

# Discovery & Evidence

**Texas Justice Court Training Center**

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**Funded by a Grant from the Texas Court of Criminal Appeals**

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# Discovery

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## What is Discovery?



Exchange of information between parties in a case.

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## What Does That Mean?



Parties are entitled to know what information the other side has.



What witnesses do they have?



What documents do they have?



Do they have other items, like pictures, videos, etc.?

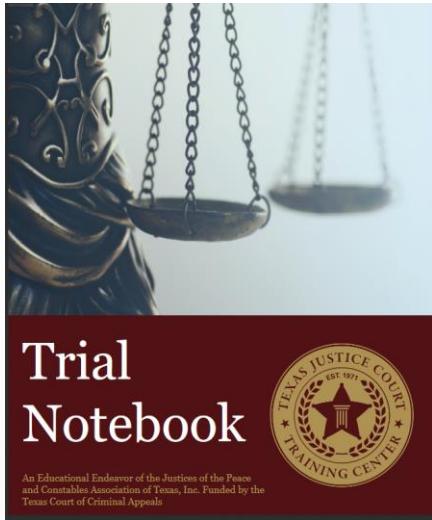
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## The Purpose of Discovery

- To allow parties to obtain full knowledge of the issues and facts of the lawsuit before trial. *West v Solita*, 536 SW2d 240 (Tex. 1978)
  - “The objective of the Texas discovery rules is to prevent trial by ambush.” *Gutierrez v Dallas ISD*, 729 SW2d 691 (Tex. 1987)
- Also allows parties to obtain information about the nature and location of assets after a civil judgment for the purposes of enforcing the judgment.

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## CHAPTER 2: DISCOVERY

### A. What is Discovery?

Discovery is the way that parties in a case exchange information, such as pictures, documents, and statements, related to the case.

Despite what is shown on television, surprises are not meant to happen in a trial. This has been the view of the Texas Supreme Court for many years. Discovery is "to allow parties to obtain full knowledge of the issues and facts of the lawsuit before trial." *West v. Soltis*. The objective of the Texas discovery rules is to prevent trial by ambush. *Gutierrez v. Dallas ISD*.

### 1. Discovery in Criminal Cases

Criminal discovery issues are almost always handled by the prosecutor. Most county and district attorney offices automatically give the defense attorney or defendant the information they are asking for.

However, there is a law that governs the process for the defendant to formally request evidence that is relevant to the case and outlines what the state must give to the defense. This is often referred to as the "Michael Morton Act," a 2013 bill of the same name that broadened the scope of information that the state is required to provide to the defendant or their attorney, if they have one. The state must give the defendant any evidence that is in their possession or allow them to inspect and copy the information. Because of recent scrutiny of this process, many prosecutor's offices have created policies to make sure this is complied with. *Code of Criminal Procedure Art. 39.14*; Chapter 6 of the *Criminal Deskbook*.

If there is exculpatory, mitigating, or impeaching information in the custody of the state, the state must inform the defense and disclose that information to the defense without delay.

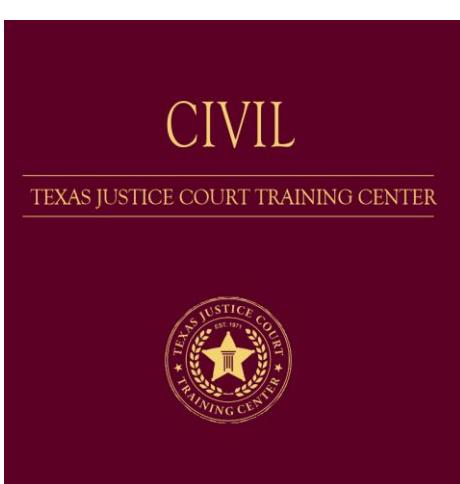
### F. Pretrial Discovery

#### 1. What is Pretrial Discovery?

Pretrial discovery is the process by which the parties to a civil case can obtain information about the case from the other side before the trial. That way, they are able to develop the facts they will present at trial and avoid being unfairly surprised by facts the other side presents.

Discovery is routinely used in civil cases filed in district court or county court to help

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the parties prepare their cases for trial. It is far less common in justice court, because the cases in justice court are less complex and the cost of the discovery might be more than the amount in dispute.

However, sometimes there is a legitimate need for pretrial discovery in a civil case in justice court.

Discovery may also be taken after a judgment has been entered. *This is discussed on page 111.*

### 2. What Types of Discovery Are There?

# Discovery in Criminal Cases



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## Criminal Discovery

- Discovery requests are fairly rare in justice court.
- The defendant usually requests things such as copies of documents or photographs.
- The state is **not required** to allow self represented defendants to make copies, **but may allow it**, or just give copies to the self represented defendants.
- Code of Criminal Procedure Art. 39.14(a) & Art. 39.14(d).

