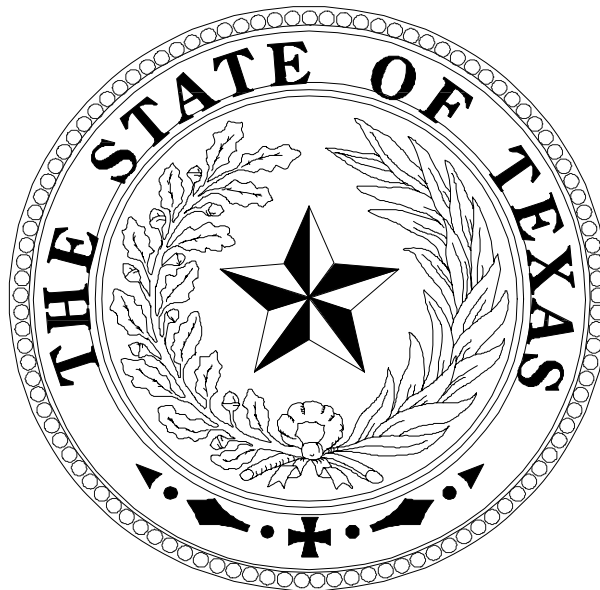


Examinee
Number

Exam
Date February 2009

Civil Procedure & Evidence

[This Civil booklet is one part of the Procedure & Evidence session. Both the Civil and the Criminal booklets must be completed during the 90 minute Procedure & Evidence testing session.]



TEXAS BAR EXAMINATION

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YOUR ANSWERS MUST BE LIMITED TO THE 5 LINES PROVIDED AFTER EACH QUESTION. ANYTHING MORE THAN 5 LINES WILL NOT BE GRADED.

CIVIL PROCEDURE AND EVIDENCE

Paul, a resident of Nueces County, Texas, went to the local hardware store, Supplies, Inc., (“Supplies”), to purchase an electric saw. Supplies is a Texas corporation with its principal place of business in Nueces County, Texas. After purchasing the saw, Paul asked David, a salesman for Supplies, to demonstrate how the saw operated. When David turned on the saw, its blade came loose, resulting in serious injuries to Paul’s arm. David is a resident of San Patricio County, Texas. In addition to working for Supplies, David is also a representative for the manufacturer of the saw, Tools, Inc., (“Tools”), a Delaware corporation. Tools regularly advertises and sells its products in Texas through hardware stores like Supplies.

Paul sues David, Supplies, and Tools in a state district court in Nueces County, Texas. Paul’s lawsuit seeks damages resulting from the injuries he sustained in the incident in question. All of the defendants are properly served with citation and a copy of the original petition.

- 1. Tools wants to object to the jurisdiction of the Nueces County district court on the ground that it is not amenable to process issued by a Texas court. What pleading, if any, must Tools file to present such objection and when must it file such pleading? Explain fully.**

- 2. Assume that Tools properly presents its objection to the Court’s jurisdiction over it. What may the Court consider in ruling on the objection? How should the Court rule on the objection? Explain fully.**

3. Assume that Tools is considering removing the case to federal court on the basis of diversity of citizenship, given that it is a Delaware corporation. Does Tools have a valid basis for removing the case on diversity grounds? Explain fully.

4. David does not want the case to proceed against him in Nueces County because he does not live in the county. What pleading must David file to present his objection to the case proceeding against him in Nueces County, and when must David file the pleading? Explain fully.

5. Assume David properly files his objection to the case proceeding against him in Nueces County. How should Paul respond, and how should the Court rule? Explain fully.

6. Assume that Paul’s original petition did not state the total amount of damages that he is seeking. Supplies wants to know the maximum amount of damages that Paul seeks. What pleading can Supplies file to require Paul to state the amount of damages that he seeks? Assume Supplies files the proper pleading. How should the Court rule? Explain fully.

7. When Paul filed his original petition, he also filed a Request for Production, which was served on each of the Defendants along with the citation and a copy of the original petition. When must each Defendant file an answer to the petition to avoid a default judgment and what is the deadline for each Defendant to file responses to the Requests for Production? Explain fully.

8. Assume the lawsuit proceeds in the Nueces County district court against all of the named Defendants. The parties want to proceed with written discovery before scheduling oral depositions. Identify five permissible forms of discovery under the Texas Rules of Civil Procedure.

9. Paul's attorney sends Tools attorney a request for admission asking Tools to admit within 31 days of service of the request, that Tools was the manufacturer of the electric saw in question. Forty (40) days after Tools attorney received the request for admission, he served Paul's attorney with a response denying the request for admission. What is the effect of that response and what must Tool's attorney do and show to change that result? Explain fully.

10. All of the Defendants want to independently verify the nature and extent of Paul's injuries. How can that be accomplished? Explain fully.

11. Assume that Paul receives a discovery request from a Defendant calling for the production of material that Paul's attorney considers to be privileged. How can Paul's attorney preserve the privilege? Explain fully.

