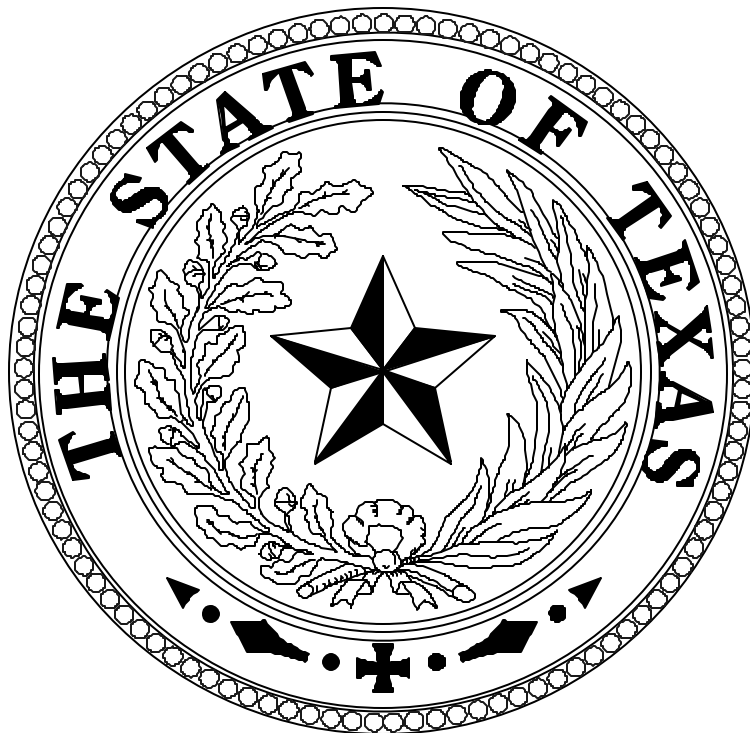


Examinee  
Number

Exam  
Date 2/2003

# Procedure & Evidence Questions



## TEXAS BAR EXAMINATION

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**YOUR ANSWERS MUST BE LIMITED TO THE 5 LINES PROVIDED AFTER EACH QUESTION. ANYTHING MORE THAN 5 LINES WILL NOT BE GRADED.**

## **CIVIL PROCEDURE AND EVIDENCE**

Pat, doing business as “Wonder Widgets,” is a retailer of specialized high tech widgets. Her store is in Fort Worth, Tarrant County, Texas. These widgets only function if constantly maintained at a regulated temperature. They must be handled carefully at each stage of the commercial chain by the manufacturer, shippers, wholesalers, and retailers.

Pat has two wholesale suppliers, Don Ho Wholesale Supply, Inc. (“Don Ho”) and Jim Dandy Specialty Warehouse, Inc. (“Jim Dandy”). The wholesalers warrant that the widgets have been kept continuously at the approved temperature. Both operate under identical contracts with Pat to deliver widgets, per her orders, to her warehouse in Tarrant County, Texas. Don Ho is incorporated and located in Kansas. Jim Dandy is incorporated in Texas and its principal office is in Denton County, Texas.

Pat has experienced numerous complaints from her customers about the widgets not performing as they should, allegedly because the temperature at which they have been stored has deviated from the approved temperature. Pat has received numerous returns of widgets and suffered serious loss of business as a result. Pat wants to bring one suit against both Don Ho and Jim Dandy.