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## What Types of Things Might be Asked for in a Criminal Case?

- Dashboard camera video tapes
- Copy of a police report
- Picture taken of reported damage

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## Discovery Requests Go to the Prosecutor – Not to the Court

- If you receive a discovery request in a criminal case, forward the request to the prosecutor.

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# When is the Court Involved in Criminal Discovery?

- The state may object to the defendant's discovery request.
  - The court must hold a hearing and decide if the items should be disclosed.
  - *Example: if the request is not relevant to the case or is something the state does not have.*
- The defendant may request a hearing if the state redacts (blacks out) anything from the documents they do provide.
  - If that happens, the court must hold a hearing and decide at the hearing if the redactions are proper.

*Code of Criminal Procedure Art. 39.14(c).*

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## ‘Michael Morton Act’ and Exculpatory Evidence

- The state must give any “exculpatory evidence” to the defendant.
  - The defendant **does not** have to request this information.
- Exculpatory evidence is any evidence that could show the defendant is not guilty or would tend to reduce the punishment for the crime.

*Brady v. Maryland, 373 U.S. 83 (1963); Code of Criminal Procedure Art. 39.14*

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# Discovery in Civil Cases



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## When Discovery Can Be Used

- **Pre-trial** discovery is limited to what the judge approves and considers **reasonable and necessary** (certain procedures apply).
- **Post-judgment** discovery doesn't have to be approved by the court ahead of time.
- Discovery requests can be objected to (certain procedures apply).

*More information coming up about all of this when we talk about discovery procedures.*

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# Types of Civil Discovery

Requests for disclosure

Requests for admissions

Interrogatories

Requests for production

Depositions

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## Requests for Disclosure

- Specific requests – or questions – stated verbatim in the Texas Rules of Civil procedure.
- Approved by the Supreme Court.
  - You would not need to decide if it is reasonable and necessary.

*Texas Rules of Civil Procedure, Rule 194 (a) – (l)*

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## Requests for Admission

- Written requests that the other party admit or deny in writing the truth of any matter relevant to the pending case.
- Each request for admission should cover only one topic.
  - *NOT: "Admit you drove a red car and it clearly already had damage to the front bumper"*
- These are not questions, but statements.

*Texas Rules of Civil Procedure 198.1*

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## “Deemed” Admissions

- If a party doesn’t answer to either “admit or deny” the statement, it is treated as if they admitted it. These are called “deemed” admissions.

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## A Party Can Withdraw an Answer to a Request for Admission If:

- The party shows ***good cause*** for the withdrawal or amendment; and
- The court finds that the parties relying upon the responses and deemed admissions ***will not be unfairly prejudiced***.

*Texas Rules of Civil Procedure, Rule 198*

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## Interrogatories

Written questions that must be answered under oath.

Can respond by objecting to the interrogatory.

Purpose is to gather information about the other party's case.

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# Requests for Production

A party can make a request for production or for inspection – to inspect, sample, test, photograph and copy documents or physical things within the scope of discovery.

The request must be specific about the items so that the party responding knows exactly what the request is for.

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## Scope of Interrogatories and Requests for Production

- You can always limit the ‘scope’ if you agree with the subject matter.
- For example, you can limit the time span of the request (i.e.: “only for the past 5 years”) or the types of information (i.e. only allow records related to the injury at issue vs. all medical records).
- It is your choice as the court what to allow.

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## Discovery Scenario #1

- Amber was drinking and hit Bronson's parked car with her car. Bronson is now suing her for the damage. In her discovery request, Amber is asking for all records and photos related to car damage or repairs that Bronson has had since he was 16.
  - Is this reasonable and necessary?
  - How might you limit the scope?

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## Depositions

- A deposition is sworn testimony taken outside of court for use later either in court or to assist in enforcing a judgment.
- Very rare in justice courts.

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## More Information

For more information on each type of discovery discussed in the previous slides, see Ch. 2, Section A of TJCTC's *Trial Notebook*.

## Civil Discovery Procedures

The procedures for discovery in civil cases is different depending on when during the case it is done:



Pre-Trial



Post-Judgment

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Pre-Trial Discovery

*(After a lawsuit is filed, but **before** a judgment is issued)*

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## Need Approval from Court

- Pre-trial discovery is allowed in justice court, but is limited to what the judge considers ***reasonable and necessary***.
- The court is the gatekeeper – discovery cannot be served on the opposing party until after it has been approved by the court in a signed order.

*Texas Rules of Civil Procedure, Rule 500.9. (a)*

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## Different from Other Courts

- County & district courts do ***not*** require the court's approval first.
- Those courts have little information that discovery is even happening.

