



TEXAS MOTION PRACTICE HANDBOOK

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- (j) Failure of a Party to Designate Himself or Herself As a Person With Knowledge of Relevant Facts
- (k) Survivability of Sanctions Following Nonsuit
- (l) A Reversal of the Trend Toward the Imposition of Sanctions—*TransAmerican v. Powell*
- (m) Monetary Sanctions

SELECTED CASES

- 1. Validity
- 2. Purpose of Sanctions
- 3. Sanctions in General
- 4. Death Penalty Sanctions
- 5. Burden of Proof
- 6. Prejudice
- 7. Interrogatories
- 8. Depositions
- 9. Right to Hearing on Sanctions Motion
- 10. Timing of Sanctions Motion

CHECKLISTS

Movant—Sanctions and Motion to Compel
Nonmovant—Sanctions and Motion to Compel

FORMS

- 10.1 Motion for Sanctions—Rule 13, Frivolous Lawsuit
- 10.2 Order on Motion for Sanctions—Rule 13, Frivolous Lawsuit
- 10.3 Motion for Sanctions—Rule 21b, Failure to Serve Papers
- 10.4 Order on Motion for Sanctions—Rule 21b, Failure to Serve Papers
- 10.5 Motion for Sanctions—Rule 166, Violation of Pretrial Order
- 10.6 Order on Motion for Sanctions—Rule 166, Violations
- 10.7 Motion to Compel Answers to Interrogatories/Requests for Production
- 10.8 Order on Motion to Compel Answers to Interrogatories/Requests for Production
- 10.9 Motion to Strike Expert for Failure to Produce Report of Independent Medical Examination
- 10.10 Order on Motion to Strike Expert for Failure to Produce Report of Independent Medical Examination
- 10.11 Motion for Issuance of Writ of Attachment—Rule 176, Failure of Witness to Attend
- 10.12 Writ of Attachment—Rule 176, Failure of Witness to Attend
- 10.13 Motion to Compel Answers to Deposition Questions
- 10.14 Order on Motion to Compel Answers to Deposition Questions
- 10.15 Motion to Compel Designation of Corporate Representative
- 10.16 Order on Motion to Compel Designation of Corporate Representative
- 10.17 Motion for Sanctions—Failure of Witness to Attend Deposition
- 10.18 Order on Motion for Sanctions for Failure to Attend
- 10.19 Motion for Sanctions—Abuse of Discovery

CHAPTER 11

GUARDIAN *AD LITEM* PRACTICE IN PERSONAL INJURY CASES

11.0 Introduction

11.1 Guardian *Ad Litem* Overview

- (a) Recommendations of a Guardian *Ad Litem*
- (b) The Parent-Guardian Release
- (c) Ownership of the Cause of Action/Statutes of Limitations on Such Actions
- (d) The Nature of the Relationship Between the Minor, the Next Friend, and the Guardian *Ad Litem*
- (e) The Distinction Between Guardians *Ad Litem*, Attorneys *Ad Litem*, and Guardians Over the Minor's Estate
- (f) Standards for Appointment of Guardians *Ad Litem* in Personal Injury Cases
- (g) Standards for Appointment in Service by Publication Cases
- (h) Malpractice Liability of the Guardian *Ad Litem*
- (i) Payment of Guardian *Ad Litem* Fees

11.2 Disbursement and Management of the Minor's Recovery

- (a) Claims Between the Minor and the Next Friend As to Proceeds From Settlement
- (b) Subrogation
- (c) Management and Investment of the Minor's Recovery
- (d) The Registry of the Court
- (e) Management by Next Friend or a Bonded Manager
- (f) Section 142.005 Trust
- (g) Commercial Annuities With Qualified Assignment
- (h) Treasury Bond Structured Settlement Trusts (SST)
- (i) Combining a Section 142 Trust and a Commercial Annuity
- (j) The "Special Needs" Medicaid Trust
- (k) Master Pooled Trusts
- (l) Formal Guardianship

11.3 Procedure

- (a) Jurisdiction and Venue
- (b) Preparation for the Minor Prove-Up Hearing by Plaintiff's Counsel
- (c) Preparation for the Minor Prove-Up Hearing by Defense Counsel
- (d) Preparation for the Minor Prove-Up Hearing by the Guardian *Ad Litem*
- (e) Resolution of Disputes As to the Terms of the Settlement or the Distribution of the Proceeds
- (f) The Minor Prove-Up Hearing
- (g) Drafting Settlement Agreements and Judgments
- (h) Appeal and Mandamus

