

PUBLICATION UPDATE

FUNDAMENTALS OF TEXAS TRIAL PRACTICE

CIVIL AND CRIMINAL

Fifth Edition

2019 SUPPLEMENT

HIGHLIGHTS

Juris Publishing is pleased to present the 2019 supplement to *Fundamentals of Texas Trial Practice, Civil and Criminal, Fifth Edition*. This supplement includes the following updated materials:

- Recent case clarifying notice required in civil pleadings, § 1.02.2
- Recent cases clarifying special exceptions to civil pleading. §§ 1.02.2, 1.03.5
- New authority on discovery by direct access of electronic devices in civil cases. § 1.03.4
- Recent case on discovery of *Brady* material in criminal cases. § 1.03.4
- Recent case clarifying effect of amended pleadings in civil cases. § 1.03.5
- New authorities on use of stipulations. § 1.03.6
- Recent authority on objecting to violation of Motion in Limine. § 2.03.2

- Recent case on offer of proof of expert's testimony in civil trial. § 2.04.4
- Recent case clarifying request for jury in civil trial. § 3.01.1
- Recent case clarifying use of deposition testimony. § 8.01.4[E][2][d]
- Recent cases and authorities on qualification of witness as expert. §§ 9.02.1, 9.07
- Recent case clarifying trial of issue by implied consent in civil case. § 10.02.1

TEXAS LAW AND PRACTICE SERIES

**FUNDAMENTALS OF
TEXAS TRIAL PRACTICE**

CIVIL AND CRIMINAL

FIFTH EDITION

2019 SUPPLEMENT

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JURIS

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Chapter 1
TRIAL PREPARATION

§ 1.02. PREPARATION MUST BE FOCUSED

§ 1.02.2. Your Opponent’s Theory

[A]. Pleadings

[1]. Civil

PAGE 2

[In second sentence, after “fair” notice, add note 1.1]

^{1.1} *Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018) [“fair” notice means fair and adequate notice of facts upon which pleader’s claim is based]

[Add to note 2]

Deroeck v. DHM Ventures, LLC, 556 S.W.3d 831, 835 (Tex. 2018) [without special exception, pleadings liberally construed in pleader’s favor]

§ 1.03. FUNDAMENTAL STEPS OF TRIAL PREPARATION

§ 1.03.4. Formal Discovery

[A]. Civil

PAGE 9

[Add to note 25]

See Dustin B. Benham, E-Discovery, Direct access of electronic devices after *In re Marion Shipman*, 82 Tex. Bar J. 168 (No. 3, March, 2019)

[B]. Criminal

PAGE 11

[Add to note 40]

Ex parte Espada, 565 S.W.3d 326, 335 (Tex.App. – San Antonio 2018, pet. ref’d.) [perjured testimony]

§ 1.03.5. Amend Pleadings

[A]. Civil

PAGE 11

[Replace sentence with, and add notes 42.1 and 43.1]

The sustaining of your opponent’s special exception^m may necessitate amending your pleadings to clarify the allegations of your theory,^{42.1} and the results of formal discovery^a may require amending your pleadings⁴³ by pleading theories that are supported by admissible evidence and abandoning those that are not.^{43.1}

^{42.1} *M & M Resources, Inc. v. DSTJ, LLP*, 564 S.W.3d 446, 453 (Tex.App. – Beaumont 2018, - -) [if sustaining special exception requires repleading, failure to file curative amendment may result in dismissal]. See O’CONNOR’S TEXAS RULES – CIVIL TRIALS, 3-G, §§ 9.3 – 9.5 (Jones McClure 2018).

^{43.1} *McAllen Hospitals, L.P. v. Gonzales*, 566 S.W.3d 451, 460 (Tex.App. – Corpus Christi 2018 - -)

[After first paragraph, add with note 43.2]

Amended pleadings supersede prior pleadings, and a claim not included in amended pleading is deemed dismissed.^{43.2}

^{43.2} *Bos v. Smith*, 556 S.W.3d 645, 666-67 (Tex. 2018).

§ 1.03.6. Prepare for Trial

[E]. Prepare Trial Notebook

PAGE 15

[Add to note 50]

See O’CONNOR’S TEXAS RULES – CIVIL TRIALS, Texas Rules of Civil Procedure, TRCP 11 at 979-80 (Jones McClure 2018). *See* Dix and Schmolesky, CRIMINAL PRACTICE AND PROCEDURE, § 40:48 (43 Tex. Prac. 3rd ed. 2011); §§ 46:81, 51:50 (43A Tex. Prac. 3rd ed. 2011).

