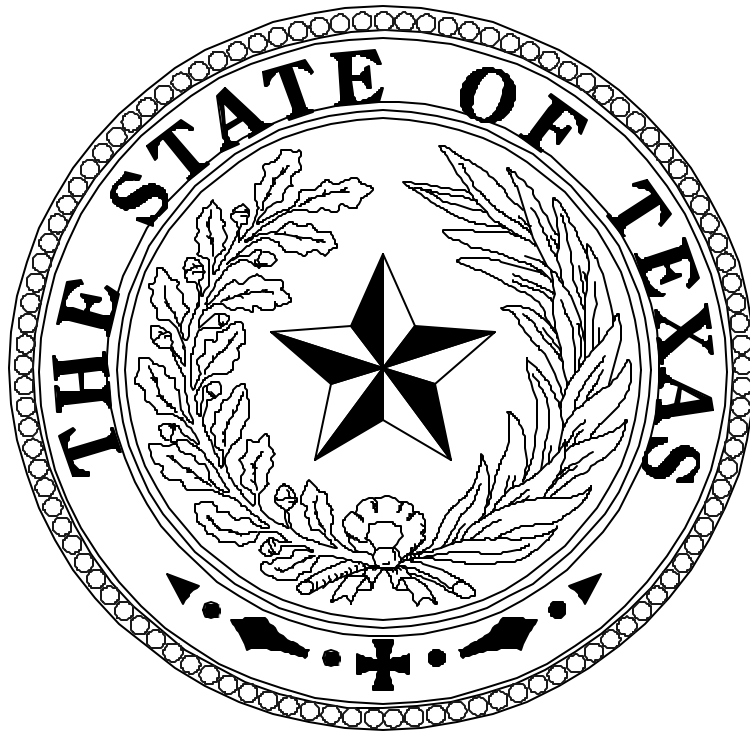


Examinee
Number

Exam
Date

2/2001

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

Paul Palmer, a resident of Bell County, has filed a negligence, breach of warranty, and product liability suit in state district court in Hill County, Texas. Palmer alleges that a curling iron, which he had bought for his daughter from Dad's Department Store ("Dad's"), was defective, overheated, and caused a fire in his home. Palmer, who is uninsured, seeks to recover the cost of repairing the damage to his home and for injuries to his minor daughter, and he alleges damages in excess of \$50,000. Palmer sued two defendants: the retailer, Dad's, a sole proprietorship in Waco, Texas (McLennan County); and Kurlee, Inc., the manufacturer, a Vermont corporation with its headquarters in Vermont.

- 1. Name (a) four things that must be disclosed if a request is made by a party without sending interrogatories or requests for production, and state (b) how long after the request is served such disclosures must be made.**

Kurlee does in fact make curling irons but maintains that it sells them only to distributors in New England and that it shipped no curling irons to Texas or to any intermediaries that do business in Texas.

- 2. You are counsel for Palmer. Based on the facts provided, what must Palmer plead and prove in order to invoke Texas Long Arm Jurisdiction over Kurlee, Inc.?**

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

3. You are counsel for Kurlee, Inc. State (a) what pleading you should file to contest personal jurisdiction; (b) what you should say in that pleading; (c) whether the pleading must be verified; (d) whether Kurlee's participating in discovery waives Kurlee's contest of jurisdiction; (e) in what forms you may present evidence for consideration by the court in deciding jurisdiction.

Assume you are Kurlee, Inc.'s counsel. Kurlee, Inc. wants (1) to object to generality of the pleadings, (2) to deny all Palmer's allegations, (3) to challenge Palmer's choice of the county in which he filed the case, and (4) to object to jurisdiction over Kurlee, Inc.

4. State (a) in the order in which they should be filed, the name of each pleading to accomplish all these strategies and (b) why the order of pleading is significant.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

You are counsel for Dad's and are in the process of drafting an answer. Dad's has just noticed that the suit was filed in Hill County, instead of McLennan County. Dad's does not do business in Hill County. Dad's would like to have the case moved to McLennan County, where it is well known.

5. State (a) what motion must be filed to move the case to a different county; (b) what must be said in the motion; (c) at what stage of the proceedings must the motion be filed; (d) in what form you must present evidence for consideration by the Court in determining the motion; (e) which party will have the burden of proof.

Assume that Dad's did not seek to move the case to another county before filing an answer. Now you are Kurlee, Inc.'s counsel. Kurlee, Inc. also wants to try to have the case moved to another county.

