

**STANDING ORDER IN LIMINE
96TH JUDICIAL DISTRICT COURT
TARRANT COUNTY, TEXAS**

The following matters shall not be referred to, alluded to, or in any way mentioned or insinuated in front of the venire panel or jury, unless and until admissibility is determined in a hearing outside the presence of the jury.

1. Mischaracterizing Opposing Counsel's Questions: Mischaracterizing opposing counsel's questions as though counsel was testifying (e.g. "You heard [opposing counsel] say yesterday that, . . .").

2. Personal Lives of Attorneys or Parties: Discussing the personal lives of the Parties or their attorneys, except as relevant to a material issue in the case.

3. Political Affiliation or Activities of Attorneys or Parties: Discussing the Political affiliation or activities of the parties or their attorneys.

4. How Venire-members would Vote in this Case: Explaining the facts of this particular case and then attempting to obtain, or obtaining, a commitment as to how the venire member would vote in this particular case; *Cavnar v. Quality Control Parking*, 678 S.W.2d 548 (Tex. App. - Houston [14th] 1984), modified on other grounds, 696 S.W.2d 549 (Tex. 1985); *Campbell v. Campbell*, 215 S.W. 134 (Tex. Civ. App. - Dallas 1919, refd); *Texas Gen. Indem. Co. v. Mannhalter*, 290 S.W.2d 360 (Tex. Civ. App. - Galveston 1956, no writ).

5. Reading Statutes or Law to Jury: Reading or paraphrasing or discussing statutes or law until and unless the Court approves counsel so doing, such as approving a negligence per se charge or the instructions that will be included in the charge. General propositions from the PJC related to the type of case on trial may be mentioned; Tex. R. Civ. P. 226a.

6. Golden Rule & Inverse Golden Rule: Any of the following: (1) how the jury would feel if they, or any of them, had been sued; (2) whether certain sums of money would make them, or any of them, feel rich; (3) that they, or any of them, should put themselves in one party's or another's position; (4) that they, or any one of them, make a decision for one party or another party which they would want a jury to make for them if they were in the position of one or the other party; or (5) applying medical testimony to jurors, such as, "even our jurors over [certain age] would have degenerative disk disease;"; *U.S. v. Palma* 473 F.3d 899.

Citation: *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007)

A so-called "golden rule" argument which asks the jurors to place themselves in the position of a party "is universally condemned because it encourages the jury to 'depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.'" *Lovett ex rel. Lovett v. Union Pac. R.R. Co.*, 201 F.3d 1074, 1083 (8th Cir.2000) (quoting *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir.1982)).

7. Collateral Source Rule: That Plaintiff has received, has been entitled to receive, will receive or will become entitled to receive, benefits of any kind or character from a collateral source, including but not limited to the following collateral source benefits:

- a. Benefits under private group insurance policy;
 - b. Benefits under insurance policies generally;
 - c. Benefits from voluntary contribution by the employer of Plaintiff;
 - d. Benefits from sick leave and/or vacation;
 - e. Benefits from the Federal Government, including Social Security, Veteran's Administration, tax exemption or military medical benefits;
 - f. Services furnished without charge (e.g. Parkland Hospital; Medicaid or Medicare);
 - g. The fact of any suit or the settlement or amount of settlement therein related to any third party claims arising out of the incident made the basis of this lawsuit;
 - h. Compensation for time not actually worked; and
 - i. Benefits from pensions;
- Haygood v. De Escabedo 54 Tex. Sup. Ct. J. 1377 (Tex. 2012).

8. Plaintiff's Payment for Medical Services: Whether Plaintiff has paid for any medical, hospital, doctor or drug bills, including whether some other entity or person has paid or guaranteed payment of (letter of protection) such medical service providers, unless a witness for the professional medical services provider (including any hospital, clinic, doctor or source of pharmaceuticals) is called to testify live or by deposition and it is established that such witness's ultimate payment pursuant to a letter of protection may be influenced by such testimony.

9. Taxation of Recovery: That any recovery by the Plaintiff either would or would not be subject to Federal Income taxation or any other form of taxation; TEX. R. CIV. EVID. 401-403 But see Tex. CPRC §18.09.

