

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, formerly a resident of Harris County, but now a resident of Dallas County, Texas, has brought suit against Dotcom, Inc., a Florida corporation with its principal place of business in Florida, and against John, a citizen of Oklahoma, in District Court in Dallas County, Texas.

In January 1999, Dotcom hired Paul to work for it as an employee selling advertising on its website. Dotcom gave Paul the state of Texas as his exclusive territory. All sales to Texas buyers would generate a commission for Paul.

In July 1999, Dotcom signed up John to do the same work and assigned him Oklahoma as his exclusive territory.

John began to infringe on Paul's sales territory in Texas. He would initiate calls to prospects in Sherman, Gainesville, and Wichita Falls, and then have the buyers meet him just inside the Oklahoma border, establish an Oklahoma post office address, and sign a contract so he could get commissions. The buyers went along with this because John told them he could give them better prices if they signed a contract in Oklahoma at "Oklahoma rates."

Paul has sued Dotcom, Inc., and John for infringing on his territory and for loss of commissions of \$65,000. He has sued John also for interference with contractual rights. Dotcom has counterclaimed against Paul for refund and offset for Paul's inflated expense reports.

- 1. In order to satisfy the prerequisites for serving the Defendants by serving the Texas Secretary of State under the Texas Long Arm Jurisdiction Statute, what must Paul affirmatively allege in his petition?**

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2. What steps must Paul take, under the Texas Long Arm Jurisdiction Statute, to prove the perfection and date of service of process on Defendants for purposes of establishing the date by which Defendants' answer must be filed?

3. Paul wants to obtain a default judgment if possible. Assuming the due date for the answer of a Defendant has passed, what is the earliest time and what conditions must be met before Paul may obtain a default judgment?

4. Dotcom, Inc., has been served. It wants to remove the case to federal court. Is the case properly removable? Explain fully.

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5. Assuming Dotcom, Inc. desires to remove the case to federal court, within what time period must Dotcom file its notice of removal?

6. Again assuming Dotcom, Inc. attempts to remove the case, and that Dotcom did not file an answer in state court before filing its removal petition in federal court, within what time period must Dotcom file its answer in federal court?

7. Assume each party wants to have the case tried by a jury. What, if anything, must be done by Paul and by Defendants, respectively, and by when must it be done, to preserve the right to jury trial in federal court?

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8. Assume the case is remanded from federal district court to the District Court of Dallas County. Defendants are exploring whether they have a basis for transferring venue. In general, and without regard to any mandatory or permissive venue exceptions, what are 2 of the 4 places where a lawsuit may properly be brought?

9. Dotcom, Inc. has a cause of action for materials and merchandise it has been supplying Paul on account, and Paul is overdue in paying the last six months' accounts. What must Dotcom plead in order to bring a counterclaim for sworn account?

10. Assume that Dotcom, Inc. files its counterclaim for sworn account and that it complies with all the pleading requirements. Paul disputes the quality and amounts of materials supplied by Dotcom, and the sums which Dotcom alleges he owes. What must Paul do in order to preserve his right to present his defenses to the counterclaim at trial?

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11. Assuming no discovery plan has been pled for Paul’s case in state district court, how many hours of deposition are allowed for each defendant?

12. Jury selection is in process. Aside from bias or prejudice for or against a party, what are 2 of the remaining 4 bases for striking a prospective juror for cause?

13. How many peremptory strikes does each Defendant have in selecting the jury?

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14. At trial Paul wishes to use the deposition testimony of John. Although he was given the opportunity to do so, John never signed, corrected, or returned his deposition, but now claims the record has many mistakes and John objects to Paul offering the deposition testimony. What must Paul show in order to be permitted to offer testimony from John's deposition into evidence, in light of John's claims of transcription error?

15. Paul had retained an expert witness, Guru, specifically for trial to help establish his economic damages. When Paul got Guru's report he did not like it and never identified Guru as an expert witness in discovery responses. Dotcom by coincidence had retained an expert witness who often socialized with Guru and through its expert learned that Paul had retained Guru and that Guru had rendered some opinions that were favorable to Dotcom. May Dotcom obtain Guru's report in discovery over objection from Paul? Explain fully.

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16. Paul designates another expert witness, Dr. Econ. Dr. Econ reviews Guru's report, which was accidentally included in the box of documents Paul's attorney asked him to review. Dr. Econ does not agree with Guru's opinions, and did not base his report on them. At Dr. Econ's deposition, Dr. Econ testifies truthfully that he has reviewed Guru's report, and Dotcom asks Paul to produce it. Is Dotcom entitled to discover Guru's report? Explain fully.

17. Dotcom has a key fact witness, George, (not an employee), who is currently working in Alaska. The witness is willing to give a deposition but not to travel to Texas because of the time and expense involved. Dotcom is not willing to pay him for his travel expense and time because the value of the case does not justify it. What option, if any, does Dotcom have for obtaining George's oral deposition testimony in admissible form for use at trial? What restrictions, if any, apply?

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18. The deposition of John is underway. Aside from privilege objections, what 3 objections may counsel make in good faith at the deposition without risk of sanctions?

19. In order to perfect an issue for appeal, a motion for new trial is required in 5 instances. Name any 2 of them.

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20. At trial, John's ex-wife, Mary attends with him. John and Mary had remained friends and business partners after the divorce in 1998, and she continued to work with him in the office. Paul knows that Mary did a lot of the paperwork for John in connection with his sales for Dotcom and may have even accompanied John on sales calls. She has been listed as a fact witness by John, but her deposition has not been taken. Paul invokes the rule of exclusion and sequestration of witnesses and moves to exclude Mary from being in the courtroom while any witness testifies. How should the court rule? State your reasons.

