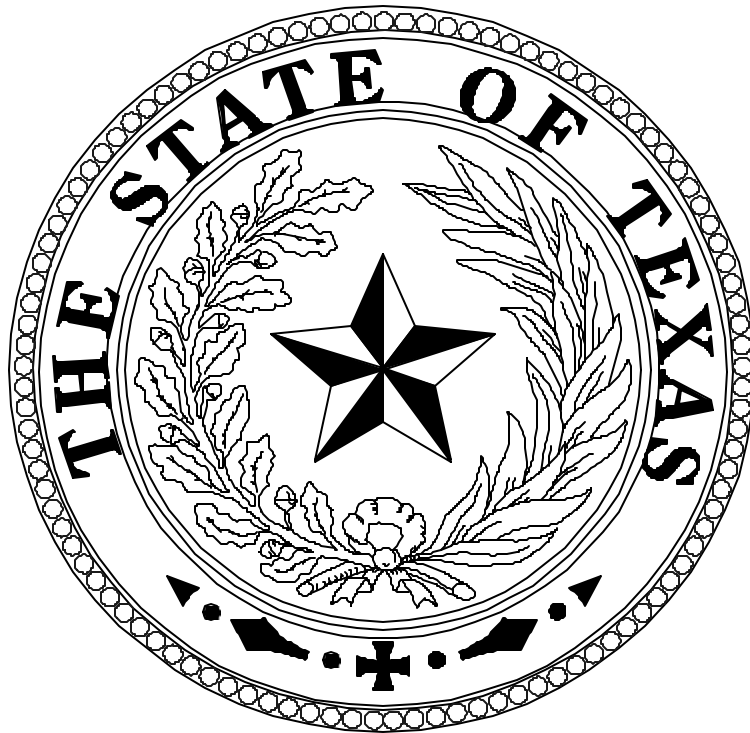


Examinee

Exam

Procedure & Evidence Questions



TEXAS BAR EXAMINATION

COPYRIGHT © 2000 TEXAS BOARD OF LAW EXAMINERS

THIS MATERIAL, OR ANY PORTION HEREOF, MAY NOT BE REPRINTED WITHOUT THE ADVANCE WRITTEN PERMISSION OF THE TEXAS BOARD OF LAW EXAMINERS

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

Harry Homeowner, a citizen of the State of Texas and a resident of Harris County, retains you to represent him in a lawsuit he intends to pursue against Buildem, Inc., a Delaware corporation with its principal office in Phoenix, Arizona. Buildem, Inc. has no office in Texas. Homeowner purchased a \$750,000 home in Houston, Harris County, Texas from Buildem Houston, Inc. Homeowner alleges that Buildem Houston, Inc., a Texas corporation that was a subsidiary of Buildem, Inc. and has now been dissolved, breached a contract and violated the Texas Deceptive Trade Practices Act by using substandard and unapproved insulation and other building materials.

- 1. Assume that Buildem Houston, Inc.'s former marketing director has knowledge of facts important to Homeowner's case and that he is scheduled to accept a job overseas with a different company rendering him unavailable to participate in discovery unless it occurs prior to filing suit. What must Homeowner do to secure the former marketing director's deposition prior to the filing of the lawsuit and what are three (3) points that must be included in the documents relating to Homeowner's effort to secure the deposition?**

- 2. Assume that no mandatory venue provision applies and that there is more than one county where Homeowner can file suit in Texas under the general venue rule. What criteria can be used to determine one of the counties where Homeowner might file the suit? Explain fully.**

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

3. What procedure is available to Buildem, Inc. to challenge the Texas court’s exercise of personal jurisdiction over it and at what stage of the case must it be asserted? Explain fully.

