Question 4 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued a defendant for breach of contract. The court admitted testimony by the plaintiff that the defendant and his wife quarreled frequently, a fact of no consequence to the lawsuit. The defendant seeks to testify in response that he and his wife never quarreled. The court

A: must permit the defendant to answer if he had objected to the plaintiff's testimony.
B: may permit the defendant to answer, whether or not he had objected to the plaintiff's testimony.
C: may permit the defendant to answer only if he had objected to the plaintiff's testimony.
D: cannot permit the defendant to answer, whether or not he had objected to the plaintiff's testimony.

The explanation for the answer is:

The correct answer is B. The defendant's testimony, while it would normally be considered irrelevant, is admissible as curative evidence to respond to the previously admitted irrelevant evidence about his quarreling with his wife. A court may, but does not have to, admit irrelevant evidence if the evidence is curative and rebuts the previously admitted irrelevant evidence and the curative evidence is not prejudicial.

Answer A and C are incorrect because the defendant is not required to object to the introduction of the initial irrelevant evidence before he can ask for the admission of curative evidence. In addition, the court has discretion in determining whether or not curative evidence must be admitted. For example, if an instruction to the jury would suffice to counter the previous introduction of irrelevant evidence, the court does not have to admit additional irrelevant evidence, even if it is curative. Answer D is incorrect because the court has discretion to either admit, or refuse to admit, curative evidence.

Question 18 - Evidence - Privileges and Other Policy Exclusions

The question was:

A physician, who was called as a witness by a defendant, was asked to testify to statements made to the physician by her patient for the purpose of obtaining treatment. Which of the following is the best basis for excluding evidence of the patient's statements in a jurisdiction with a doctor-patient privilege?

A: An objection by the physician asserting her privilege against disclosure of confidential communications made by a patient.
B: An objection by the plaintiff's attorney on the grounds of the doctor-patient privilege.
C: A finding by the trial judge that the patient had left the office without actually receiving treatment.
D: The assertion of a privilege by the patient's attorney, present at the trial as a spectator at the patient's request, and allowed by the trial judge to speak.

The explanation for the answer is:

The correct answer is D. The doctor/patient privilege is held by the patient, not the physician. Only the patient, or a lawyer acting on his behalf, has the right to invoke and waive the privilege. The patient's attorney, if he is acting on the patient's behalf and is allowed to speak by the trial judge, may invoke the patient's privilege and would be the best basis for excluding the evidence.

Answer A is incorrect because the doctor/patient privilege resides with the patient, and the doctor does not provide the best basis for objecting to the disclosure. Answer B is incorrect because the doctor/patient privilege resides with the patient and cannot be asserted by an attorney who is not representing the patient. Answer C is incorrect because the doctor/patient privilege extends to statements made while seeking treatment and whether or not the patient actually received the treatment is irrelevant to the determination of the admissibility of the evidence. Even if the judge determines that the patient had left the office without actually receiving treatment, the evidence can still be excluded under the doctor/patient privilege if the patient, or his attorney on his behalf, assert the privilege. An assertion of the doctor/patient privilege by the patient's attorney, acting at his behest, is the best basis for excluding the evidence of that patient's statements to his doctor.

Question 18 - Evidence - Privileges and Other Policy Exclusions

The question was:

A physician, who was called as a witness by a defendant, was asked to testify to statements made to the physician by her patient for the purpose of obtaining treatment. Which of the following is the best basis for excluding evidence of the patient's statements in a jurisdiction with a doctor-patient privilege?

A: An objection by the physician asserting her privilege against disclosure of confidential communications made by a patient.
B: An objection by the plaintiff's attorney on the grounds of the doctor-patient privilege.
C: A finding by the trial judge that the patient had left the office without actually receiving treatment.
D: The assertion of a privilege by the patient's attorney, present at the trial as a spectator at the patient's request, and allowed by the trial judge to speak.

The explanation for the answer is:

The correct answer is D. The doctor/patient privilege is held by the patient, not the physician. Only the patient, or a lawyer acting on his behalf, has the right to invoke and waive the privilege. The patient's attorney, if he is acting on the patient's behalf and is allowed to speak by the trial judge, may invoke the patient's privilege and would be the best basis for excluding the evidence.

Answer A is incorrect because the doctor/patient privilege resides with the patient, and the doctor does not provide the best basis for objecting to the disclosure. Answer B is incorrect because the doctor/patient privilege resides with the patient and cannot be asserted by an attorney who is not representing the patient. Answer C is incorrect because the doctor/patient privilege extends to statements made while seeking treatment and whether or not the patient actually received the treatment is irrelevant to the determination of the admissibility of the evidence. Even if the judge determines that the patient had left the office without actually receiving treatment, the evidence can still be excluded under the doctor/patient privilege if the patient, or his attorney on his behalf, assert the privilege. An assertion of the doctor/patient privilege by the patient's attorney, acting at his behest, is the best basis for excluding the evidence of that patient's statements to his doctor.

Question 19 - Evidence - Presentation of Evidence

The question was:

A leading question is *LEAST* likely to be permitted over objection when

A: asked on cross-examination of an expert witness.
B: asked on direct examination of a young child.
C: asked on direct examination of a disinterested eyewitness.
D: related to preliminary matters such as the name or occupation of the witness.

The explanation for the answer is:

The correct answer is C. Leading questions are generally not permitted if they are asked on direct examination of a disinterested eye witness. Answer A is incorrect because leading questions are permitted on cross-examination, regardless of whether the witness is an expert or not. Answer B is incorrect because leading questions are much more likely to be permitted by the court if the witness is a child. Answer D is incorrect because leading questions are permitted to be asked on preliminary matters that do not require testimony about the facts at issue. Leading questions on direct examination of a disinterested witness are the least likely of the examples to be permitted if there is an objection.

Question 52 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The plaintiff sues a bar for injuries suffered in an automobile accident caused by a patron of the bar. The plaintiff claims that the patron was permitted to drink too much liquor at the bar before the accident.

A witness, who was present at the bar on the night of the incident, testified that on the night of the accident the patron was drunk. The witness then proposed to testify about his remark to his companion on just how drunk the patron appeared. The witness's remark to his companion is

A: admissible as an excited utterance.
B: admissible as a prior consistent statement.
C: admissible as a statement by the witness regarding a condition he observed, made while he was observing it.
D: inadmissible if there was no evidence that the witness had expertise in determining intoxication.

The explanation for the answer is:

The correct answer is C. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition is admissible as a present sense impression; this is an exception to the hearsay rule. The witness's descriptive statement was made as the witness was perceiving the patron's condition, which is what makes it admissible here as a present sense impression.

Answer A is incorrect because there is no evidence that the witness's statement was made under the stress of an exciting event that would make it admissible as an excited utterance. The patron's intoxication is not enough to constitute an exciting event for the purposes of this hearsay exception; nothing in the facts indicate that the witness was surprised, startled, or otherwise emotionally affected by the patron's being drunk. Answer B is incorrect because the witness's statement would be improperly bolstering his own testimony; prior consistent statements are inadmissible before the witness's testimony has been attacked on cross-examination. Answer D is incorrect because the witness's statement is admissible as a present sense impression, and because a witness need not be an expert in order to testify to his or her own direct observations. Lay witness testimony regarding a bar patron's intoxication is admissible.

Question 53 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The plaintiff sues a bar for injuries suffered in an automobile accident caused by a patron of the bar. The plaintiff claims that the patron was permitted to drink too much liquor at the bar before the accident.

The bar called the patron to testify and expected him to say that he was sober when he left the bar; however, on direct examination the patron testified that he may have had a little too much to drink at the bar. The bar now seeks to confront the patron with his statement made on deposition that he was sober when he left the bar. Which of the following is true concerning this statement?

A: It may be used only to refresh the patron's recollection.
B: It is admissible for impeachment and as substantive evidence that the patron was sober.
C: It is inadmissible, because the bar cannot impeach its own witness.
D: It is inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is B. Prior inconsistent statements, given by a witness who is subject to cross examination on the stand, can be used both as an impeachment and as substantive evidence if they were given under oath and under penalty of perjury. Because the patron's testimony at the trial is inconsistent with his sworn testimony from the deposition, the statement from the deposition is admissible to impeach the patron's current testimony. The statement is also admissible as substantive evidence as a prior inconsistent statement.

Answer A is incorrect because prior sworn statements are not necessarily limited to refreshing recollection. Additionally, nothing indicates that the patron was having any difficulty recollecting prior events; difficulty of recollection is a necessary prerequisite for this exception. Answer C is incorrect because parties may impeach any witness, even their own. Answer D is incorrect because prior inconsistent statements given under oath at a deposition are not hearsay if the witness is testifying at trial and is subject to cross-examination; such prior sworn statements may be admitted for their substantive as well as impeachment value.

Question 55 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The plaintiff sues a bar for injuries suffered in an automobile accident caused by a patron of the bar. The plaintiff claims that the patron was permitted to drink too much liquor at the bar before the accident.

The plaintiff offers evidence that, after the accident, the owner of the bar visited him at the hospital and, offering to pay all of the plaintiff's medical expenses, said, "That's the least I can do after letting the patron leave the bar so drunk last night." The statement that the patron was drunk when he left the bar on the night of the accident is

A: admissible as an admission by the owner of the bar that the patron was drunk when he left the bar.
B: admissible as a factual admission made in connection with an offer of compromise.
C: inadmissible as hearsay not within any exception.
D: inadmissible as a statement made in connection with an offer to pay medical expenses.

The explanation for the answer is:

The correct answer is A. The owner's statement that the patron was drunk when he left the bar is admissible as an admission by a party opponent. Although the offer to pay medical expenses would be inadmissible, the accompanying statement that the patron was drunk is an admissible admission by the owner.

Answer B is incorrect because it misstates the rule regarding offers to compromise, if this truly was a factual admission made in connection with an offer to compromise, then the statement would be inadmissible. Furthermore, on these facts there is no offer to compromise, instead this is a naked offer to pay medical expenses. Answer C is incorrect because an admission by a party opponent is specifically excluded from the definition of hearsay. Answer D is incorrect because statements accompanying a naked offer to pay medical expenses are not covered by the exclusionary rule, and are admissible.

Question 55 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The plaintiff sues a bar for injuries suffered in an automobile accident caused by a patron of the bar. The plaintiff claims that the patron was permitted to drink too much liquor at the bar before the accident.

The plaintiff offers evidence that, after the accident, the owner of the bar visited him at the hospital and, offering to pay all of the plaintiff's medical expenses, said, "That's the least I can do after letting the patron leave the bar so drunk last night." The statement that the patron was drunk when he left the bar on the night of the accident is

A: admissible as an admission by the owner of the bar that the patron was drunk when he left the bar.
B: admissible as a factual admission made in connection with an offer of compromise.
C: inadmissible as hearsay not within any exception.
D: inadmissible as a statement made in connection with an offer to pay medical expenses.

The explanation for the answer is:

The correct answer is A. The owner's statement that the patron was drunk when he left the bar is admissible as an admission by a party opponent. Although the offer to pay medical expenses would be inadmissible, the accompanying statement that the patron was drunk is an admissible admission by the owner.

Answer B is incorrect because it misstates the rule regarding offers to compromise, if this truly was a factual admission made in connection with an offer to compromise, then the statement would be inadmissible. Furthermore, on these facts there is no offer to compromise, instead this is a naked offer to pay medical expenses. Answer C is incorrect because an admission by a party opponent is specifically excluded from the definition of hearsay. Answer D is incorrect because statements accompanying a naked offer to pay medical expenses are not covered by the exclusionary rule, and are admissible.

Question 56 - Evidence - Writings Recordings and Photographs

The question was:

In a narcotics conspiracy prosecution against the defendant, the prosecutor offers in evidence a tape recording of a telephone call allegedly made by the defendant. A lay witness is called to testify that the voice on the recording is the defendant's. Her testimony to which of the following would be the *LEAST* sufficient basis for admitting the recording?

A: She had heard the same voice on a similar tape recording identified to her by the defendant's brother.
B: She had heard the defendant speak many times, but never over the telephone.
C: She had, specifically for the purpose of preparing to testify, talked with the defendant over the telephone at a time after the recording was made.
D: She had been present with the defendant when he engaged in the conversation in question but had heard only the defendant's side of the conversation.

The explanation for the answer is:

The correct answer is A. The recording can be authenticated by the testimony of a lay witness who, through first-hand knowledge, is familiar with the defendant's voice. However, the testimony of the witness in answer A is the least likely to provide a sufficient basis for admitting the recording. The witness's knowledge of the defendant's voice in answer A is based solely on the hearsay statement of the defendant's brother. The witness in answer A has no first-hand knowledge of the defendant's voice.

Answer B is incorrect because first-hand knowledge of a voice, even if not over the telephone, is sufficient to authenticate an audiotape identification. Answer C is incorrect because the witness may become familiar with the defendant's voice at any time. Answer D is incorrect because the witness was present during the recording of the conversation and can reliably identify the defendant's voice on the tape.

Question 116 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant is tried for armed robbery of a bank.

The prosecution, in its case in chief, offers evidence that when the defendant was arrested one day after the crime, he had a quantity of heroin and a hypodermic needle in his possession. This evidence should be

A: admitted to prove the defendant's motive to commit the crime.
B: admitted to prove the defendant's propensity to commit crimes.
C: excluded, because its probative value is substantially outweighed by the danger of unfair prejudice.
D: excluded, because such evidence may be offered only to rebut evidence of good character offered by the defendant.

The explanation for the answer is:

The correct answer is C. Because the defendant is on trial for armed robbery, evidence of his commission of other crimes is inadmissible against him because it is much more prejudicial than probative. The fact that the defendant had illegal substances on his person when he was arrested has very little probative value on the issue of whether or not he committed the armed robbery, and it is highly prejudicial to the defendant.

Answer A is incorrect because, although proof of other crimes may be used to show motive, the mere possession of illegal substances the day after the crime has very little relevance to prove that motive. In addition, the possession, even if it were relevant to prove motive, would still be more prejudicial than probative. Answer B is incorrect because evidence of other crimes is not admissible to prove propensity to commit crimes in general. Answer D is incorrect because the general character of the accused cannot be shown through specific incidents of conduct. More importantly, the evidence should be excluded because it is simply more prejudicial than probative.

Question 118 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is tried for armed robbery of a bank.

At the request of police, the teller who was robbed prepared a sketch bearing a strong likeness to the defendant, but the teller died in an automobile accident before the defendant was arrested. At trial the prosecution offers the sketch. The sketch is

A: admissible as an identification of a person after perceiving him.
B: admissible as past recollection recorded.
C: inadmissible as hearsay not within any exception.
D: inadmissible as an opinion of the teller.

The explanation for the answer is:

The correct answer is C. The sketch amounts to an out-of-court statement of an unavailable witness and is inadmissible as hearsay not within any exception. The sketch is a statement by the teller that the man depicted committed the robbery, and, since the teller is unavailable to testify, the sketch should be found to be inadmissible.

Answer A is incorrect because the exception to the hearsay rule that allows the introduction of a statement of identification after perceiving the person requires that the declarant be available at the trial and subject to cross-examination. Since the teller is unavailable, the sketch would not meet the requirements of that exception to the hearsay rule. Answer B is incorrect because the past recollection recorded exception to the hearsay rule only applies if the witness is available on the stand to testify as to the sketch. If the witness is unavailable, the prior statement, in this case in the form of a sketch, remains an out-of-court statement that is being offered for the truth of the matter asserted and should be held inadmissible. Answer D is incorrect because it ignores the fact that the statement is hearsay. The sketch is inadmissible hearsay and should not be allowed into evidence.

Question 119 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is tried for armed robbery of a bank.

The defendant testified on direct examination that he had never been in the bank that had been robbed. His counsel asks, "What, if anything, did you tell the police when you were arrested?" If his answer would be, "I told them I had never been in the bank," this answer would be

A: admissible to prove that the defendant had never been in the bank.
B: admissible as a prior consistent statement.
C: inadmissible as hearsay not within any exception.
D: inadmissible, because it was a self-serving statement by a person with a substantial motive to fabricate.

The explanation for the answer is:

The correct answer is C. The defendant's prior statement to the police that he had never been in the bank is an out-of-court statement that is being offered for the truth of the matter asserted - that he had never been in the bank. It should be found to be inadmissible as hearsay not within any exception.

Answer A is incorrect because, although the prior statement to the police is being offered to prove that the defendant had never been in the bank, it is still hearsay without any exception, and is thus inadmissible. Answer B is incorrect because prior consistent statements are only admissible to rebut an express or implied charge against the declarant of recent fabrication, improper influence, or motive. Here, the defendant's counsel asked the question on direct examination, before any of those charges were made on cross-examination, so the defendant's prior statement to the police is inadmissible hearsay. Until there is a charge made on cross-examination of recent fabrication, improper influence, or motive, the statement is inadmissible. Answer D is incorrect because it misstates the relevant evidentiary requirements for the admission of out-of-court statements. The fact that the statement is self-serving and made by a person with a motive to fabricate does not make it inadmissible. The statement is inadmissible because it is hearsay not within any exception.

Question 120 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant is tried for armed robbery of a bank.

On cross-examination of the defendant, the prosecutor asks him whether he was convicted of tax fraud the previous year. The question is

A: proper to show that the defendant is inclined to lie.
B: proper to show that the defendant is inclined to steal money.
C: improper, because the conviction has insufficient similarity to the crime charged.
D: improper, because the probative value of evidence is outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is A. Evidence of prior crimes is admissible to impeach the testimony of a witness if the crime is a felony or a crime of dishonesty. The defendant's prior conviction for tax fraud is admissible to attack the credibility of his testimony, and a question regarding his prior conviction is proper.

Answer B is incorrect because the prior conviction can only be used to impeach the defendant's testimony; it cannot be used to prove conduct in conformity with it. If the defendant had not testified, the prior conviction could not be used against him. Answer C is incorrect because it ignores the use of the prior conviction for impeachment. The prosecution does not need to show that the crimes are similar in any way before the prior conviction can be used to impeach the defendant's testimony. Answer D is incorrect because the prior conviction is highly probative as to the defendant's credibility and is being used only as impeachment and not to prove conduct in conformity with the prior conviction. Since the prior conviction is being used to impeach the defendant's testimony, it is probative and the question is proper.

Question 130 - Evidence - Writings Recordings and Photographs

The question was:

A plaintiff sued a defendant for a libelous letter received by an investigator. The authenticity and contents of the letter are disputed.

The plaintiff's attorney asks the investigator to testify that, a week before receiving the libelous letter, he had written to the defendant inquiring about the plaintiff. The testimony is

A: admissible because this inquiry was made in the regular course of the investigator's business.
B: admissible without production of the inquiry letter or the showing of its unavailability.
C: inadmissible because the plaintiff's attorney had not given the defendant notice of the investigator's intended testimony.
D: inadmissible because the inquiry letter itself was not shown to be unavailable.

The explanation for the answer is:

The correct answer is B. The investigator's testimony about his prior inquiry concerning the plaintiff is admissible, without producing the inquiry letter or proving its unavailability, because the investigator's testimony that the initial inquiry letter was sent authenticates the defendant's letter under the reply-letter doctrine. Under that doctrine, while the contents of the original letter are irrelevant and do not have to be proven, evidence that the inquiry letter was sent suffices to authenticate the reply letter.

Answer A is incorrect because the inquiry letter does not have to arise from the regular course of business before the investigator could testify to sending the letter. Answer C is incorrect because the plaintiff does not have to inform the defendant about the investigator's plan to testify to sending the inquiry letter. Answer D is incorrect because the investigator could testify that the inquiry letter was sent to the defendant without proving unavailability of the inquiry letter.

Question 147 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was tried for the July 21 murder of a victim. In his case in chief, the defendant called his first witness to testify to the defendant's reputation in his community as a "peaceable man." The testimony is

A: admissible as tending to prove the defendant is believable.
B: admissible as trying to prove the defendant is innocent.
C: inadmissible, because the defendant has not testified.
D: inadmissible, because reputation is not a proper way to prove character.

The explanation for the answer is:

The correct answer is B. A criminal defendant is permitted to introduce evidence of his good character, if relevant to the charge, to attempt to prove he is innocent. The witness's testimony as to the defendant's reputation as a "peaceable man" is admissible to prove he is not guilty of murder.

Answer A is incorrect because the defendant's being a "peaceable man" is irrelevant to the determination as to whether the defendant is believable or not. It is relevant, however, to his character for non-violence. Answer C is incorrect because the defendant does not have to testify before evidence of his peaceable nature is admissible to prove he did not commit the crime. Answer D is incorrect because reputation is a proper way to prove character. The defendant is permitted to put in evidence of his peaceable character to attempt to prove he did not commit the offense of murder.

Question 147 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was tried for the July 21 murder of a victim. In his case in chief, the defendant called his first witness to testify to the defendant's reputation in his community as a "peaceable man." The testimony is

A: admissible as tending to prove the defendant is believable.
B: admissible as trying to prove the defendant is innocent.
C: inadmissible, because the defendant has not testified.
D: inadmissible, because reputation is not a proper way to prove character.

The explanation for the answer is:

The correct answer is B. A criminal defendant is permitted to introduce evidence of his good character, if relevant to the charge, to attempt to prove he is innocent. The witness's testimony as to the defendant's reputation as a "peaceable man" is admissible to prove he is not guilty of murder.

Answer A is incorrect because the defendant's being a "peaceable man" is irrelevant to the determination as to whether the defendant is believable or not. It is relevant, however, to his character for non-violence. Answer C is incorrect because the defendant does not have to testify before evidence of his peaceable nature is admissible to prove he did not commit the crime. Answer D is incorrect because reputation is a proper way to prove character. The defendant is permitted to put in evidence of his peaceable character to attempt to prove he did not commit the offense of murder.

Question 148 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was tried for the July 21 murder of a victim.

The defendant called a witness to testify that on July 20 the defendant said that he was about to leave that day to visit relatives in a distant state. The testimony is

A: admissible, because it is a declaration of present mental state.
B: admissible, because it is not hearsay.
C: inadmissible, because it is irrelevant.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is A. The defendant's statement to the witness describes the defendant's current mental condition, that being his intention to visit relatives in a distant state. The statement should be admissible under the 'then existing mental condition' exception to the hearsay rule.

Answer B is incorrect because the defendant's statement is an out-of-court statement offered into evidence for the truth of the matter asserted, and is thus hearsay. However, the statement is being offered to try and prove the defendant intended to leave the area where the murder occurred and is admissible under the 'then existing mental condition' exception to the hearsay rule.

Answer C is incorrect because the evidence is clearly relevant to establish the defendant's state of mind concerning a possible alibi defense to the murder, namely the defendant's intent to leave for a distant state.

Answer D is incorrect because, although the statement is hearsay, it is admissible under the 'then existing mental state' exception to the hearsay rule. Because the defendant's statement to the witness is being offered to prove the defendant's intent to visit relatives in a distant state, it is hearsay; however, the statement is admissible to show the defendant's mental condition at the time the statement was made.

Question 149 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was tried for the July 21 murder of a victim.

The defendant called a witness to testify to his alibi. On cross-examination of the witness, the prosecution asked, "Isn't it a fact that you are the defendant's first cousin?" The question is

A: proper, because it goes to bias.
B: proper, because a relative is not competent to give reputation testimony.
C: improper, because the question goes beyond the scope of direct examination.
D: improper, because the evidence being sought is irrelevant.

The explanation for the answer is:

The correct answer is A. Questions regarding familial relations between a witness for the defense and the defendant are proper to probe for the possible existence of bias or the witness's motive to lie. Answer B is incorrect because the witness is being called to testify to an alibi, not to give reputation evidence. In addition, answer B is incorrect because a relative of the defendant is not automatically incompetent to give evidence of reputation. Answer C is incorrect because questions regarding a witness's prejudice, bias, or motive to lie can be raised at any time and are proper regardless of whether those issues were raised on direct examination. Answer D is incorrect because the existence of a familial relationship between a witness and a defendant is probative of the issue of whether the witness has any bias or motive to lie, and is thus relevant.

Question 150 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was tried for the July 21 murder of a victim.

The defendant called a witness to testify to his alibi. On cross-examination of the witness, the prosecutor asked, "Weren't you on the jury that acquitted the defendant of another criminal charge?" The best reason for sustaining an objection to this question is that

A: the question goes beyond the scope of direct examination.
B: the probative value of the answer would be outweighed by its tendency to mislead.
C: the question is leading.
D: prior jury service in a case involving a party renders the witness incompetent.

The explanation for the answer is:

The correct answer is B. Because there is no implication of bias simply because a witness was on a jury that previously acquitted the defendant, the question is improper. The witness's service on a jury at the defendant's earlier trial, even if the jury acquitted the defendant, is at best minimally probative. In order to prevent the jury from speculating about the other case, or drawing improper conclusions about the witness's prior jury service, the question should not be allowed.

Answer A is incorrect because matters affecting the credibility of a witness are allowed on cross-examination, regardless of whether or not they were raised on direct examination. Answer C is incorrect because leading questions are permitted during the cross examination of a witness. Answer D is incorrect because prior jury service in a case involving a party does not render the witness incompetent. The limitations placed on a juror's service only apply to the immediate case the juror is sitting on and inquiries into the validity of the verdict. It does not foreclose the possibility of that juror ever testifying in another case involving the parties. The best reason for sustaining an objection is that the question lacks probative value, and any probative value the question does have is outweighed by the question's tendency to mislead the jurors.

Question 161 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A clerk was held up at gun point with an unusual revolver with a red painted barrel while she was working in a neighborhood grocery store. A defendant is charged with armed robbery of the clerk.

The prosecutor calls a witness to testify that, a week after the robbery of the clerk, he was robbed by the defendant with a pistol that had red paint on the barrel. The witness' testimony is

A: admissible to establish an identifying circumstance.
B: admissible to show that the defendant was willing to commit robbery.
C: inadmissible, because it is improper character evidence.
D: inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is A. Evidence of other crimes, while generally not admissible, can be admitted to prove things other than the defendant's criminal disposition. The acronym "MIMIC" identifies relevant purposes for admitting such evidence: Motive, Intent, Mistake, Identity, or Common scheme or plan. In this question, because the gun was very unusual, the testimony of the witness is admissible to establish the identity of the robber by establishing that the identifying characteristic was present in the earlier crime.

Answer B is incorrect because the evidence of the defendant robbing the witness is admissible only to prove identity, not to prove the defendant's willingness or penchant for committing robberies.

Answer C is incorrect because the evidence of the defendant's robbery is not being offered as character evidence; instead, it is being offered to establish the identity of the person who robbed the clerk. While evidence of other crimes is generally considered improper character evidence, there is an exception when the evidence is being used for a MIMIC purpose.

Answer D is incorrect because the probative value of the witness's testimony in identifying the robber outweighs the danger of unfair prejudice.

Question 161 - Evidence - Relevancy and Excluding Relevant Evidence

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B: admissible to show that the defendant was willing to commit robbery.
C: inadmissible, because it is improper character evidence.
D: inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is A. Evidence of other crimes, while generally not admissible, can be admitted to prove things other than the defendant's criminal disposition. The acronym "MIMIC" identifies relevant purposes for admitting such evidence: Motive, Intent, Mistake, Identity, or Common scheme or plan. In this question, because the gun was very unusual, the testimony of the witness is admissible to establish the identity of the robber by establishing that the identifying characteristic was present in the earlier crime.

Answer B is incorrect because the evidence of the defendant robbing the witness is admissible only to prove identity, not to prove the defendant's willingness or penchant for committing robberies.

Answer C is incorrect because the evidence of the defendant's robbery is not being offered as character evidence; instead, it is being offered to establish the identity of the person who robbed the clerk. While evidence of other crimes is generally considered improper character evidence, there is an exception when the evidence is being used for a MIMIC purpose.

Answer D is incorrect because the probative value of the witness's testimony in identifying the robber outweighs the danger of unfair prejudice.

Question 184 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A bus passenger sued the transit company for injuries to his back from an accident caused by the company's negligence. The company denies that the passenger received any injury in accident.

The passenger's counsel seeks to introduce an affidavit he obtained in preparation for trial from a physician, who has since died. The affidavit avers that the physician examined the passenger two days after the company's 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.

The explanation for the answer is:

The correct answer is D. The physician's affidavit is an out-of-court statement that is being offered for the truth of the matter asserted and should be inadmissible as hearsay not within any exception.

Answer A is incorrect because the affidavit concerns the physician's examination of the passenger, not just the passenger's statements to the physician of present bodily condition. Although the statements the passenger made to the physician for the purposes of medical treatment may be admissible, the affidavit regarding the physician's evaluation of the passenger would be inadmissible hearsay.

Answer B is incorrect because an affidavit is insufficient to be considered "former testimony" that would be an exception to the hearsay rule. The affidavit was not subject to cross-examination by the party to the suit, which may allow for the development of the testimony, and would not be admissible under the prior testimony exception to the hearsay rule.

Answer C is incorrect because the physician's examination, done just two days after the accident, finding that the passenger had suffered a recent back injury is clearly relevant to the issue of whether the passenger suffered an injury in the accident. Although relevant, the physician's affidavit is still inadmissible hearsay. Since the affidavit was not prior testimony and not subject to cross-examination, it is hearsay not within any exception.

Question 185 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A bus passenger sued the transit company for injuries to his back from an accident caused by the company's negligence. The company denies that the passenger received any injury in accident.

The company calls an observer to testify that right after the accident, the passenger told him that he had recently suffered a recurrence of an old back injury. The judge should rule the 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.

The explanation for the answer is:

The correct answer is A. The passenger's statement that he suffered from a recurrence of an old back injury is a statement that is being offered against the passenger to show he was not injured in the accident. The passenger's statement is an admission by a party opponent and is thus not hearsay.

Answer B is incorrect because there is no evidence that the passenger was under the stress of the excitement of a startling event when he made the statement. The passenger's statement would not be considered an excited utterance or a spontaneous declaration. Answer C is incorrect because the statement indicates that the passenger had suffered a back injury before the accident and had recently had a recurrence of the injury. This evidence is clearly relevant to the issue of whether the passenger was actually injured in the accident and whether the injury was caused by the accident. Answer D is incorrect because hearsay is specifically defined to exclude admissions by a party opponent. The passenger's statement to the observer is an admission by a party opponent and should be admissible.

Question 193 - Evidence - Privileges and Other Policy Exclusions

The question was:

An automobile driver sues a company for injuries suffered when the automobile driver's car collided with one of the company's trucks. The company'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. The automobile driver 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.

The explanation for the answer is:

The correct answer is B. Confidential communications between an attorney and client made during legal consultation are privileged, and the production of them will not be required. The report of the company's general manager was made at the request of the company's attorney in preparation for trial and is a confidential communication protected by the attorney-client privilege.

Answer A is incorrect because the report was done at the behest of the attorney and in preparation for trial, so, although it is a business record, it is also privileged and should not be required to be produced. Answer C is incorrect because whether or not the report contains hearsay is irrelevant to the determination of whether the report is a privileged communication. Answer D is incorrect because whether or not such reports are self-serving is also irrelevant to the determination of whether the report is a privileged communication. Since the report is covered by the attorney-client privilege, production of the report is not required.

Question 197 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff brought an action against the defendant for injuries received in an automobile accident, alleging negligence in that the defendant was speeding and inattentive. The plaintiff calls a witness to testify that the defendant had a reputation in the community for being a reckless driver and was known as a "dare-devil." The witness' testimony is

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

The explanation for the answer is:

The correct answer is D. Evidence of a person's character is inadmissible to prove the individual acted in conformity with such character on a particular occasion. The defendant's reputation in the community as a "dare-devil" is inadmissible to prove he acted negligently on this occasion.

Answer A is incorrect because the evidence sought to be admitted here is character evidence of the defendant's reputation, not evidence of the defendant's habits. Habit evidence consists of a routine, specific practice, not a general reputation, and is offered to show a pattern of habitual action. Answer B is incorrect because the witness's testimony is offered only to show that, on the date in question, the defendant was acting consistent with his reputation. This type of evidence is inadmissible in civil cases. Answer C is incorrect because the witness's testimony is not being used to rebut any evidence of the defendant's good character. It is being offered to show conduct consistent with a bad reputation. Given this fact situation, the witness's testimony is an attempt to prove the defendant's negligence by showing a reputation for negligence and will be found to be inadmissible.

Question 202 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

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

The explanation for the answer is:

The correct answer is B. The brother's affidavit is an out-of-court statement that is being offered for the truth of the matter asserted, namely that the grantor had begun displaying unusual behavior. Thus, the brother's affidavit is hearsay and inadmissible because it is not within any exception.

Answer A is incorrect because eyewitness opinion can be relevant and admissible; this affidavit is only inadmissible because it is hearsay. Answer C is incorrect because there is no "official document" exception to the hearsay rule that would allow for the admissibility of an affidavit. Answer D is incorrect because the ancient document exception requires that the document be authenticated and be over twenty years old. The brother's affidavit, only 15 years old and not self-authenticating, does not fit that exception. Therefore, the brother's affidavit is inadmissible hearsay and should be found to be inadmissible.

Question 214 - Evidence - Writings Recordings and Photographs

The question was:

A defendant has denied his purported signature on a letter which has become critical in a breach of contract suit between the defendant and the plaintiff. At trial, the plaintiff's counsel calls a teacher who testifies that she taught the defendant mathematics in school ten years earlier, knows his signature, and proposes to testify that the signature to the letter is that of the defendant.

The defendant'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 the defendant'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 she has seen the person in question write, and has an opinion concerning the writing in question.

The explanation for the answer is:

The correct answer is D. A non-expert who is familiar with the handwriting in question is permitted to give an opinion as to the identity of the handwriting. Handwriting is one of the areas in which courts will accept testimony regarding a lay person's opinion, if the opinion is based on the perception of the witness and the opinion would be helpful to the trier of fact.

Answer A is incorrect because identification of handwriting does not need to be given by expert testimony; any person sufficiently familiar with another's handwriting is allowed to give his opinion. Answer B is incorrect because the mere fact that there may be someone more familiar with the handwriting does not preclude the teacher from testifying as to her opinion that the writing is the defendant's. The best evidence rule does not apply in this case as the original writing is being used. The fact that the teacher has not seen the defendant's signature in ten years only goes to the weight that the trier of fact should give the testimony. Answer C is incorrect because the teacher does not need to be qualified as an expert before she is allowed to testify as to her opinion regarding the defendant's handwriting.

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The defendant'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 the defendant'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 she has seen the person in question write, and has an opinion concerning the writing in question.

The explanation for the answer is:

The correct answer is D. A non-expert who is familiar with the handwriting in question is permitted to give an opinion as to the identity of the handwriting. Handwriting is one of the areas in which courts will accept testimony regarding a lay person's opinion, if the opinion is based on the perception of the witness and the opinion would be helpful to the trier of fact.

Answer A is incorrect because identification of handwriting does not need to be given by expert testimony; any person sufficiently familiar with another's handwriting is allowed to give his opinion. Answer B is incorrect because the mere fact that there may be someone more familiar with the handwriting does not preclude the teacher from testifying as to her opinion that the writing is the defendant's. The best evidence rule does not apply in this case as the original writing is being used. The fact that the teacher has not seen the defendant's signature in ten years only goes to the weight that the trier of fact should give the testimony. Answer C is incorrect because the teacher does not need to be qualified as an expert before she is allowed to testify as to her opinion regarding the defendant's handwriting.

Question 215 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff 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 the owner of the hotel building and the lessee of the restaurant. The evidence showed that the hallway floor had been waxed approximately an hour before the plaintiff slipped on it, and although the wax had dried, there appeared to be excessive dried wax caked on several of the tiles. The hotel owner's defense was that the hallway was a part of the premises leased to the lessee of the restaurant over which he retained no control. The lessee denied negligence and alleged contributory negligence.

The lessee offered to prove, through the restaurant manager, that in the week immediately preceding the plaintiff's fall, at least 1,000 people had used the hallway in going to and from the restaurant, and the manager 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 the plaintiff did not use the care exercised by reasonably prudent people.
B: admissible, because it tends to prove that the lessee was generally careful in maintaining the floor.
C: inadmissible, because the manager's testimony is self-serving.
D: inadmissible, because it does not bear on the issue of the lessee's exercise of due care on this specific occasion.

The explanation for the answer is:

The correct answer is D. The absence of similar accidents is generally not admissible to show an absence of negligence. The court will only have the discretion to admit such evidence if the structural condition involved is unchanged. Here, the floor was waxed an hour before the plaintiff's fall. Therefore, the structural condition was changed and the absence of similar accidents will not be relevant to the defendant's exercise of due care on this particular occasion.

Answers A and B are incorrect because due to the re-waxing of the floor, the testimony of the restaurant manager about the previous week is not relevant. Answer C is incorrect because the fact that the testimony is self-serving is not a proper reason to exclude the restaurant manager's testimony; bias can be raised on cross-examination.

Question 216 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff 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 the owner of the hotel building and the lessee of the restaurant. The evidence showed that the hallway floor had been waxed approximately an hour before the plaintiff slipped on it, and although the wax had dried, there appeared to be excessive dried wax caked on several of the tiles. The hotel owner's defense was that the hallway was a part of the premises leased to the lessee of the restaurant over which he retained no control, and the lessee denied negligence and alleged contributory negligence.

If the plaintiff offered to prove that the day after she fell, the hotel owner 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 the hotel owner 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 the plaintiff'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.

The explanation for the answer is:

The correct answer is A. Subsequent remedial measures are inadmissible as evidence of negligence or defect. However, such evidence is admissible as proof of ownership or control over the property. In this question, the defense that the hotel owner raised was that he retained no control over the hallway, so evidence that the hotel owner had the vinyl taken up and replaced is relevant to prove the hotel owner's ownership and control over the property in question.

Answer B is incorrect because subsequent remedial measures are not admissible as proof of awareness of an unsafe condition which had occurred earlier. Answer C is incorrect because the success or failure of the new flooring is irrelevant to the issues in the case. Answer D is incorrect because it fails to consider the exception to the rule that subsequent remedial measures are admissible to prove control or ownership.

Question 244 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

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

The defendant calls a bystander to testify that the passenger, who was riding in the plaintiff's automobile and who also was injured, confided to him at the scene of the accident that "we should have had our lights on." The 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.

The explanation for the answer is:

The correct answer is C. The passenger's statement that "we should have had our lights on" to the bystander is an out-of-court statement being offered for the truth of the matter asserted. As such, it is hearsay, and does not fall into any exception to the hearsay rule and it is thus inadmissible.

Answer A is incorrect because the passenger is not a party to the suit, and his statement cannot be attributed to the plaintiff to be considered an admission of a party opponent. The passenger was not the plaintiff's agent, he was not the plaintiff's representative, he was not a co-conspirator, and the plaintiff did not adopt the passenger's statement as his own, so the statement is not admissible as an admission by a party opponent. Answer B is incorrect because there is no evidence that the passenger is unavailable to testify, which would be necessary to allow the statement in under the statement against interest exception. In addition, the passenger had no criminal or civil liability for the accident and his statement that the lights should have been on was not against his own interest. Answer D is incorrect because opinion evidence is admissible. The passenger's statement is inadmissible because it is hearsay, not because it is opinion.

Question 245 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

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

The defendant offers to have a bystander testify that he was talking to a witness when he heard the crash and heard the witness, now deceased, exclaim, "That car doesn't have any lights on." The bystander's testimony is

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

The explanation for the answer is:

The correct answer is A. The witness' statement that "that car doesn't have any lights on" was a statement describing the condition of the vehicle and was made while the witness was perceiving that condition. Although the statement was made out of court and is being offered for the truth of the matter asserted, it fits the present sense impression exception to the hearsay rule and is admissible.

Answer B is incorrect because, for the present sense impression exception to the hearsay rule, the availability of the declarant is immaterial; the witness's unavailability does not render his statement admissible. Answer C is incorrect because, although the statement is hearsay, it falls under the present sense impression exception to the hearsay rule. Answer D is incorrect because the Dead Man's Statute is inapplicable to this question because the bystander has no interest in the estate of the witness. The Dead Man's Statute is to prevent witness testimony about conversations with a deceased party and is not relevant to this situation.

Question 246 - Evidence - Privileges and Other Policy Exclusions

The question was:

An owner and his employee, a driver, consult an attorney about a motor vehicle collision resulting in a suit by the litigant against the owner and the driver as joint defendants. The attorney calls 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. The owner thereafter files a cross-claim against the driver for indemnity for any damages obtained by the litigant.

The litigant calls the driver to testify in litigant's case in chief to admissions made by the owner in the conference. On objection by the owner, the court should rule that the driver's testimony is

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

The explanation for the answer is:

The correct answer is C. The attorney-client privilege covers confidential communications between an attorney and client made during the legal consultation, and those communications are inadmissible in cases with third party claimants. The litigant's attempt to introduce the owner's statements made during the legal conference violates the attorney client privilege, and the driver's testimony as to statements made by the owner at the conference is inadmissible.

Answer A is incorrect because the mere presence of the investigator in the conference does not act as a waiver of the attorney-client privilege. Since the investigator was at the conference to take notes that were meant to be confidential at the request of the attorney, his presence as the agent of the attorney does not waive the privilege. In addition, the driver's presence at the conference, who was also represented by the attorney, does not waive the privilege as to litigant. Since everyone in the joint consultation conference was there pursuant to the legal representation, the communications held in that room were confidential to anyone outside the meeting. Thus, the attorney-client privilege would prevent the litigant from introducing evidence of the owner's statements at the joint consultation.

Answer B is incorrect because the driver and the owner were both clients of the attorney at the time of the conference, so the communications are still subject to the attorney client privilege in regards to the litigant. Because the driver was not originally an adverse party to the owner, the communications in the original meeting were to be confidential to all outside sources, including the litigant. The attorney client privilege still applies.

Answer D is incorrect because the best evidence rule deals only with writings, recordings and photographs, and is based on the idea that original writings are superior to a copies. It would not preclude the testimony of a witness in this case.

Question 246 - Evidence - Privileges and Other Policy Exclusions

The question was:

An owner and his employee, a driver, consult an attorney about a motor vehicle collision resulting in a suit by the litigant against the owner and the driver as joint defendants. The attorney calls 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. The owner thereafter files a cross-claim against the driver for indemnity for any damages obtained by the litigant.

