11**

Rule 11 requires agreements between attorneys or parties concerning a pending suit to be in the record of the cause to be enforceable. To be binding, agreements must also be in writing and signed by parties. *See id.*, 907 S.W.2d at 460. Once the existence of such an agreement becomes disputed, it is unenforceable unless it comports with these requirements. *See London Market Companies v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991). Compliance with Rule 11 does not require the written agreement to be filed before consent is withdrawn by one of the parties, but merely requires that the agreement be filed before it is sought to be enforced. *See Padilla*, 907 S.W.2d at 461.

Rule 11 “is a minimum requirement for enforcement of all agreements concerning pending suits, including but not limited to, agreed judgments.” *Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex. 1984). A valid consent judgment cannot be rendered by a court when consent of one of the parties thereto is wanting. *See Williams v. Hollingsworth*, 568 S.W.2d 130,131 (Tex.1978).

### **2. Rule 11 does not apply pre-suit**

Rule 11 “applies only to agreements concerning a pending suit [it] does not apply to a pre-existing agreement asserted as a defense to a suit.” *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 393 (Tex. 1993). Thus, parties to a lawsuit may enter into any binding agreements regarding matters touching the lawsuit.

### **3. Consequences of Breach or Repudiation**

If a party withdraws his consent to entry of a judgment this does not make the settlement agreement unenforceable. *See Stevens v. Snyder*, 874 S.W.2d 241, 243-44 (Tex. App.--Dallas 1994, writ denied). Under Rule 11 and § 154.071(a), the Civil Practice and Remedies Code, a party may enforce a settlement agreement without the other party’s consent under contract law.

### **4. “Open Court” stipulations under Rule 11**

A stipulation regarding testimony of witnesses discussed in open court, appearing in the statement of facts and made part of the official record, complies with Rule 11. *See Austin v. Austin*, 603 S.W.2d 204, 207 (Tex. 1980).

A stipulation that appeared in the statement of facts bearing the certificate of the official court reporter is sufficient to support a judgment even if the party contends that his counsel had no authority to make the stipulations and even if counsel did not remember making the stipulation. *See Sone v. Braunig*, 469 S.W.2d 605, 610-11 (Tex. Civ. App.-Beaumont 1971, writ ref'd n.r.e.)

One trial court's findings of fact, and judgment, referred to an agreement to waive a jury trial. The statement of facts, however, revealed that plaintiffs counsel objected to the trial court's holding that an agreement to waive jury trial existed. Neither the statement of facts, judgment, nor findings of fact revealed that an open court waiver of jury trial was made. Consequently, the alleged waiver failed to comply with Rule 11. *See Duvall v. Sadler*, 711 S.W.2d 369, 376-77 (Tex. App.-Texarkana 1986, writ ref'd n.r.e.).

Statement of facts revealing that at the time of trial all parties concurred that an agreement had been made at a preliminary hearing and at a deposition, were held "insufficient" to comply with Rule 11. *See Cravens v. Cravens*, 533 S.W.2d 372, 375 (Tex. Civ. App.-El Paso 1975, no writ).

A recitation in judgment that a party was entitled to recover attorney's fees as stipulated by the parties did not comply with Rule 11 and was unenforceable on appeal because the stipulation did not appear anywhere in the record other than in the judgment. *See Markman v. Gaitz*, 499 S.W.2d 692, 697 (Tex. Civ. App.-Houston [1<sup>st</sup> Dist.] 1973, writ ref'd n.r.e.).

## **5. Stipulations are binding only on the parties making them**

A stipulation is not binding on a party who did not enter into the stipulation. *See United Services Auto. Ass'n v. Ratterree*, 512 S.W.2d 30, 34 (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.). Conversely, one may not escape the effect of one's own stipulation on the ground that it may not be binding on others. *See Ex Parte Southland Independent School Dist.*, 518 S.W.2d 921, 926 (Tex. Civ. App.-Amarillo 1974, writ ref'd n.r.e.). Additionally, a non-party to a stipulation will be bound by the terms of a stipulation entered into between other parties if he offers it into evidence. *See Houston Sash & Door Co. v. Davidson*, 509 S.W.2d 690, 692 (Tex. Civ. App.-Beaumont 1974, writ ref'd n.r.e.) (terms of stipulation made between defendants and offered into evidence by plaintiff held to be binding on plaintiff as a "judicial admission").

