

Harry Homeowner, a citizen of the State of Texas and a resident of Harris County, retains you to represent him in a lawsuit he intends to pursue against Buildem, Inc., a Delaware corporation with its principal office in Phoenix, Arizona. Buildem, Inc. has no office in Texas. Homeowner purchased a \$750,000 home in Houston, Harris County, Texas from Buildem Houston, Inc. Homeowner alleges that Buildem Houston, Inc., a Texas corporation that was a subsidiary of Buildem, Inc. and has now been dissolved, breached a contract and violated the Texas Deceptive Trade Practices Act by using substandard and unapproved insulation and other building materials.

- 1. Assume that Buildem Houston, Inc.'s former marketing director has knowledge of facts important to Homeowner's case and that he is scheduled to accept a job overseas with a different company rendering him unavailable to participate in discovery unless it occurs prior to filing suit. What must Homeowner do to secure the former marketing director's deposition prior to the filing of the lawsuit and what are three (3) points that must be included in the documents relating to Homeowner's effort to secure the deposition?**

- 2. Assume that no mandatory venue provision applies and that there is more than one county where Homeowner can file suit in Texas under the general venue rule. What criteria can be used to determine one of the counties where Homeowner might file the suit? Explain fully.**

3. What procedure is available to Buildem, Inc. to challenge the Texas court’s exercise of personal jurisdiction over it and at what stage of the case must it be asserted? Explain fully.

4. a. Assume that Homeowner’s pleadings contain the following statement “The unliquidated damages are within the jurisdictional limits of this court.” What procedural mechanism can Buildem, Inc. employ to require the Plaintiff to specify the maximum amount claimed, and at what stage of the case may it be employed? Explain fully.

b. In a single sentence, set forth what statement Homeowner’s pleadings should contain, including the minimum dollar amount, if he wishes to conduct discovery under Level II.

5. Assume that Homeowner files suit in a state district court in Texas against only the parent company, Buildem, Inc. May Buildem, Inc. remove this case to the federal district court, assuming the amount in controversy is sufficient? Explain fully.

6. Assume that Homeowner brings suit against both Buildem, Inc. and its former subsidiary, Buildem Houston, Inc. What is Buildem, Inc.'s best argument that it is entitled to remove the case to the Federal District Court. Explain fully.

7. Assume that the attorneys for both Homeowner and Buildem, Inc., with the consent of their clients, agree to waive a deadline with prejudice to the party who is entitled to enforce the deadline. What steps should the attorneys take to ensure that their agreement is enforceable? Explain fully.

8. Assume that Buildem, Inc. wishes to assert a counterclaim against Homeowner. What are three (3) factors that would have to be present for the counterclaim to be compulsory and what would be the effect of failing to assert a compulsory counterclaim in the instant action? Explain fully.

9. Assume that after suit was filed, Buildem, Inc.’s attorney obtained a copy of the contract between Homeowner and Buildem Houston, Inc. and learned that it contained a clause requiring mediation of disputes. What pleading should be filed by Buildem, Inc. to require Homeowner to submit to mediation, at what stage of the case should it be asserted, and what is the effect of failing to assert it timely? Explain fully.

10. Assume that mediation occurred and was unsuccessful in resolving the dispute. In the course of the mediation, Buildem, Inc.’s president admitted in the presence of the mediator that its now defunct subsidiary, Buildem Houston, Inc., was a “shell” that never had any assets and was established as a means of insulating Buildem, Inc., the corporate parent, from liability. At trial, and over the objection of his attorney, can Buildem, Inc.’s president be impeached with the statement he made during the mediation, and may Homeowner call the mediator as a witness to testify about that statement? Explain fully.

11. In state court, what steps must be taken to request a trial by jury as a matter of right, and by when must the steps be accomplished? Explain fully.

12. Assuming that the trial court failed to give you and your client at least 45 days notice of a trial setting, what motion should you file to preserve your client's right to receive such notice, what points should you assert in the motion, and what should you do to preserve error if the trial court failed to grant the motion? Explain fully.

13. Assume that the agreement between Homeowner and Buildem Houston, Inc. contained a provision requiring that Homeowner inspect the property prior to taking title as a valid condition precedent to Homeowner's right to recover for breach of contract and that Buildem, Inc. contends that Homewowner never performed the inspection. If Homeowner alleges in his complaint that he performed the inspection, what must Buildem, Inc. do to put the condition precedent in issue and who bears the burden of proving performance of the condition? Explain fully.

14. In the course of discovery, Homeowner requests information from Buildem, Inc. concerning a proprietary process used by Buildem, Inc. in its home construction projects to prepare and install insulation materials. On what grounds could Buildem, Inc. resist discovery, and, if the court nevertheless orders discovery, what remedy should Buildem, Inc. seek to preserve its proprietary information from disclosure to competitors? Explain fully.

15. Homeowner retained a scientific expert to testify about the failure of the insulation used by Buildem, Inc. to meet recognized industry standards. Assume that the expert is qualified to express an opinion and that his opinion is based on a scientific theory and technique he employed in testing the insulation materials. What are three (3) factors that will be considered by a Texas court in making a threshold determination of admissibility of the expert's testimony? Explain fully.

16. Buildem, Inc.'s attorney objects to Homeowner's request that the court admit into evidence a publication on insulation standards published by an agency of the federal government charged with adopting uniform national building standards. The ground of the objection is that the publication has not been authenticated. How should the court rule? Explain fully.

17. Assume that an excerpt from the agreement between Homeowner and Buildem Houston, Inc. was offered into evidence by Buildem, Inc. and the court received it in evidence. Homeowner believes the excerpt, taken out of context, creates a misimpression. What can Homeowner do to place the excerpt in context? Explain fully.

18. In the midst of trial, Homeowner determines that he will be unable to establish a key element of his claim and that he will need more time and discovery to develop that element. May Homeowner terminate the proceeding without prejudice to his right to reinstitute his lawsuit, what procedure should he employ to do so, at what stage of the proceedings must he do so, and assuming the limitations period has not passed, what effect, if any, does this have on any pending counterclaims by Buildem, Inc.? Explain fully.

19. Assume that judgment in favor of Buildem, Inc. was signed following a trial to the court without a jury. What method is available to Homeowner to obtain the basis of the court's decision, and what is the deadline for employing that method? Explain fully.

20. Assume that Homeowner desires to appeal the adverse judgment. What document must Homeowner file to perfect the appeal and what are two items of information that must be contained in the document? Explain fully.

Civil Procedure & Evidence – July 2000

1. A failure to completely read the introductory paragraph. Many applicants did not acknowledge two separate causes of action (DTPA and breach of contract) or that the Houston subsidiary had been dissolved. That information was relevant to several questions.
2. A failure to correctly read the question information. Often applicants would give answers that, though legally correct, failed to answer the specific question.
3. When asked to list three factors, some applicants would reword the same factor three different ways rather than offer three different factors.
4. When asked how the court should rule, some applicants would try to hedge their bets, taking both sides.
5. A failure to fully explain. Some applicants simply tossed out buzz words rather than actually explaining their answers.
6. A failure to manage time. Most applicants who scored below 25 did so because they did not complete all questions.

February 2001

Paul Palmer, a resident of Bell County, has filed a negligence, breach of warranty, and product liability suit in state district court in Hill County, Texas. Palmer alleges that a curling iron, which he had bought for his daughter from Dad's Department Store ("Dad's"), was defective, overheated, and caused a fire in his home. Palmer, who is uninsured, seeks to recover the cost of repairing the damage to his home and for injuries to his minor daughter, and he alleges damages in excess of \$50,000. Palmer sued two defendants: the retailer, Dad's, a sole proprietorship in Waco, Texas (McLennan County); and Kurlee, Inc., the manufacturer, a Vermont corporation with its headquarters in Vermont.

- 1. Name (a) four things that must be disclosed if a request is made by a party without sending interrogatories or requests for production, and state (b) how long after the request is served such disclosures must be made.**

Kurlee does in fact make curling irons but maintains that it sells them only to distributors in New England and that it shipped no curling irons to Texas or to any intermediaries that do business in Texas.

- 2. You are counsel for Palmer. Based on the facts provided, what must Palmer plead and prove in order to invoke Texas Long Arm Jurisdiction over Kurlee, Inc.?**

3. **You are counsel for Kurlee, Inc. State (a) what pleading you should file to contest personal jurisdiction; (b) what you should say in that pleading; (c) whether the pleading must be verified; (d) whether Kurlee’s participating in discovery waives Kurlee’s contest of jurisdiction; (e) in what forms you may present evidence for consideration by the court in deciding jurisdiction.**

Assume you are Kurlee, Inc.’s counsel. Kurlee, Inc. wants (1) to object to generality of the pleadings, (2) to deny all Palmer’s allegations, (3) to challenge Palmer’s choice of the county in which he filed the case, and (4) to object to jurisdiction over Kurlee, Inc.

4. **State (a) in the order in which they should be filed, the name of each pleading to accomplish all these strategies and (b) why the order of pleading is significant.**

You are counsel for Dad's and are in the process of drafting an answer. Dad's has just noticed that the suit was filed in Hill County, instead of McLennan County. Dad's does not do business in Hill County. Dad's would like to have the case moved to McLennan County, where it is well known.

5. **State (a) what motion must be filed to move the case to a different county; (b) what must be said in the motion; (c) at what stage of the proceedings must the motion be filed; (d) in what form you must present evidence for consideration by the Court in determining the motion; (e) which party will have the burden of proof.**

Assume that Dad's did not seek to move the case to another county before filing an answer. Now you are Kurlee, Inc.'s counsel. Kurlee, Inc. also wants to try to have the case moved to another county.

6. **Assuming Kurlee, Inc. is subject to Texas jurisdiction, state whether or not it is too late for Kurlee, Inc. to request that the case be moved to another county and why.**

7. **Assume that Kurlee, Inc. is subject to jurisdiction and is the only defendant in the case. Kurlee, Inc. wishes to move the case to another county. State which county Kurlee, Inc. has the best chance for moving the case to, and why.**

8. **Without regard to the facts in the *Palmer v. Dad's and Kurlee, Inc.* case, list five affirmative defenses that must be verified.**

Dad's has a long running business relationship with Palmer, who has done business for years at Dad's, buying his supplies for his business on credit there. Palmer has not paid the last three months' bills for supplies, including the bill covering the curling iron in question. Dad's asks for your advice on whether to countersue Palmer.

9. **State (a) the factors for determining whether the counterclaim is compulsory; and (b) under what circumstances, if any, Dad's counterclaim would be compulsory. Explain fully.**

As counsel for Palmer, you have just completed serving disclosures and producing documents on the last day for timely responding. One week later, your supervising attorney who has reviewed the file, tells you that in the file copy of the materials that were produced are documents that were privileged.

10. What must Palmer’s counsel do to avoid a waiver of privilege claims as to the matters contained in the documents produced? Explain fully.

Kurlee, Inc. wants to take the curling iron back to its laboratory for microscopic examination and microscopic testing, some of which may be destructive. Palmer refuses because he does not trust Kurlee, Inc. with his key evidence of the curling iron.

11. What discovery avenues are available to Kurlee, Inc. to obtain the curling iron for testing, and what, if any, limitations do the Rules place on such testing by Kurlee, Inc.?

Palmer has waited patiently for one year while discovery is conducted. He wants to settle and move on with repairing his house and would like to resolve the case by mediation.

12. a. As Palmer’s counsel what strategy do you have available to force the defendants to attend a mediation?

Assume that a mediation is held but that neither Kurlee, Inc. nor Dad’s offer anything to settle with Palmer. Instead, they swagger and sneer that they would never pay anything to Palmer because they do not like him, regardless of whether he has a meritorious case.

b. What remedy, if any, does Palmer have with the Court to either seek sanctions against Defendants for their conduct or to require that they return to a second mediation and to negotiate in good faith by making realistic offers to Palmer?

At the original mediation, Palmer hears the Kurlee, Inc. party representative say to the mediator that Kurlee, Inc. had 10 reports in the last year of house fires related to the identical model of curling iron. This is very inconsistent with Kurlee, Inc.'s discovery responses.

c. Palmer wants you as his attorney to subpoena the mediator to testify in court about what he heard Kurlee, Inc.'s representative say. What advice do you give Palmer on this and for what reasons?

One year after filing the suit, Palmer has no expert witness on causation. Dad's has an expert witness who opines that the fire was caused solely by faulty wiring in the house and that it had nothing to do with the curling iron that was in the general area where the fire originated. Dad's would like for you to explore ways to conclude the case without a trial.

13. Given this factual background, name two variations of a motion Dad's can file to seek a pretrial adjudication of the case. Explain the difference between the two variations.

Palmer hires Radar Rogers, a local small electronics repairman, to testify as his expert. He has no college or technical school education, has never published any papers and has never investigated a fire, but has 25 years of experience in diagnosing and repairing small electric appliances. His training is on the job. He has concluded that the thermostat cut off switch had defects in design and manufacture, that it failed, and that it caused the fire.

14. Dad's questions whether Radar is qualified as an expert. State five factors that the court should take into consideration in deciding whether Radar's qualifications meet the criteria required to admit expert opinion testimony into evidence.

Dad's representative has heard talk for years at the local barber shop that Palmer both used drugs and occasionally sold them and may even have had a conviction or two, 10 to 12 years ago. Dad's asks you to find a way to offer this into evidence, either through Dad's representative or by calling the barber to testify.

