

**Test Booklet  
INSTRUCTIONS**

**THERE ARE EIGHTEEN PAGES TO THIS EXAM**

1. There are two sections to this examination. The first section is short essay and consists of 30 questions. Each of the questions is worth 5 points --a total of 150 points for Section I. The second section of the examination is composed of three longer essay questions. Each of the questions is worth 25 points --a total of 75 points for Section II. There are a total of 225 points on this examination. The time for completing the examination is three hours.
2. This examination is "closed book."
3. Be sure to answer the specific questions that are asked. Information supplied relating to some unasked question will not increase your score and consumes your time needed to answer the asked questions.
4. If additional facts are necessary to resolve an issue, specify what additional facts you believe to be necessary and why they are significant. You may not make an assumption that changes or contradicts the stated facts. This material will not count in the number of lines that you are limited to.
5. Quality, not quantity, is desired. Think through and briefly outline your answers before you begin to write.
6. Write legibly. Be sure to formulate your answers in complete sentences and paragraphs with proper grammar. Failure to do so will result in an appropriately lower score.
7. Do not seek an interpretation of language in the questions from anyone. If you sense ambiguity or typographical error, correct the shortcoming by shaping the question in a reasonable way and by recording your editorial corrections in your answer.
8. **Other than answers to Section II, all answers must be written in the appropriate spaces in this booklet.** Only answers in this booklet will be graded for Section I. Do not exceed the designated space for each answer. Only one line of writing per printed line is allowed. Do not write outside of margins, on back, etc. Excess material will not be read and will not count towards your score.
9. If you are using Softest, your answer to the longer essay question must not exceed 150 words. Excess material will not be read and consequently any overage will not count towards your score. "Excess material" means words which appear at the physical end of the printed version of your answer in excess of the allotted number of words. If you attempt to

manipulate the word count to gain an unfair advantage such as by omitting spaces between words, your score will be significantly reduced by an amount to be determined on a case-by-case basis.

Under the Honor Code, when you turn in this examination, you affirm that you have neither given, received, nor obtained aid in connection with this examination, nor have you known of any one so doing. If you cannot make this affirmation, you shall note such fact on your examination and must immediately advise the Dean of the reason therefore.

EXAM NUMBER \_\_\_\_\_

**Section I**  
**Short Answer**

**(Each question is worth 5 points for a total of 150 points)**

1. Briefly explain the Texas Supreme Court's jurisdiction, if any, over an interlocutory appeal from the trial court's granting of a temporary injunction.

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2. Does the *Craddock* standard apply to a motion for a new trial filed after judgment has been granted on a summary judgment motion? Briefly explain.

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3. Briefly explain the differences, if any, between constructive service of process and substituted service of process.

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4. On September 8, 2003, the trial court signed a final judgment in favor of the plaintiff because the defendant failed to appear for the trial. The defendant never received written notice from the clerk that a final judgment had been signed, but did obtain actual knowledge of the signing on October 3, 2003. The defendant filed a motion for new trial on October 13, 2003. No other pleadings were filed by either party, and the trial court granted the new trial on November 1, 2003. Briefly discuss the validity of the trial court's action in granting the new trial.

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5. Plaintiff sued defendant for medical malpractice. On December 15, 1989, the judge granted a take-nothing summary judgment disposing of all parties and causes of action. On January 5, 1990, the plaintiff filed a motion for new trial. The judge at a hearing on February 1, 1990, orally vacated the summary judgment and wrote his ruling down on the docket sheet and signed the docket sheet. The written order overruling the summary judgment was signed on November 8, 1990. The judge then set the case down for trial. What should an intelligent defendant's lawyer do at this stage? Briefly explain.

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6. Plaintiff sued defendant on a promissory note. The defendant filed an answer containing only a general denial. On the day of trial the defendant sought to amend his answer to assert for the first time the affirmative defense of failure of consideration. Following a hearing the trial judge permitted the defendant's pleading to be amended to include the affirmative defense of failure of consideration. Assume for the purposes of your answer that the trial court's decision was correct. Briefly discuss all legal bases in support of the trial court's decision

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7. On June 1, 2004, a jury returned a verdict and the judge orally announced in open court that he would enter a judgment in favor of the plaintiff against the defendant. The defendant filed a motion for new trial on June 2, 2004; the trial

court signed the final judgment in favor of the plaintiff and overruled the motion for new trial by written orders on July 3, 2004. On July 10, 2004, the defendant filed a motion to modify the judgment. Specifically the defendant's motion requested that the court correct the docket number on the judgment to reflect the proper number. On August 8, 2004, the trial judge modified the judgment to reflect the proper docket number. Did the trial court have the jurisdiction to modify the judgment? Briefly explain. If the court had the jurisdiction, briefly explain its plenary power over the modified judgment. If the court did not have the jurisdiction, what can the plaintiff do to vitiate the modified judgment?