12. In response to a request for production from Paul, Supplies' attorney inadvertently produces communications between Supplies and its attorneys. What must Supplies' attorney do to avoid a waiver of the attorney-client privilege with respect to the communications that were produced? Explain fully.

13. During Paul's deposition, his attorney wants to object to questions being asked by Supplies' attorney. What objections to questions can Paul's attorney make during the deposition? What objections to testimony can be made during the deposition?

14. In the course of discovery, Paul identifies an expert witness who states in his expert's report that the electric saw was defective. How and on what basis can Tools challenge the expert and his opinion? Explain fully.

15. Assume that the Court sustains Tools pretrial objection to Paul's expert and that Paul has no other evidence to support his claim that the electric saw was defective. What pretrial procedure is available to Tools to avoid the necessity of a trial on this claim? Assume that Tools follows the applicable procedure, how should the Court rule? Explain fully.

16. The case proceeds to trial. Prior to jury selection, Paul wants to keep the attorneys for the Defendants from disclosing to the jury panel certain information regarding his relationship with his ex-wife. How can Paul's attorney keep the information from the jury panel and what must he show? Explain fully.

17. During trial, Paul calls a witness who he had failed to identify in his discovery responses. The attorneys for all of the Defendants object to the witness. What must Paul show in order for the witness to be able to testify? Explain fully.

18. At the conclusion of his case in chief, Paul rests. David’s attorney believes that Paul failed to present any evidence to support the negligence claim that Paul had filed against David. What procedure is available to David’s attorney at this point in the trial to bring the matter to the attention of the Court? Explain fully.

19. The case proceeds to verdict. The jury returns a verdict in favor of Paul. The Defendants believe that the evidence does not support the jury’s verdict. What pleadings can the Defendants file to prevent the entry of a judgment in favor of Paul? Explain fully.

20. The Court enters judgment on the verdict. The Defendants want to file a motion for a new trial. When must such a motion be filed in order for it to be timely? Assume a motion for new trial is timely filed, what happens if the Court never rules on the motion? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

THIS CONCLUDES THE CIVIL PROCEDURE AND EVIDENCE QUESTIONS. CRIMINAL PROCEDURE AND EVIDENCE QUESTIONS ARE CONTAINED IN A SEPARATE BOOKLET.

February 2009 Civil Procedure and Evidence Comments

1. Almost all examinees knew Tools had to file a special appearance before any other pleading.
2. Although almost all examinees knew the court should deny the special appearance because Tools has sufficient contacts in Texas, few examinees knew the court could make this determination on the basis of the pleadings, any stipulations, other discovery, and any oral testimony.
3. Almost all examinees knew Tools did not have a valid basis for removal because there was not complete diversity; Supplies and David are Texas defendants.
4. Almost all examinees knew David had to file a motion to transfer venue prior to or concurrently with any other pleading.
5. Almost all examinees knew the court would deny the motion to transfer venue because venue was proper where all or a substantial part of the acts or omissions occurred (Nueces County) or venue was proper as to one defendant (Supplies) in Nueces County and, therefore, proper as to all defendants.
6. Most examinees knew Supplies should file a special exception, requiring Paul to amend his pleadings to specify the maximum amount of damages. Most examinees knew the court should grant the special exception.
7. Almost all examinees knew the answer must be filed by 10am on the first Monday after the expiration of 20 days from the date of service. Most examinees knew the responses to the requests for production were due 50 days after service of the request.
8. Almost all examinees correctly listed five of the permissible forms of discovery under Tex. R. Civ. Proc. 192.1.
9. Almost all examinees knew Tools's untimely response to the request for admission resulted in the admission being deemed admitted. Few also know the request was considered admitted without the necessity of a court order. Most examinees knew Tools should file a motion to withdraw the deemed admission by showing good cause for the late response and no undue prejudice.
10. Although almost all examinees knew the defendants could file a motion asking the court to order that Paul be examined by a qualified physician, few knew that such a request must be upon a showing of good cause.
11. Most examinees knew Paul had to state in his response that the information or material responsive to the request has been withheld; the request to which the information or material relates; and the privilege asserted.

12. Most examinees knew Supplies had to respond within 10 days. Most did not know Supplies had to amend its response, identifying the material produced and stating the privilege asserted. Most examinees knew the requesting party had to promptly return the specified material and any copies pending a court ruling.
13. Almost all examinees knew “leading,” “form,” and “ non-responsive” were the 3 objections allowed during a deposition.
14. Almost all examinees knew Tools could file a pre-trial Daubert motion challenging the expert’s qualifications or challenging the reliability/relevance of the expert’s opinions.
15. Almost all examinees knew Tools could file either a traditional motion for summary judgment or a no-evidence motion for summary judgment on the defect claim, and that the court should grant the motion.
16. Almost all examinees knew Paul should file a motion in limine. Most also knew the motion should state why the information was irrelevant and show that the probative value of the information was outweighed by its prejudicial value.
17. Almost all examinees knew the motion should state the failure to timely supplement the discovery response would not unfairly surprise or prejudice the other parties. Few also knew the motion could state there was good cause for the failure to timely supplement.
18. Almost all examinees knew David should file a motion for a directed/instructed verdict. Few also knew the motion should show that the evidence was insufficient to raise a fact issue with respect to David’s negligence.
19. Almost all examinees knew defendants could file a motion for judgment notwithstanding the verdict. Few knew the defendants could also file a motion to disregard a jury finding on a question that has no support in the evidence.
20. Almost all examinees knew the motion for new trial must be filed prior to or within 30 days after the judgment is signed. Most knew the motion is overruled by operation of law 75 days after the judgment is signed.