6. Assuming Kurlee, Inc. is subject to Texas jurisdiction, state whether or not it is too late for Kurlee, Inc. to request that the case be moved to another county and why.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

7. Assume that Kurlee, Inc. is subject to jurisdiction and is the only defendant in the case. Kurlee, Inc. wishes to move the case to another county. State which county Kurlee, Inc. has the best chance for moving the case to, and why.

8. Without regard to the facts in the *Palmer v. Dad's and Kurlee, Inc.* case, list five affirmative defenses that must be verified.

Dad's has a long running business relationship with Palmer, who has done business for years at Dad's, buying his supplies for his business on credit there. Palmer has not paid the last three months' bills for supplies, including the bill covering the curling iron in question. Dad's asks for your advice on whether to countersue Palmer.

9. State (a) the factors for determining whether the counterclaim is compulsory; and (b) under what circumstances, if any, Dad's counterclaim would be compulsory. Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

As counsel for Palmer, you have just completed serving disclosures and producing documents on the last day for timely responding. One week later, your supervising attorney who has reviewed the file, tells you that in the file copy of the materials that were produced are documents that were privileged.

10. What must Palmer’s counsel do to avoid a waiver of privilege claims as to the matters contained in the documents produced? Explain fully.

Kurlee, Inc. wants to take the curling iron back to its laboratory for microscopic examination and microscopic testing, some of which may be destructive. Palmer refuses because he does not trust Kurlee, Inc. with his key evidence of the curling iron.

11. What discovery avenues are available to Kurlee, Inc. to obtain the curling iron for testing, and what, if any, limitations do the Rules place on such testing by Kurlee, Inc.?

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

Palmer has waited patiently for one year while discovery is conducted. He wants to settle and move on with repairing his house and would like to resolve the case by mediation.

12. a. As Palmer’s counsel what strategy do you have available to force the defendants to attend a mediation?

Assume that a mediation is held but that neither Kurlee, Inc. nor Dad’s offer anything to settle with Palmer. Instead, they swagger and sneer that they would never pay anything to Palmer because they do not like him, regardless of whether he has a meritorious case.

b. What remedy, if any, does Palmer have with the Court to either seek sanctions against Defendants for their conduct or to require that they return to a second mediation and to negotiate in good faith by making realistic offers to Palmer?

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

At the original mediation, Palmer hears the Kurlee, Inc. party representative say to the mediator that Kurlee, Inc. had 10 reports in the last year of house fires related to the identical model of curling iron. This is very inconsistent with Kurlee, Inc.'s discovery responses.

- c. Palmer wants you as his attorney to subpoena the mediator to testify in court about what he heard Kurlee, Inc.'s representative say. What advice do you give Palmer on this and for what reasons?**

One year after filing the suit, Palmer has no expert witness on causation. Dad's has an expert witness who opines that the fire was caused solely by faulty wiring in the house and that it had nothing to do with the curling iron that was in the general area where the fire originated. Dad's would like for you to explore ways to conclude the case without a trial.

- 13. Given this factual background, name two variations of a motion Dad's can file to seek a pretrial adjudication of the case. Explain the difference between the two variations.**

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

Palmer hires Radar Rogers, a local small electronics repairman, to testify as his expert. He has no college or technical school education, has never published any papers and has never investigated a fire, but has 25 years of experience in diagnosing and repairing small electric appliances. His training is on the job. He has concluded that the thermostat cut off switch had defects in design and manufacture, that it failed, and that it caused the fire.

14. Dad’s questions whether Radar is qualified as an expert. State five factors that the court should take into consideration in deciding whether Radar’s qualifications meet the criteria required to admit expert opinion testimony into evidence.

Dad’s representative has heard talk for years at the local barber shop that Palmer both used drugs and occasionally sold them and may even have had a conviction or two, 10 to 12 years ago. Dad’s asks you to find a way to offer this into evidence, either through Dad’s representative or by calling the barber to testify.

15. Name two valid objections that Palmer could raise.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

Palmer wants to prove his daughter's medical records for medical treatment by offering copies of all of his doctor's records.

16. a. What foundation must Palmer establish to get these records admitted as an exception to the hearsay rule?

b. By what means may Palmer authenticate the copies?

Palmer wants to offer federal agency regulations for small appliances with heating elements. He does not want to incur the expense of deposing or bringing an agency official to court to testify.

17. Identify two ways in which Palmer may authenticate the regulations so they will be admissible.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

Assume that the only remaining cause of action is strict liability. Palmer wants to offer into evidence the change in design that Kurlee, Inc. made in the curling iron six months after Palmer's fire. Kurlee, Inc. objects that this is a post-accident effort to prevent other accidents, which public policy encourages, that admitting such evidence would discourage manufacturers from making changes, and that it is prejudicial.