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CRIMINAL PROCEDURE AND EVIDENCE

You are hired to represent Defendant, who has been charged with Driving While Intoxicated - his Second (DWI-2) in Harris County, Texas. The State alleges that in 1995 Defendant was convicted of a DWI in Travis County, Texas, and received a two-year probated sentence.

Defendant's bail is set by the judge at \$25,000. Defendant cannot post a bond in that amount, and asks you to get the bond reduced.

1. List three of the factors the court must consider in fixing the amount of Defendant's bail.

The district attorney informs you that since DWI-2 is a misdemeanor, Defendant's case will be prosecuted by an "information."

2. What is an "information"? Name one way in which an information differs from an indictment.

You file a motion for discovery, seeking (1) a copy of the stationhouse videotape made of Defendant following his arrest, and (2) the names of the State's expert witnesses. The State refuses to provide these materials to you and tells you to "set the matter for hearing."

3. Is the State obligated to provide the two items requested? Explain fully.

On the post-arrest videotape of Defendant, a Houston police officer is heard asking Defendant whether he wishes to answer questions concerning the offense. Defendant answers, "No. I'm taking the Fifth. I want my lawyer and I want him right now." The State tells you that it intends to play this videotape to the jury.

4. Should the jury be entitled to see and/or hear this portion of the videotape? Why or why not? What action, if any, should you take in an effort to prevent this videotape from going to the jury?

5. At a pre-trial hearing, Defendant gives testimony regarding the matter raised in question number 4, above. By doing so, has he waived his right to remain silent at his trial? Explain fully.

After the court sets this case for trial, you discover that a defense witness is absent. You decide to request a continuance.

6. List two factors you must allege in a first motion for continuance. State whether or not such a motion must be sworn.

Defendant decides to go to trial, electing to try his case to a jury. During your voir dire examination of the panel, prospective juror #8 informs you that he has formed an opinion that Defendant is guilty.

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

8. How many challenges for cause is Defendant entitled to? How many peremptory challenges? Does the number of peremptory challenges differ depending on whether the trial takes place in county or district court?

You subpoena Banker, who witnessed Defendant's arrest. Although properly served with the subpoena, Banker refuses to comply, telling your investigator, "I refuse to be a witness. Time is money and I don't intend to waste either."

9. What action, if any, is available to you to compel Banker’s attendance? Explain fully.

After the jury is seated, the prosecutor delivers her opening statement. In that statement, she tells the jury as follows:

PROSECUTOR: I also expect the evidence to show that Defendant knows full well that he is guilty of this offense. He knows that because he wanted to plead guilty in exchange for our plea bargain...

DEFENSE LAWYER: Objection!

COURT: What is your objection counsel? I’m not a mind-reader.

10. What is the proper objection to Prosecutor’s statement? How should the court rule? Explain fully.

The State calls Friend, a co-worker of Defendant. Friend testifies that Defendant sent her a letter (Letter #1) which contains potentially damaging admissions regarding the DWI. However, Defendant also sent Friend a second letter (Letter #2), which recants letter #1. The State offers only letter #1 into evidence.

11. Should you wish to do so, when and under what authority can you offer letter #2 before the jury? Explain fully.

The State's next witness is Officer, who arrested Defendant. You know that Officer is going to testify that, at the time of Defendant's arrest, a search of his car revealed an unlicensed handgun. You do not want the jury to hear testimony of this extraneous offense.

12. In sequential order, list the steps you should take to keep Officer's testimony out of evidence.

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

During a recess, the State informs you its next witness is Defendant's wife. Prosecutor says it is her intention to inquire whether Defendant admitted to Wife that he had been drinking prior to his arrest. Wife does not want to testify against her husband.

14. If called as a witness, can Wife be compelled, over her objection, to testify for the State? Can Wife refuse even to be called as a witness for the State? Explain fully.

Wife changes her mind and decides that she wants to testify about Defendant's conversation with her. Defendant however, objects to Wife's testimony.

15. Can Defendant claim a privilege and prevent Wife from testifying about the communication?

After the State rests, the following exchange occurs:

DEFENSE LAWYER: Your honor, the State has rested, and prior to calling my first witness, I now wish to make a brief opening statement to the jury.

COURT: Your request is denied as untimely, counsel. Now let's proceed.

16. Is the court's ruling correct? Explain fully.

Defendant calls as his first witness Expert, who has specialized knowledge about the rate of alcohol absorption into the human bloodstream. Expert intends to offer his opinion that Defendant was not intoxicated at the time of his arrest. The following exchange occurs:

PROSECUTOR: Your honor, we move to conduct a voir dire examination before the jury hears from this witness.

DEFENSE LAWYER: Your honor, I ...

COURT: Sit down counsel. The State's request is granted.

17. Is the court's ruling correct? Explain fully.

Defendant makes the decision to testify at the guilt/innocence stage of the trial. On cross-examination, the following exchange occurs:

PROSECUTOR: Mr. Defendant, isn't it true that you were convicted in 1995 in Travis County of misdemeanor DWI?

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

COURT: Sustained.

18. Is the court's ruling correct? Explain fully.

As Defendant's last witness, you call the presiding judge to give testimony that Defendant has always come to court on time and has never smelled of alcohol.

19. Can Defendant call the judge as a witness? Explain fully.

Following the reading of the court's charge and the argument of counsel, the jury begins its deliberations. Following two days of deliberations, the jury announces itself hopelessly deadlocked. You move for a mistrial, but the State opposes.

20. In order for the court to grant a mistrial, must the State join in your motion? Explain fully.

THIS CONCLUDES THE PROCEDURE AND EVIDENCE QUESTIONS.