The litigant calls the driver to testify in litigant's case in chief to admissions made by the owner in the conference. On objection by the owner, the court should rule that the driver's testimony is

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

The explanation for the answer is:

The correct answer is C. The attorney-client privilege covers confidential communications between an attorney and client made during the legal consultation, and those communications are inadmissible in cases with third party claimants. The litigant's attempt to introduce the owner's statements made during the legal conference violates the attorney client privilege, and the driver's testimony as to statements made by the owner at the conference is inadmissible.

Answer A is incorrect because the mere presence of the investigator in the conference does not act as a waiver of the attorney-client privilege. Since the investigator was at the conference to take notes that were meant to be confidential at the request of the attorney, his presence as the agent of the attorney does not waive the privilege. In addition, the driver's presence at the conference, who was also represented by the attorney, does not waive the privilege as to litigant. Since everyone in the joint consultation conference was there pursuant to the legal representation, the communications held in that room were confidential to anyone outside the meeting. Thus, the attorney-client privilege would prevent the litigant from introducing evidence of the owner's statements at the joint consultation.

Answer B is incorrect because the driver and the owner were both clients of the attorney at the time of the conference, so the communications are still subject to the attorney client privilege in regards to the litigant. Because the driver was not originally an adverse party to the owner, the communications in the original meeting were to be confidential to all outside sources, including the litigant. The attorney client privilege still applies.

Answer D is incorrect because the best evidence rule deals only with writings, recordings and photographs, and is based on the idea that original writings are superior to a copies. It would not preclude the testimony of a witness in this case.

Question 247 - Evidence - Privileges and Other Policy Exclusions

The question was:

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

The driver calls the investigator in his defense against the cross-claim. He seeks to have the investigator testify to an admission made by the owner in the conference. On objection by the owner, the court should rule the investigator'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 the owner has not waived the attorney-client privilege.

The explanation for the answer is:

The correct answer is A. Although the owner's communications at the joint consultation conference were confidential to outside parties, they were not confidential as to the driver. Since the driver and the owner are now adverse parties, statements made by the owner at the joint consultation are not privileged in this case, and the court should rule the investigator's testimony admissible.

Answer B is incorrect because the investigator was acting as an agent of the attorney and was in a confidential relationship with the owner and driver. Answer C is incorrect because the conference involved a discussion of the facts of the collision and the owner's insurance, which was confidential information. The mere fact that it may be discussed later at trial does not mean the communications were not confidential. Answer D is incorrect because, with the driver in the room during the joint conference with their attorney, the owner had already waived confidentiality as to the driver. Since the owner's admissions in the conference were made in the presence of the driver, there was no attorney-client privilege as to the driver's introduction of those statements into evidence.

Question 255 - Evidence - Privileges and Other Policy Exclusions

The question was:

The driver of a car and three passengers were injured when their car was struck by a truck owned by Mammoth Corporation and driven by a Mammoth employee. A second Mammoth employee was riding in the truck. The issues in this case include the negligence of the Mammoth employee in driving too fast and failing to wear glasses, and the negligence of the driver of the car in failing to yield the right of way.

The car driver's counsel proffers evidence showing that shortly after the accident, Mammoth Corporation put a speed governor in the truck involved in the accident. The judge should rule the proffered evidence

A: admissible as an admission of a party.
B: admissible as *res gestae*.
C: inadmissible for public policy reasons.
D: inadmissible, because it would lead to the drawing of an inference on an inference.

The explanation for the answer is:

The correct answer is C. Placing a speed governor in the truck is the taking of a subsequent remedial measure to avoid future accidents. It is in favor of public policy to encourage the taking of remedial measures, regardless of the actual fault involved in the initial accident. Evidence of taking such remedial measures, if introduced to show negligence or culpable conduct, should be ruled inadmissible.

Answer A is incorrect because placing a speed governor in the vehicle does not necessarily constitute an admission of fault in this case, and because evidence of subsequent remedial measures is inadmissible pursuant to public policy. Answer B is incorrect because a subsequent addition of the speed governor is not res gestae of the accident. Answer D is incorrect because "drawing an inference from an inference" is not a legal standard to determine the admissibility of evidence and because the evidence is inadmissible as a subsequent remedial measure.

Question 256 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The driver of a car and three passengers were injured when their car was struck by a truck owned by Mammoth Corporation and driven by a Mammoth employee. A second Mammoth employee was riding as a passenger in the truck. The issues in this case include the negligence of the Mammoth employee in driving too fast and failing to wear glasses, and the negligence of the driver of the car in failing to yield the right of way.

The car driver's counsel seeks to introduce the written statement from the Mammoth truck's passenger that the Mammoth employee had left his glasses (required by his operator's license) at the truck stop when they had left five minutes before the accident. The judge should rule the statement admissible only if

A: The driver of the car first proves that the truck passenger is an agent of Mammoth and that the statement concerned a matter within the scope of his agency.
B: The driver of the car produces independent evidence that the Mammoth employee who was driving was not wearing corrective lenses at the time of the accident.
C: The truck passenger is shown to be beyond the process of the court and unavailable to testify.
D: the statement was under oath in affidavit form.

The explanation for the answer is:

The correct answer is A. The passenger's written statement is an out-of-court statement that is being offered for the truth of the matter asserted, and would typically be considered inadmissible as hearsay. However, if the passenger's statement is an admission by a party opponent, it would be admissible as nonhearsay under the federal rules. Here, the passenger's statement would be admissible as a vicarious admission by a party opponent if the passenger is an agent of Mammoth and the statement concerned a matter within the scope of the agency.

Answer B is incorrect because, even if there was independent evidence that the Mammoth employee was not wearing corrective lenses at the time of the accident, that fact would not change the determination that the passenger's written statement is inadmissible hearsay. Hearsay, even if corroborated, is still hearsay. Answer C is incorrect because the passenger's availability to testify is irrelevant to the determination of whether the written statement is inadmissible hearsay. Even if the passenger is unavailable, the statement would still be inadmissible. Answer D is incorrect because affidavits are insufficient to be considered admissible as prior testimony. Unless the driver of the car can show that the passenger's written hearsay statement amounted to an admission by a party opponent, the statement should be held inadmissible.

Question 257 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The driver of a car and three passengers were injured when their car was struck by a truck owned by Mammoth Corporation and driven by a Mammoth employee. A second Mammoth employee was riding in the truck. The issues in this case include the negligence of the Mammoth employee in driving too fast and failing to wear glasses, and the negligence of the driver of a car in failing to yield the right of way. Mammoth's counsel seeks to have a sheriff testify that while he was investigating the accident he was told by the driver of a car, "This was probably our fault." The judge should rule the proffered evidence

A: admissible as an admission of a party.
B: admissible, because it is a statement made to a police officer in the course of an official investigation.
C: inadmissible, because it is a mixed conclusion of law and fact.
D: inadmissible, because it is hearsay, not within any exception.

The explanation for the answer is:

The correct answer is A. The driver of the car's statement admitting fault is being introduced against him and is admissible as an admission by a party opponent. Admissions by a party opponent are specifically defined as nonhearsay under the federal rules.

Answer B is incorrect because there is no exception to the hearsay rule for statements made to police officers in the course of an official investigation. The driver of the car's statement is admissible because it is an admission by a party opponent, not because he made it to a police officer. Answer C is incorrect because it misstates the standard for the admission of hearsay statements. In addition, a party can admit to a matter of law, and there is no rule concerning mixed issues of law and fact as it applies to hearsay. Answer D is incorrect because the admission is specifically excluded from the definition of hearsay.

Question 272 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The defendant is charged with the murder of the deceased. The prosecutor introduced testimony of a police officer that the deceased told a priest, administering the last rites, "I was stabbed by [the defendant]. Since I am dying, tell him I forgive him." Thereafter, the defendant's attorney offers the testimony of a friend that the day before, when the deceased believed he would live, he stated he had been stabbed by an old enemy, not the defendant. The testimony of the friend 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 this case.

The explanation for the answer is:

The correct answer is B. Statements that may otherwise be inadmissible as hearsay can be used to impeach testimony already given from the declarant. Although the deceased's statement that an old enemy had stabbed him would normally be inadmissible hearsay, it can be used to impeach his later statement that the defendant was the one who stabbed him. Although the declarant is deceased, his admissible statement that the defendant was the killer can still be impeached by one of the declarant's prior inconsistent statements.

Answer A is incorrect because the deceased's statement to his friend that an old enemy had stabbed him, if it were admitted for the truth of the matter asserted (that the old enemy did stab the deceased), then it would be hearsay without any exception. The statement that the old enemy stabbed him was not a dying declaration, and since it was hearsay, it can be used only to impeach his later statement and not as substantive evidence.

Answer C is incorrect because the deceased's statement is factual evidence and not opinion evidence. Opinion evidence that goes to the ultimate issue in the case may be inadmissible, but factual evidence, such as who stabbed the victim, is clearly admissible.

Answer D is incorrect because who actually stabbed the deceased, whether it is the defendant or the old enemy, is one of the most substantive issues in the case, and the deceased's statement that the old enemy had stabbed him is clearly relevant to determine who killed the deceased.

Question 278 - Evidence - Writings Recordings and Photographs

The question was:

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

The farmer offered to testify that he looked up the equestrian's telephone number in the directory, called that number, and that a voice answered "This is [the equestrian] speaking." At this the farmer 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 speaker'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 because the farmer did not testify that he was familiar with the equestrian's voice and that it was in fact the equestrian to whom he spoke.
D: inadmissible because the equestrian was not first asked whether or not the conversation took place and has been given the opportunity to admit, deny, or explain.

The explanation for the answer is:

The correct answer is A. The farmer's testimony regarding his use of the telephone directory for an outgoing call, his use of the telephone system, and the speaker identifying himself as the equestrian, provides sufficient authentication for the telephone call to allow its entry into evidence.

Answer B is incorrect because judicial notice of the accuracy of telephone directories, by itself, would not provide the proper authentication for the telephone call. Answer C is incorrect because identification of the equestrian's voice is not the only way to authenticate the telephone call. Authentication can also be done in the manner above; it is not necessary for the caller to be familiar with the voice of the speaker in all cases. Answer D is incorrect because there is no requirement that the equestrian has to be questioned about the call before testimony regarding it can be introduced. If the telephone conversation is properly authenticated, it can be admitted into evidence, regardless of whether the equestrian is questioned about it or not.

Question 279 - Evidence - Writings Recordings and Photographs

The question was:

In a trial between a farmer and an equestrian, an issue arose about the equestrian's ownership of a horse, which had caused damage to the farmer's crops. The farmer testified that the photograph was taken within a week after the alleged occurrence, and fairly and accurately portrays the condition of the cornfield after the damage was done.

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

The explanation for the answer is:

The correct answer is A. To authenticate a photograph in order to introduce it into evidence requires the proponent to establish that the photograph fairly and accurately portrays the scene it represents. Because the farmer testified that the photograph fairly and accurately portrays the condition of the cornfield after the damage was done, it should be admitted into evidence.

Answer B is incorrect because the proximity in time to the incident is not the determining factor in the admissibility of a photograph. The determining factor is whether the photograph fairly and accurately depicts the scene it represents. Answer C is incorrect because it is no longer necessary to show the circumstances around the taking of the photograph before the photograph can be admitted into evidence. Answer D is incorrect because testimony regarding what is in the photograph does not preclude the admission of the photograph. If the photograph fairly and accurately depicts the nature and extent of damage done, the photograph should be admitted into evidence.

Question 282 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sues a department store for personal injuries, alleging that while shopping she was knocked to the floor by a merchandise cart being pushed by a stock clerk and her back was injured as a result.

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

The judge should rule the report offered by the department store

A: admissible as *res gestae*.
B: admissible as a business record.
C: inadmissible, because it is hearsay, not within any exception.
D: inadmissible, because the stock clerk is available as a witness.

The explanation for the answer is:

The correct answer is C. The stock clerk's written report is an out-of-court statement that is being offered for the truth of the matter asserted - that the plaintiff fell and was not hit by the cart. Thus, it is hearsay. The stock clerk's written report does not fall within any of the exceptions to the hearsay rule and is inadmissible.

Answer A is incorrect because the report is being offered for the truth of the matter asserted - that the plaintiff fell on her own accord - and not to show any state of mind of the stock clerk. Answer B is incorrect because the accident report is the type of business record that the department store keeps in the regular course of business, but quotes the stock clerk's own statement about the accident. A business record that quotes parties or witnesses is generally not within the exception because the person being quoted in the report is under no duty to accurately convey information about the incident. Answer D is incorrect because the stock clerk's availability as a witness is not the best choice for the rationale of the judge when ruling on the admissibility of the report. Further, whether the stock clerk is available or not, the report is still hearsay and inadmissible.

Question 306 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant, who was charged with the crime of assaulting the plaintiff, admitted striking the plaintiff but claimed to have acted in self-defense when he was attacked by the plaintiff, who was drunk and belligerent after a football game.

The defendant's friend was called to testify that the plaintiff had a reputation among the people with whom he lived and worked for law-breaking and frequently engaging in brawls. The trial judge should rule the testimony

A: admissible to support the defendant's theory of self-defense, touching on whether the defendant or the plaintiff was the aggressor.
B: inadmissible because the friend did not testify as to specific acts of misconduct on the plaintiff's part of which the friend has personal knowledge.
C: inadmissible on the question of the defendant's guilt because the defendant, not the plaintiff, is on trial.
D: inadmissible, because the friend failed to lay a proper foundation.

The explanation for the answer is:

The correct answer is A. Evidence of a relevant, specific trait of character of the alleged victim can be offered by the accused to attempt to show that the victim was the aggressor in this case. The defendant's friend's testimony that the plaintiff had a reputation for a specific, relevant trait, in this case a reputation for law-breaking and violence, is admissible to support the defendant's theory of self defense by showing that the plaintiff was the aggressor.

Answer B is incorrect because the defendant's friend does not need to testify to specific acts of misconduct by the plaintiff, but rather can testify to the plaintiff's reputation in the community for violence. Answer C is incorrect because the defendant has raised the issue of self-defense, and the defendant's friend's testimony is allowed to help prove that defense through reputation evidence of the alleged victim. Answer D is incorrect because the defendant's friend can testify as to things in his personal knowledge, including the plaintiff's reputation.

Question 320 - Evidence - Privileges and Other Policy Exclusions

The question was:

The driver of an automobile ran into and injured a pedestrian. With the driver in his car were his wife and another passenger. A passerby saw the accident and called the police department, which sent a sheriff to investigate.

All of these people were available as potential witnesses in the case brought by the pedestrian against the driver. The pedestrian alleges that the driver, while drunk, struck the pedestrian who was in a duly marked crosswalk.

The pedestrian's counsel wishes to prove that after the pedestrian filed suit, the driver went to the pedestrian's residence and offered $1,000 to settle the pedestrian's claim. The trial judge should rule this evidence

A: admissible as an admission of a party.
B: admissible as an admission to show the driver'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 relevant and an admission, the policy of the law is to encourage settlement negotiations.

The explanation for the answer is:

The correct answer is D. For public policy reasons, settlement offers and the conduct or statements accompanying such offers are not admissible. Normally, for the exclusion to apply there must be an implied or express indication that a claim will be made, and the claim must be disputed as to liability or amount. If there is not, then an admission of fact is usually not considered part of a settlement negotiation and will be admissible as an admission. Here, a claim has clearly been made. The statement by the plaintiff is an offer to settle, and at the time of the statement liability was still in dispute. Therefore, the defendant's offer to settle for $1,000 would be inadmissible.

Answer A is incorrect because, although an offer to settle may include an admission, the offer is still not admissible in court. Answer B is incorrect because it is a misstatement of the applicable law and ignores the public policy and rule against admitting settlement offers into evidence. Answer C is incorrect because an offer to settle could be relevant to the question of liability. The offer to settle is inadmissible, not because it is irrelevant, but because public policy is to encourage the settlement of claims.

Question 321 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The driver of an automobile ran into and injured a pedestrian. With the driver in his car were his wife and another passenger. A passerby saw the accident and called the police department, which sent a sheriff to investigate.

All of these people were available as potential witnesses in the case brought by the pedestrian against the driver. The pedestrian alleges that the driver, while drunk, struck the pedestrian who was in a duly marked crosswalk.

The pedestrian's counsel wants to have the sheriff testify to the following statement made to him by the passenger, out of the presence of the driver: "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, because it is hearsay, not within any exception.
D: inadmissible, because it would lead the court into nonessential side issues.

The explanation for the answer is:

The correct answer is C. The passenger's statement is an out of court declaration that is being offered for the truth of the matter asserted - that the driver had been drinking. As such, it is hearsay and inadmissible because it does not meet the criteria for any exception to the hearsay rule.

Answer A is incorrect because the passenger is not a party to the suit and his statement cannot be attributed to the driver. He was not an agent or a co-conspirator, nor was his statement adopted by the driver, so it is not an admission by a party opponent. Answer B is incorrect because the passenger's admission that he had been drinking had no civil or criminal liability for him and was not so far contrary to his pecuniary or proprietary interests that no reasonable person would have made the statement had it not been true. Answer D is incorrect because the statement, although hearsay, is relevant to prove that the driver had been drinking when the accident occurred. The statement is highly relevant and should not be suppressed solely because it would lead to nonessential side issues. The statement, however, is inadmissible because it is hearsay, not within any exception.

Question 346 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was indicted for the murder of the victim by poison. At trial, the prosecutor calls the county coroner, 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 the victim's corpse and that it is the coroner's opinion, based on that study, that the victim died of poisoning. The slides have not been offered in evidence.

The coroner'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 the coroner 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.

The explanation for the answer is:

The correct answer is C. The coroner's testimony that, in her opinion, the victim died from poisoning, should be admitted as expert testimony. Because the coroner has specialized knowledge that will assist the trier of fact, and she is state-certified and qualified to render an opinion, her testimony should be admitted. The coroner's testimony was the product of reliable principles and methods, and she followed the accepted medical practice in arriving at her opinion.

Answer A is incorrect because the cause of death, while a critical issue, is not the ultimate issue of fact that would encroach on the province of the jury. The coroner would not testify that the defendant poisoned the victim; her testimony would be that the victim died of poisoning, a perfectly proper issue to be handled by expert testimony. Answer B is incorrect because an expert can rely on facts, or in this case, slides, that are not introduced into evidence, in forming her opinion as to the cause of death. The slides do not need to be introduced into evidence before the coroner would be allowed to testify as to her opinion. Answer D is incorrect because it is the wrong standard for determining the issue of admissibility of expert testimony. The admissibility of the coroner's testimony does not rest on whether the matters observed were pursuant to a duty imposed by law.

Question 347 - Evidence - Privileges and Other Policy Exclusions

The question was:

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

The judge, over the prosecutor's objection, ordered that if the witness 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: The witness had not been charged with any crime and, thus, could claim no privilege against self-incrimination.
B: The witness'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 the witness' answer could incriminate her.

The explanation for the answer is:

The correct answer is B. The witness, had she answered the cross-examination question, would have incriminated herself in criminal wrongdoing and subjected herself to possible criminal sanctions. By refusing to answer the question, the witness properly invoked her rights under the Fifth Amendment against self-incrimination, and she cannot be forced to answer the question. Since her refusal to testify was proper, the court can find that there was no meaningful cross-examination possible and could order that her testimony from direct examination be stricken.

Answer A is incorrect because the witness, by admitting to the sale of narcotics, could be charged with that crime. The witness cannot be forced to incriminate herself. Answer C is incorrect because there is no balancing test to determine the propriety of an invocation of the witness's Fifth Amendment rights against self-incrimination. The witness cannot be ordered to testify on the basis that her testimony is more important than her privilege against self-incrimination. However, the court can order her to testify, but if she still refuses, can order her prior testimony on direct stricken. Answer D is incorrect because the witness's answer could clearly incriminate her. If she answers the question affirmatively, she has admitted to committing the crime of the sale of narcotics. The risk of the witness incriminating herself is sufficient for her invocation of her privilege against self-incrimination.

Question 353 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

Cars driven by the plaintiff and the defendant collided, and the defendant was charged with driving while intoxicated in connection with the accident. She pleaded guilty and was merely fined, although under the statute the court could have sentenced her to two years in prison.

Thereafter, the plaintiff, alleging that the defendant's intoxication had caused the collision, sued the defendant for damages. At trial, the plaintiff offers the properly authenticated record of the defendant's conviction. The record should be

A: admitted as proof of the defendant's character.
B: admitted as proof of the defendant's intoxication.
C: excluded, because the conviction was not the result of a trial.
D: excluded, because it is hearsay, not within any exception.

The explanation for the answer is:

The correct answer is B. The defendant's plea of guilty to driving while intoxicated is an admission that she was, in fact, intoxicated when the accident occurred. As an admission, the record of the defendant's conviction can be admitted as proof of the defendant's intoxication. Answer A is incorrect because a prior conviction for driving while intoxicated is inadmissible to prove character. Answer C is incorrect because the defendant did not need to be tried for the charge before the conviction can be used as an admission. Her plea of guilty to the charge is an admission against a party opponent and can be used against her in the civil case. Answer D is incorrect because the plea of guilty is an admission by a party opponent, which is specifically defined as non-hearsay.

Question 354 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff sued a defendant for damages for injuries that the plaintiff incurred when a badly rotted limb fell from a curbside tree in front of the defendant's home and hit the plaintiff. The defendant claimed that the tree was on city property and thus was the responsibility of the city. At trial, the plaintiff offered testimony that a week after the accident, the defendant had cut the tree down with a chainsaw. The offered evidence is

A: inadmissible, because there is a policy to encourage safety precautions.
B: inadmissible, because it is irrelevant to the condition of the tree at the time of the accident.
C: admissible to show the tree was on the defendant's property.
D: admissible to show that tree was in a rotted condition.

The explanation for the answer is:

The correct answer is C. Subsequent remedial measures, including the removal of a tree, are generally inadmissible to show negligence. However, they can be introduced into evidence to prove ownership or control over the property in question. The defendant's cutting down of the tree can be used at trial, not to prove negligence, but to prove the defendant owned and had control over the tree.

Answer A is incorrect because, even though subsequent remedial measures are generally inadmissible to prove negligence, the defendant's cutting down of the tree is admissible to prove the tree was on the defendant's property. Answer B is incorrect because the defendant's cutting down of the tree is relevant to the main facts at issue - whose property the tree was on. Answer D is incorrect because the subsequent remedial measure of chopping down the tree is admissible only to show ownership of the tree, not to show negligence or that the tree was in a rotted condition.

Question 359 - Evidence - Writings Recordings and Photographs

The question was:

A building contractor sued a defendant for failure to pay on a small cost-plus construction contract. At trial, the contractor, 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.

The defendant objects on the ground that the contractor had routinely recorded these facts in notebooks which are in the contractor's possession.

The contractor's testimony is

A: admissible as a report of 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.

The explanation for the answer is:

The correct answer is B. Witnesses are competent to testify as to items within their first-hand knowledge. The contractor can testify to the amount of pipe, workers, and number of hours spent on the job because these items are based on his first-hand knowledge. The fact that there may be other written evidence on this issue does nothing to preclude the contractor from testifying to items within his first-hand knowledge.

Answer A is incorrect because the contractor's testimony is not a report of regularly conducted business activity; it is live testimony from a witness. Answer C is incorrect because the best evidence rule applies only to writings, recordings, and photographs, and does not preclude the admission of testimony that is based on first-hand knowledge. Answer D is incorrect because the contractor's testimony is not merely a summary of writings. It is his own recollection of items within his first-hand knowledge, separate and apart from the writings. The contractor's testimony is admissible.

Question 361 - Evidence - Privileges and Other Policy Exclusions

The question was:

A grand jury was investigating a bank robbery. The only information known to the prosecutor was a rumor that the defendant might have been involved. The grand jury subpoenaed the defendant. He refused to answer questions about the robbery and was granted use immunity. He then testified that he and his friend had robbed the bank. The grand jury indicted both the defendant and his friend for the bank robbery. The prosecutor permitted the friend to enter a plea to a lesser offense in exchange for the friend's agreement to testify against the defendant. The prosecutor had no evidence as to the identity of the robbers except the testimony of the friend and the defendant.

At the defendant's trial, his objection to the friend's being permitted to testify should be

A: sustained, because the prosecutor may not bargain away the rights of one codefendant in a deal with another.
B: sustained, because the friend's testimony was acquired as a result of the defendant's grand jury testimony.
C: overruled, because the police suspected the defendant even before he testified in the grand jury hearing.
D: overruled, because a witness cannot be precluded from testifying if his testimony is given voluntarily.

The explanation for the answer is:

The correct answer is B. Since the defendant's grand jury testimony was the only evidence garnered by the police that led to the friend's testimony, having the friend testify at trial would violate the original grant of use immunity to the defendant. The only evidence identifying the defendant as one of the bank robbers is the testimony of the friend. The friend's testimony was only discovered as a result of the defendant's testimony at the grand jury. Since the defendant had been granted immunity, any evidence that is found solely as a result of the defendant's testimony is inadmissible.

Answer A is incorrect because it misstates the standard to review the admissibility of the friend's testimony. Answer C is incorrect because, although the police suspected the defendant, there was no evidence as to the identity of the robbers until the defendant testified. The friend's testimony implicating the defendant was only discovered as a direct result of the defendant's immunized grand jury testimony. Answer D is incorrect because it is a misstatement of the law. A witness can be precluded from testifying if allowing the testimony would violate one of the defendant's constitutional rights or a prior grant of immunity. The defendant's testimony before the grand jury was obtained pursuant to a grant of use immunity, and the admission of any evidence that is solely the result of that testimony is precluded. The defendant's objection to the friend's testimony should be sustained.

Question 379 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

The defendant is tried on a charge of driving while intoxicated. When the defendant was booked at the police station, a videotape was made that showed him unsteady, abusive, and speaking in a slurred manner. If the prosecutor lays a foundation properly identifying the tape, should the court admit it in evidence and permit it to be shown to the jury?

A: Yes, because it is an admission.
B: Yes, because its value is not substantially outweighed by unfair prejudice.
C: No, because the privilege against self-incrimination is applicable.
D: No, because specific instances of conduct cannot be proved by extrinsic evidence.

The explanation for the answer is:

The correct answer is B. The videotape is relevant evidence on the issue of whether the defendant was intoxicated, and it is more probative than prejudicial. If a proper foundation is laid, there is no reason to exclude the videotape from evidence.

Answer A is incorrect because the videotape is not hearsay. It is not an out-of-court statement being offered for the truth of the matter asserted. In addition, a videotape is not an admission, it is evidence recounting the events of the night in question. Answer C is incorrect because the privilege against self-incrimination does not extend to physical reactions or statements made without a custodial interrogation. The defendant's unsteady appearance, his abusive language, and his speaking in a slurred manner are not statements that would be protected by his privilege against self-incrimination. Answer D is incorrect because it is inapplicable to the issue in this question. Specific incidents of conduct regarding the underlying charge, in this case the defendant's appearance and actions, can certainly be proven by the extrinsic evidence of the videotape. The videotape, if a foundation is properly laid, is probative evidence that should be admitted into evidence and shown to the jury.

Question 388 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In a plaintiff's negligence action against a defendant arising out of a multiple-car collision, a witness testified for the plaintiff that the defendant went through a red light. On cross-examination, the defendant seeks to question the witness about her statement that the light was yellow, made in a deposition that the witness gave in a separate action between a man and a woman. The transcript of the deposition is self-authenticating.

On proper objection, the court should rule the inquiry

A: admissible for impeachment only.
B: admissible as substantive evidence only.
C: admissible for impeachment and as substantive evidence.
D: inadmissible, because it is hearsay, not within any exception.

The explanation for the answer is:

The correct answer is C. Prior inconsistent statements given by a witness who is subject to cross examination on the stand can be used both for impeachment and as substantive evidence if the prior statements were given under oath and under penalty of perjury. Since the witness's testimony at the trial is inconsistent with her sworn testimony at the deposition, the statement at the deposition is admissible to impeach the witness's current testimony. The statement at the deposition is also admissible as substantive evidence to show the light was yellow.

Answer A is incorrect because the prior inconsistent statement can be used as substantive evidence, as well as for impeachment. Answer B is incorrect because the prior inconsistent statement can be used as impeachment of the witness's testimony at trial, in addition to being substantive evidence. Answer D is incorrect because prior inconsistent statements, if they are given under oath and under penalty of perjury in a deposition, are specifically excluded from the definition of hearsay.

Question 393 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

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

A: proper, because the conduct involved untruthfulness.
B: improper because the conduct had not resulted in conviction of the witness.
C: improper, because the impeachment involved a specific instance of misconduct.
D: improper, because the claim form would be the best evidence.

The explanation for the answer is:

The correct answer is A. Specific instances of the conduct of a witness, if probative of truthfulness or untruthfulness, can be inquired into on cross-examination of the witness to show the witness's character trait of untruthfulness. The witness's filing a false insurance claim involves untruthful conduct and, consequently, the defendant should be allowed to ask the witness about it.

Answer B is incorrect because there does not need to be a conviction for a crime before a witness can be questioned about specific instances of untruthful conduct. Answer C is incorrect because specific instances of conduct, if they are probative on the issue of the witness's truthfulness or untruthfulness, can be inquired into on cross-examination. Answer D is incorrect because the best evidence rule applies only to writings, recordings, and photographs and does not limit the use of testimony of a witness.

Question 412 - Evidence - Presentation of Evidence

The question was:

In a plaintiff's personal injury action, a physician who had no previous knowledge of the matter sat in court and heard all the evidence about the plaintiff's symptoms and conditions.

The physician is called to give her opinion whether the plaintiff's injuries are permanent. May the physician 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 the plaintiff's condition.
D: No, because permanence of injury is an issue to be decided by the jury.

The explanation for the answer is:

The correct answer is B. A witness, qualified to testify as an expert, is allowed to give an opinion based on the facts or data in the particular case, and those facts or data can be made known to the expert at or before the hearing or trial. There is no requirement that an expert hear the facts or evidence prior to the trial. The physician should be allowed to testify.

Answer A is incorrect because an expert is not required to fully identify all the data on which the opinion is based before giving her opinion to the court. Answer C is incorrect because the physician does have personal knowledge of the plaintiff's condition, albeit through the testimony and evidence presented in the courtroom. The physician is not required to conduct a physical exam of the plaintiff before she will be allowed to testify as to the extent of the plaintiff's injury. Answer D is incorrect because testimony in the form of an opinion, otherwise admissible, is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Question 428 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

In a tort action, a witness testified against the defendant. The defendant then called a friend to the stand, who testified that the witness had a bad reputation for veracity. The defendant then also called a second friend to testify that the witness once perpetrated a hoax on the police.

The second friend's testimony is

A: admissible, because the hoax involves untruthfulness.
B: admissible, because the hoax resulted in conviction of the witness.
C: inadmissible, because it is merely cumulative impeachment.
D: inadmissible, because it is extrinsic evidence of a specific instance of misconduct.

The explanation for the answer is:

The correct answer is D. Specific instances of a witness's conduct may not be proven by extrinsic evidence when they are being used to impeach the credibility of the witness. Offering testimony that the witness once perpetrated a hoax on the police is attempting to prove specific incidents of misconduct with extrinsic evidence, and is thus inadmissible.

Answer A is incorrect because, even if the hoax involved untruthfulness, it cannot be proven with extrinsic evidence in the absence of a conviction. It may be inquired into on cross-examination, but it cannot be introduced into evidence by the testimony of another. Answer B is incorrect because even if the witness was convicted for the hoax, there is no indication in the question that the conviction required proof of dishonesty or a false statement. Answer C is incorrect because the testimony is not cumulative. The testimony is inadmissible because it is an improper method of impeachment.

Question 439 - Evidence - Privileges and Other Policy Exclusions

The question was:

A defendant is being tried in federal court for criminal conspiracy with another man to violate a federal narcotics law. At trial, the prosecutor calls the defendant's new wife and asks her to testify about a meeting between the defendant and the other man that she observed before she married the defendant.

Which of the following is the most accurate statement of the applicable rule concerning whether the defendant's wife may testify?

A: The choice belongs to the defendant's wife.
B: The choice is the defendant's.
C: The defendant's wife is permitted to testify only if both the wife and the defendant agree.
D: The defendant's wife is compelled to testify even if both the wife and the defendant object.

The explanation for the answer is:

The correct answer is A. The proposed testimony of the defendant's wife would invoke the adverse spousal privilege, a privilege that only exists in the wife's discretion. The witness spouse, in this case the defendant's new wife, alone has a privilege to refuse to testify adversely against her husband, and she may be neither compelled to testify nor foreclosed from testifying. The choice is hers.

Answer B is incorrect because the adverse spousal privilege belongs to the defendant's wife, and the determination of whether to testify or not is her decision to make. The defendant cannot prevent his wife from testifying. Answer C is incorrect because, once again, the decision belongs to the defendant's wife and no one else. The defendant does not need to agree before his wife, if she wishes, is allowed to testify. Answer D is incorrect because the adverse spousal privilege still exists in federal court. If the defendant's wife wishes not to testify against the defendant, she cannot be compelled to do so.

Question 444 - Evidence - Presentation of Evidence

The question was:

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

On cross-examination, the plaintiff asked the witness 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 the witness' testimony.
B: admitted, because specific acts bearing on truthfulness may be inquired about on cross-examination.
C: excluded, because the court has determined that the witness is qualified to testify as an expert.
D: excluded, because the witness's character has not been put in issue.

The explanation for the answer is:

The correct answer is A. Although the witness was permitted by the court to testify as to his opinion, the plaintiff is permitted to challenge the witness's qualifications because the challenge is relevant to the weight given to the witness's opinion.

Answer B is incorrect because the witness's failure in chemistry class has absolutely no bearing on his truthfulness or untruthfulness as a witness. Answer C is incorrect because, although the court has determined that the witness is qualified to render an opinion, the plaintiff retains the right to question the witness regarding his qualifications in an effort to question the weight the witness's testimony should be given by the fact-finder. Answer D is incorrect because a failure in a chemistry class does not go to the witness's character trait for truthfulness or untruthfulness. Since the question regarding the witness's failure in chemistry indicates the weight his opinion should carry rather than his character for truthfulness or untruthfulness, the question is proper, and the answer should be admitted.

Question 465 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The defendant was prosecuted for bank robbery. At trial, the bank teller was unable to identify the defendant, now bearded, as the bank robber. The prosecutor then showed the bank teller a group of photographs, and the teller testified that she had previously told the prosecutor that the middle picture (concededly a picture of the defendant before he grew a beard) was a picture of the bank robber.

The bank teller's testimony is

A: inadmissible, because it is hearsay, not within any exception.
B: inadmissible, because it is a violation of the defendant's right of confrontation.
C: admissible as prior identification by the witness.
D: admissible as past recollection recorded.

The explanation for the answer is:

The correct answer is C. A prior statement by a witness, if that witness is testifying and available for cross-examination, is not hearsay and is admissible, if it is one of identification of a person made after perceiving the person. The bank teller's prior identification of the defendant in a lineup is admissible as a prior identification by the witness.

Answer A is incorrect because a prior identification by a witness is specifically excluded from the definition of hearsay. Answer B is incorrect because the witness has testified and will be available for cross-examination about the prior identification and the lack of an in-court identification, so there is no violation of the defendant's right to confrontation. Answer D is incorrect because a past recollection recorded would indicate the introduction of a writing made at or near the time of the event. There is no mention of any writing in the fact pattern, just the photographs.

Question 472 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was charged with aggravated assault. At trial the defendant did not testify; however, he sought to offer opinion evidence of his good character for truth and veracity.

This testimony should be

A: admitted, because a criminal defendant is entitled to offer evidence of his good character.
B: admitted, because a party's credibility is necessarily in issue.
C: excluded, because character is not admissible to prove conduct in conformity therewith.
D: excluded, because it is evidence of a trait not pertinent to the case.

The explanation for the answer is:

The correct answer is D. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except when the trait of character offered by an accused is pertinent to the charge the accused is facing. The defendant's attempt to introduce evidence of his good character for truth and veracity is inadmissible because truth and veracity is not a pertinent trait in a aggravated assault case when the defendant is not testifying.

Answer A is incorrect because a criminal defendant is entitled to offer evidence of his good character only if it involves a pertinent trait to the underlying charge. Truthfulness has no relevance to a determination of whether or not an aggravated assault occurred. Answer B is incorrect because the defendant's credibility, since he did not testify, is not at issue. If the defendant had testified and been cross examined as to his reputation for dishonesty, it may be admissible, but the defendant did not testify and his credibility is not at issue in the case. Answer C is incorrect because it ignores the exception to the general rule that character evidence is not admissible to prove conduct in conformity therewith. The exception is where a defendant is allowed to present evidence as to pertinent traits of character in the case. Since the trait for honesty and veracity is irrelevant to an aggravated assault charge, that evidence is inadmissible here.

Question 472 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was charged with aggravated assault. At trial the defendant did not testify; however, he sought to offer opinion evidence of his good character for truth and veracity.

This testimony should be

A: admitted, because a criminal defendant is entitled to offer evidence of his good character.
B: admitted, because a party's credibility is necessarily in issue.
C: excluded, because character is not admissible to prove conduct in conformity therewith.
D: excluded, because it is evidence of a trait not pertinent to the case.

The explanation for the answer is:

The correct answer is D. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except when the trait of character offered by an accused is pertinent to the charge the accused is facing. The defendant's attempt to introduce evidence of his good character for truth and veracity is inadmissible because truth and veracity is not a pertinent trait in a aggravated assault case when the defendant is not testifying.

Answer A is incorrect because a criminal defendant is entitled to offer evidence of his good character only if it involves a pertinent trait to the underlying charge. Truthfulness has no relevance to a determination of whether or not an aggravated assault occurred. Answer B is incorrect because the defendant's credibility, since he did not testify, is not at issue. If the defendant had testified and been cross examined as to his reputation for dishonesty, it may be admissible, but the defendant did not testify and his credibility is not at issue in the case. Answer C is incorrect because it ignores the exception to the general rule that character evidence is not admissible to prove conduct in conformity therewith. The exception is where a defendant is allowed to present evidence as to pertinent traits of character in the case. Since the trait for honesty and veracity is irrelevant to an aggravated assault charge, that evidence is inadmissible here.

Question 485 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

An issue in a plaintiff's action against a defendant for causing the plaintiff's back injury was whether the plaintiff's condition had resulted principally from a similar occurrence five years before, with which the defendant had no connection.

The plaintiff called his treating physician, who offered to testify that when she saw the plaintiff after the latest occurrence, the plaintiff had told her that before the accident he had been working full time, without pain or limitation of motion, in a job that involved lifting heavy boxes.

The physician's testimony should be

A: admitted, because it is a statement of the plaintiff's then existing physical condition.
B: admitted, because it is a statement made for purposes for medical diagnosis.
C: excluded, because it is hearsay, not within any exception.
D: excluded, because the plaintiff is available as a witness.

The explanation for the answer is:

The correct answer is B. Statements made for purposes of medical diagnosis or treatment, and statements describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, are an exception to the hearsay rule and are admissible. The plaintiff's statement to his treating physician, although hearsay, described his medical history and the lack of any symptoms or pain, and would be admissible.

Answer A is incorrect because the plaintiff's statement regarding his lack of pain or limitation while working was a statement of memory or belief. The plaintiff's statements were not describing his condition that day to the physician but were rather a description of his physical condition in the past. Those statements are not about his then existing physical condition and would not be admissible on that basis. Answer C is incorrect because, although the statements are hearsay, they do fit the statement made for purposes of medical diagnosis exception to the hearsay rule. Answer D is incorrect because the plaintiff's availability is immaterial to the determination of whether these statements fit the medical diagnosis exception to the hearsay rule.

Question 507 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued the defendant in an automobile collision case. At trial, the plaintiff wishes to show by extrinsic evidence that the defendant's primary witness is also the defendant's partner in a gambling operation.

This evidence is

A: admissible as evidence of the witness's character.
B: admissible as evidence of the witness's possible bias in favor of the defendant.
C: inadmissible, because criminal conduct can be shown only by admission or record of conviction.
D: inadmissible, because bias must be shown on cross-examination and not by extrinsic evidence.

The explanation for the answer is:

The correct answer is B. The evidence that the witness and the defendant are partners in a business operation is relevant and admissible to show the witness's potential bias or motive to lie on the defendant's behalf. Answer A is incorrect because the evidence is being presented to determine the witness's bias toward the defendant, not to prove the witness has a bad character. In addition, specific instances of the conduct of a witness, such as gambling operations, for the purpose of attacking or supporting the witness' character for truthfulness may not be proven by extrinsic evidence. Answer C is incorrect because criminal conduct does not have to be shown only by admission or record of conviction, direct firsthand knowledge can also be used. In addition, the evidence is admissible on the issue of the witness's potential bias and motive to lie for the defendant. Answer D is incorrect because evidence of bias or motive to lie is not restricted to cross-examination; extrinsic evidence of bias is admissible.

Question 513 - Evidence - Privileges and Other Policy Exclusions

The question was:

An attorney sued a client for his fee, based on an agreed hourly rate. The client subpoenaed the attorney's time records for the days on which he purported to have worked for the client, in order to show that the attorney had billed an impossible number of hours to the client and others on those days. The client's subpoena provided that any information concerning the matters handled for other clients be deleted or masked. The attorney moved to quash the subpoena on the ground of attorney-client privilege.

The subpoena should be

A: upheld, because the information about hours billed is not within the privilege.
B: upheld, because an attorney has no right to invoke his clients' privilege without instruction from the clients.
C: quashed, because an attorney is entitled to a right of privacy for the work product in his files.
D: quashed, because no permission was obtained from the other clients to divulge information from their files.

The explanation for the answer is:

The correct answer is A. The attorney-client privilege extends to confidential communications between an attorney and client during a legal consultation. Information about hours billed, however, is not a confidential communication and is not subject to the privilege.

Answer B is incorrect because an attorney can invoke the right to the privilege without the knowledge of his client, including cases where the client is deceased. Answer C is incorrect because the information being sought, the number of hours billed, does not require the disclosure of any confidential or privileged information and does not invade the work product of the attorney. Answer D is incorrect because, since there is no attorney client privilege in billed hours information, there is no need to obtain permission from the other clients.

Question 518 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In litigation over the estate of a decedent who died intestate, a woman, who is eighteen years old, claimed to be the decedent's niece and entitled, therefore, to a share of his large estate. In support of her claim, the woman offered in evidence a Bible, properly identified as having belonged to the decedent's family, in the front of which was a list of family births, marriages, and deaths. The list recorded the woman's birth to the decedent's oldest sister.