10. Unrelated Claims: That any party has asserted, or had asserted against them, unrelated, prior or subsequent claims, suits or settlements, or the amounts thereof, that any such matters have been tried, or been the subject of any type of reprimand or corrective action, or that any other incidents, near incidents or other events have occurred at the same or similar location, whether before or after the filing of this lawsuit; except for impeachment regarding contradictions in claims made in this suit (e.g. plaintiff already made claim for permanent loss of earning capacity but refuses to admit in this case having suffered any prior loss or diminution in earning capacity) *Dallas Ry. & co. v. Farnsworth*, 227 S.W.2d 1017, 148 Tex. 584 (1950); *Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923, 926 (Tex. App. - Beaumont 1983, writ refd n.r.e.).

But see *Missouri Pac. R. Co. v. Cooper*, 563 S.W.2d 233 (Tex. 1978)

Notes: This case details the conditions under which earlier accidents can be used to lay a proper predicate to prove extra-hazardous conditions. It makes no mention of prior cases involving the parties in the instant case.

Dallas Ry. & Terminal Co. v. Farnsworth, 148 Tex. 584, 227 S.W.2d 1017 (1950)

Notes: This case also discusses in some detail the exceptions to the general rule that evidence that a person has been guilty of a similar act of negligence is inadmissible to prove negligence in the instant case.

Nevauex v. Park Place Hosp., Inc., 656 S.W.2d 923 (Tex. App. 1983), writ refused n.r.e. (Nov. 2, 1983)

Notes: Supports the general rule that "evidence of other acts or transactions such as this [involving the same defendant] would be inadmissible under the doctrine of 'res inter alios acta.'" However, the case implies that evidence of sufficiently similar circumstances could be admissible.

Note: The proposed Limine item may be overbroad in relation to these holdings. Impeachment is not the only situation where Texas law allows for the introduction of many of the facts implicated. This limine item applied as written may deprive many parties of legitimate avenues of proving negligence and other causes of action. Therefore, each Court should tailor this Limine on a case-by-case basis.

11. Unrelated Injuries and Accidents: That Plaintiff has been involved in any other accidents, or has suffered any unrelated injury or illness or the effects thereof; except for injuries to or accidents involving the same or related parts of Plaintiffs body unless correlation is proven between a past event and the current one; *Guevara v. Ferrer*, 247 S.W.3d 662, 669 (Tex. 2007); *Farmers Tex. Cnty. Mut. Ins. Co. v. Pagan*, 453 S.W.3d 454 (Tex. App. 2014).

12. Subsequent Remedial Measure: Rule 407 (a) provides: "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or-if disputed-proving ownership, control, or the feasibility of precautionary measures." *Dudley v. Texas State Dep't of Highways & Pub. Transp.*, 716 S.W.2d 628, 630 (Tex. App. – Corpus Christi 1986, no writ).

Dudley v. Texas State Dep't of Highways & Pub. Transp., 716 S.W.2d 628 (Tex. App. 1986,).

13. Personal Habits including Drugs and Alcohol Use or Abuse: Any party's or witness's personal habits, including drinking and/or drug habits, without first approaching the bench and demonstrating the existence of an allegation that any such habits contributed to the occurrence made the basis of this suit, or that any party or witness was intoxicated from drugs or alcohol at the time of said occurrence; TEX. R. CIV. EVID. 401-403.

14. Failure to File Income Tax Returns: That any party or witness has failed to file an income tax return with the Internal Revenue Service or has failed to report income to the federal government; TEX. R. CIV. EVID. 401-403.

15. Circumstances of Retention of, or Relationship with, Counsel: How, when, why by whom referred (personal injury "runner" or call from insurance company claims handler); Any reference to when any party retained counsel and on what basis any party is, or whether they in fact are, compensating their counsel monetarily for their counsel's services or the relationship between counsel and client including any reference to an insurance company, TEX. R. CIV. EVID. 401-403.