SELECTED CASES

1. Standards for Appointment
2. Discretion of the Trial Court
3. On Service by Publication
4. Duties of the *Ad Litem*
5. Awarding Costs

CHECKLISTS

Plaintiff—Guardian *Ad Litem* Practice and Procedure
Defendant—Guardian *Ad Litem* Practice and Procedure
For *Ad Litem* Appointed Before Settlement
For *Ad Litem* Appointed After Settlement

FORMS

- 11.1 Motion for Order Appointing Guardian *Ad Litem*
 - 11.2 Objection to Motion for Order Appointing Guardian *Ad Litem*
 - 11.3 Application to Withdraw Minor's Funds Upon Attaining Age of Majority
 - 11.4 Order to Withdraw Minor's Funds Upon Attaining Age of Majority
 - 11.5 Order on Motion for Appointment of Guardian *Ad Litem*
- Language for Reproducible Certificate of Service and Fiat

CHAPTER 12

MOTIONS FOR DIRECTED VERDICT

12.1 General Overview

- (a) Motions for Directed Verdict in General
- (b) An Analysis of Rule 268 Motion for Instructed Verdict
- (c) Grounds for Directed Verdict
- (d) Motions for Directed Verdict in Nonjury Trials
- (e) A Comparison Between Directed Verdict and Summary Judgment Practice
- (f) Directed Verdict for Defendant
- (g) Directed Verdict for Plaintiff
- (h) Time to Move for Directed Verdict
- (i) Directed Verdict on Court's Own Motion
- (j) Form of Motion for Directed Verdict

12.2 The Prima Facie Case

- (a) In General
- (b) The Prima Facie Case
- (c) Locating the Elements of the Prima Facie Case
- (d) Covering the Basics of the Prima Facie Case
- (e) Protecting the Parties From Surprise or Ambush Attack on the Prima Facie Case

12.3 Weight and Sufficiency of the Evidence

- (a) In General
- (b) Gross Negligence
- (c) Bad Faith/Breach of Duty of Good Faith and Fair Dealing
- (d) Failure to Warn/Marketing Defect Cases
- (e) Lost Earnings
- (f) Tortious Interference With Business Relationships
- (g) Directed Verdict Based Solely Upon Interested/Expert Witness Testimony

12.4 Appeal and Error

SELECTED CASES

- 1. In General
- 2. Motion for Judgment in Nonjury Trials
- 3. Specificity and Contents of the Motion
- 4. Directed Verdict for the Defendant
- 5. Directed Verdict for the Plaintiff
- 6. Timing of the Motion
- 7. Directed Verdict On Court's Own Motion

8. Directed Verdict Based Upon Interested or Expert Witness Testimony
9. Appellate Review

CHECKLISTS

- Plaintiff—Motions for Directed Verdict
- Defendant—Motions for Directed Verdict
- Movant—Motions for Directed Verdict
- Respondent—Motions for Directed Verdict

FORMS

- 12.1 Defendant's Motion for Directed Verdict—Defect in Pleading
 - 12.2 Order on Defendant's Motion for Directed Verdict—Defect in Pleading
 - 12.3 Defendant's Motion for Directed Verdict—Evidence Conclusively Proves Truth of Fact in Issue
 - 12.4 Order on Defendant's Motion for Directed Verdict—Evidence Conclusively Proves Truth of Fact in Issue
 - 12.5 Defendant's Motion for Directed Verdict—Evidence Is Insufficient to Raise a Fact Issue
 - 12.6 Order on Defendant's Motion for Directed Verdict—Evidence Is Insufficient to Raise a Fact Issue
 - 12.7 Plaintiff's Motion for Directed Verdict—Failure of Defendant to Introduce Any Evidence
 - 12.8 Order on Plaintiff's Motion for Directed Verdict—Defendant's Failure to Introduce Any Evidence
 - 12.9 Plaintiff's Motion for Directed Verdict—Evidence Is Legally Insufficient to Raise a Fact Issue
As to Affirmative Defense
 - 12.10 Order on Plaintiff's Motion for Directed Verdict—Evidence Is Legally Insufficient to Raise a
Fact Issue As to Affirmative Defense
- Language for Reproducible Certificate of Service And Fiat

CHAPTER 13

WITHDRAWAL OR DISQUALIFICATION OF COUNSEL

13.1 Withdrawal of Counsel

- (a) Procedure for Withdrawal

13.2 Grounds for Withdrawal

- (a) Good Cause for Withdrawal Under Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct
- (b) Good Cause for Withdrawal Under Other Rules of Disciplinary Conduct

