

CHAPTER 1. INTRODUCTION TO TEXAS COURTS

A. The Texas Rules of Civil Procedure

Read Rules 1, 3a; Tex. Const. art. V § 31; Gov't Code § 22.004.

Texas civil practice is primarily governed by the Texas Rules of Civil Procedure, the rules promulgated by the Texas Supreme Court pursuant to its rulemaking power.¹ Pursuant to that grant of power, the Supreme Court adopted the Texas Rules of Civil Procedure in 1941. The Rules were generally amended every two years, although no amendments were made from 1990 to 1997. Since 1990, the Supreme Court and its Advisory Committee have been working on dramatic changes to the Rules, particularly in the areas of discovery, sanctions, the jury charge, and appellate procedure. New appellate rules and a new summary judgment rule became effective September 1, 1997. New discovery rules became effective January 1, 1999. Significant rule changes were made in response to the 2003 tort reform legislation.

Although the original 1941 Texas Rules of Civil Procedure (“TRCP”) were adopted in response to the same movement that produced the Federal Rules of Civil Procedure (adopted in 1939), and the Federal Rules were used somewhat as a guide, significant differences exist between the two. A quick look through the table of contents to the Texas Rules of Civil Procedure shows the first difference between the Texas and Federal Rules—there are many more rules in Texas than in the federal courts. On first glance, the Texas rules appear to be well-organized. Further study will reveal, however, that while the organization may have made sense in 1941, the many amendments since have created a hodgepodge of rules. Often, a series of rules share the same number, but are entirely unrelated. For instance, Rule 166 governs pretrial conferences and Rule 166a governs summary judgments. Large groups of rules are missing, having been repealed for one reason or another, such as the separate codification of the Texas Rules of Appellate Procedure (“TRAP”). Moreover, although many of the rules are quite modern, others are clearly antiquated, causing only confusion in today’s practice.

Many Texas courts also have a set of local rules that further define practice before them. The Texas Supreme Court adopted the current version of Rule 3a after determining that many courts had unwritten local rules, known only to the judges and local lawyers who practiced before them, that changed significant deadlines set out in the Texas Rules of Civil Procedure. Local rules often establish local procedures for handling the court’s docket, pretrial matters and motions dealing with such matters as default judgments and withdrawal of counsel.² Rule 3a requires all local rules to be published and approved by the Supreme Court, and prohibits local rules that alter the time limits imposed by the Texas Rules of Civil Procedure.³ It is extremely important that you become familiar with the local rules applicable to any court in which you practice. Nearly every county has a set of local rules and there is little uniformity.

Texas civil practice is also governed by a number of statutes. Most of these statutes can be found in the Texas Civil Practice and Remedies Code (“CPRC”) and the Government Code.

¹ The Rules Enabling Act of 1939, now codified as GOV’T CODE § 22.004.

² See *e.g.*, *United Business Machines v. Southwestern Bell Media, Inc.*, 817 S.W.2d 120 (Tex. App.—Houston [1st Dist.] 1991, no writ) (approving Harris County local rules that allowed sanctions to be imposed after written submission without oral hearing).

³ See *United Marketing Technology, Inc. v. First USA Merchant Services, Inc.*, 812 S.W.2d 608, 611 (Tex. App.—Dallas 1991, writ denied) (holding that Dallas Civil District Court local rule allowing amended pleading only with leave of court not less than 14 days before trial is inconsistent with TRCP 63 and violates TRCP 3a).

Sometimes, the legislative agenda differs from the rules promulgated by the Supreme Court. For example, in the 1995 legislative session significant changes were made to the venue statutes, effective for cases filed on or after September 1, 1995. The *rules* concerning venue, however, have not been revised. A sanctions bill also became law in 1995, creating significant conflicts with the sanctions practice that is now part of the rules.

Appellate practice in Texas is governed by the Texas Rules of Appellate Procedure (“TRAP”), which were adopted in 1997, and apply to both civil and criminal appeals. Before 1997, the civil appellate rules were contained in the Texas Rules of Civil Procedure. The appellate rules present more of a “cookbook” approach than do the civil rules—they provide a fairly detailed description of what one has to do when appealing a case.

The Texas Rules of Evidence (“TRE”) govern the admission of evidence at trial. However, a few of these affect civil procedure (such as the rules governing privilege). Thus, some of these rules are also included in the materials.