16. Nature of, or Characterization of, Counsel's Practice: From referring to opposing counsel as "a plaintiffs' personal injury lawyer" or "a defense counsel" or "an insurance defense lawyer" or otherwise characterizing opposing counsel, or any member of opposing counsel's firm, as one who regularly represents plaintiffs or defendants in personal injury lawsuits or medical malpractice actions; TEX. R. CIV. EVID. 401-403.

17. Accident Statistics: From referring to the number of injuries or deaths on the highways of any particular region during any particular time period. TEX. R. CIV. EVID. 401-403.

18. Undesignated Fact or Expert Witness: TRCP 193, 194.

19. Unproduced documents: TRCP 193, 194.

20. Lawsuits or Claims against Expert & Fact Witnesses: Any reference to prior lawsuits or claims filed against any expert witness or other witness called to testify at the trial of this case (TEX. R. CIV. EVID. 401-403; See also *French v. Brodsky*, 521 S.W.2d 670 (Tex. Civ. App. - Houston [1st Dist.]1975, writ ref'd n.r.e.), rev'd on other grounds, 551 S.W.2d 33 (Tex. 1977)).

21. Expert Witness' Income: Any questions or references to the financial, accounting or income information, sources and records, of any expert witness called to testify at the trial of this case, other than any income received for expert consultation services in this or other litigation or claims (TEX. R. EVID. 401-403) *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970)); *Olinger v. Curry*, 926 S.W.2d 832 (Tex. App. 1996).

22. Lay Medical Opinions: That any non-expert witness and counsel refrain from expressing a medical opinion including a diagnosis of a condition or symptoms and any future disability or loss of use experienced by any party or witness, because Texas cases hold that it is a function of the doctor, not the patient, to diagnose a disease not within a layman's common knowledge. *Amoco Chem. Corp. v. Stafford*, 663 S.W.2d 147 (Tex. App. - Houston [1st Dist.] 1983, no writ) (citing *Gerland's Food Fair Inc. v. Hare*, 611 S.W.2d 113 (Tex. Civ. App. - Houston [1st Dist.] 1981, writ refd n.r.e.); *Tyler Mirror & Glass co. v. Simpkins*, 407 S.W.2d 807 (Tex. Civ. App. - Tyler, 1966, writ refd n.r.e.)).

23. Testifying Police Officer's Qualifications Determined Before Opinion Expressed: That any police officer or other investigating officer called to testify concerning the facts surrounding an investigation be precluded from giving an opinion as to the cause of an accident until the court, out of the jury's presence, has had the opportunity to determine whether the officer is qualified to give an opinion (*Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68 (Civ. App. - Corpus Christi 1987, refd n.r.e.)).

24. Criminal Convictions of a party, witness, or lawyer.

25. Incarceration: That any party's failure to attend trial is as a result of confinement for conviction of a crime.

26. Traffic Citation: That any witness or party did or did not receive a traffic ticket in connection with the accident made the basis of this suit (*Condra Funeral Home v. Rollin*, 158 Tex. 478, 314 S.W.2d 277 (1958)).

27. License Suspension or Driving Without License: Any reference or inquiry directly or indirectly as to whether any party has had any license suspension of any kind or was driving without a license (TEX. R. CIV. EVID. 401-404); *Medina v. Salinas*, 736 S.W.2d 224 (Tex. App. - Corpus Christi 1987, writ denied) (trial court properly excluded driver's lack of drivers license because there was not a claim for negligent entrustment and "lack of a license does not, as a matter of law, make a driver liable or constitute a proximate cause of a collision"); *Miller v. Jones*, 270 S.W.2d 303 (Tex. Civ. App. - Dallas 1954, writ refd n.r.e.) (trial court's exclusion of driver's failure to have drivers license not error where there was no issue regarding negligent entrustment).

28. Previous Accidents or Traffic Violations: Any reference or inquiry directly or indirectly as to whether any party has had any previous automobile accident or traffic violations of any kind or has not had any citations or traffic convictions (TEX. R. EVID. 401-404).

29. Contents of Documents not (yet) Admitted: The contents of any document not then admitted in evidence, except (1) to establish the predicate for admissibility or (2) impeachment of a witness then on the witness stand.

