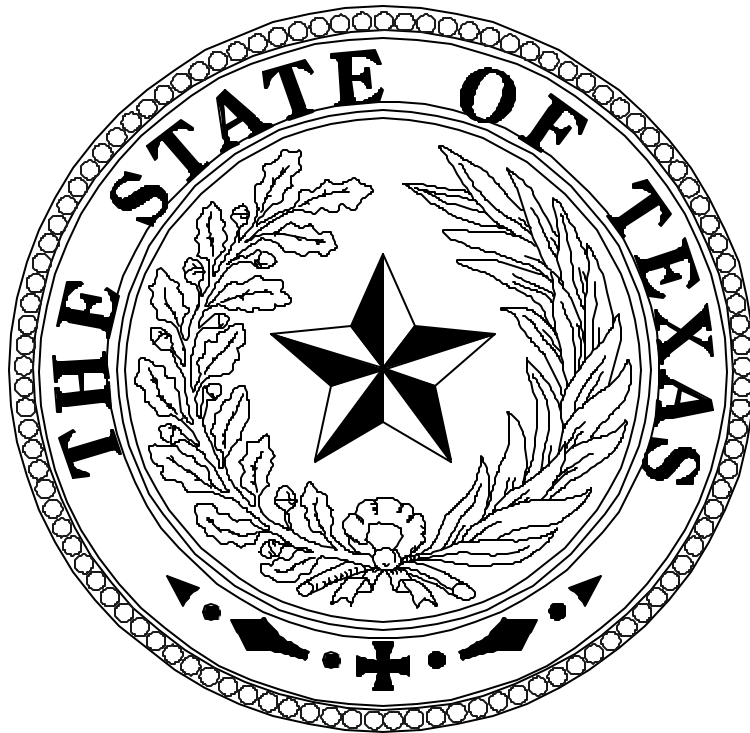


Examinee
Number

Exam
Date

2/2000

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

JAVA, Inc. retains you to defend it in a personal injury suit filed by Kosmo in the District Court of Travis County, Texas for damages allegedly resulting from the spill of hot coffee served to Kosmo in a coffee bar owned and operated by JAVA. A summons and complaint have been properly served on JAVA.

- 1. When is JAVA's answer due? (No calculation of exact date is necessary.)**

- 2. Assume that shortly after the injury Kosmo agreed to a cash settlement with JAVA and signed a full and final release of claims against JAVA as consideration for the settlement. What pleading will you file to raise the applicable defense, identify the defense you will assert and state whether verification is necessary?**

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

3. A. What motion is available to you to establish that JAVA is entitled to judgment in its favor as a matter of law on the defense you have asserted and when can it be filed?

B. Identify two forms of proof JAVA can file in support of the motion you have identified in Part A, above.

4. In response to the motion you have identified in Question 3A above, Kosmo submits legally sufficient proof of his own to the effect that he was coerced to sign the release. How should the trial court rule on JAVA's motion? Explain your answer.

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5. Assume that in the proceeding you have identified in Question 3A, above, the court has ruled for JAVA. Can Kosmo appeal that ruling? Then, assume that the court has ruled for Kosmo. Can JAVA appeal that ruling? Explain your answers.

6. Extensive discovery is sought by Kosmo. Assume that JAVA has grounds to object to or resist a subpoena for production of documents included in a notice of deposition. Explain what procedural devices you could utilize to assert JAVA's objections to the subpoena, within what time period you would be required to assert them, and in what forum you would assert them.

7. Explain one valid reason Kosmo's attorney may give during the oral deposition of Kosmo to instruct Kosmo not to answer a particular question.

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8. Assuming that Kosmo’s attorney has grounds to object to certain questions asked by JAVA’s attorney during the course of Kosmo’s oral deposition, state the only valid objections (s)he may assert under the Texas Rules of Civil Procedure.