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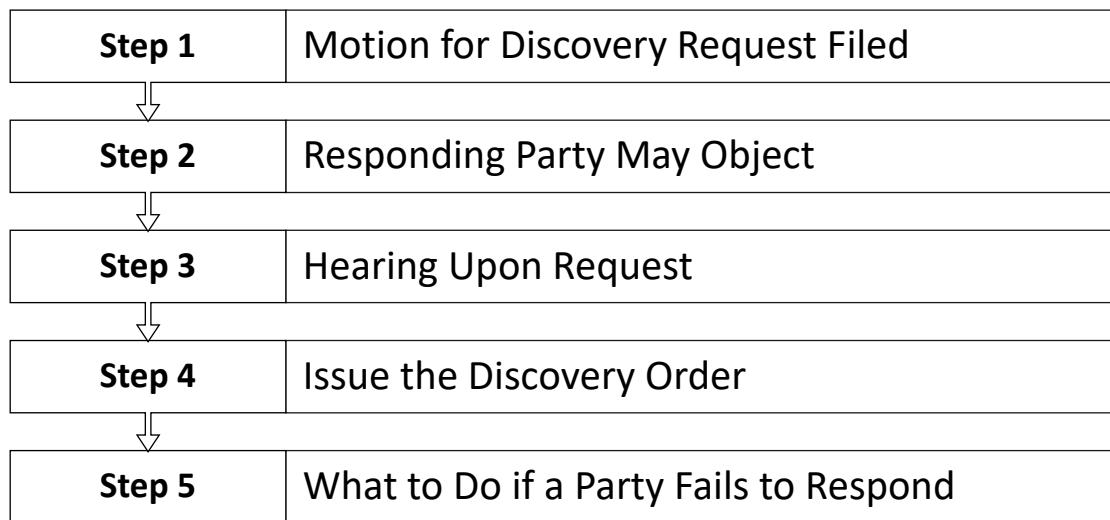
# What if Discovery is Served Without Approval in Justice Court?

A party does not have to respond to discovery that **has not** been approved by written order of the court.

- If they don't respond, it cannot be held against them because the discovery was improper.
- If they do respond, the court may choose to strike the invalid discovery request and exclude the information from the case.

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## Pre-trial Discovery Procedure in JP Court:



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## Step 1: Motion for Discovery Request Filed

- A party may submit a motion to request discovery at any time after a case is filed, including with the initial filing.
  - Must be written.
  - The other party must be served with the motion.

*Texas Rules of Civil Procedure, Rules 500.9(a) & Rule 501.4. (a)*

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## Step 2: Responding Party May Object

- The responding party may request a hearing.
- The responding party may object that the discovery requested is unnecessary or unreasonable.
  - Many times, the objection will be that the request is unreasonable, because it is too broad and difficult to answer.

*Texas Rules of Civil Procedure, Rule 500.9. (a)*

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## Step 3: Hearing Upon Request

- The court may hold a hearing on discovery but is not required to unless a party requests one.
- There is no set timeframe stated in the rule as to how long the court must wait for the responding party to request a hearing.
- If a hearing is requested, the court should set it, notice all parties, and hear any concerns.

*Texas Rules of Civil Procedure, Rule 500.9. (a)*

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## Step 4: Issue the Discovery Order

- The order must be written and provided to all parties.
  - The order should state which discovery requests have been approved, the timeframe in which to respond, and where the responses should be sent.
- The court has broad discretion to determine what to allow and what the deadlines will be.
  - What is reasonable and necessary?
  - ***May be some, may be all, may be nothing.***

*Texas Rules of Civil Procedure 500.9 (a)*

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# Form of the Discovery Order

- Can use TJCTC form.
  - Can simply mark through sections not approved of and can attach to a signed order.
  - Can require the party to 're-do' the discovery per the approved portions as an order and then sign.
  - Can find another way ***as long as it makes it clear*** what must be answered and by when.

*Texas Rules of Civil Procedure 500.9 (a)*

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# Sample Order

PLAINTIFF _____		§	IN THE JUSTICE COURT
V. _____		§	PRECINCT _____
DEFENDANT _____		§	COUNTY, TEXAS
<b>PRETRIAL DISCOVERY ORDER</b>			
<p>The court, having considered the written motion of <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant for pretrial discovery and the discovery requests submitted to the court for approval pursuant to Rule 500.9, <b>FINDS</b> the following discovery to be reasonable and necessary and authorizes such discovery to be served on the responding party:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> None</li> <li><input type="checkbox"/> The following Interrogatories: Nos. _____</li> <li><input type="checkbox"/> The following Requests for Production of Documents: Nos. _____</li> <li><input type="checkbox"/> The following Requests for Admission: Nos. _____</li> <li><input type="checkbox"/> Other discovery: _____</li> <li><input type="checkbox"/> The attached discovery requests.</li> </ul> <p>The responding party shall respond to the discovery requests within _____ days and shall serve the responses on the party making the discovery requests in a manner permitted under Rule 501.4.</p> <p>Failure to comply with this Pretrial Discovery Order may result in sanctions, including dismissal of the case or an order to pay the other party's discovery expenses.</p> <p><b>ISSUED AND SIGNED</b> on _____, 20____.</p> <hr/> <p>JUSTICE OF THE PEACE, PRECINCT _____ COUNTY, TEXAS</p>			

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## Discovery Scenario #2

Thea claims she loaned Randy her car and he never gave it back. Randy claims the car was a gift. Thea has filed a motion to request discovery. In the proposed discovery, she includes a request for copies of all of Randy's text messages that include Thea's name.