18. What is the proper ruling on this objection? Explain your answer.

The jury returns a verdict for ten times Palmer's damages, and the court enters judgment on the verdict. Defendants want to appeal liability and damage findings.

19. What affirmative steps must Defendants take and in what courts and by when must they be taken to perfect these issues with the Court of Appeals?

20. Name two things Defendant's can do to suspend the enforcement of the judgment pending appeal.

TURN THE PAGE TO CONTINUE THE EXAM.

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CRIMINAL PROCEDURE AND EVIDENCE

You are appointed to represent Defendant, who is indigent. Defendant has been arrested for and charged with murder. The Dallas County grand jury will meet next week to consider an indictment against Defendant. You decide to attend the grand jury session in order to present evidence and argue in behalf of Defendant.

- 1. Are there circumstances under which you can appear and present evidence before a grand jury in behalf of Defendant? Explain your answer.**

Your best efforts notwithstanding, the grand jury returns a true bill. The indictment charges as follows:

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

THE GRAND JURORS OF DALLAS COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Dallas County, Texas, in the State of Texas, upon their oaths do present in and to the 283rd District Court of said County that John Defendant, in the County of Dallas and State aforesaid, on or about the 10th day of December, 2000, did then and there cause the death of an individual, William Victim, by shooting him with a deadly weapon, to-wit: a firearm

AGAINST THE PEACE AND DIGNITY OF THE STATE.

DAVID JONES

You conclude that this indictment is fundamentally defective, but decide to forego your pre-trial objection and urge the issue on appeal.

- 2. Why is this indictment defective? What procedure is available to Defendant to challenge the indictment? At what stage of the proceedings must Defendant assert such a challenge? Explain your answer.**

Defendant files a pre-trial discovery motion requesting all exculpatory evidence in possession of the State. In its file, the State has two statements from Witness, who claims to have been present at the murder. Statement Number One, which is written and signed by Witness, states that Witness saw Defendant shoot Victim without provocation. Statement Number Two, given one month later but unsigned by Witness, recants Statement Number One and states that Defendant shot Victim only after Victim had first attacked Defendant with a knife. However, since Statement Number Two is unsigned by Witness, the State decides it is not necessary to reveal its existence to Defendant.

- 3. Is the State required to disclose Statement Number Two to Defendant? Why or why not? Would it matter whether Defendant had made a request for exculpatory evidence? Explain your answer.**

During a pre-trial conference, the Prosecutor tells you the State believes that Defendant has no criminal record. However, Defendant has revealed to you that he has been convicted of a felony under a different name. You decide not to disclose this fact to either the State or the Court, reasoning that it is protected by the attorney-client privilege. Shortly thereafter, Defendant informs you that he wishes to file a sworn application for probation.

4. Under the circumstances outlined above, should you file a probation application for Defendant? Why or why not? If an application for probation is not filed, must you disclose Defendant's criminal history to the State? Explain your answer.

5. If Defendant elects to file an application for probation, at what stage of the proceedings must it be filed? At what stage of the proceedings must an election for judge/jury punishment be filed?

At a pre-trial hearing, the State requests that you provide a list of all defense witnesses, including experts, whom you intend to call at trial. You respond that such information is protected by the attorney-client privilege and refuse to comply.

6. How should the Court rule on the State's request? Explain your answer.

After reviewing all of the evidence, you decide that it is in Defendant's best interest to plead guilty to the murder charge pursuant to a plea bargain. Defendant disagrees and tells 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 three admonishments that the Court must give before accepting a felony plea of guilty.

Prior to trial, Prosecutor informs you that she will seek to introduce evidence of Defendant's alleged extraneous acts of misconduct. You are concerned that Prosecutor will refer to these acts during her voir dire examination of the prospective jurors.

8. What procedure, if any, should you employ to prevent this action by Prosecutor? What should you do to preserve the issue on appeal in the event Prosecutor refers to those acts during voir dire? Explain your answer.

Of the 42 person jury panel summoned, 8 are African-Americans. Since Defendant is white and Victim was African-American, you exercise your peremptory challenges to strike all 8 of these venire persons.

9. Can Prosecutor challenge your action? If so, what procedure will be employed in determining whether or not Prosecutor's challenge will prevail? Explain your answer.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

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

PROSECUTOR: Tell the jury how you are employed.

WITNESS: I am the records custodian for Parkland Hospital.

