

A COMPLETE TRIAL GUIDE

HOW TO PROSECUTE AND DEFEND A THEFT BY CHECK CASE



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HOT CHECK LAW

There are two types of criminal “hot check” cases that may be filed against a check writer in Texas; Issuance of a Bad Check and Theft by Check. Anytime someone issues a bad check, whether the check is for 10 cents or 10 million dollars, whether it’s for the simultaneous exchange of merchandise or a service or for a payment on account, whether it’s to pay a debt owed or to pay rent, the mere issuance of that bad check into commerce is a criminal offense. It is issuance of a bad check, a class “C” misdemeanor. A class “C” misdemeanor offense and is punishable by no jail time and a fine not to exceed \$500.

If the check is issued for the *simultaneous exchange* of merchandise or a service it is *also* theft by check and can be filed as a higher criminal charge. It is theft by check only when the check recipient “relies” on the check being good at the moment it is passed and in return for the check gives up something of value. If the check is \$20-\$499.99 the offense is a class “B” misdemeanor punishable by up to 180 days in the county jail and/or \$2,000 fine. If the check is \$500-\$1499.99 the offense is a class “A” misdemeanor punishable by up to 1 year in the county jail and/or \$4,000 fine. If the check is \$1,500-\$19,999.99 it is a fourth degree felony punishable by up to two years in the state jail and/or \$10,000 fine. If the check is \$20,000- \$199,999.99 it is a third degree felony punishable by two to ten years in prison and/or \$10,000 fine.

A “hot check” can be both an Issuance of a Bad Check offense AND Theft by Check, meaning a check written for the simultaneous exchange of merchandise can be filed against the check writer as Issuance of a Bad Check AND be filed simultaneously as Theft by Check. A person can be convicted of Issuance of a Bad Check and convicted of Theft by Check by passing the *same* check. Since issuance of a bad check is NOT a lesser included offense of theft by check, it is not double jeopardy. (See Texas Penal Code, Article 32.41(g))

Section 32.41 of the Texas Penal Code - Issuance of a Bad Check

“(a) A person commits an offense if he issues or passes a check or similar sight order for the payment of money *knowing* that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.”

What does this mean? It means that if you *thought* you had sufficient funds in your account when you wrote a check, you did not commit a crime when the check bounced. It means that if you *knew* you had insufficient funds in your account when you wrote a check, you are committing a crime by passing that check (unless the check recipient *knows* it is insufficient. See Section 2 - Defenses)

How can the prosecution prove what you *knew* at the time you wrote the check? Section 32.41 further states:

“(b) This section does not prevent the prosecution from establishing the required knowledge by direct evidence; however, for purposes of this section, the issuer’s knowledge of insufficient funds is *presumed* (except in the case of a post-dated check or order) if:

(1) he had no account with the bank or other drawee at the time he issued the check or order or

(2) payment was refused by the bank or other drawee for lack of funds or sufficient funds on presentation within 30 days after issue and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

What does this mean? It means a jury or judge can *presume* you *knew* you had insufficient funds in your account when you wrote that bad check if your account was closed at the time you wrote the check or if the account was open, you did not pay for the check if it was presented to your bank within 30 days after you wrote it and you did not pay the check within 10 days after a certified letter was sent to you.

What if you did not receive the certified letter? It does not matter. Section 32.41 further states:

“(c) Notice for purposes of Subsection (b)(2) may be actual notice or notice in writing that:

(1) is sent by registered or certified mail with return receipt requested, by telegram with report of delivery requested, or by first class mail if the letter was returned unopened with markings indicating that the address is incorrect and that there is no current forwarding order;

(2) is addressed to the issuer at his address shown on :

(A) the check or order;

(B) the records of the bank or other drawee; or

(C) the records of the person to whom the check or order has been issued or

passed; and

(3) contains the following statement:

“This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.”

(d) If notice is given in accordance with Subsection (c), it is presumed that the notice was received no later than five days after it was sent.

So, the judge or jury can *presume* you *knew* you were writing a bad check if you did not pay the check after the check receiver told you it bounced or if a certified letter is sent to you and the check is not paid within 15 days after the letter is sent. It does not matter that you did not receive the letter. It just has to be sent to you.

Does this mean you are guilty? Absolutely NOT! It only helps the state prove your *state of mind*. It does not mean it actually WAS your state of mind. Remember, if you thought the funds

were in your account at the moment you wrote the check, you are not guilty of issuance of a bad check. The rest of Section 32.41 states:

“(e) A person charged with an offense under this section may make restitution for the bad checks. Restitution shall be made through the prosecutor’s office if collection and processing were initiated through that office. In other cases, restitution may, with the approval of the court in which the offense is filed, be made through the court.

(f) Except as otherwise provided by this subsection, an offense under this section is a Class C misdemeanor. If the check or similar sight order that was issued or passed was for a child support payment the obligation for which is established under a court order, the offense is a Class B misdemeanor.

(g) An offense under this section is not a lesser included offense of an offense under Section 31.03 or 31.04.”

So, what does this criminal statute mean? It means if you write a check and it bounces, whether by accident, mistake, or negligence there is a presumption you committed a criminal offense if you wrote and passed a check, it bounces because there were not sufficient funds in your account at the moment it was passed and it was not paid for within 15 days after a properly worded and mailed letter was sent to your address.

Section 31.06 of the Texas Penal Code - Presumption for Theft by Check

a) If the actor obtained property or secured performance of service by issuing or passing a check or similar sight order for the payment of money, (*knowing*) when the issuer did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, it is prima facie evidence of his intent to deprive the owner of property under Section 31.03 (Theft) including a drawee or third-party holder in due course who negotiated the check or to avoid payment for service under Section 31.04 (Theft of Service) (except in the case of a postdated check or order) if:

(1) he had no account with the bank or other drawee at the time he issued the check or order;
or

(2) payment was refused by the bank or other drawee for lack of funds or sufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

(b) For purposes of Subsection (a)(2) or (f)(3), notice may be actual notice or notice in writing that:

(1) is sent by registered or certified mail with return receipt requested or by telegram with report of delivery requested;

(2) is addressed to the issuer at his address shown on:

(A) the check or order;

(B) the records of the bank or other drawee; or

(C) the records of the person to whom the check or order has been issued or

passed; and

(3) contains the following statement:

“This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.”

(c) If notice is given in accordance with Subsection (b), it is presumed that the notice was received no later than five days after it was sent.

(d) Nothing in this section prevents the prosecution from establishing the requisite intent by direct evidence.

(e) Partial restitution does not preclude the presumption of the requisite intent under this section.

(f) If the actor obtained property by issuing or passing a check or similar sight order for the payment of money, the actor’s intent to deprive the owner of the property under Section 31.03 (Theft) is presumed, except in the case of a postdated check or order, if:

- (1) the actor ordered the bank or other drawee to stop payment of the check or order;
- (2) the bank or drawee refused payment to the holder on presentation of the check or order within 30 days after issue;
- (3) the owner gave the actor notice of the refusal of payment and made a demand to the actor for payment or return of the property; and
- (4) the actor failed to:
 - (A) pay the holder within 10 days after receiving the demand for payment; or
 - (B) return the property to the owner within 10 days after receiving the demand for return of the property

Texas Penal Code - Section 1.07 (19) - “Effective consent” includes consent by a person legally authorized to act for the owner.