30. Pleadings: The content of pleadings, except for general references to the type of case or the relief sought.

31. Financial Status: Any reference to the financial status of either party to this suit - in absolute terms or relative wealth between the parties (*Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941)) [overruled by *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981)] including that any party is a little person or a small or struggling business; *National Union Fire Insurance Co. v. Kwiatkowski*, 915 S.W.2d 662 (Tex. App. 1996).

32. Governmental Entity's Power or Resources: Any reference or allusion to, or suggestion of, the supposed power or resources of any governmental entity, including but not limited to such governmental entity's allegedly large economic resources, either monetary or manpower, that might have been focused upon correcting any allegedly defective or dangerous conditions, or upon the investigation, preparation, and conduct of any trial herein, or its alleged ability to easily satisfy any liability imposed upon it or any judgment entered against it.

33. Testimony of Witnesses Not Called to Testify: That any party has not called to testify any witness equally available to both parties in this cause or to suggest to the jury by argument or otherwise what would have been the testimony of any witness not actually called (*St. Paul Mercury Ins. Co. v. Jackman*, 331 S.W.2d 253 (Tex. Civ. App. Eastland 1960 writ ref'd n.r.e.); *Texas Power and Light Co. v. Walker*, 559 S.W.2d 403 (Tex. Civ. App. - Texarkana 1977, no writ); *Sanders v. St. Paul Fire and Marine Ins.*, 429 S.W.2d 516 (Tex. Civ. App. - Texarkana 1968, ref'd n.r.e.).

34. Testimony of Equally Available Witnesses: That any party has not called any particular witness that would be available equally to such party through the subpoena and deposition process, unless it has been first established, outside the presence of the jury, that such witness is or was an employee of the party alleged to have failed to call such witness who is legally available, and who was clearly in a position to obtain material information on a point in issue (*Boyles v. Houston Lighting & Power Co.*, 464 S.W.2d 359; *(Tex-Jersey Oil Corp. v. Beck*, 157 Tex. 541, 305 S.W.2d 162 (1957), overruled by *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

35. Hearsay Witness Statements: Any ex parte statement or report of any other person not then and there present in court to testify and to be cross-examined or otherwise suggest to the jury by argument or otherwise what would have been the testimony of any witness not actually called - this includes all witnesses whom counsel have not arranged to bring to trial in person or by deposition unless the statements are related to sexual assault; (*Texas Power & Light Co. v. Walker*, *supra*; *Sanders v. St. Paul Fire & Marine Ins. Co.*, *supra*); *Beheler v. State*, 3 S.W.3d 182 (Tex. App. 1999); *Turner v. State*, 924 S.W.2d 180, 182 (Tex.App.-Eastland 1996, pet. ref'd); *Macias v. State*, 776 S.W.2d 255, 259 (Tex.App.San Antonio 1989, pet. ref'd).

36. Employment Refused or Terminated: That at any time in the past, any witness was rejected or turned down for employment, or discharged from employment by reason of a physical examination, unless the physician who then examined such witness is present, testifies, and is subject to cross examination.

37. Photographs or Videos: That any photograph, video or motion picture be tendered to Court and opposing counsel, outside of the presence of the jury, and shown or exhibited to determine its relevance and suitability for introduction into evidence prior to informing the jury as to its existence or contents.

38. Discovery Demands between Counsel: That no counsel or party make demands or request before the jury for matters found or contained in their opponent's file, which would include statements, pleadings, photographs, and other documents, nor to demand or request further or additional medical examinations, physical demonstrations, or other requests during the course of the trial and in the presence of the jury (TEX. R. EVID. 401-403, 503).

39. Witness List: That neither counsel request at any time that their opposing counsel identify the persons whom opposing counsel intends to call as witnesses or attempt to engage in any other type of discovery during trial; TRCP193.6.

40. Discovery Disputes or Conduct: Any reference to the fact that any party sought protective orders from the Court; the Court's rulings on such requests; or that any party claimed any privilege during the pretrial discovery in this matter; or that any party sought to exclude proof during the pretrial discovery; or that the Court has ruled concerning the scope of pretrial discovery; or that the Court imposed sanctions against any party for failure to submit to pretrial discovery or that any party asserted objections to any discovery in this action; TRCP 192.6.

