

Scott Pearce's Master MBE Method

Evidence

Evidence - Official National Conference of Bar Examiners Outline of Testable Issues

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Questions 1-3 are based on the following fact situation.

Paul, the Plaintiff in a personal injury action, called Wes as a witness to testify that Dan's car, in which Paul had been riding, ran a red light. Wes, however, testified that Dan's car did not run the light.

Question 1

Paul then called Vic to testify that Dan's car did run the light. The trial judge should rule that Vic's testimony is

- A. admissible because Paul was surprised by Wes's testimony
- B. admissible because Vic's testimony was relevant to material issues
- C. inadmissible because Paul cannot impeach his own witness
- D. inadmissible because Paul is bound by the testimony of his own witness

Question 2

On cross-examination of Vic, Dan's attorney asked if Vic was drunk at the time he witnessed the accident, and Vic responded, "No, I have never in my life been drunk. Dan's attorney then sought to prove by the testimony of Yank that Vic was drunk on New Year's Eve two years before the accident. The trial judge should rule that Yank's testimony is

- A. admissible to impeach Vic by showing that he had an imperfect recollection of recent events
- B. admissible to show that Vic is not the kind of person on whom one should rely for ascertaining the truth
- C. inadmissible because a witness cannot be impeached by proof of specific acts of misconduct
- D. inadmissible because the question of whether Vic has ever been drunk is a collateral matter

Question 3

Dan called Zemo as a witness and asked him if he knew Vic's reputation for veracity in the community where Vic resided. The trial judge should rule that this question is

- A. objectionable because it is collateral to the issues on trial
- B. objectionable because character cannot be proven by generalities
- C. unobjectionable because it is a foundation for impeachment of Vic
- D. unobjectionable because Zemo could be expected to know Vic personally if he knew his reputation

Question 4

John Smith has denied his purported signature on a letter which has become critical in a breach of contract suit between Smith and Miller. At trial, Miller's counsel calls Alice, a teacher, who testifies that she taught John Smith mathematics in school ten years earlier, knows his signature, and proposes to testify that the signature to the letter is that of John Smith. Smith's counsel objects. The trial judge should

- A. sustain the objection on the ground that identification of handwriting requires expert testimony and the teacher does not, per se, qualify as an expert
- B. sustain the objection on the ground that the best evidence of Smith's handwriting would be testimony by a person who had examined his writing more recently than ten years ago
- C. overrule the objection on the ground that a schoolteacher qualifies as an expert witness for the purpose of identifying handwriting
- D. overrule the objection on the ground that a layman may identify handwriting if he has seen the person in question write, and has an opinion concerning the writing in question

Question 5

Drew is charged with the murder of Pitt. The prosecutor introduced testimony of a police officer that Pitt told a priest, administering the last rites, "I was stabbed by Drew. Since I am dying, tell him I forgive him." Thereafter, Drew's attorney offers the testimony of Wall that the day before, when Pitt believed he would live, he stated that he had been stabbed by Jack, an old enemy. The testimony of Wall is

- A. admissible under an exception to the hearsay rule
- B. admissible to impeach the dead declarant
- C. inadmissible because it goes to the ultimate issue in the case
- D. inadmissible because it is irrelevant to any substantive issue in the case

Question 6

Dever was indicted for the murder of Vickers by poison. At trial the prosecutor calls the county coroner, Dr. Wolfe, who is a "board-certified" pathologist, to testify that, in accord with good practice in her specialty, she has studied microphotographic slides, made under her supervision by medical assistants, of tissue taken from Vickers' corpse and that it is Wolfe's opinion, based on that study, that Vickers died of poisoning. The slides have not been offered in evidence.