To prove that the woman is the decedent's niece, the Bible listing is

A: admissible as an ancient document.
B: admissible as a family record.
C: inadmissible, because it is hearsay, not within any exception.
D: inadmissible, because there was no showing of firsthand knowledge by the one who wrote it.

The explanation for the answer is:

The correct answer is B. Statements of fact concerning personal or family history contained in family Bibles, genealogies, tombstones, etcetera, are admissible hearsay. The woman's Bible listing is a family history contained in a family Bible and is thus admissible as a family record.

Answer A is incorrect because there is no evidence that the statement in the Bible is over twenty years old, or that the authenticity of the Bible and statement has been established. Answer C is incorrect because, although it is hearsay, the Bible listing is admissible under the family record exception to the hearsay rule. Answer D is incorrect because the family record exception does not require that the author have firsthand knowledge of the birth.

Question 521 - Evidence - Writings Recordings and Photographs

The question was:

A businessowner used aluminum brackets in her business. On the telephone listed as hers in the telephone book, the businessowner received a call in which the caller said, "This is [the defendant], the owner of a hardware company. We have a special on aluminum brackets this week at 30 percent off." The businessowner ordered brackets from the caller. When the brackets were never delivered, the businessowner sued the defendant for breach of contract.

At trial, the defendant, who denies having made the telephone call, objects to the businessowner's testimony concerning it. When asked, the businessowner testifies that, aside from the telephone call, she had never heard the defendant speak until she met him in the judge's chambers before the trial and that, in her opinion, the voice on the telephone was the defendant's.

The strongest argument for admission of the businessowner's testimony concerning the telephone call is that

A: the call related to business reasonably transacted over the telephone.
B: the call was received at a number assigned to the businessowner by the telephone company.
C: after hearing the defendant speak in chambers, the businessowner recognized the defendant's voice as that of the person on the telephone.
D: self-identification is sufficient authentication of a telephone call.

The explanation for the answer is:

The correct answer is C. An incoming telephone call can be authenticated by the identification of the voice, whether heard firsthand or through mechanical or electronic transmission or recording, or by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. The best argument the businessowner can make is that the telephone call is authenticated by her ability to testify that she recognized the defendant's voice as that of the person on the telephone.

Answer A is incorrect because it puts forth the standard for the authentication of outgoing telephone calls, not incoming calls as is the call in this case. Outgoing telephone calls can be authenticated by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if, in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. However, the call at issue in this case is an incoming call, which requires opinion evidence as to the identification of the voice. Answer B is incorrect for the same reason, the call was incoming and not outgoing.

Answer D is incorrect because self-identification is only sufficient authentication for outgoing calls to a listed number to a residential line. The businessowner's best argument for the admissibility of the call is her ability to recognize the voice over the telephone as that of the defendant.

Question 528 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued a defendant for slander, alleging that the defendant had publicly accused the plaintiff of being a thief. In his answer, the defendant admitted making the accusation, but alleged that it was a true statement.

At trial, the defendant offers evidence that the plaintiff stole a ring worth $10,000 from a jewelry store.

Evidence concerning this theft should be

A: admitted, because specific instances of conduct may be proved when character is directly in issue.
B: admitted, because the plaintiff's action constituted a felony.
C: excluded, because character must be shown by reputation or opinion.
D: excluded, because its relevance is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is A. Because the defendant is asserting that his statement was true, it must be determined whether or not the plaintiff is a thief. In cases in which character or a trait of character of a person is an essential element, that element may be proven by specific instances of that person's conduct. Therefore, evidence that the plaintiff stole a ring on a prior occasion should be admissible to prove the truth of the defendant's statement.

Answer B is incorrect because the fact that the crime is a felony is only important if it is used for impeachment. In this case, the evidence that the plaintiff stole a ring is being used to prove the truth of an allegedly slanderous statement and the plaintiff's character trait for thievery is an essential element of the defendant's defense.

Answer C is incorrect because, although character evidence is generally shown by reputation or opinion, in cases where a character trait is essential to the defense of a claim, specific instances of conduct are admissible.

Answer D is incorrect because the issue of whether the plaintiff is a thief is an essential element of the defense to a defamation charge. Therefore, the evidence that the plaintiff is a thief is highly probative and has very little danger of unfair prejudice. Because the plaintiff's prior theft is an essential to the defense of the alleged defamation, evidence of specific instances of conduct can be used to prove the existence of that character trait.

Question 532 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for damages arising out of an automobile collision. At trial, the plaintiff called an eyewitness to the collision. The plaintiff expected the eyewitness to testify that she had observed the defendant's automobile for five seconds prior to the collision and estimated the defendant's speed at the time of the collision to have been 50 miles per hour. Instead, the eyewitness testified that she estimated the defendant's speed to have been 25 miles per hour.

Without finally excusing the eyewitness as a witness, the plaintiff then called a police officer to testify that the eyewitness had told him during his investigation at the accident scene that the defendant "was doing at least 50."

The police officer's testimony is

A: admissible as a present sense impression.
B: admissible to impeach the eye witness.
C: inadmissible, because the plaintiff may not impeach his own witness.
D: inadmissible, because it is hearsay, not within any exception.

The explanation for the answer is:

The correct answer is B. The police offcer's testimony is admissible only to impeach the testimony of the eyewitness. Prior inconsistent statements, even if they are hearsay, can be used to impeach the testimony of a witness.

Answer A is incorrect because the eyewitness's statement to the police officer during the investigation was not made at the same time, or immediately after, the eyewitness saw the accident. Her statement is not admissible under the present sense impression exception to the hearsay rule. Answer C is incorrect because a witness can be impeached by any party, including the party that called the witness. Answer D is incorrect because, in this case, the statement is being used to impeach the eyewitness's trial testimony that the defendant was traveling at 25 miles per hour. The eyewitness's statement to the police officer cannot be used as substantive evidence because it is hearsay not within any exception. However, it can be used to impeach eyewitness at trial.

Question 540 - Evidence - Presentation of Evidence

The question was:

A defendant is on trial for burglary. During cross-examination of the defendant, the prosecutor wants to inquire about the defendant's earlier conviction for falsifying a credit application.

Which of the following facts concerning the conviction would be the best reason for the trial court's refusing to allow such examination?

A: The defendant was released from prison 12 years ago.
B: The defendant was put on probation rather than imprisoned.
C: It was for a misdemeanor rather than a felony.
D: It is on appeal.

The explanation for the answer is:

The correct answer is A. Evidence of a prior conviction may be used to impeach a witness if it is a crime of dishonesty and less than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction. If the defendant was released from prison 12 years ago, the conviction should not be used. Answer B is incorrect because the actual sentence imposed, whether probation or prison, is irrelevant to determine the admissibility of the prior conviction. Answer C is incorrect because a crime of dishonesty, as is the case with falsifying a credit application, can be used to impeach regardless of whether it was a felony or a misdemeanor. Answer D is incorrect because a pending appeal does not render evidence of a conviction inadmissible. The trial court's best reason for refusing to allow the prosecutor to inquire about the prior conviction is that it is too remote to be admissible due to amount of time lapsed.

Question 547 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was prosecuted for homicide. He testified that he shot in self-defense. In rebuttal, a police officer testified that he came to the scene in response to a telephone call from the defendant. The police officer offers to testify that he asked, "What is the problem here, sir?" and the defendant replied, "I was cleaning my gun and it went off accidentally."

The offered testimony is

A: admissible as an excited utterance.
B: admissible to impeach the defendant and as evidence that he did not act in self-defense.
C: inadmissible, because of the defendant's privilege against self-incrimination.
D: inadmissible, because it tends to exculpate without corroboration.

The explanation for the answer is:

The correct answer is B. The defendant's statement to police officer is admissible as impeachment to the defendant's statement that he shot in self-defense. It is also admissible as substantive evidence that the defendant did not act in self-defense under the admission by a party exception to the hearsay rule. A prior inconsistent statement, in this case the original claim to the police officer that the shooting was an accident, is admissible to impeach the defendant's trial testimony. In addition, his statement to the police officer is an admission by a party opponent and thus specifically excluded from the definition of hearsay.

Answer A is incorrect because there is no evidence that the defendant made the statement while under the stress of excitement caused by a startling event or condition and because it ignores the fact that the statement can be used for impeachment purposes. Answer C is incorrect because the defendant was not subject to custodial interrogation when he volunteered his statement so the police officer was not required to give him hisMiranda warnings. Preliminary investigative questions are permissible without having to Mirandize the witness. Answer D is incorrect because the statement's tendency to exculpate without corroboration is not the test to determine the admissibility of the statement.

Question 559 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff sued the defendant for personal injuries sustained when the defendant's car hit the plaintiff, a pedestrian. Immediately after the accident, the defendant got out of his car, raced over to the plaintiff, and said, "Don't worry, I'll pay your hospital bill."

Assume that the defendant kept his promise to pay for the plaintiff's medical expenses. The plaintiff's testimony concerning the defendant's statement is

A: admissible, because it is an admission of liability by a party opponent.
B: admissible, because it is within the excited utterance exception to the hearsay rule.
C: inadmissible to prove liability, because it is an offer to pay medical expenses.
D: inadmissible, because the defendant kept his promise to pay the plaintiff's medical expenses.

The explanation for the answer is:

The correct answer is C. An offer to pay medical expenses is not admissible to prove liability for the injury due to public policy concerns. Thus, the defendant's statement to the plaintiff that he would pay for the plaintiff's hospital bill is inadmissible to prove liability. Answer A is incorrect because a naked offer to pay medical expenses is not an admission. Furthermore, such an offer is specifically deemed inadmissible for public policy purposes. Answer B is incorrect because even if the excited utterance exception applied, the statement would still be inadmissible because it is an offer to pay medical expenses. Answer D is incorrect because whether or not the defendant actually kept his promise to pay is irrelevant to the determination of whether the offer to pay is admissible.

Question 565 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In a civil action for personal injury, the plaintiff alleges that he was beaten up by the defendant during an altercation in a crowded bar. The defendant's defense is that he was not the person who hit the plaintiff. To corroborate his testimony about the cause of his injuries, the plaintiff seeks to introduce, through the hospital records custodian, a notation in a regular medical record made by an emergency room doctor at the hospital where the plaintiff was treated for his injuries. The notation is: "Patient says he was attacked by [the defendant]."

The notation is

A: inadmissible, because the doctor who made the record is not available for cross-examination.
B: inadmissible as hearsay, not within any exception.
C: admissible as hearsay, within the exception for records of regularly conducted activity.
D: admissible as a statement made for the purpose of medical diagnosis or treatment.

The explanation for the answer is:

The correct answer is B. The plaintiff's statement to the emergency room doctor that the defendant attacked him is an out-of-court statement that is being offered for the truth of the matter asserted -- that the defendant did attack the plaintiff. As such, it is hearsay and not admissible under any exception to the hearsay rule.

Answer A is incorrect because the doctor who made the notation does not need to be present at trial and available for cross-examination before the report itself is admissible under the business record exception to the hearsay rule. The custodian of the hospital records can properly authenticate the document and allow for its admission. In addition, although the medical records may be admissible themselves, the plaintiff's statement to the doctor constituted another level of hearsay, which would make the statement inadmissible.

Answer C is incorrect because, although the notation from the doctor into the medical record meets the exception for records of regularly conducted activities, the plaintiff's statement to the doctor about who the attacker was is another level of hearsay that is inadmissible.

Answer D is incorrect because the plaintiff's statement to the doctor identifying the defendant as the attacker was not a statement made for the purpose of medical diagnosis or treatment. Not everything a patient states to a doctor is admissible under this exception to the hearsay rule, and a statement identifying the assailant to the doctor serves no reasonable purpose for diagnosis or treatment and is consequently inadmissible under that exception.

Question 574 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

The defendant was tried for the homicide of a girl whose strangled body was found beside a remote logging road with her hands taped together. After the defendant offered evidence of an alibi, the state calls a witness to testify that the defendant had taped her hands and tried to strangle her in the same location two days before the homicide but that she escaped.

The evidence is

A: admissible as tending to show that the defendant is the killer.
B: admissible as tending to show the defendant's violent nature.
C: inadmissible, because it is improper character evidence.
D: inadmissible, because it is unfairly prejudicial.

The explanation for the answer is:

The correct answer is A. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, evidence of other crimes can be admitted to show opportunity, intent, preparation, or plan. The crime against the witness occurred at the same location, involved the same method of restraint of the victim, used the same method to attempt to kill the victim, and occurred only a few days earlier than the homicide. The witness's testimony would be admissible to prove the defendant had the same opportunity, preparation, and plan in both cases, and could be used to prove that the defendant is the killer.

Answer B is incorrect because the witness's testimony cannot be used to show the defendant's violent nature, or his acts in conformity therewith. The testimony can be used to show his plan, preparation, and opportunity to commit the homicide, but cannot be used to show the defendant's bad character. Answer C is incorrect because the witness's testimony is not being used to prove character, but is being used to prove the same opportunity, preparation, and plan in both cases. Used for this purpose, the witness's testimony is admissible. Answer D is incorrect because the witness's testimony is highly probative on the issue of the defendant's guilt, and its probative value outweighs the prejudicial effect it may have.

Question 586 - Evidence - Presentation of Evidence

The question was:

In a prosecution of the defendant for murder, the government seeks to introduce a properly authenticated note written by the victim that reads: "[the defendant] did it." In laying the foundation for admitting the note as a dying declaration, the prosecution offered an affidavit from the attending physician that the victim knew she was about to die when she wrote the note.

The admissibility of the note as a dying declaration is

A: a preliminary fact question for the judge, and the judge must not consider the affidavit.
B: a preliminary fact question for the judge, and the judge may properly consider the affidavit.
C: a question of weight and credibility for the jury, and the jury must not consider the affidavit.
D: a question of weight and credibility for the jury, and the jury may properly consider the affidavit.

The explanation for the answer is:

The correct answer is B. Preliminary questions concerning the admissibility of evidence shall be determined by the court. In making its determination, the court is not bound by the rules of evidence except those with respect to privileges. The admissibility of the note should be determined by the judge, and he is permitted to consider the affidavit. Answer A is incorrect because the judge is permitted to consider the affidavit even if it were considered hearsay. Answer C and D are incorrect because matters regarding the admissibility of evidence are for the judge, and only the judge, to rule on.

Question 613 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The plaintiff sued a police officer for false arrest. The police officer's defense was that, based on a description he heard over the police radio, he reasonably believed the plaintiff was an armed robber. A police radio dispatcher, reading from a note, had broadcast the description of an armed robber on which the police officer claims to have relied.

The defendant offers three item as evidence. First, the police officer's testimony relating the description he heard. Second, the police dispatcher's testimony relating the description he read over the radio. Third, the note containing the description the police dispatcher testifies he read over the radio.

Which of the items are admissible on the issue of what description the police officer heard?

A: Only the police officer's testimony relating the description he heard.
B: Only the police officer's testimony relating the description he heard and the note containing the description the police dispatcher testifies he read over the radio.
C: Only the police dispatcher's testimony relating the description he read over the radio and the note containing the description the police dispatcher testifies he read over the radio.
D: All three items offered by the defendant.

The explanation for the answer is:

The correct answer is D. The main issue at trial is to make a determination of what the police officer heard over the police radio. All three items of evidence the defendant is seeking to admit (the police officer's testimony, the police dispatcher's testimony, and the note) are relevant and admissible to that issue. The police officer can testify as to what he believed he heard. The police dispatcher can testify as to what he read over the radio. The note the police dispatcher read from is admissible to show what the police officer heard. They are all forms of relevant evidence to aid the fact finder in its determinations. None of these forms should be considered hearsay, because they are not admitted for the truth of the matter asserted - what the armed robber actually looked like - but rather to show their effect on the listener, the police officer. Additionally, the police dispatcher's testimony, since it is not a document, is not subject to exclusion under the best evidence rule. All three of these items of evidence are relevant, and there are no reasons for their exclusion from evidence.

Question 637 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for copyright infringement for using in the defendant's book some slightly disguised house plans on which the plaintiff held the copyright. The plaintiff is prepared to testify that he heard the defendant's executive copyright assistant say that the defendant had obtained an advance copy of the plans from the plaintiff's office manager.

The plaintiff's testimony is

A: admissible as reporting a statement of an employee of a party opponent.
B: admissible as a statement of a co-conspirator.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because there is no showing that the assistant was authorized to speak for the defendant.

The explanation for the answer is:

The correct answer is A. A statement made by a party's employee concerning a matter within the scope of the employment, and made during the existence of the relationship, is excluded from the definition of hearsay as a vicarious admission of a party opponent. Because the statement the plaintiff is seeking to testify about was made by an executive assistant who was working on copyright matters, the statement is admissible.

Answer B is incorrect because there is no evidence that the executive assistant was involved in any way in the obtaining of the copy of the plans or in the alleged infringement, so the assistant should not be considered a co-conspirator. In addition, the statement the assistant made was not made in furtherance of a conspiracy. The statement is not admissible as a co-conspirator statement but rather as an admission by an employee of a party opponent. Answer C is incorrect because admissions by a party opponent, or by a party opponent's employee, are specifically excluded from the definition of hearsay. Answer D is incorrect because there is no requirement that the employee whose statement is sought to be introduced must be authorized to speak for the party. Because it was made by the defendant's employee and in the scope of employment, the statement is not hearsay and is admissible against the defendant.

Question 643 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

The defendant, charged with armed robbery of a store, denied that he was the person who had robbed the store.

In presenting the state's case, the prosecutor seeks to introduce evidence that the defendant had robbed two other stores in the past year.

This evidence is

A: admissible, to prove a pertinent trait of the defendant's character and the defendant's action in conformity therewith.
B: admissible, to prove the defendant's intent and identity.
C: inadmissible, because character must be proved by reputation or opinion and may not be proved by specific acts.
D: inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is D. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of an accused person in order to show action in conformity therewith. The prosecutor is seeking to introduce evidence that the defendant robbed two other stores in order to prove that the defendant robbed this particular store; this evidence is inadmissible. The probative value of the other robberies is substantially outweighed by the danger of unfair prejudice to the defendant.

Answer A is incorrect because the other robberies do not prove any "pertinent trait" to an armed robbery charge beyond being evidence that, since the defendant robbed two other stores, he must have robbed this one. The rules of evidence specifically exclude the prior robberies from being used to show that the defendant's present actions were in conformity with those prior robberies.

Answer B is incorrect because, although evidence of other crimes may be admissible to show intent or identity, these prior crimes are not being offered for those purposes. There are no facts to indicate that the prior robberies are being used to prove anything other than that the defendant committed this particular robbery because he committed two prior robberies; this is an impermissible use of evidence of other crimes. Unless there are specific qualities present in the prior convictions that tie the prior crimes to the particular robbery that the defendant is currently on trial for, the evidence of the prior crimes is inadmissible.

Answer C is incorrect because specific acts, including prior crimes, can be used for some purposes; however, they cannot be used to prove present action in conformity with the prior crimes.

Question 672 - Evidence - Presentation of Evidence

The question was:

During litigation on a federal claim, a plaintiff had the burden of proving that a defendant received a notice. The plaintiff relied on the presumption of receipt by offering evidence that the notice was addressed to the defendant, properly stamped, and mailed. The defendant, on the other hand, testified that she never received the notice.

Which of the following is correct?

A: The jury must find that the notice was received.
B: The jury may find that the notice was received.
C: The burden shifts to the defendant to persuade the jury of nonreceipt.
D: The jury must find that the notice was not received, because the presumption has been rebutted and there is uncontradicted evidence of nonreceipt.

The explanation for the answer is:

The correct answer is B. The jury may, but is not required to, find that the notice was received. The plaintiff's presumption under the mail box rule, that a properly addressed, stamped and mailed notice reached its destination, imposes on the party against whom it is directed (here, the defendant) the burden of presenting evidence to rebut or meet the presumption. In response to the presumption under the mail box rule, the defendant testified that she never received the notice. The jury is thus empowered to judge the credibility of both sides and can, but is not required to, find that the notice was received.

Answer A is incorrect because the plaintiff's presumption that notice was received was rebutted by the defendant's testimony that she did not receive it. The jury is not required to find that the notice was received. Answer C is incorrect because the burden of proof does not shift to the defendant; it remains throughout the trial upon the party on whom it was originally cast (the plaintiff in this case). The defendant does not need to persuade the jury of non-receipt. Answer D is incorrect because the rebuttal of a presumption does not require a finding for the rebutting party. In addition, the evidence that the notice was not received was contradicted by evidence of the properly mailed notice. The jury, as fact finder, may find the notice was received, but is not required to.

Question 673 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In a medical malpractice suit by a patient against his doctor, the patient seeks to introduce a properly authenticated photocopy of the patient's hospital chart. The chart contained a notation made by a medical resident that an aortic clamp had broken during the plaintiff's surgery. The resident made the notation in the regular course of practice, but had no personal knowledge of the operation, and cannot remember which of the operating physicians gave him the information.

The document is

A: admissible as a record of regularly conducted activity.
B: admissible as recorded recollection.
C: inadmissible as a violation of the best evidence rule.
D: inadmissible, because it is hearsay within hearsay.

The explanation for the answer is:

The correct answer is A. The chart is admissible as a record of regularly conducted activity. The chart is a record of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, that was kept in the course of a regularly conducted business activity. In addition, it was the regular practice of that business to making medical records in order to maintain a memorandum, report, record or data compilation. Although the resident may not be able to recall which physician gave him the information, the resident knew that the statement was made. Therefore, the document is admissible.

Answer B is incorrect because the medical record is not a recollection recorded, it is a record of regularly conducted activity. See Rule 803(5). Additionally, the facts state that the patient wants to "introduce the authenticated photocopy" into evidence. If the patient was using the copy to refresh the recollection of a witness, it would be seen by the witness only, not by the jury, and would not need authentication or introduction.

Answer C is incorrect because, unless there is a genuine question as to the authenticity of the original, which there is not in this case, a duplicate is acceptable as evidence. Answer D is incorrect because the records are admissible under the regularly conducted business activity exception to the hearsay rule, which includes the statements made within the document.

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The explanation for the answer is:

The correct answer is A. The chart is admissible as a record of regularly conducted activity. The chart is a record of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, that was kept in the course of a regularly conducted business activity. In addition, it was the regular practice of that business to making medical records in order to maintain a memorandum, report, record or data compilation. Although the resident may not be able to recall which physician gave him the information, the resident knew that the statement was made. Therefore, the document is admissible.

Answer B is incorrect because the medical record is not a recollection recorded, it is a record of regularly conducted activity. See Rule 803(5). Additionally, the facts state that the patient wants to "introduce the authenticated photocopy" into evidence. If the patient was using the copy to refresh the recollection of a witness, it would be seen by the witness only, not by the jury, and would not need authentication or introduction.

Answer C is incorrect because, unless there is a genuine question as to the authenticity of the original, which there is not in this case, a duplicate is acceptable as evidence. Answer D is incorrect because the records are admissible under the regularly conducted business activity exception to the hearsay rule, which includes the statements made within the document.

Question 679 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

At the defendant's trial for stealing an automobile, the defendant called a character witness who testified that the defendant had an excellent reputation for honesty. In rebuttal, the prosecutor calls another witness to testify that he recently saw the defendant cheat on a college examination.

The prosecution witness's testimony should be

A: admitted, because the defendant has "opened the door" to the prosecutor's proof of bad character evidence.
B: admitted, because the cheating involves "dishonesty or false statement."
C: excluded, because it has no probative value on any issue in the case.
D: excluded, because the defendant's cheating can be inquired into only on cross-examination of the defendant's witness.

The explanation for the answer is:

The correct answer is D. In all cases in which evidence of character or a trait of character of a person is admissible but not essential, such as in this case, proof of that trait of character may be made by testimony regarding reputation or by testimony in the form of opinion. Specific instances of conduct can only be used on cross-examination. Because the defendant's honesty is not an essential element of the charge, the prosecutor cannot use specific incidents of conduct to show that the defendant is guilty. However, the prosecutor could have inquired about relevant specific instances of misconduct on cross-examination of the defendant's witness. Answer A is incorrect because, even though the "door" may have been opened regarding the defendant's honesty, the prosecutor cannot use specific incidents of misconduct to rebut the character evidence testimony given by the defendant's witness, except in cross-examination.

Answer B is incorrect because cheating on a college exam is a specific instance of misconduct; it is not reputation or character evidence. Although the cheating involved dishonesty or false statement, it was not a prior conviction and cannot be used as evidence. Answer C is incorrect because, by calling the defendant's witness to testify about the defendant's reputation for honesty, the defendant made his character relevant to the case. Thus, a specific instance of dishonesty would certainly be probative on that issue. The evidence is excluded however, not because it is irrelevant or non-probative, but because specific instances of dishonest conduct cannot be used to show that the defendant is guilty.

Question 686 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant for damages for back injuries received in a car wreck. The defendant disputed the damages and sought to prove that the plaintiff's disability, if any, resulted from a childhood horseback riding accident. The plaintiff admitted to the childhood accident but contended it had no lasting effect.

The plaintiff calls an orthopedist who had never examined the plaintiff and poses to the physician a hypothetical question as to the cause of the disability that omits any reference to the horseback riding accident. The question was not provided to opposing counsel before trial.

The best ground for objecting to this question would be that

A: the physician lacked firsthand knowledge concerning the plaintiff's condition.
B: the hypothetical question omitted a clearly significant fact.
C: hypothetical questions are no longer permitted.
D: sufficient notice of the hypothetical question was not given to opposing counsel before trial.

The explanation for the answer is:

The correct answer is B. Hypothetical questions that do not include all clearly significant facts at issue in a case are irrelevant. Since the plaintiff omits any reference to the horseback riding accident, even though he admitted it occurred, any response to the hypothetical by the physician will be irrelevant to the determination of the cause of the injury.

Answer A is incorrect because an expert is allowed to offer an opinion on a hypothetical question, even if the expert had no firsthand knowledge of the plaintiff's condition. That hypothetical, however, must be relevant to the issue in the case. Answer C is incorrect because hypothetical questions, as long as they are based on the facts or data in the particular case, are still permitted. Answer D is incorrect because there is no notice requirement that hypothetical questions must be provided to opposing counsel before trial. The best ground for objecting to the plaintiff's hypothetical question is that it omitted a clearly significant fact in asking for the opinion.

Question 686 - Evidence - Presentation of Evidence

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The plaintiff calls an orthopedist who had never examined the plaintiff and poses to the physician a hypothetical question as to the cause of the disability that omits any reference to the horseback riding accident. The question was not provided to opposing counsel before trial.

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A: the physician lacked firsthand knowledge concerning the plaintiff's condition.
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D: sufficient notice of the hypothetical question was not given to opposing counsel before trial.

The explanation for the answer is:

The correct answer is B. Hypothetical questions that do not include all clearly significant facts at issue in a case are irrelevant. Since the plaintiff omits any reference to the horseback riding accident, even though he admitted it occurred, any response to the hypothetical by the physician will be irrelevant to the determination of the cause of the injury.

Answer A is incorrect because an expert is allowed to offer an opinion on a hypothetical question, even if the expert had no firsthand knowledge of the plaintiff's condition. That hypothetical, however, must be relevant to the issue in the case. Answer C is incorrect because hypothetical questions, as long as they are based on the facts or data in the particular case, are still permitted. Answer D is incorrect because there is no notice requirement that hypothetical questions must be provided to opposing counsel before trial. The best ground for objecting to the plaintiff's hypothetical question is that it omitted a clearly significant fact in asking for the opinion.

Question 687 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was prosecuted for the murder of a victim, whose body was found one morning in the street near the defendant's house. The state calls a witness, a neighbor, to testify that during the night before the body was found he heard the defendant's wife scream, "You killed him! You killed him!"

The witness' testimony is

A: admissible as a report of a statement of belief.
B: admissible as a report of an excited utterance.
C: inadmissible, because it reports a privileged spousal communication.
D: inadmissible on spousal immunity grounds, but only if the wife objects.

The explanation for the answer is:

The correct answer is B. The defendant's wife's statement is an out-of-court statement that is being offered for the truth of the matter asserted - that the defendant killed the victim - so it is hearsay. However, the statement related to a startling event or condition made while the wife was under the stress of excitement caused by the event or condition, and is thus admissible as an excited utterance. Therefore, the witness's testimony is admissible.

Answer A is incorrect because there is no statement of belief exception to the hearsay rule that applies to the wife's statement. In addition, the statement is clearly being offered for the truth of the matter asserted (that the defendant did kill the victim) and is not merely being offered to show the wife's belief. Answer C is incorrect because the wife's statement is not a privileged communication. It was not confidential and was said loudly enough that the neighbor heard it. Non-confidential statements are not covered by any form of spousal privilege. Answer D is incorrect because, although spousal immunity may allow a wife not to testify against her husband, it does not extend to the witness's testimony regarding what he overheard the wife say. The witness is the person testifying, not the defendant's wife, so even if the defendant's wife objects, the witness can still testify about what he heard.

Question 693 - Evidence - Presentation of Evidence

The question was:

A defendant was prosecuted for sexually abusing his 13-year-old stepdaughter. The stepdaughter testified to the defendant's conduct. On cross-examination, defense counsel asks the stepdaughter, "Isn't it true that shortly before you complained that your stepfather abused you, he punished you for maliciously ruining some of his phonograph records?"

The question is

A: proper, because it relates to a possible motive for the stepdaughter to falsely accuse the defendant.
B: proper, because the stepdaughter's misconduct is relevant to her character for veracity.
C: improper, because the incident had nothing to do with the stepdaughter's truthfulness.
D: improper, because it falls outside the scope of direct examination.

The explanation for the answer is:

The correct answer is A. A witness may be properly questioned about any bias or motive to lie the witness may have. The defendant's counsel is permitted to inquire into whether the stepdaughter may have a bias or motive to lie about the abuse since the defendant had punished her shortly before the complaint of the abuse.

Answer B is incorrect because the stepdaughter's misconduct is actually irrelevant to her character for veracity. Ruining phonograph records has nothing to do with the stepdaughter's character for truthfulness or her credibility. Answer C is incorrect because, although the incident had nothing to do with the stepdaughter's character for truthfulness, the question is still proper to show that the stepdaughter may have a bias against the defendant or a motive to lie. Answer D is incorrect because a witness's bias or motive to lie can be inquired into upon during cross-examination, even if the direct examination did not deal with the incident. Cross-examination into matters affecting the credibility of the witness is proper.

Question 693 - Evidence - Presentation of Evidence

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The question is

A: proper, because it relates to a possible motive for the stepdaughter to falsely accuse the defendant.
B: proper, because the stepdaughter's misconduct is relevant to her character for veracity.
C: improper, because the incident had nothing to do with the stepdaughter's truthfulness.
D: improper, because it falls outside the scope of direct examination.

The explanation for the answer is:

The correct answer is A. A witness may be properly questioned about any bias or motive to lie the witness may have. The defendant's counsel is permitted to inquire into whether the stepdaughter may have a bias or motive to lie about the abuse since the defendant had punished her shortly before the complaint of the abuse.

Answer B is incorrect because the stepdaughter's misconduct is actually irrelevant to her character for veracity. Ruining phonograph records has nothing to do with the stepdaughter's character for truthfulness or her credibility. Answer C is incorrect because, although the incident had nothing to do with the stepdaughter's character for truthfulness, the question is still proper to show that the stepdaughter may have a bias against the defendant or a motive to lie. Answer D is incorrect because a witness's bias or motive to lie can be inquired into upon during cross-examination, even if the direct examination did not deal with the incident. Cross-examination into matters affecting the credibility of the witness is proper.

Question 743 - Evidence - Writings Recordings and Photographs

The question was:

A plaintiff sues a defendant for breach of a promise made in a letter allegedly written by the defendant to the plaintiff. The defendant denies writing the letter.

Which of the following would NOT be a sufficient basis for admitting the letter into evidence?

A: Testimony by the plaintiff that she is familiar with the defendant's signature and recognizes it on the letter.
B: Comparison by the trier of fact of the letter with an admitted signature of the defendant.
C: Opinion testimony of a nonexpert witness based upon a familiarity acquired in order to authenticate the signature.
D: Evidence that the letter was written in response to one written by the plaintiff to the defendant.

The explanation for the answer is:

The correct answer is C. Although a lay witness is allowed to offer an opinion to identify and authenticate handwriting, to do so, the witness's familiarity with the handwriting must have not been acquired for purposes of the litigation. A non-expert who familiarized himself with the defendant's writing for the purpose of authenticating it at trial was acting in preparation for trial, and is not allowed, under the rules of evidence, to authenticate the letter.

Answer A is incorrect because a letter can be authenticated by testimony of a witness that is familiar with the signature and can identify it on the letter. Answer B is incorrect because a writing can be authenticated by a comparison by the trier of fact with specimens which have been authenticated. Answer D is incorrect because a writing can be authenticated by evidence that the writing was done in response to another writing from the same parties.

Question 752 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In the prosecution of a defendant for murdering a victim, the defendant testified that the killing had occurred in self-defense when the victim tried to shoot him. In rebuttal, the prosecution seeks to call a witness, the victim's father, to testify that the day before the killing, the victim told her father that she loved the defendant so much she could never hurt him.

The witness's testimony is

A: admissible within the hearsay exception for statements of the declarant's then existing state of mind.
B: admissible, because the victim is unavailable as a witness.
C: inadmissible as hearsay not within any exception.
D: inadmissible, because the victim's character is not at issue.

The explanation for the answer is:

The correct answer is A. The victim's statement to her father that she loved the defendant and could never hurt him is admissible as a statement of a then-existing mental or emotional condition. The witness's testimony is being introduced to show the victim's existing emotional and mental state when she made the statement, and is admissible as an exception to the hearsay rule.

Answer B is incorrect because, for the purposes of the then-existing mental or emotional condition exception to the hearsay rule, it is irrelevant whether the declarant is available or not. Answer C is incorrect because, although the statement may be hearsay, it is admissible under the then-existing emotional state exception to the hearsay rule. Answer D is incorrect because the victim's character, as far as the self-defense claim goes, is at issue in the case. In addition, the statement itself goes to the victim's state of mind when the statement was made and not to her general character for violence or non-violence.

Question 764 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant is on trial for arson. In its case in chief, the prosecution offers evidence that the defendant had secretly obtained duplicate insurance from two companies on the property that burned and that the defendant had threatened to kill his ex-wife if she testified for the prosecution.

The court should admit evidence of

A: The defendant's obtaining duplicate insurance only.
B: The defendant's threatening to kill his ex-wife only.
C: Both the defendant's obtaining duplicate insurance and threatening to kill his ex-wife.
D: Neither the defendant's obtaining duplicate insurance nor threatening to kill his ex-wife.

The explanation for the answer is:

The correct answer is C. Evidence of other crimes or acts are not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The fact that the defendant had obtained duplicate insurance of the burned property is relevant because it shows the defendant's motive for committing the arson. Any minor prejudicial effect of the evidence of duplicate insurance would be outweighed by the probative value of the evidence. The defendant's threat to kill his ex-wife if she testifies is also relevant, admissible evidence. The threat to kill his wife is being offered as proof of the defendant's plan and knowledge, and his consciousness of his guilt and his attempts to stop the introduction of evidence against him. Both the defendant's obtaining duplicate insurance and threatening to kill his ex-wife are admissible into evidence. Answers A, B, and D are incorrect because both the duplicate insurance and the threat to kill his ex-wife are admissible.

Question 768 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

Roberta Monk, a famous author, had a life insurance policy with an insurance company. Her son was the beneficiary. The author disappeared from her residence in the city of Metropolis two years ago and has not been seen since. On the day that Roberta disappeared, Sky Airlines Flight 22 left Metropolis for Rio de Janeiro and vanished; the plane's passenger list included a Roberta Rector.

The son is now suing the insurance company for the proceeds of his mother's policy. At trial, the son offers to testify that his mother told him that she planned to write her next novel under the pen name of Roberta Rector.

The son's testimony is

A: admissible as circumstantial evidence that Roberta Monk was on the plane.
B: admissible as a party admission, because Roberta Monk and her son are in privity with each other.
C: inadmissible, because Roberta Monk has not been missing more than seven years.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is A. The son's testimony concerning his mother's statement that she planned to write her next novel under the pen name of Roberta Rector is not hearsay and is admissible as circumstantial evidence that Roberta Monk was on the plane. Although it is an out-of-court statement, Roberta's statement is not being offered for the truth of the matter asserted -- that Ms. Monk planned to write her next novel using the pen name Roberta Rector. Instead, the statement is being offered to show that the person on the plane named Roberta Rector was, in fact, Roberta Monk. Since the statement is not being offered for the truth of the matter asserted, it is admissible as relevant evidence. Answer B is incorrect because the statement is not an admission, and it is not from a party to the suit.

Answer C is incorrect because the length of time Roberta has been missing has no relevance to the determination of the admissibility of the statement. Answer D is incorrect because the statement is not being offered to prove Roberta Monk's next book was going to have the pen name Roberta Rector, so it is not being offered for the truth of the matter asserted. The statement is not hearsay.

Question 773 - Evidence - Writings Recordings and Photographs

The question was:

Which of the following items of evidence is LEAST likely to be admitted without a supporting witness?

A: In a libel action, a copy of a newspaper purporting to be published by the defendant newspaper publishing company.
B: In a case involving contaminated food, a can label purporting to identify the canner as the defendant company.
C: In a defamation case, a document purporting to be a memorandum from the defendant company president to "All Personnel," printed on the defendant's letterhead.
D: In a case involving injury to a pedestrian, a pamphlet on stopping distances issued by the State Highway Department.

The explanation for the answer is:

The correct answer is C. Before an item of evidence can be admitted into evidence, it must be authenticated. There are certain documents and types of documents that are self-authenticating. These self-authenticating documents do not need a supporting witness before they can be admitted. A document purporting to be a memo from a company, even if on letterhead, is not a self-authenticating document, and is least likely of the examples to be admitted without a supporting witness.

Answer A is incorrect because printed materials purporting to be newspapers or periodicals are self-authenticating. Answer B is incorrect because inscriptions, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin are self-authenticating. Answer D is incorrect because books, pamphlets, or other publications purporting to be issued by public authority are self-authenticating. Only answer C is not listed in F.R.E. 902, which lists self-authenticating documents, and it is the least likely to be admitted without a supporting witness.

Question 778 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

Under the rule allowing exclusion of relevant evidence because its probative value is substantially outweighed by other considerations, which of the following is NOT to be considered?

A: The jury may be confused about the appropriate application of the evidence to the issues of the case.
B: The evidence is likely to arouse unfair prejudice on the part of the jury.
C: The opponent is surprised by the evidence and not fairly prepared to meet it.
D: The trial will be extended and made cumbersome by hearing evidence of relatively trivial consequence.

The explanation for the answer is:

The correct answer is C. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue delay, waste of time, or needless presentation of cumulative evidence. Only answer C does not deal with any of those considerations, and instead deals with the exclusion of evidence based on potential discovery violations. Answer A is incorrect because juror confusion of the issues is a consideration in determining whether to exclude relevant evidence. Answer B is incorrect because unfair prejudice on the part of the jury is also a consideration in determining whether to exclude relevant evidence. Answer D is incorrect because waste of time and needless presentation of trivial evidence is also a consideration in determining whether to exclude relevant evidence.

Question 788 - Evidence - Presentation of Evidence

The question was:

In contract litigation between the plaintiff and the defendant, a fact of consequence to the determination of the action is whether the plaintiff provided the defendant with a required notice at the defendant's branch office "in the state capital." The plaintiff introduced evidence that he gave notice at the defendant's office in the city of Capitan. Although Capitan is the state's capital, the plaintiff failed to offer proof of that fact.

Which of the following statements is most clearly correct with respect to possible judicial notice of the fact that Capitan is the state's capital?

A: The court may take judicial notice even though the plaintiff does not request it.
B: The court may take judicial notice only if the plaintiff provides the court with an authenticated copy of the statute that designates Capitan as the capital.
C: If the court takes judicial notice, the burden of persuasion on the issue of whether Capitan is the capital shifts to the defendant.
D: If the court takes judicial notice, it should instruct the jury that it may, but is not required to, accept as conclusive the fact that Capitan is the capital.

The explanation for the answer is:

The correct answer is A. A court may take judicial notice of a relevant fact whether a party requests it or not. Answer B is incorrect because a court can take judicial notice of a fact that is not subject to reasonable dispute, and the plaintiff would not have to provide any information to the court before it can take judicial notice. Answer C is incorrect because there is no burden shifting in cases involving judicial notice. Answer D is incorrect because, in civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. The jury is required to accept a judicially noticed fact as conclusive on the issue. Because the identity of the capital of a state is a fact not subject to reasonable dispute, the judge can take judicial notice of it, even if neither party requests it.

Question 791 - Evidence - Presentation of Evidence

The question was:

In an automobile negligence action by a plaintiff against a defendant, a bystander testified for the plaintiff. The defendant later called a witness, who testified that the bystander's reputation for truthfulness was bad.

On cross-examination of the witness, the plaintiff's counsel asks, "Isn't it a fact that when you bought your new car last year, you made a false affidavit to escape paying the sales tax?"

This question is

A: proper, because it will indicate the witness's standard of judgment as to reputation for truthfulness.
B: proper, because it bears on the witness's credibility.
C: improper, because character cannot be proved by specific instances of conduct.
D: improper, because one cannot impeach an impeaching witness.

The explanation for the answer is:

The correct answer is B. Specific instances of a witness's misconduct, for the purpose of attacking or supporting the witness's character for truthfulness, may not be proved by extrinsic evidence. They may, however, if probative of the witness's character for truthfulness or untruthfulness, be inquired into on cross-examination of the witness. The witness's creation of a false affidavit is probative of his character for truthfulness and bears on his credibility. The plaintiff's counsel's questioning of the witness is proper. Answer A is incorrect because the question is admissible as to the witness's credibility and not to his standard for judgment of reputations. Answer C is incorrect because a witness's character for truthfulness or untruthfulness cannot be proven by extrinsic evidence of specific instances. However the instances can be asked about in cross-examination. Answer D is incorrect because it is a misstatement of law. Any witness may be impeached.

Question 796 - Evidence - Presentation of Evidence

The question was:

In the prosecution of a defendant for forgery, the defense objects to the testimony of a government expert on the ground of inadequate qualifications. The government seeks to introduce a letter from the expert's former criminology professor, stating that the expert is generally acknowledged in his field as well qualified.