## **G. Types of Evidentiary Stipulations**

### **1. Factual stipulations**

It is settled that the parties may agree on the truth of specific facts by stipulation and thus limit the issues to be tried. *See Geo-Western Petroleum Development Inc. v. Mitchell*, 717 S.W.2d 734, 736 (Tex. App. - Waco 1986, no writ). These stipulations are admissible evidence. *See Austin*

*v. Austin*, 603 S.W.2d 204, 206-07 (Tex. 1980). Failure to introduce stipulations of fact into evidence in a jury case, however, may result in a failure of proof. *See Texas Employer's Ins. Ass'n v. Lara*, 711 S.W.2d 224, 224-25 (Tex. 1986). The following cases illustrate how stipulations of fact have been used, and the effect of these stipulations:

## **2. Stipulations as to absent witness testimony**

The parties may agree upon statements that an absent witness would make if that witness were present to testify. The parties may further agree that such statements could be introduced as evidence. *See Austin*, 603 S.W.2d at 206; *see also Hibbler v. Knight*, 735 S.W.2d 924, 927 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1987, writ ref'd n.r.e.). This evidence may be presented orally by stipulation in open court. *See Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 886-87 (Tex. App.-El Paso 1993, original proceeding). By doing so, however, the truth of the absent witness' statements is not necessarily admitted, and the statements may be controverted by opposing evidence. *See Austin*, 603 S.W.2d at 206. The probative effect of the absent witness' testimony, as with other evidence, is determined by the fact finder. *See id.* at 207. This evidence may be presented orally by stipulation in open court.

## **3. Stipulations as to admissibility of evidence**

Parties may agree to the admissibility of evidence without necessarily stipulating as to the truth of such matters. *Austin v. Austin*, 603 S.W.2d 204, 206 (Tex. 1980). Parties may, by stipulation, waive the necessity of admitting original or certified copies of certain instruments in evidence, but at the same time reserve the right to make any legal objections to the admission of such instruments. *See Frede v. Lauderdale*, 322 S.W.2d 379, 383 (Tex. Civ. App.-San Antonio 1959, writ ref'd n.r.e.). A party who stipulates that documentary evidence may be admitted without any objection is thereafter bound by it. *See Kincheloe v. Houston Fire & Casualty Inc. Co.*, 289 S.W.2d 833, 834 (Tex. Civ. App.-Texarkana 1956, no writ). Such a stipulation is, in effect, an agreement that the proper predicate can be laid and that further proof of the predicate need not be presented. *See In re Estate of Watson*, 720 S.W.2d 806, 807-08 (Tex. 1986); *see also Valley Forge Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 579 S.W.2d 271, 274-75 (Tex. Civ. App.-Dallas 1978, writ ref'd n.r.e.).

## **4. Parties cannot stipulate to questions of law**

Parties cannot stipulate as to the legal conclusions to be drawn from the facts of a case. *See Martinez v. Hardy*, 864 S.W.2d 767, 770 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1993, writ denied). Such stipulations are without effect and will not bind the parties or the trial court. *See id.*; *Smith v. Morris & Co.*, 694 S.W.2d 37, 39 (Tex. App. - Corpus Christi 1985, writ ref'd n.r.e.) (Parties cannot stipulate that the purchaser of real property at a sheriff's sale was a "bona fide purchaser for value"); *City of Houston v. Deshotel*, 585 S.W.2d 846, 849 (Tex. Civ. App.-Houston [1<sup>st</sup> Dist.] 1979, no writ) (Parties cannot stipulate that City of Houston was engaged in a proprietary function in the operation of a sanitation truck, since the disposal of garbage is a governmental function governed by the Texas Tort Claims Act); *Washington v. Law*, 519 S.W.2d 953, 955 (Tex. Civ. App.-Houston [14<sup>th</sup> Dist.] 1975, writ ref'd n.r.e.) (Stipulation by parties that the administration of an estate was necessary did

not control the power of the trial court to determine that no administration was necessary); *see also Atlantic Richfield Co. v. Hilton*, 437 S.W.2d 347, 351 (Tex. Civ. App. - Tyler 1969, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 905 (1969) (Parties cannot stipulate as to the construction and legal effect of unambiguous terms of a contract).

## **F. Use of Stipulations as Evidence**

An agreed statement of facts under Rule 263 of the Texas Rules of Civil Procedure need not be entered into evidence. Instead, it becomes operative upon filing with the clerk of the court.