[In note 52, replace 2017 Supp. Juris with]

2018 Supp., Juris

PAGE 16

[Add to CROSS-REFERENCES]

^m § 1.02.2[A][1] Pleadings – Civil

**Chapter 2
OBJECTIONS****§ 2.03. PRE-TRIAL OBJECTIONS****§ 2.03.2. Motions in Limine****PAGE 20**

[In second paragraph, replace last sentence with and add note 12.1]

If the proponent of the evidence that is the subject of the motion should violate the judge’s instruction, the movant must, first, object to the admissibility of the evidence, and, then, call the judge’s attention to the violation.^{12.1}

^{12,1} See Schlueter and Schlueter, TEXAS RULES OF EVIDENCE MANUAL, § 103.02[3][g] at 49 (10th ed. 2015, Juris).

§ 2.04. TRIAL OBJECTIONS

§ 2.04.1. When to Object

[B]. Know What Is Objectionable

PAGE 21

[Add to note 13]

See Brown and Rondon, TEXAS RULES OF EVIDENCE HANDBOOK 2019, Article IV, B. Rule 401(a), Relevance (Thomson Reuters 2019) [“legal issues and facts raised in the particular case”].

[C]. Recognize What Is Objectionable

PAGE 22

[In note 17, add to Schlueter and Schlueter]

and (2018 Cum. Supp.) [drawing or using emoji]

PAGE 23

[In note 22, replace note 1820 with]

note 20

[Add to note 23]

See Brown and Rondon, TEXAS RULES OF EVIDENCE HANDBOOK 2019, Article IV, B. Rule 401(a), 1. General principle of relevance (Thomson Reuters 2019) [evidence that “alters the probabilities involved” to any degree].

§ 2.04.2. How to Object

[C]. Be Timely

PAGE 24

[In note 24, add to Schlueter and Schlueter]

and 2018 Cum. Supp.)

PAGE 26

[In first paragraph, replace quoted provisions of Rule of Evidence 104(b) with]

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

§ 2.04.4. Making Offer of Proof

[A]. Substantive Evidence

[2]. Testimony of Expert Witness

PAGE 35

[In note 44, add]

Gunn v. McCoy, 554 S.W.3d 645, 666-67 (Tex. 2018)

**Chapter 3
JURY SELECTION****§ 3.01. IN GENERAL****§ 3.01.1. Right to Trial by Jury**

PAGE 37

[At end of first paragraph, add with note 01]

When one party properly requests a jury and pays the fee, all other parties have the right to a jury and can rely on the requesting party's request.⁰¹

⁰¹ *Matter of Marriage of Harrison*, 557 S.W.3d 99, 136 (Tex.App. – Houston [14th Dist.] 2018, pet. den'd.)

§ 3.02. FUNDAMENTALS OF VOIR DIRE EXAMINATION**§ 3.02.9. Inquire about Relief or Remedy Sought****PAGE 55**

[Add to note 65]

Quezada v. State, 553 S.W.3d 537, 545 (Tex.App. – El Paso 2018, - -) [defendant who timely files application for probation entitled to inquire about prospective jurors' ability to consider probation]

§ 3.02.21. Exercising Challenges

[A]. Challenges for Cause

[2]. Preserving Error

PAGE 64

[Add to note 77]

See Dix and Schmolesky, CRIMINAL PRACTICE AND PROCEDURE, §41:81 (43 West Tex. Prac, 3d ed. 2011).

Chapter 5
DIRECT EXAMINATION

§ 5.03. FUNDAMENTALS OF DIRECT EXAMINATION

§ 5.03.2. Prepare Witnesses

PAGE 84

[In note 6, add to Schlueter and Schlueter]

and 2018 Cum. Supp.)

Chapter 6
CROSS-EXAMINATION

§ 6.02. PURPOSES OF CROSS-EXAMINATION

PAGE 97

[In note 1, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

§ 6.03. PREPARATION FOR CROSS-EXAMINATION

§ 6.03.2. During Trial in Criminal Case

PAGE 99

[In note 2, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

Chapter 7
EXHIBITS

§ 7.04. HOW TO GET AN EXHIBIT ADMITTED

§ 7.04.5. Have Witness Authenticate and Identify Exhibit

PAGE 111

[In note 3, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

§ 7.04.6. Offer the Exhibit**PAGE 112**

[In second complete paragraph at end of third sentence, add note 4.1]

⁴¹ See Schlueter and Schlueter, TEXAS RULES OF EVIDENCE MANUAL, § 1.04.02[3][b] (10th ed. 2015, 2018 Cum. Supp., Juris)

