

Examinee  
Number

Exam  
Date 7/2003

# Procedure & Evidence Questions



## TEXAS BAR EXAMINATION

**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**

Paul and Susan (Plaintiffs) have a lake home in Hill County, Texas, where they stay about once a month on weekends. They live and work in Tarrant County, Texas. They have made a claim under their homeowner's insurance policy on their lake home for water damage from pipes that they claim burst during an ice storm in February 2003 and flooded their house. The Insurance Company (Defendant) has denied their claim based on non-coverage. Plaintiffs sued Defendant in state District Court in McLennan County, Texas, where their attorney resides.

Defendant decides to file a motion to transfer venue from McLennan County.

- 1. What must Defendant plead to contest venue? What form of proof is considered by the court in determining the motion? What evidence, if any, must Defendant file with the motion? Explain fully.**

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- 2. If Defendant fails to file a responsive pleading by the required time after service of process, what elements must Plaintiffs prove to establish a right to default judgment?**

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**3. Identify four things that must be disclosed on request for disclosure without propounding interrogatories or requests for production. Within what time period must they be disclosed?**

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Plaintiffs have served their responses to Defendant's requests for disclosure. They discover a few months later that they did not disclose two witnesses, who are not favorable to Plaintiffs' case.

**4. What, if any, obligation do Plaintiffs have to produce this information? Within what time must they do so? Explain fully.**

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In its initial disclosure, Defendant accidentally produced to Plaintiffs a detailed memo from Defendant's lawyer, marked PRIVILEGED AND CONFIDENTIAL. In the memo, Defendant's lawyer evaluates the issues and potential exposure in the case. Defendant discovers the inadvertent disclosure 20 days following its production and immediately requests that Plaintiffs return the document. Plaintiffs' counsel declines Defendant's request to return the document.

**5. What remedy, if any, does Defendant have to compel the return of the document from Plaintiff? Explain fully.**

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Paul is being deposed.

**6. What objections, if any, may Paul's counsel make at the deposition?**

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Plaintiffs have kept the specimen sections of pipe that were removed when repairs were done. Defendant wants to inspect and test these specimens.

**7. What procedure, if any, is available to Defendant to obtain access to the specimen pipe sections for inspection and testing? Explain fully..**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

Plaintiffs and Defendant are ordered to mediation. At the mediation, Plaintiff Paul makes statements to the Mediator about having problems with prior leaks and repairs at the lake house before the ice storm. Defendant serves a subpoena on the mediator to compel her to testify in a deposition about Paul’s statement.

**8. Can Defendant compel Mediator to testify about Paul’s statement at the mediation? Explain fully.**

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Plaintiffs retain Manfred as an expert to assist in developing their case on damages. Plaintiffs do not intend to call him to testify and have not designated him as an expert, nor have they produced his detailed written report. After defense counsel overhears Manfred talking about his opinions at a café, Defendant files a motion to compel production of Manfred’s impressions and opinions.

**9. How should the Court rule on the motion? Explain fully.**

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Defendant designates an expert witness whose qualifications seem questionable to Plaintiffs. The expert claims he can tell what caused the pipe to fail by “just looking at it.”

**10. What procedure, if any, is available to Plaintiffs to obtain a determination of whether this individual is qualified to testify as an expert witness? Explain fully.**

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**11. What factors must the Court consider in determining the admissibility of expert opinion testimony? Explain fully.**

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Jury selection begins. Defendant wants to explore every possible basis for striking venire persons for cause.

**12. Aside from bias or prejudice for or against a party, identify two bases for challenging a prospective juror for cause. Explain fully.**

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Before trial, Plaintiffs offered to settle their case for \$25,000. Defendant declined the offer. At trial, Plaintiffs seek \$100,000 in damages. Defendant offers into evidence Plaintiffs' written settlement proposal.

**13. What objection, if any, should Plaintiffs' counsel make to Defendant's offer of evidence? Explain fully.**

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Neighbor owns the lake house across the street from Plaintiffs' lake house. At trial, Plaintiff Susan testifies that Neighbor told her that his pipes also froze as a result of the same ice storm.

**14. What objection, if any, should Defendant make, and how should the Court rule? Explain fully.**

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Defendant offers authenticated records of Paul's 1985 conviction for felony drug delivery and his 1996 conviction for misdemeanor DWI.