4. a. Assume that Homeowner’s pleadings contain the following statement “The unliquidated damages are within the jurisdictional limits of this court.” What procedural mechanism can Buildem, Inc. employ to require the Plaintiff to specify the maximum amount claimed, and at what stage of the case may it be employed? Explain fully.

b. In a single sentence, set forth what statement Homeowner’s pleadings should contain, including the minimum dollar amount, if he wishes to conduct discovery under Level II.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

5. Assume that Homeowner files suit in a state district court in Texas against only the parent company, Buildem, Inc. May Buildem, Inc. remove this case to the federal district court, assuming the amount in controversy is sufficient? Explain fully.

6. Assume that Homeowner brings suit against both Buildem, Inc. and its former subsidiary, Buildem Houston, Inc. What is Buildem, Inc.'s best argument that it is entitled to remove the case to the Federal District Court. Explain fully.

7. Assume that the attorneys for both Homeowner and Buildem, Inc., with the consent of their clients, agree to waive a deadline with prejudice to the party who is entitled to enforce the deadline. What steps should the attorneys take to ensure that their agreement is enforceable? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

8. Assume that Buildem, Inc. wishes to assert a counterclaim against Homeowner. What are three (3) factors that would have to be present for the counterclaim to be compulsory and what would be the effect of failing to assert a compulsory counterclaim in the instant action? Explain fully.

9. Assume that after suit was filed, Buildem, Inc.’s attorney obtained a copy of the contract between Homeowner and Buildem Houston, Inc. and learned that it contained a clause requiring mediation of disputes. What pleading should be filed by Buildem, Inc. to require Homeowner to submit to mediation, at what stage of the case should it be asserted, and what is the effect of failing to assert it timely? Explain fully.

10. Assume that mediation occurred and was unsuccessful in resolving the dispute. In the course of the mediation, Buildem, Inc.’s president admitted in the presence of the mediator that its now defunct subsidiary, Buildem Houston, Inc., was a “shell” that never had any assets and was established as a means of insulating Buildem, Inc., the corporate parent, from liability. At trial, and over the objection of his attorney, can Buildem, Inc.’s president be impeached with the statement he made during the mediation, and may Homeowner call the mediator as a witness to testify about that statement? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

11. In state court, what steps must be taken to request a trial by jury as a matter of right, and by when must the steps be accomplished? Explain fully.

12. Assuming that the trial court failed to give you and your client at least 45 days notice of a trial setting, what motion should you file to preserve your client's right to receive such notice, what points should you assert in the motion, and what should you do to preserve error if the trial court failed to grant the motion? Explain fully.

13. Assume that the agreement between Homeowner and Buildem Houston, Inc. contained a provision requiring that Homeowner inspect the property prior to taking title as a valid condition precedent to Homeowner's right to recover for breach of contract and that Buildem, Inc. contends that Homewowner never performed the inspection. If Homeowner alleges in his complaint that he performed the inspection, what must Buildem, Inc. do to put the condition precedent in issue and who bears the burden of proving performance of the condition? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

14. In the course of discovery, Homeowner requests information from Buildem, Inc. concerning a proprietary process used by Buildem, Inc. in its home construction projects to prepare and install insulation materials. On what grounds could Buildem, Inc. resist discovery, and, if the court nevertheless orders discovery, what remedy should Buildem, Inc. seek to preserve its proprietary information from disclosure to competitors? Explain fully.

15. Homeowner retained a scientific expert to testify about the failure of the insulation used by Buildem, Inc. to meet recognized industry standards. Assume that the expert is qualified to express an opinion and that his opinion is based on a scientific theory and technique he employed in testing the insulation materials. What are three (3) factors that will be considered by a Texas court in making a threshold determination of admissibility of the expert's testimony? Explain fully.

16. Buildem, Inc.'s attorney objects to Homeowner's request that the court admit into evidence a publication on insulation standards published by an agency of the federal government charged with adopting uniform national building standards. The ground of the objection is that the publication has not been authenticated. How should the court rule? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

17. Assume that an excerpt from the agreement between Homeowner and Buildem Houston, Inc. was offered into evidence by Buildem, Inc. and the court received it in evidence. Homeowner believes the excerpt, taken out of context, creates a misimpression. What can Homeowner do to place the excerpt in context? Explain fully.