13.3 Disqualification of Counsel

- (a) The Lawyer As a Witness
- (b) Representation Adverse to Former Client (Confidential Information)
- (c) Employment of Legal Assistants and Secretaries
- (d) Conflicting Interests
- (e) Will Contests
- (f) Other Matters
- (g) Time to Move for Disqualification—Waiver of Disqualification

13.4 Motions to Show Authority

- (a) Motions to Show Authority in General
- (b) Procedure on Motion to Show Authority

13.5 Mandamus

SELECTED CASES

1. Withdrawal of Counsel
2. Removal on Motion to Show Authority
3. Disqualification of Counsel on Grounds of Disciplinary Rules Violations

CHECKLIST

Withdrawal of Counsel

FORMS

- 13.1 Motion to Withdraw Under Rule 10—Another Attorney Has Been Retained
 - 13.2 Order on Motion to Withdraw Under Rule 10—Another Attorney Has Been Retained
 - 13.3 Motion to Withdraw Under Rule 10—Another Attorney Has Not Been Retained
 - 13.4 Order on Motion to Withdraw Under Rule 10—Another Attorney Has Not Been Retained
 - 13.5 Motion to Disqualify Counsel
 - 13.6 Order on Motion to Disqualify Counsel
 - 13.7 Motion to Show Authority
 - 13.8 Order on Motion to Show Authority
 - 13.9 Notice of Designation of Lead Counsel
- Language For Reproducible Certificate of Service and Fiat

CHAPTER 14

RECUSAL OR DISQUALIFICATION OF JUDGES

14.0 Introduction

14.1 Grounds and Procedures for Recusal and Disqualification

- (a) Grounds for Disqualification
- (b) Grounds for Recusal
- (c) Pecuniary Interests Under Tex. Const. art. V, § 11
- (d) Acceptance of Campaign Contributions
- (e) Disciplinary Proceedings
- (f) Contempt Proceedings
- (g) Procedure in Motions to Recuse or Disqualify Judge
- (h) Voluntary Recusal in Absence of Motion
- (i) Where Motion Is Technically Defective
- (j) Where Motion Is Untimely
- (k) Orders Made Subsequent to Recusal by Judge Who Has Been Removed
- (l) Sanctions Under Rule 18a(h)

14.2 Objections to Visiting Judge

- (a) In General
- (b) Effect of Disqualification of Visiting Judge

14.3 Appellate Review

- (a) On Original Trial Judge's Refusal to Recuse Himself or Herself or Refer Case
- (b) Denial of Motion to Recuse by Judge Assigned by Administrative Judge

SELECTED CASES

CHECKLISTS

- Disqualification: Movant
- Disqualification: Respondent
- Recusal: Movant
- Recusal: Respondent

FORMS

- 14.1 Motion to Recuse
- 14.2 Order of Recusal
- 14.3 Order Declining Recusal and Order of Referral
- 14.4 Motion to Disqualify Judge
- 14.5 Objection to Visiting Judge

CHAPTER 15

MOTIONS FOR COSTS AND RELATED MATTERS

15.1 Taxable and Nontaxable Costs in General

- (a) Taxable Court Costs
- (b) Accounting for Taxable Court Costs
- (c) Nontaxable Costs
- (d) Taxing Court Costs to the Prevailing Party
- (e) Effect of Tender

15.2 Costs and Expenses Recoverable Under Special Statute or Rule

- (a) Frivolous or Groundless Suits
- (b) In Assault and Battery, Slander, and Defamation of Character
- (c) On Motion for Continuance
- (d) Bad Faith Motion to Recuse
- (e) Sanctions for Failure to Serve or Deliver Copy of Pleading or Motions
- (f) On Dismissal or Nonsuit
- (g) On Motion to Transfer Venue
- (h) Declaratory Judgments
- (i) Attorney's Fees
- (j) Guardian *Ad Litem* Fees

15.3 Proceedings to Secure Costs

- (a) Security for Costs
- (b) Procedure on Affidavit of Inability to Pay Costs
- (c) Motions to Rule for Costs
- (d) Execution for Costs

SELECTED CASES

- 1. Entitlement to Costs
- 2. Taxing Costs Against the Prevailing Party
- 3. Splitting of Costs Award
- 4. On Affidavit of Indigency