B. The Adversary System and Civil Procedure

To understand any system of civil procedure, one must have a basic understanding of the adversary process, an essential element in the American judicial system. In an adversary system, neutral and passive decision-makers adjudicate disputes after hearing evidence and arguments presented by both sides. The parties and their client-dedicated legal representatives, rather than the judge, control much of the progress of the proceedings. They gather and evaluate facts and legal theories and present them to the decision-maker in the most persuasive manner possible. The system thus creates competition between the parties, encouraging each to marshal all of the law and facts favorable to its side and to attack unreliable information presented by the opponent. Although the incentives created are not so much to seek the truth as to seek success for their partisan position, in theory the competition between the two sides results in a complete and accurate account of the dispute. The adversary system creates incentives to thoroughly investigate, but it also creates incentives to keep the results of investigations confidential to prevent any benefit from accruing to the opponent. Thus, although investigation and analysis of the facts underlying the dispute are encouraged, the newly uncovered facts are only selectively made available to the fact-finder.

The rules of procedure govern this adversary system and often make choices that may seem somewhat arbitrary. In order to succeed in a lawsuit, these rules of procedure must be obeyed. Sometimes a party is rewarded with victory in the dispute despite the true merits of the case. Rule 1 of the TRCP, however, proclaims that “[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.” This book will explore whether our rules of civil procedure have achieved these goals of justice and efficiency.

C. An Overview of Texas Pretrial Procedure

Pretrial procedure is the process by which parties prepare for the trial in which their dispute will be resolved. While a trial may last only a few days or weeks, the pretrial portion of modern civil procedure usually consumes months or, more likely, years. During the pretrial portion, the case is likely to be settled by agreement between the parties. Thus, the primary purpose, to prepare for trial, is often forgotten.

Before a lawsuit is commenced, the plaintiff has to make many decisions. Most importantly, the plaintiff must decide that filing suit is worth the time, effort, and expense that it will cost to pursue it. Litigation is only one of many dispute resolution processes, and is perhaps the most expensive and time-consuming. It usually should be resorted to only when other informal methods of dispute resolution have failed.

Assuming that the decision to pursue litigation has been made, the litigant must decide in which court to bring the action. First, the plaintiff must determine which courts have subject matter jurisdiction over the dispute, and choose the forum accordingly. As you will see, some of the Texas trial courts have limited subject matter jurisdiction, governed by a complicated statutory scheme. The plaintiff must also determine in which of the 254 Texas counties suit should be filed. This concept, called venue, is also governed by statute, and usually gives the plaintiff several options from which to choose.

The suit is commenced when the plaintiff files its pleadings, called the “Plaintiff’s Original Petition,” rather than the “Complaint” as it is called in most other courts. In this written document, the plaintiff identifies the defendant and gives the defendant notice of the claims being asserted against it. The plaintiff can bring multiple claims against multiple parties. The defendant is brought within the power of the court when the defendant is served with process and a copy of the plaintiff’s pleadings. Texas courts have power over all persons who reside in Texas as well as limited power over nonresidents. Therefore, if the plaintiff seeks to sue a nonresident, the question of personal jurisdiction must be considered.

Following service of process, the defendant must respond to the petition, usually by filing an answer that denies the plaintiff’s allegations, and sets forth any defensive allegations upon which the defendant wants to rely. These pleadings (the petition and answer) provide the blueprint of the lawsuit, from which decisions regarding relevance are determined in discovery and at trial. When the rules were originally promulgated, pleadings were the primary vehicle by which parties obtained information from their opponents about the litigation. Accordingly, the rules provide a vehicle for the defendant to ask the plaintiff to plead more specifically. In addition, the defendant may want to contest the court’s subject matter jurisdiction, personal jurisdiction, or venue. The rules provide for special pleadings that have the specific purpose of objecting to the assertion of jurisdiction or venue. Last, but not least, the defendant may want to bring in additional parties or assert his own claims against the plaintiff. There are rules of procedure allowing for each of these as well.

The most time-consuming pretrial matter is discovery, where the parties formally obtain information relevant to the lawsuits from the other parties to the lawsuit and from nonparties. Over time, the scope of discovery has broadened substantially, seeking to reveal the relevant facts and prohibit trial by surprise. Broad discovery has significant implications for pleading practice—as more facts are revealed through discovery, the use of pleadings as a tool to reveal facts becomes superfluous.