15. Name two valid objections that Palmer could raise.

Palmer wants to prove his daughter's medical records for medical treatment by offering copies of all of his doctor's records.

16. a. What foundation must Palmer establish to get these records admitted as an exception to the hearsay rule?

b. By what means may Palmer authenticate the copies?

Palmer wants to offer federal agency regulations for small appliances with heating elements. He does not want to incur the expense of deposing or bringing an agency official to court to testify.

17. Identify two ways in which Palmer may authenticate the regulations so they will be admissible.

Assume that the only remaining cause of action is strict liability. Palmer wants to offer into evidence the change in design that Kurlee, Inc. made in the curling iron six months after Palmer's fire. Kurlee, Inc. objects that this is a post-accident effort to prevent other accidents, which public policy encourages, that admitting such evidence would discourage manufacturers from making changes, and that it is prejudicial.

18. What is the proper ruling on this objection? Explain your answer.

The jury returns a verdict for ten times Palmer's damages, and the court enters judgment on the verdict. Defendants want to appeal liability and damage findings.

19. What affirmative steps must Defendants take and in what courts and by when must they be taken to perfect these issues with the Court of Appeals?

20. Name two things Defendant's can do to suspend the enforcement of the judgment pending appeal.

Civil Procedure & Evidence – February 2001

Each paragraph number corresponds to the number of the civil procedure and evidence question on the exam.

1. Although most examinees knew the time limit for disclosure, many were unable to state correctly four things that must be disclosed.
2. Most examinees did not seem to understand what Palmer must plead and prove to invoke long arm jurisdiction over Kurlee.
3. Many examinees did not seem to know whether the pleading to contest personal jurisdiction needed to be verified and the extent of allowable discovery. Many discussed due order of pleading which was not asked by this question.
4. Relatively few examinees had difficulty with this "due order of pleading" question.
5. Examinees often confused motions to transfer venue based on improper venue with motions to change venue based on undue prejudice.
6. Many examinees did not seem to know that each defendant has an individual right to challenge venue.
7. Examinees who did not read carefully apparently overlooked the instruction to assume that Kurlee, Inc. was the only defendant in the case.
8. This question asked for five affirmative defenses that must be verified. Many examinees were unable to correctly state five.
9. Many examinees did not seem to know all the factors for compulsory counterclaims. Others did not clearly answer part (b).
10. Many examinees did not seem to know the substantive law regarding inadvertent disclosure of privileged matters.
11. Relatively few examinees had difficulty with this question on production and inspection.
12. Some examinees did not understand that the courts are limited in forcing mediation.
13. Many examinees did not seem to know there were two types of summary judgments, and many discussed other motions.
14. Most examinees were able to come up with five factors to be considered in evaluating the qualifications of an expert witness.
15. Examinees did not seem to have much difficulty with this question on extraneous character evidence.
16. Many examinees were not sufficiently familiar with the elements of the business records exception. Others did not seem to know how to authenticate a business record.

17. Examinees who gave only one way to authenticate the regulations had difficulty because the question called for two ways.
18. Examinees who did poorly on this question apparently did not remember the strict liability exception to Rule 407 of the Texas Rules of Evidence.
19. Examinees who did poorly on this question and on Question 20 simply seemed unfamiliar with the appellate procedure.

July 2001

Paul, formerly a resident of Harris County, but now a resident of Dallas County, Texas, has brought suit against Dotcom, Inc., a Florida corporation with its principal place of business in Florida, and against John, a citizen of Oklahoma, in District Court in Dallas County, Texas.

In January 1999, Dotcom hired Paul to work for it as an employee selling advertising on its website. Dotcom gave Paul the state of Texas as his exclusive territory. All sales to Texas buyers would generate a commission for Paul.

In July 1999, Dotcom signed up John to do the same work and assigned him Oklahoma as his exclusive territory.

John began to infringe on Paul's sales territory in Texas. He would initiate calls to prospects in Sherman, Gainesville, and Wichita Falls, and then have the buyers meet him just inside the Oklahoma border, establish an Oklahoma post office address, and sign a contract so he could get commissions. The buyers went along with this because John told them he could give them better prices if they signed a contract in Oklahoma at "Oklahoma rates."

Paul has sued Dotcom, Inc., and John for infringing on his territory and for loss of commissions of \$65,000. He has sued John also for interference with contractual rights. Dotcom has counterclaimed against Paul for refund and offset for Paul's inflated expense reports.

- 1. In order to satisfy the prerequisites for serving the Defendants by serving the Texas Secretary of State under the Texas Long Arm Jurisdiction Statute, what must Paul affirmatively allege in his petition?**

2. **What steps must Paul take, under the Texas Long Arm Jurisdiction Statute, to prove the perfection and date of service of process on Defendants for purposes of establishing the date by which Defendants' answer must be filed?**

3. **Paul wants to obtain a default judgment if possible. Assuming the due date for the answer of a Defendant has passed, what is the earliest time and what conditions must be met before Paul may obtain a default judgment?**

4. **Dotcom, Inc., has been served. It wants to remove the case to federal court. Is the case properly removable? Explain fully.**

5. Assuming Dotcom, Inc. desires to remove the case to federal court, within what time period must Dotcom file its notice of removal?

6. Again assuming Dotcom, Inc. attempts to remove the case, and that Dotcom did not file an answer in state court before filing its removal petition in federal court, within what time period must Dotcom file its answer in federal court?

7. Assume each party wants to have the case tried by a jury. What, if anything, must be done by Paul and by Defendants, respectively, and by when must it be done, to preserve the right to jury trial in federal court?

8. Assume the case is remanded from federal district court to the District Court of Dallas County. Defendants are exploring whether they have a basis for transferring venue. In general, and without regard to any mandatory or permissive venue exceptions, what are 2 of the 4 places where a lawsuit may properly be brought?

9. Dotcom, Inc. has a cause of action for materials and merchandise it has been supplying Paul on account, and Paul is overdue in paying the last six months' accounts. What must Dotcom plead in order to bring a counterclaim for sworn account?

10. Assume that Dotcom, Inc. files its counterclaim for sworn account and that it complies with all the pleading requirements. Paul disputes the quality and amounts of materials supplied by Dotcom, and the sums which Dotcom alleges he owes. What must Paul do in order to preserve his right to present his defenses to the counterclaim at trial?

11. Assuming no discovery plan has been pled for Paul’s case in state district court, how many hours of deposition are allowed for each defendant?

12. Jury selection is in process. Aside from bias or prejudice for or against a party, what are 2 of the remaining 4 bases for striking a prospective juror for cause?

13. How many peremptory strikes does each Defendant have in selecting the jury?

14. At trial Paul wishes to use the deposition testimony of John. Although he was given the opportunity to do so, John never signed, corrected, or returned his deposition, but now claims the record has many mistakes and John objects to Paul offering the deposition testimony. What must Paul show in order to be permitted to offer testimony from John's deposition into evidence, in light of John's claims of transcription error?

15. Paul had retained an expert witness, Guru, specifically for trial to help establish his economic damages. When Paul got Guru's report he did not like it and never identified Guru as an expert witness in discovery responses. Dotcom by coincidence had retained an expert witness who often socialized with Guru and through its expert learned that Paul had retained Guru and that Guru had rendered some opinions that were favorable to Dotcom. May Dotcom obtain Guru's report in discovery over objection from Paul? Explain fully.

16. Paul designates another expert witness, Dr. Econ. Dr. Econ reviews Guru’s report, which was accidentally included in the box of documents Paul’s attorney asked him to review. Dr. Econ does not agree with Guru’s opinions, and did not base his report on them. At Dr. Econ’s deposition, Dr. Econ testifies truthfully that he has reviewed Guru’s report, and Dotcom asks Paul to produce it. Is Dotcom entitled to discover Guru’s report? Explain fully.

17. Dotcom has a key fact witness, George, (not an employee), who is currently working in Alaska. The witness is willing to give a deposition but not to travel to Texas because of the time and expense involved. Dotcom is not willing to pay him for his travel expense and time because the value of the case does not justify it. What option, if any, does Dotcom have for obtaining George’s oral deposition testimony in admissible form for use at trial? What restrictions, if any, apply?

18. The deposition of John is underway. Aside from privilege objections, what 3 objections may counsel make in good faith at the deposition without risk of sanctions?

19. In order to perfect an issue for appeal, a motion for new trial is required in 5 instances. Name any 2 of them.

20. At trial, John's ex-wife, Mary attends with him. John and Mary had remained friends and business partners after the divorce in 1998, and she continued to work with him in the office. Paul knows that Mary did a lot of the paperwork for John in connection with his sales for Dotcom and may have even accompanied John on sales calls. She has been listed as a fact witness by John, but her deposition has not been taken. Paul invokes the rule of exclusion and sequestration of witnesses and moves to exclude Mary from being in the courtroom while any witness testifies. How should the court rule? State your reasons.

Civil Procedure & Evidence – July 2001

Paragraph numbers correspond to the question number on the exam.

1. In addressing the prerequisites for long-arm jurisdiction, most examinees knew that the defendants did business in Texas or had some other minimum contact. Unfortunately, many devoted their entire space to this prerequisite and neglected to address the other three prerequisites.
2. Many examinees knew that the Texas secretary of state needed to be served; however, some neglected to mention that the secretary had to serve the defendants and that the return had to be filed with the court. Still others used this space to discuss regular service of process.
3. Many examinees did not explain that the return had to be on file for ten days before a default judgment could be filed.
4. Many examinees failed to mention that diversity jurisdiction had a \$75,000-damages minimum.
5. Most examinees simply did not state the deadline for filing a notice for removal.
6. While many examinees knew the twenty-day deadline for filing an answer in federal court, many thought the twenty days ran from the date of removal rather than the date of petition filing.
7. Although most examinees correctly responded that a jury trial had to be requested in federal court, almost none correctly stated the deadline.
8. Most examinees had little difficulty with this venue question.
9. Many examinees unnecessarily discussed compulsory counterclaims.
10. Many examinees mistakenly said that a general denial would preserve Paul's defenses to Dotcom's counterclaims.
11. Most examinees had little difficulty with this question regarding deposition hours. Some did not mention that the defendants shared their hours.
12. The most common mistake on this question was the confusion of disqualifications with challenges for cause.
13. On this question regarding the number of peremptory challenges, examinees gave answers ranging from three per side to fifteen each. Other examinees confused whether it was six challenges per side or per defendant.
14. Most examinees knew that John had waived his objections. However, only a few examinees knew there was a twenty-day deadline.
15. Most examinees who had difficulty with this question apparently thought that Guru's having been retained for trial meant that he was automatically a testifying or reviewed consulting expert. Others did not answer the question "yes" or "no".
16. Most examinees did poorly because they apparently thought the report was undiscoverable because Econ did not base his testimony on it. Others thought Guru's report was subject to the snap-back provision because it was accidentally disclosed.

17. Most examinees who had difficulty with this question did not seem to realize that a telephone deposition could be taken.
18. Most examinees did well on this question regarding deposition objections.
19. Most examinees had little difficulty on this question on new trial requirements.
20. A few examinees did poorly because they overlooked the fact that Mary was an ex-spouse.

Peter Payne is 15 years old. On August 24, 2001, Peter visited the Big Box Warehouse in Amarillo, Potter County, Texas with his friends to browse and see the latest television and sound equipment.

Big Box Warehouse is a national chain of electronic appliance warehouse stores that offers a big inventory of the latest products. It stores the electronics in their original unopened boxes on racks and shelves ranging from 3 to 20 feet above the floor; the product boxes are placed by employees using forklifts and scissor-type lifts that can raise products vertically for storage off the floor. The top shelf has no rails and often the product boxes are stacked 4 to 5 deep on the top shelf without any rails to prevent their falling. Signs are posted directing customers to ask for help in obtaining any boxes shelved more than 6 feet from floor level.

Peter is injured when a boxed television falls from a stack of 4 on the top shelf, 20 feet from the floor, and hits him. Peter is dazed but laughs it off and leaves the store with his friends. He does not report to the store the incident or any injury until 3 days later. Peter's friends were the only witnesses to the incident. After his continued complaints of pain, his grandmother takes him to the doctor, who diagnoses muscle strain and bruises, and some possible nerve damage to his neck and back, the symptoms of which have mostly gone away with several weeks of treatment.