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CIVIL PROCEDURE AND EVIDENCE – July 2009

Extra Good Plumbing (“Extra”) was a Texas sole proprietorship with a principal place of business in Nueces County, Texas. Bill resided in Kleberg County, Texas. Bill requested that Extra send an employee to his residence to check a possible gas leak. Extra dispatched an employee, Ray, to Bill’s residence. Ray resides in Brooks County, Texas. Ray had been a plumber for one month.

Ray discovered a gas valve leak inside Bill’s residence. Ray told Bill he could try to replace the valve, but that he was not certified to replace any type of leaking gas valve. Bill told Ray he did not care about any certification and that he wanted Ray to replace the valve. Ray turned the gas off at Bill’s gas meter. Ray installed a replacement valve manufactured by Plumber Parts, Inc. (“Parts”). Parts is not a Texas corporation, but it had over \$2,000,000 in sales in Texas in the year of the valve replacement.

In spite of a city ordinance to the contrary, Bill turned his gas back on at the gas meter without contacting the local gas utility. The next day, Bill’s house exploded and he sustained serious personal injuries. Bill hired a lawyer to sue Ray and Extra for his personal injuries sustained in the explosion and fire.

1. What county or counties would be proper venue for such a lawsuit? Explain fully.

2. Bill sues Extra and Ray in Brooks County. Extra wants to contest venue in Brooks County and move the case to Nueces County. What pleading must Extra file to challenge venue in Brooks County? When must the pleading be filed? Explain fully.

3. Extra wants to add Parts to the case as a party defendant, alleging negligence and product liability causes of action. What pleading must Extra file and when must it file the pleading to add this party to the case? Explain fully.

4. How must service of process be accomplished with respect to Parts, since it is a corporation and is not registered with the Texas Secretary of State? Explain fully.

5. Parts wishes to contest the jurisdiction of the Texas trial court. What pleading must Parts file to contest the jurisdiction of Texas over it in this case? Explain fully.

6. Parts contends that it is not a Texas corporation and does not conduct business in Texas. How should the court rule on Parts' plea to the Texas trial court's jurisdiction? Explain fully.

7. Bill's attorney wants to know if Extra has liability insurance for this case and if Extra, its lawyers or its insurance company have any statements concerning this case. How can he secure this information? Explain fully.

8. Bill's attorney retains and designates as an expert an engineer to investigate the explosion and fire. The engineer does not prepare a written report. Extra wants to know what facts Bill's expert's investigation revealed and what his expert opinions are. How can Extra obtain this information? Explain fully.

9. Bill claims the explosion and fire have caused him to acquire post traumatic stress disorder (PTSD). Bill is a veteran and has been treated by the Veterans Administration Medical Center. Bill refuses to produce any medical records for health care prior to the explosion. He refuses to sign a medical authorization for such records. What steps should Extra and Ray take to obtain these prior medical records or obtain an authorization for the records? Explain fully.

10. The parties file cross-notices for party depositions. Bill notices the depositions in Kleberg County, Texas and Extra notices the depositions in Nueces County, Texas. Both parties timely file motions to quash the other parties' notices. Upon a hearing on the motions to quash, in what county should the trial court order the depositions be taken? Explain fully.

11. Parts contends it has no person, employee, or agent who can or will testify as a witness because no one in the company has any personal knowledge about the explosion and fire. How can Bill's lawyer compel Parts to produce a witness for deposition in the case? Explain fully.

12. Parts' expert and the Fire Marshall believe that the valve in question was not defective, but rather that the valve was improperly installed by Ray and that the valve's design was not a cause in fact of the explosion and fire. Discovery is complete. What motion or motions should Parts file in order to be dismissed from the case? What documents should be attached to the motion or motions? Explain fully.

13. Bill requested a jury trial in his Original Petition but did not pay a jury fee. The case is on the non-jury docket and is set for trial. Forty-five days before trial, Bill pays the jury fee and requests a setting on the jury docket. Extra, Ray and Parts file objections to Bill's attempt to move the case to the jury docket. The motion is set for a hearing. How should the court rule? Explain fully.

14. In voir dire, a prospective juror says, "Extra did a lousy job at my home last year, but I think I could be fair." What steps should Extra's lawyer take to challenge that potential juror? Explain fully.

15. As the trial begins, Bill’s attorneys call Ray as Bill’s first witness. Ray and Extra object on the basis that Bill must testify first and lay a foundation for his claims against Ray and Extra. How should the court rule? Explain fully.