Texas Penal Code - Section 2.05 PRESUMPTION.

When this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:

(1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and

(2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

(A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

(B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;

(C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

(D) If the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Issuance vs. Theft by Check- differences

For issuance of a bad check, the state has a presumption that the defendant “knew” insufficient funds whereas theft by check the state has prima facie evidence of defendant’s “intent” to steal if proper notice given according to the statute. This presumption and prima facie evidence is rebuttable and may be disregarded if the facts do not warrant.

THE STATE'S CASE

WITNESSES AND EVIDENCE

Witnesses:

- 1) **Eyewitness:** (Mandatory) The person who witnessed the passing of the check and can establish value of product or service (if theft by check). Without this witness, the state cannot prove who passed the check and cannot introduce the check into evidence.
- 2) **Notice Witness:** (Optional) The person who gave actual notice or sent a letter for notice of the bad check. Must have this witness in order to use the "presumption".
- 3) **Bank Employee:** (Optional) This witness can clarify defendant's account balance on the check date and can allow bank hearsay on the check to be introduced

Evidence:

- 1) **The bad check:** (Mandatory) Introduced through the eyewitness
- 2) **A copy of the notice sent:** (Optional) If state uses the presumption it must have a copy of the letter sent (unless the letter was returned) Introduced through the person who sent it.
- 3) **The returned notice or the signed return receipt:** (Optional) If state uses the presumption it must have either the unopened letter sent or the signed return receipt. Introduced through the person who sent it.
- 4) **Defendant's bank records:** (Mandatory) Need certified copy of defendant's bank records or live bank witness with a copy of the business records
- 5) **Defendant's bank signature card:** (Mandatory) Need certified copy of defendant's bank signature card or live bank witness with a copy of the business records
- 6) **A certified copy of D.L. or I.D.:** (Optional) If state's eyewitness cannot identify check writer in court state must have certified copy of D.L or I.D. for identification purposes.
- 7) **Bill of sale, invoice, evidence of sale** (If theft by check) Need proof of product or service sold or rendered along with fair market value of product or service

ELEMENTS OF OFFENSE

The state must prove the following elements for issuance of a bad check conviction:

1) The defendant _____ (defendant)

Weakness: Can state really prove beyond a reasonable doubt that the defendant passed the check? Any eyewitnesses? Any valid identification? Would the state want to accidentally convict a person who is a true victim of identity fraud?

2) on or about _____ (a certain date)

Weakness: Was the check post-dated? Was the date left blank to be filled in by someone else at a later date? Can the state be sure the check was passed on that particular date alleged?

3) in _____ (county), Texas

Weakness: Was check sent by mail? May allege county is was written or received.

4) did then and there issue or pass

Weakness: Was check pre-signed and passed for an amount without the authority of the signer? Was check written by an employer and cashed by the employee? How can state prove who signed it?

5) a check or similar sight order for the payment of money

Weakness: Was check to held as collateral and never intended to be used for the payment of money?

6) knowing that issuer does not have sufficient funds in or on deposit with the bank

Weakness: must have direct evidence showing defendant "knew" insufficient funds in account or must prove elements of the presumption (see below)

Weakness: must have bank records in evidence and proof defendant opened the account in question.

IF CANNOT PROVE KNOWLEDGE WITH DIRECT EVIDENCE THEN STATE NEEDS TO PROVE FOLLOWING EVIDENCE TO USE THE "PRESUMPTION"

7a) defendant had no account with the bank on _____ (check date)

Weakness: defendant's check may have been returned account closed... but the account may have been open and with sufficient funds when the check was written.

OR

7b) payment was refused by the bank for insufficient funds on presentation within 30 days after issue and issuer failed to pay within 10 days after receiving notice

Weakness: Must prove check was presented to bank within 30 days. If held longer, then

cannot use presumption

Weakness: Must prove notice was actually given to defendant or sent to defendant using certain language, to a certain address and using a certain type of mail.

DEFENSES

Each one of the following defenses means the check writer is **NOT GUILTY** of issuance of a bad check. The following are REAL defenses to the offense. Embodied in the trial questions are the PROCEDURAL defenses to the prosecution's case.

(1) CHECK WRITER "THOUGHT" THERE WERE SUFFICIENT FUNDS IN THE ACCOUNT WHEN THE CHECK WAS WRITTEN

If a check writer "truly" believes there were sufficient funds in the account when the check was written, there is no intent to commit a criminal offense. How can this be proved?

(a) Check register - If the check writer's register reflects a balance in the account greater than the check amount written, this constitutes written proof of check writer's mind set when the check was written. There may not have been sufficient funds in the account when the check was written, but if it can be proved beyond a reasonable doubt that the check writer "thought" there were sufficient funds, the judge/jury must acquit.

Example: If a check register says there is a balance of \$103.25 in the account after check number 108 and the next transaction is check number 109 for \$58.00, the resulting balance would be \$55.25. If check number 109 for \$58.00 bounces, in the check writer's mind there were sufficient funds in the account to cover it. This would provide proof that the check writer did not "know" there were insufficient funds in the account when the check was written.

(b) Testimony - If the check writer "threw" away the check register, the only evidence the check writer "thought" there were sufficient funds in the account is if the check writer testifies on the witness stand. The defendant need not testify in a criminal trial and it is up to the discretion of the defendant whether testifying is in the best interest. If the check writer makes a good witness, is presentable, honest-sounding, with nothing to hide and can present a solid defense, the check writer may testify that he "thought" the funds were in the account and if a judge/jury believes him, the judge/jury must acquit.

Example: I, John Doe, did truly believe that I had sufficient funds in my account when I wrote that check for \$84.58. I thought my direct deposit was made, but due to an error by my employer, it was not made. They have been making direct deposit like clockwork for 4 years without a problem. I didn't know about the problem until several weeks later.

The following examples are the most common ways a check accidentally bounces and the check writer is innocent of a crime:

1. Check writer has no control over the checkbook

If the check writer is the wife or husband or son or daughter or boyfriend or girlfriend of a person who maintains *sole control* over the checkbook, it's deposits, it's bank statements, it's check register and record keeping the check writer could bounce a check on the word of the controller that sufficient funds exist. If the person who maintains control over the checkbook indicates that sufficient funds exist in the account to write a check, the check writer is not committing a criminal offense since the check writer believes there are sufficient funds in the account when the check is written.

2. Joint accounts

If two or more people are signers on the account, make deposits into the account, write checks from the account, make ATM withdrawals and debit transactions from the account, it is possible that one hand doesn't know what the other hand is doing at a particular moment. A check writer may think there are sufficient funds in the account at the moment a check is issued, but that check writer may not have known that the other account holder simultaneously made a debit purchase or ATM withdrawal that made the account insufficient when the check was written. There is no intent to issue a bad check at that moment and the check writer is not guilty of a criminal offense if the check writer believed there were sufficient funds in the account at the moment the check was issued.