41. Negligent Entrustment against a Governmental Entity: Any reference to a claim against a governmental entity for negligent entrustment arising out of intentional torts; *Walden v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App. - Tyler 1993, no writ); *Young v. City of Dimmitt*, 787 S.W.2d 50 (1990).

42. Payments or Settlements: Any reference to the fact that any party or former party has heretofore paid any party-claimant any sum for damages or that any settlement has been reached in connection therewith or the amount or that any party has partially settled this claim or has otherwise admitted liability therefor.

43. Settlement Offers: Any references to settlements or attempted settlement by any party or former party in connection with any party-claimant in this lawsuit (*Petco Corp. v. Plumber*, 392 S.W.2d 163 (Tex. Civ. App. - Dallas, 1965, writ ref'd n.r.e. Tex R. Evid. 408, 409).

44. Insurance: That any party is or is not covered in whole or in part by insurance of any kind with respect to the loss or damage in question TEX. R. EVID. 411; *Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548, 556 (Tex. App. 1984), writ granted (Nov. 21, 1984), rev'd in part, 696 S.W.2d 549 (Tex. 1985) *Page v. Thomas*, 71 S.W.2d 234 (Tex. 1934); *Texas co. v. Betterton*, 88 S.W.2d 1039 (Tex. 1936); *M.J. Constr. Co. v. Deatherage*, 231 S.W.2d 501 (Tex. Civ. App. Eastland 1950));- except in suits for recovery of uninsured or underinsured coverage. *State Farm Mut. Auto. Ins. V. Matlock*, 446 S.W.2d 81, 86 (Tex. Civ. App. – Dallas 1969), reversed in part on other grounds, 462 S.W.2d 277 (Tex. 1970) (citing *Aguilera vs. Reynolds well Service*, 234 S.W.2d 282 (Tex. Civ. App. - San Antonio 1951, writ ref'd); *New Hampshire Fire Ins. v. Plainsman Elevators, Inc.*, 371 S.W.2d 68 (Tex. Civ. App. - Amarillo 1963, writ ref'd n.r.e.); *United States Fire Ins. vs. Hutchinson*, 421 S.W.2d 706 (Tex. Civ. App. - Texarkana 1967, writ ref'd n.r.e.)). N.B.: Matlock was reversed on the allocation of the burden of proof that the responsible party was

uninsured which is now governed by TEX. INS. CODE ANN. art. 5.06-1 (7) (burden of proof on the uninsured status of the responsible party is on the uninsured motorist carrier).

45. Identity of Insurance Carrier: Inquiring about the identity of the liability insurance carrier for any party or any expert witness called to testify unless said individual is an employee or director of the insurance carrier, and whether they have any feeling or belief that an adverse verdict against the Defendant would affect their insurance rates (*Mendoza v. Varon*, 563 S.W.2d 646 (Tex. Civ. App. - Dallas 1978, writ ref'd n.r.e.)).

46. Venire-person's Connection with Insurance Industry: Voir dire examination regarding connection with the insurance industry; but each prospective juror's occupation and past occupations; and that of those persons in their households will be permitted outside the presence of the panel to avoid harm by interjecting insurance into the case (*Brockett v. Tice*, 445 S.W.2d 20 (Tex. Civ. App. - Houston [1st Dist.] 1969, writ ref'd n.r.e.); *A. J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763 (Tex. Civ. App. - Tyler 1971, writ ref'd n.r.e.); *Green v. Ligon*, 190 S.W.2d 742 (Tex. Civ. App. - Fort Worth 1945, writ ref'd n.r.e.)).

47. Damages "Regardless of Who Actually Pays:" That all parties and counsel refrain from using prejudicial words and phrases, or undue emphasis on benign words and phrases (e.g. " ... award damages against thiiiiis Deeeefennndant"), regarding who pays the damages or when or whether damages will ever be paid, or any similar version of such inquiry which improperly injects the issue of insurance, by implication, into the suit (*Griffith v. Casteel*, 313 S.W.2d 149 (Tex. Civ. App. Houston 1958, re'd n.r.e.); *Hurley v. McMillan*, 268 S.W.2d 229 (Tex. Civ. App. - Galveston 1954, writ ref'd n.r.e.); *Ulmer v. Mackey*, 242 S.W.2d 679 (Tex. Civ. App. - Fort Worth 1951, writ ref'd n.r.e.)),

48. Legal or Factual Responsibility for Judgment: That all parties and counsel refrain from making any statement or implication that any party would or would not be legally or factually responsible to pay for an adverse judgment, if any, as a result of an adverse verdict.