Dr. Wolfe's opinion should be

- A. excluded, because the cause of death is a critical issue to be decided by the trier of fact
- B. excluded, because her opinion is based on facts not in evidence
- C. admitted, because Wolfe followed accepted medical practice in arriving at her opinion
- D. admitted, because her opinion is based on matters observed pursuant to a duty imposed by law

Question 7

Powers sued Debbs for battery. At trial, Powers' witness Wilson testified that Debbs had made an unprovoked attack on Powers. On cross-examination, Debbs asks Wilson about a false claim that Wilson had once filed on an insurance policy. The question is

- A. proper, because the conduct involved untruthfulness
- B. proper provided that the conduct resulted in conviction of Wilson
- C. improper, because the impeachment involved a specific instance of misconduct
- D. improper, because the claim form would be the best evidence

Question 8

Darden was prosecuted for armed robbery. At trial, Darden testified in his own behalf, denying that he had committed the crime. On cross-examination, the prosecutor intends to ask Darden whether he had been convicted of burglary six years earlier.

The question concerning the burglary conviction is

- A. proper, if the court finds that the probative value for impeachment outweighs the prejudice to Darden.
- B. proper, because the prosecutor is entitled to make this inquiry as a matter of right
- C. improper, because burglary does not involve dishonesty or false statement
- D. improper, because the conviction must be proved by court record, not by question on cross-examination

Question 9

In Peel's personal injury action, Wilson, a physician who had no previous knowledge of the matter, sat in court and heard all the evidence about Peel's symptoms and conditions. Wilson is called to give her opinion whether Peel's injuries are permanent. May Wilson so testify?

- A. Yes, provided she first identifies the data on which her opinion is based
- B. Yes, because an expert may base her opinion on facts made known to her at the trial
- C. No, because she has no personal knowledge of Peel's condition
- D. No, because permanence of injury is an issue to be decided by the jury

Question 10

In a tort action, Fisher testified against Dawes. Dawes then called Jones, who testified that Fisher had a bad reputation for veracity. Dawes then also called Weld to testify that Fisher once perpetrated a hoax on the police.

Weld's testimony is

- A. admissible, provided that the hoax involved untruthfulness
- B. admissible, provided that the hoax resulted in conviction of Fisher
- C. inadmissible, because it is merely cumulative impeachment
- D. inadmissible, because it is extrinsic evidence of a specific instance of misconduct

Question 11

In a civil suit by Pine against Decker, Decker called Wall, a chemist, as an expert witness, and asked him a number of questions in chemistry. Over Pine's objection that Wall was not shown to be qualified in chemistry, the trial court permitted Wall to testify as to his opinion in response to a hypothetical question.

On cross-examination, Pine asked Wall if he had failed two chemistry courses while doing his graduate work.

The answer should be

- A. admitted, because it is relevant to the weight to be given to Wall's testimony
- B. admitted, because specific acts bearing on truthfulness may be inquired about on cross-examination
- C. excluded, because the court has determined that Wall is qualified to testify as an expert
- D. excluded, because Wall's character has not been put in issue

Question 12

Park brought an action against Dan for injuries received in an automobile accident, alleging negligence in that Dan was speeding and inattentive. Park calls White to testify that Dan had a reputation in the community of being a reckless driver and was known as "dare-devil Dan." White's testimony is

- A. admissible as habit evidence
- B. admissible because it tends to prove that Dan was negligent at the time of this collision
- C. inadmissible because Dan has not offered testimony of his own good character
- D. inadmissible to show negligence

Question 13

The bus in which Pat was riding was struck from the rear by a taxi. He sued Cab Company for a claimed neck injury.

Cab Company claimed the impact was too slight to have caused the claimed injury and introduced testimony that all passengers had refused medical attention at the time of the accident. Pat called a doctor from City Hospital to testify that three persons (otherwise proved to have been on the bus) were admitted to the hospital for treatment of severe neck pain within a week after the accident. The trial judge should rule the doctor's testimony

- A. admissible, because a doctor is properly qualified as an expert in medical matters
- B. admissible if other testimony established causal connection between the other passengers' pain and the accident
- C. inadmissible, because the testimony to neck pain is hearsay, not within any exception
- D. inadmissible, because the testimony is not the best evidence of the other passengers' pain and the passengers are not shown to be unavailable

Questions 14-15 are based on the following fact situation.

