

TEXAS PROCEDURE UPDATE: Recent Cases, Amended Rules of Procedure & Legislative Enactments Affecting Texas Practice

Professor Elaine Grafton Carlson
South Texas College of Law
1303 San Jacinto, Suite 755
Houston, Texas 77002
(713) 646 1870
ecarlson@stcl.edu

Courtney Taylor Carlson
Jackson Walker L.L.P.
1401 McKinney
Houston, Texas 77010
(713) 752-4500
ccarlson@jw.com

37th Annual Page Keeton Civil Litigation Conference
University of Texas School of Law
Austin
October 24-25, 2014

*These materials are largely excerpted from McDonald & Carlson, Texas Civil Practice (2013 Supplement), West Publishing. Westlaw Database: "txcp"

Contents

PROFESSOR ELAINE A. CARLSON	v
Courtney Taylor Carlson	vi
Pretrial and Trial Procedure Update	1
Attorneys	1
Courts	2
Actions	3
In General	3
Declaratory Judgments	5
Trespass To Try Title	5
Class Actions	5
Preemption	7
Parties	7
Multi District Litigation	9
Pleadings: In General	10
Verified	10
Amended Pleadings	10
Immunity	11
Texas Tort Claims Act	11
Review of Immunity Rulings	11
Res Judicata	12
Jurisdiction, Service of Process, and Ancillary Proceedings	20
Special Appearance & Personal Jurisdiction	20
Plea To The Jurisdiction	22
Dominant Jurisdiction	22
Attacks on Defective Service	23
Forum Non Conveniens	25
Injunctive Relief	28
Discovery	30
Scope of Discovery	30
Electronic Discovery	31
Rule 202 Depositions	33
Discovery Regarding Experts & Expert Reports	34
Medical Privileges	35
Trade Secret Privilege	35
Contempt and Sanctions	39
Daubert Rulings	41

Arbitration	42
Arbitration- Discovery	47
Summary Judgment	47
Choice of Law	55
Motion Practice	55
Jury Trial	56
Jury Selection	56
The Jury Charge	56
Election of Remedies	59
Attorney Fees	60
Prejudgment and Postjudgment Interest	65
Non Suit	65
Dismissal	66
Dismissal Due to Absence/Deficiency in Expert Report	66
Dismissal For Want of Prosecution	69
Default Judgments	69
Settlement	72
Motion for New Trial and Other Post-Judgment Motions	73
Bill of Review	77
Supersedeas	78
Enforcement of Domestic Judgment	81
Fraudulent Transfer	81
Turnover Orders to Enforce Judgment	81
Full Faith and Credit	82
Appellate Review	83
Preservation of Error	84
Waiver of Appellate Complaint	85
Appeals from Summary Judgments	85
Jurisdiction of Appellate Courts	86
interlocutory Appeals	87
Appellate Mandate	91
Appellate Timetables	91
Appellate Record	92
Restricted Appeals	92
APPENDIX A	95
Recently Amended Rules of Procedure & Legislative Enactments Affecting Litigation	95
Unsworn Declarations In Lieu of Affidavits	95
Online Access to Local Rules of Texas Courts	97
Notice of Constitutional Challenges to Attorney	97

Digital Signatures.....	99
Electronic Filing With Courts Mandated.....	99
Amount in Controversy Jurisdiction Raised in County Courts At Law	100
Small Claims Court Abolished & New Rules Govern Justice Court Proceedings.....	100
Probate Code Repealed	100
Changes to Return of Service Practice	100
Rules for Early Dismissal of Cases On the Pleadings	101
Expedited Trials.....	104
Court Approved Forms For No Contest Divorces.....	111
Litigation Expenses Recoverable- Offer of Settlement	111
Responsible Third Party Designation Limited	112
Conduct of The Jury.....	112
Discretionary Interlocutory Appeals	112
Appellate Motions & Brief Limitations Measured By Number of Words Not Pages.....	113
Appellate Record.....	113
Parental Rights Termination Appeals	113
Anti-Slapp Suits	114
Expedited Foreclosures	115
Cases Needing Additional Resources.....	115
APPENDIX B	116
Restyling Rules of Evidence.....	116
Proposed Texas Rule Changes Pending before the Texas Supreme Court	116
Ancillary Rules of Procedure.....	116

PROFESSOR ELAINE A. CARLSON
Stanley J. Krist Distinguished Professor of Law
South Texas College of Law, Houston, Texas
ecarlson@stcl.edu

BIOGRAPHICAL INFORMATION

Professional Appointments:

Member, American Law Institute.