- 1. Assume that Pat files suit against Don Ho and Jim Dandy in a Texas state district court in Tarrant County. What basis does Pat have for maintaining personal jurisdiction over Don Ho in a Texas state district court? Explain fully.**

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2. **Many of Pat’s most important customers are major employers in Tarrant County. Their employees are outraged at the widget failures. Critical news coverage of the failure of widgets in several high technology businesses has been extensive in print and broadcast media in the county. Aside from mandatory or permissive venue issues, do Defendants have any other basis for a change of venue and, if so, what is required to bring the argument before the court? Explain fully.**

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3. **Jim Dandy was properly served with citation and mailed the suit papers and citation to its attorney. The package, however, was misdelivered by the US Postal Service. Jim Dandy did not file an answer. Pat obtained a default judgment against Jim Dandy in the amount of \$500,000. Describe one remedy that Jim Dandy may have to attack the default judgment in the trial court, and the time deadlines, if any, for such remedy. Explain fully.**

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4. **Don Ho files a timely answer and also files a counterclaim against Pat for accounts she has not paid. She had bought widgets from Don Ho on account. What elements must Don Ho satisfy to meet the requirements for bringing a suit on a sworn account under TRCP 185? Explain fully.**

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5. **Don Ho's counterclaim against Pat met all requirements for a suit on a sworn account. Pat filed a general denial. Without offering any supporting evidence on his counterclaim, Don Ho moves to preclude Pat from offering any evidence at trial in defense of his counterclaim. How should the court rule? Explain fully.**

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**6. Pat has established venue on claims against Jim Dandy because their contract specified venue in Tarrant County, Texas. Because Don Ho was an out of state corporation, however, there was no venue clause in the contract between Pat and Don Ho. Does Don Ho have any valid objections to venue? Explain fully.**

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**7. Pat designated Level 2 of the Discovery Control Plan for this case. Don Ho's counterclaim for damage to business reputation exceeds the damages prayed for by Pat. Don Ho believes that Level 2 does not allow sufficient discovery for his counterclaim. What, if any, options does Don Ho have to adjust the Level of Discovery? Explain fully.**

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**8. List three items of information that must be provided if requested under a Rule 194 Request for Disclosure, and state when the response is due.**

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**9. Assume that this is still a Level 2 Case. A deposition of a witness is now entering the 60<sup>th</sup> hour of cumulative time taken thus far in deposing witnesses, by the side examining this witness. What objection or instruction, if any, is available to counsel who wants to end the deposition? Explain fully.**

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**10. Defendant Jim Dandy wants to physically view and examine the refrigerated facility where Pat stored her widgets. Pat objects. What valid options does Jim Dandy have to obtain access to Pat's storage facility? Explain fully.**

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**11. Don Ho's designated expert witness reviewed a report of Don Ho's consulting expert witness. At his deposition, Don Ho's expert testified that he reviewed this report. Pat immediately requests that Don Ho produce the report of the consulting witness. Don Ho declines to produce it. How should the court rule? Explain fully.**

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**12. After full discovery, Pat failed to produce any evidence of defect in the widgets. What pretrial procedures are available to Don Ho to possibly avoid the necessity for a trial? Explain fully.**

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**13. As the jury selection process begins, Don Ho’s counsel notices that the jurors on the first three rows appear less sophisticated than those on the last three rows. He believes sophisticated jurors would be more favorable to Don Ho’s case. What, if any, procedural options does Don Ho’s counsel have? Explain fully.**

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**14. During jury selection in a state district court, how many peremptory challenges does each Defendant in this case have? Explain fully.**

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**15. The court granted Jim Dandy’s motion in limine precluding references to other litigation filed or pending against Jim Dandy. In opening statement, Pat’s attorney referred to the fact that Jim Dandy had been sued at least 10 times, “so he ought to feel at home in the courtroom.” What valid objections or motions are available to Defendant Jim Dandy and when should they be asserted? Explain fully.**

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**16. Jim Dandy made a written request that Pat produce, for inspection, her employees’ written reports evaluating the function of the widgets she purchased from Jim Dandy after they were returned to her by her customers with claims that they were defective. Pat responded that she lost the reports and could not find them. Jim Dandy believes that it has been prejudiced in not being able to review these reports. What relief, if any, is available to Jim Dandy to cure the arguable prejudice? Explain fully.**