9. Dr. Know, a world-renowned authority on prevention of thermal burns, has been retained by JAVA to assist in its defense. He does not have personal knowledge of the facts and circumstances giving rise to the suit. Explain in what capacity JAVA must employ Dr. Know to avoid having to disclose Dr. Know and his report during discovery, and explain under what circumstances JAVA might be required to disclose Dr. Know and his report.

10. Brewski, Inc., the manufacturer of JAVA’s coffee brewing equipment, has not been made a party to the suit. What are two modes of discovery available to JAVA to compel discovery from Brewski, and what limit, if any, applies as to the distance a non-party can be required to travel to comply with discovery requests.

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11. During discovery, Kosmo requests production of attorney notes taken in meetings between JAVA’s attorney and its employees during the investigation of Kosmo’s injuries. On what grounds, as JAVA’s counsel, should you object to this request? Explain your answer.

12. In response to JAVA’s request to Kosmo to produce medical records to substantiate the nature and extent of Kosmo’s injuries, Kosmo refuses to produce his medical records or permit discovery from his physician on the basis of physician/patient privilege. JAVA moves the court to compel discovery over Kosmo’s objection. How should the court rule? Explain your answer.

13. Assume the trial of Kosmo vs. JAVA, Inc. is now commencing. On behalf of JAVA, you announce: “Your honor, I am invoking ‘THE RULE’ pursuant to the Texas Rules of Evidence and the Texas Rules of Civil Procedure.” Assuming “THE RULE” was properly invoked, name two classes of prospective witnesses exempt from exclusion from the courtroom.

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14. What is the possible range of rulings the trial court might make concerning a potential witness who violates “THE RULE,” and what standard will be applied to the court’s rulings upon review?

15. In the course of Kosmo’s case in chief, his mother is called to testify that Kosmo’s disfiguring injuries have caused her beloved son to move back in to live in her home and have diminished his overall enjoyment of life. In the course of her direct testimony, Kosmo’s mother unexpectedly states, “I know, because I’ve heard that Kosmo has beat the heck out of those kids who are always making fun of him.”

A. Is Kosmo’s attorney allowed to try to impeach his client’s mother? Explain your answer.

B. To find out whether Kosmo’s mother has personal knowledge about the beatings she alluded to, what request should Kosmo’s attorney make and how can (s)he preserve error if the court refuses to grant that request?

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16. In the course of JAVA’s case in chief, JAVA’s attorney seeks to introduce business records into evidence. Discuss how you as JAVA’s counsel will introduce JAVA’s business records, specifying at least three elements of proof necessary to overcome the hearsay objection.

17. After the parties rested and closed, JAVA timely tendered a requested jury question in substantially correct form concerning its defense of release, for which proof had been presented. Kosmo timely tendered a requested jury instruction in support of his theory that the release was coerced. Kosmo’s instruction did not include all elements necessary to state his theory of coercion in substantially correct form.

What must JAVA do to preserve an objection about the incomplete instruction? Explain both the form that JAVA’s objection may take, and also explain at what stage of the proceedings it must be made.

18. At what stage of the proceedings must the court rule on the parties’ requests and objections to the charge to the jury, and how should the court’s rulings be made part of the record?

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19. Assume the trial court signed a judgment on the jury verdict in favor of Kosmo. If JAVA believes there was factually insufficient evidence to support a particular jury finding, what motion should JAVA file and within what period of time to preserve its complaint?

20. Assuming that JAVA has timely filed the motion described in Question 19, explain what will happen if the trial court does not issue any ruling and what is meant by the trial court's "plenary power" over its judgment.

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TURN THE PAGE AND CONTINUE THE EXAM.

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CRIMINAL PROCEDURE AND EVIDENCE

In July 1999, Victim places a 911 call to the Austin Police Department, reporting that her husband, Defendant, has physically assaulted her. This is not the first time Victim has made such a police report. When the police arrive at the scene, they find Victim bruised and bloodied, Defendant belligerent and apparently intoxicated, and the couple's 5-year-old son, Child, crying hysterically. The police immediately arrest Defendant. On the way to jail, the officer transporting Defendant suddenly says, "OK, buddy, tell me what happened tonight. Things will go better for you if you get it off your chest -- I'll even put in a good word for you with the D.A." Defendant responds by saying, "She was driving me crazy, so I beat the snot out of her. I have to do that every couple of weeks to keep her in line. But I'd better shut my mouth until I talk with a lawyer."

