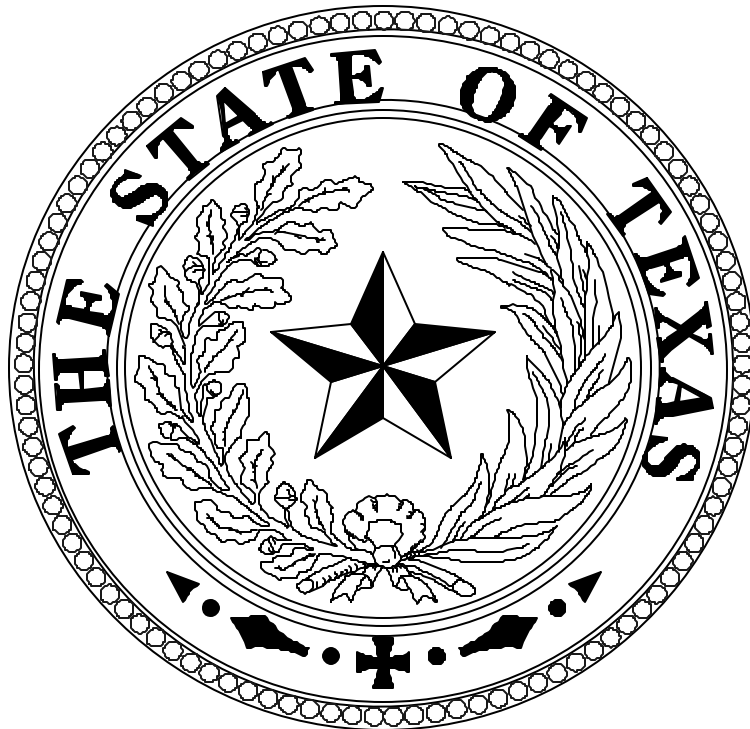


Examinee  
Number

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Date

# Procedure & Evidence Questions



## 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**

Pam, a resident of Bowie County, Texas, was injured in a three-car automobile collision while she was driving her car in Travis County, Texas. The other two drivers were Don, a resident of Oklahoma, and Jim, who is a resident of Potter County, Texas. Pam is considering whether to bring suit against both Don and Jim for damages in excess of \$100,000.

- 1. Pam has not yet filed suit. Bob, an independent witness to the accident, is very ill and may be close to death. Pam wants to obtain his deposition quickly while he is still able to testify and before she could typically commence formal discovery. Describe three requirements that Pam must satisfy to obtain a court order allowing her to take Bob's deposition before filing suit. Explain fully.**

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- 2. What must Pam plead and prove for a Texas court to maintain jurisdiction over Don, under the Long Arm Statute? Explain fully.**

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

**3. Pam is considering bringing suit in federal district court in Texas. Does Pam have sufficient basis for maintaining diversity of citizenship jurisdiction over Don and Jim in federal court? Explain fully.**

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**4. Under the general venue rule, in what county or counties can Pam bring her suit in Texas state district court against Don and Jim? Explain fully.**

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**5. Pam files suit and obtains service on Don. Don does not file an answer. What must Pam establish in order to obtain a default judgment against Don for liability and damages? Explain fully.**

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

6. Assume that before Pam obtains a default judgment against Don, he decides to contest the lawsuit. He has been served with citation through the Texas Secretary of State. In order to preserve his objection to jurisdiction in a Texas court: (a) what motion must Don file; (b) in what form must it be presented; and (c) when should he file it?

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7. Don sends written discovery requests to Pam with his objections to jurisdiction. Pam contends that, by participating in discovery under the Texas Rules of Civil Procedure, Don has subjected himself to the jurisdiction of the Texas court and has waived his objection to jurisdiction. Assuming that this argument is properly raised by Pam, how should the court rule? Explain fully.

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

**8. Pam files suit in Travis County, Texas. Jim answers the suit by filing a general denial. Don files a motion objecting to venue, subject to his objection to jurisdiction. Pam responds that Don is already bound to venue in Travis County because Jim did not object to venue in Travis County and waived his potential venue objection, and thus established venue for all defendants. How should the court rule on Pam’s argument that Jim’s waiver precludes Don’s venue objections? Explain fully.**

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**9. Assume that Don files a motion to transfer venue and specially denies the venue facts pled by Pam. Further assume that Pam does not raise the waiver argument. What, if anything, must Pam file and when will it be due? Explain fully.**

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

**10. Pam designates the level of discovery as Level 2. How many hours of deposition are permitted for each Defendant, in which to examine and cross-examine Pam and her designated experts? Explain fully.**