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8. A non-resident defendant was properly served with citation by serving the Secretary of the State of Texas, on September 1, 2004. The Secretary of State then mailed the non-resident a letter with attached copies of the petition and citation as required law by certified mail, return receipt requested. The non-resident received the letter and attached copies on September 4, 2004. The Secretary of State's certificate reflecting service of the citation and receipt by the defendant was properly filed on September 8, 2004. When is the defendant's answer due? Briefly explain.

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9. Briefly explain the Texas rules concerning the duty to supplement or amend deposition testimony in civil cases.

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10. Briefly discuss the difference between a severance and a separate trial.

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11. Briefly explain the consequences, if any, of a plaintiff's failure to file an answer to a counterclaim.

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12. A plaintiff failed to disclose in response to properly filed discovery requests the names of persons having knowledge of relevant facts. During the trial of the case the plaintiff wanted to offer the testimony of witnesses. The defendant objected. The trial court permitted the plaintiff to call witness. Assume for the purposes of your answer that the trial court's decision was correct. Briefly discuss all legal bases in support of the trial court's decision.

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13. As a general rule, affirmative defenses must be plead or they are waived. List three exceptions to this rule that were discussed in class.

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14. Briefly explain the purpose of a plea in abatement. The recognized pleas in abatement include (list three):

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15. Briefly explain the difference between interest *eo nomine* and interest as damages. Please include in your explanation which, if either, may be supported by a prayer for general relief.

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16. A defendant filed a motion to transfer venue alleging both improper venue and inconvenience of the parties. The trial court granted the motion to transfer without specifying the grounds. Briefly discuss what remedies, if any, the plaintiff may undertake to challenge the court's ruling on the motion to transfer venue. Be sure to include in your answer when such remedies, if any, may be undertaken.

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17. The plaintiff filed suit against two defendants. One defendant filed an answer containing a general denial. The second defendant filed a motion to transfer venue and subject to that motion, a general denial. Briefly explain what the plaintiff must do, if anything, to maintain venue in the county of suit under the general venue rule. Please be specific.

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18. Briefly explain when and under what circumstances a plaintiff can intervene in a pending lawsuit. If the trial court grants the intervention, what legal remedies, if any, are available for the defendant to challenge the trial court's ruling? Briefly explain

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19. Defendant filed a motion for summary judgment based upon an affirmative defense. The plaintiff filed a timely response. The hearing was held and the plaintiff failed to appear due to mere negligence. The court granted the defendant's motion and entered a judgment that plaintiff take nothing. The clerk failed to send notice of the judgment to the plaintiff as required by the rules of civil procedure. Five months after the signing of the judgment the plaintiff filed a restricted appeal. Briefly explain whether the plaintiff will be successful on her restricted appeal.

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20. Plaintiff's case was dismissed for want of prosecution. The plaintiff did not learn of the dismissal judgment in time to file a motion to reinstate. However, the plaintiff timely filed a restricted appeal. The record was devoid of any indication that notice of the judgment or of the dismissal hearing had been issued or sent by the clerk of the court. In her restricted appeal the plaintiff



alleged that she had not received any notice that the trial court intended to dismiss her case for want of prosecution and had not received any notice of the entry of the judgment. The plaintiff tendered to the appellate court affidavits of her counsel and the district clerk averring that none of the required notices were given. Briefly explain whether the plaintiff will be successful on her restricted appeal.

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FOR QUESTIONS 21-25 THE FOLLOWING FACT PATTERN APPLIES:

Sam South was driving his car on Woodlawn in San Antonio, when suddenly and without warning a car driven by Betty North ran a red light and collided with Sam's car causing Sam serious bodily injuries. Sam filed a lawsuit against Betty. In his original petition he sought to recover for the damages to his car as well as for the personal injuries that he received in the accident. His original petition also sought recovery of both pre-judgment and post-judgment interest. Betty was properly served with a citation in the suit but never filed an answer.

21. Sam desires to take a default judgment against Betty, as she has not answered his lawsuit after proper service of citation. State the requirements of the Texas Rules of Civil Procedure that Sam must follow in order to obtain a default judgment for the damages to his car and for his personal injuries.