Is this reasonable and necessary?

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## Step 5: What to Do if a Party Fails to Respond

- A party must respond to any **approved** discovery in the time stated by the court.
- If they don't adequately respond, this should be brought to the court's attention by the requesting party in a Motion to Compel.
  - Motion to Compel: "A party's request that the court force the party's opponent to respond to the party's discovery request" -*Black's Law Dictionary*.
  - A Motion to Compel should **not** be brought on the court's own motion.

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# Hearing a Motion to Compel

- The court should set a hearing on the motion within a reasonable amount of time & give notice to both parties.
- Hear the arguments as to why the discovery was not responded to or was not sufficiently responded to.
- You may order a new answer date or modify the discovery requested.
- You could also potentially order sanctions.
  - *Texas Rules of Civil Procedure 500.9(a)*
  - The court may use Texas Rule of Civil Procedure 215.1 as guidance.

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## Potential Sanctions

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Reasonable expenses for having to bring a motion to compel, including attorney fees.

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No more discovery by the disobedient party.

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The facts involved in the discovery dispute will be decided against the disobedient party.

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Facts that were the subject of the discovery order not allowed into evidence.

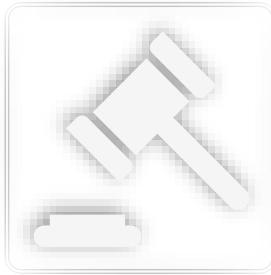
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Strike pleadings, dismiss with or without prejudice, or give a default judgment against the disobedient party.

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Contempt (use caution!)

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## Post-judgment Discovery

*(After a judgment is issued)*

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### Purpose

- These requests seem very personal because the case is now post-judgment and the plaintiff is trying to collect on the judgment.
- Therefore, the focus in post-judgment discovery is, “do you have money and where is it so I can recover on my judgment?”

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## Which Types of Discovery Apply

- Interrogatories will often be served asking for assets, property, and money.
- Depositions and requests for productions could also be utilized to get this information, but they are less common.
- Requests for disclosure and admission would no longer apply.

*There should be no more discovery about who was wrong, why, or how much money is owed.*

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## Post-Judgment Discovery Procedure

- There is no requirement that these requests go through the court. The requests may be made to the party directly.
- The responding party must be given at least 30 days to respond.

*Texas Rules of Civil Procedure, Rule 500.9(b)*

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# Objection to Discovery

- The responding party may object in writing within 30 days of receiving the request.
- The court must then hold a hearing to determine if the discovery request is valid.
  - If the objection is denied, the judge must order the party to respond to the discovery request.
  - If the objection is upheld, the judge may modify the discovery request or dismiss it entirely.

*Texas Rules of Civil Procedure, Rule 500.9(b)*

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# Failure to Respond

- Just like with pre-trial discovery, a Motion to Compel can be filed with the court by the requesting party for failure to adequately respond.
- The court should set a hearing on the motion within a reasonable amount of time & give notice to both parties.

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## Order on Motion to Compel

- If the motion is granted after listening to arguments, the court should order the responding party to respond by a certain date. The court can also potentially order sanctions.
  - But note that many of the pre-trial discovery sanctions will not apply because the case is over.
  - *We again urge caution, restraint, and thoughtfulness in the use of discovery sanctions.*
- If the motion is not granted, then the court will just enter an order denying the motion. The discovery should not be modified at this point (new discovery can always be served).

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## Evidence

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# What is 'Evidence' in the Courtroom?

Testimony from witnesses and documents or items.

Each party may offer these as their evidence at trial.

The other party may try to keep them out of evidence by objecting.

The court decides what should come in after an objection based on the Texas Rules of Civil Procedure and Rules of Evidence.

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## When Do The Rules Apply in Criminal Cases?

- The Rules of Evidence always apply to a criminal proceeding in a justice court.

*Code of Criminal Procedure Art. 45.011*

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## When Do the Rules Apply in Civil Cases?

- The Rules of Evidence **do not apply** **except:** “when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties.”

