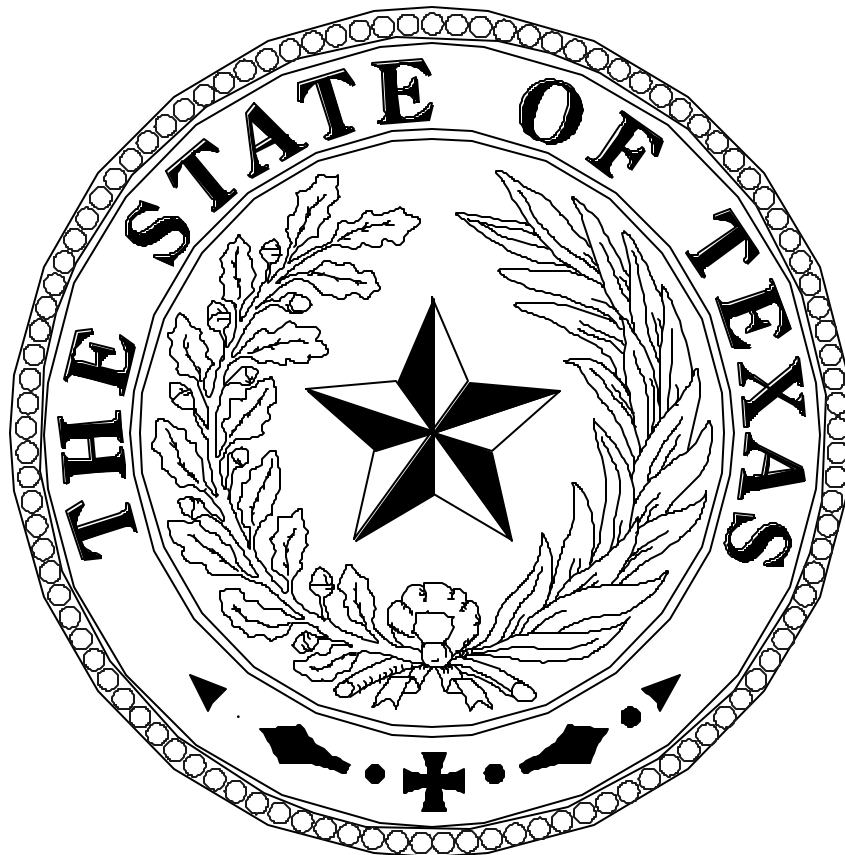


Examinee
Number

Exam
Date

2/2004

Procedure & Evidence Questions



TEXAS BAR EXAMINATION

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CIVIL PROCEDURE AND EVIDENCE

X Corp is a Texas corporation with headquarters in Travis County, Texas. X Corp has developed a thriving on-line 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.**

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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.

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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.

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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.

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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.

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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 deposition 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.

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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.

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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.

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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.

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CRIMINAL PROCEDURE & EVIDENCE

In October 2003, Victim called the Lubbock, Texas police to report a burglary of his apartment. Numerous items of personal property were taken, including a TV and Victim's checkbook. The police had no suspects at the time of the report.

Four weeks later, Snitch was arrested while attempting to cash a check taken in the burglary. During his post-arrest interrogation, Snitch agreed to reveal the name of a person who Snitch claimed helped him commit the burglary. In return, Snitch asked for immunity from prosecution for the burglary. The police, with the concurrence of the Lubbock County District Attorney, agreed to the deal. Snitch then named Defendant, whom you represent.

Based on Snitch's information, the police went to Defendant's house to interview him about the burglary. Defendant denied any knowledge of the felony offense.

- 1. Under the circumstances set out above, can the police arrest Defendant without a warrant? Explain fully.**

- 2. What rights and obligations does Defendant have in regard to an appearance before the grand jury?**

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3. What rights and obligations does Snitch have in regard to an appearance before the grand jury?

The grand jury indicts Defendant. The indictment charges as follows:

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS OF LUBBOCK COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Lubbock County, in the State of Texas, upon their oaths do present in and to the 364th District Court of said County, that John Defendant, in the County of Lubbock and State aforesaid, on or about the 1st day of October 2003, did then and there enter a building owned, occupied and used as a habitation by Sam Victim, without the effective consent of Sam Victim,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ David Foreman
David Foreman
Foreman, Grand Jury

4. Is this indictment sufficient to charge the offense of burglary of a habitation? Explain fully.

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5. Explain the purpose of an examining trial and whether, under the circumstances set out above, Defendant is entitled to an examining trial.