Appointee: Supreme Court of Texas Advisory Committee on Rules of Practice and Procedure 1986-present; Texas Supreme Court Task Force on Ancillary Proceedings, Chair 2009-2012; Texas Supreme Court Task Force: Code of Judicial Conduct Member 2003-2004; State Bar of Texas Appellate Council 2005-2008, Texas Supreme Court Task Force: Judicial Speech Advisory Committee 2002; Texas Supreme Court Task Force on Civil Reform 2002-2003; Past member of Appellate Practice Specialist Exam Commission; Civil Trial Law Specialist Exam Commission; Personal Injury Trial Law Specialist Exam Commission.

Law Related Publications, Academic Appointments and Honors, Education and Bar Admissions:

Stanley J. Krist Distinguished Professor of Law, Professor at South Texas College of Law. Faculty 1982-Present, Faculty, Houston Bench Bar Conference on Appellate Practice 2000, 1998; Faculty, Texas Judicial Conference 1993-1994, Faculty, Texas Briefing Attorney Seminar 1998.

Author, McDonald and Carlson, Texas Civil Practice, West Publishing (six volume treatise): Co-author with Professors William Dorsaneo, David Crump, and Elizabeth Thornburg: Texas Pretrial and Trial & Appellate Practice texts, Lexis Publishing Co.; Author of numerous articles focusing upon civil procedure and related topics, including publications with Baylor Law Review, Texas Tech Law Review, St. Mary's Law Review, South Texas Law Review; Texas Bar Journal, and others. State Bar of Texas, Litigation Section, Contributing Author on Civil Procedure Update for Section Quarterly Publication "The Advocate" 1987-1999.

Honors: Texas Extraordinary Women in Texas Law, Texas Lawyer Award 2008; Distinguished Alumna, South Texas College of Law 2008; State Bar of Texas Bar Foundation Outstanding Law Review Article of the Year, 1995; Vinson & Elkins Faculty Excellence Award; South Texas College of Law Outstanding Professor Award.

Visiting Professor and CLE Lecturer, University of Texas School of Law; Continuing Legal Education Author and Frequent Lecturer, State Bar of Texas, Southern Methodist University School of Law, South Texas College of Law, Houston Bar Association, Travis County Bar Association; Internal Seminars: First and Fourteenth Court of Appeals, Texas Association of Defense Counsel, Texas College of Trial Advocacy, Texas Judicial Conference. Advisor to Texas Legislature, Joint Special Committee on Security for Judgment, Texas Legislation 1987, as well as Commission on Federal Courts 1990.

Briefing Attorney (First Court of Appeals), Honorable James P. Wallace 1978-1980.

Admitted to Bar 1979. Admitted to practice before all Texas Courts, the U.S. Supreme Court; U.S. Court of Appeals, Fifth and Eleventh Circuits; U.S. District Court, Southern District of Texas.

Preparatory education, Southern Illinois University (B.A. 1974); McMaster University (Master of Arts 1976); Legal education, South Texas College of Law (J.D. Summa Cum Laude 1979).

**Courtney Taylor Carlson
Jackson Walker L.L.P.
1401 McKinney St., Suite 1900
Houston, Texas 77010
(713) 752-4500**

Courtney Taylor Carlson was born in Houston, Texas, in 1983. She received her Bachelor of Business Administration from the University of Texas at Austin in 2005 and her Doctor of Jurisprudence with honors from South Texas College of Law in 2008. She currently is an associate in the litigation section of Jackson Walker in the Houston office. Ms. Carlson's practice focuses on civil litigation and appellate issues. She has served on the adjunct faculty of South Texas College of Law teaching Texas Procedure as well as Appellate Advocacy.

Ms. Carlson was a Briefing Attorney to Justice David M. Medina of the Supreme Court of Texas from 2008-2009. While at South Texas, Ms. Carlson was a Staff Member on the Texas Journal of Business Law and a Member of Phi Delta Phi Legal International Fraternity. She received an American Jurisprudence Award in 2005 for obtaining the highest grade in her Legal Research and Writing course.

Ms. Carlson was a member of three varsity appellate advocacy teams, including the William B. Spong, Jr. National Moot Court Competition where her team won first place and received the Best Brief award, the Burton D. Wechsler First Amendment Moot Court Competition where her team received the Best Brief award and she was named the Third Best Speaker, and the American Bar Association National Appellate Advocacy Competition where her team won at the regional level. As a result of Ms. Carlson's active involvement in the South Texas Advocacy Program, she was honored with the Dean's Student Advocacy Service Award for Most Outstanding Female Varsity Moot Court Advocate.

