

Examinee

Exam

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

Peter Payne is 15 years old. On August 24, 2001, Peter visited the Big Box Warehouse in Amarillo, Potter County, Texas with his friends to browse and see the latest television and sound equipment.

Big Box Warehouse is a national chain of electronic appliance warehouse stores that offers a big inventory of the latest products. It stores the electronics in their original unopened boxes on racks and shelves ranging from 3 to 20 feet above the floor; the product boxes are placed by employees using forklifts and scissor-type lifts that can raise products vertically for storage off the floor. The top shelf has no rails and often the product boxes are stacked 4 to 5 deep on the top shelf without any rails to prevent their falling. Signs are posted directing customers to ask for help in obtaining any boxes shelved more than 6 feet from floor level.

Peter is injured when a boxed television falls from a stack of 4 on the top shelf, 20 feet from the floor, and hits him. Peter is dazed but laughs it off and leaves the store with his friends. He does not report to the store the incident or any injury until 3 days later. Peter's friends were the only witnesses to the incident. After his continued complaints of pain, his grandmother takes him to the doctor, who diagnoses muscle strain and bruises, and some possible nerve damage to his neck and back, the symptoms of which have mostly gone away with several weeks of treatment.

- 1. The accident took place while Peter was visiting his grandparents for the summer in Amarillo (Potter County), where he had lived with his parents until he was 12. His family had moved to McAllen, Texas, and at the time of the accident, his residence was with his parents in McAllen (Hidalgo County). Peter's lawyer has his law office in McAllen and prefers to bring suit in a Texas state court in Hidalgo County. There are no Big Box Warehouse stores in Hidalgo County. Big Box Warehouse is incorporated in Idaho and owns stores in several larger Texas cities. Would venue be sustained in Hidalgo County over Big Box's timely motion to transfer? Explain fully.**

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2. **Peter’s lawyer files suit against Big Box in the District Court of Hidalgo County, naming Peter as the sole plaintiff, and serves Big Box through its registered agent for service of process. What is the rule for calculating Big Box’s answer date?**

3. **Counsel for Big Box wants to remove to U.S. District Court based on diversity of citizenship jurisdiction. Big Box is incorporated in Idaho, has numerous stores in Texas, and has its executive offices in Abilene, Taylor County, Texas. Ignoring the amount in controversy, does Big Box have a meritorious basis upon which to remove to federal court based on diversity jurisdiction? Explain fully.**

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4. Counsel for Big Box observes that Peter’s petition clearly alleges that Peter is 15 years old and is concerned that Peter, a minor, does not have capacity to sue. What type of pleading should Big Box file to properly raise the capacity issue, and what technical requirement must the pleading satisfy? Explain fully.

5. Peter’s suit is pending in Hidalgo County District Court. Big Box Warehouse does not have a store nor does it have any presence in Hidalgo County, and it wants to file a motion to transfer venue to Potter County. Big Box has filed its answer early, some 10 days before its answer was due, and now files its motion to transfer 7 days before its original answer was due. Does the motion to transfer timely raise the venue issue? Explain fully.

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6. Big Box has also considered moving to transfer venue to Bexar County, the county with a Big Box store nearest to Hidalgo County. What grounds, if any, does Big Box have for alleging in a motion to transfer that venue is mandatory or permissive in Bexar County? Explain fully.

7. Big Box has claims for overdue charge accounts from Peter’s parents, Mr. and Mrs. Payne. Assume that Mr. and Mrs. Payne have amended the petition to sue as next friend for their son Peter and that neither is suing for damages individually. Can Big Box satisfy the requirements for bringing either a mandatory or permissive counterclaim against Mr. and Mrs. Payne for the overdue charge accounts? Explain fully.

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8. Petersues for past and future medical expenses, disability, and loss of ability to earn future income and seeks not more than \$50,000 in damages. State the level of discovery, the number of deposition hours, and the number of interrogatories allowed per side.

9. Big Box’s attorney takes Peter’s deposition in pretrial discovery and is also having Peter’s testimony recorded by videotape. Peter has an attitude problem and is not making a very good impression. He is also not answering the questions well and is volunteering all sorts of things. His counsel wants to instruct Peter not to answer a pending question, which is particularly likely to reveal even more unfavorable but relevant information. What are the permissible grounds upon which a deponent’s attorney may instruct the deponent not to answer a question at his deposition, and are any of the grounds applicable here? Explain fully.

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10. Peter's treating doctor has been convicted for defrauding insurance carriers, but the conviction is on appeal. Peter intends to offer his treating doctor's testimony into evidence. Can Big Box get the doctor's conviction admitted into evidence over Peter's objection? Explain fully.

