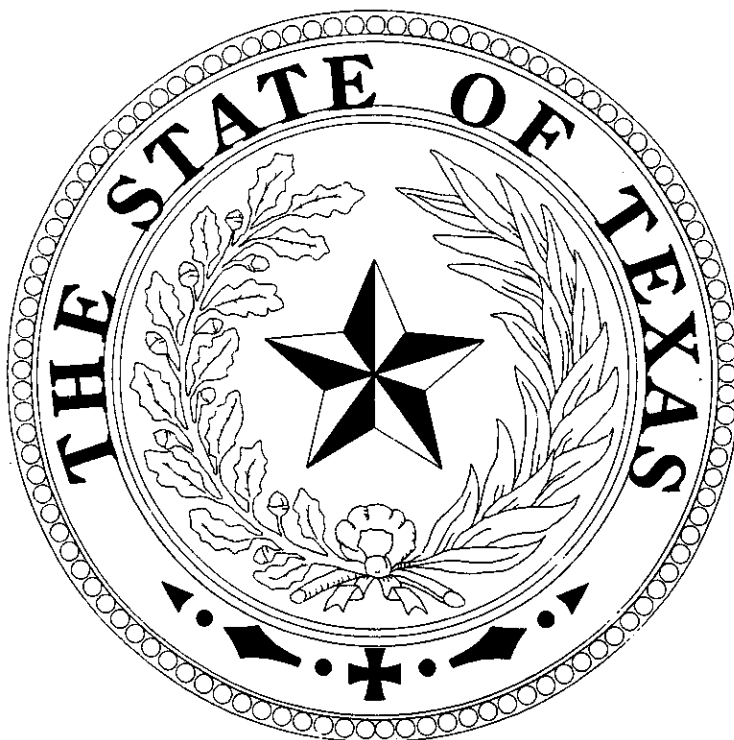


Examinee  
Number

Exam  
Date JULY 2010

# Civil Procedure & Evidence

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



## TEXAS BAR EXAMINATION

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

## **CIVIL PROCEDURE AND EVIDENCE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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