PROSECUTOR: Did you bring records with you today which relate to the medical treatment of Victim?

WITNESS: Yes, I did. They are marked as State's Exhibit One.

PROSECUTOR: Your honor, we offer State's Exhibit One.

DEFENSE COUNSEL: Objection, your honor. Improper predicate.

COURT: Sustained.

10. Is the Court's ruling correct? If so, what predicate must the State lay in order to properly admit State's Exhibit One? Explain your answer.

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 COUNSEL: 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 the objection.

DEFENSE COUNSEL: Thank you, Judge.

11. Is the Court's ruling correct? Even if the Court's ruling was correct, what, if anything, must you do further to preserve any issue of prejudice on appeal? Explain your answer.

Assume that the State has rested its case-in-chief. At that point, you do not believe the State has shown Defendant's guilt beyond a reasonable doubt.

12. What procedural steps, if any, should you take before beginning your presentation of Defendant's case, and should you do so within the hearing of the jury? Explain your answer.

You call Defendant as your last witness. During the State's cross-examination of your client, the following exchange occurs:

PROSECUTOR: You claim that Victim came at you with a knife; is that your story?

DEFENDANT: Yes, ma'am.

PROSECUTOR: And you told your lawyer this story, didn't you?

DEFENDANT: Yes, ma'am.

PROSECUTOR: And your lawyer certainly took notes while you were telling him this story, didn't he?

DEFENDANT: Yes, ma'am.

(Cross-examination script continues on the next page.)

PROSECUTOR: Your honor, we request that the defense turn over those notes to us for use during our cross-examination of Defendant. Our demand is based on *Gaskin* and is made in an effort to show prior inconsistent statements.

COURT: Yes, that's right. Mr. Defense Lawyer, turn over the notes.

13. Is the Court's ruling correct? Why or why not? Explain your answer.

After Defendant has testified, you rest. The State calls Officer as its first rebuttal witness. The following exchange occurs:

PROSECUTOR: Officer, this is not the first time you have dealt with Defendant is it?

OFFICER: Oh, no, ma'am.

PROSECUTOR: In fact, you have arrested Defendant for everything from driving while intoxicated to indecency with a child, right?

DEFENSE COUNSEL: Objection.

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

14. What is the basis of your objection? How should the Court rule on the objection? Explain your answer.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

15. Would your answer be the same if the question asked of Officer was whether, rather than having been arrested, Defendant had been convicted of prior felony offenses? Explain your answer.

16. Must the Court's charge be merely submitted to the jurors or must it be read to them? In state court, is the charge submitted/read before or after final jury arguments? What is the corresponding procedure in a federal criminal trial? Explain your answer.

In spite of your Herculean efforts, the jury finds Defendant guilty after only 8 minutes of deliberation. Although jury punishment has been elected, the swiftness of the verdict causes Defendant to reconsider that election. Defendant now decides that he wishes to have the judge assess punishment, but the Prosecutor objects.

17. May Defendant change his election at this stage of the trial? Explain your answer.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

During the punishment phase of Defendant's trial, the following exchange occurs:

PROSECUTOR: Detective, do you know the reputation that Defendant has in the community in which he resides for being a peaceful and law-abiding citizen?

DETECTIVE: Yes, ma'am, I do. His reputation is very, very bad.

PROSECUTOR: And since the Defendant has been found guilty by this jury, do you have an opinion as to what his prison sentence should be?

DETECTIVE: I certainly do. Defendant should receive

DEFENSE COUNSEL: Objection!

COURT: State your objection, Counsel.

18. What specific objection, if any, should you make? How should the Court rule? Explain your answer.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

The Court's punishment charge includes an instruction that Defendant will not be eligible for parole until serving one-half of his sentence or 30 years, whichever is less. During her closing argument, Prosecutor argues as follows:

PROSECUTOR: Ladies and gentlemen, remember the Court's charge. Whatever sentence Defendant receives can be served in only one-half the time. Give Defendant double whatever you wish him actually to serve so he can't get out and harm another innocent victim.

19. Is this proper argument by Prosecutor? Why or why not? Explain your answer.

After two days of deliberations on the punishment issue, the jury announces that it is hopelessly deadlocked. The Court makes the following ruling on the record:

COURT: I am declaring a mistrial in this case. Since the jury has agreed on Defendant's guilt, that finding will be left undisturbed. A new jury panel will be summoned for tomorrow. At that time, we will commence a new hearing on punishment.

20. Is the Court's decision correct? Why or why not? Explain fully.

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