CHECKLIST

Motions to Rule for Costs

FORMS

- 15.1 Motion to Rule for Costs—Rule 13 Violation
- 15.2 Order on Motion to Rule for Costs—Rule 13 Violation
- 15.3 Motion to Rule for Costs—On Motion for Continuance
- 15.4 Order on Motion to Rule for Costs—On Motion for Continuance
- 15.5 Motion to Rule for Costs—On Bad Faith Motion to Recuse
- 15.6 Order on Motion to Rule for Costs—On Bad Faith Motion to Recuse
- 15.7 Motion to Rule for Costs—On Dismissal or Nonsuit
- 15.8 Order on Motion to Rule for Costs—On Dismissal or Nonsuit
- 15.9 Motion to Rule for Costs—Attorney's Fees Provided by Statute
- 15.10 Order on Motion to Rule for Costs—Attorney's Fees Provided by Statute
- 15.11 Rule 143, Motion to Provide Security for Costs
- 15.12 Order on Rule 143, Motion to Provide Security for Costs
- 15.13 Affidavit of Inability to Pay Costs

Language For Reproducible Certificate of Service and Fiat

CHAPTER 16

MOTIONS IN LIMINE

16.1 General Overview

- (a) Practical Considerations in Moving for Orders in Limine
- (b) Procedure for Presenting a Motion in Limine
- (c) Procedure for Preserving Error When Motion Is Overruled
- (d) Preserving Error When Motion Is Granted
- (e) Sanctions for Violation of Orders in Limine

16.2 Particular Subjects for Motion in Limine

- (a) Collateral Source Benefits
- (b) Bad Acts
- (c) Receipt of Traffic Ticket/Payment of Fine
- (d) Subsequent Remedial Measures
- (e) Prior Convictions
- (f) Drugs or Drinking Unrelated to Accident or Causation
- (g) Financial Status of the Parties
- (h) Income Taxation of Award
- (i) Testimony Contradicting Matter Admitted by Judicial Admission
- (j) Compromise and Offers to Compromise
- (k) Existence of Liability Insurance
- (l) Plea of *Nolo Contendere*
- (m) Lack of Personal Knowledge
- (n) Bad Acts or Personal Problems Offered to Show Effects of Stress on Performance at Time in Question
- (o) Character Evidence
- (p) Untruthfulness As to Unrelated Matter
- (q) Similar Transactions or Occurrences
- (r) Matters Contained in Insurance Application
- (s) Polygraph Test Results
- (t) Evidence Obtained by Illegal Means or Rules Violations
- (u) Out-of-Court Experiments or Re-enactment of Occurrence
- (v) Failure to Designate Witnesses or Evidence in Discovery Responses
- (w) Claims of Privilege
- (x) Religious Beliefs
- (y) Status As an Illegal Alien
- (z) Evidence of Contingency Fee Arrangements
- (aa) Evidence of Other Income of Plaintiff
- (bb) Marital Prospects of Surviving Spouse in Wrongful Death Action
- (cc) Recovery Subject to Income Taxation
- (dd) Seat Belts
- (ee) Peer Review or Hospital Committee Meetings

SELECTED CASES

- 1. Purpose and Effect
- 2. Trial Court's Discretion
- 3. Violations of the Order in Limine

CHECKLISTS

Movant—Motion in Limine
Responding Party—Motion in Limine
Preservation of Objections—Motion in Limine

FORMS

16.1 Standard Motion in Limine
16.2 Order in Limine
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NEW TRIALS

- 17.1 Introduction
- 17.2 Limit of Two New Trials
- 17.3 For Jury Misconduct
- 17.4 Time to File Motions
- 17.5 Modification or Correction of Judgment
- 17.6 New Trial on Service by Publication
- 17.7 Effect Upon Appellate Timetables
- 17.8 Requests for Findings of Fact and Conclusions of Law
- 17.9 Reinstatement Following Dismissal for Want of Prosecution

SELECTED CASES

- 1. In General
- 2. New Trial Following Judgment by Default
- 3. Discretion of the Trial Court
- 4. Specific Claims for Relief
- 5. Timing of Motion
- 6. Partial New Trial
- 7. The *Craddock* Test
- 8. Newly Discovered Evidence
- 9. Conduct of the Jury
- 10. Appellate Review

CHECKLIST

Motion for New Trial

FORMS

- 17.1 Motion for New Trial Following Entry of Default Judgment
 - 17.2 Order Granting New Trial Following Entry of Default Judgment
 - 17.3 Motion for New Trial—Damages Manifestly Too Large or Too Small
 - 17.4 Order Granting New Trial—Damages Manifestly Too Large or Too Small
 - 17.5 Motion for New Trial—Complaint Upon Which Evidence Must Be Heard
 - 17.6 Order Granting New Trial—Complaint Upon Which Evidence Must Be Heard
 - 17.7 Motion for New Trial—Newly Discovered Evidence
 - 17.8 Order Granting New Trial—Newly Discovered Evidence
- Language for Reproducible Certificate of Service and Fiat