3. Depositing a bad check into an account

If a check writer deposits a check into their account and assumes that check was good and writes checks off that deposit, there is no criminal intent to issue bad checks if that deposited check bounces. Legally a deposited check is only good once the deposited check's bank honors it. It should not be considered real money until that time. However, check writers make the assumption the deposit is good and with honest intentions write checks with that assumption. This is no crime.

(2) CHECK WRITER HAD SUFFICIENT FUNDS IN THE ACCOUNT WHEN THE CHECK WAS WRITTEN, BUT NOT WHEN THE CHECK HIT THE BANK.

If the check writer had sufficient funds in the account at the moment the check was written, the check writer is not guilty of issuing a bad check if it bounces. Why? Because at the moment the check was written, it was good. It does not matter how much was in the account when the check hit the bank. Unless the check writer's intention all along was to withdraw the money after the check was issued just so it would not clear, no criminal intent to issue a bad check at the moment exists. How can this be proved?

(a) Bank Statement - Get a copy of the bank statement and look at the daily balance on the date the bad check was written. If that balance (minus any unpaid checks written prior to the one in question) is greater than the check amount written, there is no intent to issue a bad check.

Example: There is \$1000 in the checking account and a check is written for \$100 on April 10th leaving a balance of \$900. On April 12th the check writer's wife withdraws \$950 from the account before the \$100 check hit's the bank. There is only \$50 left in the account when the \$100 check hits the bank on April 13th for collection. The check bounces for insufficient funds.

Is the check writer "guilty"? Absolutely not! Unless it can be proven that the check writer intended on April 10th to withdraw that money from the account before the check hit the bank, a crime was not committed. The prosecution has the burden of proving the check writer's intent on withdrawing the money to cause a check to bounce on purpose.

Example: There is \$100,000 in the checking account and a check is written for \$100 on April 10th leaving a balance of \$99,900. On May 1st the account is closed because the check writer has been transferred to San Diego. The bank gives the check writer a cashiers check for \$98,000 to close the account. On May 4th the \$100 check hits the bank and is returned marked "account closed."

Is the check writer "guilty"? Absolutely not! When the check was written there were sufficient funds in the account. No crime was committed.

3. HOLD CHECKS: CHECK WRITER ASKED RECIPIENT TO "HOLD" THE CHECK FOR A PERIOD OF TIME.

When a person gives another person a "hold" check, it is understood that the check in question is NOT GOOD at that time. Therefore, there is no intent to issue or pass a bad check at that moment. The check is not a demand instrument, but rather a debt instrument. It is an I.O.U. It is not a criminal case. How can this be proved?

a) The Check- Look at the check date (written by the check writer) and look at the dates stamped on the check by the banks. If there is a large discrepancy in the dates, it is logical to assume that the check was "held".

Example: Henry writes a check for \$100.00 and asks Joe to "hold" it for 3 weeks. Henry dates the check April 15th. Joe holds the check for 3 weeks and deposits it into his account on May 8th. The check goes through the federal reserve system and reaches Henry's bank where it is marked "NSF" on May 10th. Has a crime been committed? NO! because Joe "knew" the check was no good when he took it on April 15th. There was no issuance of a bad check on April 15th. The bank stamp marks verify the check was "held".

If, however, Joe called Henry on May 8th (when Joe was ready to deposit the check into his account) and he asked Henry at that time, "Henry, is this \$100 check good NOW!" and Henry replies, "yes," then Henry is in effect issuing a bad check on May 8th. The offense date would be May 8th, not April 15th and Henry may be prosecuted for issuance of a bad check.

Normally, a "hold" check, since it is an I.O.U., is a civil matter if the check is not paid back.

4. STOP PAYMENT CHECKS: CHECK WRITER HAD SUFFICIENT FUNDS IN ACCOUNT WHEN CHECK WRITTEN.

When a person gives someone a check for a service or merchandise and that person stops payment on the check because they are dissatisfied with the service or merchandise, Texas law *allows* them to stop payment on the check SO LONG AS the check writer had sufficient funds in the account when the check was written, the check writer had no intent to stop payment on the check BEFORE it was issued and the property is returned upon demand by the check recipient or there is a valid civil dispute concerning the merchandise or service rendered.

Example: Joe gets his car repaired at ABC repair shop. The bill is \$320. He has \$500 in his checking account. He writes a check for \$320. The next day, his car stalls and Joe is upset because he paid \$320 to correct this problem. He goes to his bank and stops payment on the check. Has a crime been committed? No. Joe had sufficient funds in his account when the check was written, had no intent to stop payment before he issued it and has a valid civil dispute with the repair shop.

Example: Joe gets his car repaired at ABC repair shop. The bill is \$320. He has only \$100 in his account, but he needs his car immediately and writes the check hoping to cover it later. The car breaks down the next day and he stops payment on the check. It costs him another \$400 to get the car fixed properly by another repair shop. Joe refuses to pay ABC repair shop since they did not fix his car correctly and it cost him \$400 to get it fixed right. Did Joe commit a crime? Yes, he did. He did not have sufficient funds in his account when he wrote ABC the check for \$320, therefore, he deceived ABC into thinking they were receiving money for the repairs before they relinquished the car back to Joe.

Example: John buys a bed for \$2000. He writes a check for \$2000 and has \$10,000 in his checking account. John sleeps in the bed for a couple of days and doesn't like the way it feels. He stops payment on the check. The furniture store demands their \$2000 or the return of the bed. John does neither. Has a crime been committed? Yes, it has. Even though John had sufficient funds in his account when the check was written and even though he had a valid civil dispute with the furniture company, John did not return the merchandise upon demand.

9. FEES CHARGED BY THE BANK

10. FORGETTING TO LOG IN A TRANSACTION

11. DIRECT DEPOSITS

12. LOST OR STOLEN CHECKBOOK

13. ATM OR DEBIT CARDS

14. OVERDRAFT PROTECTION

15. POST-DATED CHECKS

16. STOP-PAYMENT CHECKS

17. AN ERROR IN BOOKKEEPING

18. ORDERED TO DO SO BY THE BOSS

19. BANK ERROR

20. DID NOT RECEIVE NOTICE

VOIR DIRE

Defensive Issues

Two-fold purpose:

1) **Weed out biased jurors** (Jurors who had bad experiences with check writers, or are so responsible they never bounced a check, or who never owned a checkbook to understand the problems that may arise)

2) **Plant seed in jurors minds** (Let them know state has burden of proving “knowledge” client was passing bad check, that accidents or negligence is not a crime, that mistakes happen to everybody’s checkbook)

Q. Who here thinks that when a check bounces, it is automatically a crime?

Why? It is not a crime when a check bounces by mistake. Let jury know that it is a crime only when the defendant “knows” the check is insufficient.

Q. Who here thinks that because an accidentally bounced check is not paid for the person must have committed a crime?

Why? Some people don’t read their mail, forget to take care of things, lose their jobs and can’t pay back. Let jury know defendant had to “know” the check was insufficient when written and it doesn’t matter why it was not paid back.