11. Peter's lawyer discovers several prior accidents that occurred at other Big Box stores over a year ago, although there is no history of such accidents at the Amarillo store. These incidents include slip or trip and fall accidents involving liquids on the floor or extension cords that were left stretched across aisles. Peter wants to offer evidence of the prior accidents to show a pattern of inattentiveness to customer safety, negligence and sloppy store safety policy.

A. On what specific grounds should Big Box object? Explain fully.

B. Should the court allow the evidence of these prior incidents? Explain fully.

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12. Peter and his friends rode their skateboards to the store on the day of the incident. Big Box has taken the statement of one of those friends who revealed that the day after the incident Peter and his friends went to Skateboard City and did skateboarding tricks. Peter and his friends fell on occasion, sometimes painfully, but they took their falls in good humor. None complained of any injury at the skateboard park, although the friend recalled that he had to carry Peter's skateboard home for him because Peter was dizzy and complaining of a headache. Peter has served a written request under Texas Rules of Civil Procedure Rule 194.2 for each category of the materials and information described in the rule. Must Big Box disclose either (a) the name of the witness or (b) this statement in response to the request? Explain fully.

13. Peter designates his two testifying expert witnesses and produces a report from only one of them. Big Box wants to depose them before designating any experts of its own. Peter objects to producing experts for deposition until Big Box designates its testifying experts and produces their reports. How should the court rule on Peter's objection to producing each of his expert witnesses for deposition? Explain fully.

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14. Six months before trial, Big Box served discovery requests for disclosure under the Texas Rules of Civil Procedure Rule 194. After that, and 75 days before the end of the discovery period, Peter is treated for the first time by a new doctor. Peter designates this new doctor as an expert witness 60 days before the end of discovery. Big Box objects to any trial testimony from the new doctor. How should the court rule? Explain fully.

15. Peter wants to prove his medical expenses by offering his medical bills into evidence by way of affidavit. What steps must Peter follow to get these bills admitted into evidence without the doctor's live or deposition testimony at trial? Explain fully.

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16. Big Box had planned to add rails to the top shelves in its stores to protect the inventory. This work was originally scheduled for 6 months after the accident, but was accelerated to and begun on the day after the accident was reported. Peter wants to offer into evidence (1) the plans to modify and (2) the post-accident addition of the rails. Is evidence of either the plans or the addition of the rails admissible over the objection of Big Box? Explain fully.

17. Ten days before trial, Peter’s doctor diagnoses possible damage to Peter’s foot. Five days before trial, Peter files an amended petition to include a damage claim for an injury to his foot. Big Box claims surprise and timely objects to the amended pleading. Should the court sustain the objection? Explain fully.

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18. Big Box produces voluminous documents in discovery. Peter provides 45 days prior notice of his intention to use some of these documents at trial. He offers them into evidence at trial without supporting affidavits or foundation testimony. Big Box objects that the documents are not properly authenticated. Should the objection be sustained? Explain fully.

19. Assume that at trial, Peter offers evidence of the injury to his foot without having filed an amended pleading claiming injury to his foot. Assume also that the evidence is admitted without objection. After the close of the evidence, Big Box objects to the charge to the jury, claiming that the jury should not be allowed to consider the injury to the foot because it is not supported by any pleading. What steps, if any, should Peter take to overcome the objection, and how should the court rule? Explain fully.

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20. **Big Box had offered before trial to settle the case with Peter for \$7,500. On cross-examination, Peter’s lawyer asks Big Box’s manager if it is true that Big Box had made this offer to settle the case. On what basis should Big Box object, and how should the court rule? Explain fully.**

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CRIMINAL PROCEDURE AND EVIDENCE

You are appointed to represent Defendant, who has been charged with murder. You are informed that the Harris County, Texas grand jury will meet the next day to consider an indictment against him.

- 1. Can Prosecutor compel Defendant to testify before the grand jury? What rights does Defendant have regarding an appearance? Explain fully.**

Following Prosecutor's presentation, the Harris County grand jury returns the following indictment:

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

THE GRAND JURORS OF HARRIS COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in the County of Harris in the State of Texas, upon their oaths do present in and to the 100th District Court of said County that George Defendant, in the County of Harris and State aforesaid, on or about the 10th day of January, 2002, did then and there cause the death of an individual, Sally Victim, by shooting her with a deadly weapon.

Terry Jones

TERRY JONES
Foreman, Grand Jury

2. Is this indictment defective? Why or why not? Explain fully.

On the day the indictment against Defendant is returned, the court orders that you file and present any pre-trial motions within the following three days.

3. Is this a proper order of the court? Explain fully.

During the course of its investigation into this offense, the Houston Police Department interviews an eye-witness who identifies Neighbor as the killer. The police, however, conclude that this identification was in error.

4. What is the State's obligation, if any, regarding this evidence and does the State's obligation depend on whether Defendant has formally requested the information? Explain fully.