*Texas Rules of Civil Procedure 500.3*

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## Where to Find the Texas Rules of Evidence

- <https://www.txcourts.gov/>
- TJCTC Trial Notebook Ch. 7

*Remember, the rules should be made available at your court! --Texas Rules of Civil Procedure 500.3 (f)*

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Rule	Effective Date	Proposed Changes
Texas Rules of Civil Procedure	September 1, 2016	
Texas Rules of Appellate Procedure	September 1, 2016	
Texas Rules of Evidence	June 14, 2016	
Statewide Rules Governing Electronic Filing in Criminal Cases	November 1, 2015	
Texas Rules of Judicial Administration	March 22, 2016	
Texas Code of Judicial Conduct	August 22, 2002	
Rules of Judicial Education	November 25, 2013	
Judicial Branch Certification Commission Rules	September 1, 2014	
Texas Disciplinary Rules of Professional Conduct	March 22, 2016	
Texas Rules of Disciplinary Procedure	March 22, 2016	
Judicial Bypass Rules under Ch. 33 of the Family Code	January 1, 2016	

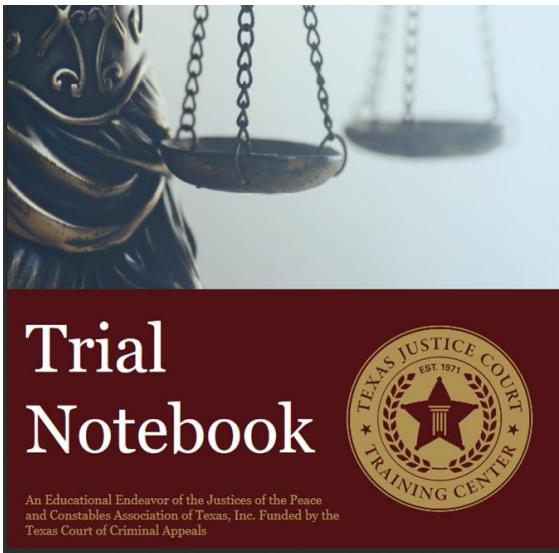
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TEXAS RULES OF EVIDENCE  
Effective June 1, 2020

<b>ARTICLE I.</b>	<b>GENERAL PROVISIONS</b>
Rule 101.	<a href="#">Title, Scope, and Applicability of the Rules; Definitions</a>
Rule 102.	<a href="#">Purpose</a>
Rule 103.	<a href="#">Ruling on Evidence</a>
Rule 104.	<a href="#">Preliminary Questions</a>
Rule 105.	<a href="#">Evidence That Is Not Admissible Against Other Parties or for Other Purposes</a>
Rule 106.	<a href="#">Remainder of or Related Writings or Recorded Statements</a>
Rule 107.	<a href="#">Rule of Optional Completeness</a>
<b>ARTICLE II.</b>	<b>JUDICIAL NOTICE</b>
Rule 201.	<a href="#">Judicial Notice of Adjudicative Facts</a>
Rule 202.	<a href="#">Judicial Notice of Other States' Law</a>
Rule 203.	<a href="#">Determining Foreign Law</a>
Rule 204.	<a href="#">Judicial Notice of Texas Municipal and County Ordinances, Texas Register</a>
	<a href="#">Contents and Published Agency Rules</a>
<b>ARTICLE III.</b>	<b>PRESUMPTIONS</b>
Rule 301.	<a href="#">[No Rules Adopted at This Time]</a>
<b>ARTICLE IV.</b>	<b>RELEVANCE AND ITS LIMITS</b>
Rule 401.	<a href="#">Test for Relevant Evidence</a>
Rule 402.	<a href="#">General Admissibility of Relevant Evidence</a>
Rule 403.	<a href="#">Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons</a>
Rule 404.	<a href="#">Character Evidence; Crimes or Other Acts</a>
Rule 405.	<a href="#">Methods of Proving Character</a>
Rule 406.	<a href="#">Habit; Routine Practice</a>
Rule 407.	<a href="#">Subsequent Remedial Measures; Notification of Defect</a>
Rule 408.	<a href="#">Compromise Offers and Negotiations</a>
Rule 409.	<a href="#">Offers for Medical and Similar Expenses</a>
Rule 410.	<a href="#">Prior Proceedings, and Related Statements</a>
Rule 411.	<a href="#">Liability Insurance</a>
Rule 412.	<a href="#">Evidence of Previous Sexual Conduct in Criminal Cases</a>
<b>ARTICLE V.</b>	<b>PRIVILEGES</b>
Rule 501.	<a href="#">Privileges in General</a>
Rule 502.	<a href="#">Required Reports Privileged By Statute</a>
Rule 503.	<a href="#">Lawyer-Client Privilege</a>
	<a href="#">[No Rules Adopted at This Time]</a>

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**CHAPTER 7: THE TEXAS RULES OF EVIDENCE IN JUSTICE COURTS**

**A. Application of the Rules and Objections**



This chapter is only a summary of the most commonly applicable rules of evidence in justice court cases. The full text of the Rules of Evidence can be found at <https://www.txcourts.gov/rules-forms/rules-standards/>.