Q. Who here has ever bounced a check? Was it a mistake? Clear it up?

Why? They can relate to your client. Note the jurors who never bounced a check. The overly responsible ones may not be able to relate to your client’s problems

Q. Has anybody here been in trouble or knows somebody who has been in trouble for a bounced check?

Why? They can relate to your client. Note the jurors who have been in trouble

Q. Has anybody here “not” owned a checkbook?

Why? You don’t want a juror who can’t relate to check problems. Note the jurors who don’t own a checkbook.

Q. Has anybody here ever received a bad check? Was it paid back? Did you file criminal charges? Do you receive many?

Why? You don't want a juror who has received bad checks. Biased against you.

Q. Does everybody understand that bouncing a check in and of itself is not a crime, it is “knowingly” bouncing a check that is a crime?

Why? Plant the seed that state has heavy burden of proving “knowingly”

Q. If a woman had a million dollars in her checking account and writes a check for \$100 and that check bounces because the husband withdraws all the money when the check hits the bank and a certified letter is sent to the woman and is signed by the husband who divorces her and never gives her the letter, even though the state has a presumption of guilt, would you find her guilty?

Why? Plant seed that presumption is just a presumption, nothing more

Q. Does anybody think that just because the state brings into evidence a check with my client's name on it and purportedly signed by my client that my client must have passed the check?

Why? Plant the seed that it could be a forgery

Q. Can anybody here tell me what the number one consumer complaint to the Federal Trade Commission was in the year 2001? (Identity Theft)

Why? Plant the seed that your client could be victim of identity theft

Q. Has anybody here been one or knows one of the 85,680 victims of identity theft in the U.S. in 2001 or has ever been a victim in the past?

Why? Those jurors can understand the state has a great burden to prove who passed the check

Q. Can everybody here picture a situation where your checks and drivers license are lost or stolen and someone uses them to pass a check signing your name?

Why? Plant the seed that that is how forgers commit the crime of forgery

Q. Does anybody think that just because the state brings into evidence some bank records with my client's name on it and a signature card that purports to be my client's signature that my client must have opened that account?

Why? Plant the seed that it is possible for an identity thief to go into a bank, open an account under your client's name using your client's identification

Q. Does anybody think that just because a check is returned “unpaid” that it automatically means that the check was NSF or AC?

Why? Plant the seed that a check can be returned for a non-criminal reasons such as stop-payment, uncollected funds, refer to maker, requires two signatures or forgery

Q. Does anybody think that just because an “unpaid” check is not paid back that the

person should be found “guilty”?

Why? Plant seed that not everyone gets their mail, not everyone reads their bank statements each month and not everyone knows a check has bounced

Q. Does anybody believe that people who don't pay their bounced checks, or bills or other debts are “deadbeats”?

Why? Plant seed that people become unemployed, incapacitated, divorced, or experience unexpected expensive tragedies that prevent them from paying back

Q. Who here thinks a person is a criminal if they don't pay their credit card debts?

Why? Plant seed that person who can't pay for accidentally bounced check is no more guilty of a crime than someone who can't pay their credit card and files bankruptcy

Q. Who here thinks my client must be guilty of something or he wouldn't be sitting here today?

Why? Plant seed that this is an exercise in the judicial system and you just pulled someone off the street to see if a jury would convict simply because they are sitting there

Q. Who expects us to do or say anything during the state's trial?

Why? Explain state has full burden of proof. Defense can sit outside and wait

Q. Who would find my client “guilty” simply because he doesn't take the witness stand to explain his side of the story?

Why? Explain criminal trials only have one side and civil trials have two sides. Constitution says defendant's do not have to take the stand to defend themselves

Q. Is anybody here related to, know, or do business with the judge, prosecutor, witnesses, defendant or any other person associated with this court, merchant, D.A.'s office or otherwise?

Why? Don't want anybody who is biased against your client because they are family, friends, acquaintances, business associates, or customers

Q. Has anybody here ever been “falsely” accused of something and felt like they should not have suffered the consequences, like a traffic ticket?

Why? Plant seed that your client is being falsely accused of a crime

Q. Has anybody here experienced or can imagine an experience when (give client's defense such as hold check, post-dated check, stop payment, negligence, ATM withdrawal, error in check register, bank error, etc.. see defense chapter)? Do you think that is a crime?

Why? Whatever your client's defense is, plant the seed that this mistake happens to check writers all the time and it does not make them guilty of a criminal offense

Q. Does anybody here automatically believe that if a person accidentally bounces a

check, is sent a certified letter demanding payment and the check is not paid that they must be “guilty”?

Why? Plant the seed that just because the state can prove the “presumption” your client is not automatically guilty. It’s just a presumption of guilt and can be rebutted with evidence.

Q. Does anybody believe that bounced checks should be in civil courts like some states and not in criminal courts like Texas?

Why? Plant the seed that other states consider bad checks just a civil matter, not a criminal matter. So why should Texas make it a crime?

Q. Who here does not think they could be fair and impartial for any other reason?

Why? There may be something you missed as to why a juror would be prejudicial to your client’s interest

Q. Does anybody here own a business that has been through tough times?

Why? Business owners can’t pay their bills and file bankruptcy but are not considered criminals if the items they purchased are not paid for.

Q. Has anybody pre-signed checks and had somebody else write in the amounts and payee?

Why? No authority to do so and done by mistake without permission of signer

THE EYEWITNESS

To prove a person issued or passed a bad check, the prosecution needs to provide an eyewitness to the passing of the check. Without an eyewitness, the prosecution cannot prove their case. Why? Because the eyewitness is the only person who can identify the person passing the check and is the only person through which the central piece of evidence, the check, can be introduced.

A store supervisor or employee who did not witness the passing of the check is not a competent witness for this purpose. The Texas Rules of Evidence, Rule 602- Lack of Personal Knowledge states "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Having knowledge of a particular clerk's "procedure" in accepting checks is not relevant unless that supervisor witnessed the clerk accepting the check and witnessed the clerk following the check acceptance "procedure." In that case, the supervisor would become the eyewitness as if the supervisor accepted the check himself.

Questions for the Eyewitness/Check Receiver:

State your name, please?

Mr/s. _____ (Eyewitness), I'll direct your attention to _____ (check date) and ask you were you employed on that date?

Where were you employed?

What type of business is this?

Where is this business located?

What were your duties on _____ (check date)?

Mr/s. _____ (Eyewitness), at your place of business, is it in the regular course of business to accept checks for payment of goods and services?

As an employee of this business, did you personally accept checks for the payment of goods and services?

Again, I'll direct your attention to _____ (check date) and ask you whether or not you had any dealings with a person named _____ (defendant)?

Would you recognize the defendant _____ (defendant) as the person who came into your place of business on _____ (check date)?

(If the eyewitness says "no" then must use drivers license or ID as means of identification or some other eyewitness. If the answer was "no," skip the next four questions)

How do you recognize or remember the defendant _____ (defendant) in this case?

(Note: state must prove beyond a reasonable doubt that eyewitness remembers the defendant. Make sure judge/jury hears ample testimony concerning HOW eyewitness remembers this particular defendant)

Cross- How many customers do you see a day? Hundreds?