On the issue of the expert's qualifications, the letter may be considered by

A: the jury, without regard to the hearsay rule.
B: the judge, without regard to the hearsay rule.
C: neither the judge nor the jury, because it is hearsay not within any exception.
D: both the judge and the jury, because the letter is not offered for a hearsay purpose.

The explanation for the answer is:

The correct answer is B. Preliminary questions concerning the qualification of a person to be a witness shall be determined by the court. In making its determination, the court is not bound by the rules of evidence except those with respect to privileges. The letter, although hearsay, may be considered by the judge in determining whether the witness is qualified as an expert.

Answer A is incorrect because the judge, not the jury, determines the qualifications of a person to be a witness. Answer C is incorrect because the rules of evidence, including the rule against hearsay, do not apply to the judge's making the initial determination whether the witness is qualified to testify as an expert. Answer D is incorrect because the determination is to be made by the judge only, and because the letter should be used outside the presence of the jury.

Question 807 - Evidence - Presentation of Evidence

The question was:

In a federal court diversity action by a plaintiff against a defendant on an insurance claim, a question arose whether the court should apply a presumption that, where both husband and wife were killed in a common accident, the husband died last.

Whether this presumption should be applied is to be determined according to

A: traditional common law.
B: federal statutory law.
C: the law of the state whose substantive law is applied.
D: the federal common law.

The explanation for the answer is:

The correct answer is C. In civil actions and proceedings, whether a presumption should be applied is determined in accordance with the state law whose substantive law is applied to the case. Answer A is incorrect because the state whose substantive law is being applied in the case determines whether the presumption should be applied. Answers B and D are incorrect for the same reason.

Question 826 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued a defendant for libel. After the plaintiff testified that the defendant wrote to the plaintiff's employer that the plaintiff was a thief, the defendant offers evidence that the plaintiff once stole money from a former employer.

The evidence of the plaintiff's prior theft is

A: admissible, as substantive evidence to prove that the plaintiff is a thief.
B: admissible, but only to impeach the plaintiff's credibility.
C: inadmissible, because character may not be shown by specific instances of conduct.
D: inadmissible, because such evidence is more unfairly prejudicial than probative.

The explanation for the answer is:

The correct answer is A. Because one of the main issues in the case is whether or not the plaintiff is a thief (and consequently whether the defendant's letter to the employer was true), the plaintiff's character trait for thievery is essential. In cases in which character or a trait of character of a person is an essential element, proof may be made by showing specific instances of that person's conduct. Evidence that the plaintiff stole money from a former employer on a prior occasion is admissible to prove that the plaintiff is a thief.

Answer B is incorrect because the evidence of the plaintiff's prior theft can be used to prove the truth of the statement that the plaintiff is a thief, as well as for impeachment of the plaintiff's testimony. Answer C is incorrect because the evidence of the plaintiff's prior theft is not being used to show character but rather is being used to provide a defense to the claim for libel. In addition, the evidence that the plaintiff stole money demonstrates his character trait for thievery, which would be an essential element of the defendant's defense. Answer D is incorrect because whether the plaintiff is indeed a thief is an essential issue in the case, and evidence that the plaintiff stole money from his former employer is highly probative and has little danger of unfair prejudice.

Question 837 - Evidence - Presentation of Evidence

The question was:

A defendant was charged with possession of cocaine. At the defendant's trial, the prosecution established that, when approached by police on a suburban residential street corner, the defendant dropped a plastic bag and ran, and that when the police returned to the corner a few minutes later after catching the defendant, they found a plastic bag containing white powder. The defendant objects to introduction of this bag (the contents of which would later be established to be cocaine), citing lack of adequate identification.

The objection should be

A: overruled, because there is sufficient evidence to find that the bag was the one the defendant dropped.
B: overruled, because the objection should have been made on the basis of incomplete chain of custody.
C: sustained, because the defendant did not have possession of the bag at the time he was arrested.
D: sustained, unless the judge makes a finding by a preponderance of the evidence that the bag was the one dropped by the defendant.

The explanation for the answer is:

The correct answer is A. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. By establishing that the defendant dropped a plastic bag, and that, after only a few minutes, the police officers returned to the same spot and found a plastic bag, the prosecution has introduced sufficient evidence for a finding that the bag was the one the defendant dropped. The objection should be overruled.

Answer B is incorrect because the bag is admissible, and an objection on the basis of incomplete chain of custody would be overruled. Answer C is incorrect because, although the defendant did not have possession of the bag at the time he was caught, the police identified him with the bag just prior to his fleeing. There is sufficient evidence to link the bag to the defendant and to provide sufficient identification and authenticity. Answer D is incorrect because the judge does not have to make a finding by a preponderance of the evidence that the bag was the one dropped by the defendant; the judge need only find that there was sufficient evidence to support a finding that the plastic bag in question was the one the defendant was holding.

Question 839 - Evidence - Writings Recordings and Photographs

The question was:

A threatening telephone call that purports to be from a defendant to a witness is most likely to be admitted against the defendant if

A: the caller identified himself as the defendant.
B: the witness had previously given damaging testimony against the defendant in another lawsuit.
C: the witness had given his unlisted number only to the defendant and a few other persons.
D: the witness believes that the defendant is capable of making such threats.

The explanation for the answer is:

The correct answer is C. The requirement of authentication or identification as a condition to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. By severely limiting the number of people who knowingly could call and threaten the witness, there is sufficient evidence to support a finding that the telephone call is what the witness claims it to be.

Answer A is incorrect because self-identification on an incoming telephone call is insufficient evidence to allow for the admission of the telephone call against the defendant. Answer B is incorrect because testimony providing motive to the defendant, without more, will be insufficient to allow for the admission of the telephone call against the defendant. Answer D is incorrect because the witness's belief that the defendant is capable of making such threats is virtually irrelevant to the identification of the caller and the admissibility of the telephone call. Severely limiting the number of possible callers would be the best method to support the introduction of the telephone call.

Question 859 - Evidence - Privileges and Other Policy Exclusions

The question was:

In a suit by a plaintiff against a defendant, the plaintiff sought to subpoena an audiotape on which the defendant had narrated his version of the dispute for his attorney. Counsel for the defendant moves to quash the subpoena on the ground of privilege.

The audiotape is most likely to be subject to subpoena if

A: the defendant played the audiotape for his father to get his reactions.
B: the lawsuit involved alleged criminal behavior by the defendant.
C: the defendant has been deposed and there is good reason to believe that the audiotape may contain inconsistent statements.
D: the defendant is deceased and thus unavailable to give testimony in person.

The explanation for the answer is:

The correct answer is A. The attorney-client privilege is broken if the communications involved are not intended to be or do not remain confidential. If the defendant played the audiotape for his father to get his reaction, the communication is no longer confidential and the attorney-client privilege will not apply. Answer B is incorrect because, even if the lawsuit alleged criminal behavior by the defendant, the privilege remains in effect. Only if the communication contains ongoing criminal activity or a plan to commit a future crime or fraud will the crime-fraud exception break the attorney-client privilege. Answer C is incorrect because whether or not the audiotape contains inconsistent statements is irrelevant to determining whether those statements are protected under the attorney-client privilege. Answer D is incorrect because the attorney-client privilege extends beyond the death of the client.

Question 863 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for injuries received when she fell down a stairway in the defendant's apartment building. The plaintiff, a guest in the building, alleged that she caught the heel of her shoe in a tear in the stair carpet. The plaintiff calls a tenant to testify that another resident had said to the the tenant a week before the plaintiff's fall: "When I paid my rent this morning, I told the manager he had better fix that torn carpet."

The resident's statement, reported by the tenant, is

A: admissible, to prove that the carpet was defective.
B: admissible, to prove that the defendant had notice of the defect.
C: admissible, to prove both that the carpet was defective and that the defendant had notice of the defect.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is D. The resident's statement is hearsay within hearsay. Therefore, it must have an exception to each level of hearsay. The first level of hearsay, the resident's statement about what he told the landlord, would be admissible to show knowledge. However, the second level of hearsay, the tenant's statement about what the resident told him, does not meet the requirements of any exception to the hearsay rule and thus his statement is inadmissible.

Answer B is incorrect because although the resident's statement would be admissible for its effect on the listener, the tenant's reporting of that statement is hearsay not within any exception. Answers A and C are incorrect because not only is the tenant's reporting of that statement hearsay not within any exception, but the resident's statement to the tenant is also inadmissible hearsay if it is being used as proof that the carpet was defective.

Question 866 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was prosecuted for bankruptcy fraud. The defendant's wife, now deceased, had testified adversely to the defendant during earlier bankruptcy proceedings that involved similar issues. Although the wife had been cross examined, no serious effort was made to challenge her credibility despite the availability of significant impeachment information. At the fraud trial, the prosecutor offers into evidence the testimony given by the defendant's wife at the bankruptcy proceeding.

This evidence should be

A: admitted, under the hearsay exception for former testimony.
B: admitted, because it is a statement by a person identified with a party.
C: excluded, because it is hearsay not within any exception.
D: excluded, because the defendant has the right to prevent use of his spouse's testimony against him in a criminal case.

The explanation for the answer is:

The correct answer is A. The defendant's wife's testimony at the prior hearing, if relevant to the bankruptcy fraud case, is admissible under the former testimony exception to the hearsay rule. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, is admissible if the declarant is unavailable. In this case, the wife is now deceased and unavailable to testify. Although the testimony was in a separate proceeding, the defendant had the opportunity and motive to cross examine his wife about the testimony, and the mere fact that he didn't use all he could have on cross examination does not make the testimony inadmissible. Therefore, it is admissible under the former testimony exception. Answer B is incorrect because the standard for admission of hearsay is not that it was a statement by a person identified with a party. There is no evidence that the former testimony would be an admission or that the wife's testimony could be imputed to the husband. Answer C is incorrect because the statements are admissible under the former testimony exception to the hearsay rule. Answer D is incorrect because the defendant does not have the right to prevent the use of his spouse's testimony against him, and even if he did, the confidentiality of the statements had already been breached when the wife first testified.

Question 871 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was charged with possession of cocaine with intent to distribute. He had been stopped while driving a car and several pounds of cocaine were found in the trunk. In his opening statement, the defendant's counsel asserted that his client had no key to the trunk and no knowledge of its contents. The prosecutor offers the state motor vehicle registration, shown to have been found in the glove compartment of the car, listing the defendant as the owner.

The registration should be

A: admitted, as a statement against interest.
B: admitted, as evidence of the defendant's close connection with the car and, therefore, knowledge of its contents.
C: excluded, unless authenticated by testimony of or certification by a state official charged with custody of vehicle registration records.
D: excluded, as hearsay not within any exception.

The explanation for the answer is:

The correct answer is B. The state issued motor vehicle registration is admissible to show the vehicle was the defendant's and for the inference that he knew what was in the trunk. State issued motor vehicle registrations are self-authenticating documents that are admissible under the public records and records of regularly conducted business exceptions to the hearsay rule. Answer A is incorrect because the vehicle registration is not a statement made by the defendant; it is made by the state. In addition, it is not a statement against interest. Answer C is incorrect because the motor vehicle registration is self-authenticating. Answer D is incorrect because the registration meets the requirements for the public records exception to the hearsay rule.

Question 886 - Evidence - Writings Recordings and Photographs

The question was:

A plaintiff sued a defendant for dissolution of their year-long partnership. One issue concerned the amount of money the plaintiff had received in cash. It was customary for the defendant to give the plaintiff money from the cash register as the plaintiff needed it for personal expenses. The plaintiff testified that, as he received money, he jotted down the amounts in the partnership ledger. Although the defendant had access to the ledger, he made no changes in it. The defendant seeks to testify to his memory of much larger amounts he had given the plaintiff.

The defendant's testimony is

A: admissible, because it is based on the defendant's firsthand knowledge.
B: admissible, because the ledger entries offered by a party opponent opened the door.
C: inadmissible, because the ledger is the best evidence of the amounts the plaintiff received.
D: inadmissible, because the defendant's failure to challenge the accuracy of the ledger constituted an adoptive admission.

The explanation for the answer is:

The correct answer is A. The defendant is seeking to testify that he had provided larger amounts to the plaintiff than was indicated in the ledger. That testimony is based on the defendant's firsthand knowledge; he was the one who handed the plaintiff the money. The defendant can testify as to how much money was there, and his testimony is admissible.

Answer B is incorrect because the testimony is admissible as relevant, firsthand knowledge evidence, not because the "door had been opened." Answer C is incorrect because the best evidence rule does not apply to testimonial evidence in this case. Answer D is incorrect because there are no facts that support the idea that the defendant failed to challenge the accuracy of the ledger or that he adopted it as the truth. The defendant can certainly offer testimony on matters within his firsthand knowledge, and the mere fact that there may be contradictory evidence in the ledger does not foreclose his testimony.

Question 890 - Evidence - Presentation of Evidence

The question was:

A defendant is on trial for killing the victim. The prosecutor calls a witness to testify that after being shot, the victim said, "The defendant did it." Before the testimony is given, the defendant's lawyer asks for a hearing on whether the victim believed his death was imminent when he made the statement.

Before permitting evidence of the dying declaration, the judge should hear evidence on the issue from

A: both sides, with the jury not present, and decide whether the witness may testify to the victim's statement.
B: both sides, with the jury present, and decide whether the witness may testify to the victim's statement.
C: both sides, with the jury present, and allow the jury to determine whether the witness may testify to the victim's statements.
D: the prosecutor only, with the jury not present, and if the judge believes a jury could reasonably find that the victim knew he was dying, permit the witness to testify to the statement, with the defendant allowed to offer evidence on the issue as a part of the defendant's case.

The explanation for the answer is:

The correct answer is A. Preliminary questions concerning the admissibility of evidence shall be determined by the court. Both sides are permitted to present evidence and argument about the admissibility of the evidence, and the hearing should be conducted outside of the presence of the jury. Answer B is incorrect because, in jury cases, evidentiary hearings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. The jury should not be present for the evidentiary hearing. Answer C is incorrect because the jury should not be present and the determination is to be done by the judge. Answer D is incorrect because both sides, not just the proponent of the evidence, must be permitted to present evidence and arguments about the admissibility of evidence. In addition, the standard the judge should use in ruling on the admissibility in Answer D is incorrect.

Question 894 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A driver sued a factory for injuries suffered in the crash of the driver's dune buggy, allegedly caused by a defective auto part manufactured by the factory. The factory claims that the part was a fraudulent imitation, not produced by the factory.

Which of the following is NOT admissible on the issue of whether the part was manufactured by the factory?

A: The fact that the defective part bears the factory's insignia or trademark.
B: Testimony that the part was purchased from a parts house to which the factory regularly sold parts.
C: The part itself and a concededly genuine part manufactured by the factory (for the jury's comparison).
D: A judgment for another plaintiff against the factory in another case involving substantially similar facts.

The explanation for the answer is:

The correct answer is D. Since the issue in the case is very specific to the facts of the case, a judgment for another plaintiff against the factory, even if the facts are substantially similar, is inadmissible in this case. It is completely irrelevant to the determination of whether the driver's auto part was manufactured by the factory that some other plaintiff in some other case obtained a judgment against the factory.

Answer A is incorrect because the insignia or trademark is relevant, non-hearsay evidence that is self-authenticating as an inscription, sign, or label purporting to have been affixed in the course of business and indicating ownership, control, or origin. Answer B is incorrect because the testimony that the part was purchased from a parts house to which the factory regularly sold parts is relevant, admissible evidence. While certainly not dispositive, where the part was purchased is certainly evidence having a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Answer C is incorrect because identification of the object can be shown through comparison by the trier of fact with specimens which have been authenticated.

Question 900 - Evidence - Privileges and Other Policy Exclusions

The question was:

A defendant was prosecuted in federal court for making threats against the President of the United States. The defendant was a voluntary patient in a private psychiatric hospital and told a nurse, shortly before the President came to town, that the defendant planned to shoot the President. The nurse reported the threat to FBI agents.

The defendant's motion to prevent the nurse's testifying is likely to be

A: successful, because the statement was made in a medical setting.
B: successful, because the nurse violated a confidence in reporting the statement.
C: unsuccessful, because the statement was not within any privilege.
D: unsuccessful, because the defendant had not been committed involuntarily by court order.

The explanation for the answer is:

The correct answer is C. Although federal courts do recognize a psychiatrist-patient privilege, the defendant's statement to the nurse that he planned to shoot the President was not confidential and was not made to obtain treatment. Therefore, the statement is unprivileged and the nurse should be allowed to testify about the statement.

Answer A is incorrect because, although the statement was made in a medical setting, the privilege only covers confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment. Not every statement in a medical setting is privileged, and the defendant's statement to the nurse was not a confidential communication made in the course of diagnosis or treatment. Answer B is incorrect because whether or not the statement was made in confidence is not the legal standard to determine its admissibility. The statement was not subject to the privilege. Answer D is incorrect because whether the defendant was there voluntarily or committed involuntarily has no relevance to the determination of whether the privilege applies.

Question 913 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was charged with murder, and a witness testified for the prosecution. On cross-examination of the witness, the defendant seeks to elicit an admission that the witness was also charged with the same murder and that the prosecutor told her, "If you testify against the defendant, we will drop the charges against you after the conclusion of the defendant's trial."

The evidence about the prosecutor's promise is

A: admissible, as proper impeachment of the witness.
B: admissible, as an admission by an agent of a party-opponent.
C: inadmissible, because the law encourages plea-bargaining.
D: inadmissible, because the evidence is hearsay not within any exception.

The explanation for the answer is:

The correct answer is A. The prosecutor's statement to the witness is not being offered for the truth of the matter asserted -- that the state will drop the charges against the witness. Rather, it is being offered to show the witness's bias and interest in the outcome of the case. If the witness believes that the state will drop the charges against him, he clearly has a motive to give testimony that would curry favor with the state. Therefore, he can be properly impeached with the prosecutor's promise to him.

Answer B is incorrect because the prosecutor is not an agent of a party-opponent and because a plea offer is not an admission. Answer C is incorrect because, although plea agreements are encouraged, plea offers by the prosecution can still be used against a witness when it provides a motive for the witness to lie. Prior plea bargaining is only inadmissible against the same defendant who was the party to the bargaining. Answer D is incorrect because the prosecutor's statement is not being offered for the truth of the matter asserted, so it is not hearsay.

Question 917 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff sued a defendant for fraud. After verdict for the plaintiff, the defendant talked with a juror about the trial.

The defendant's motion for a new trial would be most likely granted if the juror is willing to testify that he voted for the plaintiff because he

A: misunderstood the judge's instructions concerning the standard of proof in a fraud case.
B: was feeling ill and needed to get home quickly.
C: relied on testimony that the judge had stricken and ordered the jury to disregard.
D: learned from a court clerk that the defendant had been accused of fraud in several recent lawsuits.

The explanation for the answer is:

The correct answer is D. A juror may not testify about a verdict, deliberations, or mental process in reaching a verdict. However, a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. If the jury obtained inadmissible and prejudicial information from a clerk that the defendant had been accused of fraud in several recent lawsuits, the defendant's motion for a new trial will most likely be granted.

Answer A is incorrect because a possible misunderstanding as to the standard of proof by one juror is inadmissible evidence and may not lead to a new trial. Answer B is incorrect because the juror's mental process, that he wished to get home quickly, is inadmissible evidence and may not lead to a new trial. Answer C is incorrect because relying on testimony that should have been disregarded is inadmissible evidence and may not lead to a new trial. Only in answer D is there extraneous, prejudicial evidence that was improperly brought to the jury's attention that would be admissible and allow for a new trial.

Question 933 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was charged with using a forged prescription from a doctor to obtain Percodan from a drugstore on May 1. At trial, the drugstore owner identified the defendant as the customer, but the defendant testified that he had not been in the store.

In rebuttal, the prosecutor calls two additional drug store owners to testify that, on May 1, a man they identified as the defendant had presented prescriptions for Percodan from a doctor at their drug stores.

The additional drug store owners' testimony is

A: admissible, to prove a pertinent trait of the defendant's character and the defendant's action in conformity therewith.
B: admissible, to identify the man who presented the prescription at the original drugstore.
C: inadmissible, because it proves specific acts rather than reputation or opinion.
D: inadmissible, because other crimes may not be used to show propensity.

The explanation for the answer is:

The correct answer is B. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, other crimes evidence can be admitted to show identity, intent, preparation, or plan. The evidence the prosecutor seeks to admit is that the exact same man, the defendant, had presented a forged prescription from the exact same doctor, for the exact same drug, on the exact same day. That evidence would be admissible to prove the identity, which the defendant called into question by his testimony, of the person who obtained the Percodan at the drugstore.

Answer A is incorrect because evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Answer C is incorrect because the additional drug store owners' testimony is not being used to prove character; it is being used to prove identity. Used for this purpose, the testimony is admissible even though it covers specific acts. Answer D is incorrect because, although evidence of other crimes is inadmissible to prove propensity, evidence of the other crimes in this case is admissible to prove identity.

Question 948 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for theft. At trial, the prosecutor called a husband and wife. They testified that, as they looked out their apartment window, they saw thieves across the street break the window of a jewelry store, take jewelry, and leave in a car. The wife telephoned the police and relayed to them the license number of the thieves' car as her husband looked out the window with binoculars and read it to her. Neither of them has any present memory of the number. The prosecutor offers as evidence a properly authenticated police tape recording of the wife's telephone call with her voice giving the license number, which is independently shown to belong to the defendant's car.

The tape recording of the wife stating the license is

A: admissible, under the hearsay exception for present sense impressions.
B: admissible, as nonhearsay circumstantial evidence.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because the wife never had firsthand knowledge of the license number.

The explanation for the answer is:

The correct answer is A. The tape recording of the wife's reading of the license plate number is an out-of-court statement that is being offered for the truth of the matter asserted. However, the tape recording is a statement describing or explaining an event or condition made while the wife was perceiving the event or condition. She was recounting what her husband was saying. The husband's statements to his wife were also statements describing or explaining an event or condition made while the husband was perceiving the event or condition - the reading of the license plate from the vehicle. The tape recording is admissible because both statements, the husband's to his wife and the wife's into the recording, meet the criteria of the present sense impression exception to the hearsay rule.

Answer B is incorrect because the statements are hearsay. Answer C is incorrect because, although hearsay, the statements are admissible under the present sense impression exception to the hearsay rule. Answer D is incorrect because the wife did have first-hand knowledge as to what her statement describes: the license plate numbers her husband was stating to her. The husband himself had first-hand knowledge as to the license number.

Question 950 - Evidence - Presentation of Evidence

The question was:

The plaintiff sued a church for damages he suffered when the plaintiff crashed his motorcycle in an attempt to avoid a cow that had escaped from its corral. The cow and corral belonged to a farm that had recently been left by will to the church. At trial, the plaintiff seeks to ask the defendant's witness whether she is a member of that church.

The question is

A: improper, because evidence of a witness's religious beliefs is not admissible to impeach credibility.
B: improper, because it violates First Amendment and privacy rights.
C: proper, for the purpose of ascertaining partiality or bias.
D: proper, for the purpose of showing capacity to appreciate the nature and obligation of an oath.

The explanation for the answer is:

The correct answer is C. The witness's membership in the church would be relevant and admissible to ascertain whether she has any possible bias or motive to lie for the defendant church.

Answer A is incorrect because, although evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced, the witness's membership in the defendant church is not being used for that improper reason. It is being used to ascertain any bias or motive to lie she may have. Answer B is incorrect because violations of First Amendment and privacy rights do not lead to the exclusion of evidence in this case. Because the question is relevant and admissible, the witness cannot claim that the answer will violate her rights. Answer D is incorrect because the evidence is not being used to show the witness's capacity to understand the oath; it is being used to determine her possible motive to lie and her possible bias.

Question 954 - Evidence - Privileges and Other Policy Exclusions

The question was:

A defendant was charged with the sale of narcotics. The federal prosecutor arranged with the defendant's wife for her to testify against her husband in exchange for leniency in her case. At trial, the prosecution calls the wife, who had been granted immunity from prosecution, to testify, among other things, that she saw her husband sell an ounce of heroin.

Which of the following statements is most clearly correct in the federal courts?

A: The defendant's wife cannot be called as a witness over her husband's objection.
B: The defendant's wife can be called as a witness but cannot testify, over the defendant's objection, that she saw him sell heroin.
C: The defendant's wife can refuse to be a witness against her husband.
D: The defendant's wife can be required to be a witness and to testify that she saw her husband sell heroin.

The explanation for the answer is:

The correct answer is C. The wife's proposed testimony could lead to her invoking the adverse spousal privilege, a privilege against testifying against her husband. That privilege, however, only exists at the wife's discretion. The witness spouse, in this case the defendant's wife, alone has a privilege to refuse to testify adversely against her husband; she may be neither compelled to testify nor foreclosed from testifying. The choice is hers.

Answer A is incorrect because the adverse spousal privilege is the wife's, and the determination of whether to testify or not is her decision to make. The defendant cannot object and force his wife not to testify. Answer B is incorrect because the defendant's wife can testify, if she wishes, that she saw her husband sell heroin. Her testimony about her firsthand knowledge of the sale does not require that the wife disclose any privileged marital communication from her husband. She will testify as to what she saw. Answer D is incorrect because the adverse spousal privilege still exists. If the wife wishes not to testify against her husband, she cannot be compelled, in federal court, to do so.

Question 957 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for evading $100,000 in taxes. The prosecution offers in evidence an anonymous letter to the IRS, identified as being in the defendant's handwriting, saying, "I promised my mother on her deathbed I would try to pay my back taxes. Here is $10,000. I'll make other payments if you promise not to prosecute. Answer yes by personal ad saying, 'OK on tax deal.'"

The letter is

A: admissible, as a statement of present intention or plan.
B: admissible, as an admission of a party opponent.
C: inadmissible, because it is an effort to settle a claim.
D: inadmissible, because the probative value is substantially outweighed by the risk of unfair prejudice.

The explanation for the answer is:

The correct answer is B. The anonymous letter is being offered against the defendant and is an admission by him that he knows he owes back taxes. The letter is admissible as an admission by a party opponent.

Answer A is incorrect because the letter is not a statement of the defendant's then existing mental condition that the defendant intended to pay. Instead, the letter is being offered to prove that the defendant owed back taxes. It is admissible as an admission, not as a statement of the defendant's intent. Answer C is incorrect because, to be an inadmissible offer to compromise, the letter must be an attempt to compromise a claim which was disputed as to either validity or amount. The defendant's offer was not made to settle the claim that was in dispute; the statement was made in an attempt to stop the I.R.S. from prosecuting him. The policy considerations which underlie the rule do not come into play when the goal is to induce a creditor to settle an admittedly due amount for a lesser amount. The letter does not meet the requirements to be considered a valid offer to compromise and is admissible. Answer D is incorrect because the letter is highly probative and any prejudice against the defendant is not unfair. The admission of the letter is, of course, detrimental to the defendant's defense, but that is not due to any unfair prejudice.

Question 961 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant is charged with aggravated assault on a game warden. The defendant testified that, when he was confronted by the warden, who was armed and out of uniform, the defendant believed the warden was a robber and shot in self-defense. The state calls a witness to testify that a year earlier, he had seen the defendant shoot a man without provocation and thereafter falsely claimed self-defense.

The witness's testimony is

A: admissible, as evidence of the defendant's untruthfulness.
B: admissible, as evidence that the defendant did not act in self-defense on this occasion.
C: inadmissible, because it is improper character evidence.
D: inadmissible, because it is irrelevant to the defense the defendant raised.

The explanation for the answer is:

The correct answer is C. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. The witness's testimony is being offered as evidence of the defendant's bad character. There is an exception that allows the prosecution to use character evidence, but only if the evidence is being used to rebut character evidence introduced by the defendant. Because the defendant did not introduce any character evidence intended to prove that he is a nonviolent, peaceful person, the prosecution is not permitted to introduce evidence intended to prove the defendant's violent character.

Answer A is incorrect because the evidence of the prior shooting is evidence of a violent character, not for an untruthful character. In addition, specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness may not be proved by extrinsic evidence. Answer B is incorrect because the fact that the defendant raised a self-defense claim in a prior case, whether successfully or not, is inadmissible to prove the defendant did not act in self-defense in this case. The evidence of the prior shooting and his defense cannot be used to show absence of self-defense in this case. Answer D is incorrect because the evidence may be relevant, but it is specifically excluded by the rules of evidence dealing with the character of the accused. See FRE 404(b).

Question 964 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a driver for damages for the death of the plaintiff's husband, resulting from an automobile collision. At trial, the driver calls the husband's doctor to testify that the day before his death, the husband, in great pain, said, "It was my own fault; there's nobody to blame but me." The doctor's testimony should be admitted as

A: a statement against interest.
B: a dying declaration.
C: a statement of the husband's then existing state of mind.
D: an excited utterance.

The explanation for the answer is:

The correct answer is A. The husband's statement taking fault for the accident, at the time it was made, tended to subject the husband to civil liability, and would render invalid any claim he had against the driver. A reasonable person in the husband's position would not have made the statement unless he believed it to be true. The statement is admissible under the statement against interest exception to the hearsay rule.

Answer B is incorrect because there is no evidence that the husband made the statement knowing his death was imminent or that the statement concerned the cause or circumstances of his death. Although he was in great pain, there is no indication that the husband knew he was going to die and was making the statement as a dying declaration.

Answer C is incorrect because the husband's statement is being offered to prove he was at fault for the accident, not to prove what was in his mind when he died. In addition, the statement is a statement of memory or belief to prove the fact remembered or believed - that he was at fault. As such, it is specifically excluded from the definition of a statement of then existing mental state and is inadmissible.

Answer D is incorrect because there is no evidence that the husband's statement related to a startling event and was made while he was under the stress of excitement caused by the event or condition. The husband may have been in great pain, but his statement was not an excited utterance because of the accident. The doctor's testimony should be admitted as a statement against interest.

Question 973 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for an assault that occurred March 5 in California. To support his defense that he was in Utah on that date, the defendant identifies and seeks to introduce a letter he wrote to his sister a week before the assault in which he stated that he would see her in Utah on March 5.

The letter is

A: admissible, within the state of mind exception to the hearsay rule.
B: admissible, as a prior consistent statement to support the defendant's credibility as a witness.
C: inadmissible, because it lacks sufficient probative value.
D: inadmissible, because it is a statement of belief to prove the fact believed.

The explanation for the answer is:

The correct answer is A. The defendant's letter to his sister describes the defendant's current mental condition - that when he wrote the letter, he intended to go to visit his sister on March 5. The statement should be admissible under the then existing mental condition/state of mind exception to the hearsay rule.

Answer B is incorrect because prior consistent statements cannot be used to support the testimony of the witness unless the witness testifies, and the prior consistent statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. No such charge has been raised against the defendant, so the letter does not meet the requirements for the prior consistent statement exception.

Answer C is incorrect because the letter is clearly evidence that has the tendency to make the existence of the defendant's intent to be in Utah on March 5th more probable or less probable than it would be without the evidence. As such, it is relevant, admissible evidence and should not be excluded as lacking in probative value.

Answer D is incorrect because the letter is not a statement of belief, but rather a statement of the defendant's intent, and it is not being offered to prove the defendant went to Utah, but rather is admissible to show that the defendant intended to be in Utah on March 5.

Question 981 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

Plaza Hotel sued Plaza House Hotel for infringement of its trade name. To establish a likelihood of name confusion, plaintiff Plaza Hotel offers a series of memoranda which it had asked its employees to prepare at the end of each day listing instances during the day in which telephone callers, cab drivers, customers, and others had confused the two names.

The memoranda should be

A: excluded, because they are more unfairly prejudicial and confusing than probative.
B: excluded, because they are hearsay not within any exception.
C: admitted, because they are records of regularly conducted business activity.
D: admitted, because they are past recollection recorded.

The explanation for the answer is:

The correct answer is B. The memoranda prepared by the employees are out-of-court statements that are being offered for the truth of the matter asserted - that these instances of confusion occurred. As such, they are hearsay, and they do not meet the requirements of any exception. The memoranda should be excluded from evidence.

Answer A is incorrect because the memoranda should be excluded under the hearsay rule, not because they are more prejudicial and confusing than probative. The facts sought to be introduced by the memoranda - that customers and potential customers are confused by the possible trade name infringement - are clearly probative and not unfairly prejudicial. It is because these events are contained in the hearsay memoranda that they are inadmissible. Answer C is incorrect because the memoranda are not records that are kept in the course of the Plaza Hotel's regularly conducted business activity. The hotel is not in the business of creating memoranda in regards to possible litigation, so the memoranda are not done in the hotel's regular course of business and are inadmissible as hearsay. Answer D is incorrect because the memoranda are not being offered through a witness who is unable to fully and accurately testify as to the events. The memoranda are not prior recollection recorded in this case and are inadmissible as hearsay.

Question 987 - Evidence - Privileges and Other Policy Exclusions

The question was:

In a federal investigation of a defendant for tax fraud, the grand jury seeks to obtain a letter written January 15 by the defendant to her attorney in which she stated: "Please prepare a deed giving my ranch to the university but, in order to get around the tax law, I want it back-dated to December 15." The attorney refuses to produce the letter on the ground of privilege.

Production of the letter should be

A: prohibited, because the statement is protected by the attorney-client privilege.
B: prohibited, because the statement is protected by the client's privilege against self-incrimination.
C: required, because the statement was in furtherance of crime or fraud.
D: required, because the attorney-client privilege belongs to the client and can be claimed only by her.

The explanation for the answer is:

The correct answer is C. The attorney-client privilege will cover confidential communications made during a legal consultation between an attorney and client. However, if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud, the privilege does not apply. The defendant's letter explicitly states that the deed she is seeking should be back-dated to avoid the tax law. Because the services sought by the defendant from her attorney were for the commission of tax fraud, the communication will not be privileged and the production of the letter should be required.

Answer A is incorrect because it ignores the crime-fraud exception to the attorney-client privilege. Answer B is incorrect because the letter, although certainly incriminating, was not made to law enforcement officers in a custodial interrogation. Answer D is incorrect because the attorney can assert the privilege on behalf of the client.

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Production of the letter should be

A: prohibited, because the statement is protected by the attorney-client privilege.
B: prohibited, because the statement is protected by the client's privilege against self-incrimination.
C: required, because the statement was in furtherance of crime or fraud.
D: required, because the attorney-client privilege belongs to the client and can be claimed only by her.

The explanation for the answer is:

The correct answer is C. The attorney-client privilege will cover confidential communications made during a legal consultation between an attorney and client. However, if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud, the privilege does not apply. The defendant's letter explicitly states that the deed she is seeking should be back-dated to avoid the tax law. Because the services sought by the defendant from her attorney were for the commission of tax fraud, the communication will not be privileged and the production of the letter should be required.

Answer A is incorrect because it ignores the crime-fraud exception to the attorney-client privilege. Answer B is incorrect because the letter, although certainly incriminating, was not made to law enforcement officers in a custodial interrogation. Answer D is incorrect because the attorney can assert the privilege on behalf of the client.

Question 994 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant for breach of a commercial contract in which the defendant had agreed to sell the plaintiff all of the plaintiff's requirements for widgets. The plaintiff called an expert witness to testify as to damages. On cross-examination, the defendant seeks to elicit from the expert witness that he had provided false testimony as a witness in his own divorce proceedings.

This evidence should be

A: admitted, because the evidence was elicited from the expert witness on cross-examination.
B: admitted, because the questioning can be substantiated by clear and convincing extrinsic evidence.
C: excluded, because it is impeachment on a collateral issue.
D: excluded, because it is improper character evidence.

The explanation for the answer is:

The correct answer is A. Specific instances of misconduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. The expert witness's false testimony in his divorce proceeding is probative of his character for truthfulness or untruthfulness, and can be inquired into upon in cross-examination.

Answer B is incorrect because extrinsic evidence of the prior false testimony is inadmissible and does not need to be shown by clear and convincing evidence. Answer C is incorrect because the expert witness's character for truthfulness or untruthfulness is not a collateral issue and may be inquired into during cross-examination. Answer D is incorrect because character evidence is admissible against a witness if it goes to the witness's character for truthfulness or untruthfulness. The defendant is allowed to question an expert witness regarding his prior false testimony.

Question 1005 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A corporation sued its former vice president for return of $230,000 that had been embezzled during the previous two years. Called by the corporation as an adverse witness, the vice president testified that his annual salary had been $75,000, and he denied the embezzlement. The corporation calls a banker to show that, during the two-year period, the vice president had deposited $250,000 in his bank account.

The banker's testimony is

A: admissible as circumstantial evidence of the vice president's guilt.
B: admissible to impeach the vice president.
C: inadmissible, because its prejudicial effect substantially outweighs its probative value.
D: inadmissible, because the deposits could have come from legitimate sources.

The explanation for the answer is:

The correct answer is A. Evidence that the vice president's bank deposits consisted of more money than he legally earned has the tendency to make embezzlement more probable than it would be in the absence of that evidence. The banker's testimony is relevant, circumstantial evidence to show the vice president's guilt, and is admissible.

Answer B is incorrect because the banker's testimony would not serve to impeach any testimony the vice president previously gave. It would not necessarily have any bearing on the credibility of the vice president's prior testimony, and thus there would be no grounds for impeachment. Answer C is incorrect because the evidence is clearly probative, and, although damaging to the vice president's case, is not prejudicial. Answer D is incorrect because the admissibility of evidence is determined by its relevance to the case, not its possible explanations. Although the deposits could have come from legitimate sources, the evidence of the deposits is still admissible to show that the vice president had more money than he legally earned.

Question 1007 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for illegal discrimination, claiming that the defendant fired him because of his race. At trial, the plaintiff called a witness, expecting him to testify that the defendant had admitted the racial motivation. Instead, the witness testified that the defendant said that he had fired the plaintiff because of his frequent absenteeism. While the witness is still on the stand, the plaintiff offers a properly authenticated secret tape recording he had made at a meeting with the witness in which the witness related the defendant's admissions of racial motivation.

The tape recording is

A: admissible as evidence of the defendant's racial motivation and to impeach the witness's testimony.
B: admissible only to impeach the witness's testimony.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because a secret recording is an invasion of the witness's right of privacy under the U.S. Constitution.

The explanation for the answer is:

The correct answer is B. The tape recording is admissible to impeach the witness's testimony that the defendant fired the plaintiff for frequent absenteeism. However, the tape recording contains out-of-court statements that are being offered for the truth of the matter asserted - that the defendant fired the plaintiff because of his race. As such, it is hearsay. Since it does not meet the requirements of any exception to the hearsay rule, the tape is inadmissible as substantive evidence.

Answer A is incorrect because prior inconsistent statements are inadmissible as substantive evidence unless they were given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Answer C is incorrect because, although the statements on the tape recording are hearsay, they can still be used to impeach the witness's testimony that the plaintiff was fired for absenteeism. Answer D is incorrect because the statements on the tape were not privileged communications, and whatever invasion of privacy that may have occurred would not affect the admissibility of the evidence because the taping was not done by the state.

Question 1025 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff's estate sued a defendant, a store, claiming that one of the defendant's security guards wrongfully shot and killed the plaintiff when the plaintiff fled after being accused of shoplifting. The guard was convicted of manslaughter for killing the plaintiff. At his criminal trial the guard, who was no longer working for the defendant, testified that the defendant's security director had instructed him to stop shoplifters "at all costs." Because the guard's criminal conviction is on appeal, he refuses to testify at the civil trial. The plaintiff's estate then offers an authenticated transcript of the guard's criminal trial testimony concerning the instructions of the defendant's security director.

This evidence is

A: admissible as a statement of an agent of a party-opponent.
B: admissible, because the instruction from the security director is not hearsay.
C: admissible, although hearsay, as former testimony.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is D. The defendant store was not a party to the prior criminal trial and its attorney was never afforded the opportunity to develop the guard's testimony by direct, cross, or redirect examination. The defendant store, against whom the guard's testimony is sought to be admitted, was not a predecessor in interest to the prosecutor, and the prosecutor did not have the motive to cross examine the guard's testimony regarding the defendant store's involvement in the crime. For these reasons, the guard's testimony at his criminal trial does not meet the requirements of the prior testimony exception to the hearsay rule and is inadmissible.

Answer A is incorrect because the guard, when he made the statements, was no longer employed by the defendant store so his admissions were not made by an agent of a party opponent. Answer B is incorrect because the hearsay sought to be admitted is the guard's testimony that the director told him to stop shoplifters at any cost. The guard's testimony is hearsay not within any exception to the hearsay rule. Answer C is incorrect because the defendant store was not able to develop the guard's prior testimony through cross examination. The guard's testimony does not meet the requirements of the prior testimony exception to the hearsay rule and is inadmissible.

Question 1026 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for shooting her husband from ambush. The plaintiff offers to testify that, the day before her husband was killed, he described to her a chance meeting with the defendant on the street in which the defendant said, "I'm going to blow your head off one of these days."

The witness's testimony concerning her husband's statement is

A: admissible, to show the defendant's state of mind.
B: admissible, because the defendant's statement is that of a party-opponent.
C: inadmissible, because it is improper evidence of a prior bad act.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is D. The deceased's statement to his wife that the defendant told him that the defendant was going to blow the deceased's head off one of these days is an out-of-court statement that is being offered for the truth of the matter asserted - that the defendant threatened the deceased. This statement is thus hearsay and is inadmissible because it does not meet the requirements for any exception to the hearsay rule.

Answer A is incorrect because the hearsay statement is the deceased's statement to his wife. The defendant's statement to the deceased may be admissible to show the defendant's state of mind, but the deceased relaying that statement to his wife is another level of hearsay that has no exception and is thus inadmissible. Therefore answer B is incorrect. Answer C is incorrect because the statement is inadmissible because it is hearsay, not because it is improper evidence of a prior bad act. The prior bad act of threatening the deceased, if not hearsay, would be admissible to show the defendant's motive. However, it is hearsay, and thus inadmissible.

Question 1026 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for shooting her husband from ambush. The plaintiff offers to testify that, the day before her husband was killed, he described to her a chance meeting with the defendant on the street in which the defendant said, "I'm going to blow your head off one of these days."

The witness's testimony concerning her husband's statement is

A: admissible, to show the defendant's state of mind.
B: admissible, because the defendant's statement is that of a party-opponent.
C: inadmissible, because it is improper evidence of a prior bad act.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is D. The deceased's statement to his wife that the defendant told him that the defendant was going to blow the deceased's head off one of these days is an out-of-court statement that is being offered for the truth of the matter asserted - that the defendant threatened the deceased. This statement is thus hearsay and is inadmissible because it does not meet the requirements for any exception to the hearsay rule.