16. During discovery the parties obtain the report of the Fire Marshal. Later, the Fire Marshal is deposed. The Fire Marshal is listed as a trial witness by all parties, except Parts. Parts calls the Fire Marshal as a witness at trial. Extra objects to the Fire Marshal being called by Parts because Parts did not list him as a witness. How should the court rule? Explain fully.

17. In order to impeach Ray, Bill proffers evidence that Ray has five convictions for moving violations in the last twelve months. Ray objects to the admission of this evidence. How should the court rule? Explain fully.

18. After the first day of trial, Parts offers to pay Bill \$10,000 for a release of all claims and an agreement to indemnify Parts from the claims of Extra. The next morning, Extra seeks to offer into evidence the fact that Parts sought indemnity from the claims of Extra against Parts, as an admission that Parts was liable for the explosion. Parts objects to the offer of such evidence. How should the court rule? Explain fully.

19. After the parties rest and close, the defendants move for instructed verdicts. The court grants the motion of Parts and denies all other motions for instructed verdict. In the court's charge, which of the parties' proportionate responsibility should be submitted to the jury? Explain fully.

20. The jury finds Extra to be responsible for the explosion through negligent staffing. Extra believes there is no evidence to support a finding of negligent staffing against it. Before a judgment is entered, what motion should Extra file to bring this issue to the trial court's attention? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE. THIS CONCLUDES THE CIVIL PROCEDURE AND EVIDENCE QUESTIONS. CRIMINAL PROCEDURE AND EVIDENCE QUESTIONS ARE CONTAINED IN A SEPARATE BOOKLET.

July 2009 Civil Procedure and Evidence Comments

1. Almost all examinees knew the proper venue for Bill's lawsuit was Kleberg County (place of occurrence); Nueces County (principle place of business for Extra); and Brooks County (Ray, a natural person's residence).
2. Almost all examinees knew Extra needed to file a motion to transfer venue and almost all knew the motion had to be filed prior to or concurrently with any other pleading.
3. Few examinees knew Extra had to file a Third Party Petition and citation on Parts in order to add Parts to the case, and few knew leave of court was required if the pleading was filed outside 30 days after Extra filed its answer.
4. Many examinees knew that because Parts did not have a principle place of business in Texas and did not have an agent for service in Texas, that service of process could be accomplished by serving the Texas Secretary of State. Few examinees knew the Texas Secretary of State would then forward the citation and Third Party Petition to Parts's corporate headquarters.
5. Almost all examinees knew Parts had to file a special appearance to contest jurisdiction.
6. Almost all examinees knew the court should deny the special appearance, but few examinees knew the court could make this ruling because Parts's \$2 million in Texas sales constituted sufficient minimum contacts to confer jurisdiction.
7. Almost all examinees knew Bill could submit Requests for Disclosure to Extra's attorney.
8. Almost no examinee knew that if an expert report is not produced in response to Requests for Disclosure, Extra and Ray could file a motion to require the expert to reduce his findings and opinions to written form.
9. Almost all examinees knew Extra and Ray could file a motion to compel Bill to sign a medical authorization for the records. Few examinees fully explained that Extra and Ray needed to set forth, in the motion, their belief that many Gulf War veterans suffer from PTSD and that Extra and Ray do not otherwise have access to Bill's prior medical records and there is good cause for the court order.
10. Few examinees knew that if the parties cannot agree on where the depositions should take place, the court should order the party depositions to be taken in Brooks County, the county of the pending lawsuit.
11. Many examinees knew Bill's attorneys should serve a notice to depose a designated corporate representative. Most examinees did not know that the notice needed to describe with reasonable particularity the matters on which the deposition is requested.
12. Almost all examinees knew Parts should file a no-evidence motion for summary judgment and a traditional motion for summary judgment. Most examinees did not know the expert's

report and the Fire Marshall's report should be attached.