When the facts of the case are in controversy, the stipulated facts should be read into evidence in the presence of the trier of fact, preferably from the witness stand in a jury case so that the jury is aware that the stipulation constitutes evidence. The proponent of the stipulation may have the stipulation marked as an exhibit and attempt to introduce it into evidence. While there appears to be no case law on point, the decision to admit the written stipulation into evidence as an exhibit is discretionary with the trial court and will depend, in large measure, on the nature and substance of the stipulation. Stipulations that encompass ultimate issues of fact, such as an agreement as to the amount of damages, should be made a part of the record. Additionally, stipulations as to the admissibility of evidence need not be offered into evidence, but should be brought to the trial court's attention.

## **VIII. Practical Considerations**

Most lawyers utilize evidence without a witness, but only recently have lawyers begun to do so effectively. Depositions, stipulations, admissions, discovery and other types of evidence have always been treasure troves for compelling evidence. The problem has been in introducing the evidence in a way that makes an impact with the jury.

With recent advances in technology, there is no excuse for a flat or boring presentation of such evidence. From blow-ups to video depositions, there are infinite ways to introduce evidence and make it memorable. This section describes some practical ideas for improving the use of such evidence.

### **A. Depositions**

#### **1. Don't present a deposition in the order it was taken**

Most depositions are not taken in the same logical order that you would use a trial, but that does not mean that you cannot re-arrange the presentation to conform to the logic of your case and to highlight major points. There is no rule which requires a deposition to be read into the record or played in chronological order. A litigant is entitled to present their evidence in the order they believe to be most effective as long as the presentation is not misleading. *See Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App.-Texarkana 1992, writ denied).

## **2. Plan for objections**

Nothing destroys the effectiveness of deposition excerpts more than constant interruptions, sustained objections, and clumsy presentation. This is more true for video depositions. Anticipate objections and try to work them out in advance. Be prepared for optional completeness. If you are reading the segment, there isn't much of an issue. For video, make sure you cut the tape in a way that lets you pause for optional completeness.

## **3. Use video depositions effectively**

When available, use video depositions. More importantly, transfer the cut tape to CD or DVD. Editing a CD or DVD to add, remove, or even rearrange video segments is far easier than editing a video. If you anticipate objections or optional completeness, you can add or remove segments at trial without the awkward "fast forward" moment.

If a witness is discussing an exhibit, project the exhibit through an Elmo or powerpoint while the deposition witness is discussing the document. If at all possible, use computer software to project both the video deposition and the document on the same screen so that the jury does not go back and forth between screens.

Try projecting the transcript alongside the video. Some jurors retain information better if they read it. There is plenty of software available that will play a deposition video and project the transcript alongside the video.

## **4. Time your excerpts**

Know how long each of your deposition excerpts will be. Generally speaking, any presentation over twenty minutes will lose the jury. If your presentation is going to be longer (to present evidence for the appellate record), present your key testimony in the first fifteen to twenty minutes.

If you time your excerpts, you can use some of them to strategically fill time. If for whatever reason you have free time between witnesses, a short deposition excerpt will prevent you from looking like you are wasting the jury's time. Or if you plan it correctly, you can end the week with a short but effective video deposition to leave the jury with a highpoint.

## **5. Don't be cumulative**

Drawing an objection is the least of your worries when deposition excerpts are cumulative. Juries simply don't like repetitive testimony, especially boring deposition excerpts. Be prepared to cut you excerpts as the trial progresses to eliminate cumulative testimony that has come in through other means.

## **6. Look at the video before trial**

View a video before you play it for a jury. A witness's credibility and tone do not come through in a transcript. If you are trying to portray a witness as the evil mastermind, make sure they do not look like an innocent clod.

## **B. Don't Just Read from Documentary Evidence**

Publish, don't just read, key documentary evidence such as stipulations, admissions, written discovery and pleadings. If the evidence is being introduced, not for the jury, but for the record, don't bother. But, if you want the jury to consider the evidence, make it memorable. For example:

1. Use blow-ups or a projection device to project the document, or the portion you are introducing to the jury.
2. If you use powerpoint, use the motion features to have the question to an interrogatory or request for admission appear first then the answer slide in second.
3. Make sure you can use a highlighting feature on your blow-up or projection. In a long document, it is critical to bring the jury's attention to the portion you care about.
4. Introduce critical evidence at the right time. Don't just wait until the end of trial and don't introduce it all at once. Try to introduce evidence in the logical flow of your case.

Not all of these methods are expensive and many can be done in-house. The extra time and expense you spend on introducing documentary evidence effectively will be well worth it.

## **IX. CONCLUSION**

Evidence that can be introduced without witnesses should be a part of any trial. If you go beyond the obvious and use discovery materials, pleadings, admissions, and judicial notice effectively, you can streamline your case and focus on key facts.