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22. At the default judgment hearing, the judge after considering all things necessary for a determination of the matter, orally announced and rendered in open court that he was going to enter judgment for Sam in the amount of \$10,000 for his personal injuries and property damage to his car, and was going to award Sam \$150 for pre-judgment interest. However, the court's written judgment awarded Sam only the \$10,000 for his personal injuries and property damage to his car. The written judgment also contained the phrase that "the defendant though duly cited failed to appear". The clerk did not mail notice of the default judgment to Betty. Betty did not acquire actual knowledge of the default until 40 days after the judgment was signed. State the remedy or remedies, if any, that Betty may now pursue in an appellate court to set aside the default judgment, and the time deadlines, if any, for each such remedy or remedies. Will Betty be successful? Discuss briefly.

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23. [In answering the remaining questions (23, 24, and 25) assume that Betty filed a motion for new trial 5 days after the trial court signed the default judgment]. (a.) If the trial court never signed a written order overruling Betty's motion for new trial, when does the plenary power of the trial court over the default judgment terminate. Briefly explain. (b.) Assume that the trial court entered an order overruling the motion for new trial the day after the motion for new trial was filed, when does the plenary power of the trial court over the default judgment terminate. Briefly explain. (c.) Assume that 50 days after filing the motion for new trial and prior to the trial court entering any orders concerning the motion for new trial, Betty filed an amended motion for new trial. What effect, if any, does such filing have on the trial court's plenary power? Briefly explain.

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24. Assume that during the trial court's plenary power, the judge entered a new written judgment modifying its earlier written judgment by adding a Mother Hubbard clause. What, if anything, does such action do to the plenary power of the trial court? Briefly explain.

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25. After the plenary power of the trial court had expired, Sam filed a motion requesting the court to modify its earlier judgment to include \$150 in pre-judgment interest and to add post judgment interest. Does the trial court have the authority to grant any of the relief requested in Sam's motion? Briefly explain.

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26. Approval by the Texas Supreme Court of a holding of the Commission of Appeal's decision prior to 1934 signified:

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For questions 27-30 state whether you agree or disagree with each of the following statements. Briefly explain your answer.

27. A trial court may grant a motion to transfer venue of a civil lawsuit from a county of proper venue to another county that might originally have been considered a county of proper venue.

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28. No interlocutory appeal shall lie from a trial judge's granting of a motion to transfer venue.

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29. The work product exemption from discovery continues even after the litigation for which the work product was prepared concludes.

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30. A judgment entered in a lawsuit for the partition of land, where all the owners of the land in question are not joined as parties, is binding upon those who were parties to the judgment.

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## SECTION II.

### LONGER ESSAY

**(Each question is worth 25 points for a total of 75 points)**

1. Robert F. Barnes sued Harold Caldwell, a Colorado resident, in Texas in 1989, alleging various causes of action stemming from a contract dispute. Barnes arranged for Caldwell to be personally served with process in Colorado through a private process server, DeWayne Perdew. The return of service filed with the trial court reflects that Perdew hand-delivered process to Caldwell in Jefferson County, Colorado on July 30, 1989, and was supported by Perdew's affidavit. Caldwell contends that he was never served with process, and as a result, did not file an answer. When Caldwell did not answer, Barnes obtained a \$15,500,000 default judgment against him.

In 1992, Caldwell filed a petition for a bill of review in the trial court, claiming he was never served with process. In support of his claim, Caldwell submitted (1) an affidavit stating that he had never been served; (2) an affidavit

from Perdew in which Perdew contradicted his earlier affidavit by stating that he had not, in fact, ever served Caldwell; (3) an affidavit from Perdew's ex-girlfriend, Lucy Lackey, corroborating Perdew's retraction by stating that Perdew could not have served Caldwell on July 30, 1989, because on that date he was attending a George Strait concert with her in Cheyenne, Wyoming; (4) the affidavits of four litigants in unrelated lawsuits, whom Perdew claimed to have served on July 30, 1989, but who similarly denied service; and (5) the affidavit of a landlord stating that no one resided at an apartment where Perdew claimed to have served a tenant with process on that same date.

In June 2000, the trial court conducted a pretrial hearing on the question of Caldwell's service. At the hearing, Caldwell offered evidence suggesting that he was never served with process, including the above-mentioned affidavits, Caldwell's own testimony that he was not served with process on July 30, 1989, or at any other time, and Lackey's testimony that on July 30, 1989, Perdew was with her in Wyoming and therefore did not serve process on Caldwell. During cross-examination, however, Caldwell admitted that in the past he had purposely allowed approximately a dozen default judgments to be taken against him, even after being properly served with process, because defaulting was often less costly than defending the underlying suits. In addition, during Lackey's cross-examination, she admitted that she could not remember who prepared her affidavit or where it was signed. She also testified that she could not produce receipts and concert ticket stubs supporting her trip with Perdew to Wyoming, because in 1991, she had relinquished them to Caldwell's agents after they arranged to meet with her at the Taco Bell where she worked in Colorado. Caldwell, however, never introduced any receipts or ticket stubs into evidence to support Lackey's claims.