49. Financial Capability to Respond in Damages: That all parties and counsel refrain from making any statement or implication that any party would or would not be financially capable to respond in damages for an adverse judgment, if any, as a result of an adverse verdict; *Living Inc. v. Redinger*, 667 S.W.2d 846 (Tex. App. 1984).

50. Prosecution or Defense Costs: Any reference to the expenditures incurred by any party for the prosecution or defense of this matter or the preparation of any exhibits in this case.

51. Direct Invasion of Attorney-Client Privilege: Any question or comment directly about matters or communications that have transacted between any attorney and his or her client, including any and all employment contracts, conversations regarding any such communications or transactions related to such communication (TEX. R. av. EVID. 503; *Foster v. Buchele*, 213 S.W.2d 738 (Tex. Civ. App. - Fort Worth 1948, ref'd. n.r.e.); *Cochran v. Cochran*, 333 S.W.2d 635 (Tex. Civ. App. - Houston 1960, writ ref'd n.r.e.)).

52. Attorney's Fees without Basis for Recovery: That any counsel or party not refer to attorney's fees of any party, unless a claim for attorneys fees recognized in law will be submitted to the jury, as these are not matters for the jury and would cause the jury to speculate how much of the verdict would go to the attorney's fees or cause it to add attorney's fees in arriving at the answer to damages; *White Cabs v. Moore*, 199 S.W.2d 202 (Tex. Civ. App. 1947).

53. Attorney's Personal Opinion - Except for What Evidence Shows: That every party and counsel not mention or state to the jury his, her or their personal beliefs (as opposed to stating what the facts will show or arguing the facts in evidence) concerning the merits or justice of any party's claim or defense or right or entitlement to compensation payments (*Wallace v. Liberty Mutual Ins. Co.*, 413 S.W.2d 787, 790 (Tex. Civ. App. - Houston 1967, writ refd n.r.e.)); see State Bar Rules, art. X, Texas Texas Disciplinary Rules of Professional Conduct at 3.04(c)(3).

54. Comments on Credibility or Testimony of Other Witnesses. Any testimony by witnesses concerning the credibility of any other witness, and any questions to any witness calling for or suggesting that the witness directly or indirectly comment upon the testimony of other witnesses, unless such a commenting witness is deemed an "expert" witness pursuant to Tex. R. Evid. 702. Such testimony is not competent evidence, it is irrelevant and unfairly prejudicial, and it improperly invades the province of the jury, Tex. R. Evid. 402, 403, 608(a); *Ochs v. Martinez*, 789 S.W.2d 949, 957 (Tex. App. -- San Antonio 1990, writ denied) ("A witness may not give an opinion concerning the truth or falsity of another's testimony, for it is the jury's task to assess the credibility of witnesses.").

55. Immigration Status: Any party or witness's status regarding immigration to or residency in the United State Tex. Rule Evidence 403, 404, 404 (b), 608 (b), *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010).

56. References to Evidentiary Motions Including Limine: That any party or counsel filed a motion in limine; the Court's ruling on such motion, any motion to exclude from proof any matter bearing on the issues in this cause or the rights of the parties to this suit *Texas Employers Ins. Assoc. v. Philips*, 255 S.W.2d 364 (Tex. Civ. App. - Eastland 1953, ref. n.r.e.); *Burdick v. York Oil co.*, 364 S.W.2d 766, 769-770 (Tex. Civ. App. - San Antonio 1963, writ refd n.r.e.).

57. Effect of Answers to Charge: Any comment or argument by counsel that constitutes advice to the jury on the effect of its answers.