Answer A is incorrect because the hearsay statement is the deceased's statement to his wife. The defendant's statement to the deceased may be admissible to show the defendant's state of mind, but the deceased relaying that statement to his wife is another level of hearsay that has no exception and is thus inadmissible. Therefore answer B is incorrect. Answer C is incorrect because the statement is inadmissible because it is hearsay, not because it is improper evidence of a prior bad act. The prior bad act of threatening the deceased, if not hearsay, would be admissible to show the defendant's motive. However, it is hearsay, and thus inadmissible.

Question 1032 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for robbing a bank in State A. She testified that she was in State B at the time of the robbery. The defendant calls her friend, a witness, to testify that two days before the robbery the defendant told him that she was going to spend the next three days in State B.

The witness's testimony is

A: admissible, because the statement falls within the present sense impression exception to the hearsay rule.
B: admissible, because a statement of plans falls within the hearsay exception for then-existing state of mind.
C: inadmissible, because it is offered to establish an alibi by the defendant's own statement.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is B. The defendant's statement to the witness describes the defendant's current mental condition, which was that she intended to go spend the next three days in State B. The statement is admissible under the then-existing mental condition exception to the hearsay rule. Statement of future plans falls within the hearsay exception for then-existing state of mind.

Answer A is incorrect because the defendant's statement that she was going to State B for the next three days is not a statement describing or explaining an event or condition, and it was not made while the defendant was perceiving that event or condition. It is thus not a present sense impression, it is a statement of then-existing state of mind. Answer C is incorrect because it misstates the standard for determining admissible hearsay statements. Answer C is also incorrect because the statement is offered to show that the defendant had plans, not to show that the defendant followed through with those plans. Answer D is incorrect because the statement, although hearsay, falls under the then-existing state of mind exception to the hearsay rule.

Question 1038 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant for breach of contract. The plaintiff's position was that the woman, whom he understood to be the defendant's agent, said, "On behalf of [the defendant], I accept your offer." The defendant asserted that the woman had no actual or apparent authority to accept the offer on the defendant's behalf.

The plaintiff's testimony concerning the woman's statement is

A: admissible, provided the court first finds by a preponderance of the evidence that the woman had actual or apparent authority to act for the defendant.
B: admissible, upon or subject to introduction of evidence sufficient to support a finding by the jury that the woman had actual or apparent authority to act for the defendant.
C: inadmissible, if the woman does not testify and her absence is not excused.
D: inadmissible, because it is hearsay not within any exception.

The explanation for the answer is:

The correct answer is B. The relevancy of the woman's statement to the plaintiff is conditioned on the showing that the woman had actual or apparent authority to act for the defendant. If the woman did not have actual or apparent authority to act for the defendant, the statement would be irrelevant to the plaintiff's case against the defendant and it should not be admitted. However, the statement is admissible subject to the introduction of evidence sufficient to support a finding that the woman had actual or apparent authority to act for the defendant.

Answer A is incorrect because it misstates the standard for determining the admissibility of evidence whose relevance is conditioned on facts not yet shown. The court does not have to make a finding by a preponderance of the evidence before it admits the statement, it may admit the statement subject to evidence sufficient to support a finding that the woman had authority to act for the defendant. Answer C is incorrect because the woman's availability to testify is irrelevant for the admission of her statement to the plaintiff. Answer D is incorrect because, if the woman had apparent or actual authority to act for the defendant, the statement would not be hearsay, it would be an admission by a party opponent. A statement can be admitted into evidence conditional on a finding that the statement is relevant and non-hearsay. If the conditions are met, the statement remains in evidence. If not, the statement is struck by the court.

Question 1045 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant is on trial for the murder of his father. The defendant's defense is that he shot his father accidentally. The prosecutor calls a witness, a police officer, to testify that on two occasions in the year prior to this incident, he had been called to the defendant's home because of complaints of loud arguments between the defendant and his father, and had found it necessary to stop the defendant from beating his father.

The evidence is

A: inadmissible, because it is improper character evidence.
B: inadmissible, because the witness lacks first-hand knowledge of who started the quarrels.
C: admissible to show that the defendant killed his father intentionally.
D: admissible to show that the defendant is a violent person.

The explanation for the answer is:

The correct answer is C. Evidence of other acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as intent and absence of mistake or accident. The defendant's prior arguments and near-beatings of his father are admissible to prove that the killing of his father was not accidental, and was, in fact, intentional.

Answer A is incorrect because this type of character evidence is not being offered to prove action in conformity therewith, but rather intent and absence of mistake or accident. Thus it is proper and admissible. Answer B is incorrect because the witness does not need to know who started the quarrels in order to make this evidence relevant to the issue of whether the defendant shot his father intentionally or accidentally. Answer D is incorrect because evidence of other acts is not admissible to show the defendant's violent character. It is admissible, however, to show intent and lack of mistake or accident.

Question 1055 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued an auto manufacturing company for his wife's death, claiming that a defective steering mechanism on the family car caused it to veer off the road and hit a tree when his wife was driving. The defendant claims that the steering mechanism was damaged in the collision and offers testimony that the deceased wife was intoxicated at the time of the accident.

Testimony concerning the wife's intoxication is

A: admissible to provide an alternate explanation of the accident's cause.
B: admissible as proper evidence of the wife's character.
C: inadmissible, because it is improper to prove character evidence by specific conduct.
D: inadmissible, because it is substantially more prejudicial than probative.

The explanation for the answer is:

The correct answer is A. Evidence of the plaintiff's wife's intoxication while she was driving is relevant and admissible to show the possible cause or causes of the accident. Answer B is incorrect because the plaintiff's wife's intoxication at the time of the accident is not character evidence; it is evidence of her factual, bodily state at the time of the accident. It is relevant because her intoxication may have caused the accident. Answer C is incorrect because the evidence of the wife's intoxication at the time of the accident is not character evidence. Answer D is incorrect because evidence of the wife's intoxication is probative on the issue of the cause of the accident, and is not unfairly prejudicial.

Question 1058 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A construction company sued a development company for money owed on a cost-plus contract that required notice of proposed expenditures beyond original estimates. The defendant asserted that it never received the required notice. At trial the plaintiff calls a witness, its general manager, to testify that it is the plaintiff's routine practice to send cost overrun notices as required by the contract. The witness also offers a photocopy of the cost overrun notice letter to the defendant on which the plaintiff is relying, and which he has taken from the plaintiff's regular business files.

On the issue of giving notice, the letter copy is

A: admissible, though hearsay, under the business record exception.
B: admissible, because of the routine practices of the company.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because it is not the best evidence of the notice.

The explanation for the answer is:

The correct answer is B. On the issue of notice, the letter copy is not being offered for the truth of the matter asserted – i.e. what the proposed expenditures beyond the original estimates were. The letter copy is being offered to show that the plaintiff sent the letter, not the actual contents of the letter; therefore, it is not hearsay. In addition, evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

Answer A is incorrect because the letter copy, offered on the issue of notice, is not hearsay because it is not being offered for the truth of the matter asserted in the letter. Answer C is incorrect because the letter copy, offered on the issue of notice, is not hearsay because it is not being offered for the truth of the matter asserted in the letter. Answer D is incorrect because the duplicate letter is admissible to the same extent as an original.

Question 1062 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In a jurisdiction without a Dead Man's Statute, a deceased man's estate sued the defendant claiming that the defendant had borrowed $10,000 from the deceased man, which had not been repaid as of the man's death. The man was run over by a truck. At the accident scene, while dying from massive injuries, the man told a police offficer to "make sure my estate collects the $10,000 I loaned to the defendant."

The police officer's testimony about the deceased man's statement is

A: inadmissible, because it is more unfairly prejudicial than probative.
B: inadmissible, because it is hearsay not within any exception.
C: admissible as an excited utterance.
D: admissible as a statement under belief of impending death.

The explanation for the answer is:

The correct answer is B. The deceased man's statement to the police officer is an out-of-court statement that is being offered for the truth of the matter asserted - that the deceased man loaned the defendant $10,000. As such, it is hearsay, and it is inadmissible because it does not meet the requirements for any exception to the hearsay rule.

Answer A is incorrect because the statement is inadmissible as hearsay, not because the statement is not probative. Answer C is incorrect because the deceased man's statement was about the loan and not related to a startling event or condition, so it is not an excited utterance. Answer D is incorrect because the deceased man's statement was about the loan and not concerning the cause or circumstances of what the declarant believed to be impending death. As such, it is not a dying declaration. Because the deceased man's statement is hearsay, and it does not meet the requirements of any exception, it is inadmissible.

Question 1069 - Evidence - Presentation of Evidence

The question was:

A defendant is charged with murder in connection with a carjacking incident during which the defendant allegedly shot the victim while attempting to steal the victim's car. The prosecutor calls the victim's four-year-old son, whose face was horribly disfigured by the same bullet, to testify that the defendant shot his father and him.

The prosecutor has presented evidence showing that the son has personal knowledge of the incident, understands the oath to testify truthfully, and has the cognitive ability of a seven-year-old. The son's testimony should be

A: admitted, because the prosecutor has provided evidence that the son has the cognitive ability of a seven-year-old.
B: admitted, because there is sufficient basis for believing that the son has personal knowledge and understands his obligation to testify truthfully.
C: excluded, because it is insufficiently probative in view of the son's tender age.
D: excluded, because it is more unfairly prejudicial than probative.

The explanation for the answer is:

The correct answer is B. Every person is competent to be a witness, as long as the person meets the requirements of having personal knowledge and taking the oath to testify truthfully. 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. In addition, before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so. Because the prosecutor has admitted evidence providing a sufficient basis for believing the son has personal knowledge and understands his obligation to testify truthfully, the son's testimony should be admitted.

Answer A is incorrect because it misstates the requirements of the fitness for a witness to testify. Likewise, answer C is incorrect because the son's age is irrelevant to whether his testimony is probative, and because the son's testimony that he saw the defendant shoot him and his father is clearly highly probative to the case. Answer D is incorrect because the son's testimony is highly probative to the case and is not unfairly prejudicial. The son's testimony is certainly detrimental to the defendant's case, but it is not unfairly prejudicial.

Question 1069 - Evidence - Presentation of Evidence

The question was:

A defendant is charged with murder in connection with a carjacking incident during which the defendant allegedly shot the victim while attempting to steal the victim's car. The prosecutor calls the victim's four-year-old son, whose face was horribly disfigured by the same bullet, to testify that the defendant shot his father and him.

The prosecutor has presented evidence showing that the son has personal knowledge of the incident, understands the oath to testify truthfully, and has the cognitive ability of a seven-year-old. The son's testimony should be

A: admitted, because the prosecutor has provided evidence that the son has the cognitive ability of a seven-year-old.
B: admitted, because there is sufficient basis for believing that the son has personal knowledge and understands his obligation to testify truthfully.
C: excluded, because it is insufficiently probative in view of the son's tender age.
D: excluded, because it is more unfairly prejudicial than probative.

The explanation for the answer is:

The correct answer is B. Every person is competent to be a witness, as long as the person meets the requirements of having personal knowledge and taking the oath to testify truthfully. 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. In addition, before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so. Because the prosecutor has admitted evidence providing a sufficient basis for believing the son has personal knowledge and understands his obligation to testify truthfully, the son's testimony should be admitted.

Answer A is incorrect because it misstates the requirements of the fitness for a witness to testify. Likewise, answer C is incorrect because the son's age is irrelevant to whether his testimony is probative, and because the son's testimony that he saw the defendant shoot him and his father is clearly highly probative to the case. Answer D is incorrect because the son's testimony is highly probative to the case and is not unfairly prejudicial. The son's testimony is certainly detrimental to the defendant's case, but it is not unfairly prejudicial.

Question 1076 - Evidence - Presentation of Evidence

The question was:

While on trial for murdering her husband, a defendant testified that she acted in self-defense. The defendant calls an expert, a psychologist, to testify that under hypnosis the defendant had described the killing, and that in the expert's opinion the defendant had been in fear for her life at the time of the killing.

Is the expert's testimony admissible?

A: Yes, because the expert was able to ascertain that the defendant was speaking truthfully.
B: Yes, because it reports a prior consistent statement by a witness (the defendant) subject to examination concerning it.
C: No, because reliance on information tainted by hypnosis is unconstitutional.
D: No, because it expresses an opinion concerning the defendant's mental state at the time of the killing.

The explanation for the answer is:

The correct answer is D. No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone. The expert's testimony is inadmissible because, by opining that the defendant had been in fear for her life at the time of the killing, it expresses an opinion concerning the defendant's mental state.

Answer A is incorrect because an expert witness cannot testify that another witness's statements are truthful, and also because the expert gave an opinion as to the defendant's ultimate state of mind, which an issue for the jury to decide. Answer B is incorrect because the prior consistent statements are not admissible, and again because the expert gave an opinion as to the defendant's ultimate state of mind, which an issue for the jury to decide. Answer C is incorrect because it is not unconstitutional to allow testimony obtained under hypnosis.

Question 1083 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued a defendant for injuries suffered in a car accident allegedly caused by brakes that had been negligently repaired by the defendant. At a settlement conference, the plaintiff exhibited the brake shoe that caused the accident and pointed out the alleged defect to an expert, whom the defendant had brought to the conference. No settlement was reached. At trial, the brake shoe having disappeared, the plaintiff seeks to testify concerning the condition of the shoe.

The plaintiff's testimony is

A: admissible, because the defendant's expert had been able to examine the shoe carefully.
B: admissible, because the plaintiff had personal knowledge of the shoe's condition.
C: inadmissible, because the brake shoe was produced and examined as a part of settlement negotiations.
D: inadmissible, because the plaintiff did not establish that the disappearance was not his fault.

The explanation for the answer is:

The correct answer is B. Because the plaintiff had personal knowledge of the brake shoe's condition, the plaintiff can testify to the condition of the shoe. Answer A is incorrect because the defendant's expert need not have examined the shoe before the plaintiff can testify about its condition. Answer C is incorrect because it is irrelevant that the brake shoe was produced and examined as part of settlement negotiations. Answer D is incorrect because the plaintiff does not need to establish that the disappearance was not his fault before the plaintiff can testify about its condition. A witness may testify to matters within his personal knowledge, and, because the item of evidence is not a writing, recording, or photograph, no other requirements are necessary.

Question 1086 - Evidence - Writings Recordings and Photographs

The question was:

A defendant is on trial for nighttime breaking and entering of a warehouse. The warehouse owner had set up a camera to take infrared pictures of any intruders. After an expert establishes the reliability of infrared photography, the prosecutor offers the authenticated infrared picture of the intruder to show the similarities to the defendant.

The photograph is

A: admissible, because an expert witness can point out to the jury the similarities between the person in the photograph and the defendant.
B: admissible, allowing the jury to compare the person in the photograph and the defendant.
C: inadmissible, because there was no eyewitness to the scene available to authenticate the photograph.
D: inadmissible, because infrared photography deprives a defendant of the right to confront witnesses.

The explanation for the answer is:

The correct answer is B. The infrared photograph, once authenticated, can be identified by comparison by the trier of fact with the defendant. The photograph is admissible as substantive evidence and the jury should be allowed to compare the person in the photograph and the defendant.

Answer A is incorrect because the expert witness is not required to point out the similarities to the jury before the photograph is identifiable and admissible. Answer C is incorrect because there does not need to be an eyewitness to the scene available to authenticate the photograph if the photo is already authenticated by the testimony of the expert witness. Answer D is incorrect because the photograph is not a witness that the defendant has a right to "confront." Because the jury is able to make a comparison between the photograph and the defendant, the photograph is admissible.

Question 1098 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant for personal injuries suffered in a train-automobile collision. The plaintiff called an eyewitness, who testified that the train was going 20 miles per hour. The defendant then offers the testimony of an experienced police accident investigator that, based on his training and experience and on his examination of the physical evidence, it is his opinion that the train was going between 5 and 10 miles per hour.

Testimony by the investigator is

A: improper, because there cannot be both lay and expert opinion on the same issue.
B: improper, because the investigator is unable to establish the speed with a sufficient degree of scientific certainty.
C: proper, because a police accident investigator has sufficient expertise to express an opinion on speed.
D: proper, because the plaintiff first introduced opinion evidence as to speed.

The explanation for the answer is:

The correct answer is C. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion. The police accident investigator's opinion was based upon sufficient facts, was the product of reliable principles and methods, and the investigator has applied the principles and methods reliably to the facts of the case. The testimony of the investigator, because he has sufficient expertise to express an opinion, is admissible.

Answer A is incorrect because it is a misstatement of the law. There certainly can be both lay and expert opinion on the same issue. Answer B is incorrect because the investigator relied on his training and experience, as well as his examination of the physical evidence, to reach his opinion on the speed of the train, which is the proper standard for the admissibility of his opinion. Answer D is incorrect because the ability of the investigator to give an opinion on the speed of the train is not conditioned on the plaintiff's first introducing opinion evidence on speed. Even if the plaintiff had not entered any opinion evidence on speed, the investigator's testimony would still be admissible.

Question 1098 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant for personal injuries suffered in a train-automobile collision. The plaintiff called an eyewitness, who testified that the train was going 20 miles per hour. The defendant then offers the testimony of an experienced police accident investigator that, based on his training and experience and on his examination of the physical evidence, it is his opinion that the train was going between 5 and 10 miles per hour.

Testimony by the investigator is

A: improper, because there cannot be both lay and expert opinion on the same issue.
B: improper, because the investigator is unable to establish the speed with a sufficient degree of scientific certainty.
C: proper, because a police accident investigator has sufficient expertise to express an opinion on speed.
D: proper, because the plaintiff first introduced opinion evidence as to speed.

The explanation for the answer is:

The correct answer is C. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion. The police accident investigator's opinion was based upon sufficient facts, was the product of reliable principles and methods, and the investigator has applied the principles and methods reliably to the facts of the case. The testimony of the investigator, because he has sufficient expertise to express an opinion, is admissible.

Answer A is incorrect because it is a misstatement of the law. There certainly can be both lay and expert opinion on the same issue. Answer B is incorrect because the investigator relied on his training and experience, as well as his examination of the physical evidence, to reach his opinion on the speed of the train, which is the proper standard for the admissibility of his opinion. Answer D is incorrect because the ability of the investigator to give an opinion on the speed of the train is not conditioned on the plaintiff's first introducing opinion evidence on speed. Even if the plaintiff had not entered any opinion evidence on speed, the investigator's testimony would still be admissible.

Question 1117 - Evidence - Privileges and Other Policy Exclusions

The question was:

A passenger is suing a defendant for injuries suffered in the crash of a small airplane, alleging that the defendant had owned the plane and negligently failed to have it properly maintained. The defendant has asserted in defense that he never owned the plane or had any responsibility to maintain it. At trial, the passenger calls a witness to testify that the witness had sold to the defendant a liability insurance policy on the plane.

The testimony of the witness is

A: inadmissible, because the policy itself is required under the original document rule.
B: inadmissible, because of the rule against proof of insurance where insurance is not itself at issue.
C: admissible to show that the defendant had little motivation to invest money in maintenance of the airplane.
D: admissible as some evidence of the defendant's ownership of or responsibility for the airplane.

The explanation for the answer is:

The correct answer is D. The witness's testimony that he had sold liability insurance on the plane to the defendant is admissible evidence to show the defendant's ownership or responsibility for the plane. It is relevant because the defendant has denied ownership. Answer A is incorrect because the witness is not testifying to the content of the policy, only to its existence, and is not required to introduce the policy itself before he can testify. Answer B is incorrect because it misstates the standard for determining whether the witness's testimony is admissible. Answer C is incorrect because the existence of the policy is admissible and relevant to show the defendant's ownership or responsibility for the airplane, not his motivation to invest money in the airplane. It is the defendant's ownership of the plane that is at issue, and the witness's testimony is admissible as proof on that issue.

Question 1128 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A pedestrian died from injuries caused when a driver's car struck him. The pedestrian's executor sued the driver for wrongful death. At trial, the executor calls a nurse to testify that two days after the accident, the pedestrian said to the nurse, "The car that hit me ran the red light." Fifteen minutes thereafter, the pedestrian died.

As a foundation for introducing evidence of the pedestrian's statement, the executor offers to the court the doctor's affidavit that the doctor was the intern on duty the day of the pedestrian's death and that several times that day the pedestrian had said that he knew he was about to die.

Is the affidavit properly considered by the court in ruling on the admissibility of the pedestrian's statement?

A: No, because it is hearsay not within any exception.
B: No, because it is irrelevant since dying declarations can only be used in prosecutions for homicide.
C: Yes, because, though hearsay, it is a statement of then-existing mental condition.
D: Yes, because the judge may consider hearsay in ruling on preliminary questions.

The explanation for the answer is:

The correct answer is D. Preliminary questions concerning the admissibility of evidence shall be determined by the court. In making its determination, the court is not bound by the rules of evidence except those with respect to privileges. The judge may consider the affidavit, even though it is hearsay, in making its determination of the admissibility of the pedestrian's statements.

Answer A is incorrect because, although the affidavit is hearsay, the judge can consider hearsay in preliminary determinations of admissibility. Answer B is incorrect because dying declarations can be used in civil actions. Answer C is incorrect because, although the affidavit is hearsay, the judge can consider hearsay in preliminary determinations of admissibility. In addition, the affidavit itself is not a statement of then-existing mental condition; it is a statement of what the pedestrian said and did.

Question 1134 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant for personal injuries arising out of an automobile accident.

Which of the following would be an ERROR?

A: The judge allows the defendant's attorney to ask the defendant questions on cross-examination that go well beyond the scope of direct examination by the plaintiff, who has been called as an adverse witness.
B: The judge refuses to allow the defendant's attorney to cross-examine the defendant by leading questions.
C: The judge allows cross-examination about the credibility of a witness even though no question relating to credibility has been asked on direct examination.
D: The judge, despite the defendant's request for exclusion of witnesses, allows the plaintiff's eyewitnesses to remain in the courtroom after testifying, even though the eyewitness is expected to be recalled for further cross-examination.

The explanation for the answer is:

The correct answer is D. At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. Because the court in answer D did not exclude witnesses after the defendant had requested it, the court acted in error.

Answer A is incorrect because the judge may, in the exercise of discretion, permit inquiry during cross-examination into additional matters as if on direct examination. Because the court has the discretion to allow the questioning in that manner, allowing the questioning is not error. Answer B is incorrect because, although ordinarily leading questions should be permitted on cross-examination, there is no requirement that the judge must allow the defendant's attorney to use leading questions on cross-examination of the defendant. Answer C is incorrect because matters affecting the credibility of the witness can be asked on cross-examination, regardless of whether they had been asked on direct examination. Only in answer D is there a requirement that the judge take an action, and to fail to do so would amount to error.

Question 1135 - Evidence - Presentation of Evidence

The question was:

A plaintiff is suing a defendant for injuries suffered in an automobile collision. At trial the plaintiff's first witness testified that, although she did not see the accident, she heard her friend say just before the crash, "Look at the crazy way old [defendant] is driving!" The defendant offers evidence to impeach the witness's friend by asking the witness, "Isn't it true that [the friend] beat up [the defendant] just the day before the collision?"

The question is

A: proper, because it tends to show possible bias of the witness's friend against the defendant.
B: proper, because it tends to show the witness's friend's character.
C: improper, because the witness's friend has no opportunity to explain or deny it.
D: improper, because impeachment cannot properly be by specific instances.

The explanation for the answer is:

The correct answer is A. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and, if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Because the witness's friend's statement has been entered into evidence, the defendant is permitted to inquire into any possible bias or motive to lie that the friend has for the making of that statement. The fact that the friend may have beaten up the defendant the day before the accident is relevant to show that the friend has a dislike and bias against the defendant that may lead to his making a false statement.

Answer B is incorrect because, except for being relevant to the friend's motive to lie about the defendant, the fact that the friend beat up the defendant has no relevance to the friend's character for truthfulness or untruthfulness. The friend's character for beating people up would be inadmissible.

Answer C is incorrect because the friend need not have an opportunity to explain or deny before the question can properly be asked. Because the question is relevant to show why the friend may have made the statement, it is proper for the defendant to ask it.

Answer D is incorrect because the question is being asked to establish the friend's motive to lie about the defendant in his statement, and is proper. Additionally, specific instances of conduct, if for the purpose of attacking a witness's credibility, can be inquired into on cross-examination.

Question 1139 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was charged with attempted murder of a victim in a sniping incident in which the defendant allegedly shot at the victim from ambush as the victim drove his car along an expressway. The prosecutor offers evidence that seven years earlier the defendant had fired a shotgun into a woman's house and that the defendant had once pointed a handgun at another driver while driving on the street.

This evidence should be

A: excluded, because such evidence can be elicited only during cross-examination.
B: excluded, because it is improper character evidence.
C: admitted as evidence of the defendant's propensity toward violence.
D: admitted as relevant evidence of the defendant's identity, plan, or motive.

The explanation for the answer is:

The correct answer is B. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. The evidence the prosecution is seeking to admit is being offered only to show the defendant's bad character and that he was acting in conformity therewith. The evidence should be excluded.

Answer A is incorrect because the defendant has not testified. In addition, even if the defendant takes the stand, the evidence cannot be inquired into on cross examination because only specific incidents probative on the issue of truthfulness or untruthfulness, which these prior bad acts are not, can be asked of the witness. Answer C is incorrect because evidence of other crimes, wrongs, or acts is not admissible character evidence when it is used in order to show action in conformity with those wrongs. Answer D is incorrect because although evidence may be admissible to prove identity, plan, or motive, none of the incidents the prosecution is seeking to introduce is relevant on any of those issues. There are no common elements, outside of their being instances of the defendant's bad character with a weapon, between the prior crimes and the current crime that would be relevant on the issue of identity, plan, or motive. The other incidents are only sought to be introduced to show the defendant's poor character, and the evidence of those incidents should be suppressed.

Question 1145 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

At a defendant's murder trial, the defendant calls his first witness to testify that the defendant has a reputation in their community as a peaceable and truthful person. The prosecutor objects on the ground that the witness's testimony would constitute improper character evidence.

The court should

A: admit the testimony as to peaceableness, but exclude the testimony as to truthfulness.
B: admit the testimony as to truthfulness, but exclude the testimony as to peaceableness.
C: admit the testimony as to both character traits.
D: exclude the testimony as to both character traits.

The explanation for the answer is:

The correct answer is A. Although evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, there is an exception that allows the accused to offer evidence of a trait of character that is pertinent to the trial. In a case where the charge is murder, the accused's reputation in the community as being a peaceable person would be a pertinent trait and should be admissible if proposed by the accused. However, the accused's reputation in the community as a truthful person would not be pertinent to the murder charge, and should be inadmissible. Because the defendant has not testified, his reputation in the community as a truthful person would be irrelevant and inadmissible.

Answer B is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted. Answer C is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted. Answer D is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted.

Question 1145 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

At a defendant's murder trial, the defendant calls his first witness to testify that the defendant has a reputation in their community as a peaceable and truthful person. The prosecutor objects on the ground that the witness's testimony would constitute improper character evidence.

The court should

A: admit the testimony as to peaceableness, but exclude the testimony as to truthfulness.
B: admit the testimony as to truthfulness, but exclude the testimony as to peaceableness.
C: admit the testimony as to both character traits.
D: exclude the testimony as to both character traits.

The explanation for the answer is:

The correct answer is A. Although evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, there is an exception that allows the accused to offer evidence of a trait of character that is pertinent to the trial. In a case where the charge is murder, the accused's reputation in the community as being a peaceable person would be a pertinent trait and should be admissible if proposed by the accused. However, the accused's reputation in the community as a truthful person would not be pertinent to the murder charge, and should be inadmissible. Because the defendant has not testified, his reputation in the community as a truthful person would be irrelevant and inadmissible.

Answer B is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted. Answer C is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted. Answer D is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted.

Question 1148 - Evidence - Presentation of Evidence

The question was:

In a federal civil trial, the plaintiff wishes to establish that, in a state court, the defendant had been convicted of fraud, a fact that the defendant denies.

Which mode of proof of the conviction is LEAST likely to be permitted?

A: A certified copy of the judgment of conviction, offered as a self-authenticating document.
B: Testimony of the plaintiff, who was present at the time of the sentence.
C: Testimony by a witness to whom the defendant made an oral admission that he had been convicted.
D: Judicial notice of the conviction, based on the court's telephone call to the clerk of the state court, whom the judge knows personally.

The explanation for the answer is:

The correct answer is D. A judicially noticed fact must be one not subject to reasonable dispute, in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Because the proof of conviction is subject to reasonable dispute, because the conviction is not generally known within the territorial jurisdiction of the federal court, and because the telephone call to the clerk of the state court, which is hearsay, can reasonably be questioned, judicial notice of the conviction is the least likely method available to prove the conviction.

Answer A is incorrect because certified copies of the judgment of conviction are self-authenticating and would be a proper mode of proof of the conviction. Answer B is incorrect because a witness can testify as to items within his first-hand knowledge, and, the plaintiff, if he was present at the time of sentence, would have that requisite first-hand knowledge. Answer C is incorrect because an oral admission by the defendant that he had been convicted would be admissible under the admission by a party opponent exception to the hearsay rule. The least likely permissible mode of proving a conviction is allowing the judge to take judicial notice based on a telephone call.

Question 1154 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for injuries sustained in an automobile collision. During the plaintiff's hospital stay, a staff physician examined the plaintiff's X-rays and said to the plaintiff, "You have a fracture of two vertebrae, C4 and C5." An intern, who was accompanying the doctor on her rounds, immediately wrote the diagnosis on the plaintiff's hospital record. At trial, the hospital records custodian testifies that the plaintiff's hospital record was made and kept in the ordinary course of the hospital's business.

The entry reporting the doctor's diagnosis is

A: inadmissible, because no foundation has been laid for the doctor's competence as an expert.
B: inadmissible, because the doctor's opinion is based upon data that are not in evidence.
C: admissible as a statement of then existing physical condition.
D: admissible as a record of regularly conducted business activity.

The explanation for the answer is:

The correct answer is D. Medical records are admissible as a record of regularly conducted activity. The medical records are reports or records of acts, events, conditions, opinions, and diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, and they are kept in the course of a regularly conducted business activity. The doctor's statement to the intern is a diagnosis made near the time of occurrence and the information was transmitted to the intern from the doctor. The entry reporting the doctor's diagnosis is admissible under the record of regularly conducted business activity exception to the hearsay rule.

Answer A is incorrect because the doctor does not need to be an expert before his statement is admissible. As long as the doctor is considered a person with knowledge, his statement is admissible. Answer B is incorrect because the data relied on by the doctor does not need to be introduced into evidence. If they are of a type reasonably relied upon by experts in the particular field in forming opinions, the facts or data themselves need not be admissible in evidence in order for the opinion or inference to be admitted. Answer C is incorrect because the doctor cannot make an admissible statement of then-existing physical condition about another person. The doctor's recounting of his diagnosis of the patient is not a statement of the doctor's then existing state of mind, emotion, sensation, or physical condition.

Question 1160 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for participating in a drug sale. The prosecution calls a witness, an undercover officer, to testify that, when the seller sold the drugs to the witness, the seller introduced the defendant to the witness as "my partner in this" and the defendant shook hands with the witness but said nothing.

The witness's testimony is

A: inadmissible, because there is no evidence that the seller was authorized to speak for the defendant.
B: inadmissible, because the statement of the seller is hearsay not within any exception.
C: admissible as a statement against the defendant's penal interest.
D: admissible as the defendant's adoption of the seller's statement.

The explanation for the answer is:

The correct answer is D. The defendant, by not correcting the witness, by accepting the introduction, and by shaking hands with the witness, manifested an agreement with the seller's statement that the defendant was the seller's "partner in this." These actions will suffice for a finding that the defendant adopted the seller's statement, and the seller's statement that the defendant was his partner will be admissible as an adopted admission by a party opponent. The defendant does not need to verbally acknowledge the statement; the mere acceptance and some action on the part of the defendant will act as an adoption of the statement.

Answer A is incorrect because, although the seller was not authorized to speak for the defendant, the statement is still admissible as an admission by a party opponent because the defendant manifested an adoption or belief in the statement's truth. Answer B is incorrect because admissions, and adoptive admissions, are specifically excluded from the definition of hearsay. Answer C is incorrect because the admission is not hearsay needing that exception. In addition, the defendant was not the declarant of the statement. He did, however, manifest a belief in the truth of the seller's statement, making it admissible as an adoptive admission.

Question 1174 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

At a defendant's trial for sale of drugs, the government called a witness to testify, but the witness refused to answer any questions about the defendant and was held in contempt of court. The government then calls a police officer to testify that, when the witness was arrested for possession of drugs and offered leniency if he would identify his source, the witness had named the defendant as his source.

The testimony offered concerning the witness's identification of the defendant is

A: admissible as a prior consistent statement by a witness.
B: admissible as an identification of the defendant by a witness after having perceived him.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because the witness was not confronted with the statement while on the stand.

The explanation for the answer is:

The correct answer is C. The witness's statement that the defendant was his source was an out-of-court statement that is being offered for the truth of the matter asserted - that the defendant was the source for the drugs. It is therefore hearsay; because it does not meet the requirements of any exception to the hearsay rule, it is inadmissible.

Answer A is incorrect because, before a prior consistent statement is admissible as substantive evidence, the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement. In this case, the witness has never testified or been subject to cross-examination, so his prior statements are not admissible. In addition, the witness's hearsay statement is not being offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Answer B is incorrect because, before a prior identification is admissible as substantive evidence, the declarant must testify at the trial or hearing and must be subject to cross-examination concerning the statement. In this case, the witness has never testified or been subject to cross-examination, so his prior identification is not admissible. In addition, the witness's hearsay statement was not simply one of identification of the defendant, such as "That is the defendant," but instead it was a statement of fact that the defendant supplied him with drugs. As such, it is not an identification of a person.

Answer D is incorrect because the statement is inadmissible hearsay, regardless of whether the witness was not confronted with the statement while on the stand.

Question 1181 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

In an arson prosecution the government seeks to rebut the defendant's alibi that he was in a jail in another state at the time of the fire. The government calls a witness to testify that he diligently searched through all the records of the jail and found no record of the defendant having been incarcerated there during the time the defendant specified.

The testimony of the witness is

A: admissible as evidence of absence of an entry from a public record.
B: admissible as a summary of voluminous documents.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because the records themselves must be produced.

The explanation for the answer is:

The correct answer is A. The witness's statement that he diligently searched all the records of the jail and found no record of the defendant is admissible under the absence of an entry from a public record exception to the hearsay rule. To prove the nonoccurrence or nonexistence of a matter of which a record was regularly made and preserved by a public office or agency, evidence in the form of testimony that a diligent search failed to disclose the record is admissible. Jail records are records regularly made and preserved by a public office or agency, and the witness's testimony about his diligent search of those records is admissible to prove the defendant was not in the jail when he claimed to be.

Answer B is incorrect because a summary of voluminous documents allows for the admission of charts and summaries of large amounts of documents. Although the witness's testimony is an account of a search of voluminous documents, the testimony is admissible under the absence of public records exception to the hearsay rule, not because it is a summary. Answer C is incorrect because the witness's testimony does meet the requirements for the absence of an entry in public records exception to the hearsay rule. Answer D is incorrect because the exception to the hearsay rule does not require that the documents be produced or introduced into evidence before the testimony is admissible.

Question 1205 - Evidence - Presentation of Evidence

The question was:

In a civil trial for professional malpractice, the plaintiff sought to show that the defendant, an engineer, had designed the plaintiff's flour mill with inadequate power. The plaintiff called an expert witness who based his testimony solely on his own professional experience but also asserted, when asked, that the book Smith on Milling Systems was a reliable treatise in the field and was consistent with his views. On cross-examination, the defendant asked the witness whether he and the book's author were ever wrong. The witness answered, "Nobody's perfect." The defendant asked no further questions. The defendant called a second expert witness and asked, "Do you accept the book as reliable?" The second witness said, "It once was, but it is now badly out of date." The plaintiff requested that the jury be allowed to examine the book and judge for itself the book's reliability.

Should the court allow the jury to examine the book?

A: No, because the jury may consider only passages read to it by counsel or witness.
B: No, because the plaintiff's expert in testifying did not rely on the treatise but on his own experience.
C: Yes, because an expert has testified that the treatise is reliable.
D: Yes, because the jury is the judge of the weight and credibility to be accorded both written and oral evidence.

The explanation for the answer is:

Answer A is correct. Federal Rule of Evidence 803(18), the learned treatise exception, provides that if the court finds a publication to be a reliable authority, then "statements" may be read into evidence, but that the publication may not be received as an exhibit. Thus, the jury is not allowed to bring learned treatises into the jury room. There is a concern that if juries were allowed unrestricted access to the whole publication, they may rely on parts of the publication that are not germane to the case. Moreover, the intent of the rule is that juries need to be guided through the pertinent parts of the publication by the testifying experts.

Answer B is incorrect. Federal Rule of Evidence 803(18), the learned treatise exception, allows statements from a treatise to be read into evidence where the treatise is "called to the attention of an expert witness" and is found to be reliable by the court. The rule does not require that an expert rely on the treatise. In this case, the publication was called to the attention of the defendant's expert.

Answer C is incorrect. Federal Rule of Evidence 803(18), the learned treatise exception, allows statements from a treatise to be read into evidence when the treatise is "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." In this case, one expert testified that the publication was reliable, but the other expert contests that assertion. The decision on reliability is for the court; it is not correct to say that the court should find the publication reliable simply because one expert has found it to be so. In addition, the rule allows "statements" from a learned treatise to be read into evidence, but does not allow the publication to be received as an exhibit.

Answer D is incorrect. The statement is technically correct, but it does not mean that the jury gets to consider every piece of evidence that the parties wish to present. Federal Rule of Evidence 803(18), the learned treatise exception, requires the judge to determine that the publication is reliable before it can be considered by the jury. In addition, the rule allows "statements" from a learned treatise to be read into evidence, but does not allow the publication to be received as an exhibit.

Question 1212 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

In a civil trial arising from a car accident at an intersection, the plaintiff testified on direct that he came to a full stop at the intersection. On cross-examination, the defendant's lawyer asked whether the plaintiff claimed that he was exercising due care at the time, and the plaintiff replied that he was driving carefully. At a sidebar conference, the defendant's lawyer sought permission to ask the plaintiff about two prior intersection accidents in the last 12 months where he received traffic citations for failing to stop at stop signs. The plaintiff's lawyer objected.

Should the court allow defense counsel to ask the plaintiff about the two prior incidents?

A: No, because improperly failing to stop on the recent occasions does not bear on the plaintiff's veracity and does not contradict his testimony in this case.
B: No, because there is no indication that failing to stop on the recent occasions led to convictions.
C: Yes, because improperly failing to stop on the recent occasions bears on the plaintiff's credibility, since he claims to have stopped in this case.
D: Yes, because improperly failing to stop on the recent occasions tends to contradict the plaintiff's claim that he was driving carefully at the time he collided with the defendant.

The explanation for the answer is:

Answer A is correct. Under Federal Rule of Evidence 608(b), a witness can be impeached with prior bad acts that bear upon truthfulness. Failing to stop at a stop sign has no bearing on truthfulness. As a general matter, a witness also can be impeached with evidence that contradicts a part of his testimony that bears on an important issue in dispute. However, in this case, the prior bad acts do not contradict the witness's testimony that he stopped on this occasion. Essentially, the defendant is trying to show that the plaintiff is a careless driver. Carelessness is a character trait, and evidence of a person's character is not admissible in a civil case to prove how that person acted on the occasion in question.
Answer B is incorrect. Under Federal Rule of Evidence 608(b), a witness can be impeached with bad acts that do not result in convictions. The reason that the prior acts are inadmissible is not because there were no convictions, but rather because the acts have no bearing on veracity or contradiction of prior testimony.
Answer C is incorrect. Under Federal Rule of Evidence 608(b), a witness can be impeached with prior bad acts that bear upon truthfulness by demonstrating falsity, dishonesty, or the like. Otherwise, the probative value of the acts as to credibility are substantially outweighed by the risks of prejudice, confusion, and delay, and would be excluded under Federal Rule of Evidence 403. In this case, the plaintiff's prior acts may demonstrate carelessness, but they do not demonstrate dishonesty.

Answer D is incorrect. A person can be acting carefully on one occasion and not another, so the prior acts are not contradictory of the plaintiff's testimony that he was careful in this instance. If the plaintiff testified that he had never run a stop sign, then the prior acts would contradict his testimony.

Question 1216 - Evidence - Writings Recordings and Photographs

The question was:

A defendant was charged with burglary. At trial, a police officer testified that, after the defendant was arrested and agreed to answer questions, the officer interrogated him with a stenographer present, but that he could not recall what the defendant had said. The prosecutor presented the officer with a photocopy of the stenographic transcript of the interrogation. The officer, after looking at it, was prepared to testify that he recalled that the defendant admitted to being in the area of the burglary. The defendant objected to the officer's testimony on the ground that it violated the "original document" rule (also known as the "best evidence" rule).

Should the officer's testimony concerning the defendant's recorded confession be admitted?

A: No, because a photocopy cannot be used without a showing that the original is unavailable.
B: No, because the stenographer has not testified to the accuracy of the transcript.
C: Yes, because a photocopy is a duplicate of the original.
D: Yes, because the prosecutor is not attempting to prove the contents of the document.

The explanation for the answer is:

Answer D is correct. The prosecutor is trying to prove what the defendant said, not what the transcript says. Accordingly, Federal Rule of Evidence 1003, the best evidence rule, is not relevant. It would be different, for example, if this were a contract and the parties differed over the wording of a clause in the contract. In this case, the copy of the transcript is properly used under Federal Rule of Evidence 612 to revive the officer's recollection.

Answer A is incorrect. The prosecutor is trying to prove what the defendant said, not what the transcript says. Accordingly, Federal Rule of Evidence 1003, the best evidence rule, is not relevant. Even assuming that the best evidence rule applied here, this is not an accurate statement of the law. Under Rule 1003, a duplicate can be admissible without any showing that the original is unavailable. A showing of unavailability is required only if the party is seeking to introduce something other than a duplicate (e.g., oral testimony) to prove the contents of a document. See Federal Rule of Evidence 1004.