**15. What objections, if any, should Paul's counsel make, and how should the Court rule? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

At trial, Plaintiffs offer evidence concerning additional home repairs that had not been listed as part of their original claim and which had not been referred to in their pleadings or discovery answers. Defendant did not object to the evidence at the time of Plaintiffs' offer, but now objects to the submission of a jury question for these damages.

**16. How should Plaintiffs respond to overcome Defendant's objection? Explain fully.**

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On cross-examination, Defendant's counsel asks Plaintiff Susan to explain her religious beliefs, which he considers to be vastly different from and offensive to the local community, in order to cast doubt on her credibility.

**17. What valid objection, if any, should Plaintiffs make to this line of questioning? Explain fully.**

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Defendant produces a great number of documents in its response to Plaintiffs' request for production. Nineteen days before trial, Plaintiffs notified Defendant of their intent to offer some of these documents into evidence at trial. At trial, Plaintiffs offer these documents into evidence. Defendant objects that they have not been properly authenticated.



**18. How should the Court rule on Defendant's objection? Explain fully.**

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Plaintiffs have rested their case. Defendant believes that Plaintiffs have omitted proof of an element of their case.

**19. What motion should Defendant present, when should it be presented and on what grounds should it be based? Explain fully.**

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In closing argument, Plaintiffs ask for \$100,000 in damages, based on evidence offered. The jury awards \$1,000,000.

**20. What motion should Defendant file, if Defendant wants to ask the Court to set aside the jury's verdict on damages? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.  
TURN THE PAGE TO CONTINUE THE EXAM.**

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

## **CRIMINAL PROCEDURE & EVIDENCE**

After responding to a 911 call from Neighbor, police arrest Defendant at the scene for the aggravated assault of his wife, Victim. Defendant is known to the arresting officers, inasmuch as Defendant served a 2-year misdemeanor DWI probation imposed in 1997. Defendant commits no offense in the presence of the officers.

The Court has appointed you to represent Defendant in Texas District Court.

- 1. Under Texas law, is the warrantless arrest of Defendant proper? Explain fully.**

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At his post-arrest interrogation Defendant asks to speak with a lawyer. Detective ignores the request, continues the custodial interrogation and eventually obtains a written inculpatory statement from Defendant.

- 2. What motion should you file regarding this statement? What basis should such motion allege? At what stage of the proceedings should you file the motion? Explain fully.**

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Prior to the grand jury considering the felony allegation against Defendant, you file a motion requesting an examining trial.

3. **What is an examining trial and what is its purpose? Is Defendant entitled to an examining trial under the circumstances outlined above? Explain fully.**

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As you prepare your case, you become concerned that Defendant is mentally incompetent to stand trial.

4. **What is the legal presumption regarding Defendant's competency? Who has the burden of proof and what is the standard of proof regarding competency? Explain fully.**

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Prosecutor advises you that, in addition to his written statement, Defendant gave a custodial oral statement concerning this offense. Prosecutor also informs you that she intends to offer Defendant's oral statement at trial.

5. **Identify 3 predicates which must be satisfied in order for Defendant's oral statement to be admissible in a criminal proceeding. Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

As Prosecutor is preparing her case, she discovers that the State has two statements from Witness. In a written, signed Statement Number One, Witness says he saw Defendant assault Victim without provocation. In a subsequent, unsigned Statement Number Two, Witness recants Statement Number One and contends that Defendant struck Victim only after Victim had first attacked Defendant. Since the State does not intend to call Witness to testify, Prosecutor decides it is not necessary to reveal Statement Number Two to Defendant.

- 6. Is the State required to disclose Witness' name to Defendant? Is Prosecutor required to disclose Statement Number Two to Defendant? Would it matter whether Defendant had filed a pretrial motion requesting such evidence? Explain fully.**

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After reviewing all of the evidence, you decide that it is in Defendant's best interest to plead guilty to the aggravated assault charge. Defendant refuses, accuses you of "selling him out", and instructs you that he wishes to persist in his plea of not guilty.

- 7. Who decides what plea will be entered? If Defendant changes his mind and agrees to enter a guilty plea, list 3 admonishments that the Court must give Defendant before accepting his felony plea of guilty.**

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Plea negotiations are unsuccessful. Prior to trial, you learn that Prosecutor intends to introduce medical records describing Victim's injuries.