58. TEX. CIV. PRAC. & REM. CODE ANN, 18.001 Rulings:

a. Scope Limited to Statute; No Additional Opinions: Nothing in TEX. CIV. PRAC. & REM. CODE ANN, 18.001 or TEX. R. EVID. 803 (6) and 902 (10) permits the affidavits to contain substantive testimony beyond that explicitly authorized by the statute and rules to expedite admission of documents into evidence. Affidavits in proper form according to TEX. CIV. PR.AC. & REM. CODE ANN. 18.001 (c), which are filed and served in accordance with subsection (d), will be admitted into evidence, limited to (excerpted, if necessary) the scope permitted in subsection (a): the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary.

Accordingly, any statements in any 18.001 affidavits beyond this scope are subject to this limine order.

b. Affidavit & Attached Records are Admitted into Evidence: Section 18.001 (d) provides that the affidavit is admitted into evidence.

c. Uncontroverted Affidavit Still Requires Submission to Jury: Affidavits admissible according to the preceding paragraph "are sufficient evidence to support a finding of

fact by judge or jury that the amount charged was reasonable or that the service was necessary." TEX. CIV. PRAC. & REM. CODE ANN. 18.001 (b) (emphasis supplied); *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758, 761 (Tex. App. - Fort Worth 1988, no writ)). The statute's wording clearly indicates the past and future reasonable and necessary medical care must still be submitted to the jury.

d. Uncontroverted Affidavit's Preclusive Effect: Section 18.001 (e) does preclude controverting evidence to such affidavits unless a controverting affidavit is filed. *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex. App. - Eastland 1995, n.w.h.); *Hilland O. Arnold*, 856 S.W.2d 240, 241-42 (Tex. App.- Texarkana 1993, no writ). Section 18.001 (e) does not preclude ARGUMENT (voir dire, opening or closing) critical of section 18.001 affidavit evidence. Argument is, for example, telling the jury that they can decide whether or not a certain charge is reasonable. Argument is not telling the jury that counsel thinks a certain charge is unreasonable (counsel is not testifying and there is no evidence controverting the charges on which to base such an affirmative argument).

(i) Cross-Examination:

1. If the section 18.001 affiant (doctor) testifies about reasonableness and necessity of fees contained within section 18.001 affidavit, then wide open cross examination will be permitted.

2. If the section 18.001 affiant (doctor) does not testify about the reasonableness or necessity of the fees contained within the section 18.001 affidavit (e.g. testifies about supplemental fees or some other doctor's fees or the treatment rendered or causation) , cross examination of the affiant (doctor) will not be Permitted on the matters contained within the section 18.001 affidavit, but cross-examination will be Permitted of the matters outside the section 18.001 matters.

e. Effect of Controverting Affidavit: Although section 18.001 (e) and (f) do provide that a controverting affidavit enables the party filing it to controvert the initial section 18.001 affidavit, the statute does not indicate clearly whether the initial section 18.001 affidavit remains in evidence joined by the controverting affidavit ("trial by affidavit" view) or whether both affidavits are to be excluded from evidence as hearsay ("knock-out" view), thereby requiring plaintiff to call the doctor to testify. Because section 18.001 nowhere provides that the controverting affidavit is admitted into evidence, the better view would appear to be "knockout," so this Court will exclude both the initial and controverting section 18.001 affidavit from evidence, absent a stipulation by counsel to the contrary

59. Limits on Medical Business Records Affidavit: Business record affidavits in proper form according to TEX. R. EVID. 803 (6) and filed according to TEX. R. EVID. 902 (10), which may be combined with section 18.001 affidavits discussed above, may contain information about the documents attached, that such documents are and the witness is:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

TEX. R. CIV. EVID. 803 (6). Notwithstanding the frequent objections to the contrary,

a. Additional Medical Opinions are Inadmissible: Only R. 803 (6) averments are permitted in a R. 902(10) affidavit, not additional medical opinions in the nature of a hearsay statement or report made by a person (records custodian affiant) whose qualifications typically are not shown or known.

b. Opinions & Diagnoses in Attached Medical Records are Admissible: The Rule explicitly requires admission of "opinions or diagnoses" within the documents attached to the affidavit.