After the pretrial hearing, the trial court made the following factual findings: (1) the credibility and interest of the witnesses present at the hearing was in issue; (2) Caldwell had a practice of being served with process and not answering, thus allowing default judgments to be entered against him; (3) Perdew gave at least two completely contradictory statements under oath regarding service; (4) Lackey's credibility had been called into question; and (5) Caldwell had been served. Based on these findings, the trial court declined to proceed to trial and denied Caldwell's bill of review. The court of appeals affirmed the trial court's judgment. Caldwell petitioned the Texas Supreme Court for review. Assume that the Texas Supreme Court grants the petition for review, write the opinion for the Court (excluding the factual recitation) fully explaining your reasons for affirmance or reversal of the lower courts.

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2. Martin Linen Supply Company, Inc. ("Martin") picked up, cleaned and redelivered cleaned laundry to the Uvalde Country Club Inc. ("Uvalde") in Uvalde, Texas. Martin filed a sworn account lawsuit to recover for its services alleging that Uvalde had failed to pay the various invoices sent to it by Martin for the services. Interestingly enough (and unknown to Martin's lawyer), Uvalde had in fact paid for the services. Martin's original petition alleged that the defendant, Uvalde, could be served by serving its registered agent, "Henry Bunting." at his business address, 137 West Nopal Street, in Uvalde, Uvalde County, Texas. The citation was prepared as noted in the original petition and was given to the sheriff to serve Uvalde, by serving its registered agent, "Henry Bunting" at the above address. The filed sheriff's return on the back of this citation showed service on Uvalde by physical delivery to "Sam Jones" its registered agent at the above mentioned address. Uvalde failed to answer, and the trial court rendered a default judgment reciting proper service on Uvalde in favor of Martin. Five months later, Uvalde comes to you for advice it on its legal options to set aside or to avoid the effects of the default judgment. What advice

do you give Uvalde? Fully explain. Assuming that you are successful in getting the default judgment set aside, what should you include in Uvalde's answer to the lawsuit? Briefly explain.

Blank ruled lines for writing an answer.

3. In April, 1981, Murph filed suit against Jones in Cause 3424B in 87th District Court in Leon County to partition certain real estate in Leon County. On June 25, 1982, the parties appeared in court and entered an agreement to settle the case, and agreed to submit thereafter to an agreed judgment of the court. Soon thereafter Murph repudiated the agreement to settle and so informed the trial court and provide the court with the reasons for the repudiation. The matter was then set for a hearing on August 6, 1982. Murph appeared and the judge advised him that he was going to enter a consent judgment without consent of Murph and over his objections. Thereafter the judge entered final decree in Cause 3424B dated August 6, 1982, dividing the property as previously agreed by the parties. Murph filed a motion for new trial



the next day which was overruled by court order the day after it was filed. On August 5, 1983, Murph filed a case, Cause 9248, as a Bill of Review. On September 21, 1983, Murph filed a Motion to Vacate the Judgment in Cause 3424B, and Withdraw Murph's Petition for Bill of Review (Cause 9248). On December 16, 1983, after hearing, the court granted Murph's motion for nonsuit on Murph's petition for Bill of Review (Cause 9248), and denied Murph's motion to vacate the August 6, 1982, judgment in Cause 3424B. Murph timely appealed to the court of appeal asserting that the trial court erred in overruling his motion to vacate the 1982 consent judgment [in Cause 3424B] because the undisputed evidence discloses that the court knew before it entered the consent judgment that Murph did not consent to the entering of such judgment and the court therefore lacked the authority to do so. The record discloses that the parties agreed to the terms of the judgment on June 25, 1982, but that Murph withdrew his agreement and consent prior to August 6, 1982, and so informed the judge. The trial judge nevertheless rendered the previously agreed consent judgment. You are the justice of the court of appeals assigned to write the opinion of the court. Write the opinion for the court (excluding the factual recitation) fully explaining your reasons for affirmance or reversal of the lower court.

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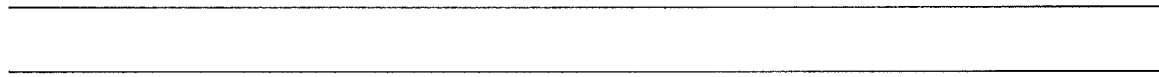
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Have a great summer!