Cross- How many customers have you seen since _____ (check date)? Thousands?

Cross- How many times have you seen my client _____? Just once?

Cross- Are you telling this judge/jury that of all the thousands of people you've seen since _____ (check date), there is no doubt in your mind that my client is the one who came into your store?

Cross- Can you tell the judge/jury what the check passer was wearing?

Cross- Can you tell the judge/jury if the check passer was wearing glasses?

Cross- Can you tell the judge/jury if his hair was long or short?

Cross- Can you tell the judge/jury if he wrote right or left handed?

Cross- Can you tell the judge/jury that you have 20/20 vision?

Cross- Do you wear any corrective lens or glasses? (Were you wearing them?)

Cross- If I told you my client had an identical twin brother and that brother is the one who did business with you, is it possible my client was not in your store that day?

Cross- (If eyewitness says "no") So you are saying it is impossible?

Cross- Is it possible that someone other than my client passed you a check on that day?

Do you see the defendant _____ (defendant) in the courtroom?

Can you please point out the defendant _____ (defendant) for the judge/jury?

May the record reflect (if there is a record) that the witness has identified the defendant.

Did you accept any checks for payment on _____ (check date?)

MARK CHECK AS STATE EXHIBIT NUMBER 1

Mr/s. _____ (Eyewitness), I'll show you what has been marked as state's exhibit number 1 and ask you if you can identify it?

What is state's exhibit number 1?

Is it a check you personally received on _____ (check date)?

How do you recognize this check as a check you received on _____ (check date)?
(Are there any personal markings on the check such as eyewitness' initials?)

Cross- How many checks do you accept each day? Hundreds?

Cross- How many checks have you accepted since _____ (check date)? Thousands?

Cross- If I took all those checks you accepted and mixed them up with thousands of other checks, could you pick out each and every check you accepted out of those thousands or is it possible you could miss some?

Cross- So, there are some checks you accept when you can't tell later on that you accepted it.

Cross- Is it possible that some other clerk accepted this check?

(If this eyewitness did not accept this check, state cannot introduce the check)

Cross- How is it not possible?

Cross- Is it possible that in your haste, you may forget once in awhile to put your initials on a check you accepted?

Who passed this check to you?

(Note: if eyewitness does not remember the defendant by sight, the eyewitness would answer that he/she does not know who passed him/her the check and can only say that it is a person who owns drivers license or ID number ____)

The same defendant you identified in this courtroom?

Was this check passed in _____ county, Texas?

(Note: prosecution need not prove which precinct check was passed for issuance of bad check cases... just the county. See Chapter 45.019 (7)(b) of the Texas Code of Criminal Procedure.)

Why was this check given to you?

Except for some extra markings, is State's exhibit number 1 in the same or similar condition as when you took it?

Did the person passing the check/defendant fill out and sign the check in front of you?

Did the person passing the check/defendant say or do anything to lead you to believe that the check was not good?

To your knowledge or with your permission was the check a post-dated check?

To your knowledge or with your permission was the check a hold check?

Did you believe the check to be good when you took it?

Cross- Was the check passer cooperative when passing the check?

Cross- Did the check passer swiftly answer any questions you might have concerning his address or phone number being correct?

Cross- Did the check passer resist handing you a drivers license or ID?

Cross- Did the check passer seem to be in a hurry?

Cross- Did the check passer seem nervous or sweaty?

Cross- Did the check passer act as if there was something wrong with the check?

Cross- Did the check passer give you any indication he thought there were insufficient funds in the account?

Cross- Did the check passer act in any way, shape or form to indicate to you that he was attempting to pass a bad check?

Cross- When you called the bank to verify the funds, did the check passer run away?
(It's highly unlikely the eyewitness called the bank)

Cross- You did not call the bank? So all indications to you was that the check was good, is that correct?

Cross- Is it possible that the check passer had sufficient funds in the account when the check was passed at that very moment?

Cross- Is it possible that the check passer had thousands of dollars in that checking account at the moment that check was passed?

(Try to show there is no direct evidence that the check passer "knew" he was passing a bad check)

Would you have accepted the check had the person passing the check/defendant told you it was no good?

What are your normal procedures for accepting checks?

Did you follow those procedures upon accepting this check?

What procedure did you take in accepting this particular check?

Cross- How many checks have you accepted while employed at _____?

Cross- Is it possible that you did not follow this procedure on one of those (thousands) of checks?

Cross- Is it possible that you did not follow that procedure on this check?

Cross- Suppose I showed you a videotape of the manner in which you accepted checks. Are you still positive you follow those procedures with every single check?

Did you ask the person passing the check/defendant anything concerning his address or phone number?

What did you ask?

What steps did you take to assure you had a good address or phone number?

(If the eyewitness does not remember the defendant by sight, the following questions along with a certified copy of the defendant's drivers license or ID can be used to prove identity)

Cross- To your knowledge, did you have a correct address and phone number for the check passer when the check was passed?

Did you write down the check passers/defendant's drivers license or ID number on the check? From what document did you get this information, a drivers license or ID card?

Cross- Have you heard of flea market or fake ID's?

Cross- Is it possible that you were given a flea market or fake ID?

Cross- Have you heard of situations where a person loses their ID and the person who finds it goes to a flea market and gets an ID made that looks deceptively similar to a real Texas Department of Public Safety ID and it is made using the victims actual ID number?

Cross- Is it possible you accepted a fake ID?

Cross- If it was a real drivers license/ID that you accepted, is it possible that the real drivers license/ID was tampered with?

Cross- Have you heard of situations where a person loses their ID and the person who finds it cuts open the plastic covering and inserts their own photo onto the ID?

Cross- Is it possible you accepted an altered ID?

Cross- So it is possible that the ID number you wrote on the check could have been used by someone other the real owner of that number?

What is the drivers license or ID number that you wrote on the check?

(Note: If the license number was pre-printed on the check... the eyewitness may have looked at the drivers license/ID and simply circled the pre-printed number on the check. Make sure judge/jury believes eyewitness actually looked at the number before circling number pre-printed on check)

Was there a photo on the drivers license or ID?

Did you look at the picture on the drivers license or ID?

Did it match that of the check passer/defendant?

Cross- Are you telling this judge/jury that out of the thousands of checks that you accept, you look at each and every ID picture to see that it matches the check passer?

Cross- Are you telling this judge/jury that you are 100% positive that you looked at the picture on this check passer's ID and matched it with the check passer?

Cross- Is it possible that you did not match this particular check passer to the picture on the ID?

Cross- Show us exactly how you do this procedure with me. (Do a demonstration by passing the person a check)

Did you look at the signature on the drivers license or ID?

Did it match that of the check passer/defendant?

Cross- Are you telling this judge/jury that out of the thousands of checks that you accept, you look at each and every ID signature to see that it matches the check passer?

Cross- Are you telling this judge/jury that you are 100% positive that you looked at the signature on this check passer's ID and matched that of the check passer?

Cross- Is it possible that you did not match this particular check passer's signature to the signature on the ID?