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**17. Pat has told her husband all about the refrigeration problems at her business and what was in the lost records. Her husband was not involved in the business and had no part in the disappearance of the records. Don Ho takes the deposition of Pat's husband to find out everything she told him about the claims in her lawsuit and the missing records. Pat objects to such inquiries and asserts the spousal privilege. How should the court rule? Explain fully.**

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**18. The jury returns a very large verdict for Pat. Defendants feel that it is a result of emotion and is not supported by the evidence. What motions, if any, are available to Defendants to prevent the court from entering judgment on the verdict, and when must they be filed? Explain fully.**

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19. Defendants want to file a motion for new trial. What is the deadline for filing the motion?

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20. After judgment is entered, Defendants file a motion for new trial. What effect, if any, does this have on the court's plenary power over the judgment? Explain fully.

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**YOUR ANSWERS MUST BE LIMITED TO THE 5 LINES PROVIDED AFTER EACH QUESTION. ANYTHING MORE THAN 5 LINES WILL NOT BE GRADED.**

## **CRIMINAL PROCEDURE & EVIDENCE**

In January 2002, Child (age 9) tells her teacher that Defendant (Child's stepfather) had "touched her" and "hurt her down there." Teacher contacts the Austin Police Department (located in Austin, Travis County, Texas) to report the information. The police question Child, who maintains that she cannot remember where the offense occurred. The police immediately go to Defendant's workplace, where he is arrested without benefit of warrant.

After Defendant's arrest, he is warned of his rights by the police officers and then subjected to a custodial interrogation. Although Defendant refuses to give a written statement about the offense, he does make an oral admission that he has had sexual contact with Child. The police make note of Defendant's oral statement in their official offense report.

You are appointed by the Court to represent Defendant.

- 1. Under the circumstances noted above, is Defendant's oral statement admissible against him in a Texas criminal prosecution? Explain fully.**

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Defendant's bail is originally set at \$100,000. You file a writ of habeas corpus, and, after the hearing, the Court reduces the bail to \$25,000. However, the Court also imposes a bond condition that Defendant not directly communicate with Child or go near the residence of Child. You argue that the Court lacks authority to impose such a condition, in that it would require Defendant to move out of the home he shares with Child and her mother.

**2. Is this a proper condition of bond under Texas law? Explain fully.**

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The Travis County Grand Jury indicts Defendant for sexual assault of a child under the age of fourteen, alleging venue as Travis County, Texas.

**3. Is Travis County a proper venue for this case? Explain fully.**

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In a pre-trial motion, you contend that the arrest of Defendant was improper inasmuch as the police did not have an arrest warrant.

**4. Was Defendant's arrest improper? Explain fully.**

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As you prepare this case for trial, you discover that a defense witness is unavailable. You decide to file a first motion for continuance.

**5. List three items that you must allege in your motion for continuance.**

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You also file a pre-trial motion to suppress Defendant's custodial oral statement. After conducting a *Jackson v. Denno* hearing on the motion, the Court finds that since the statement was given after a full and voluntary waiver of Defendant's rights and is corroborated by other facts, it will be admitted into evidence.

**6. Is the Court's ruling correct? Explain fully.**

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Defendant instructs you to approach Prosecutor in order to discuss the possibility of a plea bargain. You are reluctant to do so because you do not wish for any such negotiations to be taken as an admission of guilt by Defendant and used against him at trial.

**7. Would such discussions, relating to a defendant's willingness to plead guilty, be admissible at trial? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

One month prior to trial, you make a written request upon the State to provide you with any “404(b) crimes, wrongs, or acts,” which they intend to introduce. The State refuses your request.

**8. What obligation, if any, does the State have to provide you such notice? Explain fully.**

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Prior to trial, you receive a certified letter from Prosecutor informing you that the State intends to offer what it terms an “outcry” statement of Child.

**9. What are the threshold admissibility requirements for an outcry statement? Explain fully.**

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Seven members of the jury array are African-Americans. Although none of these venire persons are stricken for cause, Prosecutor peremptorily challenges all seven.