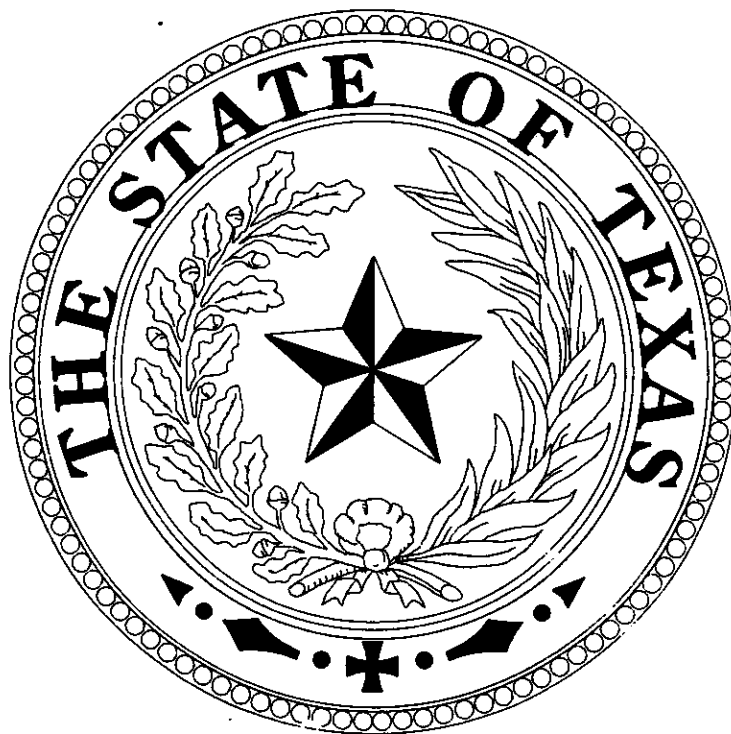
13. Almost all examinees knew the trial court should overrule the objections and move the case to the jury docket. Most examinees explained the court should do so because of the strong preference for jury trials in Texas and because Bill requested a jury in his Original Petition, putting the defendants on notice.
14. Almost all examinees knew Extra should move to challenge the juror for cause. Many examinees also knew that if the challenge for cause failed, Extra should use a preemptory strike. Few examinees knew Extra should also notify the court of the need to use the preemptory strike.
15. Almost all examinees knew the trial court should overrule the objection to Bill calling Ray as the first witness. Few examinees fully explained that, in a civil case, a plaintiff may call witnesses in any order.
16. Almost all examinees knew the court should allow the Fire Marshall to testify. Most examinees explained that the failure to list the witness was an oversight, good cause existed to allow the late designation, and no other party would be prejudiced because all parties had access to the Fire Marshall's report and his deposition.
17. Almost all examinees knew Ray's objection should be sustained. Most examinees explained that the objection should be sustained because the moving violations were irrelevant or were improper impeachment evidence because they were not misdemeanors involving moral turpitude.
18. Almost all examinees knew the objection should be overruled because offers of settlement are inadmissible. Many examinees fully explained that Texas favors settlement discussions and settlements without fear of a proposed settlement being used as an admission of responsibility in front of a jury.
19. Most examinees knew that, because Parts's responsibility should not be submitted, only that of Ray, Extra, and Bill should be submitted. Few examinees fully explained that Ray's responsibility was based on ordinary negligence; Extra's on vicarious liability and liability for negligent staffing; and Bill's responsibility was based on his comparative responsibility for his own negligence.
20. Almost all examinees knew Extra should file a motion for judgment notwithstanding the verdict.

Examinee
Number

Exam
Date FEBRUARY 2010

Civil Procedure & Evidence

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CIVIL PROCEDURE AND EVIDENCE

Trey slipped, fell and injured himself while he was shopping at the Home Grocery Store (“Home”) at its only location in Collin County. Trey’s fall was caused by water on the floor which came from the ice machine. The machine was owned and maintained by Ice Products (“Ice”), whose principal place of business is in Parker County. Trey filed a suit for damages in district court in Dallas County, his county of residence, alleging that Home and Ice were jointly and severally negligent and that their negligence proximately caused his injuries.

- 1. After Trey files his lawsuit, what documents must be served upon the defendants in order to compel them to file an answer? Explain fully.**

- 2. What pleading should Home file to contest the filing of the suit in Dallas County and when should the pleading be filed? Explain fully.**

3. **If the court decides to grant relief to Home regarding the county of suit, what county or counties constitute a proper location for the suit and why? Explain fully.**

Ice alleges that the district court has no jurisdiction over the parties and subject matter of the suit. Ice moves the court to dismiss the case for lack of jurisdiction.

4. **How should the court rule? Explain fully.**

Trey's original petition is very broad and makes general allegations of negligence against both defendants.

5. **What pleading should the defendants file to require the plaintiff to re-plead his case with more definite and specific factual allegations? Explain fully.**

Home is actually a Texas corporation and not a sole proprietorship as pleaded by Trey.

6. **How should Home give notice to the parties and the court that it is a corporation and intends to seek the protection of that status for its shareholders? Explain fully.**

Ice believes that Trey's suit against Ice is barred by the statute of limitations. Ice does not want to disclose this defense for strategic reasons.

7. **Must Ice raise this issue before the case goes to trial and if so, how should Ice assert the defense of limitations? Explain fully.**

Trey and his attorney want to know if Home and Ice have liability insurance to cover any of the claims brought in this suit. Ice's attorney informally tells Trey's attorney that Ice has no insurance. Home's attorney makes no reply about insurance coverage.

8. **What document can Trey serve to determine whether either defendant is covered by insurance? Explain fully.**

By way of interrogatories, Home inquires of Trey whether he has sustained other accidental personal injuries, before or after the incident made the basis of the lawsuit. Trey objects to the interrogatory as being irrelevant. Home sets the objection for hearing.

9. How should the court rule? Explain fully.

Following Trey's fall, Home requests that Ice move the ice machine to an area of the store where there is less customer traffic. Trey plans to offer this fact into evidence to prove knowledge of a dangerous condition. Home and Ice believe that the evidence is not admissible and is prejudicial.