**8. Lacking extrinsic evidence of admissibility, what procedure must Prosecutor follow to properly introduce such records at trial? Explain fully.**

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When the jury panel of 42 veniremen is assembled, you note that several police officers and a former bar examiner are among the first 15 veniremen. You conclude that these individuals may not be favorable defense jurors.

**9. What action, if any, can you take to change the seating order of the veniremen? At what stage of the proceeding should you take this action? Explain fully.**

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During your voir dire examination of the jury panel, one of the prospective jurors reveals that she was a victim of spousal abuse and harbors a strong and unfavorable opinion about persons charged with that offense.

**10. What must you show to establish a proper challenge for cause to this prospective juror?**

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Of the 42 person jury panel summoned for trial, 8 are African-American. Prosecutor uses 8 of her peremptory strikes on these veniremen.

- 11. What procedure, if any, should you employ to contest this action by Prosecutor, and at what stage of the proceedings should you employ it? Explain fully.**

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Prosecutor announces before trial that she intends to call Victim as her first case-in-chief witness. Defendant objects, citing the husband-wife privilege.

- 12. Can Victim testify for the State over Defendant's objection? Can Victim refuse even to be called as a witness for the State? Explain fully.**

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After Victim testifies on direct examination in behalf of the State, you then move for the production of her written statement for use during your cross-examination. Prosecutor objects to your request for disclosure, citing the work-product privilege.

**13. How should the Court rule on your request? What sanctions may the Court impose if Prosecutor refuses to produce Witness' statement? Explain fully.**

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As the State's case-in-chief continues, the following exchange occurs:

PROSECUTOR: Your honor, the State of Texas calls Defendant. Only he can tell us what really happened.

DEFENSE: Objection, your honor. Prosecutor knows full well that she cannot call Defendant to testify.

COURT: Ms. Prosecutor, I realize that was probably an oversight on your part. But unfortunately, I must sustain Defendant's objection.

**14. Is the Court's ruling correct? Even if the Court's ruling is correct, what, if anything, must you do to further preserve any issue of prejudice on appeal? Explain fully.**

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Defendant calls as his first witness, Expert, who claims to have specialized knowledge about "battered wife syndrome". Expert intends to offer his opinion that Victim has exaggerated her complaints about Defendant's behavior toward her. Prosecutor asks to take Expert on voir dire examination prior to the jury hearing the testimony.

**15. Should the Court grant the State's request? Explain fully.**

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During the guilt/innocence stage of trial, Defendant voluntarily takes the stand to testify in his own behalf. On cross-examination by the State the following exchange occurs:

PROSECUTOR: Mr. Defendant, isn't it true that you were convicted of misdemeanor DWI in 1997 in Ector County, Texas?

DEFENSE: Objection your honor. This is an effort to impeach Defendant with evidence of an inadmissible conviction.

COURT: Sustained.

**16. Is the Court's ruling correct? Explain fully.**

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Continuing her cross-examination of Defendant, Prosecutor asks the following:

PROSECUTOR: Mr. Defendant, you have just told the jury that you are not guilty of this offense, is that correct?

DEFENDANT: Yes, and I'll say it again -- I didn't assault my wife. I love her!

PROSECUTOR: Can you then explain sir, why you offered to plead guilty in return for a 5-year probated sentence?



**17. What objection(s), if any, should you make and how should the Court rule? Explain fully.**

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Although Defendant has elected to have the jury assess punishment, during the guilt/innocence deliberations Defendant now decides that he wishes to have the judge assess punishment if he is found guilty. Prosecutor objects to the change.

**18. May Defendant change his election at this stage of the trial? Does Prosecutor’s objection affect Defendant’s right to change his election? Explain fully.**

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**19. How many jurors are necessary to find Defendant guilty? How many jurors are necessary to find the Defendant not guilty? How many jurors must agree on the assessment of punishment, if Defendant is found guilty? What are the consequences of fewer than the required number of jurors as to each of these 3 outcomes?**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

Following his trial, Defendant asks you to explain the law regarding “ineffective assistance of counsel.” Although your feelings are hurt by the question, you do so.

**20. Under Texas law, what is the standard for determining ineffective assistance of counsel?**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

**THIS CONCLUDES THE PROCEDURE AND EVIDENCE QUESTIONS.**