Paula sued for injuries she sustained in a fall in a hotel hallway connecting the lobby of the hotel with a restaurant located in the hotel building. The hallway floor was covered with vinyl tile. The defendants were Horne, owner of the hotel building, and Lee, lessee of the restaurant. The evidence was that the hallway floor had been waxed approximately an hour before Paula slipped on it, and although the wax had dried, there appeared to be excessive dried wax caked on several of the tiles. Horne's defense was that the hallway was a part of the premises leased to Lee over which he retained no control, and Lee denied negligence and alleged contributory negligence.

Question 14

Lee offered to prove by Marks, the restaurant manager, that in the week immediately preceding Paula's fall at least 1,000 people had used the hallway in going to and from the restaurant, and Marks had neither seen anyone fall nor received reports that anyone had fallen. The trial judge should rule this evidence

- A. admissible, because it tends to prove that Paula did not use the care exercised by reasonably prudent people
- B. admissible, because it tends to prove that Lee was generally careful in maintaining the floor
- C. inadmissible, because Marks's testimony is self-serving
- D. inadmissible, because it does not bear on the issue of Lee's exercise of due care on this specific occasion

Question 15

If Paula offered to prove that the day after she fell Horne had the vinyl tile taken up and replaced with a new floor covering, the trial judge should rule the evidence

- A. admissible, because it is relevant to the issue of whether Horne retained control of the hallway
- B. admissible, because it is relevant to the issue of awareness of the unsafe condition of the hallway at the time of Paula's fall
- C. inadmissible, because there was no showing that the new floor covering would be any safer than the old
- D. inadmissible, because to admit such would discourage a policy of making repairs to prevent further injury, regardless of fault

Question 16

Pace sues Def Company for injuries suffered when Pace's car collided with Def Company's truck. Def's general manager prepared a report of the accident at the request of the company's attorney in preparation for the trial, and delivered the report to the attorney. Pace demands that the report be produced. Will production of the report be required?

- A. Yes, because business reports are not generally privileged.
- B. No, because it is a privileged communication from client to the attorney.
- C. No, because such reports contain hearsay.
- D. No, because such reports are self-serving.

Questions 17-18 are based on the following fact situation.

Owner and his employee, Driver, consult Attorney about a motor vehicle collision resulting in a suit by Litigant against Owner and Driver as joint defendants. Attorney calls Irving, his investigator, into the conference to make notes of what is said, and those present discuss the facts of the collision and Owner's insurance. Owner thereafter files a cross-claim against Driver for indemnity for, any damages obtained by Litigant.

Question 17

Litigant calls Driver to testify in Litigant's case in chief to admissions made by Owner in the conference. On objection by Owner, the court should rule that Driver's testimony is

- A. admissible, because of the presence of persons in the conference other than Attorney and Owner
- B. admissible, because Driver is an adverse party in the lawsuit
- C. inadmissible because of the attorney-client privilege
- D. inadmissible, because the best evidence is Irving's notes of the conference

Question 18

Driver calls Irving in his defense against the cross-claim. He seeks to have Irving testify to an admission made by Owner in the conference. On objection by Owner, the court should rule Irving's testimony

- A. admissible, because the attorney-client privilege does not apply, in suits between those conferring with him, to joint consultations with an attorney
- B. admissible, because the attorney-client privilege does not apply to testimony by one who does not stand in a confidential relationship with the person against whom the evidence is offered
- C. admissible, because the conference was not intended to be confidential, since it concerned anticipated testimony in open court
- D. inadmissible, because Owner has not waived the attorney-client privilege

Question 19

At the trial of Davis for a murder that occurred in New Town, the prosecution called Waite, who testified that she saw Davis kill the victim. Davis believed that Waite was 600 miles away in Old Town, engaged in the illegal sale of narcotics, on the day in question. On cross-examination by Davis, Waite was asked whether she had in fact sold narcotics in Old Town on that date. Waite refused to answer on the ground of self incrimination.