10. What document should Home and Ice file to bring this matter to the attention of the court and to keep this matter from being presented to the jury? Explain fully.

11. Should Trey's counsel attempt to offer the fact of the post-accident re-location of the ice machine into evidence, what substantive objection should Home and Ice make regarding this evidence? Explain fully.

In his first amended original petition, Trey alleges direct acts of negligence and alleges claims of negligent hiring, staffing, and supervision against Ice due to its high employee turnover rate. Discovery is complete and Trey has produced no evidence to support the negligent hiring, staffing, or supervision claims. Ice fears this pleading will be prejudicial to its defense.

12. What pleading should Ice file to attack these allegations of negligent hiring, staffing, and supervision, so as to remove them from the court's and jury's consideration? Explain fully.

Trey requested a jury trial and paid a jury fee. Home and Ice requested a jury trial. Trey filed a motion to remove the case from the jury docket and place it on the non-jury docket. Home and Ice object to the motion.

13. How should the court rule? Explain fully.

The parties attended a mediation conference. The mediation failed. During the mediation, an Ice representative disclosed that the machine in question was old and needed repair. Trey subpoenas the mediator to testify about the disclosure at trial. The mediator files a motion to quash the subpoena.

14. How should the court rule? Explain fully.

On the second day of trial, one of the jurors is seriously injured and can no longer serve as a juror. There are no alternate jurors. Home asks the court for a mistrial. Trey opposes the motion for mistrial.

15. How should the court rule? Explain fully.

Trey discovers that prior to his fall, Ice had been to Home's store on four occasions to repair leaks in the machine in question. Prior to Trey's fall, an Ice employee told Home to obtain rubber mats to protect customers. Trey offers these facts into evidence. Home objects on the basis that the witness is not its employee, that Home denies the conversation, and that the alleged statements are not binding on Home.

16. How should the court rule? Explain fully.

In a video deposition, a Home employee testifies that he saw Trey spill a soda, step in the soda he spilled, and fall. At trial, Home offers video clips of this deposition testimony. Trey's attorney objects to the video clips because Home has not shown that the witness is dead or is otherwise unavailable to testify in person.

17. How should the court rule? Explain fully.

Ice calls Trey's wife as an adverse witness. Out of the presence of the jury, Ice's lawyer tells the court that he intends to ask the witness if Trey told her that he fell because he slipped in the soda. Trey objects to this line of questioning.

18. How should the court rule? Explain fully.

During trial, the court refuses to admit into evidence Trey's unauthenticated medical bills and wage statements. Trey then offers his own sworn answers to interrogatories to authenticate and prove his medical expenses and lost wages. Home objects to this evidence.

19. How should the court rule? Explain fully.

After the trial court signs a judgment in favor of Trey, Home and Ice file a motion for new trial based upon jury misconduct. They attach an affidavit of one of the jurors. In that affidavit that juror swears: "The presiding juror was rude and hateful to the other jurors. The presiding juror told the other jurors that all the defendants' witnesses were liars, and the presiding juror said the jury needed to award the plaintiff a substantial sum of money because he was badly injured." The affiant testifies to these facts at the jury misconduct hearing. No other evidence is offered to support the motion.

20. How should the court rule? Explain fully.

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February 2010 Civil Procedure and Evidence Comments

1. Almost all examinees knew a copy of plaintiff's original petition had to be served on defendants. Most examinees knew a citation prepared by the clerk of the court also had to be served on defendants.
2. Almost all examinees knew Home had to file a motion to transfer venue prior to or concurrently with any other pleading.
3. Most examinees knew Collin County was the proper county for the suit.
4. Almost all examinees knew Ice's motion or plea to the jurisdiction should be denied. Most also knew the motion should be denied because all parties were citizens of Texas and the incident made the basis of the suit occurred in Texas.
5. Almost all examinees knew the defendants should file special exceptions. Most knew the defendants should ask the court to order the plaintiff to replead his case more specifically or face dismissal of the case.
6. Few examinees knew Home should file a verified pleading advising the court and parties it had been sued in the wrong capacity.
7. Almost all examinees knew Ice had to raise its affirmative defense before trial. Few knew the pleading had to be filed at least seven days before trial.
8. Almost all examinees knew Trey should serve defendants with a request for disclosure.
9. Almost all examinees knew Trey's objection should be overruled. Most knew the objection should be overruled because in a personal injury case prior and subsequent injuries are relevant to causation.
10. Although almost all examinees knew the defendants should file a motion in limine.
11. Most examinees knew the substantive objection is that the evidence is inadmissible because it is a subsequent remedial change.
12. Most examinees knew Ice should file a no-evidence motion for summary judgment.
13. Almost all examinees knew the case should be retained on the jury docket. Most examinees knew that Texas has a strong preference for jury trials.
14. Almost all examinees knew the trial court should grant the mediator's motion to quash.
15. Most examinees knew the court should proceed with trial with only eleven jurors. Most knew ten jurors must agree to all answers.

