

FEBRUARY 2018 – CRIMINAL PROCEDURE & EVIDENCE COMMENTS

1. Is testimony about Marty's unrecorded oral statement admissible in evidence in trial? Explain.
Oral statements must be recorded to be admissible.

Common wrong answer: Yes it is not hearsay and admissible as a statement by party opponent. Yes an officer can testify to what was instead since the recording is unavailable.

2. After the search warrant is issued how many days do the police have to execute it? Explain.
Three days excluding the date of issuance and the day of execution.

Common wrong answer: Reasonable time or would state an incorrect number.

3. How is a grand jury formed? Explain
By summons from a fair cross section of the community like a petit jury.

Common wrong answer: By appointment of a grand jury commissioner or like a petit jury. Applicant would include the old system as an option along with the correct answer.

4. Can prosecutor participate in grand jury's deliberations to resolve dispute? Explain.

No person can be in the grand jury room during deliberations. A prosecutor can only present charges or answer questions of law when the juror are not deliberating.

Common wrong answer: yes they may answer questions during deliberation.

5. Is evidence of the defendant meeting with his lawyer admissible? Explain.

No, the act of meeting with or retaining a lawyer is not any evidence of guilt.

Common wrong answer: Applicant would get this completely wrong or fail to answer second portion of the question.

6. Can the State take June's (elderly person) deposition in this criminal case? Explain.

Yes, the state can take a deposition of an elderly person.

Common wrong answer: Applicant most often failed to provide the correct answer to the second portion of the exam. Yes because they are a material to the case and are close to death or ill.

7. What procedural rules control the conduct of the deposition? Explain.

The rules of civil procedure control where they do not conflict with the CCP or constitutional rights.

Common wrong answer: May only object to form, leading and nonresponsive.

8. How many challenges does each of them have? Explain.

There is no limit for challenges for cause.

Common wrong answer: Applicant would give an exact number confusing it with preemptory challenges.

9. How many peremptory challenges to each of them have?

In a non-capital felony each is entitled to 10.

Common wrong answer: Applicant would say 6 or 8.

10. Can Mr. Smith, a grand juror who returned Marty's indictment, serve on Marty's petit jury? Explain.

No a grand juror that issued the indictment cannot serve on the jury.

Common wrong answer: Applicant would get the second portion of the question incorrect. Cannot serve because of the juror would be biased or was a potential witness in the case.

11. What are the first two steps that must be taken in a criminal trial prior to the presentation of evidence?

The indictment must read and a plea entered.

Common wrong answer: Opening statements by both sides and invocation of the Rule.

12. Is Marty's lawyer required to make an opening statement at the beginning of trial? Explain.

No, he can reserve his opening for the beginning of his case after the close of the state's case.

Common wrong answer: Applicant would say yes or fail to answer second portion of the questions as to why they were not required to give an opening statement.

13. What is the rule of sequestration? Explain.

Rule 615 excludes persons who are witnesses from attending trial or discussing their testimony with others except the lawyers.

Common wrong answer: Prohibits the jurors from reading the news or discussing the case with anyone outside of the proceedings.

14. Are victims subject to the rule of sequestration? Explain.

Yes, if they are witnesses and their testimony will be materially affected.

Common wrong answer: No the victim is entitled to remain in the courtroom. Applicant would fail to answer the second portion of the question and explain that they can be removed if their testimony would be materially affected by hearing other testimony.

15. Prosecutor plans to call Jackie to testify that she engaged in a social media conversation with Marty, thinking she was speaking with June. Marty's lawyer objects that this testimony is hearsay. How should the court rule? Explain.

The Court will overrule the objection because the social media conversation is an operative fact.

Common wrong answer: Applicant would correctly state overruled and then fail to give the proper explanation. The testimony was being used to show present sense impression or that it was permitted to prove motive, opportunity, plan, identity, absence of mistake, or lack of evidence (404b). Alternatively, the applicant would incorrectly sustain the objection because it went to show the truth of the matter asserted, that Marty was impersonating June.

16. Marty was previously convicted of felony possession of marijuana, but his conviction is on appeal. Prosecutor wants to introduce this prior conviction into evidence. Marty's lawyer objects that this is not proper under the Rules of Evidence. Explain.

Under TRE 609(e) convictions on appeal are not admissible. The Court should grant the objection.

Common wrong answer: Overrule because it is a felony conviction within the past 10 years or in the alternative sustain because it related to the charge and prejudicial against Marty.

17. The presentation of the evidence is completed and both sides have rested their cases. What procedural step should Marty's lawyer take to preserve a sufficiency of the evidence challenge for appeal? Explain.

Marty's lawyer should move for a directed verdict on the basis that the evidence is insufficient.

Common wrong answer: Offer of proof or a judgment notwithstanding the verdict.

18. In Texas, is the closing jury charge given by the Court before or after the lawyers give their closing arguments?

Before.

Common wrong answer: After

19. The Court charges the jury that it thinks the testimony of June was particularly important for the jury to decide the case. Marty's lawyer objects that this comment by the court was not proper. How should the Court rule? Explain.

Sustain, the instruction was a comment on the weight of the objection.

Common wrong answer: Applicant would either correctly state sustain and not answer the explanation portion of the question or state overruled because the court can guide the jury as to which law to apply and what evidence to pay attention

20. What must Marty's lawyer do, in addition to objecting to the Court's comment about June's testimony, to preserve error, if any, for appeal?

As for the jury to be instructed and move for a mistrial.

Common wrong answer: Applicant most often failed to give a complete answer and missed first part of stating grounds for the objection, they would instead simply answer move for a mistrial or obtain a ruling.