The judge, over the prosecutor's objection, ordered that if Waite did not testify, her direct testimony should be stricken. The order to testify or have the testimony stricken can best be supported on the basis that

- A. Waite had not been charged with any crime and, thus, could claim no privilege against self-incrimination
- B. Waite's proper invocation of the privilege prevented adequate cross-examination
- C. the public interest in allowing an accused to defend himself or herself outweighs the interest of a non-party witness in the privilege
- D. the trial record, independent of testimony, does not establish that Waite's answer could incriminate her

Question 20

In a contract suit between Terrell and Ward, Ward testifies that he recalls having his first conversation with Terrell on January 3. When asked how he remembers the date, he answers, "in the conversation, Terrell referred to a story in that day's newspaper announcing my daughter's engagement." Terrell's counsel moves to strike the reference to the newspaper story. The judge should

- A. grant the motion on the ground that the best evidence rule requires production of the newspaper itself
- B. grant the motion, because the reference to the newspaper story does not fit within any established exception to the hearsay rule.
- C. deny the motion on the ground that the court may take judicial notice of local newspapers and their contents
- D. deny the motion on the ground that a witness may refer to collateral documents without providing the documents themselves

Questions 21-22 are based on the following fact situation.

In a trial between Jones and Smith, an issue arose about Smith's ownership of a horse, which had caused damage to Jones's crops.

Question 21

Jones offered to testify that he looked up Smith's telephone number in the directory, called that number, and that a voice answered "This is Smith speaking." At this Jones asked, "Was that your horse that tramped across my cornfield this afternoon?" The voice replied "Yes." The judge should rule the testimony

- A. admissible, because the answering Smith's identification of himself, together with the usual accuracy of the telephone directory and transmission system, furnishes sufficient authentication
- B. admissible, because judicial notice may be taken of the accuracy of telephone directories
- C. inadmissible unless Jones can further testify that he was familiar with Smith's voice and that it was in fact Smith to whom he spoke
- D. inadmissible unless Smith has first been asked whether or not the conversation took place and has been given the opportunity to admit, deny or explain

Question 22

Jones seeks to introduce in evidence a photograph of his cornfield in order to depict the nature and extent of the damage done. The judge should rule the photograph

- A. admissible if Jones testifies that it fairly and accurately portrays the condition of the cornfield after the damage was done
- B. admissible if Jones testifies that the photograph was taken within a week after the alleged occurrence
- C. inadmissible if Jones fails to call the photographer to testify concerning the circumstances under which the photograph was taken
- D. inadmissible if it is possible to describe the damage to the cornfield through direct oral testimony.

Question 23

Potts, a building contractor, sued Dennis for failure to pay on a small cost-plus construction contract. At trial, Potts, who personally supervised all of the work, seeks to testify to what he remembers about the amount of pipe used, the number of workers used on the job, and the number of hours spent grading.

Dennis objects on the ground that Potts had routinely recorded these facts in notebooks which are in Potts's possession.

Potts's testimony is

- A. admissible as a report of a regularly conducted business activity
- B. admissible as based on first-hand knowledge
- C. inadmissible, because it violates the best evidence rule
- D. inadmissible, because a summary of writings cannot be made unless the originals are available for examination

Questions 24-25 are based on the following fact situation.

Rider, a bus passenger, sued Transit Company for injuries to his back from an accident caused by Transit's negligence. Transit denies that Rider received any injury in the accident.