- 1. The accident took place while Peter was visiting his grandparents for the summer in Amarillo (Potter County), where he had lived with his parents until he was 12. His family had moved to McAllen, Texas, and at the time of the accident, his residence was with his parents in McAllen (Hidalgo County). Peter's lawyer has his law office in McAllen and prefers to bring suit in a Texas state court in Hidalgo County. There are no Big Box Warehouse stores in Hidalgo County. Big Box Warehouse is incorporated in Idaho and owns stores in several larger Texas cities. Would venue be sustained in Hidalgo County over Big Box's timely motion to transfer? Explain fully.**

2. **Peter’s lawyer files suit against Big Box in the District Court of Hidalgo County, naming Peter as the sole plaintiff, and serves Big Box through its registered agent for service of process. What is the rule for calculating Big Box’s answer date?**

3. **Counsel for Big Box wants to remove to U.S. District Court based on diversity of citizenship jurisdiction. Big Box is incorporated in Idaho, has numerous stores in Texas, and has its executive offices in Abilene, Taylor County, Texas. Ignoring the amount in controversy, does Big Box have a meritorious basis upon which to remove to federal court based on diversity jurisdiction? Explain fully.**

4. **Counsel for Big Box observes that Peter’s petition clearly alleges that Peter is 15 years old and is concerned that Peter, a minor, does not have capacity to sue. What type of pleading should Big Box file to properly raise the capacity issue, and what technical requirement must the pleading satisfy? Explain fully.**

5. **Peter’s suit is pending in Hidalgo County District Court. Big Box Warehouse does not have a store nor does it have any presence in Hidalgo County, and it wants to file a motion to transfer venue to Potter County. Big Box has filed its answer early, some 10 days before its answer was due, and now files its motion to transfer 7 days before its original answer was due. Does the motion to transfer timely raise the venue issue? Explain fully.**

6. **Big Box has also considered moving to transfer venue to Bexar County, the county with a Big Box store nearest to Hidalgo County. What grounds, if any, does Big Box have for alleging in a motion to transfer that venue is mandatory or permissive in Bexar County? Explain fully.**

7. **Big Box has claims for overdue charge accounts from Peter’s parents, Mr. and Mrs. Payne. Assume that Mr. and Mrs. Payne have amended the petition to sue as next friend for their son Peter and that neither is suing for damages individually. Can Big Box satisfy the requirements for bringing either a mandatory or permissive counterclaim against Mr. and Mrs. Payne for the overdue charge accounts? Explain fully.**

8. Peter sues for past and future medical expenses, disability, and loss of ability to earn future income and seeks not more than \$50,000 in damages. State the level of discovery, the number of deposition hours, and the number of interrogatories allowed per side.

9. Big Box's attorney takes Peter's deposition in pretrial discovery and is also having Peter's testimony recorded by videotape. Peter has an attitude problem and is not making a very good impression. He is also not answering the questions well and is volunteering all sorts of things. His counsel wants to instruct Peter not to answer a pending question, which is particularly likely to reveal even more unfavorable but relevant information. What are the permissible grounds upon which a deponent's attorney may instruct the deponent not to answer a question at his deposition, and are any of the grounds applicable here? Explain fully.

10. Peter's treating doctor has been convicted for defrauding insurance carriers, but the conviction is on appeal. Peter intends to offer his treating doctor's testimony into evidence. Can Big Box get the doctor's conviction admitted into evidence over Peter's objection? Explain fully.

11. Peter's lawyer discovers several prior accidents that occurred at other Big Box stores over a year ago, although there is no history of such accidents at the Amarillo store. These incidents include slip or trip and fall accidents involving liquids on the floor or extension cords that were left stretched across aisles. Peter wants to offer evidence of the prior accidents to show a pattern of inattentiveness to customer safety, negligence and sloppy store safety policy.

A. On what specific grounds should Big Box object? Explain fully.

B. Should the court allow the evidence of these prior incidents? Explain fully.

12. Peter and his friends rode their skateboards to the store on the day of the incident. Big Box has taken the statement of one of those friends who revealed that the day after the incident Peter and his friends went to Skateboard City and did skateboarding tricks. Peter and his friends fell on occasion, sometimes painfully, but they took their falls in good humor. None complained of any injury at the skateboard park, although the friend recalled that he had to carry Peter's skateboard home for him because Peter was dizzy and complaining of a headache. Peter has served a written request under Texas Rules of Civil Procedure Rule 194.2 for each category of the materials and information described in the rule. Must Big Box disclose either (a) the name of the witness or (b) this statement in response to the request? Explain fully.

13. Peter designates his two testifying expert witnesses and produces a report from only one of them. Big Box wants to depose them before designating any experts of its own. Peter objects to producing experts for deposition until Big Box designates its testifying experts and produces their reports. How should the court rule on Peter's objection to producing each of his expert witnesses for deposition? Explain fully.

- 14. Six months before trial, Big Box served discovery requests for disclosure under the Texas Rules of Civil Procedure Rule 194. After that, and 75 days before the end of the discovery period, Peter is treated for the first time by a new doctor. Peter designates this new doctor as an expert witness 60 days before the end of discovery. Big Box objects to any trial testimony from the new doctor. How should the court rule? Explain fully.**

- 15. Peter wants to prove his medical expenses by offering his medical bills into evidence by way of affidavit. What steps must Peter follow to get these bills admitted into evidence without the doctor's live or deposition testimony at trial? Explain fully.**

16. Big Box had planned to add rails to the top shelves in its stores to protect the inventory. This work was originally scheduled for 6 months after the accident, but was accelerated to and begun on the day after the accident was reported. Peter wants to offer into evidence (1) the plans to modify and (2) the post-accident addition of the rails. Is evidence of either the plans or the addition of the rails admissible over the objection of Big Box? Explain fully.

17. Ten days before trial, Peter’s doctor diagnoses possible damage to Peter’s foot. Five days before trial, Peter files an amended petition to include a damage claim for an injury to his foot. Big Box claims surprise and timely objects to the amended pleading. Should the court sustain the objection? Explain fully.

18. Big Box produces voluminous documents in discovery. Peter provides 45 days prior notice of his intention to use some of these documents at trial. He offers them into evidence at trial without supporting affidavits or foundation testimony. Big Box objects that the documents are not properly authenticated. Should the objection be sustained? Explain fully.

19. Assume that at trial, Peter offers evidence of the injury to his foot without having filed an amended pleading claiming injury to his foot. Assume also that the evidence is admitted without objection. After the close of the evidence, Big Box objects to the charge to the jury, claiming that the jury should not be allowed to consider the injury to the foot because it is not supported by any pleading. What steps, if any, should Peter take to overcome the objection, and how should the court rule? Explain fully.

20. Big Box had offered before trial to settle the case with Peter for \$7,500. On cross-examination, Peter's lawyer asks Big Box's manager if it is true that Big Box had made this offer to settle the case. On what basis should Big Box object, and how should the court rule? Explain fully.

Civil Procedure & Evidence – February 2002

1. Many examinees did not seem to know that the plaintiff's residence was a proper venue, particularly with an out-of-state defendant.
2. Most examinees knew the deadline for filing an answer.
3. Most examinees recognized that there was diversity because the defendant's principal place of business was in Texas. Many examinees did not know that a corporation could have multiple residences.
4. Although most examinees understood that the plea had to be verified, many could not name the precise plea or motion.
5. Most examinees knew the due order of pleading.
6. Many examinees did not elaborate as to why Bexar County did not fall under the mandatory or permissive venue rules.
7. Most examinees could explain why the counterclaim would not be compulsory. However, only a few knew that tort claims and contract claims could not be a permissive counterclaim.
8. Most examinees answered this discovery question sufficiently.
9. Examinees who had difficulty with this question often confused objections with grounds for not answering.
10. Most examinees knew that the conviction was not admissible because it was not final.
11. Few examinees had difficulty with this question regarding the admission of evidence.
12. A number of examinees did not fully answer the question as to the deadline and what precise information was discoverable.
13. Many examinees treated the question as though it dealt with testifying and consulting experts.
14. Most examinees seemed to believe that the deadline was thirty days before trial.
15. Few examinees explained the deadlines for admitting business or medical records via affidavit.
16. Few examinees had difficulty with this question about subsequent remedial measures.
17. Most examinees knew the rules regarding the deadline for amended pleadings.
18. Most examinees knew that documents produced by a party are self-authenticated. However, only a few examinees knew the deadline for objecting to the document's admission.

19. Most examinees answered this trial amendment question adequately.

20. Most examinees knew the proper objection. A few did not answer how the court should rule.

Pam, a resident of Bowie County, Texas, was injured in a three-car automobile collision while she was driving her car in Travis County, Texas. The other two drivers were Don, a resident of Oklahoma, and Jim, who is a resident of Potter County, Texas. Pam is considering whether to bring suit against both Don and Jim for damages in excess of \$100,000.

- 1. Pam has not yet filed suit. Bob, an independent witness to the accident, is very ill and may be close to death. Pam wants to obtain his deposition quickly while he is still able to testify and before she could typically commence formal discovery. Describe three requirements that Pam must satisfy to obtain a court order allowing her to take Bob's deposition before filing suit. Explain fully.**

- 2. What must Pam plead and prove for a Texas court to maintain jurisdiction over Don, under the Long Arm Statute? Explain fully.**

- 3. Pam is considering bringing suit in federal district court in Texas. Does Pam have sufficient basis for maintaining diversity of citizenship jurisdiction over Don and Jim in federal court? Explain fully.**

- 4. Under the general venue rule, in what county or counties can Pam bring her suit in Texas state district court against Don and Jim? Explain fully.**

- 5. Pam files suit and obtains service on Don. Don does not file an answer. What must Pam establish in order to obtain a default judgment against Don for liability and damages? Explain fully.**

- 6. Assume that before Pam obtains a default judgment against Don, he decides to contest the lawsuit. He has been served with citation through the Texas Secretary of State. In order to preserve his objection to jurisdiction in a Texas court: (a) what motion must Don file; (b) in what form must it be presented; and (c) when should he file it?**

- 7. Don sends written discovery requests to Pam with his objections to jurisdiction. Pam contends that, by participating in discovery under the Texas Rules of Civil Procedure, Don has subjected himself to the jurisdiction of the Texas court and has waived his objection to jurisdiction. Assuming that this argument is properly raised by Pam, how should the court rule? Explain fully.**

8. Pam files suit in Travis County, Texas. Jim answers the suit by filing a general denial. Don files a motion objecting to venue, subject to his objection to jurisdiction. Pam responds that Don is already bound to venue in Travis County because Jim did not object to venue in Travis County and waived his potential venue objection, and thus established venue for all defendants. How should the court rule on Pam's argument that Jim's waiver precludes Don's venue objections? Explain fully.

9. Assume that Don files a motion to transfer venue and specially denies the venue facts pled by Pam. Further assume that Pam does not raise the waiver argument. What, if anything, must Pam file and when will it be due? Explain fully.

10. Pam designates the level of discovery as Level 2. How many hours of deposition are permitted for each Defendant, in which to examine and cross-examine Pam and her designated experts? Explain fully.

11. Identify four types of information that must be produced by a party if requested by another party under a Rule 194.1 Request for Disclosure. Explain fully.

12. Pam objects to some of Defendants' Rule 194 Requests for Disclosure, based upon her assertion of the work product privilege. How should the court rule? Explain fully.

13. Jim retained an expert witness to assist with the defense of the case, but does not intend to call this expert witness to testify at trial. Must Jim identify the expert in response to a Request for Disclosure or produce an expert report from her? Explain fully.

14. Don has identified an expert witness, but has not produced a report from him or a summary of his opinions. Don has given notice of intention to take the depositions of Pam's experts, whom she has identified and from whom she has produced reports. What basis, if any, does Pam have for objection to these proposed depositions? Explain fully.

- 15. Pam has filed affidavits from the records custodians of her treating doctors and hospital, to prove her medical expenses. Jim’s attorney wants to dispute the amount of these expenses at trial by offering rebuttal evidence about what the reasonable and necessary medical expenses should have been. What, if anything, must Jim’s attorney do before trial to preserve that opportunity? Explain fully.**

- 16. Pam’s case has been called to trial. Pam notices that, after the peremptory strikes have been exercised, all but one of the female venire persons have been stricken. What, if any, remedy does Pam have and how should she assert it? Explain fully.**

17. The court granted a motion in limine to preclude Pam’s attorney from referring to the existence of liability insurance. The motion was granted. In opening statement, Pam’s attorney refers to liability insurance in violation of the court’s limine order. What should defense counsel do to preserve error? Explain fully.

18. Defendants want to exclude all the witnesses from the courtroom during the testimony at trial, except for the parties and whoever is testifying. What procedure, if any, is available to accomplish this request and would it apply to Pam’s husband who is also a witness? Explain fully.

19. Forty (40) days before trial, Pam’s doctors diagnose a new injury. Twenty- five (25) days before trial, Pam supplements her discovery answers to disclose her newly diagnosed injury. However, she does not supplement her previously disclosed medical expert reports. At trial she offers expert testimony about her new injury. Defendants object. How should the court rule? Explain fully.

20. The jury finds in favor of Pam on liability and awards as actual damages an amount five times more than the evidence at trial established. What potentially applicable complaints regarding the damage award must Defendants assert in a motion for new trial, in order to preserve the error for appeal?

Civil Procedure & Evidence – July 2002

1. Most examinees were able to come up with one or two requirements. Other examinees chose to treat this question as calling for the requirements for depositions in general.
2. Many examinees only gave the general law regarding long arm jurisdiction. Few addressed the specific plea and proof requirements for this particular situation.
3. Most examinees knew that the in-state defendant precluded diversity jurisdiction. Some, however, thought you could use joinder to override a lack of diversity.
4. Most examinees knew the available venues for suit.
5. A number of examinees failed to give the complete requirements for a default judgment.
6. Some confused the process for contesting personal jurisdiction with the process for overcoming a default judgment.
7. Many examinees did not know that participation in discovery was not an acceptance of personal jurisdiction.
8. Some examinees thought that “tag-along” jurisdiction would preclude the second defendant’s right to challenge venue.
9. Most examinees did not know the time frame or the procedure for contesting venue.
10. Most examinees knew the number of discovery hours available. Some examinees did not know that parties on the same side share their hours.
11. Nearly all examinees received full credit on this question regarding information required in requests for disclosure.
12. Many examinees mistakenly treated this question as calling for a discussion of the work product rules rather than explaining that work product was not applicable to disclosure requests.
13. Most examinees knew the difference between the various types of experts and their discoverability.
14. Many did not understand that the party not seeking relief does not have the same requirements as the party seeking relief.
15. Many examinees did not know that the defense was required to disclose their expert before trial.
16. Some examinees, however, did not seem to know that Batson applies to gender-based peremptory challenges.
17. Many examinees did not completely answer the question.