**10. What procedure, if any, should you employ to contest this action by Prosecutor? Explain fully.**

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**11. What remedy should you request, if Prosecutor's peremptory challenges are ruled improper? Explain fully.**

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**12. Explain the difference between a challenge for cause and a peremptory challenge and list two examples of each.**

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The State subpoenas Defendant's wife as its first witness. Wife wishes to invoke her spousal privilege not to be called as a witness against Defendant.

**13. Can Wife be called as a witness against Defendant? If so, can Wife be compelled to testify against Defendant? Explain fully.**

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The State's next witness is Custodian. The following exchange occurs:

PROSECUTOR: How are you employed?

CUSTODIAN: I am the records custodian for Brackenridge Hospital.

PROSECUTOR: In response to a subpoena, did you bring records with you today which relate to a physical examination of Child?

CUSTODIAN: Yes, I did. They are marked as State's Exhibit One.

PROSECUTOR: Your honor, we offer State's Exhibit One.

DEFENSE LAWYER: Objection, your honor. Improper predicate.

COURT: Overruled.

**14. Is the Court’s ruling correct? If not, describe the proper predicate necessary to admit State’s Exhibit One?**

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As the State’s case-in-chief continues, the following exchange occurs:

PROSECUTOR: Your honor, the State of Texas calls Defendant. Only he can tell us what really happened.

DEFENSE LAWYER: Objection, your honor. Prosecutor knows full well that she cannot call Defendant to testify at this stage.

COURT: Ms. Prosecutor, unfortunately I must sustain the objection.

**15. Is the Court’s ruling correct? Would the ruling be any different at the penalty phase of Defendant’s trial? Explain fully.**

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**16. Would the Court’s ruling be the same if Defendant had voluntarily testified in the pre-trial *Jackson v. Denno* hearing? Explain fully.**

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As its final case-in-chief witness, the State calls Doctor. The following exchange occurs:

PROSECUTOR: Doctor, do you know Defendant?

DOCTOR: Yes, I do. I am a psychiatrist. Defendant consulted me concerning the allegations against him.

PROSECUTOR: Okay. Let me ask you some questions about those consultations, and what Defendant told you.

DEFENSE LAWYER: Objection, your honor. Privilege.

**17. How should the Court rule on your privilege objection? Explain fully.**

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After the State rests, you call Expert as your first witness. The following exchange occurs:

DEFENSE LAWYER: Doctor, please tell the jury what you do.

EXPERT: I am an expert in the topic of sexual offenses. I have made a study of the frequency of false reporting of such offenses by children. I think that in this case . . . . .

PROSECUTOR: Objection. The State requests to test this witness' credentials before the jury hears his testimony.

**18. Should the Court grant the State's request? What procedure should be followed if the Court grants the request?**

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Your next witness is Friend, and without any objection from the State, you elicit testimony from him regarding Defendant's character. During the State's cross-examination, the following exchange occurs:

PROSECUTOR: Let me ask you some questions about Defendant's criminal history. You know, don't you, that Defendant has been arrested numerous times?

FRIEND: No, I don't know that. This is the first time I've heard that.

PROSECUTOR: Well, let's go over this lengthy list of arrests and see if that refreshes your memory.

DEFENSE LAWYER: Objection.

COURT: Why are you interrupting us again, Counsel? The jury is entitled to know about your client.

**19. What is the proper objection to Prosecutor’s questions and how should the Court rule? Explain fully.**

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The jury finds Defendant guilty. Prior to trial, you filed a sworn application for probation on behalf of Defendant, alleging that Defendant has never before been convicted in this State, any other state, or any court of the United States.

**20. Can the Court or the jury now consider a sentence of deferred adjudication as punishment for this offense? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

**THIS CONCLUDES THE PROCEDURE AND EVIDENCE QUESTIONS.**