The Texas rules set out particular permitted forms of discovery. Parties can take oral depositions of parties and witnesses (where the lawyers question a witness under oath, and the proceedings are recorded and transcribed for later use). Parties can also make inquiries to other parties through written interrogatories (written questions that require a written answer made under oath). One of the most useful discovery vehicles is the request for documents and things (where parties are required to produce requested and relevant documents and things for inspection and copying). The rules also provide for various privileges and exemptions from discovery, which, when properly asserted by the responding party, can protect that party from having to disclose particular information in discovery. Because our system uses the adversary system to accumulate facts in discovery, disputes over discovery have become the rule rather than the exception. The Texas Rules of Civil Procedure provide detailed guidelines for the resolution of these disputes.

D. An Overview of Texas Trial and Appellate Procedure

The advocate in a jury trial must cultivate a split personality. He or she is almost always working the case at two levels, trying to coax a favorable verdict out of the jury while at the same time making a record of trial court errors so that the case can be reversed if the result is bad. These objectives do not always live in harmony. Often, trial counsel is so caught up in the demands of the moment—where to go with the witness when the court has excluded critical testimony, for example—that the need to “preserve error” is forgotten until it is too late.⁴ Sometimes the emphasis on persuasion causes counsel to deliberately forego the preservation of error. An improper closing argument may be even more damaging if highlighted by objection. Repeated objections, though sometimes necessary, can be seen by the jury as a suspicious bent toward concealment. If you make the right objection every time you can to “protect the record” you will undoubtedly have preserved all errors for appeal—where you will surely need them, the judge and jury having long since decided that you are a pettifogger intent on defeating an open trial. In a typical trial no more than two or three bad rulings will be critical. The rest will be harmless (that is, not reversible error) and can be seen as such when they occur. So it is that the best advocates, who know how to preserve error, sometimes decide not to do it.

It is perhaps unfair, but it is the case that almost everything that goes wrong at a trial can and will be laid at the feet of the judge. Why? Because the judge’s control of the trial is both preventative and curative. The judge can prevent unfairness by excluding certain evidence before it comes in, for example, or by preparing a correct charge, or, in some cases, by granting a motion for directed verdict and ending the trial early. But the judge can sometimes *cure* unfairness after the fact by such actions as striking improper comments and instructing the jury to disregard them, admonishing overzealous counsel, declaring a mistrial, or taking the case away from an errant jury. And, at the end of the day, when the trial is over and the jury has gone home, the court can cure *all* trial errors by ordering a new trial and starting over.

Procedure is not advocacy and knowledge of procedure does not aid in persuasion. In fact, procedural rules are often devised precisely for the purpose of blunting persuasion that is effective because it goes past the limits of fair disputation. Advocacy is salesmanship. It attempts to win the

⁴ The term “preserving error” places an unfortunate emphasis on the negative. We should be concerned with stamping out error rather than preserving it. What is meant, of course, is that the errors which occurred during the trial are preserved in the record for appellate review.

favor of the court or jury and to make them do what the advocate wants. Procedural rules set the boundaries for advocacy, controlling and channeling it into an orderly (and presumably fair) contest and providing appellate recourse to those aggrieved by the trial court's actions. The trial counsel's mission is to use advocacy to win, but failing that, to protest errors with the required formalities so that the record will support a reversal on appeal. This secondary or conditional goal—preserving a basis for reversal if the verdict goes the wrong way—sometimes tempts counsel to ignore ethical obligations and to “seed the record with error” or “sandbag”; that is, to hide the real objection in a barrage of bogus complaints, so that the judge is tricked into overruling it. The judge's error can then form the basis of a reversal if the sandbagger loses, giving his client the chance to return to fight another day. One of the missions of procedure is to protect the judge—and the system—from such deception.

So, procedure sets the rules and advocacy operates within them to persuade. Many procedural disputes lie almost entirely within the trial court's discretion. The court will decide on whatever grounds it wishes, constrained only by some rather vague prohibitions against completely arbitrary behavior. If it wants to consider irrelevancies or appeals to emotion or even competing hairstyles it will do so.⁵ Advocacy is an art, and whatever persuades—within the limits of ethical behavior—is right. If you think you can persuade the judge by reciting *Hiawatha*, you're welcome to do it. Therefore, once we have identified a matter for decision as one within the court's discretion we will have little more to say about it. We will leave the techniques of persuading the judge to advocacy courses and will concentrate instead on the rules and strictures which the trial court must follow or else risk reversal.