(Note: a personal identification card issued by the store can be used only if a photo or signature appears on the card and it is matched to the check passers face or signature at the time of the transaction. Also, the state would need an eyewitness who issued that store card who can testify from personal knowledge who opened the account and received the card. If that second eyewitness cannot identify the cardholder by sight, he/she must have written down the customers drivers license or ID number on the application and matched the customers face or signature with the drivers license or ID- Why? Because anybody who has received a stolen drivers license can open an account with a store and purport to be the victim of the stolen license for the purposes of stealing)

Did you write any other information gathered from the drivers license or ID?

Did you write any other identifiers such as DOB, height, weight, eyes, hair?

After you accepted the check, what did you do with it?

AT THIS TIME YOUR HONOR, STATE WOULD INTRODUCE STATE'S EXHIBIT NUMBER 1 INTO EVIDENCE.

(The check can be introduced ONLY IF the bank markings, which are hearsay, are deleted. The state cannot introduce check with bank markings of NSF or AC on it unless it is introduced later through a bank employee after the proper predicate is laid.)

Objection, your honor. We object to the check's introduction with the bank's hearsay written on the check and request that it be stricken and blanked out before it is introduced.

WITH THE CHECK IN EYEWITNESS' HAND- What pre-printed name appears on the heading of the check?

What pre-printed address appears on the heading of the check?

Is there any other address written on the check?

What pre-printed phone number, drivers license number or social security number, if any, appears on the check?

Is there any other phone number written on the check?

What check number is this?

What date was written on this check?

To whom is the check made out?

For what amount was this check made in numerals?

For what amount was this check made in writing?

On what bank is this check drawn?

On what account number is this check drawn?

What name is signed on the signature line?

Cross- Is it possible a forger passed this check?

Cross- Is it possible my client did not pass this check?

Cross- Is it possible that a person's checks are lost or stolen and then used by a clerk who works in a store in order to purchase merchandise then blame the victim of the lost or stolen checks?

Cross- Is it possible that a friend or acquaintance of yours passed my client's lost or stolen check to you for merchandise and your store now blames my client for passing the check when in fact it was somebody you knew?

On the back of the check, are you familiar with the information written by your store?

What is the information you or your computer wrote on the back of the check?

To the best of your knowledge, was this check returned to your business unpaid?

(Eyewitness cannot testify concerning NSF or AC or any other bank marks since it is hearsay... it is simply "NOT PAID")

To your knowledge, has this check been paid to this date?

MARK CERTIFIED COPY OF DRIVERS LICENSE OR ID AS STATE EXHIBIT NUMBER 2

At this time, your honor, if there are no objections from the defense, the state would offer state's exhibit number 2, which is a certified copy of _____ (defendant's) drivers license/ID issued by the Texas Department of Public Safety and is certified by a custodian of records at the department and conforms with the Texas Rules of Evidence- Rule 902- Self Authentication and Rule 901(b)(7).

Mr/s. _____ (Eyewitness), I'll show you what has been marked as state's exhibit number 2 and ask you if you can identify it?

What is state's exhibit number 2?

What DL/ID number appears on this exhibit?

Is this the same DL/ID number that you wrote on check number ____ back on _____ (check date)?

Is there a photograph on state's exhibit number 2?

What is the name that appears on the DL/ID?

What is the address that appears on the DL/ID?

Is there a signature on the DL/ID?

In your opinion, does the signature on the DL/ID match the signature on state's exhibit number 1?

Are there any identifiers on the DL/ID?

What are those identifiers?

Did you write any of these identifiers on state's exhibit number 1?

Which ones did you write?

Is it your testimony that the person who passed you this check is the same person who appears on this DL/ID?

Cross- Are you aware that criminals steal people identities everyday?

Cross- Are you aware that the Federal Trade Commission stated that in the year 2001 that identity theft headed the top 10 consumer related crimes in the US?

Cross- Are you aware that 42% of the 204,000 consumer complaints related to identity theft?

Cross- Are you aware that in the United States, that equates to 85,680 victims of identity theft?

Cross- Is it possible that a criminal who committed identity theft can come to your store and pass a check and DL/ID using my client's identity?

Cross- Is it possible that somebody other than my client could have passed this check and DL/ID and you did not catch it?

Cross- Are you saying it is impossible?

Cross- So it is possible that my client is a victim of identity theft?

(If theft by check charge- ask the following questions)

Mark invoice, bill of sale, or any other exhibit relating to the transaction as state's exhibit number 2A

I'll show you what has been marked as state's exhibit number 2A and ask if you can identify it?

What is state's exhibit number 2A?

How can you tell state exhibit number 2A belongs to this transaction?

Was state exhibit number 2A this made during the regular course of business?

Was state exhibit number 2A made by someone with personal knowledge of the event?

Was state exhibit number 2A made at or near the time of the event?

Was state exhibit number 2A in your care, custody and control?

With no objections, your honor, state would introduce state's exhibit number 2A into evidence. Please describe in detail the property or services rendered.

What was the total cost to the defendant for the property or services rendered?

Do you regularly sell this product or service in your line of work?

Are you familiar with the fair market value for this product or service?

How are you familiar with the market value? (How long have you been selling it?)

What was the fair market value of the product or service the defendant received for the check?

Would you have given the defendant the product or service had you known the check in question was not good?

(If service rendered)- Is payment for your service expected immediately after rendition of that service?

After service is completed, was it a condition that you be paid before you left the premises or before the defendant left the premises?

Cross- Do you own the product (Did you provide the service yourself?)

Cross- Were you just the middleman in the transaction?

Cross- Has that product or service been sold for a lower price elsewhere?

Cross- Is there tax associated with the price?

Cross- (If product) Has that product ever been on sale? (So the value is lower)

Cross- (If product) Is product worth the price paid if defective? (Infer that is why it was not returned or real value is should be lower if defective)

Cross- (If service) Shouldn't the value of the service be dependent upon the quality of work performed?

Cross- (If service) Is service worth the price if the customer is not satisfied?

Cross- (If service) Is service worth the price if the customer had to go elsewhere to get the job done properly?

Cross- If the product or service was yours personally and some stranger off the street offered to buy it from you with a check, would you trust the check from a stranger without making some inquiries to his bank concerning the validity of the check?

Cross- Why did you not call the bank on this occasion?

Cross- Did my client steal from you or did he simply issue you a bad check?

Pass the witness, your honor.

THE NOTICE WITNESS

(If the state has direct evidence that the defendant “knew” there were insufficient funds in the account when the check was written, this witness is not necessary, but could bolster the state’s case. If the state has no direct evidence, this witness is necessary to raise a “presumption” under Article 32.41 of the Texas Penal Code that the defendant “knew” there were insufficient funds in the account when the check was written.)

State your name, please?

Mr/s. _____ (Eyewitness), I’ll direct your attention to _____ (check date) and ask you were you employed on that date?

Where were you employed?

How long have you been so employed?

Have you been continuously employed with _____ (Complainant) since that time?

As an employee of _____ (Complainant), what are your duties?

Is it one of your duties to contact by phone or send letters to people whose checks are returned to your store “unpaid”?

What is your normal procedure for handling a check that has been returned unpaid?