The rules of evidence are the guidelines for how a court should determine what information is considered in a case. This could mean testimony from a witness, or it could mean items like documents, picture, or videos.

In criminal cases, the rules of evidence **always** apply just as they do in county and district court. *Code of Criminal Procedure Art. 45.011.*

In civil cases, the rules of evidence generally **do not** apply. However, the court **may** choose to apply a rule of evidence to make sure the trial is fair to all parties. *Rule 500.3(e).*

**How do you know when to allow a rule of evidence in a civil case?**  
Applying the rules of evidence is more of an issue in a jury trial, because the court may need to keep the jury from hearing information that could improperly influence their verdict. The court will need to rely on its judgment to decide if information goes too far.

In a bench trial, the court would hear the information even if a party wanted to object, so the court would simply use its judgment to ignore information that should not be considered as part of the case.

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# First Rule of Evidence?

Only apply the rules when an objection is made!!

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## How Do You Respond to an Objection?

- **Sustained** – if you agree with the objection and are *not* going to allow the evidence.
- **Overruled** - if you disagree with the objection and *are* going to allow the evidence.

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# Now Let's Look at Some Specific Rules!

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## Relevance

Texas Rules of Evidence 402

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# Relevance

- All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority.
- Evidence which is not relevant is inadmissible.

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## What Does “Relevance” Mean?

- Evidence that tends to make a fact more or less likely than it would be without the evidence.
- The fact should be “of consequence” in determining the action.

*Texas Rules of Evidence 401*

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# Relevance Examples

- **(civil case):** The make and model of the car the defendant is driving at the time of the accident *is relevant* to identify which car caused the accident. The amount of the defendant's monthly car payment *is not relevant* to who caused the accident.
- **(criminal case):** A picture of the posted speed limit sign on the stretch of road the defendant was traveling on at the time of the citation *is relevant*. The music the defendant was listening to *is not relevant* to determine if he was speeding.

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# Personal Knowledge

Texas Rules of Evidence 602

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# Personal Knowledge

A witness can only talk about things they have personal knowledge of. They can prove knowledge by their own testimony.

*This rule does not apply to a witness's expert testimony under Rule 703.*

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## Personal Knowledge Example #1

- **(civil case):** The defendant in a car accident case testifies that “the plaintiff must have been texting during the accident.” The defendant **thought** they saw the plaintiff on their phone.
  - What did the defendant actually see?
  - What does the defendant actually have personal knowledge of?

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## Personal Knowledge Example #2

- **(criminal case):** The law enforcement officer testified that the defendant read a book called “How to get out of a speeding ticket.” The officer saw it on the front seat of the car.
- What did the officer actually see?
- What does the officer actually have personal knowledge of?

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## Unfair Prejudice

Texas Rules of Evidence 403

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# Unfair Prejudice (Often Called “403”)

The court may exclude relevant evidence if its “probative value is substantially outweighed by a danger of unfair prejudice” (confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence).

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## What Does That Mean?

- Most evidence is ‘prejudicial’ to the other side.
- This rule applies to evidence – even if it would be admissible – if it is **too** prejudicial.
- Usually, it’s evidence that is too extreme or distracting.

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## Unfair Prejudice Example #1

- **(civil case):** In a car accident case, the plaintiff wants to talk about all of the affairs the defendant has had.
- Would you allow information about the affairs into evidence?

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## Unfair Prejudice Example #2

- **(criminal case):** The state wants to use a previous conviction against the defendant in a speeding case. The conviction is for aggravated assault on a child.
- Would you allow the conviction into evidence?

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# Hearsay

Texas Rules of Evidence 801(d)

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## General Rule

- Generally, statements made outside of court are not admissible.
- Those statements are not as reliable as ones made in court, under oath.
- The hearsay rules consider who said something, why they said it, and the setting in which it was said to determine if the statement is reliable enough to be used in court.

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## According to the Rules of Evidence

*The following are allowed into evidence under the hearsay rule.....*

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## Truth of the Matter Asserted

Out of court statements **can** be allowed as evidence if the evidence is just showing that the statement was **made**, not that the statement is **true**.

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## Truth of the Matter Asserted

- Offering an out of court statement to show that the statement is true is called “using the statement for the truth of the matter asserted” and is not allowed under the hearsay rule.
- If the statement is not being “used for the truth,” it can be admitted into evidence.

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## Truth of the Matter Asserted Example

- Officer is explaining why he pulled over a car and says dispatch told him a blue Corvette license ABC 123 was driving erratically.
- The statement from dispatch **can** be used to show why the officer pulled the car over, but **cannot** be used as proof the car was actually driving erratically.