18. Some examinees did not know that Husband's spousal status overrode his witness status.
19. Most examinees correctly answered this question regarding supplementation deadlines for expert testimony.
20. Many examinees did not completely answer the question.

Pat, doing business as “Wonder Widgets,” is a retailer of specialized high tech widgets. Her store is in Fort Worth, Tarrant County, Texas. These widgets only function if constantly maintained at a regulated temperature. They must be handled carefully at each stage of the commercial chain by the manufacturer, shippers, wholesalers, and retailers.

Pat has two wholesale suppliers, Don Ho Wholesale Supply, Inc. (“Don Ho”) and Jim Dandy Specialty Warehouse, Inc. (“Jim Dandy”). The wholesalers warrant that the widgets have been kept continuously at the approved temperature. Both operate under identical contracts with Pat to deliver widgets, per her orders, to her warehouse in Tarrant County, Texas. Don Ho is incorporated and located in Kansas. Jim Dandy is incorporated in Texas and its principal office is in Denton County, Texas.

Pat has experienced numerous complaints from her customers about the widgets not performing as they should, allegedly because the temperature at which they have been stored has deviated from the approved temperature. Pat has received numerous returns of widgets and suffered serious loss of business as a result. Pat wants to bring one suit against both Don Ho and Jim Dandy.

- 1. Assume that Pat files suit against Don Ho and Jim Dandy in a Texas state district court in Tarrant County. What basis does Pat have for maintaining personal jurisdiction over Don Ho in a Texas state district court? Explain fully.**

2. Many of Pat’s most important customers are major employers in Tarrant County. Their employees are outraged at the widget failures. Critical news coverage of the failure of widgets in several high technology businesses has been extensive in print and broadcast media in the county. Aside from mandatory or permissive venue issues, do Defendants have any other basis for a change of venue and, if so, what is required to bring the argument before the court? Explain fully.

3. Jim Dandy was properly served with citation and mailed the suit papers and citation to its attorney. The package, however, was misdelivered by the US Postal Service. Jim Dandy did not file an answer. Pat obtained a default judgment against Jim Dandy in the amount of \$500,000. Describe one remedy that Jim Dandy may have to attack the default judgment in the trial court, and the time deadlines, if any, for such remedy. Explain fully.

4. **Don Ho files a timely answer and also files a counterclaim against Pat for accounts she has not paid. She had bought widgets from Don Ho on account. What elements must Don Ho satisfy to meet the requirements for bringing a suit on a sworn account under TRCP 185? Explain fully.**

5. **Don Ho's counterclaim against Pat met all requirements for a suit on a sworn account. Pat filed a general denial. Without offering any supporting evidence on his counterclaim, Don Ho moves to preclude Pat from offering any evidence at trial in defense of his counterclaim. How should the court rule? Explain fully.**

6. Pat has established venue on claims against Jim Dandy because their contract specified venue in Tarrant County, Texas. Because Don Ho was an out of state corporation, however, there was no venue clause in the contract between Pat and Don Ho. Does Don Ho have any valid objections to venue? Explain fully.

7. Pat designated Level 2 of the Discovery Control Plan for this case. Don Ho's counterclaim for damage to business reputation exceeds the damages prayed for by Pat. Don Ho believes that Level 2 does not allow sufficient discovery for his counterclaim. What, if any, options does Don Ho have to adjust the Level of Discovery? Explain fully.

8. List three items of information that must be provided if requested under a Rule 194 Request for Disclosure, and state when the response is due.

9. Assume that this is still a Level 2 Case. A deposition of a witness is now entering the 60th hour of cumulative time taken thus far in deposing witnesses, by the side examining this witness. What objection or instruction, if any, is available to counsel who wants to end the deposition? Explain fully.

10. Defendant Jim Dandy wants to physically view and examine the refrigerated facility where Pat stored her widgets. Pat objects. What valid options does Jim Dandy have to obtain access to Pat's storage facility? Explain fully.

11. Don Ho's designated expert witness reviewed a report of Don Ho's consulting expert witness. At his deposition, Don Ho's expert testified that he reviewed this report. Pat immediately requests that Don Ho produce the report of the consulting witness. Don Ho declines to produce it. How should the court rule? Explain fully.

12. After full discovery, Pat failed to produce any evidence of defect in the widgets. What pretrial procedures are available to Don Ho to possibly avoid the necessity for a trial? Explain fully.

- 13. As the jury selection process begins, Don Ho’s counsel notices that the jurors on the first three rows appear less sophisticated than those on the last three rows. He believes sophisticated jurors would be more favorable to Don Ho’s case. What, if any, procedural options does Don Ho’s counsel have? Explain fully.**

- 14. During jury selection in a state district court, how many peremptory challenges does each Defendant in this case have? Explain fully.**

- 15. The court granted Jim Dandy’s motion in limine precluding references to other litigation filed or pending against Jim Dandy. In opening statement, Pat’s attorney referred to the fact that Jim Dandy had been sued at least 10 times, “so he ought to feel at home in the courtroom.” What valid objections or motions are available to Defendant Jim Dandy and when should they be asserted? Explain fully.**

- 16. Jim Dandy made a written request that Pat produce, for inspection, her employees’ written reports evaluating the function of the widgets she purchased from Jim Dandy after they were returned to her by her customers with claims that they were defective. Pat responded that she lost the reports and could not find them. Jim Dandy believes that it has been prejudiced in not being able to review these reports. What relief, if any, is available to Jim Dandy to cure the arguable prejudice? Explain fully.**

17. Pat has told her husband all about the refrigeration problems at her business and what was in the lost records. Her husband was not involved in the business and had no part in the disappearance of the records. Don Ho takes the deposition of Pat's husband to find out everything she told him about the claims in her lawsuit and the missing records. Pat objects to such inquiries and asserts the spousal privilege. How should the court rule? Explain fully.

18. The jury returns a very large verdict for Pat. Defendants feel that it is a result of emotion and is not supported by the evidence. What motions, if any, are available to Defendants to prevent the court from entering judgment on the verdict, and when must they be filed? Explain fully.

19. Defendants want to file a motion for new trial. What is the deadline for filing the motion?

20. After judgment is entered, Defendants file a motion for new trial. What effect, if any, does this have on the court's plenary power over the judgment? Explain fully.

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1. Most examinees understood that there must be minimum contacts to bring a Kansas company into Texas state court. Fewer examinees identified this concept as "long-arm jurisdiction".
2. Most examinees understood the process for transferring venue based on community prejudice; however, others confused it with mandatory change of venue rules.
3. Very few examinees knew that the proper attack on a default judgment is an equitable motion for new trial or an equitable bill of review as opposed to a generic motion for new trial.
4. Many examinees chose to discuss compulsory counterclaims rather than address suits on a sworn account.
5. Only about half of the examinees knew that a sworn account needs to be denied under oath or else it is prima facie proof.
6. Most examinees knew that Don had no valid venue objections. Other examinees, however, used this question to discuss federal diversity jurisdiction.
7. Most examinees knew that level three discovery could be requested.
8. Nearly all examinees were able to come up with three items of information which must be provided pursuant to a request for disclosure.
9. Most examinees knew that they could object to the expiration of deposition time.
10. Many examinees did not know that they could either request entry onto the land pursuant to discovery or that they could move for a court order for entry onto the land.
11. Nearly all examinees understood the difference between testifying experts, consulting experts and purely consulting experts.
12. Many examinees did not know the difference between a "no evidence" summary judgment and a traditional summary judgment.
13. Many examinees knew that they could request a jury shuffle. Others understood that some venire members could be removed with a peremptory challenge.
14. Most examinees knew that there are six peremptory challenges in a civil trial. However, few understood how the challenges are allocated when there are multiple defendants.
15. Most examinees knew some of the sequence of objections for preserving error for appellate review; however, many examinees failed to fully answer this question.
16. Most examinees did not discuss spoliation. Some examinees knew that sanctions may be in order.

17. Many examinees confused the general category of spousal privilege with the specific privilege of the right not to be compelled to testify. While the latter privilege is unique to criminal law, civil law provides for a confidential communication privilege between spouses.
18. Most examinees knew that a motion for a JNOV was the appropriate motion, but few knew when the motion should be made.
19. Most examinees identified the deadlines applicable to a motion for new trial.
20. Very few examinees understood the effect filing a motion for new trial has on the court's plenary powers. Instead, many examinees chose to explain the concept of plenary power.

July 2003

Paul and Susan (Plaintiffs) have a lake home in Hill County, Texas, where they stay about once a month on weekends. They live and work in Tarrant County, Texas. They have made a claim under their homeowner's insurance policy on their lake home for water damage from pipes that they claim burst during an ice storm in February 2003 and flooded their house. The Insurance Company (Defendant) has denied their claim based on non-coverage. Plaintiffs sued Defendant in state District Court in McLennan County, Texas, where their attorney resides.

Defendant decides to file a motion to transfer venue from McLennan County.

- 1. What must Defendant plead to contest venue? What form of proof is considered by the court in determining the motion? What evidence, if any, must Defendant file with the motion? Explain fully.**

- 2. If Defendant fails to file a responsive pleading by the required time after service of process, what elements must Plaintiffs prove to establish a right to default judgment?**

- 3. Identify four things that must be disclosed on request for disclosure without propounding interrogatories or requests for production. Within what time period must they be disclosed?**

Plaintiffs have served their responses to Defendant's requests for disclosure. They discover a few months later that they did not disclose two witnesses, who are not favorable to Plaintiffs' case.

- 4. What, if any, obligation do Plaintiffs have to produce this information? Within what time must they do so? Explain fully.**

In its initial disclosure, Defendant accidentally produced to Plaintiffs a detailed memo from Defendant's lawyer, marked PRIVILEGED AND CONFIDENTIAL. In the memo, Defendant's lawyer evaluates the issues and potential exposure in the case. Defendant discovers the inadvertent disclosure 20 days following its production and immediately requests that Plaintiffs return the document. Plaintiffs' counsel declines Defendant's request to return the document.

5. What remedy, if any, does Defendant have to compel the return of the document from Plaintiff? Explain fully.

Paul is being deposed.

6. What objections, if any, may Paul's counsel make at the deposition?

Plaintiffs have kept the specimen sections of pipe that were removed when repairs were done. Defendant wants to inspect and test these specimens.

7. What procedure, if any, is available to Defendant to obtain access to the specimen pipe sections for inspection and testing? Explain fully.

Plaintiffs and Defendant are ordered to mediation. At the mediation, Plaintiff Paul makes statements to the Mediator about having problems with prior leaks and repairs at the lake house before the ice storm. Defendant serves a subpoena on the mediator to compel her to testify in a deposition about Paul's statement.

8. Can Defendant compel Mediator to testify about Paul's statement at the mediation? Explain fully.

Plaintiffs retain Manfred as an expert to assist in developing their case on damages. Plaintiffs do not intend to call him to testify and have not designated him as an expert, nor have they produced his detailed written report. After defense counsel overhears Manfred talking about his opinions at a café, Defendant files a motion to compel production of Manfred's impressions and opinions.

9. How should the Court rule on the motion? Explain fully.

Defendant designates an expert witness whose qualifications seem questionable to Plaintiffs. The expert claims he can tell what caused the pipe to fail by "just looking at it."

10. What procedure, if any, is available to Plaintiffs to obtain a determination of whether this individual is qualified to testify as an expert witness? Explain fully.

11. What factors must the Court consider in determining the admissibility of expert opinion testimony? Explain fully.

Jury selection begins. Defendant wants to explore every possible basis for striking venire persons for cause.

12. Aside from bias or prejudice for or against a party, identify two bases for challenging a prospective juror for cause. Explain fully.

Before trial, Plaintiffs offered to settle their case for \$25,000. Defendant declined the offer. At trial, Plaintiffs seek \$100,000 in damages. Defendant offers into evidence Plaintiffs' written settlement proposal.

13. What objection, if any, should Plaintiffs' counsel make to Defendant's offer of evidence? Explain fully.

Neighbor owns the lake house across the street from Plaintiffs' lake house. At trial, Plaintiff Susan testifies that Neighbor told her that his pipes also froze as a result of the same ice storm.

14. What objection, if any, should Defendant make, and how should the Court rule? Explain fully.

Defendant offers authenticated records of Paul's 1985 conviction for felony drug delivery and his 1996 conviction for misdemeanor DWI.

15. What objections, if any, should Paul's counsel make, and how should the Court rule? Explain fully.

At trial, Plaintiffs offer evidence concerning additional home repairs that had not been listed as part of their original claim and which had not been referred to in their pleadings or discovery answers. Defendant did not object to the evidence at the time of Plaintiffs' offer, but now objects to the submission of a jury question for these damages.

16. How should Plaintiffs respond to overcome Defendant's objection? Explain fully.

On cross-examination, Defendant's counsel asks Plaintiff Susan to explain her religious beliefs, which he considers to be vastly different from and offensive to the local community, in order to cast doubt on her credibility.