I’ll direct your attention to state’s exhibit number 1, and ask if you can identify it?

What is state’s exhibit number 1?

What date was this check passed to your store?

What date was this check deposited into your company’s bank account?

Cross- Did you personally make the deposit?

Cross- Did you personally receive the check back in the mail?

Cross- Is it possible that this check was not presented to the check writer’s bank within 30 days after it was issued?

To your knowledge, was this check presented to the check writer’s bank within 30 days after it was issued to your store?

(The state must prove that the check was presented to the defendant’s bank within 30 days after it was issued. Cannot use the “hearsay” bank markings to show when it was put through the bank system without the testimony of a bank employee. All this witness can say is that it must have gone to the check writers bank within 30 days because “we received the check back unpaid within 30 days after it was issued”)

Was this check returned to your store “unpaid” within 30 days after it was issued to your store?

(The state cannot “lead” the witness to testify that the check was returned “insufficient funds” or “account closed” since this information is hearsay. The check was simply returned “unpaid”.)

(If witness states that check was returned insufficient or account closed)- Objection, your honor, to references of bank markings on the check Those markings are hearsay and we ask that the witness’ answer be stricken (from any record) and the jury (if any) be instructed to disregard. The check may have been returned “unpaid”, meaning it could have been returned unpaid for “uncollected funds”, “forgery”, “refer to maker”, “requires two signatures”, “stop payment” or

“unable to verify signature.”, your honor.

When you received state’s exhibit number 1 back “unpaid” what steps did you take to clear up the “unpaid” check?

What attempts did you make to contact the check writer?

Did you contact the check writer by phone?

If so, what was your conversation?

Cross- Do you know the check writer personally?

Cross- Do you recognize the check writers voice?

Cross- Is it possible that you did not actually talk to the check writer, but to someone else who lives at the residence you dialed and that person purported to be the check writer?

If not, did you leave messages and in what manner? To a person? Machine?

Did you try to contact the check writer by mail?

What method of mail did you use?

(To use the presumption the state must prove - a) the check writer received actual notice of the unpaid check OR b) that a letter was sent by either (1) registered or certified mail with return receipt requested or (2) by telegram with report of delivery requested or (3) by first class mail if the letter was returned unopened with markings indicating that the address is incorrect and that there is no current forwarding order. Texas Penal Code Section 32.41 (c)(1))

Do you have a copy of the letter that was sent to the check writer?

MARK A COPY OF THE LETTER SENT AS STATE’S EXHIBIT NUMBER 3

(State must have a copy of the letter sent, otherwise, it could have been a letter thanking the check writer for their business or asking the check writer for the money on the unpaid check, but not in the statutory language required)

I’ll show you what has been marked as state’s exhibit number 3 and ask you if you can identify it?

What is state’s exhibit number 3?

Is this the same letter you sent to _____ (Defendant)?

Is this the same letter you send to every person whose checks bounce?

(The letter must have the following language to be used for the presumption: “This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.” Texas Penal Code, Section 32.41 (c) (3))

If there are no objections, your honor, state would offer state’s exhibit number 3 into evidence.

To what address did you send the letter?

(To be used for the presumption the letter must be sent to an address shown on a) the check, b) the records of the bank or c) the records of the person to whom the check has been passed according to the Texas Penal Code Section 32.41 (c)(2))

Where did you get that address?

Did you receive the return receipt requested or the entire letter back?

MARK THE RETURN RECEIPT OR UNOPENED LETTER AS STATE’S EXHIBIT NUMBER 4

I'll show you what has been marked as state's exhibit number 4 and ask you if you can identify it?

What is state's exhibit number 4?

(If it's the entire letter) Is this the same letter you mailed to the defendant on or about _____ (check return date)? OR

(If it's the return receipt) Is this the return receipt you requested on the letter you mailed to the defendant?

How do you know? (Look at the ID numbers)

If there are no objections, your honor, the state would offer state's exhibit number 4 into evidence.

(If return receipt)

Can you tell the judge/jury if you can read the signature, if any, on state's exhibit number 4?

What signature or name appears on the signature line?

Cross- Is it possible that somebody else signed the check writer's name like a wife, child, friend or a forger?

(If entire letter returned)

Was state's exhibit number 4 returned to you unopened?

Is it your opinion that the post office attempted to get this letter to the person and address written on the letter?

Have you had any other contact with the defendant?

To your knowledge, has this check been paid?

(If check not paid within 15 days after the written notice is sent or 10 days after actual notice given, then presumption kicks in. Section 32.41 (b)(2) says check writer must pay within 10 days after notice received and Section 32.41 (d) says written notice is presumed received no later than 5 days after it was sent.)

BANK EMPLOYEE

(The state must introduce the check writer's bank records into evidence to show that the check writer had a closed account or insufficient funds in the account on the day the check was written. The state must also prove the checking account was opened by the check writer and not some imposter, forger or identity thief.)

Introducing the bank records by affidavit (Without a live witness):

MARK THE CHECK WRITER'S BANK RECORDS AND SIGNATURE CARD AS STATE'S EXHIBIT NUMBER 5

At this time your honor, the state would offer state's exhibit number 5 into evidence, which is the bank records of _____ (defendant) of _____ (bank), account number _____, for the months of _____ through _____ along with the signature card in accordance with Section (10) Business Records Accompanied by Affidavit of the Texas Rules of Evidence Rule 902. (Self-Authentication)

Objections, your honor. The state did not give the defense at least fourteen days notice prior to trial as per Rule of Civil Procedure 21a - Section 10, Business Records Accompanied by Affidavit- of the Texas Rules of Evidence .

Texas Rules of Evidence - Rule 902 -Section (10) Business Records Accompanied by Affidavit.

(a) Records or photocopies; admissibility; affidavit; filing.

Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7), shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to commencement of trial of said cause.

(b) Form of affidavit. A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No. _____

The State of Texas)
vs.)
Defendant) _____ County, Texas

A F F I D A V I T

Before me, the undersigned authority, personally appeared, _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____ 20____.

Notary Public, State of Texas

Notary's printed name

My commission expires:

Texas Rules of Civil Procedure - Rule 21a. Methods of Service

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, **either in person or by agent** or by courier receipted delivery **or by certified or registered mail**, to the party's last known address, or by **telephonic document transfer** to the recipient's current telecopy number, or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or by telephonic document transfer, three days shall be added to the prescribed period. Notice shall be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or attorney of record, or the return of a officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service.. Nothing herein shall preclude any party from offering proof that the notice or

instrument was not received, or, if service was by mail, that it was not received within 3 days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

Texas Rules of Evidence - Rule 803 - Hearsay exceptions; availability of declarant immaterial

The following are not included by the hearsay rule, even though the declarant is available as a witness:

Rule 803(6) *Records of Regularly Conducted Activity*. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

Introducing the bank records with a live witness: (Optional)

Questions for the bank employee:

State your name, please?

How are you currently employed?

How long have you been so employed?

What are your duties at _____ bank?

Where is this bank?

Is your bank licensed to do business in _____ county?

Does your bank offer checking accounts to the public-at-large?