18. In the midst of trial, Homeowner determines that he will be unable to establish a key element of his claim and that he will need more time and discovery to develop that element. May Homeowner terminate the proceeding without prejudice to his right to reinstitute his lawsuit, what procedure should he employ to do so, at what stage of the proceedings must he do so, and assuming the limitations period has not passed, what effect, if any, does this have on any pending counterclaims by Buildem, Inc.? Explain fully.

19. Assume that judgment in favor of Buildem, Inc. was signed following a trial to the court without a jury. What method is available to Homeowner to obtain the basis of the court's decision, and what is the deadline for employing that method? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

20. Assume that Homeowner desires to appeal the adverse judgment. What document must Homeowner file to perfect the appeal and what are two items of information that must be contained in the document? Explain fully.

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

In February, 2000, Victim was walking to her car, which was parked at the Cowtown Shopping Mall, when she was suddenly confronted by a masked stranger, later identified as Defendant. Defendant told Victim that he had a knife in his pocket, that he wanted Victim's purse, and that he would "hurt her badly" if she did not comply. Victim immediately surrendered her purse, whereupon Defendant ran off without causing Victim any physical harm.

Victim reported this offense to a mall security guard, offering a description of her assailant's clothing. Ten minutes later the guard reported that he "had the perpetrator in custody." A second guard transported Victim to a nearby location in the parking lot, where she observed a man lying handcuffed on the ground. When Victim was asked whether she could identify the man as her assailant, Victim replied that while she could not positively identify the man, his clothes looked similar to those of the robber.

Upon hearing Victim's response, Defendant blurted out, "OK, I did it, but I'm sorry. You can have your money back -- please just let me go. My parole officer is going to be really, really mad at me." Fort Worth police soon arrived and took Defendant into custody, charging him with aggravated robbery.

Inasmuch as you have been a licensed attorney for almost an entire week now, the court has appointed you to represent Defendant.

After having announced his re-election bid earlier in the day, the trial judge sets Defendant's bail at \$500,000. That amount strikes you as excessive.

- 1. What procedures are available to you in an effort to effect a reduction in Defendant's bail and what arguments would you make in support of these procedures? Explain fully.**

Following the return of an aggravated robbery indictment against Defendant, you file a motion for an examining trial.

2. **Explain fully what an examining trial is, what its purpose is, and whether Defendant is entitled to an examining trial under the circumstances outlined above.**

The local newspaper gives extensive coverage to this case after it is revealed that Victim is the wife of the police chief. You begin to be concerned that because of these circumstances, it may be difficult for Defendant to get a fair trial in Fort Worth.

3. **What procedure is available to you to protect Defendant's right to a fair trial, what supporting documents must you file, and what evidence must you present in order to prevail? Explain fully.**

4. **At what stage of the case against Defendant must you undertake the procedure you have described in responding to the preceding question, and what are the consequences if you fail to undertake the procedure in a timely fashion? Explain fully.**

As you prepare your case, you begin to entertain doubts that Defendant is mentally competent to stand trial.

5. Is there a presumption regarding Defendant's competency, and, if so, what must you show in order to rebut that presumption? Explain fully.

6. Which party has the burden of proof to establish that Defendant is incompetent to stand trial, what standard of proof applies, and what consequences follow if Defendant is found incompetent to stand trial? Explain fully.

Although you did not take criminal procedure in law school, you do remember from your civil procedure class that depositions are an essential tool of pre-trial discovery.

7. What procedure must you follow before you will be allowed to take Victim's pre-trial deposition, and would your answer be any different if you wished to depose the security guards who witnessed the events? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

Name the defensive procedure you should employ to exclude the following items of evidence, explain what you must show in order to succeed, and state at what stage of the case against Defendant you must initiate the procedure.

