MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to abolish the Dead Man's Rule, Tex. R. Evid. 601(b)

Date: September 7, 2021

Summary

Texas Rule of Evidence 601(b) (the "Dead Man's Rule" or "Rule") generally prohibits interested parties in civil actions from testifying about oral communications by a decedent, unless there is corroborating evidence or an opposing party calls them to testify about the statement.

For nearly a century, Texans have asked—

> . . . whether there is any good reason for this present-day survival of a rule now only of historical interest. One wonders whether the time consumed and the difficulty in satisfactorily interpreting the statute is not out of all proportion to the end it purports to serve.

Maurice Cheek, *Testimony As to Transactions with Decedents*, 5 Tex. L. Rev. 149 (1927). The Rule has been described "deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." *Id*. (quoting Wigmore, *supra*, sec. 578 at 822).

Yet this ancient relic of English common law continues to exist in the TRE. In full, the Rule reads as follows:

> (1) Applicability. The "Dead Man's Rule" applies only in a civil case:
>
> (A) by or against a party in the party's capacity as an executor, administrator, or guardian; or
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> (B) by or against a decedent's heirs or legal representatives and based in whole or in part on the decedent's oral statement.
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> (2) General Rule. In cases described in subparagraph (b)(1)(A), a party may not testify against another party about an oral statement by the testator, intestate, or ward. In cases described in subparagraph (b)(1)(B), a party may not testify against another party about an oral statement by the decedent.
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> (3) Exceptions. A party may testify against another party about an oral statement by the testator, intestate, ward, or decedent if:
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> (A) the party's testimony about the statement is corroborated; or

> (B) the opposing party calls the party to testify at the trial about the statement.
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> (4) Instructions. If a court excludes evidence under paragraph (b)(2), the court must instruct the jury that the law prohibits a party from testifying about an oral statement by the testator, intestate, ward, or decedent unless the oral statement is corroborated or the opposing party calls the party to testify at the trial about the statement.

Tex. R. Evid. 601(b).

The Dead Man's Rule is written so confusingly as to confound its initial purpose—and has been applied by courts to allow such minimal corroboration as to limit its application into practical obscurity. The Rule cannot, and should not, be amended to clarify its text. It should be abolished.

Background

The Rule is meant to combat fraud—to prevent one party from testifying to conversations with the deceased, who is no longer available to refute the existence of truth to those respective conversations. *In re Estate of Watson*, 720 S.W.2d 806, 807 (Tex. 1986).

But its application and scope are less than clear. For almost a century, the Dead Man's Rule has been criticized as an unnecessary relic of ancient English common law (which, until 1843, entirely prohibited interested parties and persons from testifying).[1] It took 55 years for Texas to follow England's lead and abolish the disqualification of all interested witnesses, but while Texas "renounced the general disqualification of interested witnesses by statute," it "carried forth a vestige of the old common law rule" in the form of the Dead Man's statute. *Lewis v. Foster*, 621 S.W.2d 400, 402 (Tex. 1981).

In 1938, Dean McCormick criticized the Rule as having a "baneful potency for injustice," where "in the name of solicitude for the dead, the law permits one set of living folks to cut off another's claim without a fair hearing." *See* Judson F. Falknor, State Bar Journal, *The American Law Institute's Model Code of Evidence*, 18 Wash. L. Rev. & St. B.J. 228, 230-31 (1943) (quotation omitted).

In 1981, the Texas Supreme Court cited severe criticism of the rule by "leading legal scholars in the field of evidence." *Lewis*, 621 S.W.2d at 402 (citing Ray, Texas Law of Evidence sec. 321-2 (Tex. Practice 1980);[2] 2 Wigmore, Evidence sec. 478 (Chadbourn Rev. 1979); McCormick, Evidence sec. 65 (2d ed. 1972); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, at 187 (1956); Cheek, *supra*, at 172).

[1] *See Lewis v. Foster*, 621 S.W.2d 400, 402 (Tex. 1981); *Adams v. Barry*, 560 S.W.2d 935, 937 (Tex. 1978) (citing, inter alia, II J. Wigmore, Evidence § 578 at 695 (3rd ed. 1940); C. McCormick & R. Ray, Texas Law of Evidence, § 323, et seq. (2d ed. R. Ray & W. Young 1956); Cheek, Testimony As To Transactions With Decedents, 5 Tex. L. Rev. 149 (1927)).

[2] *See also* Roy R. Ray, *The Dead Man's Statute – A Relic of the Past*, 10 Sw. L. J. 390 (1956), *available at* https://core.ac.uk/download/pdf/147635851.pdf.

