

FEBRUARY 2018 – CIVIL PROCEDURE & EVIDENCE COMMENTS

1. Almost all examinees knew Abner could file his lawsuit in Harris County (where the accident occurred), Fort Bend County (where Zoe resides), or McClennan County (where Discount maintains its principal place of business).
2. Almost all examinees knew the defendants should file a motion to transfer venue prior to or concurrently with their answers, and if they failed to do so, they waived their right to challenge venue.
3. Almost all examinees knew 5 forms of discovery listed in Texas Rule of Civil Procedure Rule 192.1.
4. Almost all examinees knew Discount could make a written objection to Abner's discovery request. Many examinees also knew Discount could file a motion for protective order. Most examinees knew Discount had to respond within 30 days of being served with the discovery request.
5. Most examinees knew Discount could obtain a copy of Abner's medical records via requests for disclosure or requests for production served on Abner. Few examinees also knew Discount could obtain the records via a written deposition with a subpoena duces tecum to the health care providers.
6. Almost all examinees knew Abner was not entitled to discovery information about Discount's purely consulting experts and there were no discovery tools he could use to obtain this information.
7. Almost all examinees knew Zoe was required to raise pretrial, in her answer or amended answer, the affirmative defense of contributory/comparative negligence. Many examinees knew the amended answer should be filed at least 7 days before trial.
8. Almost all examinees knew Zoe's deposition could be taken in Fort Bend County (county of residence). Many examinees also knew that because Zoe is a party to the lawsuit, the deposition could be taken in the county of suit, Harris County.
9. Almost all examinees knew Zoe's attorney could not instruct her not to answer the questions. Few examinees stated that an instruction not to answer was appropriate only when necessary to protect a witness from abusive or harassing questions, which was not indicated here.
10. Almost all examinees knew Abner could move for an order compelling Zoe to submit to a physical examination. Most examinees knew Abner's motion had to show both good cause and that Zoe's physical condition was in controversy. Few examinees knew the order must be requested no later than 30 days before the end of the discovery period.

11. Almost all examinees knew Abner had to request a jury trial and pay the jury fee. Many examinees knew Abner should make his request by filing a written demand with the clerk a reasonable time before the date set for trial, not less than 30 days before trial.

12. Almost all examinees knew Abner had to file a motion for continuance. Few examinees stated Abner had to (1) identify the missing witness and the substance of his testimony, (2) explain why his testimony is material and not available from another source, (3) show diligence was used in attempting to secure the testimony, and (4) state the continuance is sought for justice and not solely for delay.

13. Almost all examinees knew Abner had to file a motion in limine to prevent reference to his prior arrest. Many examinees stated that if the motion was granted, the defendants were prohibited from referencing the arrest during voir dire or opening statement and would require defendants' attorney to approach the bench prior to attempting to introduce the evidence during trial.

14. Many examinees knew the defendants' objection to the photo during Abner's opening statement should be overruled. Many stated the objection should be overruled on the ground that it was untimely because the objection should have been raised as soon as the photo was displayed.

15. Most examinees knew the defendants' objection to Mary's testimony should be overruled. Few examinees explained the objection should be overruled if Abner's attorney showed either good cause for not disclosing Mary's existence earlier or that the defendants would not be unfairly surprised or unfairly prejudiced by the late disclosure.

16. Almost all examinees knew the trial court should overrule Abner's objection to his own statement that he had been texting. Most examinees explained Abner's statement was either not hearsay because it was an admission by a party opponent, or it was a hearsay exception because Abner's statement was a statement against interest.

17. Almost all examinees knew Abner had to object to the expert's testimony. Few examinees stated the objection had to be raised before the expert testified. Many examinees knew Abner's attorney could take the expert on voir dire outside the jury's presence if the objection was overruled.

18. Few examinees knew that to preserve error on the omission of contributory negligence from the jury charge, the defendants had to tender, in writing, the omitted question/instruction in substantially correct form and obtain a ruling before the charge was read to the jury.

19. Almost all examinees knew the trial court should overrule Abner's objection to the verdict and motion for judgment notwithstanding the verdict. Few examinees explained the objection/motion should be denied because Abner waived any complaint about pleading defects and/or the issue was tried by consent.

20. Most examinees knew Abner was not entitled to poll the jurors. Many examinees knew his request should have been made after the verdict was read but before the jurors were dismissed.