8. Victim’s identification of Defendant at the time of his apprehension. Explain fully.

9. Defendant’s admission at the time of his apprehension. Explain fully.

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

10. How should the court rule on the two motions? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

11. Assume that you are not compelled by the court to provide the State with a list of all defense witnesses. Can you nonetheless ethically do so voluntarily? Under the Texas Rules of Evidence, can you do so voluntarily? Explain fully.

Several weeks before trial, Defendant asks you whether his case will be tried to a jury or the judge.

12. What procedure is employed to express the choice whether to try the case to a jury or the judge, who has the right to make that decision, at what stage of the case must the decision be made, and must the choice be the same as to both the guilt and the punishment phases of the trial? Explain fully.

As the jury voir dire commences, you are surprised to learn that the court reporter has taken the morning off and is absent from the courthouse.

13. What procedure must you have employed to ensure that the court reporter takes down the voir dire examination, at what stage of the case should you have initiated the procedure, and what are the consequences if you fail to do so? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

Of the 42 person jury panel summoned for trial, 8 are African-Americans. All 8 of these veniremen are acceptable to you. The prosecutor unsuccessfully challenges each of the 8 for cause. Following this unsuccessful effort, the prosecutor uses 8 of his 10 peremptory strikes on these veniremen.

14. Describe the procedure you should employ to contest the action by the prosecutor, at what stage of the proceedings must you employ it, and what remedy should you ask the judge to grant? Explain fully.

After the jury is seated and the indictment is read, the prosecutor makes his opening statement to the jury. At the conclusion of the State's opening statement, the following exchange occurs:

Court: Ms. Defense Counsel, do you wish to make an opening statement?

Defense Lawyer: I do, your Honor. However, I wish to do so after the State rests its case-in-chief.

Court: That request is denied counsel. Either make it now or you waive it. We're not going to drag this trial out.

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

A few minutes into the testimony of the State's first witness, you realize that you have neglected to ask that "the Rule" be invoked. You announce to the court that you now wish to do so.

16. Define “the Rule”, state whether, under the circumstances, it is too late for you to invoke the Rule, and name two possible sanctions that may be imposed if the court finds that the Rule has been violated. Explain fully.

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. First, the request is untimely. Counsel should have asked for the statement at pre-trial. Secondly, this is our work-product. We refuse to produce the statement.

17. How should the court rule on each ground stated in the prosecutor’s objection, and what sanctions may the court impose if the prosecutor refuses to produce the statement? Explain fully.

After the State rests its case, you present your first witness, Convict, who testifies as an alibi witness in behalf of Defendant. On cross-examination the following exchange occurs:

Prosecutor: It is true, is it not sir, that you were convicted of robbery in Harris County, Texas, in June of 1994?

Defense Lawyer: Your Honor, we object. That conviction is remote since it occurred 6 years ago.

Court: Overruled. The witness is directed to answer the question.

18. How should the court rule on your objection, and should the ruling be different if Convict's conviction is still on appeal? Explain fully.

After both sides have rested and closed, the court directs that any requested special charges and objections to the charge be heard. You decide to make your requests and objections orally.

19. List two of the three conditions that must be met in order for you to make your requests and objections orally, and state whether you must later reduce them to writing. Explain fully.

To no one's surprise but your own, Defendant is convicted of aggravated robbery. Naturally Defendant informs you that he wishes to appeal. You state orally, and in open court, that you hereby appeal the verdict and the grounds therefor. You fail to file anything in writing regarding the appeal and you also neglect to file a motion for new trial.

20. Have you adequately preserved an appeal, and may you still file a motion for a new trial? If you may still file a motion for new trial, within what time period must you file it, and may the court grant you an extension beyond that time? Explain fully.

THIS CONCLUDES THE PROCEDURE AND EVIDENCE QUESTIONS.