Answer B is incorrect. Under Federal Rule of Evidence 612, the copy of the transcript is properly used to revive the officer's recollection. This is not a case of past recollection recorded, in which the prosecutor would have to show that the stenographer accurately recorded what the defendant said. In this case, the officer is testifying to his own recollection of what the defendant said, that recollection having been revived by looking at the transcript. A document used only to revive recollection does not have to be accurate or reliable, because the document is not being admitted into evidence. The officer's testimony is the evidence.

Answer C is incorrect. Although Federal Rule of Evidence 1003 supports the admission of photocopies with some exceptions, this option assumes that the best evidence rule applies here, which it doesn't. The prosecutor is trying to prove what the defendant said, not what the transcript says. The transcript here is being used to revive the officer's recollection under Federal Rule of Evidence 612, and Rule 1003 is not relevant.

Question 1249 - Evidence - Presentation of Evidence

The question was:

A defendant was charged in federal court with selling a controlled substance (heroin) in interstate commerce. At trial, the prosecutor introduced evidence that the defendant obtained the substance from a supplier in Kansas City and delivered it in Chicago. The defendant denied that the substance in question was heroin, but he introduced no contrary evidence on the issue of transportation.

Which of the following instructions regarding judicial notice may the judge legitimately give the jury?

A: "If you find that the defendant obtained the drugs in Kansas City and delivered them to Chicago, I instruct you to find that the substance was sold in an interstate transaction."
B: "If you find that the defendant obtained the drugs in Kansas City and delivered them to Chicago, then the burden of persuasion is on the defendant to establish that the transaction was not interstate."
C: "If you find that the defendant obtained the drugs in Kansas City and delivered them to Chicago, then you may, but you are not required to, find that the transaction was interstate in nature."
D: "I instruct you that there is a presumption that the substance was sold in an interstate transaction, but the burden of persuasion on that issue is still on the government."

The explanation for the answer is:

Answer C is correct. This instruction complies with Federal Rule of Evidence 201(f), which states that in a criminal case, "the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." A judicially-noticed fact in a criminal case allows the court to instruct on a permissible inference, but nothing more.

Answer A is incorrect. Under Federal Rule of Evidence 201(f), a judge may not instruct a jury to find a fact in a criminal case, even if it is a fact that is subject to judicial notice. Such an instruction would violate the accused's Sixth Amendment right to a trial by jury on all elements of the crime. A judicially-noticed fact in a criminal case allows the court to instruct on a permissible inference, but nothing more.

Answer B is incorrect. The government has the burden of proving all elements of a crime beyond a reasonable doubt. Under Federal Rule of Evidence 201(f), a judicially-noticed fact in a criminal case cannot shift that constitutionally mandated burden of proof. Here, the court may instruct on a permissible inference, but nothing more.

Answer D is incorrect. Under Federal Rule of Evidence 201(f), a judicially-noticed fact in a criminal case does not create a presumption. In civil cases, a judicially-noticed fact is conclusive; in a criminal case, because of the accused's constitutional right to trial by jury, the judicially-noticed fact can be brought to the attention of the jury, but the jury is free to reject it. Any instruction about a "presumption" is inappropriate in these circumstances. The court may instruct on a permissible inference, but nothing more.

Question 1258 - Evidence - Privileges and Other Policy Exclusions

The question was:

In a personal injury case, the plaintiff sued a retail store for injuries she sustained from a fall in the store. The plaintiff alleged that the store negligently allowed its entryway to become slippery due to snow tracked in from the sidewalk. When the plaintiff threatened to sue, the store's manager said, "I know that there was slush on that marble entry, but I think your four-inch-high heels were the real cause of your fall. So let's agree that we'll pay your medical bills, and you release us from any claims you might have." The plaintiff refused the offer. At trial, the plaintiff seeks to testify to the manager's statement that "there was slush on that marble entry."

Is the statement about the slush on the floor admissible?

A: No, because it is a statement made in the course of compromise negotiations.
B: No, because the manager denied that the slippery condition was the cause of the plaintiff's fall.
C: Yes, as an admission by an agent about a matter within the scope of his authority.
D: Yes, because the rule excluding offers of compromise does not protect statements of fact made during compromise negotiations.

The explanation for the answer is:

Answer A is correct. Federal Rule of Evidence 408 excludes "[e]vidence of conduct or statements made in compromise negotiations." Here, there is a dispute, and the manager's statement was made in an effort to settle that dispute. As such, the entire statement is protected as a settlement offer under Rule 408. While normally an admission of fact accompanying an offer to pay medical bills would be admissible, here the offer to pay medical bills was part of a settlement negotiation, making any accompanying admissions of fact inadmissible.

Answer B is incorrect. If not for Federal Rule of Evidence 408, which protects compromise negotiations, the statement about the slippery condition would be admissible even though the manager denied that it was the cause. Under Federal Rule of Evidence 801(d)(2)(A), party admissions are not considered hearsay when offered against the party who made the admission. Therefore, the plaintiff would be allowed to offer the part of the statement that favors the plaintiff's case, while the part that favors the defendant's case would be excluded as hearsay. The latter part would not be admissible under Rule 801(d)(2)(A), because it would be offered by the manager who made the statement.

Answer C is incorrect. The statement is true as far as it goes. But that only means that the statement is not excluded as hearsay. As explained above, the manager's statement was made in an attempt to settle the dispute, and as such, will be barred by Federal Rule of Evidence 408.

Answer D is incorrect. Federal Rule of Evidence 408 protects not only offers of compromise, but also "conduct or statements made in the course of compromise negotiations." The rationale is to allow the parties and counsel to speak freely during settlement negotiations, without having to worry that their statements will be used against them at trial. Here, there is a dispute, and the manager's statement was made in an attempt to settle that dispute. Therefore, the statement would be excluded under Rule 408.

Question 1265 - Evidence - Writings Recordings and Photographs

The question was:

In a civil action for misrepresentation in the sale of real estate, the parties contested whether the defendant was licensed by the State Board of Realtors, a public agency established by statute to license real estate brokers. The defendant testified she was licensed. On rebuttal, the plaintiff offers a certification, bearing the seal of the secretary of the State Board of Realtors. The certification states that the secretary conducted a thorough search of the agency's records and all relevant databases, and that this search uncovered no record of a license ever having been issued to the defendant. The certification is signed by the secretary.

Is the certification that there was no record of a license issuance admissible?

A: No, because it is hearsay not within any exception.
B: No, because the writing was not properly authenticated.
C: Yes, for the limited purpose of impeaching the defendant.
D: Yes, to prove the nonexistence of a public record.

The explanation for the answer is:

Answer D is correct. The certification is hearsay, but it qualifies under Federal Rule of Evidence 803(10), the hearsay exception for a certification offered to prove the absence of a public record. The certification is offered for the proper inference that if a license had been issued, it would have been recorded in the public record. Thus, the fact that there was no record found is probative evidence that a license was never issued. To be admissible, the certification must be prepared by a public official and must, on its face, indicate that a diligent search of the records was conducted. This certification satisfies the requirements of the exception. Thus, answer D is correct, and answer A is incorrect.

Answer B is incorrect. No extrinsic evidence of authenticity is required to admit a domestic public document bearing a government seal under Federal Rule of Evidence 902(1). Here, the certification is from a public agency of the United States and bears the agency's seal. Therefore, it is self-authenticating under Rule 902(1) and is admissible under Federal Rule of Evidence 803(10), the hearsay exception for a certification offered to prove the absence of a public record.

Answer C is incorrect. The certification qualifies under Federal Rule of Evidence 803(10), the hearsay exception for a certification offered to prove the absence of a public record. The certification can be offered for its truth--that there was no record of any issuance of a license to the defendant. Therefore its admissibility is not limited to impeachment; it can be used both for impeachment and as substantive proof of the disputed fact.

Question 1268 - Evidence - Presentation of Evidence

The question was:

A defendant is on trial for attempted fraud. The state charges that the defendant switched a price tag from a cloth coat to a more expensive fur-trimmed coat and then presented the latter for purchase at the cash register. The defendant testified in her own behalf that the tag must have been switched by someone else. On cross-examination, the prosecutor asks whether the defendant was convicted on two prior occasions of misdemeanor fraud in the defrauding of a retailer by the same means of switching the price tag on a fur-trimmed coat.

Is the question about the convictions for the earlier crimes proper?

A: It is not proper either to impeach the defendant or to prove that the defendant committed the crime.
B: It is proper both to prove that the defendant committed the crime and to impeach the defendant.
C: It is proper to impeach the defendant, but not to prove that the defendant committed the crime.
D: It is proper to prove the defendant committed the crime, but not to impeach the defendant.

The explanation for the answer is:

Answer B is correct. Under Federal Rule of Evidence 404(b), prior bad acts can be admitted to prove the defendant's conduct if offered for some purpose other than to show that the defendant is a bad person. In this case, the bad acts are very similar to the acts in dispute, and tend to show non-character purposes such as intent, knowledge, lack of accident, and modus operandi (i.e., that the defendant has a tendency to engage in particularized activity that sets her apart from others). Thus the bad acts can be offered as proof that the defendant committed the crime charged. In addition, Federal Rule of Evidence 609(a)(2) provides that evidence of a past conviction "shall be admitted" to impeach the credibility of a witness if the crime "involved dishonesty or false statement, regardless of the punishment." In this case, fraud convictions clearly involve dishonesty, and are therefore properly admitted to impeach the defendant. Accordingly, the convictions are admissible both to prove that the defendant committed the crime and to impeach the defendant. Thus, answer B is correct, and answers A, C, and D are incorrect.

Question 1274 - Evidence - Presentation of Evidence

The question was:

The defendant, a young doctor, is charged with falsely claiming deductions on her federal income tax return. At trial, a witness testified for the defendant that she has a reputation in the community for complete honesty. After a sidebar conference at which the prosecutor gave the judge a record showing that the defendant's medical school had disciplined her for altering her transcript, the prosecutor proposes to ask the witness on cross-examination: "Have you ever heard that the defendant falsified her medical school transcript?"

Is the prosecutor's question proper?

A: No, because it calls for hearsay not within any exception.
B: No, because its minimal relevance on the issue of income tax fraud is substantially outweighed by the danger of unfair prejudice.
C: Yes, because an affirmative answer will be probative of the defendant's bad character for honesty and, therefore, her guilt.
D: Yes, because an affirmative answer will impeach the witness's credibility.

The explanation for the answer is:

Answer D is correct. The incident can be offered on cross-examination of the character witness, the proper purpose being to show that the witness's assessment of the defendant's character for honesty is not credible. The intent of the question is to test the witness's knowledge of the defendant's reputation on the one hand, and the quality of the community on the other. If the witness hasn't heard about the falsification, he might not be very plugged in to the community and so might be a poor reputation witness. On the other hand, if the witness answers "yes," then the jury might infer that the community in which the defendant has a reputation for complete honesty may be setting the honesty bar pretty low. In either case, the alleged falsification is probative impeachment whether or not it occurred. Note that the courts require that the cross-examiner must have a good faith belief that the event actually occurred before inquiring into the act on cross-examination. In this case, that good faith standard is met by the evidence presented at the sidebar conference that the defendant was disciplined in medical school.

The question does not call for a statement that would be used for its truth. Therefore, it is not hearsay. Likewise, the alleged incident is not offered to prove income tax fraud. Rather, the intent of the question is to test the witness's knowledge of the defendant's reputation on the one hand, and the quality of the community on the other. If the witness hasn't heard about the falsification, he might not be very plugged in to the community and so might be a poor reputation witness. On the other hand, if the witness answers "yes," then the jury might infer that the community in which the defendant has a reputation for complete honesty may be setting the honesty bar pretty low. In either case, the alleged falsification is probative impeachment whether or not it occurred. Thus, answers A and B are incorrect.

Answer C is incorrect. Federal Rule of Evidence 405 prohibits evidence of specific acts indicative of a person's character when that character evidence is offered to prove that a person acted in accordance with the character trait on the occasion in question at trial. Thus, the prosecutor may not introduce the incident involving the medical school transcript for the inference that, because the defendant acted dishonestly on that occasion, she likely acted dishonestly with regard to her tax return.

Question 1278 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

In a civil action for breach of an oral contract, the defendant admits that there had been discussions, but denies that he ever entered into an agreement with the plaintiff.

Which of the following standards of admissibility should be applied by the court to evidence proffered as relevant to prove whether a contract was formed?

A: Whether a reasonable juror would find the evidence determinative of whether the contract was or was not formed.
B: Whether the evidence has any tendency to make the fact of contract formation more or less probable than without the evidence.
C: Whether the evidence is sufficient to prove, absent contrary evidence, that the contract was or was not formed.
D: Whether the evidence makes it more likely than not that a contract was or was not formed.

The explanation for the answer is:

Answer B is correct. This is the standard of relevance applied by the judge in determining admissibility under Federal Rule of Evidence 401. Under that rule, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Answer A is incorrect because the test for admissibility is whether the judge believes that the evidence is probative, not whether a reasonable jury could believe it to be so. This is established by Federal Rule of Evidence 104(a).

Answer C is incorrect because the judge determines admissibility and the jury determines sufficiency. It would be impossible for a party to build a case if every piece of evidence had to be sufficient to prove the point in dispute.

Finally, answer D is incorrect because the preponderance standard is applied by the jury to all of the evidence admitted. It is not applied by the court to determine whether a particular piece of evidence can be considered by the jury on the ultimate question. Thus, this answer confuses the standard of proof used by the jury with the standard of admissibility used by the judge.

Question 1287 - Evidence - Presentation of Evidence

The question was:

At a civil trial for slander, the plaintiff showed that the defendant had called the plaintiff a thief. In defense, the defendant called a witness to testify, "I have been the plaintiff's neighbor for many years, and people in our community generally have said that he is a thief."

Is the testimony concerning the plaintiff's reputation in the community admissible?

A: No, because character is an essential element of the defense, and proof must be made by specific instances of conduct.
B: Yes, to prove that the plaintiff is a thief, and to reduce or refute the damages claimed.
C: Yes, to prove that the plaintiff is a thief, but not on the issue of damages.
D: Yes, to reduce or refute the damages claimed, but not to prove that the plaintiff is a thief.

The explanation for the answer is:

Answer B is correct. In slander cases, where the defendant makes a statement that the plaintiff has an unsavory character, the plaintiff's character is considered "in issue" (i.e., an essential element of the claim or defense under the substantive law) in two respects. First, the plaintiff's actual character will determine whether the defendant was incorrect in his assessment, and thus liable for slander, because truth is a defense. Second, the plaintiff will allege that he is damaged by the statement, which is another way of saying that his true character has been besmirched. If, however, the plaintiff actually has a bad reputation anyway, then damages are limited. Thus, in slander cases like the one in this question, character evidence is relevant both to whether the plaintiff has a certain character trait and to the extent of damages. Under Federal Rule of Evidence 405, when character is "in issue" it can be proved by evidence of reputation, opinion, or specific acts. Thus, answer B is correct, and answers A, C, and D are incorrect.

Question 1301 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

In a suit based on a will, inheritance of $1 million depended upon whether the wife had survived her husband when both died in the crash of a small airplane. An applicable statute provided that, for purposes of distributing an estate after a common disaster, there was a rebuttable presumption that neither spouse had survived the other. A witness was called to testify that as she approached the plane she heard what she thought was a woman's voice saying, "I'm dying," although by the time the two occupants were removed from the wreckage, they were both dead.

Is the witness's testimony admissible?

A: No, because the matter is governed by the presumption that neither spouse survived the other.
B: No, because the witness's testimony is too speculative to support a finding.
C: Yes, because the hearsay rule does not apply to statements by decedents in actions to determine rights under a will.
D: Yes, because it is relevant and not otherwise prohibited.

The explanation for the answer is:

Answer D is correct. The testimony is not barred by the hearsay rule or any other rule and is relevant on the issue of whether the wife survived the husband. Furthermore, the statement by the woman is not hearsay, because it is not being offered to prove the truth of the matter asserted. It is being offered to prove that the woman was alive at the time she made the statement and hence is relevant on the issue of whether she survived her husband, even if by only a few minutes. The witness's testimony is based on her perception and memory and thus satisfies Rule 701 of the Federal Rules of Evidence.

Answer A is incorrect. The majority common law rule, which is followed by Rule 301 of the Federal Rules of Evidence, adopts the "bursting bubble" view under which a presumption disappears when sufficient counterproof is offered about the presumed fact. Here the testimony of the witness, although not conclusive, is sufficient to rebut the presumption that neither spouse survived the other and to support a jury finding that the wife outlived the husband. Therefore, the presumption is no longer controlling, and the witness's testimony is admissible.

Answer B is incorrect. The testimony is not "too speculative." A witness need not be absolutely certain of matters about which the witness testifies. Here the testimony is based on the perception and memory of the witness and thus satisfies Rule 701 of the Federal Rules of Evidence.

Answer C is incorrect. The statement by the woman is not hearsay because it is not being offered to prove the truth of the matter asserted. It is being offered to prove that the woman was alive at the time she made the statement and hence is relevant on the issue of whether she survived her husband, even if by only a few minutes.

Question 1315 - Evidence - Presentation of Evidence

The question was:

A defendant was charged with murder. While walking down the hallway during a recess in the defendant's trial, the judge overheard the defendant say to his attorney, "So what if I did it? There's not enough proof to convict." Upon the judge's reporting the incident to counsel, the prosecutor called the judge as a witness in the trial.

Is the judge's testimony regarding the defendant's statement admissible?

A: Yes, as the statement of a party-opponent.
B: Yes, because the defendant's statement, although otherwise privileged, was made without reasonable efforts to preserve confidentiality.
C: No, because the statement was a privileged attorney-client communication.
D: No, because a judge may never testify in a trial over which he or she is presiding.

The explanation for the answer is:

Rule 605 of the Federal Rules of Evidence provides that a "judge presiding at the trial may not testify in that trial as a witness." Therefore, the judge will not be able to testify as to the defendant's statements, so long as the judge is still presiding over the defendant's trial. Thus, Answer D is correct.

Answer A is incorrect. The statement is the admission of a party-opponent and would be otherwise admissible under Rule 801(d)(2)(A) of the Federal Rules of Evidence. However, under Rule 605, the admission may not be proven by the testimony of the presiding judge.

Answer B is incorrect. Although it is true that reasonable efforts were not made by the defendant and his attorney to preserve confidentiality, this means only that the communication was not privileged. It does not mean the statement is necessarily admissible. The problem here is that under Rule 605, the statement cannot be proven through the testimony of the presiding judge. The defendant's statement probably would be admissible if someone other than the presiding judge had heard it.

Answer C is incorrect. The statement would not be privileged because reasonable efforts were not made by the defendant and his attorney to preserve confidentiality. The statement was made in a public place in a voice loud enough to be overheard.

Question 1318 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant's house was destroyed by fire and she was charged with arson. To prove that the defendant had a motive to burn down her house, the government offered evidence that the defendant had fully insured the house and its contents.

Should the court admit this evidence?

A: No, because the probative value of the evidence of insurance upon the issue of whether the defendant intentionally burned her house down is substantially outweighed by the dangers of unfair prejudice and confusion of the jury.
B: No, because evidence of insurance is not admissible upon the issue of whether the insured acted wrongfully.
C: Yes, because evidence of insurance on the house has a tendency to show that the defendant had a motive to burn down the house.
D: Yes, because any conduct of a party to the case is admissible when offered against the party.

The explanation for the answer is:

Answer C is correct. Although this evidence is certainly not conclusive that the defendant committed arson (many people fully insure their houses), it is relevant to the issue of whether the defendant would have had a financial incentive to commit the arson. The defendant might be able to generate cash more quickly by burning down the house and collecting insurance proceeds than by attempting to sell the house. To be relevant under Rule 401 of the Federal Rules of Evidence, the evidence need only have "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Therefore, evidence that has only the slightest probative value can be admitted under this rule. Thus, Answer C is correct.

Answer A is incorrect. Although the probative value of this evidence on the issue of whether the defendant intentionally burned her house down is not particularly strong, the evidence is relevant to the issue of possible motive. Rule 403 of the Federal Rules of Evidence provides that relevant evidence should be admitted unless its probative value is "substantially outweighed" by the dangers of unfair prejudice or confusion. Here, the evidence of insurance is neither unfairly prejudicial nor particularly confusing.

Answer B is incorrect. Under Rule 411 of the Federal Rules of Evidence, it is true that evidence that a person was insured is generally not admissible to prove that the person acted negligently or otherwise wrongfully. However, such evidence may be received for other purposes, and proof of motive is such a purpose. In this respect, Rule 411 is similar to Rule 404(b), under which evidence of past conduct cannot be admitted to prove a propensity to engage in such conduct but can be admitted on the issue of motive.

Answer D is incorrect. There is no such broad rule that any conduct of a party may be admitted against that party.

Question 1329 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was charged with battery for allegedly attacking a man as they left a local bar together. No one else witnessed the fight. At trial, each testified that he had acted only in self-defense. The defendant called his next-door neighbor as a witness to testify as to the defendant's reputation both for truthfulness and for peacefulness. The government objected to the testimony in its entirety.

How should the court proceed?

A: Admit the evidence in its entirety.
B: Admit the evidence regarding the defendant's reputation for peacefulness, but exclude the evidence regarding his truthfulness.
C: Exclude the evidence regarding the defendant's reputation for peacefulness, but admit the evidence regarding his truthfulness.
D: Exclude the evidence in its entirety.

The explanation for the answer is:

Answer B is correct. In a prosecution for battery, the defendant's character for peacefulness is a pertinent, relevant character trait under Rule 404(a)(1) of the Federal Rules of Evidence. Rule 405 allows the defendant to offer evidence of his reputation for peacefulness. However, the evidence of the defendant's truthfulness must be excluded. Under Rule 608(a), truthfulness is a relevant trait only to rehabilitate a witness whose character for truthfulness has been attacked, but there is no indication that such an attack has taken place here. Thus, Answer B is correct, and Answers A, C, and D are incorrect.

Question 1334 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

At a trial of a contract dispute, the plaintiff offered to testify to what the defendant said in a private conversation between the two of them, which the plaintiff had secretly recorded on an audiotape that she did not offer in evidence.

Is the plaintiff's testimony admissible?

A: Yes, because the plaintiff has personal knowledge of the statement of a party-opponent.
B: Yes, because the original document rule does not apply to audiotapes.
C: No, because the statement must be proved by introduction of the audiotape itself.
D: No, because of the plaintiff's deception, even if the recording was not illegal.

The explanation for the answer is:

Answer A is correct. What the defendant said to the plaintiff, even in a private conversation, is an admission of a party-opponent and is admissible under Rule 801(d)(2)(A) of the Federal Rules of Evidence. The plaintiff has personal knowledge of what the defendant said and can testify about it. The fact that the audiotape might be better evidence of what the defendant actually said makes no difference. The best evidence rule applies only when a witness testifies about the content of a writing or recording. Here the plaintiff would not be testifying about the content of the audiotape but rather about what she personally heard.

Answer B is incorrect. The testimony is admissible because the plaintiff will testify to what she heard directly from the defendant, not about what she heard on the audiotape. Therefore, she would not be attempting to prove the content of the audiotape and there would be no violation of the original document rule. The answer is incorrect in stating that the original document rule does not apply to audiotapes. The original document rule, Rule 1002 of the Federal Rules of Evidence, applies to writings, *recordings*, and photographs.

Answer C is incorrect. Rule 1002 of the Federal Rules of Evidence requires a recording to be introduced only when its contents are being proved. Here the plaintiff is offering to testify about what she heard directly from the defendant, not about what she heard on the audiotape. The fact that an audiotape was contemporaneously made does not mean that the tape has to be produced, since the plaintiff has independent knowledge of what the defendant said. If the problem were changed so that the plaintiff only learned of the defendant's statements by listening to an audiotape, then the audiotape would have to be produced.

Answer D is incorrect. There is no rule automatically barring evidence obtained by deception. Moreover, the evidence obtained by deception (the secretly recorded audiotape) was not in fact offered. Some state and federal statutes do regulate secret recordings of conversations, and violation of such statutes sometimes means that recordings obtained in violation thereof must be excluded. But the recording was not offered in evidence in this problem. Only the statements made by the defendant were offered, and they would be admissible whether or not a contemporaneous recording was made.

Question 1348 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for wrongful death arising out of a traffic collision between the plaintiff's decedent and the defendant. At trial, the investigating traffic officer authenticated a tape recording of her shift-end dictation of comments used in preparing the written report of her factual findings. She testified that the tape recording was accurate when made and that she currently had no clear memory of the details of the investigation.

Is the tape recording admissible as evidence?

A: Yes, under the past recollection recorded exception to the hearsay rule.
B: Yes, under the public records exception to the hearsay rule.
C: No, because it is hearsay and is a police report being offered against the defendant in a wrongful death case.
D: No, because the police report itself is the best evidence.

The explanation for the answer is:

Answer A is correct. This statement meets the requirements of Rule 803(5) of the Federal Rules of Evidence, the past recollection recorded exception to the hearsay rule. The witness once had knowledge but now has insufficient recollection to testify fully and accurately about her investigation. She made the recording when the matter was fresh in her memory, and she has testified that the recording was an accurate reflection of her memory. Thus, Answer A is correct.

Answer B is incorrect. Although the officer's formal written report would qualify as a public record, the informal dictated comments she made to help her prepare the report would not. The tape recording would be admissible under the past recollection recorded exception to the hearsay rule.

Answer C is incorrect. Although the tape recording is hearsay, it fits the hearsay exception of Rule 803(5) of the Federal Rules of Evidence as a past recollection recorded. It contains only informal comments so probably does not qualify as a "police report." Even if it were a police report, there is no prohibition against the admission of a police report in a civil case if it satisfies a hearsay exception.

Answer D is incorrect. The tape recording was made prior to the written report and was used as a basis for the written report. It is not being offered to prove the content of the written report and hence its admission does not violate Rule 1002 of the Federal Rules of Evidence. Instead it is being offered to prove the factual details of the officer's investigation as she remembered them at the end of her shift when she made the tape recording.

Question 1348 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued a defendant for wrongful death arising out of a traffic collision between the plaintiff's decedent and the defendant. At trial, the investigating traffic officer authenticated a tape recording of her shift-end dictation of comments used in preparing the written report of her factual findings. She testified that the tape recording was accurate when made and that she currently had no clear memory of the details of the investigation.

Is the tape recording admissible as evidence?

A: Yes, under the past recollection recorded exception to the hearsay rule.
B: Yes, under the public records exception to the hearsay rule.
C: No, because it is hearsay and is a police report being offered against the defendant in a wrongful death case.
D: No, because the police report itself is the best evidence.

The explanation for the answer is:

Answer A is correct. This statement meets the requirements of Rule 803(5) of the Federal Rules of Evidence, the past recollection recorded exception to the hearsay rule. The witness once had knowledge but now has insufficient recollection to testify fully and accurately about her investigation. She made the recording when the matter was fresh in her memory, and she has testified that the recording was an accurate reflection of her memory. Thus, Answer A is correct.

Answer B is incorrect. Although the officer's formal written report would qualify as a public record, the informal dictated comments she made to help her prepare the report would not. The tape recording would be admissible under the past recollection recorded exception to the hearsay rule.

Answer C is incorrect. Although the tape recording is hearsay, it fits the hearsay exception of Rule 803(5) of the Federal Rules of Evidence as a past recollection recorded. It contains only informal comments so probably does not qualify as a "police report." Even if it were a police report, there is no prohibition against the admission of a police report in a civil case if it satisfies a hearsay exception.

Answer D is incorrect. The tape recording was made prior to the written report and was used as a basis for the written report. It is not being offered to prove the content of the written report and hence its admission does not violate Rule 1002 of the Federal Rules of Evidence. Instead it is being offered to prove the factual details of the officer's investigation as she remembered them at the end of her shift when she made the tape recording.

Question 1361 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff sued his insurance company for the full loss of his banquet hall by fire. The insurance company defended under a provision of the policy limiting liability to 50 percent if "flammable materials not essential to the operation of the business were stored on the premises and caused a fire." The insurance company called the keeper of the city fire inspection records to identify a report prepared and filed by the fire marshal as required by law, indicating that shortly before the fire, the fire marshal had cited the plaintiff for storing gasoline at the banquet hall.

Is the report admissible?

A: No, because it is hearsay not within any exception.
B: No, because the proceeding is civil, rather than criminal.
C: Yes, as a public record describing matters observed as to which there was a duty to report.
D: Yes, as a record of regularly conducted activity, provided the fire marshal is unavailable.

The explanation for the answer is:

Answer C is correct. The report is admissible as a public record under Rule 803(8) of the Federal Rules of Evidence. The facts of the problem indicate that the fire marshal had a legal duty to report. The fact that the fire marshal issued the citation indicates that he observed gasoline being stored in the banquet hall. Thus, Answer C is correct, and Answer A is incorrect.

Answer B is incorrect. The fact that this is a civil case does not make the report inadmissible. Public records are admissible in both civil and criminal cases. In fact, they are more broadly admissible in civil cases than in criminal cases. The report is admissible as a public record under Rule 803(8) of the Federal Rules of Evidence.

Answer D is incorrect. Although the exception for records of regularly conducted activity (Rule 803(6) of the Federal Rules of Evidence) might apply, this answer is incorrect because this exception does not require a showing of the unavailability of the fire marshal.

Question 1368 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff sued an individual defendant for injuries suffered in a collision between the plaintiff's car and the defendant's truck while the defendant's employee was driving the truck. The plaintiff sought discovery of any accident report the employee might have made to the defendant, but the defendant responded that no such report existed. Before trial, the defendant moved to preclude the plaintiff from asking the defendant in the presence of the jury whether he destroyed such a report, because the defendant would then invoke his privilege against self-incrimination.

Should the court allow the plaintiff to ask the defendant about the destruction of the report?

A: No, because a report that was prepared in anticipation of litigation is not subject to discovery.
B: No, because no inference may properly be drawn from invocation of a legitimate privilege.
C: Yes, because a party in a civil action may not invoke the privilege against self-incrimination.
D: Yes, because the defendant's destruction of the report would serve as the basis of an inference adverse to the defendant.

The explanation for the answer is:

Answer D is correct. If a party destroys evidence, it is proper for the jury to draw an inference that the evidence was adverse to that party. It is also proper for the jury to draw an adverse inference *in a civil case* from a party's assertion of the privilege against self-incrimination. Thus, the court should allow the question to be asked, because it is proper regardless of how the defendant responds. Thus, Answer D is correct, and Answer B is incorrect.

Answer A is incorrect. It is true that a report prepared in anticipation of litigation may qualify as work product. However, the work-product immunity is not absolute. Documents that are work product are still subject to discovery upon a showing of substantial need and the inability to obtain the substantial equivalent of the materials by other means. Moreover, a claim of work-product immunity must be asserted in front of and ruled on by the court. A party cannot simply destroy the material and claim work-product protection. Finally, here the plaintiff would not be asking the defendant to produce the report for the jury to see. The plaintiff would only ask whether such a report had been destroyed.

Answer C is incorrect. The privilege against self-incrimination may be asserted in both civil and criminal cases.

Question 1368 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff sued an individual defendant for injuries suffered in a collision between the plaintiff's car and the defendant's truck while the defendant's employee was driving the truck. The plaintiff sought discovery of any accident report the employee might have made to the defendant, but the defendant responded that no such report existed. Before trial, the defendant moved to preclude the plaintiff from asking the defendant in the presence of the jury whether he destroyed such a report, because the defendant would then invoke his privilege against self-incrimination.

Should the court allow the plaintiff to ask the defendant about the destruction of the report?

A: No, because a report that was prepared in anticipation of litigation is not subject to discovery.
B: No, because no inference may properly be drawn from invocation of a legitimate privilege.
C: Yes, because a party in a civil action may not invoke the privilege against self-incrimination.
D: Yes, because the defendant's destruction of the report would serve as the basis of an inference adverse to the defendant.

The explanation for the answer is:

Answer D is correct. If a party destroys evidence, it is proper for the jury to draw an inference that the evidence was adverse to that party. It is also proper for the jury to draw an adverse inference *in a civil case* from a party's assertion of the privilege against self-incrimination. Thus, the court should allow the question to be asked, because it is proper regardless of how the defendant responds. Thus, Answer D is correct, and Answer B is incorrect.

Answer A is incorrect. It is true that a report prepared in anticipation of litigation may qualify as work product. However, the work-product immunity is not absolute. Documents that are work product are still subject to discovery upon a showing of substantial need and the inability to obtain the substantial equivalent of the materials by other means. Moreover, a claim of work-product immunity must be asserted in front of and ruled on by the court. A party cannot simply destroy the material and claim work-product protection. Finally, here the plaintiff would not be asking the defendant to produce the report for the jury to see. The plaintiff would only ask whether such a report had been destroyed.

Answer C is incorrect. The privilege against self-incrimination may be asserted in both civil and criminal cases.

Question 1374 - Evidence - Presentation of Evidence

The question was:

In a prosecution for aggravated battery, a police officer testified that when he arrested the defendant, he took a knife from the defendant and delivered it to the medical examiner. The medical examiner testified that the knife blade was consistent with the victim's wound but admitted on cross-examination that any number of other knives could also have caused the wound.

Should the judge grant a motion to strike the medical examiner's testimony?

A: No, because the probative worth of this evidence is for the jury to assess.
B: Yes, because in light of the medical examiner's admission, his testimony has insufficient probative value.
C: Yes, because the medical examiner could not state the probability that the wound was caused by the defendant's knife.
D: Yes, because the probative value is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

Answer A is correct. This evidence has some probative value because it links the knife in defendant's possession to the type of knife that could have caused the victim's wound. The evidence is not very strong, because other knives could also have caused the wound. But how much weight to give to the evidence is a decision for the jury. Rule 401 of the Federal Rules of Evidence requires only that evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus to be relevant, evidence need only have *some* probative value in establishing a fact. The Advisory Committee's Note to Rule 401 quotes the famous statement "A brick is not a wall," making the point that evidence is admissible even if it is only a single brick that is a part of a large wall of evidence establishing a party's case. Thus, Answer A is correct, and Answer B is incorrect.

Answer C is incorrect. Rule 401 of the Federal Rules of Evidence does not require such a statement of probability. The medical examiner's testimony does not have to establish that defendant's knife caused the wound by any particular standard, such as beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence. It need only have probative value to be admissible.

Answer D is incorrect. Rule 401 of the Federal Rules of Evidence has a very broad and liberal standard of what is relevant: evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 403 allows evidence to be excluded under certain circumstances. But Rule 403 establishes what might be described as a presumption of admissibility, because evidence meeting Rule 401's definition of relevance is admissible unless its probative value is "substantially outweighed" by the danger of unfair prejudice. Here there does not appear to be any significant degree of unfair prejudice, let alone enough to "substantially outweigh" the value of the medical examiner's testimony.

Question 1376 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was on trial for perjury for having falsely testified in an earlier civil case that he knew nothing about a business fraud. In the perjury trial, the defendant again testified that he knew nothing about the business fraud. In rebuttal, the prosecutor called a witness to testify that after the civil trial was over, the defendant admitted to the witness privately that he had known about the fraud.

Is the witness's testimony in the perjury trial admissible?

A: Yes, but only to impeach the defendant's testimony.
B: Yes, both to impeach the defendant's testimony and as substantive evidence of the perjury.
C: No, because it is hearsay not within any exception.
D: No, because it relates to the business fraud and not to the commission of perjury.

The explanation for the answer is:

Answer B is correct. This statement is admissible both to impeach the defendant's testimony as a prior inconsistent statement and as substantive evidence, because it is an admission of a party-opponent under Rule 801(d)(2)(A) of the Federal Rules of Evidence. Thus, Answer B is correct and Answers A and C are incorrect.

Answer D is incorrect. The statement made to the witness does relate to the prior business fraud, but it is a statement by the defendant that in fact he *did* know about the fraud, when he testified in two trials that he *did not* know of it. Thus the statement is relevant to prove that the defendant's trial testimony was knowingly false and hence constituted perjury.

Question 1385 - Evidence - Presentation of Evidence

The question was:

When a man entered a bank and presented a check for payment, the bank teller recognized the signature on the check as a forgery because the check was drawn on the account of a customer whose handwriting she knew. The bank teller called the police. Before the police arrived, the man picked up the check from the counter and left.

The man was charged with attempting to cash a forged check. At trial, the prosecutor called the bank teller to testify that the signature on the check was forged.

Is the bank teller's testimony admissible?

A: Yes, because a bank teller is by occupation an expert on handwriting.
B: Yes, because it is rationally based on the bank teller's perception and is helpful to the jury.
C: No, because the bank teller was at fault in allowing loss of the original by failing to secure the check.
D: No, because it is not possible for either the jury or an expert to compare the signature on the missing check with a signature established as genuine.

The explanation for the answer is:

Answer B is correct. Rule 701 of the Federal Rules of Evidence allows lay opinion testimony when it is rationally based on the perception of the witness and is helpful to the jury. Here the teller knew the signature of the bank customer on whose account the check was drawn. This knowledge made it possible for her to recognize the signature on the check as a forgery. Her testimony that the signature was a forgery is testimony that the signature on the check presented was different from the signature of the owner of the account (a signature she knows). Obviously the owner of the account would be a stronger prosecution witness than the teller in establishing that the signature was forged, but this doesn't mean that the teller would not be allowed to testify. Thus, Answer B is correct.

Answer A is incorrect. There is nothing in the fact pattern to suggest that the bank teller is an expert on handwriting, and merely working as a bank teller would not give a person such expertise.

Answer C is incorrect. There is no rule in the law of evidence that would allow exclusion of the testimony on this basis. Moreover, there is no indication in the facts that there was fault on the part of the teller.

Answer D is incorrect. Having an expert or even the jury members themselves compare an exemplar established as genuine with the disputed signature is one way to establish whether a signature is forged or authentic. This method of authentication is specifically recognized by Rule 901(b)(3) of the Federal Rules of Evidence. But it is not the only method authorized. Rule 901(b) also allows authentication by "[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation."

Question 1391 - Evidence - Writings Recordings and Photographs

The question was:

A pedestrian sued a driver for injuries suffered in a hit-and-run accident. At trial, the pedestrian called a witness who testified that he saw the accident and that as the car sped off he accurately dictated the license number into his properly operating pocket dictating machine. The witness stated that he no longer remembered the number.

May the tape recording be played?

A: Yes, as a present sense impression only.
B: Yes, as a recorded recollection only.
C: Yes, as a present sense impression and as a past recollection recorded.
D: No, because it is hearsay not within any exception.

The explanation for the answer is:

Answer C is correct. The statement is admissible as a present sense impression under Rule 803(1) of the Federal Rules of Evidence because it describes or explains an event or condition and was "made while the declarant was perceiving the event or condition, or immediately thereafter." It is also admissible under Rule 803(5) of the Federal Rules of Evidence because it is a record "concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately," and it was made by the witness "when the matter was fresh in the witness' memory" and "reflect[s] that knowledge correctly." Thus, Answer C is correct while Answers A and B incorrect.

Answer D is incorrect. The statement on the recording is hearsay because it is an out-of-court statement offered for its truth. But it is admissible under Rule 803(1) of the Federal Rules of Evidence as a present sense impression and also under Rule 803(5) as a past recollection recorded.

Question 1391 - Evidence - Writings Recordings and Photographs

The question was:

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May the tape recording be played?

A: Yes, as a present sense impression only.
B: Yes, as a recorded recollection only.
C: Yes, as a present sense impression and as a past recollection recorded.
D: No, because it is hearsay not within any exception.

The explanation for the answer is:

Answer C is correct. The statement is admissible as a present sense impression under Rule 803(1) of the Federal Rules of Evidence because it describes or explains an event or condition and was "made while the declarant was perceiving the event or condition, or immediately thereafter." It is also admissible under Rule 803(5) of the Federal Rules of Evidence because it is a record "concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately," and it was made by the witness "when the matter was fresh in the witness' memory" and "reflect[s] that knowledge correctly." Thus, Answer C is correct while Answers A and B incorrect.

Answer D is incorrect. The statement on the recording is hearsay because it is an out-of-court statement offered for its truth. But it is admissible under Rule 803(1) of the Federal Rules of Evidence as a present sense impression and also under Rule 803(5) as a past recollection recorded.

Question 1398 - Evidence - Privileges and Other Policy Exclusions

The question was:

A defendant was on trial for tax evasion. The IRS, seeking to establish the defendant's income by showing his expenditures, called on the defendant's attorney to produce records showing only how much the defendant had paid his attorney in fees.

Should the demand for the attorney's fee records be upheld?

A: Yes, because it calls for relevant information not within the attorney-client privilege.
B: Yes, because the attorney-client privilege cannot be invoked to conceal evidence of a crime.
C: No, because the records are protected by the attorney-client privilege.
D: No, because the records are protected by the attorney work-product doctrine.

The explanation for the answer is:

Answer A is correct. The attorney-client privilege applies only to confidential communications made for the purpose of facilitating legal representation of the client. The amount the defendant paid in legal fees does not qualify as such a communication. Fee arrangements and payments are generally outside the protection of the attorney-client privilege. Thus, Answer A is correct and Answer C is incorrect. Additionally, Answer B is incorrect because the attorney-client privilege can be invoked even where it conceals evidence of a past crime.

The work-product doctrine provides a qualified immunity for materials prepared by an attorney or client in anticipation of litigation, such as witness statements, investigative reports, or trial memoranda. The amount a client paid to his attorney for legal representation is outside the protection of the work-product doctrine. Thus, Answer D is incorrect.

Question 1410 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

Several defendants, senior executives of a corporation, were charged with securities fraud. The government called as a witness another executive of the corporation, who had not been charged and who had been given immunity from prosecution, to authenticate handwritten notes that she had made after meetings of the corporation's management team at which the alleged fraud was discussed. The witness testified that she had prepared the notes on her own initiative to help her remember what had happened at the meetings. After this testimony, the government offered the notes into evidence to establish what had happened at the meetings.

Should the witness's notes be admitted?

A: No, because the notes are hearsay not within any exception.
B: No, because the witness's immunity agreement with the government makes her notes untrustworthy and thus substantially more prejudicial than probative.
C: Yes, because they are business records.
D: Yes, because they are past recollections recorded.

The explanation for the answer is:

Answer A is correct. The notes are hearsay because they are out-of-court statements offered to prove the truth of the matter asserted, and they do not fit any hearsay exception.