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## Opposing Party Statement

- Was made by the party, or
- Was made by an authorized person or agent on behalf of the party.

*Texas Rules of Evidence 801 (e)(2)*

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## Opposing Party Statement Examples

- **(civil case):** In a car accident case, the plaintiff testifies that he heard the defendant say, “I was not paying attention to the color of the light.”
- **(criminal case):** During a traffic stop for speeding, the officer testifies that the defendant told him, “I didn’t know the speed limit changed when I entered town.”

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## By an Employee or Agent (*Likely Only in Civil*)

- A customer sues the owner of an autobody shop for poor work. The employee mechanic told the plaintiff, "I think we ordered the wrong part, but it fit, so we used it."
- The employee's statement can be used against the owner of the autobody shop.

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## Excited Utterance

A statement relating to a startling event or condition, made while the person who made the statement was under the stress of excitement that it caused.



*Texas Rules of Evidence 803 (2)*

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# Excited Utterance Example

- **(civil case):** The passenger in a car accident makes a statement 30 minutes after the accident telling law enforcement that the driver of the car (the plaintiff) was texting right before the collision.
- **(criminal case):** The passenger of the defendant pulled over for speeding testified that while they were pulled over, a sports car went by quickly and startled the DPS trooper. The trooper said, “now there’s a car that was definitely speeding.”

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## But What About...

- What if it had been several hours since the ‘startling’ event?
- Would that impact this hearsay exception?

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## Records of a Regularly Conducted Activity (“Business Records Exception”)

- Made at or near the time that the event occurred.
- Made by someone with knowledge.
- Kept in the regular course of business.
- Supported by an affidavit (or testimony) from the custodian of the records.
- Opponent fails to demonstrate that the source or method of keeping the record indicate a lack of trustworthiness.

Texas Rules of Evidence 803(6)

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## Business Records Examples



An entry in a ledger book showing a payment received.



An estimate for work to be performed.



A medical record.

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# Public Records

- Public records are allowed into evidence if they include a public officer's activities during a time they had a legal duty to report.
- **But this does not include law enforcement reports in a criminal case. Why not?**
  - Criminal defendant has the right to cross examine witnesses.
  - Law enforcement should be able to testify from their own memory.

Texas Rules of Evidence 803 (8)

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# Credibility & Character of a Witness

Impeachment  
Opinion and reputation for Truthfulness  
Impeachment by a Criminal Conviction  
Crimes and Other Acts

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# Impeachment

- Impeachment means to attack the credibility – or believability – of a witness.
  - The credibility of a witness may be attacked by **any party**, including the party calling the witness.
- A party can always try to show that a witness is lying, biased, or wrong.*

Texas Rules of Evidence 607

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# Opinion and Reputation for Truthfulness

- This is the only ‘quality’ about a witness that can be criticized.
- Cannot say they are a bad person or immoral.
- Can only present evidence that a witness *is* truthful after the character of that witness for truthfulness has been ‘attacked’ by opinion or reputation evidence.
- *This is an exception to hearsay.*

Texas Rules of Evidence 608

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# Opinion and Reputation for Truthfulness

- Generally, cannot use a specific act that a person took (“specific instances of conduct”).
- Only a prior crime can be used as a specific act.
- Can use “opinion and reputation” evidence.

Texas Rules of Evidence 404, 608

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Plaintiff: Mr. Smith, do you know Ms. Johnson?

Witness: Yes, I do.

Plaintiff: How do you know her?

Witness: I have known her for 10 years and are neighbors.

Plaintiff: How well do you know her?

Witness: She is an acquaintance, I do not socialize or do business with her.

Plaintiff: Are you aware of her reputation for truthfulness in your community?

Witness: Well, I know what everyone thinks of her generally, if that's what you mean.

Plaintiff: Yes, please tell us what you understand is her reputation for telling the truth.

Witness: She has a reputation as a liar. People in our community do not think she is the sort of person who tells the truth.

Plaintiff: Have you heard of any specific times she was not truthful?

*Objection!* Court: Sustained

Plaintiff: Have you ever seen Ms. Johnson do anything deceitful?

*Objection!* Court: Sustained.

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# Impeachment by Evidence of a Criminal Conviction

- **Shall** allow into evidence to attack a witness's character for truthfulness if:
  - The party gave notice to the other side that they plan to use the conviction,
  - The conviction was within the last 10 years,
  - The crime was a felony or involved moral turpitude, &
  - The probative value outweighs its prejudicial effect to a party.

Texas Rules of Evidence 609 (a)

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# Crimes and Other Acts

- **Cannot be used to say “you did it before, so you did it this time.”**
- Can only be used for another purpose, such as: motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
  - Highly technical.
  - Rarely used in higher courts.
  - Almost never expect to use in justice court.