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**11. Identify four types of information that must be produced by a party if requested by another party under a Rule 194.1 Request for Disclosure. Explain fully.**

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

**12. Pam objects to some of Defendants' Rule 194 Requests for Disclosure, based upon her assertion of the work product privilege. How should the court rule? Explain fully.**

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**13. Jim retained an expert witness to assist with the defense of the case, but does not intend to call this expert witness to testify at trial. Must Jim identify the expert in response to a Request for Disclosure or produce an expert report from her? Explain fully.**

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**14. Don has identified an expert witness, but has not produced a report from him or a summary of his opinions. Don has given notice of intention to take the depositions of Pam's experts, whom she has identified and from whom she has produced reports. What basis, if any, does Pam have for objection to these proposed depositions? Explain fully.**

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

**15. Pam has filed affidavits from the records custodians of her treating doctors and hospital, to prove her medical expenses. Jim’s attorney wants to dispute the amount of these expenses at trial by offering rebuttal evidence about what the reasonable and necessary medical expenses should have been. What, if anything, must Jim’s attorney do before trial to preserve that opportunity? Explain fully.**

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**16. Pam’s case has been called to trial. Pam notices that, after the peremptory strikes have been exercised, all but one of the female venire persons have been stricken. What, if any, remedy does Pam have and how should she assert it? Explain fully.**

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



**17. The court granted a motion in limine to preclude Pam’s attorney from referring to the existence of liability insurance. The motion was granted. In opening statement, Pam’s attorney refers to liability insurance in violation of the court’s limine order. What should defense counsel do to preserve error? Explain fully.**

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**18. Defendants want to exclude all the witnesses from the courtroom during the testimony at trial, except for the parties and whoever is testifying. What procedure, if any, is available to accomplish this request and would it apply to Pam’s husband who is also a witness? Explain fully.**

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**19. Forty (40) days before trial, Pam’s doctors diagnose a new injury. Twenty- five (25) days before trial, Pam supplements her discovery answers to disclose her newly diagnosed injury. However, she does not supplement her previously disclosed medical expert reports. At trial she offers expert testimony about her new injury. Defendants object. How should the court rule? Explain fully.**

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**20. The jury finds in favor of Pam on liability and awards as actual damages an amount five times more than the evidence at trial established. What potentially applicable complaints regarding the damage award must Defendants assert in a motion for new trial, in order to preserve the error for appeal?**

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

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## **CRIMINAL PROCEDURE & EVIDENCE**

In December 2001, the San Antonio Police Department (located in San Antonio, Bexar County, Texas) received an anonymous telephone call that Defendant was selling cocaine out of his home. Based on that information, police officers prepared an affidavit and obtained a search warrant to search Defendant's house. Two days later the warrant was executed. When Defendant refused to open the door to his home, the police broke down the door and arrested Defendant. No controlled substances were found. However, a sawed-off shotgun was discovered in Defendant's car, which was parked in his next door neighbor's driveway.

Defendant is now charged with possession of a prohibited weapon. You are appointed by the court to represent him.

- 1. Under Texas law, did the police officers have the authority to break down Defendant's door in order to gain admittance to his home? Explain fully.**

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Following his arrest, Defendant was placed in the Bexar County jail. Defendant, however, was not taken before a magistrate for one week, due to the Christmas holidays.

- 2. Under Texas law, when must Defendant be taken before a magistrate? What are the duties of the magistrate at such appearance?**

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Prior to the district attorney presenting Defendant's case to the Bexar County grand jury, you request an examining trial.

**3. What is the purpose of an examining trial under Texas law? Explain fully.**

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You obtain a copy of the search warrant as you prepare Defendant's case for trial.

**4. Identify two items which are required to be present in a Texas search warrant.**

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The first pre-trial motion that you file on behalf of Defendant is a motion to suppress the sawed-off shotgun seized during the search of his automobile.

**5. Based on the facts set out above, explain two of the grounds you should urge in support of your motion to suppress.**

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The court schedules a pre-trial hearing on Defendant's motion to suppress evidence. Following that hearing, the court grants your motion to suppress the shotgun. The State immediately announces that it will "appeal the order all to way to the Texas Court of Criminal Appeals."

**6. Is the State entitled to pursue an interlocutory appeal in this instance? What requirements, if any, must be met by the State to do so? Explain fully.**

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You file a pre-trial discovery motion requesting a list of all the State's witnesses. The district attorney files a reciprocal motion requesting a list of all defense witnesses.

**7. How should the court rule on the State's motion? Explain fully.**

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Defendant elects a trial by jury and instructs you to file an application for probation on his behalf.