Answer B is incorrect. The grant of immunity was given after the notes were made and therefore could not affect the reliability of the notes. Moreover, with the threat of prosecution removed, a witness is arguably more trustworthy. The notes are inadmissible, however, because they are hearsay not within any exception.

Answer C is incorrect. The notes do not qualify as business records because they were prepared on the executive's own initiative to help her remember what had happened at the meetings. The business records exception to the hearsay rule requires that it be the regular practice of a business (not an individual employee) to make such records and that the records be kept in the course of regularly conducted business activity.

Answer D is incorrect. No foundation has been laid to admit the notes under the past recollection recorded exception to the hearsay rule. The executive has not testified that she has insufficient recollection to testify fully and accurately without the notes, nor has she testified that the notes are an accurate reflection of her knowledge when the matter was fresh in her memory. Moreover, even if the hearsay exception were satisfied, the notes themselves are not admissible. Under FRE 803(5), a record of recorded recollection "may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

Question 1413 - Evidence - Presentation of Evidence

The question was:

A plaintiff sued a defendant, alleging that she was seriously injured when the defendant ran a red light and struck her while she was walking in a crosswalk. During the defendant's case, a witness testified that the plaintiff had told him that she was "barely touched" by the defendant's car.

On cross-examination, should the court allow the plaintiff to elicit from the witness the fact that he is an adjuster for the defendant's insurance company?

A: No, because testimony about liability insurance is barred by the rules of evidence.
B: No, because the reference to insurance raises a collateral issue.
C: Yes, for both substantive and impeachment purposes.
D: Yes, for impeachment purposes only.

The explanation for the answer is:

Answer D is correct. Although FRE 411 generally bars evidence of liability insurance to prove negligence or wrongful conduct, it contains an exception allowing the use of such evidence to prove bias. The fact that the witness is an adjuster for the defendant's insurance company is a legitimate ground for impeachment for bias. Thus, Answer A is incorrect. Furthermore, the witness's employment by the insurance company is therefore not collateral. Thus, Answer B is incorrect.

Answer C is incorrect. The evidence is not admissible for substantive purposes. FRE 411 bars evidence of liability insurance to prove negligence or wrongful conduct. However, the rule contains an exception allowing the use of such evidence to prove bias. Thus, the fact that the witness is an adjuster for the defendant's insurance company is a legitimate ground for impeachment for bias but not a basis for admission as substantive evidence. Thus, Answer D is correct.

Question 1421 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A defendant was charged with the crime of defrauding the federal agency where he worked as an accountant. At trial, the court allowed the defendant to call his supervisor at the large corporation where he had previously worked, who testified about the defendant's good reputation in the community for honesty. Over objection, the defendant then sought to elicit testimony from his former supervisor that on several occasions the corporation had, without incident, entrusted him with large sums of money.

Should the testimony be admitted?

A: No, because the testimony is extrinsic evidence on a collateral matter.
B: No, because good character cannot be proved by specific instances of conduct unless character is an essential element of the charge or defense.
C: Yes, because it is evidence of a pertinent character trait offered by an accused.
D: Yes, because it is relevant to whether the defendant was likely to have taken money as charged in this case.

The explanation for the answer is:

Answer B is correct. When a criminal defendant seeks to prove his good character under FRE 404(a)(2), FRE 405(a) allows proof only by reputation evidence or opinion evidence, not by specific instances of conduct.

Answer A is incorrect. The testimony does not relate to a collateral matter. Under FRE 404(a)(2), a criminal defendant is allowed to present evidence about a pertinent trait of character, such as honesty in a fraud case. The problem with the testimony in this case is that it relates to specific instances of conduct. FRE 405(a) allows only reputation or opinion evidence when a criminal defendant is proving his good character, not instances of specific conduct.

Answer C is incorrect. Honesty is a pertinent trait of character in a case such as this where a defendant is charged with fraud. However, when an accused seeks to prove his good character under FRE 404(a)(2), FRE 405(a) allows proof only by reputation evidence or opinion evidence, not by specific instances of conduct.

Answer D is incorrect. The evidence is relevant, because FRE 404(a)(2) allows an accused to present evidence of a pertinent trait of character, and honesty is a pertinent trait in a case such as this where a defendant is charged with fraud. However, when an accused seeks to prove his good character under FRE 404(a)(2), FRE 405(a) allows proof only by reputation evidence or opinion evidence, not by specific instances of conduct.

Question 1427 - Evidence - Privileges and Other Policy Exclusions

The question was:

A plaintiff sued his insurance company for the proceeds of a casualty insurance policy covering his 60-foot yacht, claiming that the yacht was destroyed by an accidental fire. The company denied liability, claiming that the plaintiff hired his friend to set the fire. In the hospital the day after the fire, the friend, who had been badly burned in the fire, said to his wife, in the presence of an attending nurse, "I was paid to set the fire." Two weeks later, the friend died of an infection resulting from the burns. At trial, the insurance company called the wife to testify to the friend's statement.

Is the wife's testimony admissible over the plaintiff's objection?

A: No, because the marital privilege survives the communicating spouse's death.
B: No, because the statement was made after the conspiracy ended.
C: Yes, because it is a statement against interest.
D: Yes, because it is a statement by a co-conspirator.

The explanation for the answer is:

Answer C is correct. The statement is against the friend's interest because it could subject him to civil or criminal liability. The friend is unavailable, so the statement satisfies FRE 804(b)(3).

Answer A is incorrect. While it is true that the marital privilege survives the communicating spouse's death, the privilege never arose here, because the communication between the friend and his wife was not confidential. It was made in the presence of an attending nurse. The testimony is admissible because the friend's statement was a statement against interest and the friend is unavailable.

Answer B is incorrect. The friend's statement would not satisfy the co-conspirator exception because it was made after the conspiracy was over and it was not made in furtherance of the conspiracy. But because the statement qualifies as a statement against interest and because the friend is unavailable, the wife's testimony is admissible under FRE 804(b)(3).

Answer D is incorrect. The statement would not satisfy the co-conspirator exception because it was made after the conspiracy was over and it was not made in furtherance of the conspiracy. The wife's testimony is otherwise admissible under FRE 804(b)(3), however, because it contains the friend's statement against interest and the friend is unavailable.

Question 1430 - Evidence - Presentation of Evidence

The question was:

A defendant was charged with possession of marijuana with intent to distribute. On direct examination, the defendant testified that he worked with disadvantaged children as a drug counselor, that he hated drugs, that he would "never possess or distribute drugs," and that he had never used drugs and would not touch them. The government offered as a rebuttal witness a police officer who would testify that, three years earlier, he saw the defendant buy cocaine from a street dealer. The defendant objected.

Is the testimony of the police officer about the prior drug transaction admissible to impeach the defendant?

A: No, because the bad act of buying drugs is not sufficiently probative of a witness's character for truthfulness.
B: No, because it is contradiction on a collateral matter.
C: Yes, because it is proper contradiction.
D: Yes, because the bad act shows a disregard for the law and makes it less likely that the defendant would respect the oath of truthfulness.

The explanation for the answer is:

Answer C is correct. This is an example of impeachment by contradiction. The evidence of the prior cocaine purchase directly contradicts the defendant's testimony on direct examination that he would never possess drugs and is admissible for that purpose.

Answer A is incorrect. The evidence of purchasing cocaine being offered to impeach the defendant's character for truthfulness. Instead it is being offered to contradict his testimony on direct examination that he would never possess drugs. The offered testimony is admissible for that purpose.

Answer B is incorrect. The evidence of a prior cocaine purchase is not collateral, because the defendant is charged with drug possession and the evidence directly contradicts the defendant’s testimony on direct examination that he would never possess drugs. The offered testimony is admissible for that purpose.

Answer D is incorrect. The evidence of the prior cocaine purchase is not being offered under FRE 608(b) to show a prior bad act bearing on the witness's truthfulness. The evidence would not be admissible under FRE 608(b) in any case, because FRE 608(b) prohibits extrinsic evidence of prior acts and only allows questioning about them on cross-examination. Instead this is an example of impeachment by contradiction.

Question 1440 - Evidence - Privileges and Other Policy Exclusions

The question was:

A woman sued her friend for injuries she received as a passenger in the friend's car. On direct examination, the woman testified that the friend had been speeding and ran a red light. On cross-examination, the woman was asked whether she was under the influence of drugs at the time of the accident. The woman invoked the privilege against self-incrimination.

How should the court treat the woman's claim of privilege?

A: Deny it, because the woman waived the privilege by voluntarily testifying.
B: Deny it, because evidence of the woman's drug intoxication is essential to assessing the accuracy of her observations.
C: Uphold it, because the privilege applies in both civil and criminal cases.
D: Uphold it, because the woman's credibility cannot be impeached by a crime for which she has not been convicted.

The explanation for the answer is:

Answer C is correct. Under the Fifth Amendment to the Constitution, a witness cannot be compelled to testify against herself. A witness in a civil or criminal proceeding may refuse to give an answer that tends to connect the witness to the commission of a crime. The woman cannot be forced to reveal facts that could subject her to criminal prosecution. Thus, Answer C is correct.

Although a person can waive the privilege against self-incrimination by voluntarily testifying about the incriminating matter, in this case, the woman did not testify about anything that was self-incriminating. Thus, Answer A is incorrect.

Answer B is incorrect. A standard impeachment method is to challenge the ability of a witness to perceive and remember the event about which the witness is testifying. If the woman was under the influence of drugs, the accuracy of her observations could certainly be put in question. However, an evidence rule generally allowing this type of impeachment cannot prevail over the woman's constitutional right not to be forced to incriminate herself.

Answer D is incorrect. Even if a witness has not been convicted of a crime, an admission by the witness that he or she committed that crime could certainly affect the witness's credibility.

Question 1447 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A consumer has sued the manufacturer of a microwave oven for burn injuries allegedly caused by the manufacturer's negligent failure to warn purchasers of the dangers of heating foods in certain types of containers. The consumer has offered into evidence three letters, all received by the manufacturer before the oven was shipped to the consumer, in which customers had complained of serious burns under circumstances similar to those in the consumer's case. The manufacturer has objected to the letters on the grounds of hearsay and, in the alternative, has asked for a limiting instruction directing that the letters be considered not for the truth of the assertions contained in them but only regarding the issue of notice.

How should the court respond?

A: The court should sustain the objection and treat the request for a limiting instruction as moot.
B: The court should overrule the objection and deny the request for a limiting instruction.
C: The court should overrule the objection and give the limiting instruction.
D: The court should overrule the objection but allow only that the letters be read to the jury, not received as exhibits.

The explanation for the answer is:

Answer C is correct. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. The letters are hearsay if they are offered to prove the assertions contained in them--that there were dangers in using the microwave and that other persons had been injured. The letters are admissible only if they are offered for the limited purpose of proving that the manufacturer was put on notice of possible dangers in using the microwave. Such notice supports the claim of negligence, because it suggests that the manufacturer should have investigated and taken action to protect future consumers. Accordingly, the objection should be overruled because a limiting instruction will suffice to limit the use of the letters to the issue of notice. Thus, Answer C is correct, and Answers A and B are incorrect.

Answer D is incorrect. Allowing the letters to be read to the jury but not received as exhibits does not overcome the hearsay objection to the substantive use of these letters.

Question 1447 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A consumer has sued the manufacturer of a microwave oven for burn injuries allegedly caused by the manufacturer's negligent failure to warn purchasers of the dangers of heating foods in certain types of containers. The consumer has offered into evidence three letters, all received by the manufacturer before the oven was shipped to the consumer, in which customers had complained of serious burns under circumstances similar to those in the consumer's case. The manufacturer has objected to the letters on the grounds of hearsay and, in the alternative, has asked for a limiting instruction directing that the letters be considered not for the truth of the assertions contained in them but only regarding the issue of notice.

How should the court respond?

A: The court should sustain the objection and treat the request for a limiting instruction as moot.
B: The court should overrule the objection and deny the request for a limiting instruction.
C: The court should overrule the objection and give the limiting instruction.
D: The court should overrule the objection but allow only that the letters be read to the jury, not received as exhibits.

The explanation for the answer is:

Answer C is correct. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. The letters are hearsay if they are offered to prove the assertions contained in them--that there were dangers in using the microwave and that other persons had been injured. The letters are admissible only if they are offered for the limited purpose of proving that the manufacturer was put on notice of possible dangers in using the microwave. Such notice supports the claim of negligence, because it suggests that the manufacturer should have investigated and taken action to protect future consumers. Accordingly, the objection should be overruled because a limiting instruction will suffice to limit the use of the letters to the issue of notice. Thus, Answer C is correct, and Answers A and B are incorrect.

Answer D is incorrect. Allowing the letters to be read to the jury but not received as exhibits does not overcome the hearsay objection to the substantive use of these letters.

Question 1454 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued for injuries arising from a car accident, claiming a back injury. At trial, she wishes to testify that prior to the accident she had never had any problems with her back.

Is the plaintiff's proposed testimony admissible?

A: No, because the plaintiff has not been qualified as an expert.
B: No, because the plaintiff's pain could have been caused by factors arising after the accident, such as an injury at work.
C: Yes, because it is probative evidence of the plaintiff's injury.
D: Yes, because the testimony of parties is not subject to the lay opinion rule.

The explanation for the answer is:

Answer C is correct. The fact that the back problems arose after the accident is probative on the issue of whether the accident was the cause of the injury. Therefore, the evidence meets the standard of relevance, and the testimony should be allowed.

Answer A is incorrect. The plaintiff does not need to be qualified as an expert to testify that she had never previously had any problems with her back. Because the substance of the proposed testimony is a matter of personal knowledge, not expert opinion, the testimony should be allowed.

Answer B is incorrect. Even though other factors may have contributed to the plaintiff's back injury after the accident, she nonetheless is allowed to testify that she never had any problems with her back before the accident.

Answer D is incorrect. All testimony, even testimony by parties, is subject to the lay opinion rule under FRE 701. However, in this instance the plaintiff is not giving a lay opinion but is merely testifying on the basis of personal knowledge that she had not previously had any problems with her back. The testimony should be allowed.

Question 1454 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff sued for injuries arising from a car accident, claiming a back injury. At trial, she wishes to testify that prior to the accident she had never had any problems with her back.

Is the plaintiff's proposed testimony admissible?

A: No, because the plaintiff has not been qualified as an expert.
B: No, because the plaintiff's pain could have been caused by factors arising after the accident, such as an injury at work.
C: Yes, because it is probative evidence of the plaintiff's injury.
D: Yes, because the testimony of parties is not subject to the lay opinion rule.

The explanation for the answer is:

Answer C is correct. The fact that the back problems arose after the accident is probative on the issue of whether the accident was the cause of the injury. Therefore, the evidence meets the standard of relevance, and the testimony should be allowed.

Answer A is incorrect. The plaintiff does not need to be qualified as an expert to testify that she had never previously had any problems with her back. Because the substance of the proposed testimony is a matter of personal knowledge, not expert opinion, the testimony should be allowed.

Answer B is incorrect. Even though other factors may have contributed to the plaintiff's back injury after the accident, she nonetheless is allowed to testify that she never had any problems with her back before the accident.

Answer D is incorrect. All testimony, even testimony by parties, is subject to the lay opinion rule under FRE 701. However, in this instance the plaintiff is not giving a lay opinion but is merely testifying on the basis of personal knowledge that she had not previously had any problems with her back. The testimony should be allowed.

Question 1469 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A cyclist sued a defendant corporation for injuries sustained when she was hit by a truck owned by the defendant and driven by its employee, who was making deliveries for the defendant. The day after the accident, the employee visited the cyclist in the hospital and said, "I'm sorry for what I did." At trial, the employee testified that he had exercised due care.

Why is the cyclist's testimony relating what the defendant's employee said at the hospital admissible to prove negligence?

A: It is a prior inconsistent statement.
B: It is a statement against interest.
C: It is a statement by a party-opponent's agent.
D: It is a statement of then-existing state of mind.

The explanation for the answer is:

Answer C is correct. FRE 801(d)(2)(D) provides that a statement is "not hearsay" if it is offered against a party and “was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.” Here, the statement was made by the defendant's agent while the agent was still employed by the defendant. Furthermore, the statement concerned a matter within the scope of the agency. The agent stated he was sorry for his actions at the time of the accident, which occurred while the agent was working with the scope of his employment. Thus, Answer C is correct.

Answer A is incorrect. It is true that the statement is admissible to impeach as a prior inconsistent statement. Being sorry "for what I did" is arguably inconsistent with the testimony by the employee at trial that he had exercised due care. But a statement admissible only to impeach cannot be used for substantive purposes such as to prove negligence. As stated above, the statement is admissible as an admission by an agent under FRE 801(d)(2)(D).

Answer B is incorrect. A statement against interest is only admissible if the declarant is unavailable. Here the declarant is available and testifying at trial. As stated above, the statement is admissible as an admission by an agent under FRE 801(d)(2)(D).

Answer D is incorrect. The statement "I'm sorry" reflects the employee's state of mind at the time the statement was made. But the relevant issue is not the employee's state of mind the day after the accident but whether he was negligent at the time of the accident. The hearsay exception for state-of-mind statements is not backward looking. It generally does not allow statements of current mental feeling to prove past conduct or to show why the declarant has a certain state of mind. As stated above, the statement is admissible as an admission by an agent under FRE 801(d)(2)(D).

Question 1475 - Evidence - Presentation of Evidence

The question was:

A defendant is on trial for bank robbery. Evidence at the trial has included testimony by a bank teller who was present during the robbery. The teller testified for the prosecution after having refreshed her memory by looking at an FBI agent's investigative report that was created shortly after the robbery. The defendant has asked to examine the report.

How should the court respond?

A: The court may allow the examination if the report was used by the teller to refresh her memory before testifying, and must allow it if she used it during her testimony.
B: The court must allow the examination, but only to the extent that the report contains the teller's own statement to the FBI agent.
C: The court should not allow the examination, unless the report was used by the teller to refresh her memory while on the witness stand.
D: The court should not allow the examination, because the report was not shown to have been read and approved by the teller while the matter was fresh in her mind.

The explanation for the answer is:

Answer A is correct. FRE 612 provides that if a witness uses a writing to refresh memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. Thus, Answer A is correct.

FRE 612 allows an opponent to inspect a writing used to refresh a witness's recollection regardless of whether the writing contains the witness's own statement. Thus, Answer B is incorrect.

FRE 612 gives the court discretion to require production of a writing used to refresh a witness's recollection, even if the writing was provided to the witness before he or she testified. Thus, Answer C is incorrect.

FRE 612 allows an opponent to see material used to refresh the memory of a witness regardless of whether the material was read and approved by the witness while the matter was fresh in his or her mind. The requirement of a witness approving a writing made while the matter was fresh in the witness's mind relates to an entirely different evidence rule--FRE 803(5), which creates a hearsay exception for past recollection recorded. Thus, Answer D is incorrect.

Question 1485 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A patient sued a hospital for medical negligence, claiming that a nurse employed by the hospital failed to administer critical medication prescribed by the patient's treating physician during the plaintiff's hospitalization. To prove the nurse's failure to administer the prescribed medication, the patient called the medical records librarian, who authenticated the hospital's record of the patient's treatment, which contained no entry showing that the medication in question had been administered.

Is the hospital record admissible?

A: No, because it is hearsay not within any exception.
B: No, because the nurse's testimony would be the best evidence of her actions in treating the plaintiff.
C: Yes, although hearsay, because it is a statement against interest by agents of the hospital.
D: Yes, because it is within the hearsay exception covering the absence of entries in business records.

The explanation for the answer is:

Answer D is correct. The hospital record itself is hearsay, but it qualifies as a record of regularly recorded conduct under FRE 803(6). The absence of an entry in such a record is admissible under FRE 803(7) to prove the nonoccurrence of a matter that would normally have been recorded if it had occurred. Thus, the absence of an entry can be used by the patient to establish that the medication was not administered. Thus, Answer D is correct, and Answer A is incorrect.

Answer B is incorrect. No rule of evidence requires the patient to call the nurse to prove whether the medication was administered. Although the patient has the option of calling the nurse, the patient also has the option of introducing the hospital record as a business record to prove absence of an entry showing that the medication was administered. Both forms of proof are permissible. Under the circumstances of this case, where the nurse may have an incentive to testify falsely, the hospital record is arguably the best evidence.

Answer C is incorrect. To fit the statement against interest exception to the hearsay rule, the declarant must be shown to be unavailable, and there is no such showing here. While it is true that the hospital record itself is hearsay, it qualifies for admission as a record of regularly recorded conduct under FRE 803(6), as explained above.

Question 1485 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A patient sued a hospital for medical negligence, claiming that a nurse employed by the hospital failed to administer critical medication prescribed by the patient's treating physician during the plaintiff's hospitalization. To prove the nurse's failure to administer the prescribed medication, the patient called the medical records librarian, who authenticated the hospital's record of the patient's treatment, which contained no entry showing that the medication in question had been administered.

Is the hospital record admissible?

A: No, because it is hearsay not within any exception.
B: No, because the nurse's testimony would be the best evidence of her actions in treating the plaintiff.
C: Yes, although hearsay, because it is a statement against interest by agents of the hospital.
D: Yes, because it is within the hearsay exception covering the absence of entries in business records.

The explanation for the answer is:

Answer D is correct. The hospital record itself is hearsay, but it qualifies as a record of regularly recorded conduct under FRE 803(6). The absence of an entry in such a record is admissible under FRE 803(7) to prove the nonoccurrence of a matter that would normally have been recorded if it had occurred. Thus, the absence of an entry can be used by the patient to establish that the medication was not administered. Thus, Answer D is correct, and Answer A is incorrect.

Answer B is incorrect. No rule of evidence requires the patient to call the nurse to prove whether the medication was administered. Although the patient has the option of calling the nurse, the patient also has the option of introducing the hospital record as a business record to prove absence of an entry showing that the medication was administered. Both forms of proof are permissible. Under the circumstances of this case, where the nurse may have an incentive to testify falsely, the hospital record is arguably the best evidence.

Answer C is incorrect. To fit the statement against interest exception to the hearsay rule, the declarant must be shown to be unavailable, and there is no such showing here. While it is true that the hospital record itself is hearsay, it qualifies for admission as a record of regularly recorded conduct under FRE 803(6), as explained above.

Question 1494 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant was charged with robbery of a savings and loan branch after being arrested near the scene and found with marked bills. An hour after the robbery, the officer investigating the crime videotaped an interview with an eyewitness, in which the eyewitness described the crime and the robber. The officer then arranged for a lineup, at which the teller who was robbed identified the defendant as the robber. The officer later obtained computerized records of that day's deposits and withdrawals at the savings and loan, which allowed the calculation of how much cash was taken in the robbery. A month later, the teller testified before a grand jury, which indicted the defendant. The teller and the eyewitness both died of unrelated causes shortly afterward.

At trial, which of the following evidence, if properly authenticated, may properly be admitted against the defendant over his attorney's objection that its receipt would violate the confrontation clause?

A: A transcript of the teller's sworn grand jury testimony.
B: The computerized records from the savings and loan.
C: The officer's testimony that the teller picked the defendant out of the lineup as the robber.
D: The videotape of the eyewitness's statement.

The explanation for the answer is:

Answer B is correct. The computerized records are not a testimonial statement. *Crawford v. Washington* specifically cites business records as an example of statements that are generally not testimonial. Thus, Answer B is correct.

The teller's grand jury testimony is a classic testimonial statement barred by the confrontation clause. Since a defendant has no right to be at a grand jury hearing, the defendant does not have a chance to confront the witness at the hearing. The fact that the witness's statements were made under oath does not cure the defendant's inability to confront the witness at the grand jury hearing. Accordingly, admitting the witness's grand jury testimony without a chance for the defendant to confront and cross-examine the witness would violate the confrontation clause. Thus, Answer A is incorrect.

The officer's statement does not violate the confrontation clause because he can be cross-examined, but the teller's identification of the defendant is a testimonial statement. Since the teller is dead, it would violate the defendant's right of confrontation to admit the statement of identification by the teller. Answer C is incorrect.

The eyewitness's statement is clearly testimonial. Because the eyewitness was not cross-examined when the statement was made and cannot be cross-examined at trial (because the eyewitness is dead), the statement is inadmissible under the confrontation clause. Thus, Answer D is incorrect.

Question 1499 - Evidence - Writings Recordings and Photographs

The question was:

A defendant is being prosecuted for conspiracy to possess with intent to distribute cocaine. At trial, the government seeks to have its agent testify to a conversation that he overheard between the defendant and a co-conspirator regarding the incoming shipment of a large quantity of cocaine. That conversation was also audiotaped, though critical portions of it are inaudible. The defendant objects to the testimony of the agent on the ground that it is not the best evidence of the conversation.

Is the testimony admissible?

A: No, because the testimony of the agent is not the best evidence of the conversation.
B: No, because the testimony of the agent reports hearsay not within any exception.
C: Yes, because the best evidence rule does not require proof of the conversation through the audiotape.
D: Yes, because the audiotape is partly inaudible.

The explanation for the answer is:

Answer C is correct. Since the agent personally heard the conversation, he is not relying on the contents of the audiotape for his testimony. Therefore there is no violation of the best evidence rule. The agent is not attempting to prove the contents of the audiotape, only what he overheard. The conversation could, of course, also be proved by introducing the audiotape, and it can be argued that the audiotape is "better" evidence than the agent's testimony. Nonetheless, so long as the agent obtained his knowledge of the conversation from his own perception, and not by listening to the audiotape, the best evidence rule is not violated. Thus, Answer C is correct and Answer A is incorrect.

Answer B is incorrect. The statements made by the defendant are admissible as individual admissions under FRE 801(d)(2)(A). The statements made by the co-conspirator are admissible as admissions of a co-conspirator under FRE 801(d)(2)(E).

Answer D is incorrect. The testimony of the agent is admissible because it is based on the personal perception of the agent who overheard the conversation. Therefore, the agent will be allowed to testify to what he personally heard regardless of whether any recording was made and regardless of any defects in the recording.

Question 1504 - Evidence - Privileges and Other Policy Exclusions

The question was:

A businessman was the target of a grand jury investigation into the alleged bribery of American and foreign officials in connection with an international construction project. The businessman had stated at a press conference that no bribes had been offered or taken and that no laws of any kind had been broken. The grand jury issued a subpoena requiring the businessman to testify before it. The businessman moved to quash the subpoena on the ground that his testimony could tend to incriminate him. The prosecutor responded with a grant of use immunity (under which the businessman's compelled statements before the grand jury could not be used against him in any state or federal prosecution). The businessman responded that the grant of use immunity was not sufficient to protect his Fifth Amendment rights.

Should the businessman be compelled to testify?

A: No, because the businessman remains subject to the risk of foreign prosecution.
B: No, because use immunity does not prevent the government from prosecuting the businessman on the bribery scheme.
C: Yes, because the businessman has denied any criminal liability and therefore his Fifth Amendment rights are not at stake.
D: Yes, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights.

The explanation for the answer is:

A is incorrect. While the businessman does face the possibility of foreign prosecution, the U.S. Supreme Court has squarely held that the Fifth Amendment does not protect against the risk of foreign prosecution. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment. He should therefore be compelled to testify.

B is incorrect. It is true that the grant of use immunity does not protect the businessman from being prosecuted. Instead, it protects against the businessman's compelled statements--or any fruits of those statements--being used against him in any domestic prosecution. The U.S. Supreme Court has long held that the Fifth Amendment right is satisfied by a grant of use immunity. The Fifth Amendment does not require a grant of immunity from prosecution ("transactional immunity"). The businessman should therefore be compelled to testify.

C is incorrect. The fact that the businessman has denied liability does not mean that any statement he makes could never tend to incriminate him. Even an innocent person might say something that would tend to incriminate himself, and a tendency to incriminate is all that is required to trigger Fifth Amendment protection. However, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights, he should be compelled to testify.

D is correct. The U.S. Supreme Court has held that if a person is guaranteed, through a grant of use immunity, that neither his statements nor the fruits of those statements can be used against him in a domestic prosecution, then he loses his right to refuse to testify because his statements cannot tend to incriminate him. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment.

Question 1504 - Evidence - Privileges and Other Policy Exclusions

The question was:

A businessman was the target of a grand jury investigation into the alleged bribery of American and foreign officials in connection with an international construction project. The businessman had stated at a press conference that no bribes had been offered or taken and that no laws of any kind had been broken. The grand jury issued a subpoena requiring the businessman to testify before it. The businessman moved to quash the subpoena on the ground that his testimony could tend to incriminate him. The prosecutor responded with a grant of use immunity (under which the businessman's compelled statements before the grand jury could not be used against him in any state or federal prosecution). The businessman responded that the grant of use immunity was not sufficient to protect his Fifth Amendment rights.

Should the businessman be compelled to testify?

A: No, because the businessman remains subject to the risk of foreign prosecution.
B: No, because use immunity does not prevent the government from prosecuting the businessman on the bribery scheme.
C: Yes, because the businessman has denied any criminal liability and therefore his Fifth Amendment rights are not at stake.
D: Yes, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights.

The explanation for the answer is:

A is incorrect. While the businessman does face the possibility of foreign prosecution, the U.S. Supreme Court has squarely held that the Fifth Amendment does not protect against the risk of foreign prosecution. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment. He should therefore be compelled to testify.

B is incorrect. It is true that the grant of use immunity does not protect the businessman from being prosecuted. Instead, it protects against the businessman's compelled statements--or any fruits of those statements--being used against him in any domestic prosecution. The U.S. Supreme Court has long held that the Fifth Amendment right is satisfied by a grant of use immunity. The Fifth Amendment does not require a grant of immunity from prosecution ("transactional immunity"). The businessman should therefore be compelled to testify.

C is incorrect. The fact that the businessman has denied liability does not mean that any statement he makes could never tend to incriminate him. Even an innocent person might say something that would tend to incriminate himself, and a tendency to incriminate is all that is required to trigger Fifth Amendment protection. However, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights, he should be compelled to testify.

D is correct. The U.S. Supreme Court has held that if a person is guaranteed, through a grant of use immunity, that neither his statements nor the fruits of those statements can be used against him in a domestic prosecution, then he loses his right to refuse to testify because his statements cannot tend to incriminate him. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment.

Question 1504 - Evidence - Privileges and Other Policy Exclusions

The question was:

A businessman was the target of a grand jury investigation into the alleged bribery of American and foreign officials in connection with an international construction project. The businessman had stated at a press conference that no bribes had been offered or taken and that no laws of any kind had been broken. The grand jury issued a subpoena requiring the businessman to testify before it. The businessman moved to quash the subpoena on the ground that his testimony could tend to incriminate him. The prosecutor responded with a grant of use immunity (under which the businessman's compelled statements before the grand jury could not be used against him in any state or federal prosecution). The businessman responded that the grant of use immunity was not sufficient to protect his Fifth Amendment rights.

Should the businessman be compelled to testify?

A: No, because the businessman remains subject to the risk of foreign prosecution.
B: No, because use immunity does not prevent the government from prosecuting the businessman on the bribery scheme.
C: Yes, because the businessman has denied any criminal liability and therefore his Fifth Amendment rights are not at stake.
D: Yes, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights.

The explanation for the answer is:

A is incorrect. While the businessman does face the possibility of foreign prosecution, the U.S. Supreme Court has squarely held that the Fifth Amendment does not protect against the risk of foreign prosecution. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment. He should therefore be compelled to testify.

B is incorrect. It is true that the grant of use immunity does not protect the businessman from being prosecuted. Instead, it protects against the businessman's compelled statements--or any fruits of those statements--being used against him in any domestic prosecution. The U.S. Supreme Court has long held that the Fifth Amendment right is satisfied by a grant of use immunity. The Fifth Amendment does not require a grant of immunity from prosecution ("transactional immunity"). The businessman should therefore be compelled to testify.

C is incorrect. The fact that the businessman has denied liability does not mean that any statement he makes could never tend to incriminate him. Even an innocent person might say something that would tend to incriminate himself, and a tendency to incriminate is all that is required to trigger Fifth Amendment protection. However, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights, he should be compelled to testify.

D is correct. The U.S. Supreme Court has held that if a person is guaranteed, through a grant of use immunity, that neither his statements nor the fruits of those statements can be used against him in a domestic prosecution, then he loses his right to refuse to testify because his statements cannot tend to incriminate him. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment.

Question 1504 - Evidence - Privileges and Other Policy Exclusions

The question was:

A businessman was the target of a grand jury investigation into the alleged bribery of American and foreign officials in connection with an international construction project. The businessman had stated at a press conference that no bribes had been offered or taken and that no laws of any kind had been broken. The grand jury issued a subpoena requiring the businessman to testify before it. The businessman moved to quash the subpoena on the ground that his testimony could tend to incriminate him. The prosecutor responded with a grant of use immunity (under which the businessman's compelled statements before the grand jury could not be used against him in any state or federal prosecution). The businessman responded that the grant of use immunity was not sufficient to protect his Fifth Amendment rights.

Should the businessman be compelled to testify?

A: No, because the businessman remains subject to the risk of foreign prosecution.
B: No, because use immunity does not prevent the government from prosecuting the businessman on the bribery scheme.
C: Yes, because the businessman has denied any criminal liability and therefore his Fifth Amendment rights are not at stake.
D: Yes, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights.

The explanation for the answer is:

A is incorrect. While the businessman does face the possibility of foreign prosecution, the U.S. Supreme Court has squarely held that the Fifth Amendment does not protect against the risk of foreign prosecution. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment. He should therefore be compelled to testify.

B is incorrect. It is true that the grant of use immunity does not protect the businessman from being prosecuted. Instead, it protects against the businessman's compelled statements--or any fruits of those statements--being used against him in any domestic prosecution. The U.S. Supreme Court has long held that the Fifth Amendment right is satisfied by a grant of use immunity. The Fifth Amendment does not require a grant of immunity from prosecution ("transactional immunity"). The businessman should therefore be compelled to testify.

C is incorrect. The fact that the businessman has denied liability does not mean that any statement he makes could never tend to incriminate him. Even an innocent person might say something that would tend to incriminate himself, and a tendency to incriminate is all that is required to trigger Fifth Amendment protection. However, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights, he should be compelled to testify.

D is correct. The U.S. Supreme Court has held that if a person is guaranteed, through a grant of use immunity, that neither his statements nor the fruits of those statements can be used against him in a domestic prosecution, then he loses his right to refuse to testify because his statements cannot tend to incriminate him. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment.

Question 1504 - Evidence - Privileges and Other Policy Exclusions

The question was:

A businessman was the target of a grand jury investigation into the alleged bribery of American and foreign officials in connection with an international construction project. The businessman had stated at a press conference that no bribes had been offered or taken and that no laws of any kind had been broken. The grand jury issued a subpoena requiring the businessman to testify before it. The businessman moved to quash the subpoena on the ground that his testimony could tend to incriminate him. The prosecutor responded with a grant of use immunity (under which the businessman's compelled statements before the grand jury could not be used against him in any state or federal prosecution). The businessman responded that the grant of use immunity was not sufficient to protect his Fifth Amendment rights.

Should the businessman be compelled to testify?

A: No, because the businessman remains subject to the risk of foreign prosecution.
B: No, because use immunity does not prevent the government from prosecuting the businessman on the bribery scheme.
C: Yes, because the businessman has denied any criminal liability and therefore his Fifth Amendment rights are not at stake.
D: Yes, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights.

The explanation for the answer is:

A is incorrect. While the businessman does face the possibility of foreign prosecution, the U.S. Supreme Court has squarely held that the Fifth Amendment does not protect against the risk of foreign prosecution. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment. He should therefore be compelled to testify.

B is incorrect. It is true that the grant of use immunity does not protect the businessman from being prosecuted. Instead, it protects against the businessman's compelled statements--or any fruits of those statements--being used against him in any domestic prosecution. The U.S. Supreme Court has long held that the Fifth Amendment right is satisfied by a grant of use immunity. The Fifth Amendment does not require a grant of immunity from prosecution ("transactional immunity"). The businessman should therefore be compelled to testify.

C is incorrect. The fact that the businessman has denied liability does not mean that any statement he makes could never tend to incriminate him. Even an innocent person might say something that would tend to incriminate himself, and a tendency to incriminate is all that is required to trigger Fifth Amendment protection. However, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights, he should be compelled to testify.

D is correct. The U.S. Supreme Court has held that if a person is guaranteed, through a grant of use immunity, that neither his statements nor the fruits of those statements can be used against him in a domestic prosecution, then he loses his right to refuse to testify because his statements cannot tend to incriminate him. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment.

Question 1507 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for knowing possession of a stolen television. The defendant claims that the television was a gift from a friend, who has disappeared. The defendant seeks to testify that he was present when the friend told her neighbor that the television had been given to the friend by her mother.

Is the defendant's testimony about the friend's statement to the neighbor admissible?

A: No, because the friend's statement is hearsay not within any exception.
B: No, because the defendant has not presented evidence of circumstances that clearly corroborate the statement.
C: Yes, as nonhearsay evidence of the defendant's belief that the friend owned the television.
D: Yes, under the hearsay exception for statements affecting an interest in property.

The explanation for the answer is:

A is incorrect. The statement would be hearsay if it were offered to prove that the friend actually owned the television. But the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay and is admissible.

B is incorrect. There is no requirement that a statement offered to prove its effect on the person who heard it must be corroborated. In this case, the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of whether it was corroborated. Because the statement is not being offered for its truth, it is not hearsay and is admissible.

C is correct. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

D is incorrect. The statement is offered for a nonhearsay purpose, so there is no need to find an applicable hearsay exception. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

Moreover, if an exception were required, the exception for statements affecting an interest in property would not be applicable, because that exception requires that the statement be contained in a document. Here the statement was oral.

Question 1507 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for knowing possession of a stolen television. The defendant claims that the television was a gift from a friend, who has disappeared. The defendant seeks to testify that he was present when the friend told her neighbor that the television had been given to the friend by her mother.

Is the defendant's testimony about the friend's statement to the neighbor admissible?

A: No, because the friend's statement is hearsay not within any exception.
B: No, because the defendant has not presented evidence of circumstances that clearly corroborate the statement.
C: Yes, as nonhearsay evidence of the defendant's belief that the friend owned the television.
D: Yes, under the hearsay exception for statements affecting an interest in property.

The explanation for the answer is:

A is incorrect. The statement would be hearsay if it were offered to prove that the friend actually owned the television. But the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay and is admissible.

B is incorrect. There is no requirement that a statement offered to prove its effect on the person who heard it must be corroborated. In this case, the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of whether it was corroborated. Because the statement is not being offered for its truth, it is not hearsay and is admissible.

C is correct. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

D is incorrect. The statement is offered for a nonhearsay purpose, so there is no need to find an applicable hearsay exception. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

Moreover, if an exception were required, the exception for statements affecting an interest in property would not be applicable, because that exception requires that the statement be contained in a document. Here the statement was oral.

Question 1507 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for knowing possession of a stolen television. The defendant claims that the television was a gift from a friend, who has disappeared. The defendant seeks to testify that he was present when the friend told her neighbor that the television had been given to the friend by her mother.

Is the defendant's testimony about the friend's statement to the neighbor admissible?

A: No, because the friend's statement is hearsay not within any exception.
B: No, because the defendant has not presented evidence of circumstances that clearly corroborate the statement.
C: Yes, as nonhearsay evidence of the defendant's belief that the friend owned the television.
D: Yes, under the hearsay exception for statements affecting an interest in property.

The explanation for the answer is:

A is incorrect. The statement would be hearsay if it were offered to prove that the friend actually owned the television. But the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay and is admissible.

B is incorrect. There is no requirement that a statement offered to prove its effect on the person who heard it must be corroborated. In this case, the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of whether it was corroborated. Because the statement is not being offered for its truth, it is not hearsay and is admissible.

C is correct. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

D is incorrect. The statement is offered for a nonhearsay purpose, so there is no need to find an applicable hearsay exception. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

Moreover, if an exception were required, the exception for statements affecting an interest in property would not be applicable, because that exception requires that the statement be contained in a document. Here the statement was oral.

Question 1507 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is on trial for knowing possession of a stolen television. The defendant claims that the television was a gift from a friend, who has disappeared. The defendant seeks to testify that he was present when the friend told her neighbor that the television had been given to the friend by her mother.

Is the defendant's testimony about the friend's statement to the neighbor admissible?

A: No, because the friend's statement is hearsay not within any exception.
B: No, because the defendant has not presented evidence of circumstances that clearly corroborate the statement.
C: Yes, as nonhearsay evidence of the defendant's belief that the friend owned the television.
D: Yes, under the hearsay exception for statements affecting an interest in property.

The explanation for the answer is:

A is incorrect. The statement would be hearsay if it were offered to prove that the friend actually owned the television. But the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay and is admissible.

B is incorrect. There is no requirement that a statement offered to prove its effect on the person who heard it must be corroborated. In this case, the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of whether it was corroborated. Because the statement is not being offered for its truth, it is not hearsay and is admissible.

C is correct. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

D is incorrect. The statement is offered for a nonhearsay purpose, so there is no need to find an applicable hearsay exception. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

Moreover, if an exception were required, the exception for statements affecting an interest in property would not be applicable, because that exception requires that the statement be contained in a document. Here the statement was oral.

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Is the defendant's testimony about the friend's statement to the neighbor admissible?

A: No, because the friend's statement is hearsay not within any exception.
B: No, because the defendant has not presented evidence of circumstances that clearly corroborate the statement.
C: Yes, as nonhearsay evidence of the defendant's belief that the friend owned the television.
D: Yes, under the hearsay exception for statements affecting an interest in property.

The explanation for the answer is:

A is incorrect. The statement would be hearsay if it were offered to prove that the friend actually owned the television. But the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay and is admissible.

B is incorrect. There is no requirement that a statement offered to prove its effect on the person who heard it must be corroborated. In this case, the defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of whether it was corroborated. Because the statement is not being offered for its truth, it is not hearsay and is admissible.

C is correct. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

D is incorrect. The statement is offered for a nonhearsay purpose, so there is no need to find an applicable hearsay exception. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

Moreover, if an exception were required, the exception for statements affecting an interest in property would not be applicable, because that exception requires that the statement be contained in a document. Here the statement was oral.

