

## GRADER COMMENTS – FEBRUARY 2019 CIVIL PROCEDURE & EVIDENCE

1. Almost all examinees knew Builder should file its answer by 10am the first Monday after the expiration of 20 days from service with citation.
2. Almost all examinees knew the diversity requirement to remove to federal court existed because Builder and Developer were each a citizen of a different state. Many examinees knew the second requirement was satisfied because the amount in controversy exceeded \$75,000.
3. Almost all examinees knew Builder should file a motion to transfer venue prior to or concurrently with any answer, plea, or pleading.
4. Almost all examinees knew the trial court should grant the motion to transfer venue. Few examinees stated venue was proper in Fort Bend County because that is where all or a substantial part of the events or omissions giving rise to Developer's claims occurred; therefore, venue in Developer's county of residence was improper.
5. Almost all examinees knew Builder should file a special exception to point out the deficiency in Developer's petition. Few examinees stated Builder was entitled to a court order compelling Developer to amend its petition to state the *maximum* amount of damages sought.
6. Almost all examinees knew 5 forms of discovery listed in Texas Rule of Civil Procedure Rule 192.1 that Builder could use to obtain more information about Developer's claims.
7. Almost examinees knew Developer timely objected and responded to Builder's interrogatories. Most knew the response/objection was timely because Developer responded in 30 days by depositing the responses in the mail on Day 31 (30 days after receipt of the interrogatories by hand-delivery).
8. Almost all examinees knew Developer should serve a response describing the withheld documents and asserting the privilege under which each document was withheld. Few examinees stated this "privilege log" must be served within 15 days of the letter from Builder.
9. Few examinees knew Builder should serve Developer with a Request for Entry Upon Property to gain access to the property by Builder's surveyor.
10. Almost all examinees knew Builder should file a motion for protective order or a motion to quash to resist the Apex deposition of its president. Most examinees knew the motion must be accompanied by the president's affidavit denying personal knowledge of relevant facts.
11. Most examinees knew the trial court should sustain Builder's objections to the interrogatories and requests for production seeking information about Builder's expert. Few examinees stated the only permissible forms of discovery regarding testifying experts are requests for disclosure, written reports, and depositions.

12. Almost all examinees knew Builder's failure to respond to Developer's requests for admissions resulted in each request being deemed admitted. Most examinees knew Builder should file a motion to withdraw the deemed admissions. Most examinees knew the trial court could grant the motion if it found good cause for the withdrawal and Developer would not be unduly prejudiced by the withdrawal.
13. Most examinees knew Developer's attorney was incorrect by refusing to provide an explanation for her "objection, form." Most examinees knew the objecting attorney must give a clear and concise basis for the objection upon request.
14. Almost all examinees knew Developer was not entitled to production of the documents in electronic form because Builder does not maintain the documents in electronic form in the ordinary course of its business.
15. Almost all examinees knew Builder had to file a response to Developer's no-evidence motion for summary judgment. Few examinees knew the motion had to contain evidence raising a genuine issue of material fact as to each of Builder's defenses. Few examinees knew the response was due no later than 7 days before the summary judgment hearing.
16. Almost all examinees knew Developer should first challenge the juror for cause based on bias or prejudice. Almost all examinees knew that if the for-cause challenge was unsuccessful, Developer could use a peremptory strike to remove the juror.
17. Many examinees knew Developer should object to the qualifications of Builder's expert before the expert testifies. Most examinees knew that if the objection was overruled, Developer should ask to voir dire the expert outside the jury's presence for the limited purpose of questioning the expert on his qualifications to testify.
18. Almost all examinees knew Builder's objection should be overruled because the witness's testimony was an admission by a party opponent. Most examinees knew an admission by a party opponent is not hearsay.
19. Almost all examinees knew Builder should approach the bench outside the jury's hearing to ask the court to reconsider its ruling on the motion in limine and allow Builder to introduce the evidence. Few examinees knew that if the court refused to admit the evidence, Builder must make an offer of proof or "bill of exceptions" to put the evidence in the record for appellate review.
20. Almost all examinees knew the court should deny Builder's motion for a mistrial because, in district court, a verdict can be rendered by 10 of 12 jurors.