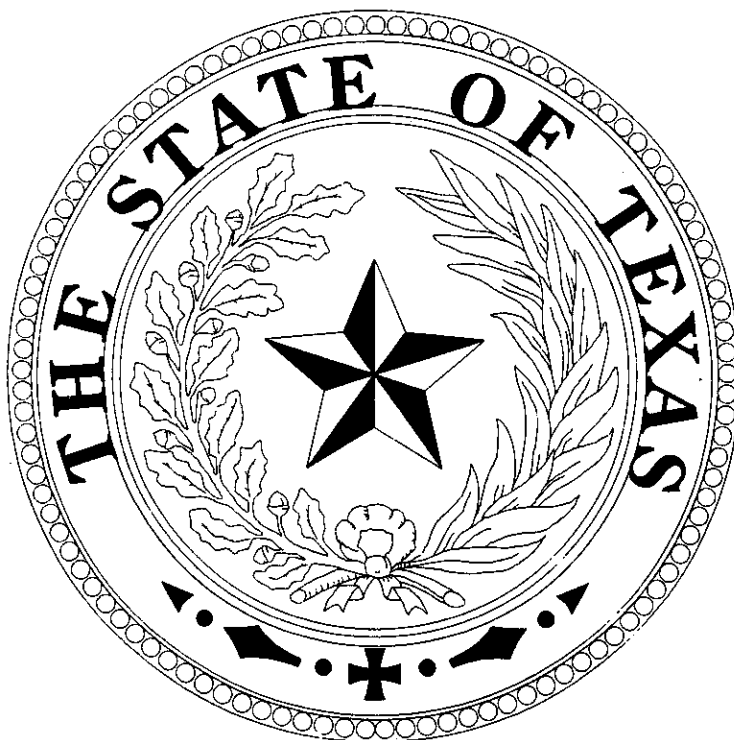
16. Most examinees knew Home's objections should be overruled. Few knew this was because Home and Ice are co-defendants and the statement is admissible as a statement by a party opponent.
17. Almost all examinees knew Trey's objection should be overruled because a party may read or play any part of a deposition.
18. Almost all examinees knew the court should exclude the testimony because the husband/wife privilege applies.
19. Almost all examinees knew Home's objection should be sustained. Few knew this was because a party cannot use his own discovery response to offer or authenticate his evidence.
20. Almost all examinees knew the motion for new trial should be denied. Most examinees correctly stated why this behavior did not rise to the level of juror misconduct.

Examinee
Number

Exam
Date JULY 2010

Civil Procedure & Evidence

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CIVIL PROCEDURE AND EVIDENCE

Dan Construction, Inc. ("DAN"), a Texas corporation, was the general contractor on the Big Tower project in Waco, McLennan County, Texas. ABC, Inc. ("ABC"), a Texas corporation, was the electrical sub-contractor for DAN on the Big Tower project. Reyna Brothers ("REYNA"), a Texas general partnership, was the concrete sub-contractor for DAN on the Big Tower project.

Paul, an employee of REYNA, was instructed by his foreman to obtain construction materials from the materials holding lot with a forklift owned by DAN. Even though Paul told his foreman he was not familiar with the operation of the forklift, the foreman instructed him to transport the materials to the work location. DAN's project manager additionally instructed Paul to load the materials quickly and drive the forklift to the assigned job location. At an intersection, the hydraulics of the forklift failed and Paul came to a sudden stop. An employee of ABC was driving a truck behind Paul. The ABC employee could not stop and collided with the forklift. Paul was thrown from the forklift and suffered personal injuries.

Pursuant to their contracts, all parties carried liability insurance for the Big Tower project.

DAN has its principal place of business in McLennan County, Texas. ABC has its principal place of business in McLennan County, Texas. The REYNA partners all reside in Travis County, Texas. Paul resides in Harris County, Texas. Paul filed suit against DAN and ABC in Brown County, Texas.

- 1. What pleading should DAN and ABC file if they intend to contest venue in Brown County, Texas, and when must the pleading be filed? Explain fully.**

DAN and ABC aver that the case should be filed in McLennan County. Paul files an alternative pleading asking the Brown County court to transfer the case to Harris County, since it is where Paul resides. DAN and ABC object to venue in Harris County, Texas.

- 2. How should the Brown County court rule? Explain fully.**

By way of a broad and general pleading, Paul sues DAN and ABC for negligence and gross negligence.

3. **What pleading must DAN and ABC file in order to require Paul to plead the specific allegations supporting his negligence and gross negligence claims? Explain fully.**

Paul re-pleads his case with specific allegations of negligence, but does not specify the allegations of gross negligence asserted against DAN and ABC. The defendants aver that the pleading regarding gross negligence has defects that are incurable.

4. **What pleading should DAN and ABC file regarding Paul's new petition, what relief should they seek, and how should the court rule? Explain fully.**

Paul's petition names "Dan Construction" and not "Dan Construction, Inc." as a defendant.