Question 1511 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff has brought a civil suit against a defendant for injuries arising out of a fistfight between them. The day after the fight, a police officer talked to the plaintiff, the defendant, and an eyewitness, and made an official police report. At trial, the plaintiff seeks to introduce from the properly authenticated police report a statement attributed to the eyewitness, who is unavailable to testify at trial, that "[the defendant] started the fight."

Should the court admit the statement from the report?

A: No, unless the entire report is introduced.
B: No, because it is hearsay not within any exception.
C: Yes, because it was based on the eyewitness's firsthand knowledge.
D: Yes, because it is an excerpt from a public record offered in a civil case.

The explanation for the answer is:

A is incorrect. The statement is inadmissible hearsay even if the entire report is introduced; the eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty, and no other hearsay exception applies.

B is correct. The eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty. The eyewitness's statement is also not a present sense impression, because it was made the day after the fight, and no other hearsay exception applies.

C is incorrect. The fact that the eyewitness purports to have personal knowledge does not solve the hearsay problem, which arises because the eyewitness might not have told the truth about the event he purportedly saw and is not subject to cross-examination about it. The eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty, and no other hearsay exception applies.

D is incorrect. The eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty, and no other hearsay exception applies.

Question 1511 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff has brought a civil suit against a defendant for injuries arising out of a fistfight between them. The day after the fight, a police officer talked to the plaintiff, the defendant, and an eyewitness, and made an official police report. At trial, the plaintiff seeks to introduce from the properly authenticated police report a statement attributed to the eyewitness, who is unavailable to testify at trial, that "[the defendant] started the fight."

Should the court admit the statement from the report?

A: No, unless the entire report is introduced.
B: No, because it is hearsay not within any exception.
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D is incorrect. The eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty, and no other hearsay exception applies.

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A plaintiff has brought a civil suit against a defendant for injuries arising out of a fistfight between them. The day after the fight, a police officer talked to the plaintiff, the defendant, and an eyewitness, and made an official police report. At trial, the plaintiff seeks to introduce from the properly authenticated police report a statement attributed to the eyewitness, who is unavailable to testify at trial, that "[the defendant] started the fight."

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Should the court admit the statement from the report?

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A is incorrect. The statement is inadmissible hearsay even if the entire report is introduced; the eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty, and no other hearsay exception applies.

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A plaintiff has brought a civil suit against a defendant for injuries arising out of a fistfight between them. The day after the fight, a police officer talked to the plaintiff, the defendant, and an eyewitness, and made an official police report. At trial, the plaintiff seeks to introduce from the properly authenticated police report a statement attributed to the eyewitness, who is unavailable to testify at trial, that "[the defendant] started the fight."

Should the court admit the statement from the report?

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Question 1517 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff has sued a defendant, alleging that she was run over by a speeding car driven by the defendant. The plaintiff was unconscious after her injury and, accompanied by her husband, was brought to the hospital in an ambulance.

At trial, the plaintiff calls an emergency room physician to testify that when the physician asked the plaintiff's husband if he knew what had happened, the husband, who was upset, replied, "I saw my wife get run over two hours ago by a driver who went right through the intersection without looking."

Is the physician's testimony about the husband's statement admissible?

A: No, because it relates an opinion.
B: No, because it is hearsay not within any exception.
C: Yes, as a statement made for purposes of diagnosis or treatment.
D: Yes, as an excited utterance.

The explanation for the answer is:

A is incorrect. An out-of-court statement is not inadmissible simply because it contains an opinion. Statements of opinion by out-of-court declarants may be admitted if they qualify under a hearsay exception and otherwise satisfy the rules governing opinion testimony of in-court witnesses. This statement, however, is hearsay not within any exception and is inadmissible.

B is correct. The statement is offered to prove liability for the accident. As such, it is not a statement made for purposes of diagnosis or treatment. Moreover, the statement was made two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies.

C is incorrect. The husband's statement is making an accusation of fault for the accident. Such a statement is not pertinent to the diagnosis or treatment of the plaintiff, as is required by the hearsay exception. No other hearsay exception applies, so the statement is inadmissible.

D is incorrect. In order for this statement to be admissible as an excited utterance, the declarant must have been under a continuous state of excitement between the time of the event and the time of the statement. Here, the husband made the statement two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies, so the statement is inadmissible.

Question 1517 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff has sued a defendant, alleging that she was run over by a speeding car driven by the defendant. The plaintiff was unconscious after her injury and, accompanied by her husband, was brought to the hospital in an ambulance.

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C is incorrect. The husband's statement is making an accusation of fault for the accident. Such a statement is not pertinent to the diagnosis or treatment of the plaintiff, as is required by the hearsay exception. No other hearsay exception applies, so the statement is inadmissible.

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Is the physician's testimony about the husband's statement admissible?

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B is correct. The statement is offered to prove liability for the accident. As such, it is not a statement made for purposes of diagnosis or treatment. Moreover, the statement was made two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies.

C is incorrect. The husband's statement is making an accusation of fault for the accident. Such a statement is not pertinent to the diagnosis or treatment of the plaintiff, as is required by the hearsay exception. No other hearsay exception applies, so the statement is inadmissible.

D is incorrect. In order for this statement to be admissible as an excited utterance, the declarant must have been under a continuous state of excitement between the time of the event and the time of the statement. Here, the husband made the statement two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies, so the statement is inadmissible.

Question 1517 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff has sued a defendant, alleging that she was run over by a speeding car driven by the defendant. The plaintiff was unconscious after her injury and, accompanied by her husband, was brought to the hospital in an ambulance.

At trial, the plaintiff calls an emergency room physician to testify that when the physician asked the plaintiff's husband if he knew what had happened, the husband, who was upset, replied, "I saw my wife get run over two hours ago by a driver who went right through the intersection without looking."

Is the physician's testimony about the husband's statement admissible?

A: No, because it relates an opinion.
B: No, because it is hearsay not within any exception.
C: Yes, as a statement made for purposes of diagnosis or treatment.
D: Yes, as an excited utterance.

The explanation for the answer is:

A is incorrect. An out-of-court statement is not inadmissible simply because it contains an opinion. Statements of opinion by out-of-court declarants may be admitted if they qualify under a hearsay exception and otherwise satisfy the rules governing opinion testimony of in-court witnesses. This statement, however, is hearsay not within any exception and is inadmissible.

B is correct. The statement is offered to prove liability for the accident. As such, it is not a statement made for purposes of diagnosis or treatment. Moreover, the statement was made two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies.

C is incorrect. The husband's statement is making an accusation of fault for the accident. Such a statement is not pertinent to the diagnosis or treatment of the plaintiff, as is required by the hearsay exception. No other hearsay exception applies, so the statement is inadmissible.

D is incorrect. In order for this statement to be admissible as an excited utterance, the declarant must have been under a continuous state of excitement between the time of the event and the time of the statement. Here, the husband made the statement two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies, so the statement is inadmissible.

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Question 1529 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A plaintiff has sued a defendant for personal injuries the plaintiff suffered when she was bitten as she was trying to feed a rat that was part of the defendant's caged-rat experiment at a science fair. At trial, the plaintiff offers evidence that immediately after the incident the defendant said to her, "I'd like to give you this $100 bill, because I feel so bad about this."

Is the defendant's statement admissible?

A: No, because it is not relevant to the issue of liability.
B: No, because it was an offer of compromise.
C: Yes, as a present sense impression.
D: Yes, as the statement of a party-opponent.

The explanation for the answer is:

A is incorrect. The defendant's statement of contrition and offer of compensation clearly have a tendency to prove that he is liable, and a tendency is all that is required for the evidence to be relevant under Rule 401. The statement is admissible as the statement of a party-opponent.

B is incorrect. The statement would not be excluded under Rule 408, which excludes statements that are made to settle a claim, because that rule applies only when the statement is made as a compromise to a disputed claim. Here, at the time the defendant made the statement, he was not contesting that he was at fault. Therefore, there was no disputed claim, and the statement is admissible as the statement of a party-opponent.

C is incorrect. The exception to the hearsay rule for present sense impressions covers a statement describing or explaining an event or condition made during or immediately after the event or condition. The defendant's statement is just an expression of contrition and not an attempt to explain any event or condition. However, the statement is admissible as the statement of a party-opponent.

D is correct. An out-of-court statement by a party that is relevant to his or her liability is admissible under the exception to the hearsay rule for statements of a party-opponent. One might think that the statement would be excluded because of Rule 408, which excludes statements that are made to settle a claim. But that rule is inapplicable, because it applies only when the statement is made to compromise a disputed claim. Here, at the time the defendant made the statement, he was not contesting that he was at fault. Therefore, there was no disputed claim.

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Question 1537 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

A defendant is charged with aggravated assault. The physical evidence at trial has shown that the victim was hit with a lead pipe in the back of the head and on the forearms and left in an alley. The medical examiner has testified that the injuries to the victim's forearms appear to have been defensive wounds. The victim has testified that he cannot remember who attacked him with the lead pipe. He would further testify that he remembers only that a passerby found him in the alley, and that he told the passerby that the defendant had hit him with the lead pipe; he then lost consciousness. The defendant objects to this proposed testimony, arguing that it is hearsay and that the victim had no personal knowledge of the identity of the perpetrator.

Is the victim's testimony concerning his previous statement to the passerby admissible?

A: No, because the prosecutor has failed to show that it is more likely than not that the victim had personal knowledge of the perpetrator's identity.
B: No, because the victim has no memory of the attack itself and therefore cannot be effectively cross-examined.
C: Yes, because the victim is subject to cross-examination, and there is sufficient showing of personal knowledge.
D: Yes, because it is the victim's own out-of-court statement.

The explanation for the answer is:

A is incorrect. The standard for personal knowledge under Rule 602 is whether a reasonable juror could find that the witness is speaking on the basis of personal knowledge. This standard is referred to as "prima facie" proof and is significantly easier to satisfy than "more likely than not." B is incorrect. The U.S. Supreme Court held in *United States v. Owens* that a declarant-witness is subject to cross-examination within the meaning of the hearsay exception for prior identifications even if the witness lacks all memory of the prior identification. C is correct. The U.S. Supreme Court held in *United States v. Owens* that a declarant-witness is subject to cross-examination within the meaning of the hearsay exception for prior identifications even if the witness lacks all memory of the prior identification. As to personal knowledge, the evidence of defensive wounds is more than sufficient to persuade a reasonable juror that the victim saw his attacker. D is incorrect. The rule against hearsay applies to any out-of-court statement admitted for its truth, including earlier statements of trial witnesses. In this case, however, there is a hearsay exception for prior identifications when the declarant is testifying and subject to cross-examination.

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Question 1544 - Evidence - Presentation of Evidence

The question was:

A man suffered a broken jaw in a fight with a neighbor that took place when they were both spectators at a soccer match.

If the man sues the neighbor for personal injury damages, which of the following actions must the trial court take if requested by the man?

A: Prevent the neighbor's principal eyewitness from testifying, upon a showing that six years ago the witness was convicted of perjury and the conviction has not been the subject of a pardon or annulment.
B: Refuse to let the neighbor cross-examine the man's medical expert on matters not covered on direct examination of the expert.
C: Exclude nonparty eyewitnesses from the courtroom during the testimony of other witnesses.
D: Require the production of a writing used before trial to refresh a witness's memory.

The explanation for the answer is:

A is incorrect. A witness can never be excluded from testifying simply because there is impeachment evidence that could be used against that witness. Under Rule 601, all witnesses are presumed to be competent. The man can use this evidence to impeach the witness when the witness testifies.

B is incorrect. The trial court is not required to prohibit a cross-examiner from asking questions unrelated to the direct examination. Rule 611(b) states that the court "may allow inquiry into additional matters."

C is correct. Rule 615 provides that if a party moves to exclude prospective witnesses before they testify, "the court must order witnesses excluded so they cannot hear other witnesses' testimony."

D is incorrect. Under Rule 612, the trial court has discretion to order a party to produce for the adversary a writing used before trial to refresh the memory of a witness called by the party, but the court is not required to do so.

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Question 1550 - Evidence - Presentation of Evidence

The question was:

A defendant is charged with robbing a bank. The prosecutor has supplied the court with information from accurate sources establishing that the bank is a federally insured institution and that this fact is not subject to reasonable dispute. The prosecutor asks the court to take judicial notice of this fact. The defendant objects.

How should the court proceed?

A: The court must take judicial notice and instruct the jury that it is required to accept the judicially noticed fact as conclusive.
B: The court must take judicial notice and instruct the jury that it may, but is not required to, accept the judicially noticed fact as conclusive.
C: The court may refuse to take judicial notice, because judicial notice may not be taken of essential facts in a criminal case.
D: The court must refuse to take judicial notice, because whether a bank is federally insured would not be generally known within the court's jurisdiction.

The explanation for the answer is:

A is incorrect. In criminal cases, the trial judge may not instruct the jury to accept a judicially noticed fact as conclusive. To do so would impermissibly limit the defendant's right to a jury trial. The court must take judicial notice of a fact if the court is supplied with the necessary information to indicate that the fact is not subject to reasonable dispute. However, Rule 201(f) provides that in a criminal case, "the court must instruct the jury that it may or may not accept the noticed fact as conclusive."

B is correct. The court must take judicial notice of a fact if the court is supplied with the necessary information to indicate that the fact is not subject to reasonable dispute. Rule 201(f) provides that in a criminal case, "the court must instruct the jury that it may or may not accept the noticed fact as conclusive."

C is incorrect. The court must take judicial notice of a fact if the court is supplied with the necessary information to indicate that the fact is not subject to reasonable dispute. Here the facts indicate that the court has been supplied with the necessary information. However, Rule 201(f) provides that in a criminal case, "the court must instruct the jury that it may or may not accept the noticed fact as conclusive."

D is incorrect. Whether a bank is federally insured is a fact that would be generally known within the jurisdiction. Even if it were not, however, under Rule 201(b) judicial notice must be taken if the indisputability of a fact "can be accurately and readily determined from sources whose accuracy cannot be questioned." The facts here so provide. However, Rule 201(f) provides that in a criminal case, "the court must instruct the jury that it may or may not accept the noticed fact as conclusive."

Question 1550 - Evidence - Presentation of Evidence

The question was:

A defendant is charged with robbing a bank. The prosecutor has supplied the court with information from accurate sources establishing that the bank is a federally insured institution and that this fact is not subject to reasonable dispute. The prosecutor asks the court to take judicial notice of this fact. The defendant objects.

How should the court proceed?

A: The court must take judicial notice and instruct the jury that it is required to accept the judicially noticed fact as conclusive.
B: The court must take judicial notice and instruct the jury that it may, but is not required to, accept the judicially noticed fact as conclusive.
C: The court may refuse to take judicial notice, because judicial notice may not be taken of essential facts in a criminal case.
D: The court must refuse to take judicial notice, because whether a bank is federally insured would not be generally known within the court's jurisdiction.

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Question 1551 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

The beneficiary of a decedent's life insurance policy has sued the life insurance company for the proceeds of the policy. At issue is the date when the decedent first experienced the heart problems that led to his death. The decedent's primary care physician has testified at trial that the decedent had a routine checkup on February 15. The physician then identifies a photocopy of a questionnaire completed by the decedent on that date in which the decedent wrote: "Yesterday afternoon I broke into a big sweat and my chest hurt for a while." The beneficiary now offers the photocopy in evidence.

Should the court admit the photocopy?

A: No, because the original questionnaire has not been shown to be unavailable.
B: No, because the statement related to past rather than present symptoms.
C: Yes, as a business record.
D: Yes, as a statement for the purpose of obtaining medical treatment.

The explanation for the answer is:

A is incorrect. This answer refers to the best evidence rule. Under the best evidence rule, a copy of a document is as admissible as the original unless a genuine question is raised about the authenticity of the original or the circumstances make it unfair to admit the copy. No such question or circumstances are present here. The photocopy should be admitted as a statement for the purpose of obtaining medical treatment.

B is incorrect. Statements of medical history can be admitted under the hearsay exception in Rule 803(4) if they are pertinent to diagnosis or treatment, regardless of whether the statements relate to past or present symptoms. The decedent's statement clearly qualifies under this hearsay exception.

C is incorrect. For a recorded statement to be admissible as a business record under Rule 803(6), the business record must be kept in the course of a regularly conducted activity and it must be a regular practice of the business to make the record. Here, the record was made by the decedent, not by the physician, and there is no indication that the decedent regularly prepared such records. However, the photocopy should be admitted as a statement for the purpose of obtaining medical treatment.

D is correct. The decedent's statement of his medical history was made for the purpose of diagnosis and treatment, and it is clearly pertinent to the physician's diagnosis and treatment. Therefore, it is admissible under Rule 803(4).

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Question 1558 - Evidence - Presentation of Evidence

The question was:

A defendant is charged with mail fraud. At trial, the defendant has not taken the witness stand, but he has called a witness who has testified that the defendant has a reputation for honesty. On cross-examination, the prosecutor seeks to ask the witness, "Didn't you hear that two years ago the defendant was arrested for embezzlement?"

Should the court permit the question?

A: No, because the defendant has not testified and therefore has not put his character at issue.
B: No, because the incident was an arrest, not a conviction.
C: Yes, because it seeks to impeach the credibility of the witness.
D: Yes, because the earlier arrest for a crime of dishonesty makes the defendant's guilt of the mail fraud more likely.

The explanation for the answer is:

A is incorrect. When a defendant calls a character witness, the prosecutor is permitted to test the character witness's knowledge of the defendant. The fact that the defendant has not put his character at issue is irrelevant.

B is incorrect. For purposes of testing the witness's knowledge of the defendant's reputation for honesty, the bad act need not have resulted in a conviction. An arrest is sufficient to have an impact on the community's view of the defendant's honesty.

C is correct. The witness has testified that she knows about the defendant's reputation. The prosecutor has the right to test the basis and adequacy of that knowledge, as well as the nature of the community itself. If the witness answers that she had not heard about the arrest, that admission could indicate that she is not very knowledgeable about the defendant's reputation in the community, because such an arrest would likely have a negative effect on that reputation. If the witness says that she had heard about the arrest, a negative inference could be raised about the community itself and its view of what it is to be an honest person.

D is incorrect. The prosecutor is not allowed to use a bad act to show that the defendant has a propensity to commit a similar bad act. Rule 404 limits the use of character evidence to prove conduct in accordance with a character trait.

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Question 1565 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

At a woman's trial for bank robbery, the prosecutor has called a private security guard for the bank who has testified, without objection, that while he was on a coffee break, the woman's brother rushed up to him and said, "Come quickly! My sister is robbing the bank!" The woman now seeks to call a witness to testify that the brother later told the witness, "I got my sister into trouble by telling a security guard that she was robbing the bank, but now I realize I was mistaken." The brother is unavailable to testify.

Is the witness's testimony admissible?

A: No, because the brother will be afforded no opportunity to explain or deny the later statement.
B: No, because the prosecutor will be afforded no opportunity to confront the brother.
C: Yes, because it is substantive proof that the woman did not rob the bank.
D: Yes, but only as an inconsistent statement to impeach the brother's credibility.

The explanation for the answer is:

A is incorrect. What is being offered here is an inconsistent statement of a hearsay declarant. The goal is to impeach that declarant's credibility. The brother's original statement would have been admitted as an excited utterance under the Rule 803(2) hearsay exception. While it is ordinarily true that a witness impeached with a prior inconsistent statement must be given an opportunity to explain or deny the statement, that opportunity is not available when a hearsay declarant is not produced at trial. Rule 806 provides that the ordinary requirement of a "fair opportunity to explain or deny" is not applicable to hearsay declarants who are being impeached with prior inconsistent statements.

B is incorrect. A prosecutor has no right to confrontation; only a criminal defendant has that right. In any case, here it is the prosecutor who offered the statement that the brother made at the time of the crime, so the prosecutor cannot argue a lack of opportunity to confront the brother.

C is incorrect. The statement later made by the brother was an out-of-court statement, and if offered for its truth, it is hearsay. There is no applicable hearsay exception.

D is correct. It is ordinarily true that a witness impeached with a prior inconsistent statement must be given an opportunity to explain or deny the statement. That is not possible, however, when a hearsay declarant is not produced at trial. Therefore Rule 806 provides that the ordinary requirement of a "fair opportunity to explain or deny" is not applicable to hearsay declarants who are being impeached with prior inconsistent statements. The inconsistent statement is probative of the brother's credibility, and Rule 806 permits such impeachment.

Question 1565 - Evidence - Hearsay and Circumstances of Its Admissibility

The question was:

At a woman's trial for bank robbery, the prosecutor has called a private security guard for the bank who has testified, without objection, that while he was on a coffee break, the woman's brother rushed up to him and said, "Come quickly! My sister is robbing the bank!" The woman now seeks to call a witness to testify that the brother later told the witness, "I got my sister into trouble by telling a security guard that she was robbing the bank, but now I realize I was mistaken." The brother is unavailable to testify.

Is the witness's testimony admissible?

A: No, because the brother will be afforded no opportunity to explain or deny the later statement.
B: No, because the prosecutor will be afforded no opportunity to confront the brother.
C: Yes, because it is substantive proof that the woman did not rob the bank.
D: Yes, but only as an inconsistent statement to impeach the brother's credibility.

The explanation for the answer is:

A is incorrect. What is being offered here is an inconsistent statement of a hearsay declarant. The goal is to impeach that declarant's credibility. The brother's original statement would have been admitted as an excited utterance under the Rule 803(2) hearsay exception. While it is ordinarily true that a witness impeached with a prior inconsistent statement must be given an opportunity to explain or deny the statement, that opportunity is not available when a hearsay declarant is not produced at trial. Rule 806 provides that the ordinary requirement of a "fair opportunity to explain or deny" is not applicable to hearsay declarants who are being impeached with prior inconsistent statements.

B is incorrect. A prosecutor has no right to confrontation; only a criminal defendant has that right. In any case, here it is the prosecutor who offered the statement that the brother made at the time of the crime, so the prosecutor cannot argue a lack of opportunity to confront the brother.

C is incorrect. The statement later made by the brother was an out-of-court statement, and if offered for its truth, it is hearsay. There is no applicable hearsay exception.

D is correct. It is ordinarily true that a witness impeached with a prior inconsistent statement must be given an opportunity to explain or deny the statement. That is not possible, however, when a hearsay declarant is not produced at trial. Therefore Rule 806 provides that the ordinary requirement of a "fair opportunity to explain or deny" is not applicable to hearsay declarants who are being impeached with prior inconsistent statements. The inconsistent statement is probative of the brother's credibility, and Rule 806 permits such impeachment.

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Question 1572 - Evidence - Presentation of Evidence

The question was:

A woman's car was set on fire by vandals. When she submitted a claim of loss for the car to her insurance company, the insurance company refused to pay, asserting that the woman's policy had lapsed due to the nonpayment of her premium. The woman sued the insurance company for breach of contract.

At trial, the woman testified that she had, in a timely manner, placed a stamped, properly addressed envelope containing the premium payment in the outgoing mail bin at her office. The woman's secretary then testified that every afternoon at closing time he takes all outgoing mail in the bin to the post office. The insurance company later called its mail clerk to testify that he opens all incoming mail and that he did not receive the woman's premium payment.

The woman and the insurance company have both moved for a directed verdict.

For which party, if either, should the court direct a verdict?

A: For the insurance company, because neither the woman nor her secretary has any personal knowledge that the envelope was mailed.
B: For the insurance company, because the mail clerk's direct testimony negates the woman's circumstantial evidence.
C: For the woman, because there is a presumption that an envelope properly addressed and stamped was received by the addressee.
D: For neither the woman nor the insurance company, because under these circumstances the jury is responsible for determining whether the insurance company received the payment.

The explanation for the answer is:

A is incorrect. Under Rule 301, the rule on presumptions, the woman has presented sufficient evidence that the envelope containing the premium payment was mailed. The rule does not require that the woman have personal knowledge that the envelope reached the post office. The insurance company then has the burden of producing evidence to rebut the presumption that the envelope was received. Because the insurance company has produced such evidence, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment.

B is incorrect. Under Rule 301, once the woman provides evidence that the envelope containing the premium payment was mailed, the insurance company has the burden of producing evidence sufficient to rebut the presumption that the envelope was received. That does not mean, however, that if the insurance company does provide such evidence it is entitled to a directed verdict. Instead, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment.

C is incorrect. It is true that the woman's evidence has triggered the presumption that the envelope containing the premium payment was received. But under Rule 301, the insurance company then has the burden of producing enough evidence to rebut the presumption. Here the insurance company has done so. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for the woman.

D is correct. The woman has presented sufficient evidence to trigger the presumption that her payment was received. The insurance company has presented sufficient evidence to rebut that presumption. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for either the woman or the insurance company.

Question 1572 - Evidence - Presentation of Evidence

The question was:

A woman's car was set on fire by vandals. When she submitted a claim of loss for the car to her insurance company, the insurance company refused to pay, asserting that the woman's policy had lapsed due to the nonpayment of her premium. The woman sued the insurance company for breach of contract.

At trial, the woman testified that she had, in a timely manner, placed a stamped, properly addressed envelope containing the premium payment in the outgoing mail bin at her office. The woman's secretary then testified that every afternoon at closing time he takes all outgoing mail in the bin to the post office. The insurance company later called its mail clerk to testify that he opens all incoming mail and that he did not receive the woman's premium payment.

The woman and the insurance company have both moved for a directed verdict.

For which party, if either, should the court direct a verdict?

A: For the insurance company, because neither the woman nor her secretary has any personal knowledge that the envelope was mailed.
B: For the insurance company, because the mail clerk's direct testimony negates the woman's circumstantial evidence.
C: For the woman, because there is a presumption that an envelope properly addressed and stamped was received by the addressee.
D: For neither the woman nor the insurance company, because under these circumstances the jury is responsible for determining whether the insurance company received the payment.

The explanation for the answer is:

A is incorrect. Under Rule 301, the rule on presumptions, the woman has presented sufficient evidence that the envelope containing the premium payment was mailed. The rule does not require that the woman have personal knowledge that the envelope reached the post office. The insurance company then has the burden of producing evidence to rebut the presumption that the envelope was received. Because the insurance company has produced such evidence, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment.

B is incorrect. Under Rule 301, once the woman provides evidence that the envelope containing the premium payment was mailed, the insurance company has the burden of producing evidence sufficient to rebut the presumption that the envelope was received. That does not mean, however, that if the insurance company does provide such evidence it is entitled to a directed verdict. Instead, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment.

C is incorrect. It is true that the woman's evidence has triggered the presumption that the envelope containing the premium payment was received. But under Rule 301, the insurance company then has the burden of producing enough evidence to rebut the presumption. Here the insurance company has done so. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for the woman.

D is correct. The woman has presented sufficient evidence to trigger the presumption that her payment was received. The insurance company has presented sufficient evidence to rebut that presumption. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for either the woman or the insurance company.

Question 1572 - Evidence - Presentation of Evidence

The question was:

A woman's car was set on fire by vandals. When she submitted a claim of loss for the car to her insurance company, the insurance company refused to pay, asserting that the woman's policy had lapsed due to the nonpayment of her premium. The woman sued the insurance company for breach of contract.

At trial, the woman testified that she had, in a timely manner, placed a stamped, properly addressed envelope containing the premium payment in the outgoing mail bin at her office. The woman's secretary then testified that every afternoon at closing time he takes all outgoing mail in the bin to the post office. The insurance company later called its mail clerk to testify that he opens all incoming mail and that he did not receive the woman's premium payment.

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For which party, if either, should the court direct a verdict?

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The explanation for the answer is:

A is incorrect. Under Rule 301, the rule on presumptions, the woman has presented sufficient evidence that the envelope containing the premium payment was mailed. The rule does not require that the woman have personal knowledge that the envelope reached the post office. The insurance company then has the burden of producing evidence to rebut the presumption that the envelope was received. Because the insurance company has produced such evidence, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment.

B is incorrect. Under Rule 301, once the woman provides evidence that the envelope containing the premium payment was mailed, the insurance company has the burden of producing evidence sufficient to rebut the presumption that the envelope was received. That does not mean, however, that if the insurance company does provide such evidence it is entitled to a directed verdict. Instead, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment.

C is incorrect. It is true that the woman's evidence has triggered the presumption that the envelope containing the premium payment was received. But under Rule 301, the insurance company then has the burden of producing enough evidence to rebut the presumption. Here the insurance company has done so. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for the woman.

D is correct. The woman has presented sufficient evidence to trigger the presumption that her payment was received. The insurance company has presented sufficient evidence to rebut that presumption. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for either the woman or the insurance company.

Question 1572 - Evidence - Presentation of Evidence

The question was:

A woman's car was set on fire by vandals. When she submitted a claim of loss for the car to her insurance company, the insurance company refused to pay, asserting that the woman's policy had lapsed due to the nonpayment of her premium. The woman sued the insurance company for breach of contract.

At trial, the woman testified that she had, in a timely manner, placed a stamped, properly addressed envelope containing the premium payment in the outgoing mail bin at her office. The woman's secretary then testified that every afternoon at closing time he takes all outgoing mail in the bin to the post office. The insurance company later called its mail clerk to testify that he opens all incoming mail and that he did not receive the woman's premium payment.

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D: For neither the woman nor the insurance company, because under these circumstances the jury is responsible for determining whether the insurance company received the payment.

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D is correct. The woman has presented sufficient evidence to trigger the presumption that her payment was received. The insurance company has presented sufficient evidence to rebut that presumption. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for either the woman or the insurance company.

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D is correct. The woman has presented sufficient evidence to trigger the presumption that her payment was received. The insurance company has presented sufficient evidence to rebut that presumption. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for either the woman or the insurance company.

Question 1576 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

At a defendant's trial for mail fraud, the defendant calls his wife to testify that she committed the fraud herself without the defendant's knowledge. On cross-examination, the prosecutor asks the wife, "Isn't it true that you have fled your home several times in fear of your husband?"

Is this question proper?

A: No, because it is leading a witness not shown to be hostile.
B: No, because its probative value is outweighed by the danger of unfair prejudice to the defendant.
C: Yes, because by calling his wife, the defendant has waived his privilege to prevent her from testifying against him.
D: Yes, because it explores the wife's possible motive for testifying falsely.

The explanation for the answer is:

A is incorrect. Leading questions are generally permitted on cross-examination, and the question is proper because it explores the wife's possible motive for testifying falsely.

B is incorrect. This answer applies the wrong balancing test. Under Rule 403, evidence that is probative is admissible unless its probative value is substantially outweighed by the risk of unfair prejudice. That test favors admitting probative evidence. It is not the case, therefore, that the probative value must outweigh the prejudicial effect for the evidence to be admissible. The question is proper because it explores the wife's possible motive for testifying falsely.

C is incorrect. The defendant does not have a privilege to prevent his wife from testifying against him. The privilege against adverse spousal testimony is held by the wife, as the witness, not by the defendant. The question is proper, however, because it explores the wife's possible motive for testifying falsely.

D is correct. A cross-examiner is entitled to question in such a way as to raise inferences about the motive of a witness to testify falsely. Here, the question raises an inference that the wife is in fear of her husband and is therefore taking the blame for her husband's crime.

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Question 1583 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A driver sued her insurance company on an accident insurance policy covering personal injuries to the driver. The insurance company defended on the ground that the driver's injuries were intentionally self-inflicted and therefore excluded from the policy's coverage.

The driver testified at trial that she had inflicted the injuries, as her negligence had caused the crash in which she was injured, but that she had not done so intentionally. She then called as a witness her treating psychiatrist to give his opinion that the driver had been mentally unbalanced, but not self-destructive, at the time of the crash.

Should the court admit the witness's opinion?

A: No, because it is a statement about the driver's credibility.
B: No, because it is an opinion about a mental state that constitutes an element of the defense.
C: No, because the witness did not first state the basis for his opinion.
D: Yes, because it is a helpful opinion by a qualified expert.

The explanation for the answer is:

A is incorrect. The witness is not offering to testify that the driver is telling the truth. (If the witness were to do so, the testimony would be inadmissible, because credibility is a question for the jury to assess.) The witness is offering to testify only to the driver's pertinent mental state, which is permissible in a civil case such as this.

B is incorrect. Rule 704(b), which prohibits an expert from testifying that a criminal defendant had or did not have the requisite mental state to commit the crime charged, is applicable to criminal cases only. There is no absolute bar to such testimony in a civil case such as this.

C is incorrect. Under Rule 705, an expert may state an opinion "without first testifying to the underlying facts or data."

D is correct. The witness's opinion helps the jury understand a relevant mental state. The standard for qualification of an expert is not high; a psychiatrist is qualified to testify to a person's mental state.

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Should the court admit the witness's opinion?

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D: Yes, because it is a helpful opinion by a qualified expert.

The explanation for the answer is:

A is incorrect. The witness is not offering to testify that the driver is telling the truth. (If the witness were to do so, the testimony would be inadmissible, because credibility is a question for the jury to assess.) The witness is offering to testify only to the driver's pertinent mental state, which is permissible in a civil case such as this.

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A: No, because it is a statement about the driver's credibility.
B: No, because it is an opinion about a mental state that constitutes an element of the defense.
C: No, because the witness did not first state the basis for his opinion.
D: Yes, because it is a helpful opinion by a qualified expert.

The explanation for the answer is:

A is incorrect. The witness is not offering to testify that the driver is telling the truth. (If the witness were to do so, the testimony would be inadmissible, because credibility is a question for the jury to assess.) The witness is offering to testify only to the driver's pertinent mental state, which is permissible in a civil case such as this.

B is incorrect. Rule 704(b), which prohibits an expert from testifying that a criminal defendant had or did not have the requisite mental state to commit the crime charged, is applicable to criminal cases only. There is no absolute bar to such testimony in a civil case such as this.

C is incorrect. Under Rule 705, an expert may state an opinion "without first testifying to the underlying facts or data."

D is correct. The witness's opinion helps the jury understand a relevant mental state. The standard for qualification of an expert is not high; a psychiatrist is qualified to testify to a person's mental state.

Question 1583 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A driver sued her insurance company on an accident insurance policy covering personal injuries to the driver. The insurance company defended on the ground that the driver's injuries were intentionally self-inflicted and therefore excluded from the policy's coverage.

The driver testified at trial that she had inflicted the injuries, as her negligence had caused the crash in which she was injured, but that she had not done so intentionally. She then called as a witness her treating psychiatrist to give his opinion that the driver had been mentally unbalanced, but not self-destructive, at the time of the crash.

Should the court admit the witness's opinion?

A: No, because it is a statement about the driver's credibility.
B: No, because it is an opinion about a mental state that constitutes an element of the defense.
C: No, because the witness did not first state the basis for his opinion.
D: Yes, because it is a helpful opinion by a qualified expert.

The explanation for the answer is:

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Question 1592 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff has brought a products liability action against a defendant, the manufacturer of a sport-utility vehicle that the plaintiff's decedent was driving when she was fatally injured in a rollover accident. The plaintiff claims that a design defect in the vehicle caused it to roll over. The defendant claims that the cause of the accident was the decedent's driving at excessive speed during an ice storm. Eyewitnesses to the accident have given contradictory estimates about the vehicle's speed just before the rollover. It is also disputed whether the decedent was killed instantly.

Which of the following items of offered evidence is the court most likely to admit?

A: A videotape offered by the defendant of a test conducted by the defendant showing that a sport-utility vehicle of the same model the decedent was driving did not roll over when driven by a professional driver on a dry test track at the top speed testified to by the eyewitnesses.
B: A videotape offered by the plaintiff of a television news program about sport-utility vehicles that includes footage of accident scenes in which the vehicles had rolled over.
C: Evidence offered by the defendant that the decedent had received two citations for speeding in the previous three years.
D: Photographs taken at the accident scene and during the autopsy that would help the plaintiff's medical expert explain to the jury why she concluded that the decedent did not die instantly.

The explanation for the answer is:

A is incorrect. In order for product demonstrations to be admissible under Rule 403 to prove how an accident happened, the conditions must be substantially similar to the conditions at the time in question. This test was conducted on a dry track with a professional driver. Even if the court admits this evidence in its discretion, the question calls for the evidence that the court is most likely to admit. This evidence is not it.

B is incorrect. This evidence is not very probative, because it shows sport-utility vehicles in general, not necessarily the model used by the decedent, and there is no indication that the conditions in the accident scenes were in any way similar to the conditions in question. Under Rule 403, the probative value of this evidence is likely to be substantially outweighed by its prejudicial effect and risk of jury confusion. Even if the court admits this evidence in its discretion, the question calls for the evidence that the court is most likely to admit. This evidence is not it.

C is incorrect. This evidence would not be admissible, because it is attempting to show that the decedent had a propensity to drive too fast, to create the inference that the decedent was driving too fast at the time in question. Under Rule 404, proof of character in order to show conduct consistent with that character is inadmissible in civil cases.

D is correct. This evidence is most likely to be admitted. If these photographs are offered to illustrate the expert's testimony, the jury can be instructed to use the evidence only for that purpose. Moreover, this evidence is not as prejudicial or potentially confusing to the jury as the evidence in options (A) and (B), while the evidence in option (C) is inadmissible.

Question 1592 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff has brought a products liability action against a defendant, the manufacturer of a sport-utility vehicle that the plaintiff's decedent was driving when she was fatally injured in a rollover accident. The plaintiff claims that a design defect in the vehicle caused it to roll over. The defendant claims that the cause of the accident was the decedent's driving at excessive speed during an ice storm. Eyewitnesses to the accident have given contradictory estimates about the vehicle's speed just before the rollover. It is also disputed whether the decedent was killed instantly.

Which of the following items of offered evidence is the court most likely to admit?

A: A videotape offered by the defendant of a test conducted by the defendant showing that a sport-utility vehicle of the same model the decedent was driving did not roll over when driven by a professional driver on a dry test track at the top speed testified to by the eyewitnesses.
B: A videotape offered by the plaintiff of a television news program about sport-utility vehicles that includes footage of accident scenes in which the vehicles had rolled over.
C: Evidence offered by the defendant that the decedent had received two citations for speeding in the previous three years.
D: Photographs taken at the accident scene and during the autopsy that would help the plaintiff's medical expert explain to the jury why she concluded that the decedent did not die instantly.

The explanation for the answer is:

A is incorrect. In order for product demonstrations to be admissible under Rule 403 to prove how an accident happened, the conditions must be substantially similar to the conditions at the time in question. This test was conducted on a dry track with a professional driver. Even if the court admits this evidence in its discretion, the question calls for the evidence that the court is most likely to admit. This evidence is not it.

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C is incorrect. This evidence would not be admissible, because it is attempting to show that the decedent had a propensity to drive too fast, to create the inference that the decedent was driving too fast at the time in question. Under Rule 404, proof of character in order to show conduct consistent with that character is inadmissible in civil cases.

D is correct. This evidence is most likely to be admitted. If these photographs are offered to illustrate the expert's testimony, the jury can be instructed to use the evidence only for that purpose. Moreover, this evidence is not as prejudicial or potentially confusing to the jury as the evidence in options (A) and (B), while the evidence in option (C) is inadmissible.

Question 1592 - Evidence - Relevancy and Excluding Relevant Evidence

The question was:

A plaintiff has brought a products liability action against a defendant, the manufacturer of a sport-utility vehicle that the plaintiff's decedent was driving when she was fatally injured in a rollover accident. The plaintiff claims that a design defect in the vehicle caused it to roll over. The defendant claims that the cause of the accident was the decedent's driving at excessive speed during an ice storm. Eyewitnesses to the accident have given contradictory estimates about the vehicle's speed just before the rollover. It is also disputed whether the decedent was killed instantly.

Which of the following items of offered evidence is the court most likely to admit?

A: A videotape offered by the defendant of a test conducted by the defendant showing that a sport-utility vehicle of the same model the decedent was driving did not roll over when driven by a professional driver on a dry test track at the top speed testified to by the eyewitnesses.
B: A videotape offered by the plaintiff of a television news program about sport-utility vehicles that includes footage of accident scenes in which the vehicles had rolled over.
C: Evidence offered by the defendant that the decedent had received two citations for speeding in the previous three years.
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D is correct. This evidence is most likely to be admitted. If these photographs are offered to illustrate the expert's testimony, the jury can be instructed to use the evidence only for that purpose. Moreover, this evidence is not as prejudicial or potentially confusing to the jury as the evidence in options (A) and (B), while the evidence in option (C) is inadmissible.

Question 1596 - Evidence - Privileges and Other Policy Exclusions

The question was:

At the start of the trial of a defendant and a codefendant for robbery, the codefendant and her attorney offered to give the prosecutor information about facts that would strengthen the prosecutor's case against the defendant in exchange for leniency toward the codefendant. The prosecutor refused the offer. Shortly thereafter, the codefendant committed suicide.

During the defendant's trial, the prosecutor called the codefendant's attorney and asked him to relate the information that the codefendant had revealed to the attorney.

Is the attorney's testimony admissible?

A: No, because the codefendant's communications are protected by the attorney-client privilege.
B: No, because the plea discussion was initiated by the codefendant rather than by the prosecutor.
C: Yes, because the codefendant intended to disclose the information.
D: Yes, because the information the codefendant gave to her attorney revealing her knowledge of the crime would be a statement against the codefendant's penal interest.

The explanation for the answer is:

A is correct. The prosecutor is asking for confidential communications between the codefendant and her attorney, which is privileged information. If the codefendant had actually provided information to the prosecutor, the privilege would have been waived as to any communications previously made to her attorney. However, the codefendant did not disclose any confidential communications.

B is incorrect. The prosecutor is asking for confidential communications between the codefendant and her attorney, which is privileged information, and it makes no difference who initiated the plea discussion. The question is whether the codefendant waived the privilege by offering information to the prosecutor, which she did not. Because the codefendant did not actually disclose any confidential communications to the prosecutor, there was no waiver.

C is incorrect. The prosecutor is asking for confidential communications between the codefendant and her attorney, which is privileged information. If the codefendant had actually provided information to the prosecutor, the privilege would have been waived as to any communications previously made to her attorney. However, the codefendant did not disclose any confidential communications, and whether she intended to disclose the information is irrelevant.

D is incorrect. A declaration against interest is one that tends to expose the declarant to criminal liability. Any statement to the attorney could not have subjected the codefendant to a risk of criminal liability, because the statement was privileged.

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C is incorrect. The prosecutor is asking for confidential communications between the codefendant and her attorney, which is privileged information. If the codefendant had actually provided information to the prosecutor, the privilege would have been waived as to any communications previously made to her attorney. However, the codefendant did not disclose any confidential communications, and whether she intended to disclose the information is irrelevant.

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