In 1983, the Texas Dead Man's statute[3] was repealed, and replaced with a narrower version under the new Texas Rules of Evidence in Rule 601(b). *See Tramel v. Estate of Billings*, 699 S.W.2d 259, 261 (Tex. App.—San Antonio 1985, no writ). The doctrine has been criticized by many modern authorities as reflecting a cynicism inconsistent with the underlying assumption of modern evidence codes.[4]

Despite the age of the Rule and its narrow construction by courts, parties to this day attempt to apply it beyond its scope. *See MTNV, Inc. v. ALST Realty, LLC*, No. 14-18-00170-CV, 2019 WL 6317370, at *6 (Tex. App.—Houston [14th Dist.] Nov. 26, 2019, no pet.) (explaining the Rule does not apply in an action concerning prior use easement); *Wal-Mart Stores, Inc. v. Constantine*, No. 05-17-00694-CV, 2018 WL 2001959, at *7 (Tex. App.—Dallas Apr. 30, 2018, no pet.) (in wrongful death case, holding Wal-Mart's evidence for its motion to compel arbitration cannot be excluded under the Dead Man's Rule); *Conner v. Johnson*, No. 2-03-316-CV, 2004 WL 2416425, at *5 (Tex. App.—Fort Worth Oct. 28, 2004, pet. denied) (rejecting argument on appeal that Dead Man's Rule barred testimony, where parties were not suing or sued in capacities as heirs, beneficiaries, or representative of estate); *see also Hanover Ins. Co. v. Hoch*, 469 S.W.2d 717, 724 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.) (Dead Man's Rule did not exclude testimony about conversations with a decedent where the third-party defendants were sued in their individual capacities and not as legal representatives or heirs of the decedent's estate).

The same concerns voiced in the 1980s and 1920s apply today. The Rule's corroboration exception is easily met through evidence from any competent witness or document that tends "to confirm and strengthen" the testimony and "show the probability of its truth." *See Fraga v. Drake,* 276 S.W.3d 55, 61 (Tex. App.—El Paso 2008, no pet); *Donaldson v. Taylor*, 713 S.W.2d 716, 717 (Tex. App.—Beaumont 1986, no writ); *Quitta v. Fosatti*, 808 S.W.2d 636, 641 (Tex. App.—Corpus Christi 1991, writ denied), *Escamilla v. Estate of Escamilla*, 921 S.W.2d 723, 726-27 (Tex. App.—Corpus Christi 1996, writ denied); *Powers v. McDaniel,* 785 S.W.2d 915, 920 (Tex. App.—San Antonio 1980, writ denied). The Rule's continued usefulness is in question, since the general rules of evidence governing admissibility (e.g., hearsay), apply to civil actions in Texas courts.

Currently, the Rule is narrowly applied as one of exclusion in a particular subset of civil cases, and is easily hurdled through corroboration or waiver. It is also often misapplied or mis-cited by parties in cases it should never be raised in—as most general civil practitioners do not operate within the narrow confines in which the Rule is meant to apply.

Other Jurisdictions and Rules

Texas is in the minority in maintaining the Rule.[5]

The American Law Institute's Model Code of Evidence omitted the rule in 1942. MODEL CODE OF EVID. R. 101 cmt. (1942); *see also* Judson F. Falknor, State Bar Journal, *The American Law*

[3] Tex. Rev. Civ. Stat. Ann. art. 3716 (Vernon 1926) (repealed eff. Sept. 1, 1983).
[4] *See* 2 WIGMORE, §578, at 821 (criticizing Dead Man's Statutes); Mason Ladd, *A Modern Code of Evidence*, 27 Iowa L. Rev. 213, 220 (1942) (criticizing Dead Man's Statutes; model code of evidence should presuppose "a society in which honest people outnumber the degraded, the deceitful, and the false-swearing").
[5] *See* Ed Wallis, *Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 Cleve. St. Law Rev. 75, 76 n.9 (2005).

Institute's Model Code of Evidence, 18 Wash. L. Rev. & St. B.J. 228, 230-31 (1943) (explaining the Model Code qualifies everyone to be a witness unless incapable of expressing themselves intelligibly or understanding their duty to tell the truth, "abrogates entirely the so-called Dead Man Statute," and citing Dean McCormick's 1938 article that described the Dead Man's statute as one "of the ancient barnacles which will have to go").

The Uniform Rules of Evidence do not contain a Dead Man's Rule. *See* UNIF. R. EVID. 601 cmt. notes of advisory committee on proposed rules ("The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind").

The federal rules do not incorporate any version of the Dead Man's Rule, and provide that all witnesses are competent unless the rules provide otherwise. Fed. R. Evid. 601. *See* Author's Comments at (2), Handbook on Texas Evidence, Rule 601 (Goode and Wellborn, 2020).

