

## **JULY 2015 CIVIL PROCEDURE AND EVIDENCE COMMENTS**

1. Almost all examinees knew the defendants had to file their written answers by 10 am on the first Monday following the expiration of 20 days from date of service.
2. Almost all examinees knew Mega Mart did not have a valid basis for removing the case to federal court based on diversity. Most examinees explained that because both Paul and George were citizens of Texas, complete diversity did not exist.
3. Almost all examinees knew George was required to file a motion to transfer venue before or concurrently with any responsive pleading (except a special exception) if he wanted to object to the case proceeding against him in Bailey County.
4. Almost all examinees knew the court should deny George's motion to transfer. Few examinees stated Paul should respond to George's motion with affidavits and other proof establishing venue in Bailey County. Most examinees explained venue was proper in Bailey County because all or a substantial part of the events giving rise to Paul's claim arose in Bailey County.
5. Almost all examinees knew the defendants should file a special exception pointing out that Paul's petition was vague. Most examinees stated failure to file the special exception resulted in waiver of any defect in the petition.
6. Almost all examinees listed the 5 categories of information that could be requested in a request for disclosure pursuant to Texas Rule of Civil Procedure 194.2.
7. Almost all examinees knew Paul should file a motion to compel Mega Mart to provide its insurance coverage information and request a hearing. Almost all examinees knew the court should grant the motion. Few examinees stated Texas Rule of Civil Procedure 192 does not permit objections to requests for disclosure.
8. Almost all examinees knew Paul should preserve privilege to requested documents by asserting the privilege. Few examinees explained Paul should serve Mega Mart with a withholding statement that (1) stated he was withholding information responsive to the request, (2) identified the request to which the information related, and (3) identified the privilege asserted.
9. Almost all examinees knew the court should overrule Mega Mart's objection to Paul's request for George's recorded statement. Most examinees explained a party may obtain discovery of any statement by a person with knowledge of relevant facts.
10. Almost all examinees knew Mega Mart should file a motion for a protective order or to quash the deposition of its president. Few examinees recognized this as an Apex deposition. Almost no examinee stated Mega Mart's motion should be accompanied by an affidavit from its president denying any personal knowledge of relevant facts.
11. Almost all examinees knew Mega Mart could depose Paul's expert. Most examinees knew Mega Mart could also serve Paul with a request for disclosure seeking the expert's mental impressions and opinions, and a summary of the basis for them, as well as any data compilations.
12. Almost all examinees knew George's untimely response to Paul's request for admissions resulted in deemed admissions. Most examinees knew George could change this result by filing a motion to withdraw admissions. Most examinees knew George had to show good cause and that the party relying on the admission would not be unduly prejudiced by the withdrawal.
13. Almost all examinees knew objections to deposition questions are limited to "objection leading" and "objection form." Almost all examinees knew the only permissible objection to answers is "objection non-responsive."

14. Most examinees knew Mega Mart should file a motion in limine to prevent disclosure of its changed policies/procedures and the court should grant the motion/exclude the evidence. Most examinees explained that evidence of subsequent remedial measures is inadmissible to prove negligence or culpable conduct.

15. Most examinees knew George should file a motion in limine to prevent disclosure of his DWI. Most examinees explained George had to establish such evidence was unfairly prejudicial to him. Few examinees explained George had to establish such evidence as irrelevant.

16. Almost all examinees knew Mega Mart should challenge the potential juror for cause based on bias or prejudice. Few examinees stated Mega Mart should ask additional voir dire questions to determine if the juror could, in fact, be fair.

17. Almost all examinees knew the court should overrule the objection to Paul calling George as his first witness. Most examinees stated a plaintiff need not testify first or lay a foundation before calling a witness, and may call his witnesses, including an adverse witness, in any order.

18. Almost all examinees knew the court should deny George's objection to the state trooper's testimony. Most examinees knew George's statement to the trooper at the scene of the accident was either an admission of a party opponent or an excited utterance, hearsay exceptions

19. Most examinees knew the court could allow the court reporter to read the notes from the disputed portion of George's testimony to the jury. Most examinees knew that if these notes were unavailable, the court could call George back to the witness stand to repeat the disputed testimony in the same language used at trial.

20. Almost all examinees knew the defendants could move for a JNOV. Few examinees knew the defendants could also seek a remittitur.