17. What valid objection, if any, should Plaintiffs make to this line of questioning? Explain fully.

Defendant produces a great number of documents in its response to Plaintiffs' request for production. Nineteen days before trial, Plaintiffs notified Defendant of their intent to offer some of these documents into evidence at trial. At trial, Plaintiffs offer these documents into evidence. Defendant objects that they have not been properly authenticated.

18. How should the Court rule on Defendant's objection? Explain fully.

Plaintiffs have rested their case. Defendant believes that Plaintiffs have omitted proof of an element of their case.

19. What motion should Defendant present, when should it be presented and on what grounds should it be based? Explain fully.

In closing argument, Plaintiffs ask for \$100,000 in damages, based on evidence offered. The jury awards \$1,000,000.

20. What motion should Defendant file, if Defendant wants to ask the Court to set aside the jury's verdict on damages? Explain fully.

Civil Procedure & Evidence – July 2003

General Observations: Overall, the answers were more complete and correct than on recent past examinations. However, some common problems still persist:

- A failure to answer how the Court should rule. Many low-scoring examinees did not state which way the Court should rule and, thus, lost the points for giving the correct ruling on the question. Too often, the examinees do give a specific ruling and try to answer the question both ways. Similarly, many low-scoring examinees fail to give a "yes" or "no" answer when the question calls for such an answer.
- A failure to answer the specific question. Many low-scoring examinees seemed intent on giving certain answers even though the question does not call for that answer. By giving these answers, it wastes limited time and space available for actually answering the specific questions
- A failure to fully answer the question. In some cases, the question required several factors, but the examinee would only give one factor.
- Making a Rule 11 agreement. Many low-scoring examinees answered questions by stating that the parties should enter into a Rule 11 agreement to bypass the rules. Such an answer contradicts the purpose of the civil procedure and evidence examination which is to test the examinees understanding of these rules.

Civil Procedure and Evidence Problems by Question

1. Most examinees understood how to object to venue facts based on improper venue, but many did not know that the defendant was not required to produce evidence. Others confused this situation with a change of venue based on community prejudice.
2. Most examinees knew the time-line for default judgments.
3. Most examinees could name four items which must be disclosed on a request for disclosure, and received full credit.
4. While many examinees knew that they were required to supplement discovery by disclosing the name of the new unfavorable witnesses, they did not know the deadline. Others confused this situation with Brady claims from criminal law.
5. Most examinees understood that there is a process for returning inadvertently disclosed privileged material, but few knew the specifics of that process. Many examinees were confused as to whether the clock started from the day of disclosure or the day of discovery.
6. Most examinees knew the three deposition objections.
7. Most examinees knew to request a motion for production or inspection, but few described any specifics of that motion.

8. Almost all examinees knew that a mediator cannot be compelled to testify in the absence of an agreement to do so.
9. Nearly all examinees understood the difference between testifying experts, consulting experts and purely consulting experts.
10. Many examinees knew the general process for challenging an expert witness, but were not always specific. Other examinees used this question to address the Daubert factors (see question 11).
11. Nearly all examinees could name the Daubert factors/evidentiary rules for admitting expert testimony.
12. Some examinees confused the grounds for challenging a venire person for cause with absolute disqualifications for jury service. Other examinees confused grounds for cause with grounds for peremptory challenges.
13. Most examinees knew that settlement offers were not admissible. Many examinees, however, did not know there is a specific rule of inadmissibility and thought the offer inadmissible under a more general rule such as relevance or hearsay.
14. Most examinees recognized this evidence as inadmissible hearsay.
15. Many examinees thought that prior convictions were not admissible to impeach witnesses in civil cases. Most of those examinees who did know that the prior convictions are admissible correctly explained the issues of remoteness and lack of moral turpitude.
16. Most examinees knew to file a trial amendment, but many did not understand the legal basis of trial by consent which permits it.
17. Most examinees knew that religious views were not admissible. Many examinees, however, did not know there is a specific evidentiary rule of inadmissibility. They offered a variety of bases, including many who thought the question violated the witness' constitutional rights.
18. Many examinees knew that documents produced in discovery can be deemed self-authenticated. Some examinees did not know the deadline for the defendant to object.
19. Many examinees confused a motion for directed verdict with a no-evidence motion for summary judgment. However, nearly all examinees understood why they were making the motion.
20. Most examinees knew which motion to file. However, many examinees do not understand the difference between a motion for new trial and a motion JNOV.

February 2004

X Corp is a Texas corporation with headquarters in Travis County, Texas. X Corp has developed a thriving online consulting business with a customer base in Texas and the four surrounding states. Paul and Don, both Texas citizens, were the original co-founders of X Corp; Paul is President and Don is Vice-President. Paul and Don disagree over issues of management and compensation.

A competitor in the same market, Y Corp, (an Oklahoma corporation with headquarters in Tulsa) recruits Don to come work for it as President. He accepts, but continues to live in Texas. Don hires his old college roommate Larry, an Oklahoma citizen, to manage the Oklahoma territory.

X Corp wishes to bring suit against Y Corp, Don, and Larry for interference with contractual relations, improper use of trade secrets and customer lists, and breach of Don's covenant not to compete after he left X Corp.

- 1. X Corp wants to sue Y Corp, Don and Larry in Texas state district court. What prerequisites must X Corp satisfy in order to serve Y Corp by serving the Texas Secretary of State? Explain fully.**

2. **X Corp files suit in state district court in Dallas County, Texas seeking damages of at least \$100,000. Y Corp and Larry are properly served with citation. They want to object to jurisdiction of a Texas court over them. What pleading should they file and when must it be filed? Explain fully.**

3. **Describe the form and contents required for the pleading that Y Corp and Larry should file in order to properly raise their objection to jurisdiction. Explain fully.**

4. **Y Corp and Larry also are considering removal to US District Court based on federal diversity of citizenship jurisdiction. If they choose to remove, describe what the removal petition must contain, when it must be filed, and whether they will succeed in removal to federal court. Explain fully.**

5. Assume that Defendants Larry and Y Corp decided not to pursue removal to US District Court and instead filed answers in state district court in Dallas County, Texas. Larry and Y Corp have studied the venue and now wish to object to venue and move the case to Grayson County, Texas, where Y Corp has been building an office. Can Defendants now move to transfer venue? Explain fully.

6. Again, assume that Y Corp and Larry have filed answers in Texas state district court in Dallas County, Texas but, for strategic reasons, decided against filing any motions to transfer venue and conceded that venue was proper in Dallas County, Texas. Don, a resident of Travis County, Texas has been properly served but not yet filed any pleadings. He still is within the time limits for filing an answer. Don now wishes to object to venue and transfer the case to Travis County, Texas, where he lived and worked both while originally employed by X Corp and now for Y Corp. Does the concession by the other Defendants that venue is proper preclude Don from now objecting to venue? Explain fully.

- 7. X Corp includes a reference to Discovery Level 2 in its petition. If the case proceeds in Texas state district court, describe the limitations on depositions taken and interrogatories propounded by X Corp? Explain fully.**

- 8. While the suit is pending, X Corp discovers that Don and Larry are contacting current employees of X Corp to recruit them to work for Y Corp. X Corp wants to force Y Corp, Don and Larry to stop this conduct. What elements must X Corp plead and prove in order to enjoin Don, Larry, and Y Corp from recruiting employees of X Corp? Explain fully.**

9. Assume that the Court enters an injunction ordering Y Corp to refrain from contacting or recruiting employees of X Corp. X Corp learns from one of its employees that Mary (a former X Corp employee now working for Y Corp as a manager) had a “reunion dinner party” at her home for friends who still worked at X Corp. Mary informed her guests that there were lucrative employment opportunities at Y Corp and that she was sure Y Corp was still hiring. X Corp believes that this conduct is in violation of the injunction and wants to stop this activity. What pleading should X Corp file, when should it be filed, and what relief might the Court order? Explain fully.

10. At Larry’s deposition, counsel for X Corp asks Larry, who has his own attorney, about the conversation he had with Don’s attorney about defendants’ positions in the case. Larry’s counsel asserts the attorney client privilege and instructs Larry not to answer. What procedure should X Corp’s counsel follow in order to obtain a ruling on the objection, and how should the court rule on Larry’s privilege objection? Explain fully.

11. X Corp designates an expert witness, but has not produced his report or opinions. Y Corp serves a notice for the deposition of X Corp's expert. X Corp files a motion to require Y Corp to designate its expert witness before the de position of X Corp's expert. What, if any, procedure is available to Y Corp to proceed with the deposition of X Corp's expert at this time? Explain fully.

12. Y Corp has designated its expert, Frank, and produced his report. Earlier in the litigation, Y Corp had also retained a consultant, Catherine, but considered her to be strictly a consulting expert, and has not designated Catherine as an expert or produced her report. At Frank's deposition, he discloses that he had reviewed Catherine's report but had never discussed it with her or relied on it in any way; and moreover, that he considered it flawed and that he totally disregarded her views. X Corp moves to compel production of Catherine's report. How should the Court rule? Explain fully.

- 13. Assume that X Corp has still not produced any evidence in discovery, whether fact or expert opinion, on damages. X Corp employees who have been deposed have not expressed opinions on quantifying the amount of damages allegedly sustained by X Corp and caused by Y Corp, Don and Larry. Y Corp files a “no evidence” motion for summary judgment against X Corp. What must X Corp do to prevent the Court from granting the summary judgment in favor of Y Corp? Explain fully.**

- 14. The case is called to trial. Jury selection is underway. Each of the three Defendants is separately represented by different counsel. How many peremptory strikes does each Defendant have for this case, and under what circumstances, if any, might Defendants be able to obtain additional strikes? Explain fully.**

15. X Corp calls Betty, Don's wife, to testify at trial. Betty worked at X Corp for the first 6 months after startup, then quit when she married Don. At home, after they were married, Don always confided in Betty about corporation business. X Corp suspects that Don had been planning to leave and go to work for Y Corp for 6 months before he left, and that he was copying customer lists frantically during that time, so he could use them when he went to work for Y Corp. X Corp's lawyer asks Betty about conversations she had with Don after Betty left employment with X Corp. Don's attorney objects. What objection should Don's attorney raise and how should the court rule? Explain fully.

16. X Corp calls its mail clerk Tom to the witness stand. Tom testifies that his girlfriend, a waitress, has told him that she heard Don bragging over dinner at a restaurant with friends about stealing X Corp confidential customer lists and technical information. Don's attorney objects. What objection should he make and how should the Court rule? Explain fully.

17. X Corp calls Winthrop as a witness, who testifies at trial that he recalls certain conversations with Don. At Winthrop's deposition he could not recall any such conversations. Describe the steps that Y Corp's lawyer should take in order to properly impeach Winthrop with his deposition testimony. Explain fully.

18. Y Corp calls Sam as a witness. He testifies that Paul told him that Don and Y Corp were only taking customers he did not want anyway and that Y Corp was actually helping X Corp by taking the less desirable customers. X Corp's attorney objects to the testimony as hearsay. How should the Court rule? Explain fully.

19. Frank, the expert for Y Corp, offers opinions at trial beyond those in his report and deposition. X Corp's attorney objects to this opinion testimony for failure to timely designate or supplement discovery responses. What legal exceptions to the rule on timely disclosure must Y Corp establish in order to overcome the objection to these expert opinions? Explain fully.

20. Paul testifies at trial. During Paul's direct examination he testifies about Don's employment contract, and refers to provisions in Paragraphs 4-11, copies of which X Corp's attorney offers for admission into evidence. Don's attorney believes that paragraphs 15 -20 are also relevant, but he is not currently examining the witness. What, if any, remedy should Don's attorney request? Explain fully.

Civil Procedure & Evidence – February 2004

Many low-scoring examinees did not state which way the Court should rule. Too often, examinees did not give a specific ruling and instead tried to answer the question both ways. Similarly, many low-scoring examinees did not give a “yes” or “no” answer when the question called for such an answer. Sometimes examinees seemed intent to give certain answers even though the question did not call for that answer. In some cases, the question required several factors, but the examinee would only give one factor.

Civil Procedure and Evidence Problems, by Question

1. Most examinees recognized the applicability of the Texas long-arm statute, but many failed to address the specific requirements for serving the Secretary of State.
2. Most examinees understood the special appearance motion and its place in the due order of pleadings.
3. Some examinees confused this question with motions for transfer of venue. Other examinees could not name all the content requirements of a special appearance.
4. While most examinees understood the concept of federal diversity jurisdiction, many did not address either the deadline for seeking a removal or the motion’s contents.
5. Most examinees knew that a motion to transfer venue was waived by the filing of an answer. Some examinees, however, confused motions to transfer venue with motions to change venue based on community prejudice.
6. Most examinees knew that each individual defendant has the right to assert a venue challenge.
7. Almost all examinees knew the discovery limitations for level two discovery.
8. Few examinees knew all the elements for seeking injunctive relief. Most examinees named one or two elements.
9. Most examinees recognized the concept of contempt and judicial enforcement of violations of court orders.
10. Few examinees recognized the concept of joint-defense agreements. Some examinees addressed the privilege question in light of Larry being an agent of X Corp. Other examinees simply addressed the types of objections that may be made during a deposition.
11. While most examinees knew that Y Corp had the right to depose X Corp’s expert, many examinees did not understand the role that X Corp’s failure to provide a report had on the timing of the deposition.
12. Most examinees understood the difference between testifying experts and consulting experts.