Question 24

Rider's counsel seeks to introduce an affidavit he obtained in preparation for trial from Dr. Bond, who has since died. The affidavit avers that Dr. Bond examined Rider two days after the Transit Company accident and found him suffering from a recently incurred back injury. The judge should rule the affidavit

- A. admissible as a statement of present bodily condition made to a physician
- B. admissible as prior recorded testimony
- C. inadmissible, because it is irrelevant
- D. inadmissible, because it is hearsay, not within any exception

Question 25

Transit Company calls Observer to testify that right after the accident, Rider told him that he had recently suffered a recurrence of an old back injury. The judge should rule Observer's testimony

- A. admissible as an admission of a party opponent
- B. admissible as a spontaneous declaration
- C. inadmissible, because it is irrelevant
- D. inadmissible, because it is hearsay, not within any exception

Question 26

Alex and Sam were arrested for holding up a gas station. They were taken to police headquarters and placed in a room for interrogation. As a police officer addressing both started to give them the Miranda warnings prior to the questioning, Alex said, "Look, Sam planned the damned thing and I was dumb enough to go along with it. We robbed the place-what else is there to say?" Sam said nothing. Sam was escorted into another room and a full written confession was then obtained from Alex. If Sam is brought to trial on an indictment charging him with robbery, the fact that Sam failed to object to Alex's statement and remained silent after Alex had implicated him in the crime should be ruled

- A. admissible because his silence was an implied admission by Sam that he had participated in the crime
- B. admissible because a statement of a participant in a crime is admissible against another participant
- C. inadmissible because, under the circumstances, there was no duty or responsibility on Sam's part to respond
- D. inadmissible because whatever Alex may have said has no probative value in a trial against Sam

Question 27

In a suit attacking the validity of a deed executed fifteen years ago, Plaintiff alleges mental incompetency of Joe, the grantor, and offers in evidence a properly authenticated affidavit of Harry, Joe's brother. The affidavit, which was executed shortly after the deed, stated that Harry had observed Joe closely over a period of weeks, that Joe had engaged in instances of unusual behavior (which were described), and that Joe's appearance had changed from one of neatness and alertness to one of disorder and absentmindedness. The judge should rule Harry's affidavit

- A. inadmissible as opinion
- B. inadmissible as hearsay, not within any exception
- C. admissible as an official document
- D. admissible as an ancient document

Question 28

The police, answering a complaint about noise, arrived at Sam's apartment and found Sam's wife dead on the living room floor. One of the officers turned to Sam and said, "What happened?" Sam replied, "She was a bitch and I took care of her." At Sam's trial his statement should be ruled

- A. admissible because the statement was part of the *res gestae*
- B. admissible because the statement was made at the scene, was essentially volunteered, and was not a product of a custodial interrogation
- C. inadmissible because the statement is ambiguous and not necessarily incriminatory
- D. inadmissible because Sam was effectively in police custody and should have been given the Miranda warnings

Questions 29-30 are based on the following fact situation.

Price sued Derrick for injuries Price received in an automobile accident. Price claims Derrick was negligent in (a) exceeding the posted speed limit of 35 m.p.h., (b) failing to keep a lookout, and (c) crossing the center line.

Question 29

Bystander, Price's eyewitness, testified on cross-examination that Derrick was wearing a green sweater at the time of the accident. Derrick's counsel calls Wilson to testify that Derrick's sweater was blue. Wilson's testimony is

- A. admissible as substantive evidence of a material fact
- B. admissible as bearing on Bystander's truthfulness and veracity
- C. inadmissible, because it has no bearing on the capacity of Bystander to observe
- D. inadmissible, because it is extrinsic evidence of a collateral matter

Question 30

Derrick testified in his own behalf that he was going 30 m.p.h.. On cross-examination, Price's counsel did not question Derrick with regard to his speed. Subsequently, Price's counsel calls Officer to testify that, in his investigation following the accident, Derrick told him he was driving 40 m.p.h.. Officer's testimony is

- A. admissible as a prior inconsistent statement
- B. admissible as an admission
- C. inadmissible, because it lacks a foundation
- D. inadmissible, because it is hearsay not within any exception

Questions 31-32 are based on the following fact situation.