Several states have eliminated or declined to adopt the doctrine.[6] Effective in 2017, the Wisconsin Supreme Court repealed its Dead Man's statutes.[7] Colorado, rather than abolish its Dead Man's rule, expanded it to apply to all civil cases.[8] A minority of states still retain some version of the rule.[9]

AREC'S Recommendation

AREC received an inquiry from a member of the State Bar asking the Committee to clarify whether that the Dead Man's Rule applies in closed estate matters. AREC formed a subcommittee to examine the issue, which performed research and conferred with attorneys practicing and teaching estate planning and probate law. The subcommittee did not recommend a rule amendment to make it inapplicable to closed estate matters, as such clarification could further complicate an already

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[6] *See* ALA. R. EVID. 601 & note (1998); ALASKA COMM. R. EVID. 601 & cmt; ARK. R. EVID. 601; DE. R. EVID. 601 & cmt.; IOWA R. EVID. 5.601-5.603; KS Stat § 60-407; KY. REV. STAT. ANN. § 421.210 (repealed); ME. R. EVID. 601 & note (1976); MINN. R. EVID. 617 & cmt.; NEV. REV. STAT. § 48.075 ("Evidence is not inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person"); N.D. R. EVID. 601 & note; OKLA. STAT. ANN. TIT. 12, §12-2601; S.D. COD. L. §§ 19-19-601, 19-19-804. **Utah** and **California** repealed their Dead Man's statutes, and included rules to compensate for that omission. *See* Ut. R. Evid. 601, orig. adv. comm. note; Cal. Evid. Code §§ 700, 1261; *see also* Recommendation and Study Relating to the Dead Man Statute, Calif. Law Rev. Comm'n (Feb. 21, 1957), *available at* http://clrc.ca.gov/pub/Printed-Reports/Pub007.pdf. **Florida** lacks a Dead Man's Rule under its rules of evidence, but does have a statute that allows, in a case against a personal representative, heir, trustee, etc., an unavailable declarant's statement is admissible if it is on the same subject matter as another statement by the declarant admitted into evidence by an adverse party. Fl. Stat. § 90.804(2)(e).

[7] *See* Joe Forward, *After 158 Years, Farewell to the Deadman's Statute in Wisconsin*, Stat Bar of Wisconsin Newsletter Vol. 8 No. 21 (Nov. 2, 2016), *available at* https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?volume=8&issue=21&articleid=25177.

[8] *See* C.R.S. 13-90-102; *see also* Herb E. Tucker and Marc Darling, *The 2013 Revised Colorado Dead Man's Statute*, 42 The Colorado Lawyer 45 (Sept. 2013), *available at* https://www.wadeash.com/PDF/2013-9-dead-mans-statute.pdf.

[9] Including Missouri, New York, Pennsylvania and South Carolina. *See, e.g.,* Mo. Stat. § 491.010(2) (applying to any suit where one of the parties or his agent is dead or incompetent); N.Y. Consol. L. § 4519; 42 Pa. C.S. § 5930; *see also* Hon. Mark I. Bernstein, Pennsylvania Rules of Evidence § 601[9] (Gann 2018) ("No evidentiary rule is more difficult to apply than the Dead Man's Rule"); S.C. Code §19-11-95; .

complicated rule, and could unnecessarily shift the focus of an inquiry under the rule from corroboration or waiver to whether an estate is open or closed.

In conducting research on this inquiry, the subcommittee was informed about the serious criticisms over the continued existence of the Dead Man's Rule—through written research, and through conversations with practitioners and professors of law. The subcommittee sought additional feedback from the Bar's Real Estate, Probate & Trust Law section concerning the Rule's continued viability.

One practitioner responded individually, providing her opinion that the Rule should remain in force as an additional gatekeeping process in probate matters. She noted that some trust and estate practitioners do not view the Rule as a hindrance and instead see it as vitally important to preventing uncorroborated testimony about a decedent's statements. However, if the Rule is abolished the remaining admissibility rules still apply, including the hearsay rules. Additionally, witness credibility is always subject to the factfinder's assessment. The presence, or absence, of corroborating evidence is already a factor that factfinders take into account when assessing witness credibility.

Some practitioners, and one Probate Court Judge, expressed frustration over the fact that many practitioners do not understand the rule, and do not know how to use it properly. As noted previously, the subcommittee was able to find numerous examples corroborating this conclusion.

Another practitioner and Probate Court Judge were in favor of eliminating the Rule.

The subcommittee presented its findings to AREC. After discussion and consideration of the feedback received, AREC voted to recommend that the Rule be abolished.

Recommendation

AREC recommends that the Dead Man's Rule, Tex. R. Evid 601(b), be abolished.