5. **What pleading should DAN file to assert its corporate capacity in order to protect its officers, directors, and shareholders from personal liability? Explain fully.**

Pursuant to the general construction contract between DAN and REYNA, Paul signed a pre-injury release and arbitration agreement. DAN believes this agreement constitutes an affirmative defense to Paul's claims.

6. What pleading, if any, should DAN file in order to assert the protection of the release and arbitration agreement, and when must the pleading, if any, be filed? Explain fully.

7. Name five categories of discovery authorized by the Texas Rules of Civil Procedure.

DAN's attorney submits to Paul and his attorney interrogatories requiring 50 separate answers and 50 requests for production.

8. What pleading should Paul file to object to these discovery requests and how should the court rule? Explain fully.

In response to Request for Disclosures, ABC objects to Paul's request that it disclose its insurance coverage. ABC objects to the request for disclosure claiming ABC is a large company with plenty of assets and its insurance coverage is irrelevant.

9. **What pleading should Paul file to bring ABC's objection to the court's attention and how should the court rule? Explain fully.**

In response to Request for Disclosures, Paul produces his relevant medical records but refuses to produce a properly executed medical authorization. Paul avers that his production of the records is a valid substitute for the authorization. ABC moves the court to order Paul to produce a properly executed medical authorization in addition to the medical records.

10. **How should the court rule on ABC's motion and request for a medical authorization? Explain fully.**

The parties agree on a date for the party depositions. The parties notice and cross-notice each other for the depositions of the parties. Paul and his wife attend the deposition, and a representative of DAN attends the deposition to testify as a party witness for DAN along with the president of DAN. ABC, without explanation or agreement, does not produce any witness to respond to the notices and cross-notices for deposition. All of the respective attorneys appear at the depositions as noticed.

11. **What recourse is available to DAN and Paul for ABC's failure to produce a witness at the deposition as noticed? Explain fully.**

Paul's attorney serves a notice for the deposition of Paul's treating doctor, with the deposition to be taken on Monday July 1. ABC's attorney immediately notifies Paul's counsel he is set for trial in another case on July 1 and does not have another lawyer to cover the deposition. Paul's attorney refuses to reschedule the deposition.

- 12. What pleading should ABC's attorney file to object to and abate the doctor's deposition, and when should it be filed? If the pleading is timely filed, what is the effect of the filing? Explain fully.**

DAN develops evidence that Paul's employer, REYNA, was negligent in instructing an inexperienced driver to operate the forklift.

- 13. What pleading should DAN file to support its evidence of REYNA's negligence and to support a jury question concerning the negligence of REYNA? Explain fully.**

REYNA objects to its conduct being submitted to the jury on the grounds that it is Paul's employer, and is covered by workers' compensation insurance, which as a matter of law means that its conduct should not be submitted to the jury.

- 14. How should the court rule on REYNA's objection? Explain fully.**

Paul's expert engineer has testified by deposition that, according to industry standards, DAN was grossly negligent in its maintenance of the forklift in question and that DAN's gross negligence was a proximate cause of Paul's injuries. DAN files a motion for summary judgment attacking Paul's cause of action for gross negligence.

- 15. What documents should Paul provide to the court with his response to the motion for summary judgment, and when should this response be filed? Explain fully.**

Following the accident, DAN repaired the failed hydraulic system on the forklift in question. DAN asserts that this is a subsequent remedial measure and not admissible.

- 16. What pleading should DAN file to prevent this evidence from being presented to the jury and admitted as evidence in the trial? Explain fully.**

After voir dire examination by all parties, the court announces that it will allow each side 15 minutes to make their jury strikes. Considering the claims, counterclaims, and cross-claims, the court finds that there is antagonism between all of the parties. DAN and ABC agree to cooperate with each other in making their strikes. Paul objects to DAN and ABC making their strikes together, arguing that each party must make their strikes separately.

- 17. How should the court rule on Paul's objection and why? Explain fully.**

18. Paul introduces into evidence \$100,000 in past medical expenses. The parties have stipulated outside the presence of the jury that the workers' compensation carrier paid all of Paul's medical bills in the amount of \$60,000. The jury returns a verdict for past medical bills in an amount of \$100,000. Can the court award Paul \$100,000 for past medical expenses? Explain fully.

The jury returns a verdict for Paul finding DAN grossly negligent. DAN believes there is no evidence, or insufficient evidence, to support the finding of gross negligence.

19. What pleading, if any, should DAN file to bring this issue to the court's attention before a judgment is entered? Explain fully.

The court signs and enters a judgment for Paul. DAN and ABC file a motion for new trial ten days after the judgment is signed, but do not request a hearing on the motion.

20. If no other action is taken by any party, when, if ever, will the judgment become final? Explain fully.

THIS CONCLUDES THE CIVIL PROCEDURE AND EVIDENCE QUESTIONS. CRIMINAL PROCEDURE AND EVIDENCE QUESTIONS ARE CONTAINED IN A SEPARATE BOOKLET.