**8. List two requirements of a proper application for felony probation.**

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Seven months after the grand jury indicts Defendant, the case is still not set for trial and no announcement has been made by the State.

**9. What procedure should you employ to respond to this development? What general time limitations apply to such procedure in a: (1) felony case; and (2) misdemeanor case? Explain fully.**

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As the jury voir dire commences, you notice that the court reporter is not present. Upon inquiry, you learn that the reporter is absent from the courthouse.

**10. What procedure should you have employed to ensure that the court reporter would take down the voir dire examination and what are the consequences for failing to do so? At what stage of the proceeding should you undertake this procedure? Explain fully.**

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During your voir dire of the jury panel, you conclude that several prospective jurors are legally unfit to serve on the jury. You challenge them for cause.

**11. List five challenges for cause which may be made by either the State or the defense.**

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

After the jury is impaneled, the State begins its case-in-chief, calling as its first witness the arresting officer. The following exchange occurs:

PROSECUTOR:           After Defendant's arrest, did you speak with any of his neighbors about any problems over at Defendant's house?

WITNESS: You bet I did. They told me that they had heard Defendant bragging about the sawed-off shotgun he had just bought. They said that one time they heard him say....

DEFENSE LAWYER: Objection, your honor.

COURT: State the basis for your objection, counselor.

**12. What is the evidentiary basis for your objection and how should the court rule? Explain fully.**

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**13. Would your answer to the preceding question be the same if a neighbor testified that he had heard Defendant making the statement? Explain fully.**

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



The State next calls the police officer who signed the search warrant affidavit. The following exchange occurs:

PROSECUTOR: Officer, when you executed the search warrant at Defendant's home, what were you looking for?

WITNESS: Well, we had received reliable information about some cocaine....

DEFENSE LAWYER: Objection, your honor. We have a matter of law to take up with the Court and ask that the jury be retired.

COURT: Alright counselor. But I'm getting tired of your interruptions. Let the jury be retired.

**14. What objection(s) should you make in order to keep this testimony out of evidence? Explain fully.**

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The State's third witness is Priest. The following exchange occurs:

PROSECUTOR: Do you know Defendant?

WITNESS: Yes I do. He is a member of our parish. He regularly attends confession on Saturday afternoon.

PROSECUTOR: On any of those occasions has he ever discussed with you the circumstances that led to his arrest?

DEFENSE LAWYER: Objection, judge.

COURT: What do you mean "objection" counselor? State the basis for your objection or sit down.

**15. What is the proper objection, if any? How should the court rule? Explain fully.**

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After the State rests its case, you elect to present witnesses on Defendant's behalf. As your first witness, you call Defendant's three year-old son who lives with Defendant. However, before you can begin your questioning, the following occurs:

PROSECUTOR: Your honor, we object to any testimony from Child until his competency as a witness is first established.

COURT: Sustained.

**16. Is the court's ruling correct? If so, what procedure should next occur? Explain fully.**

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After three days of trial, Defendant does not like the way things appear to be going. Defendant, who is on bond, fails to appear on the fourth day.

**17. What is the general rule regarding the presence of the accused in a: (1) felony case; and (2) misdemeanor case? Can the trial proceed in Defendant's absence?**

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The jury finds Defendant guilty. Prior to trial, Defendant elected to have the jury assess punishment. At the punishment phase, the following occurs:

PROSECUTOR: Mr. Witness, do you know the reputation of Defendant in the community in which he resides for being a peaceful and law-abiding person?

WITNESS: I sure do.

PROSECUTOR: And is that reputation good or bad?

WITNESS: It's bad. In fact, bad doesn't begin to describe it.

DEFENSE LAWYER: Objection, your honor. Hearsay.

**18. How should the court rule? Explain fully.**

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

After both sides rest, the court informs counsel for the State and defense that they will each have 30 minutes for their final arguments. The following occurs:

DEFENSE LAWYER: Your honor, since the State was allowed to make the concluding address to the jury at the guilt stage, I believe it only fair that I get to conclude at this stage. Besides, I have the burden of proof as to punishment, so I should have the final word.

PROSECUTOR: We disagree.

COURT: Well, it seems fair to me. I will grant the request.

**19. Is the court's ruling correct? Explain fully.**

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After the verdict, you decide to have your investigator interview the jurors regarding possible juror misconduct as a ground for your motion for new trial. However, the district clerk refuses to give you the jurors' home addresses and home telephone numbers.

**20. Is there any procedure available to you to obtain the information? Explain fully.**

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