Ms. Carlson is a member of the American Bar Association, the State Bar of Texas (Litigation and Appellate sections), the Houston Bar Association (Litigation and Appellate sections), and the Houston Young Lawyers Association. She has co-authored several CLE papers for the State Bar of Texas as well as the University of Texas School of Law. Ms. Carlson was awarded the 2012 Young Alumni of the Year award from South Texas College of Law

Pretrial and Trial Procedure Update

Attorneys

Gregory v. Porter & Hedges, LLP, 398 S.W.3d 881, 885 (Tex. App.--Houston [14th Dist.] 2013, pet. denied) (Plaintiffs seeking forfeiture of attorneys' fees may not recover fees paid by a third party. Rather, the attorney must return to each client the fees that each client paid to the lawyer. Fee forfeiture is only available for "clear and serious" violations of a lawyer's fiduciary duty, and even then, total fee forfeiture is not always appropriate.).

Tactical Air Def. Servs. v. Searock, 398 S.W.3d 341, 346-47 (Tex. App.--Dallas 2013, no pet.) (The attorney-client relationship is one of principal and agent. However, where the agent abandons his office before conclusion of the proceedings, any knowledge possessed by the agent cannot be imputed to the principal." A motion to withdraw as counsel must state whether the client consents to the motion and to state the client's last known address. The rule also requires an attorney seeking withdrawal to give client notice either in person *or* by mail at their last known address *by both* certified and regular first-class mail. Here, the defendants' former attorney's (Corley) motion to withdraw did not state whether either defendant consented to Corley's withdrawal, it did not indicate whether the addresses listed were the defendants' last known addresses, nor did it indicate it was delivered in person or by both certified and regular first-class mail. By failing to comply with Rule 10, Corley deprived defendants of valuable due process rights. Corley's unexplained difficulty in communicating with his clients did not excuse Corley's failure to comply with the requirements of rule 10. Even if the court assumed appellants had a duty to investigate whether Corley was still their attorney, due process requires a lesser sanction that trial without notice or an opportunity to be heard. Thus, Corley's knowledge of the trial setting cannot be imputed to defendants.).

Kanan v. Plantation Homeowner's Assoc., Inc., 407 S.W.3d 320, 328-34 (Tex. App.--Corpus Christi 2013, no pet.) (The trial court did not err in entering judgment on Rule 11 settlement agreement between homeowners association and subdivision owner, who argued it was unenforceable. The agreement was entered of record by being read into the court record.

Although subdivision owners revoked consent to the agreement the agreement is still enforceable as a contract, and the court only must not enter an agreed judgment which it recognized. The agreement contained all essential terms and material details that were vitally important and those missing from the agreement do not render it unenforceable. Violations of the statute of conveyances and the statute of frauds were not raised in the pleadings or argued before the trial court and do not make the agreement unenforceable. Also, certain terms and details of the agreement were discussed in open court and agreed to by the parties, and not supplied by the trial court to make the agreement unenforceable. Additionally, homeowner's association provided proper pleading and proof to support enforcement of the agreement by filing a pleading seeking enforcement of settlement agreement and injunction to restrain from interference with enforcement.).

Sacks v. Zimmerman, 401 S.W.3d 336, 340-43 (Tex. App.--Houston [14th Dist.] 2013, pet. denied) (Attorney's actions must involve fraudulent or malicious conduct to prevent attorney from successfully asserting affirmative defense of qualified immunity. An invasion of privacy claim does not fall into Texas' torts involving fraudulent or malicious conduct that would justify waiver of this litigation immunity. Additionally, conduct complained of that took place during the representation of a client does not prevent attorney from immunity.).

Litman v. Litman, 402 S.W.3d 280, 284 (Tex. App.--Dallas 2013, pet. denied) (Respondent in a divorce proceeding filed a motion to recuse on the morning the case was set for trial and thereafter left the courthouse without presenting the motion to the trial court. The trial court called the case and no one appeared for respondent. The judge declined to recuse because the motion was not timely filed. A trial judge has discretion to deny a motion to recuse made on the morning of trial as untimely and commence the trial. As required by Rule 18a, the judge must still refer the motion to the presiding judge of the administrative judicial district and await a response before signing a judgment.).

Courts

Pjetrovic v. 4HG Fannin Investments, LLC, 400 S.W.3d 119, 123-24 (Tex. App.--Dallas 2013, pet. denied) (A district court or a statutory county court may refer any civil case or portion of it to an associate judge. An associate judge's order has the same force and effect as an order of the referring court

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Texas Procedure Update: Recent Cases, Amended Rules of Procedure & Legislative Enactments Affecting Texas Practice

Also available as part of the eCourse

[Civil Litigation Texas Updates 2014: Civil Procedure; Supreme Court; plus Anti-SLAPP](#)

First appeared as part of the conference materials for the
38th Annual Page Keeton Civil Litigation Conference session
"Texas Civil Procedure Update"