You file a pre-trial motion requesting that the State reveal the name of any informant from whom it has acquired information about this case. Although Prosecutor acknowledges that an informant has provided the State with information, she refuses to divulge his identity. You then file a motion to compel the State to reveal the identity of its informant.

6. Under the circumstances set out above, how should the Court rule? Explain fully.

You also file a request that the State provide you with notice of any extraneous “crimes, wrongs, or acts” which the State intends to introduce against Defendant at his trial.

7. What, if any, is the State’s obligation in response to this request? Explain fully.

Four weeks before trial, you issue notice of intent to take Victim's oral deposition.

- 8. What procedure must you follow before you will be allowed to take Victim's oral pre-trial deposition? Explain fully.**

The State files a motion of its own, requesting a list of all defense witnesses you intend to call in Defendant's behalf, along with a summary of their anticipated testimony. After you refuse to comply with the request, the State files a motion to compel you to provide such information.

- 9. How should the Court rule on the State's motion? Explain fully.**

Two weeks prior to the date set for pre-trial hearings, Defendant asks you to decide whether his case will be tried to a jury or the judge.

10. Please explain the procedure that is employed to express this choice and how this choice is resolved. Must the choice be the same as to both the guilt and punishment phases of the trial? Explain fully.

The decision is made to try the case to a jury. During the voir dire examination of the panel, prospective juror #19 reveals that he has recently been burglarized and if he finds Defendant guilty, he will not consider any punishment other than the maximum.

11. What must you show to establish a challenge for cause to this prospective juror?

Inasmuch as Victim is an African-American and Defendant is white, you exercise peremptory challenges to strike every African-American on the panel.

12. Can Prosecutor challenge your action? If so, what should the prosecutor do, how must you respond, and how should the Court rule? Explain fully.

After the jury is seated, Prosecutor makes her opening statement to the jury. After she has concluded her statement, the Court asks you if you wish to make an opening statement. You tell the judge that you will make your statement after the State has rested its case-in-chief. The judge instructs you that if you wish to make a statement you must do so now or you waive your right.

13. Is the Court's ruling correct? Explain fully.

The State calls Snitch as a witness in its case-in-chief. At the conclusion of his testimony, you request that the Court order Prosecutor to provide you a copy of any statement which Snitch has given. The State refuses to do so.

14. How should the Court rule? Explain fully.

You attempt to cross-examine Snitch on his immunity agreement with the State. Prosecutor objects that your line of questioning is irrelevant.

15. How should the Court rule on Prosecutor's objection? Explain fully.

After Prosecutor rests her case-in-chief, you realize that the State has failed to prove that the premises in question were entered without the effective consent of Victim, as alleged in the indictment.

16. What action should you take and when should you take it? Explain fully.

You subpoena Banker in order to introduce testimony regarding Victim's checking account. Although properly served with the subpoena, Banker refuses to comply, telling your investigator that "he is much too busy to testify on behalf of a criminal".

17. What action should you take in response to Banker's non-compliance with your subpoena? Explain fully.

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You call Friend to testify as an alibi witness on behalf of Defendant. On cross-examination, Prosecutor asks Friend what Defendant has told him about his role in the offense. You object to any such statements as hearsay.

18. How should the Court rule on your objection? Explain fully.

Defendant elects to take the stand during the guilt-innocence phase of his trial. During cross-examination, Prosecutor asks Defendant about his prior felony conviction which occurred nine years earlier. You object that the question is irrelevant inasmuch as the conviction is not alleged as an enhancement in Defendant's indictment. In addition, you object that the conviction is remote and therefore not admissible.

19. How should the Court rule? Explain fully.

The jury finds Defendant guilty and, following the sentencing phase of the trial, sentences him to 25 years in the penitentiary. Victim then asks to make a "victim's statement" in open court. The Court allows him to do so.

20. What procedures must the Court follow when allowing Victim to make such a statement? Explain fully.

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THIS CONCLUDES THE PROCEDURE AND EVIDENCE QUESTIONS.