13. Most examinees understood that X Corp was required to produce some evidence, few examinees discussed the level of evidence necessary to avoid a summary judgment.
14. Many examinees did not understand that co-defendants share their preemptory challenges unless they can show their interests are antagonistic. Most examinees presumed adverse interests.
15. Most examinees recognized the applicability of confidential communications privilege. Some examinees confused this privilege with the testimonial privilege. Other examinees thought the confidential communication privilege was limited to criminal cases.
16. Nearly all examinees recognized the hearsay nature of the testimony and its potential status as a statement against interest. However, many examinees did not address its double hearsay nature.
17. Many examinees did not address all the steps necessary to impeach a witness with a prior inconsistent statement.
18. While many examinees recognized the testimony as an admission by a party-opponent, few examinees explained how Paul is a party-opponent.
19. Many examinees used this question to discuss trial amendments. Other examinees failed to address all the requirements for the admission of non-timely disclosed expert testimony.
20. Most examinees knew the rule of optional completeness. Some examinees did not know that the remainder of the document could be offered immediately.

July 2004

On March 30, 2004, Paul was injured in a collision with an 18-wheeler truck in Bell County, Texas. We-Haul, Inc., (“We-Haul”), a Delaware corporation, owned the truck and employed the driver, Daniel. We-Haul has its headquarters in Oklahoma. At the time of the accident, Paul was a resident of Grayson County, Texas and Daniel was a citizen of France and admitted as a permanent resident of Dallas County, Texas.

- 1. Paul wants to file suit in Texas state district court to recover damages for his injuries. He wants to stay out of federal court. Who should Paul sue, and for what minimum amount of damages, to prevent removal to federal court based on diversity of citizenship jurisdiction? Explain fully.**

- 2. Paul files suit against We -Haul and Daniel in state district court in Denton County, Texas, where he is living temporarily with his parents while recuperating from his injuries. Can Paul maintain venue in Denton County if a defendant timely objects to that venue? Explain fully.**

3. Daniel files a motion to transfer venue to Dallas County or Bell County. Under the general venue rule, is venue proper in Dallas County? in Bell County? Explain fully.

4. In his original petition, Paul alleged negligence, but did not plead specific acts or omissions. He also alleged damages in excess of the minimum jurisdictional limits of the court. Defendants filed special exceptions, which the judge orally sustained at a hearing. The judge noted her ruling in the margin of the defendants' special exceptions. Have defendants preserved for appeal their objections to the defect in Paul's petition? Explain fully.

5. The case is assigned Discovery Level 2. When does the discovery period begin and end? Explain fully.

- 6. Paul sends interrogatories to We-Haul asking for the names of all impeachment and rebuttal witnesses it expected to call at trial. We -Haul objects, claiming violation of work product privilege and trial strategy. Paul files a motion to compel. How should the court rule? Explain fully.**

- 7. Paul sends a request for production to We-Haul. What must We-Haul do to properly preserve work product and attorney client privileges to the information requested and withhold the documents from production? Explain fully.**

- 8. Assume that We-Haul properly preserves its privilege claims and does not produce the documents. How can Paul obtain more information from We-Haul about the withheld documents to assess the privilege claims? Explain fully.**

9. Helga, a crystal healer, treated Paul’s injuries. She has no medical or chiropractic license, or other official credentials. Paul designates her as an expert witness. We -Haul wants to exclude Helga’s opinions. What motion should We-Haul file? Identify three factors that the court should evaluate to determine the admissibility of Helga’s opinions. Explain fully.

10. Paul was also treated by his physician, Dr. Smith, who found that Paul was permanently disabled as a result of the collision. What motion should We -Haul file to obtain a second medical evaluation of Paul? What showing must We-Haul make to prevail on the motion? Explain fully.

11. We-Haul retained Dr. Critic as a consulting expert to review Dr. Smith’s records and opinions. Dr. Critic provided We-Haul’s counsel with his report. Paul moves to compel production of the report. How should the court rule? Explain fully.

12. We-Haul wants to take the deposition of Paul’s designated testifying expert, Dr. Smith. We-Haul has not designated any expert witnesses. Paul refuses to tender Dr. Smith for deposition. We-Haul files a motion to compel. How should the court rule? Explain fully.

13. We-Haul makes a timely written offer of settlement to Paul pursuant to Section 42.003 of the Texas Civil Practice and Remedies Code. Paul rejects the offer. If Paul obtains a judgment against We-Haul, can We-Haul still shift its litigation costs and attorney’s fees to Paul? Explain fully.

14. If We-Haul is entitled to recover its attorney’s fees and costs from Paul, are there any limitations on the amounts and kinds of such fees and costs that We -Haul can recover? Explain fully.

15. We-Haul has long known the identity, but not the whereabouts, of Motorist, who witnessed the accident. We-Haul locates Motorist one week before trial. We -Haul never identified Motorist in response to Paul’s Requests for Disclosure. At trial, We-Haul calls Motorist to the stand. Paul objects. How should the court rule? Explain fully.

16. When the case is called for trial, Paul announces ready. After jury selection, Paul learns that his key eyewitness is ill and unable to testify in court. What must Paul include in his motion for continuance, which We-Haul opposes? What must Paul do to preserve error if the court overrules the motion? Explain fully.

- 17. Paul timely amended his petition against We -Haul to allege negligent hiring, negligent entrustment and negligent maintenance. We-Haul has a policy against hiring or retaining any driver who has received three or more citations for traffic violations over a two -year period. In the year before Daniel became We-Haul's employee, he had received four such citations. At trial, Paul's attorney offers evidence of the citations. We -Haul and Daniel object on materiality and relevance grounds. How should Paul respond to the objections? Explain fully.**

- 18. At trial, Daniel testified that the brakes inexplicably failed, that the brakes had been properly maintained and that he was not aware of any problems with the brakes prior to the accident. Paul calls Daniel's passenger as a witness to testify that, days before the accident, he heard a mechanic ask Daniel at a truck stop, "Did you ever get those lousy brakes fixed on that old rig you're driving?" and that he heard Daniel respond, "I'll get around to it when I have the money." We-Haul objects to the testimony as hearsay. How should Paul respond to the objection? Explain fully.**

19. The parties and their attorneys participated in a court-ordered mediation before trial. At the mediation, We-Haul’s Vice President told Paul, “We admit that Daniel was negligent. We only disagree about the amount of damages.” At trial, We-Haul denies Daniel was negligent. During direct examination, Paul’s attorney asks Paul about the statements made at the mediation by We-Haul’s Vice-President. We-Haul objects. How should the court rule? Explain fully.

20. When asked on cross-examination whether he had consumed any illegal drugs shortly before the accident, Daniel invoked his Fifth Amendment privilege against self-incrimination and refused to answer. During jury argument, Paul’s attorney comments on Daniel’s refusal to answer and invocation of the privilege. Daniel’s attorney objects, claiming improper jury argument. How should the court rule? Explain fully.

Civil Procedure & Evidence – July 2004

Paragraph numbers correspond to the question number on the exam.

1. Most examinees knew that suing Daniel was the key to staying out of federal court. However, many examinees did not realize that the requirement for removal to federal court is complete diversity and damages in excess of \$75,000.
2. Most examinees understood the relationship between the plaintiff's residence and proper venue. However, many examinees did not note that the residence must be where the plaintiff intends to permanently reside rather than where he is temporarily residing.
3. Almost all examinees knew that venue could be transferred to the county where the accident occurred or the county where a defendant, who is a natural person, resides.
4. Many examinees did not directly answer this question, and discussed preservation of error generally. Most examinees did not seem to know that a signed written order containing the judge's oral ruling is needed.
5. Most examinees knew when the discovery period ends. However, many examinees did not seem to know or did not answer when the discovery period begins.
6. Most examinees did not appear to understand that the rules treat the discovery of the names of trial witnesses differently from the names of impeachment or rebuttal witnesses. There is no requirement to provide the names of impeachment or rebuttal witnesses unless they can be reasonably anticipated.
7. Most examinees knew the requirements of a withholding statement.
8. Few examinees seemed aware of privilege logs.
9. Almost all examinees knew the Daubert/Robinson factors for the admissibility of expert testimony.
10. Few examinees appeared to be familiar with the rule of procedure which allows one party to compel another party to submit to a physical examination.
11. Most examinees understood the difference between testifying and consulting experts. A number of examinees suggested that, when a consulting expert reviews a testifying expert's report, the consulting expert becomes discoverable.
12. Many examinees did not recognize that the timing for tendering an expert for deposition depends on whether a report is furnished or not furnished.
13. Most examinees were aware of the new CPRC provisions permitting the recovery of litigation costs after the rejection of a settlement more favorable than the judgment received.
14. Many examinees did not seem to know the specific limitations on the recovery of litigation costs. Many examinees did not answer the question asked.

15. Many examinees recognized that the undisclosed witness may be excluded. Some examinees, however, switched the burden as to which party must show good cause and a lack of unfair surprise or prejudice.
16. Most examinees generally understood what is needed to be included in a motion for continuance, but some examinees did not include all the requirements.
17. Most examinees recognized the relevance of the evidence on the issue of negligent entrustment and of whether the company followed its own policy. Some examinees only recognized one basis.
18. Most examinees recognized one statement as an admission by a party-opponent and the other statement as showing knowledge or state of mind. Some examinees only addressed the admissibility of one of the statements.
19. Most examinees understood that statements made during mediation are inadmissible.
20. Most examinees did not know that, in civil cases, a party may comment on a witness' invocation of his privilege against self-incrimination.

Sam, his wife, and their minor daughter, Jane, were on a family vacation in Harris County, Texas when a truck rear-ended their car. Sam was driving the car. Sam's wife, Martha, and Jane were passengers. All three sustained serious injuries in the collision. The owner of the truck was PipeCorp, a Texas corporation whose principal place of business has always been in Tarrant County, Texas. Bob, PipeCorp's employee, was driving the truck at the time of the collision. Sam, Martha, Jane and Bob resided in Nueces County, Texas at the time of the collision. Sam and Martha want to file a lawsuit to recover for the injuries and damages sustained by them and by Jane.

- 1. Sam and Martha decide to sue PipeCorp and Bob. What must they allege in their Original Petition to state a cause of action? Can they assert Jane's claims in the lawsuit? If so, how? Explain fully.**

- 2. Sam and Martha ("Plaintiffs") file a lawsuit against PipeCorp and Bob ("Defendants") in District Court in Nueces County, Texas. PipeCorp wants to object to venue in Nueces County, seeking to transfer the claims against it to Tarrant County. How does PipeCorp make and preserve its venue objection? Explain fully.**

- 3. Assume PipeCorp files the necessary pleading objecting to venue in Nueces County. When should the hearing be scheduled and what may the court consider in ruling on the objection to venue? Explain fully.**

- 4. How should the court rule on PipeCorp’s venue objection? Explain fully.**

- 5. Plaintiffs allege in the Original Petition that discovery should be conducted under Level 2 of the Texas Rules of Civil Procedure. Under a Level 2 discovery plan, what are the limitations on the discovery period, the total time for oral depositions and the total number of interrogatories? Explain fully.**

6. The Original Petition generally alleges that the negligence of the defendants proximately caused damages to the plaintiffs. The Petition, however, does not allege any specific acts of negligence nor a dollar amount of damages being sought. If the defendants wish to object to the generality of these allegations, what pleading should they file? If the court sustains the objection, what relief, if any, should the court grant? Explain fully.

7. After Defendants filed their responsive pleadings, Plaintiffs served Defendants with a request for production asking for all correspondence between Defendants and any third party which relates to the occurrence in question. Defense counsel wants to withhold from production documents constituting work product. What must defense counsel do to preserve the work product privilege? Explain fully.

8. Plaintiffs propound Requests for Disclosures on Defendants. List five categories of information that can be obtained under such Requests. Explain fully.

9. During Bob’s deposition, his attorney repeatedly makes suggestive objections and instructs Bob not to answer certain questions. What are the only objections by Bob’s attorney that are permitted during this oral deposition? What remedies are available if the objections go beyond those permitted under the Rules? Explain fully.

10. In its responsive pleadings, PipeCorp claims that Bob was not within the course and scope of his employment at the time of the collision. Plaintiffs’ counsel believes that the evidence conclusively establishes otherwise. Plaintiffs want the court to rule on this issue before trial. What pleading can Plaintiffs file to seek a ruling on this issue and when can they file it? Explain fully.

11. In preparing the case for trial, Plaintiffs' counsel wants to file copies of medical records to prove the amount of the medical expenses incurred in treating Plaintiffs. What facts must be stated in the affidavit which is filed with the records? Explain fully.

12. On the morning of trial, Plaintiffs' counsel realizes that he had never requested a jury nor paid the jury fee. Plaintiffs' counsel files the jury request and pays the jury fee one hour before the case is called for trial. When the judge asks for announcements, defense counsel objects to the jury request as untimely. What must be shown to permit a jury trial under these circumstances? Explain fully.

13. Assume the court allows a jury trial. Plaintiffs want to challenge several veniremen for cause, based on their responses during voir dire. What steps must Plaintiffs take to preserve error if the court denies their challenges for cause? Explain fully.