Later that night a doctor examines Victim and determines that she has suffered a broken nose and thumb, had several teeth knocked out, and exhibits severe contusions. Child is not injured.

You are appointed by the court to represent Defendant.

The District Attorney files a felony case against Defendant, alleging aggravated assault under §22.02, Texas Penal Code, and tells you he plans to present the case to the Travis County grand jury next week. The District Attorney wants Defendant to appear before the grand jury and explain his conduct.

- 1. Can the District Attorney compel Defendant to appear before the grand jury? What rights does Defendant have regarding an appearance? Explain your answer.**

After the District Attorney presents his case, the grand jury indicts Defendant. In pertinent part, the indictment charges as follows:

...Defendant did then and there cause serious bodily injury to Victim, by striking her with his fist...

QUESTION 2 APPEARS ON THE NEXT PAGE.

2. **What procedure is available to Defendant to challenge this indictment, what stage of the proceedings must Defendant assert such a challenge, and what is the consequence if Defendant fails to timely assert the challenge? Explain your answer.**

After the grand jury returns its indictment, the District Attorney offers to plead the case against Defendant in return for a sentence of 5 years. You communicate that offer to your client, who responds that he will accept a plea for a 3 year probated sentence. The District Attorney quickly rejects Defendant's counter-offer and sets the case for trial in January, 2000.

3. **In preparation for trial, you file a written motion for discovery. Is Defendant entitled to pre-trial discovery of the following materials? Explain your answer for each.**

(a) **all police reports;**

(b) **written statements of witnesses;**

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QUESTION 3 CONTINUES ON THE NEXT PAGE.**

(c) the report of the doctor who treated Victim;

(d) a written summary of Defendant's post-arrest oral admission to the police;

(e) a transcription of all grand jury testimony.

4. What motion, if any, should you file regarding the inculpatory post-arrest oral statement of Defendant, at what stage of the proceedings should you file it, and what is the likelihood that the motion will be granted? Explain your answer.

When the jury panel of 42 veniremen is assembled, you note that several police officers and a former prosecutor are among the first 15 veniremen. You conclude that these individuals may not be favorable defense jurors.

5. What action, if any, can you take to change the seating order of the veniremen, and at what stage of the proceedings should you take this action? Explain your answer.

Of the 42 person jury panel summoned for trial, 8 are African-Americans. The District Attorney uses 8 of his 10 peremptory strikes on these venire members.

6. (a) What procedure, if any, should you employ to contest this action by the prosecutor, and at what stage of the proceedings should you employ it? Explain your answer.

(b) Do the rights of Defendant to contest the action of the prosecutor differ depending on whether the Defendant is an African-American? Explain your answer.

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During the State's case-in-chief, the following exchange occurs between the 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. One time they said they heard Defendant holler...

Defense lawyer: Objection, your honor.

Court: State the basis for your objection, Counselor.

7. What is the evidentiary basis for your objection and how should the court rule? Explain your answer.

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?

8. What are the bases for your objection? How should the court rule on the objection? Explain your answer.

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9. (a) Assume that the court sustains the foregoing objection. What steps must you then take to preserve the issue for appeal? Explain your answer.

(b) What is the likely effect of your failing to take such steps? Explain your answer.

Continuing with its case-in-chief, the State calls the couple's 5-year-old son, Child, as a witness against Defendant. The following exchange occurs:

Defense lawyer: Your honor, I object. This witness is obviously not competent and is therefore disqualified.

Prosecutor: Judge, my staff has interviewed Child at length. The boy is unusually bright, and I have no doubt that he will make a credible witness.

Court: Ladies and gentlemen, please retire to the jury room. I have a matter of law to take up outside your presence.