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As you prepare your case for trial, you learn that Defendant has a lengthy history of chronic psychiatric problems. You become concerned about Defendant's competency to stand trial.

5. What facts must you establish in order to rebut the legal presumption that Defendant is competent? Explain fully.

6. List three ways in which incompetency differs from insanity under Texas law.

7. In preparation for trial, you file a written motion for discovery. Is Defendant entitled under the Texas Code of Criminal Procedure to the following: a) the names of the State's witnesses? b) statements of the State's witnesses? c) the autopsy report, including toxicological results? d) Defendant's confession? e) the Grand Jury transcription? Explain fully.

Defendant decides to plead guilty to the offense as charged.

8. List three admonishments that the court must give Defendant before accepting his felony plea of guilty.

In exchange for his plea of guilty, the State offers Defendant a deferred adjudication. Defendant asks you to explain the differences between deferred adjudication and probation.

9. What are two ways in which deferred adjudication differs from probation? Explain fully.

Defendant changes his mind and decides to try his case to a jury.

10. Who, as between judge and jury, sets punishment in a Texas criminal case, and does Texas procedure differ from federal procedure in the setting of punishment? Explain fully.

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When the jury panel of 42 venire members is assembled, you note that several police officers are among the first 15 venire persons. You conclude that these individuals may not be favorable defense jurors.

11. What action, if any, can you take to change the seating order of the venire persons, and at what stage of the proceeding should you take this action? Explain fully.

Of the 42 person jury panel summoned for trial, 8 are African-Americans. Prosecutor uses 8 of his peremptory strikes on these venire members.

12. What procedure, if any, should you employ to contest this action by Prosecutor, at what stage of the proceedings should you employ it, and what is the consequence if your contest succeeds? Explain fully.

After the jury is seated, Prosecutor informs the court that it will seek to introduce Defendant's post-arrest statement into evidence. You have previously filed a motion to suppress this confession. Defendant informs you that he wishes to testify at the suppression hearing.

13. If Defendant testifies at this hearing, what issues may Prosecutor inquire into on cross-examination, and does Defendant waive his right to remain silent at the remainder of his trial? Explain fully.

During the State’s case-in-chief, the following exchange occurs between Prosecutor and a police officer witness:

PROSECUTOR: Did you speak with any of Victim’s neighbors about any problems that she was having with Defendant?

WITNESS: I sure did. They told me that they often heard screaming and noises that sounded like fighting coming from Victim’s house. A couple of weeks before the killing they said they heard Defendant holler...

DEFENSE LAWYER: Objection and move to strike everything after “I sure did,” your honor.

COURT: State the basis for your objection, counselor.

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

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After the State's first witness has testified on direct examination, the following exchange occurs:

COURT: Counsel, you may proceed.

DEFENSE LAWYER: Your honor, the defense now moves for the production of the witness' statement for use during cross-examination.

PROSECUTOR: We object. The request is untimely. Counsel should have asked for the statement at pre-trial. We refuse to produce the statement.

15. How should the court rule on Prosecutor's objection, and what sanctions, if any, may the court impose if Prosecutor refuses to produce the statement? Explain fully.

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

COURT: Mr. Prosecutor, call your next witness.

PROSECUTOR: Your honor, the State of Texas calls Defendant.

DEFENSE LAWYER: Objection.

COURT: What do you mean "objection," counselor? What is your basis?

16. What are the bases for your objection, and how should the court rule on the objection? Explain fully.

After presenting all of its witnesses, the State rests. You note that Prosecutor has failed to prove that the offense occurred in Harris County.

17. What procedural steps should you take, and at what stage of the proceedings should you take them? Explain fully.

You offer as your first witness Professor, who claims to be an expert concerning the unreliability of eyewitness identification testimony. The following exchange occurs:

PROSECUTOR: Your honor, we object to any testimony from this witness. The proffered testimony is neither relevant nor reliable under Texas Rule of Evidence 702.

COURT: Retire the jury.

18. List five factors the court should consider in determining the admissibility of this scientific evidence.

In a last-ditch effort to save himself, Defendant takes the stand in his own behalf. On cross-examination the following exchange occurs:

PROSECUTOR: Mr. Defendant, although you now deny that you are guilty of this offense, that's not what you told your lawyer's paralegal is it? Didn't you admit this whole sorry episode to her?

DEFENSE LAWYER: Objection, your honor.

19. On what grounds should you object to this question, and how should the court rule? Explain fully.

During his closing jury argument, Prosecutor makes the following statement:

PROSECUTOR: Ladies and gentlemen of the jury, the law-abiding citizens of Harris County are watching you. They demand a conviction in this case and they demand the harshest possible penalty.

20. Assuming Prosecutor's argument is improper, what must you do to preserve error in such circumstance? Explain fully.

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