Texas Rules of Evidence 404

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# Opinions of Witnesses

Expert opinions  
Lay opinions

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## Expert Witness

- Many people are experts on topics and can testify to them if their scientific, technical, or other specialized knowledge will help to understand the evidence or determine a fact in the case.
- Must be qualified as an expert by knowledge, skill, experience, training, or education.

Texas Rules of Evidence 702

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## What's an Example of an Expert Witness You May Have in a Justice Court Case?

- Would a mechanic be an expert witness in a case against an autobody shop?

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## Opinion by Lay Witness

- Lay witness means someone who is not testifying based on special knowledge or training.
- If a person sees or hears something, they should be able to draw a conclusion from it.
- Should be rationally based on the witness's perception.
- Helpful to clearly understanding the witness's testimony or to determining a fact at issue.

Texas Rules of Evidence 701

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## What's an Example of Lay Witness Testimony?

- Could a lay witness testify to their opinion about whether another person appeared angry?

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## Privileged Communications

*Texas Rules of Evidence 503, 504, & 509*

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# Privileged Communications

- Generally, parties cannot ask for information discussed between an attorney-client, doctor-patient, or spouses.

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# Miscellaneous Evidence that Shouldn't be Admitted

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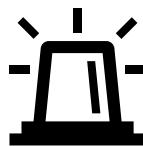
# Must Not Be Admitted into Evidence in Criminal Cases

- Any withdrawn plea of guilty or nolo contendere.
- Any statement made during plea discussions with a prosecuting attorney (if it did not result in a plea of guilty or nolo contendere).

*Texas Rules of Evidence 410*

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TJCTC strongly suggests you apply the rules on the following slide in civil cases and remind the parties before a civil trial begins that they will be applied in the case.



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Should not be admitted into evidence in civil cases:



Settlement negotiations.



Offers to pay medical expenses.



Existence of liability insurance.



A plea of *nolo contendere* made by the opposing party in a criminal case.

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## Generally Applicable Evidence Rules for Trial

Control of the court  
Excluding witnesses  
Refreshing memory

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# Control of the Court

- Can exercise reasonable control over the trial.
  - Make sure procedures are effective for determining the truth.
  - Avoid wasting time. (Ex: Set time limits on questioning witnesses.)
  - Protect witnesses from harassment or undue embarrassment. (Ex: Stop repetitive questions or attempts to pressure the witness into an answer.)

*Texas Rules of Evidence 611*

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# Excluding Witnesses (“Sequestration” or “Invoking The Rule”)

- Can order all witnesses except the parties to leave during testimony. (On request or court can do this on its own)
- Exceptions:
  - Someone “essential” to the party’s case (like an expert).
  - The victim in a criminal case, unless the court thinks they could be influenced by other testimony.
  - In civil, the spouse of the party.

*Texas Rules of Evidence 614 & Texas Rules of Civil Procedure 500.7*

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# Refreshing Memory



- Sometimes a witness forgets what happened.
- They can be reminded by reviewing a document or item and then testifying if their memory has been “refreshed.”
- The other side is entitled to:
  - See the document or item, to cross-examine the witness about it, & introduce parts that relate to the testimony of the witness.

*Texas Rules of Evidence 612*

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## Let's Try Some Scenarios!

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## Evidence Scenario #1

While driving home after an evening drinking at a local bar, the plaintiff passed out at the wheel, ran a red light and was struck by a car driven by the defendant. The plaintiff, under the influence of alcohol, staggered from his car. The defendant, believing that the plaintiff had been injured by the accident, said “It’s my fault. I was not paying attention.”

The plaintiff sued the defendant for damages alleging that the defendant was driving negligently. The plaintiff offered the statement above.

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Defendant objects to hearsay. Should the defendant’s statements be admitted?

- A. No, because the defendant’s statement is a settlement offer.
- B. No, because the plaintiff was really the negligent party.
- C. Yes, as a statement by an opposing party.

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## Evidence Scenario #2

Plaintiff sues the defendant for injuries resulting from a car accident.

At trial, the plaintiff's witness testified that the defendant ran a red light and then hit the plaintiff's car.

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Which of the following is the court most likely to be allowed to impeach the credibility of the witness?

- A. A record of a juvenile offense.
- B. A question on cross-examination asking whether the witness told the police a different version of the facts.
- C. A certified copy of a robbery arrest from five years ago for which the witness was acquitted.
- D. A record of an arrest one week ago on a felony offense.

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## Evidence Scenario #3

- Prosecutor calls Witness, who testifies that he witnessed the defendant's assault on Victim.
- Witness will testify that Victim said, "Help me, she is killing me!" Defense counsel objects, claiming hearsay.

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Should the testimony be admitted?

- A. Yes
- B. No

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