10. What inquiry must the court make to ensure that Child is competent, and should the inquiry be on or off the record? Explain your answer.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

The trial continues:

Court: Mr. Prosecutor, call your next witness.

Prosecutor: The State calls Victim, the wife of Defendant.

Defense Lawyer: Your honor, the prosecutor knows full well that the Texas Rules of Evidence disqualify this witness. We object to any testimony from this woman.

11. How should the court rule on Defendant’s objection? Explain your answer.

After the State rests its case-in-chief, the defense calls Witness, and without objection, elicits testimony regarding Defendant’s character. The following occurs during the State’s cross-examination of Witness:

Prosecutor: Mr. Witness, let me ask you about Defendant’s criminal record. You know, do you not, that Defendant has been arrested numerous times for law violations?

Witness: That’s the first I’ve heard about that.

Prosecutor: Well, let me go down this list of offenses that have been committed by Defendant and see if that refreshes your memory.

Defense Lawyer: Objection, your honor.

Court: Why are you interrupting us again, Counsel? This jury is entitled to know the truth about your client.

12. What is the proper objection to the prosecutor’s question and how should the court rule? Explain your answer.

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13. What objection, if any, should you make regarding the foregoing comment by the judge, what should you ask the judge to do with the jury while you argue the objection, and what relief should you seek? Explain your answer.

14. Assume for purposes of this question that Defendant decides to take the stand in his own behalf. What should you, as Defendant's counsel, ask the judge to do before Defendant takes the stand, and what information should you be sure the record reflects regarding Defendant's decision? Explain your answer.

During cross-examination of Defendant, prosecutor asks the following:

Prosecutor: Mr. Defendant, you have just told the jury that you are not guilty of this offense, is that correct?

Defendant: Yes, and I'll say it again -- I didn't assault my wife. I love her!

Prosecutor: Can you then explain sir, why you offered to plead guilty in return for a 3-year probated sentence?

15. What objections, if any, should you make, and how should the court rule on them? Explain your answer.

Continuing with his cross-examination, Prosecutor poses the following question to Defendant:

Prosecutor: Mr. Defendant, although you have told the jury that you are not guilty of this offense, that's not the story you told your lawyer is it? Exactly what did you tell him when he asked you if you had beaten your wife?

Defense Lawyer: Objection, your honor. Hearsay.

Court: I'll overrule that objection, Counsel.

16. Is the court's ruling as to the ground for the objection correct? What other objections, if any, should the defense lawyer have made, and what should have been the court's ruling if such an objection had been made? Explain your answer.

After both sides have rested and closed, the court provides you and the prosecutor with a proposed jury charge. You notice that while the charge states the law applicable to the case, it does not apply the law to the facts of the case.

17. On what ground should you challenge the proposed jury charge, what must you do to perfect your challenge, at what stage of the proceeding must you assert your challenge, and what is the consequence of your failure to do so? Explain your answer.

During the State's final argument, Prosecutor makes the following remarks:

a) Prosecutor: I'll point out another thing ladies and gentlemen -- even the judge didn't believe Defendant's evidence. You saw how often she sustained my objections.

b) Prosecutor: The good people of this community not only desire, they demand, that you convict this wife-beater of aggravated assault and put him away once and for all.

18. On what grounds, if any, might defense counsel object to these remarks? Explain your answer.

After brief deliberations, the jury returns a guilty verdict against Defendant.

19. What standard of proof must the State have satisfied in order to have obtained a guilty verdict? How many jurors must have concurred in the guilty verdict? What is the consequence if fewer than the requisite number of jurors voted guilty? Explain your answer.

After the trial is over, you are shocked to learn that Defendant is appealing his judgment and sentence, claiming that you provided ineffective assistance of counsel.

20. What are the constitutional grounds for such a claim, and what must Defendant/Appellant demonstrate to prevail on this point of error? Explain your answer.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

THIS CONCLUDES THE PROCEDURE AND EVIDENCE QUESTIONS.