§ 7.05. KINDS OF EXHIBITS AND THEIR AUTHENTICATION REQUIREMENTS**§ 7.05.1. Real Evidence**

[C]. Writings

[1]. In General

PAGE 115

[In note 8, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

PAGE 116

[3]. E-Mail and Text Message

[In notes 12, and 14, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

[In note 14, replace at 970 with]

963-64

[and replace 986-88 (2018 O'Connor's) with]

980-82 (Thomson Reuters 2019)

PAGE 118

[4]. Social-Networking Webpage

[In note 21, replace note 14 at 990-91 with]

note 14 at 982-85

[5]. Business and Public Records

PAGE 119

[In note 25, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

§ 7.05.2. Demonstrative or Illustrative Evidence

[B]. Foundation

[In note 26, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

PAGE 120

[In note 27, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

Chapter 8
IMPEACHMENT AND REHABILITATION

§ 8.01. IMPEACHMENT

§ 8.01.2. Requirements

[C]. Extrinsic Evidence of Noncollateral Fact

PAGE 127

[In note 6, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

§ 8.01.4 Bases of Impeachment

[E]. Prior Inconsistent Statements

[2]. Forms of Prior Inconsistent Statements

[b]. Written Statement

PAGE 137

[In note 22, replace 2017 Supp., Juris) with]

2018 Cum. Supp., Juris)

[d] Prior Testimony of Witness

PAGE 138

[In note 30 add]

See Rule of Civil Procedure 281

[In second paragraph, following fourth sentence, add with note 30.1]

If the transcript of a deposition is used as evidence, the proponent must specifically identify by reference to page or portion the testimony that is offered.^{30.1}

^{30.1} *CHW-Lattas v. City of Alice*, 565 S.W.3d 779, 793 (Tex.App. – San Antonio 2018 - -) [neither trial court nor appellate court will “wade through” entire transcript]

Chapter 9 EXPERT WITNESSES

§ 9.02. ADMISSIBILITY OF EXPERT TESTIMONY

§ 9.02.1. Requirements

PAGE 150

[In partial paragraph at top of page, at end of first complete sentence, add note 01]

⁰¹ See Goode and Wellborn, GUIDE TO THE TEXAS RULES OF EVIDENCE, § 7.02.2 (2 West Tex. Prac. 4th ed. 2016, 2018 Supp.) [statutory qualifications]; Schlueter and Schlueter, TEXAS RULES OF EVIDENCE MANUAL, § 702.02 [4] (10th ed. 2015, 2018 Cum. Supp.) [additional statutory requirements for being expert]

[In note 1, replace 2017 Supp., Juris with]

2018 Cum. Supp.)

[At end of partial paragraph a top of page, add with note 1.1]

In determining admissibility, the focus is on whether the analysis or methodology used by the expert to formulate the proffered testimony is reliable, not on whether the testimony is correct.^{1.1}

^{1.1} *Regent Care Center v. Detrick*, 567 S.W.3d 752, 762, 763 (Tex.App. – San Antonio 2018, – –) [testimony concerning reasonable and necessary past medical expenses, citing *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002) concerning value of property in eminent domain case]

§ 9.07. CROSS-EXAMINATION OF EXPERT

§ 9.07.2. Delimit Scope of Witness's Expertise

PAGE 162

[At end of first paragraph, add note 17.1]

^{17.1} *Puppala v. Perry*, 564 S.W.3d 190, 202 (Tex.App. – Houston [1st Dist.] 2018, --) [proponent must show that her expert is qualified by knowledge, skill, experience, training or education to give opinion in regard to specific issue being tried; not all licensed physicians are qualified to testify on all medical questions; physician need not practice in field about which he is testifying, but must show that he is qualified to testify to opinion on specific issue being tried].

§ 9.08. TENDERING WITNESS AS EXPERT

§ 9.08.3. Stipulation

PAGE 165

[At end of first sentence, add superscript †]

PAGE 166

[Add to CROSS-REFERENCES]

† Section 1.03.6[E]. Prepare Trial Notebook

Chapter 10
THE COURT'S CHARGE

§ 10.02. CONTENT OF CHARGE

§ 10.02.1. Issues of Fact

PAGE 167

[Add to note 3]

Bos v. Smith, 556 S.W.3d 293, 306-07 (Tex. 2018) [implied consent does not exist when evidence of unpleaded matter admitted without objection is relevant also to pleaded matter]

§ 10.02.3. Comment on Weight of Evidence**PAGE 168**

[Add to note 10]

Shock v. Property Owners Ass'n., 555 S.W.3d 339, 355-56 (Tex.App. – Corpus Christi 2018, pet. den'd.) [instruction that emphasizes particular evidence that is favorable to one party].