Peters sued Davis for \$100,000 for injuries received in a traffic accident. Davis charges Peters with contributory negligence and alleges that Peters failed to have his lights on at a time when it was dark enough to require them.

Question 31

Davis calls Bystander to testify that Passenger, who was riding in Peters automobile and who also was injured, confided to him at the scene of the accident that "we should have had our lights on." Bystander's testimony is

- A. admissible, as an admission of a party opponent
- B. admissible, as a declaration against interest
- C. inadmissible, because it is hearsay, not within any exception
- D. inadmissible, because it is opinion

Question 32

Davis offers to have Bystander testify that he was talking to Witness when he heard the crash and heard Witness, now deceased, exclaim, "That car doesn't have any lights on." Bystander's testimony is

- A. admissible as a statement of present sense impression
- B. admissible, because Witness is not available to testify
- C. inadmissible as hearsay, not within any exception
- D. inadmissible, because of the Dead Man's Statute

Question 33

Patty sues Mart Department Store for personal injuries, alleging that while shopping she was knocked to the floor by a merchandise cart being pushed by Handy, a stock clerk, and that as a consequence her back was injured.

Handy testified that Patty fell near the cart but was not struck by it. Thirty minutes after Patty's fall, Handy, in accordance with regular practice at Mart, had filled out a printed form, "Employee's Report of Accident - Mart Department Store," in which he stated that Patty had been leaning over to spank her young child and in so doing had fallen near his cart. Counsel for Mart offers in evidence the report, which had been given him by Handy's supervisor.

The judge should rule the report offered by Mart

- A. admissible as *res gestae*
- B. admissible as a business record
- C. inadmissible, because it is hearsay, not within an exception
- D. inadmissible, because Handy is available as a witness

Questions 34-37 are based on the following fact situation.

Carr ran into and injured Pederson, a pedestrian. With Carr in his car were Wanda and Walter Passenger. Passerby saw the accident and called the police department, which sent Sheriff to investigate.

All of these people were available as potential witnesses in the case of *Pedersen v. Carr*. Pedersen alleges that Carr, while drunk, struck Pederson who was in a duly marked crosswalk.

Question 34

Pederson's counsel wants to introduce testimony of Sheriff that at the police station Carr told Sheriff, "I think this was probably my fault." The trial judge should rule this testimony

- A. admissible as a part of the *res gestae*
- B. admissible as an admission of a party
- C. inadmissible because it includes a conclusion of law which the declarant was not qualified to make
- D. inadmissible because it constitutes an opinion rather than an admission of specific facts

Question 35

Pederson's counsel wishes to prove that after the accident Carr went to Pedersen and offered \$1,000 to settle Pederson's claim. The trial judge should rule this evidence

- A. admissible as an admission of a party
- B. admissible as an admission to show Carr's liability, provided the court gives a cautionary instruction that the statement should not be considered as bearing on the issue of damages
- C. inadmissible since it is not relevant either to the question of liability or the question of damages
- D. inadmissible because even though it is relevant and an admission, the policy of the law is to encourage settlement negotiations

Question 36

Pederson's counsel wants to have Sheriff testify to the following statement made to him by Walter Passenger, out of the presence of Carr: "We were returning from a party at which we had all been drinking." The trial judge should rule this testimony

- A. admissible as an admission of a party
- B. admissible as a declaration against interest
- C. inadmissible as hearsay not within any exception
- D. inadmissible because it would lead the court into nonessential side issues

Question 37

On the evening of the day of the accident, Walter Passenger wrote a letter to his sister in which he described the accident. When Walter says he cannot remember some details of the accident, Pederson's counsel seeks to show him the letter to assist him in his testimony on direct examination. The trial judge should rule this

- A. permissible under the doctrine of present recollection refreshed
- B. permissible under the doctrine of past recollection recorded
- C. objectionable because the letter was not a spontaneous utterance
- D. objectionable because the letter is a self-serving declaration in so far as the witness, Walter, is concerned