Does your bank offer loans, CD's, and other services consistent with other banks in _____ county?

Are customers checking account records kept in the regular course of business?

MARK THE CHECK WRITER'S BANK RECORDS AND SIGNATURE CARD AS STATE EXHIBIT NUMBER 5

I'll show you what's been marked as state's exhibit number 5 and ask you if you can identify it?

What is state's exhibit number 5?

Are these the checking account records and signature card of _____ (defendant) for the months of _____ through _____ ?

Are those records made in the regular course of business?

Are those records made at or near the time of the event?

Are those records made by someone with knowledge of the events contained within?

At this time, your honor, if there are no objections, state would offer state's exhibit number 5 into evidence.

When did _____ (defendant) open the account?

Is this account still open or is it closed? If closed-- when?

If closed-- why was it closed?

If closed-- Did you make the account holder aware of the closure?

Who are the signers on the account?

Did you get the signature of the person(s) who opened the account?

Did you get any identifying information from the person(s) who opened the account such as address, phone numbers, drivers license or ID number, social security number, etc?

Could you recognize the person who opened this account?

(If so, do you see that person in the courtroom today? Could you point him out for the judge/jury?)

Cross- Do you know for a fact, that my client opened this account?

Cross- Did you actually witness my client opening this account?

Cross- If so, how can you remember my client opening that account?

Cross- Is it possible that someone other than my client came into your bank, used my client's ID and opened an account purporting to be my client?

Cross - Have you heard of the numerous customer complaints concerning identity theft in this country?

Cross- What measures does your bank take to be absolutely sure that they are opening an account for the person who is not using a victim's identification?

Cross- Do you use the same criteria when opening a checking account as you do when giving someone a loan for \$50,000?

Cross- Do you check references, addresses, phone numbers, tax returns, assets and liabilities, outstanding debts, criminal records and job verification before opening up a checking account?

Cross- Are you telling this judge/jury that you scrutinize a person with background checks, credit checks, job verification, income verification, assets, bank accounts and character references when you give someone a loan, but you do none of these things when opening up a checking account?

Cross- What does your bank verify?

Cross- Has your bank ever been accused by a victim of identity theft of opening a checking account for a thief by using the victim's identity?

Cross- Have you heard of other bank's who opened up checking accounts for people who stole someone's identity and the victim of the identity theft is charged with writing bad checks because of that identity thief?

Cross- Is it possible that my client did not open this account?

Cross- Are you aware of the forgery problem in this county?

Cross- Approximately how many forgery claims does your bank get each month?

Cross- Is it possible for someone to pass a forged check and as a result getting the victim of the lost or stolen checks into criminal trouble for the forged check?

Cross- Do you know for a fact that my client passed state's exhibit number 1?

Cross- Is it possible that this is a forged check?

What is the account number for state exhibit number 5?

Was there any overdraft protection for this account?

If so, what were the conditions and for how much protection?

I'll direct your attention to state's exhibit number 5, and ask if you can tell the judge/jury what

the defendant's account balance was on _____ (check date)?

How did you arrive at that figure?

So, on _____ (check date), the defendant only had \$____ in the account to spend.

Cross- How many checks bounce per day at your bank?

(This witness is an expert on bad checks. Try to show not all people who bounce checks are criminals... people do make mistakes and this could have been a mistake)

Cross- How much money does your bank make per bad check?

Cross- What steps do you take to discourage bounced checks or is it in your bank's interest to allow it to happen since your bank loses nothing by kicking the check back?

Cross- Do you think that every bad check is written intentionally?

Cross- So it's possible that a check can bounce by mistake?

Cross- Would you consider all people who bounce checks criminals?

Cross- So it's possible to bounce a check and not be considered a criminal?

Cross- Do you believe that most people bounce checks by accident or by intent?

Cross- Have you ever bounced a check by mistake?

Cross- If so, would you consider that a crime?

Cross- Do you have any knowledge whether this check passer "knew" there were insufficient funds in this account when the check was written?

Cross- Is it possible this check was bounced by mistake?

If a person wanted to know their daily balance, is there a convenient way to find out?

Does your bank charge a fee for a bounced check?

How much is that fee?

Does your bank send out a statement to its customers each month?

Cross- In your opinion, what percent of people review their bank statement each month?

Cross- Is it possible for a check writer who bounces a check to not know the check has bounced?

Does this statement reflect the bank fees such as an NSF fee?

Does your bank send out a separate notice to the account holder if a check bounces?

What does that notice say?

To your knowledge, was the defendant sent out a bank fee notice for an NSF check?

I'll show you what has been marked as state's exhibit number 1, and ask you if you can

identify it? *(Assuming it has not been introduced yet, the following questions will allow the bank markings to be introduced, whereas, through the eyewitness, the bank markings had to be deleted as hearsay)*

Was state exhibit number 1 drawn on your bank?

When was state exhibit number 1 presented to your bank for payment?

Did your bank honor or dishonor this check?

Why was this check dishonored?

What marking did your bank attach to this check after this check was presented for payment?

What marking does the other banks in the federal reserve system place on checks when they are routed to your bank for payment?

Are these markings made in the regular course of business?

Are these marking made at or near the time of the event?

Are these markings made by someone with personal knowledge of the events?

At this time your honor, state would introduce state's exhibit number 1 into evidence if there are no objections?

Can you please tell the jury why this check was refused for payment?

Pass the witness, your honor.

CLOSING ARGUMENT

CASE LAW

Webber v. State 14-99-00234-CR

OBJECTIONS

Objections to the form of the question:

1. **Ambiguous** (can't understand the question or figure out the question)
2. **Compound** (more than 1 question asked in one sentence)
3. **Too general** (opens up a narrative answer-- be more specific in the question)
4. **Calls for narrative answer** (question allows witness to ramble)
5. **Asked and answered** (used to prevent repetitive direct)
6. **Misquotes a witness** (don't let examiner change witness' testimony and accept as truth)
7. **Document speaks for itself** (stops examiner from reading from the document)
8. **Leading** (answering for witness)
9. **Argumentative** (cannot badger witness to change story)
10. **Assume facts not in evidence** (don't let witness make an assumption a fact)
11. **Calls for speculation** (don't let witness guess)
12. **Calls for conclusion** (may need expert witness to draw conclusion)
13. **Calls for inadmissible opinion** (same)

Objections to offered evidence:

1. **Irrelevant** (evidence to make a fact that is of consequence more or less probable)
2. **Incompetent** (not eligible to testify)
3. **Hearsay** (out of court statement used to prove the truth of the matter asserted)
4. **Insufficient foundation** (need preliminary facts proved before enter evidence)
5. **Improper impeachment** (bias, prejudice, lack of senses, convictions, prior inconsistent, character)
6. **Improper rehabilitation**
7. **Cumulative**
8. **Not the best evidence** (writings, recordings and photographs)
9. **Cross-examination beyond scope of direct**
10. **Redirect beyond the scope of cross**
11. **Privileged material**
12. **Improper predicate** (need eyewitness to introduce physical evidence)
13. **Improper chain of custody** (need to prove each person who had hands on evidence until reaches court)