- 14. Assume the court had previously ruled that Bob was within the course and scope of his employment at the time of the accident. Defendants each want to exercise six (6) peremptory strikes. What pleading should Plaintiffs file to ensure that Defendants do not have an unfair advantage in the allocation of peremptory strikes? What factors should the court consider in ruling on that pleading? Explain fully.**

- 15. Immediately after the collision, Bob got out of his truck and told Sam, “I hit you because I was not paying attention.” On direct examination, Plaintiffs’ counsel asks Sam if Bob said anything after the collision. What objection should Bob’s counsel make and how should the court rule? Explain fully.**

16. At trial, Defendants call a fact witness who they had never identified in discovery. Plaintiffs' counsel objects on the grounds that Defendants had not properly supplemented their discovery responses. For the court to permit the testimony, what evidence must be presented and who has the burden to present such evidence? Explain fully.

17. During a mediation before trial, Plaintiffs told the mediator that they would accept significantly less in settlement than the amount they would seek at trial. The case did not settle. At trial, defense counsel calls the mediator to testify about what Plaintiffs said at mediation. What objection should Plaintiffs' counsel make and how should the court rule? Explain fully.

18. On cross-examination, Plaintiffs' counsel asks Bob whether he was covered by liability insurance at the time of the collision. What objection should defense counsel make and how should the court rule? Explain fully.

19. While the case was pending, Sam and Martha had many personal conversations about the accident. Sam told her it had been his fault. On cross-examination, defense counsel asks Martha what Sam told her about the accident. What objection should Plaintiffs' counsel make and how should the court rule? Explain fully.

20. Before the jury reaches a verdict, the parties agree to a settlement. They announce to the court that Plaintiffs have agreed to accept \$750,000 to settle all of the claims asserted by Sam, Martha and their minor daughter, Jane. Does the settlement require court approval? If so, what must occur before the court can approve the settlement? Explain fully.

Civil Procedure and Evidence – February 2005

Some general problems included not stating which way the court should rule when asked to do so, not answering the question that was asked, giving unnecessary information unrelated to the question asked and not listing more than one factor when asked to do so. Numbering below corresponds to the question.

1. Most examinees knew that Sam and Martha could sue on Jane's behalf since she was a minor. Many examinees did not identify the requirements of an original petition.
2. Most examinees knew to file a motion to transfer venue and understood the concept of due order of pleadings.
3. Many examinees did not seem to know the time lines for a venue hearing. However, most examinees knew that proof must be made by affidavit or other written material.
4. Many examinees overlooked the fact that Bob was a resident of Nueces County, thereby making venue in Nueces County proper.
5. Most examinees knew the limits of level 2 discovery, and knew when the discovery period ends. However, many examinees did not know or did not answer when the discovery period begins.
6. Most examinees knew to file a special exception and that the relief is an amended petition.
7. Most examinees knew the requirements for withholding privileged material.
8. Almost all examinees could identify five items subject to a request for disclosure. Some examinees simply rephrased the same item several times.
9. Almost all examinees knew the deposition objections.
10. Few examinees seemed aware of either type of summary judgment or the time frame in which either could be filed. Many examinees confused this concept with motions in limine.
11. Many examinees knew the requirements of the business records exception to the hearsay rule. Some examinees did not name all the elements of this exception.
12. Most examinees knew what must be shown to obtain a jury trial past the jury request deadline.
13. Few examinees demonstrated knowledge of the procedure for preserving error from the denial of a challenge for cause.
14. Rather than discuss motions to equalize peremptory challenges, many examinees discussed either Batson challenges or jury shuffles neither which was not what the question asked.

15. Nearly all examinees recognized that Bob's counsel's hearsay objection would be overruled because Bob's statement was both a party admission and an excited utterance.
16. Most examinees knew that the party calling the witness bore the burden to prove no unfair surprise or prejudice to the other party. However, many examinees did not mention the good cause requirement.
17. Most examinees knew that ADR proceedings are confidential. Some examinees did not state the court's ruling.
18. Most examinees recognized the insurance prohibition.
19. Most examinees recognized the spousal confidential communication privilege. Some examinees confused this privilege with the spousal testimonial privilege in criminal cases.
20. While most examinees understood that the settlement required court approval, many examinees did not discuss the effect of a minor plaintiff and the specific approval requirements therein. Many examinees instead discussed Rule 11 agreements.

Laura has been a life-long resident of Harris County, Texas. She was injured on January 15, 2002, when she slipped and fell in a grocery store in Dallas County, Texas. The owner and operator of the store was Food, Inc., a Texas corporation with its principal office in Bexar County, Texas. Laura returned home after the incident, but she never fully recovered from her injuries. Laura sought legal advice from a lawyer who practices in Travis County, Texas. The lawyer recommended that Laura file a lawsuit.

- 1. In what county or counties may Laura (“Plaintiff”) properly file the lawsuit? Explain fully.**

- 2. Seeking to avoid travel expenses, her lawyer filed suit on behalf of Plaintiff against Food, Inc., (“Defendant”) in Travis County, Texas. What pleading must Defendant file to challenge venue? When must Defendant file it? What must the pleading allege regarding proper venue? Explain fully.**

3. **Plaintiff's lawyer filed the lawsuit on January 14, 2004. He did not request the issuance of citation of service until June 15, 2004. Defendant was served with the petition and citation on October 30, 2004. What affirmative defense, if any, should Defendant assert in its answer to the suit? Explain fully.**

4. **Defendant serves Requests for Admission on Plaintiff. The Requests call for responses within 30 days of service. Plaintiff files responses to the Requests sixty (60) days after service. What is the effect of the late filed responses to Defendant's Requests? What must Plaintiff do to overcome that effect? Explain fully.**

5. Defendant served interrogatories on Plaintiff, seeking the names of the persons Plaintiff expects to call as witnesses at trial, including all rebuttal and impeachment witnesses. Plaintiff objected. How should the Court rule? Explain fully.

6. Plaintiff serves a notice to take the oral deposition of Defendant, a corporation, with a subpoena duces tecum to produce certain documents at the deposition. How much notice must be given for the deposition, as noticed? If Defendant wants to object to the notice, what must it do and when must it do it? Explain fully.

7. During the deposition of Defendant's corporate representative, Defendant's lawyer repeatedly interrupts the questioning with objections that suggest answers to the witness. What are the only objections permitted during an oral deposition? What remedies are available to Plaintiff's lawyer if Defendant's lawyer goes beyond what is permitted under the rules? Explain fully.

8. Plaintiff was treated by a number of doctors for her injuries. Defendant wants to obtain the medical records from those doctors without taking their oral depositions. How can Defendant obtain the records in admissible form? Explain fully.

9. After obtaining Plaintiff's medical records, Defendant decides that it wants Plaintiff to be examined by another qualified doctor. What must Defendant do to obtain such an independent examination? Explain fully.

10. Plaintiff timely designates an expert who claims to have expertise in the field of body mechanics of slips and falls to prove that the incident in the store resulted in permanent injuries to Plaintiff. Defendant wants to exclude the expert's testimony. What pre-trial pleading should Defendant file? What must Defendant show to exclude the testimony? Explain fully.

11. After the completion of discovery, what pleadings can Defendant file to have the merits of the case determined prior to trial? What must Defendant show to prevail? Explain fully.

12. One week before trial, Defendant seeks a continuance because there are several fact witnesses that it has not been able to depose. What showing must Defendant make in its application for continuance? Explain fully.

- 13. During discovery, Plaintiff obtains evidence of several slip and fall incidents that occurred at the store five years before Plaintiff's fall. Defendant does not want Plaintiff to refer to the prior incidents during the trial, including jury voir dire. What pleading should Defendant file with the Court? What should be included in the pleading? If the Court grants Defendant's requested relief, what procedures must Plaintiff then follow before she can mention the prior incidents before the jury? Explain fully.**

- 14. During the trial, Defendant calls to the stand a witness who claims to have seen Plaintiff just prior to the incident. Defendant had not previously disclosed the name of the witness to Plaintiff. What must Defendant establish before the Court will permit the testimony? Explain fully.**

15. At trial, Plaintiff testifies differently from what she testified to during her deposition regarding what she was doing just before she fell. What must Defendant's lawyer do before he can read Plaintiff's deposition testimony to the jury? Explain fully.

16. Twelve years before the slip and fall incident, Plaintiff completed her probation for a felony conviction. Defendant wants to cross-examine Plaintiff about the conviction while she is on the stand. Plaintiff objects. How should the Court rule? Explain fully.

17. During her deposition, Plaintiff testified that shortly after she fell, a store employee told her that he had been aware of standing water in the area, but that he had not gotten around to cleaning it up. During direct examination, Plaintiff is asked about the statement. Defendant objects on hearsay grounds. How should the Court rule? Explain fully.

18. After Plaintiff rests her case, the lawyer for Defendant believes that the evidence is legally insufficient to support a verdict for Plaintiff. How can Defendant raise this issue with the Court? If the Court allows the case to proceed, can Defendant raise the issue again, and if so, when? Explain fully.

19. During final argument, Defendant's counsel refers to matters that the Court had excluded from evidence. What objection should Plaintiff's counsel make? What relief should he request? Explain fully.

20. After the jury returns with a verdict adverse to Plaintiff, her lawyer interviews some of the jurors. He learns that one of the jurors had received a communication from a third party about the case during deliberations. How can Plaintiff's lawyer bring this matter to the attention of the Court? Can the jurors who spoke with Plaintiff's counsel after the verdict testify about this matter? Explain fully.

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1. Most examinees knew the proper venue counties for Laura's lawsuit - the county where the accident occurred or the county where the defendant resided.
2. Most examinees understood the requirements of a motion to transfer venue and when the motion must be filed.
3. Most examinees did not know that a statute of limitations affirmative defense was available, even though the lawsuit was filed within the limitations period, because Laura failed to exercise due diligence in serving the petition and citation.
4. Many examinees knew that the failure to respond to requests for admissions deemed the admissions true. Most examinees knew that they could motion the Court to "undeem" the admissions.
5. Most examinees knew that rebuttal and impeachment witnesses are not subject to discovery requests.
6. Most examinees did not know the precise notice requirement for requesting that documents be produced at a deposition under subpoena duces tecum. Many examinees did know that documents can be protected with a protective order.
7. Nearly all examinees knew the permissible deposition objections.
8. Many examinees recognized and knew the requirements for the business records exception to the hearsay rule. Few examinees seemed aware of the practice of conducting a deposition on written question.
9. Most examinees were aware of a specific motion for physical examination. However, many examinees did not know its specific requirements.
10. Most examinees recognized a need for a Daubert hearing and knew its requirements for the admission or exclusion of evidence.
11. Many examinees recognized that the proper pleading to have the merits determined before trial is a motion for summary judgment. However, many examinees did not distinguish the difference between a no-evidence and a traditional motion for summary judgment. Some examinees confused summary judgments with directed verdicts.
12. Most examinees understood the requirements for a continuance. Some examinees did not provide all the requirements.
13. Most examinees understood the concept and effects of a motion in limine.
14. Most examinees knew the requirements for calling an undisclosed witness.

15. Most examinees knew that a witness has to be confronted with a prior inconsistent statement and given a chance to explain or deny that statement. However, many did not know that extrinsic evidence of the prior statement is allowed only if the witness fails to unequivocally admit having made the prior statement.
16. Most examinees knew that Laura's prior conviction was inadmissible because it was too remote. Some examinees thought that this rule only applied in criminal cases.
17. Nearly all examinees recognized the employee's statement as either a party admission or as a statement against interest, and that the statement was not inadmissible hearsay.
18. Some examinees confused motions for an instructed verdict or for a directed verdict with motions for summary judgments. Many examinees did not recognize the applicability of a JNOV to this situation.
19. Nearly all examinees knew that an argument referring to excluded matters was outside the record, and knew what relief to request.
20. Many examinees did not know that a motion for new trial is the proper means to bring alleged jury misconduct to the court's attention. Other examinees did not know that jurors can testify about any outside influence that has been improperly brought to bear.

February 2006

Parker, a resident of Nueces County, purchased a used water heater from Supply Corp. (“Supply”) in Harris County. Jones, a resident of Harris County, installed the water heater in Parker’s home. Two weeks later, Parker suffered serious injuries when the heater exploded and started a fire. Appliance, Inc. (“Appliance”), a company with offices only in the State of Maine, was the manufacturer of the water heater. Appliance markets and sells its water heaters only in the State of Maine.

Parker files suit in Nueces County against Supply, Jones and Appliance to recover damages resulting from his injuries.

Appliance wants to keep the suit from proceeding against it in a Texas court.

- 1. What responsive pleading should Appliance file? What must the pleading allege? When should the pleading be filed? Explain fully.**

- 2. What must Parker show in his response to Appliance’s pleading in order to prevail on the issue? Explain fully.**

3. What motion should Supply file? What should the motion allege? When must the motion be filed? Explain fully.

4. What must Parker allege in his response to the motion filed by Supply if Parker wants to keep the claims against Supply in Nueces County? Explain fully.

5. What can the Court consider at the hearing on Supply's motion? How should the Court rule? Explain fully.

- 6. What pleading should Parker file and what should the Court’s order recite if Parker wants to reserve the right to refile the claims against Appliance at a later date? Explain fully.**

Parker wants to send written discovery to Supply and Jones.

- 7. Identify five items that are within the scope of written discovery about which Parker can inquire.**

Supply receives discovery requests from Parker which call for the production of internal memos between Supply and its employees made in anticipation of litigation.