What should be the criteria for overturning the judgment of the trial court? The litigant is entitled to a fair trial but not necessarily a perfect one. The system will not compel a second contest simply because inconsequential mistakes were made in the first. The soccer concept of “no harm no foul” informs the idea of harmless error. Unless the mistake was “calculated to cause and probably did cause” an improper judgment; that is, unless it changed the outcome of the case, the error will be said to be harmless and there will be no reversal. The harmless error rule is ignored in some situations where the system presumes that there is harm and the judgment will be reversed.

But there is another reason that not all errors are fatal. Many legitimate complaints about trial conduct are waived. Trial counsel is charged with seeing that his client's rights are protected by placing on the record the right protest at the right time and in the right form. The idea of “fundamental” or “incurable” error—a mistake requiring reversal even though no one complained of it at the time it was made—has almost completely disappeared.

Before an appellate court will reverse a trial court's actions it will want to see (1) that counsel clearly pointed out what the court was doing wrong (or was about to do wrong), (2) that counsel gave the “grounds” for the complaint—the rule or precept being violated, (3) that counsel told the court how to avoid or correct the error (unless that was clear from the nature of the protest), and (4) that the court clearly rejected the protest (e.g., overruled an objection). None of this counts for anything, of course, if it does not appear in the written record that goes to the appellate court.

These general requirements for preserving error are no more than common sense would suggest. In certain instances, however, the requirements are more detailed. The rules and cases require that the complainant follow a step-by-step sequence of motions and related actions. The best advocates, in time, master these requirements and it is important to do so. But those who must react

⁵ This is merely an example. In practice almost all judges will make a good faith attempt to decide discretionary matters in accordance with accepted standards.

immediately to an adverse ruling made in the heat of battle would do well to be sure the record reflects at least that the judge was told precisely what was wrong, told which rule or precept made it wrong, and then told how to fix it, and that the judge then refused to take the appropriate action.

In determining how to deal with adverse rulings or findings a careful advocate must answer some hard questions. Is the offending action one in which the court or the jury has unlimited discretion? Broad discretion? Limited discretion? Almost no discretion? Are there only two courses available either of which the trial court can take with impunity? Or is there a single right ruling, all others being wrong and potentially reversible? Furthermore, if the ruling is wrong, either as an error of law or an abuse of discretion, can it be shown to have changed the outcome? Is it a ruling that may, under special circumstances, give rise to a kind of presumed harm which overrides the usual harmless error rule? Is the complaint that the jury has acted contrary to the evidence before it and, if so, what curative action is available to the court? And finally, must an appellate review await the conclusion of the case or is the error one that may be corrected by *mandamus* or some form of interim appeal?

It may seem that this book gives short shrift to appellate procedure. But in fact, the book addresses appellate issues in every chapter. An appellate lawyer's job is not only to ensure that appellate deadlines are satisfied and the brief is written. She must also ensure that error is preserved, the record is complete, and the standards of review are well understood—all things that are included throughout this book.

E. Quick Note on Materials

In addition to this casebook, you should also have a copy of the Texas Rules of Civil Procedure, Appellate Procedure and Evidence, and the statutes that are discussed here. It is important to have a current version—the Texas Rules of Civil Procedure were last amended December 1, 2005. The Texas Rules of Appellate Procedure were last amended September 1, 2008. The Texas Rules of Evidence were last amended January 1, 2007. There are often statutory changes made during the most recent legislative session—the last session ended June 1, 2009.

Throughout this book, “Rule ____” refers to one of the Texas Rules of Civil Procedure, which will also be abbreviated as “TRCP.” The appellate rules will be abbreviated as “TRAP,” and the evidence rules will be abbreviated as “TRE.” The statutes will be referred to by the name of the Texas statutory code from which the statute comes (i.e. “Government Code”), but the Texas Civil Practice and Remedies Code will usually be referred to as “CPRC.”

The opinions in the text are substantially edited from the original. Footnotes and string cites are often deleted without noting the deletion. Large text deletions are noted with “* * *”. However, occasionally courts “* * *” as a indication of a break in the opinion. Texas Supreme Court opinions are used whenever possible, and the Texas Supreme Court is often referred to as the “Supreme Court.”