- 8. What steps must Supply take to protect from discovery the information and material contained in the memos? Explain fully.**

After receiving Supply's response to his request for production of the internal memos, Parker files a written request which asks Supply to identify the information and material in question.

9. What must Supply include in its response to Parker's request? When must Supply serve its response? Explain fully.

Parker wants to take the oral deposition of Rubio, Supply's former employee who sold Parker the water heater. Rubio now lives and works in Dallas County. Parker is aware that Rubio travels to Nueces County on a regular basis to visit family.

10. What choices does Parker have as to the place where Rubio's oral deposition may be taken? What must Parker do if he wants to take the deposition in Nueces County? Explain fully.

Rubio shows up at his deposition with his lawyer. During the deposition, Rubio and his lawyer repeatedly interrupt the deposition to confer and Rubio is repeatedly instructed by his lawyer not to answer certain questions.

11. Under what circumstances may a deponent confer with his lawyer during a deposition? When may a lawyer instruct a witness not to answer a question during a deposition? Explain fully.

Assume the claims against both Supply and Jones remain in Nueces County. Jones objects to the claims against him being tried at the same time that the claims against Supply are tried, because he believes that the explosion was due to a malfunction of the water heater, not to his installation.

12. What pleading must Jones file to bring his objection to the attention of the Court? How should the Court rule? Explain fully.

Parker designates Helper, a long-time handyman with no formal education, as an expert witness on the issue of causation. Supply wants to keep Helper's opinions from the jury.

13. What pleading must Supply file and what must it contain to bring the issue to the attention of the Court? Explain fully.

14. In response to Supply's pleading, what must Parker show to argue that Helper should be allowed to testify? Explain fully.

Five (5) days before the scheduled trial date, Supply hires Carter, a Texas State Senator, as an additional lawyer on its trial team. The legislature is scheduled to be in session on the date that the trial is to commence.

15. What must be contained in any pleading that Supply may file, which seeks to use the hiring of Carter as a reason to delay the trial? Is it mandatory that the Court grant the delay? Explain fully.

When the case is called for trial, all of the witnesses who had been subpoenaed to testify are in the courtroom. Parker does not want the witnesses to remain in the courtroom once testimony commences.

16. What must Parker do to exclude the witnesses from the courtroom while others are testifying? What instructions must the Court give the witnesses? Explain fully.

Supply suspects that Parker’s counsel, during voir dire and during the trial, may try to suggest that Supply’s insurance company will pay any judgment that may be entered against Supply.

17. What pleading may Supply file to keep Parker’s counsel from referring to the existence of insurance in the case? Assume the Court rules in favor of Supply on the pleading. What instructions will the Court give to Parker’s counsel? If Parker’s counsel refers to the existence of insurance during the trial, what, if anything, must Supply do to preserve error? Explain fully.

During the trial, one of Supply’s fact witnesses testifies differently from what she said in her deposition.

18. What steps must Parker’s lawyer take to show the jury the differences in testimony? Explain fully.

At the close of Parker’s case in chief, Supply wants to challenge the legal sufficiency of the evidence Parker presented on the issue of causation.

19. What motion must Supply make and what must it allege? Explain fully.

Assume that the court decides to submit the case to the jury. The parties do not agree with the form of the questions that the court wants to submit to the jury.

20. When and how should the parties present their objections to the proposed charge? Explain fully.

Civil Procedure and Evidence – February 2006

1. Most examinees knew the proper pleading was a special appearance challenging the court's jurisdiction, and that the special appearance must be filed first.
2. Most examinees recognized the *International Shoe* test of systematic contacts and the assumption of jurisdiction not offending traditional notions of fair play.
3. Most examinees recognized the requirements for a motion to transfer venue and when the pleading should be filed. Some examinees confused this pleading with a motion to change venue based on prejudice in the community.
4. Most examinees understood that venue would be proper in Nueces County because it was where a substantial part of the action arose.
5. While most examinees ruled correctly that the motion to transfer venue should be denied, many did not know what types of evidence may be offered to support a motion to transfer venue.
6. Many examinees did not know that a motion to non-suit and dismiss without prejudice was the proper pleading.
7. Nearly all examinees could identify five items within the scope of discovery.
8. Most examinees understood the requirements for withholding privileged material. Some examinees confused this concept with the concept of consulting versus testifying experts.
9. Most examinees knew the requirements when a further description of withheld privileged material is requested. Few examinees knew the specific deadline for responding to this request.
10. Nearly all examinees knew that Rubio's deposition may be taken in his county of residence. Most examinees knew that Rubio's deposition could be taken in a county where subpoenaed.
11. Nearly all examinees knew when an attorney could instruct a witness not to answer a deposition question. However, few examinees knew the limited situations in which a witness may confer with his attorney during a deposition.
12. Most examinees knew that the proper pleadings were a motion to sever or a motion for separate trials. Many examinees did not know the reasons why the trial court should deny a motion to sever.
13. Most examinees recognized that a *Daubert* motion was the proper pleading to contest whether an expert should testify, and that a *Daubert* motion challenges an expert's qualifications.
14. Most examinees knew the requirements under the rules of evidence for admitting expert testimony.

15. Many examinees were aware that the legislative continuance was no longer mandatory when the attorney/legislator was hired close to trial. Few examinees knew either what the party hiring the legislator must show to obtain the continuance or the time-frame when a legislative continuance becomes discretionary. Other examinees simply talked about the rules for a continuance based on a new material witness.
16. Nearly all examinees recognized the invocation of the “rule”, and the instructions to be given by the trial court.
17. Most examinees knew that the proper pleading was to file a motion in limine and most knew that the party must object again at trial to preserve error.
18. While most examinees understood that the witness could be impeached with her prior testimony, many examinees did not know the specific steps under rule 613 for impeaching the witness with her prior statement.
19. Some examinees confused motions for an instructed verdict or for a directed verdict with motions for summary judgments.
20. Most examinees knew when and how to present objections to the jury charge.

Properties, Inc. (“Properties”) owns Apartments, located in Nueces County, Texas. Properties’ principal office is in Dallas County, Texas. Sam is employed by Properties as manager of Apartments. Sam is a resident of San Patricio County, Texas. Betsy lives in Apartments. Betsy sustained serious injuries in a fire that consumed her unit in Apartments. The source of the fire was a broken electrical outlet. Betsy had asked Sam to replace the broken outlet weeks before the fire. The outlet had not been replaced prior to the fire.

Betsy filed a lawsuit in Nueces County seeking damages against Properties and Sam, both of whom were served with a copy of the petition and citation three days after the lawsuit was filed.

- 1. When must Properties and Sam file their answers to the lawsuit to ensure that the answers are timely filed? Explain fully.**

- 2. What remedy does Betsy have if either Properties and Sam do not timely file their answers? Explain fully.**

- 3. If Sam objects to being sued in Nueces County, what pleading must he file and when must he file it? What must the pleading allege? Explain fully.**

- 4. If Sam properly files the appropriate pleading challenging the lawsuit against him in Nueces County, how should the Court rule on the challenge? Explain fully.**

Following the filing of the lawsuit, Properties and its attorney knew that Sam was at all times acting within the course and scope of his employment prior to and at the time of the fire. However, Properties' attorney later signs and files a pleading in court denying that Sam was acting within the course and scope of his employment.

- 5. What remedies, and against whom, does Betsy have when she discovers what Properties and its attorney knew at the time Properties' attorney filed the pleading denying course and scope? Explain fully.**

Betsy's attorney wants to notice Properties' oral deposition to inquire about a variety of topics relevant to the issues in the lawsuit.

6. Other than the time and place for the deposition, what must the notice of deposition state? Explain fully.

7. Assuming Properties does not object to the notice of deposition, what must Properties do to comply with the notice? Explain fully.

8. If Properties wants to object to the time and place for the de position, what pleading must it file and when? Explain fully.

Betsy had vacated Apartments after the fire. Betsy subsequently retains an expert who now wants access to Apartments prior to completing his report.

9. What pleading must Betsy’s attorney file for her expert to have access to Apartments? What must the pleading state? Explain fully.

10. If Properties wants to respond to Betsy’s pleading seeking access to Apartments, when must Properties file its response? What must the response state? Explain fully.

After months of discovery, Properties decides that the manufacturer of the electrical outlet has some responsibility for the fire. Properties want to join the manufacturer as an additional party to the lawsuit.

11. What pleading should Properties’ attorney file to join the manufacturer of the outlet as an additional party? What must the pleading state? Explain fully.

The manufacturer of the outlet makes an appearance in the lawsuit. Betsy does not want the dispute between Properties and the manufacturer to be part of the lawsuit in which she has sued Properties and Sam.

12. What pleading should Betsy’s attorney file? How should the Court rule? Explain fully.

In the course of discovery, Betsy serves Requests for Admission on Sam, through his attorney, who forwards the Requests to Sam. The Requests state that responses are due within 31 days of service. Sam never responds to the Requests.

13. What is the effect of Sam’s failure to respond to the Requests for Admission? Explain fully.

14. What must Sam’s attorney do and show if he wants to avoid the effect of Sam’s failure to respond to the Requests for Admission? Explain fully.

In preparing for trial, Betsy tells her attorney that, shortly after the fire, Sam had told her that the fire was all his fault for not having replaced the outlet. During direct examination at trial, Betsy’s attorney asks her what Sam had told her after the fire. Sam’s attorney objects on hearsay grounds.

15. How should Betsy’s attorney respond? How should the court rule? Explain fully.

The state fire marshal conducted an investigation of the fire at Apartments and prepared a complete report that included factual findings and witness statements. Betsy’s attorney offers a properly authenticated copy of the report into evidence. Properties’ attorney does not want the report admitted into evidence.

16. What objection should Properties’ attorney make? How should Betsy’s attorney respond? How should the Court rule? Explain fully.

Prior to trial, Properties’ insurance carrier sent Betsy a letter offering to pay all of her medical and hospital expenses incurred in the treatment of her injuries from the fire. At trial, Betsy’s attorney wants to offer the letter into evidence.

17. What objection can Properties’ attorney make and how should the court rule? Explain fully.

Prior to trial, Betsy wrote Properties' insurance carrier offering to settle for an amount significantly less than what she is seeking in the lawsuit. Properties' attorney wants to offer Betsy's letter into evidence.

18. What objection can Betsy's attorney make and how should the court rule? Explain fully.

During the trial, Properties calls Hank, Apartments' handyman to testify about the condition of the outlet prior to the fire. Properties had not previously identified Hank as a witness. Betsy's attorney objects.

19. What must Properties' attorney show before Hank can testify? Explain fully.

At the end of the trial, the jury returns a verdict finding all liability and damages issues in favor of Betsy. The attorneys for Properties and Sam believe that the amount of the damages found by the jury is excessive.

20. If Properties and Sam want to challenge the amount of the damages found by the jury as excessive, what pleading should they file and what should the pleading state? Explain fully.

Civil Procedure and Evidence – July 2006

1. Most examinees knew that an answer is due the first Monday after the expiration of twenty days from the date of service. Some examinees thought the clock was triggered by the filing of the lawsuit rather than service of process.
2. Most examinees recognized the remedy of a default judgment for not timely answering a lawsuit. Some examinees confused this concept with a summary judgment or a directed verdict.
3. Most examinees recognized the requirements for a motion to transfer venue and when the pleading should be filed. Some examinees confused this pleading with a special appearance by a non-resident defendant.
4. Nearly all examinees understood that venue would be proper in Nueces County because that was where a substantial part of the action arose.
5. While most examinees understood that sanctions could be brought for filing a groundless pleading, some examinees did not seem to know the various types of sanctions. Other examinees did not know that sanctions could be entered against both the defendant and its attorney.
6. Many examinees did not seem to know the specific notice requirements for deposing an organization.
7. Many examinees knew that an organization needed to designate specific individuals to be deposed. However, many examinees did not know that they needed to also designate the topics assigned to those individuals.
8. Many examinees did not recognize motions to quash or motions for protective orders as the proper remedy for objecting to the time and place of a deposition. Few examinees explained the deadline for filing either of these motions.
9. Most examinees knew that a request or motion for entry upon property was the proper pleading for gaining access to the apartments, and could identify the requirements of that pleading.
10. Most examinees were able to describe the requirements for a response to a motion for entry. However, many examinees did not describe the deadline for filing this response.
11. Most examinees knew the pleading for joining a third party and the basis for adding that third party to a lawsuit.
12. Most examinees recognized a motion to sever or a motion for separate trials, and the reasons for such motions.
13. Nearly all examinees knew that an unanswered request for admissions is deemed admitted.

14. Most examinees were able to describe some of the requirements for undeeming an admission.
15. Most examinees recognized Sam's statement as an admission by a party-opponent. Some examinees confused this concept with various hearsay exceptions. Other examinees failed to answer how the court should rule.
16. Most examinees recognized hearsay as the proper objection to the admission of the fire marshal's report, and the public reports and records exception as the proper response. Other examinees mistakenly addressed the best evidence rule.
17. Most examinees knew that the offer to pay medical expenses was not admissible to prove liability for the injury. Many examinees did not state how the trial court should rule on the objection.
18. Most examinees explained that settlement offers are not admissible into evidence to prove liability.
19. Most examinees knew the requirements for offering the testimony of a witness who had not been timely disclosed.
20. Many examinees understood the concept of remittitur and that it could be filed as a separate motion or as part of a motion for new trial. Other examinees confused this concept with a JNOV.