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Preparation of the Multistate Bar Examination: One Drafting Committee’s Perspective

by John W. Reed

One who wants to know how the Multistate Bar Examination is created should begin by learning how the drafting committees work. My assignment is to describe the work of one of those committees: the Evidence Committee. Though there are differences among the six committees, they mostly are ones of style, and to learn how to operate in the evidence group is to understand the process generally.

I. Committee Personnel

The Evidence Committee consists of five members. One, a small-town general practitioner, is a former state bar examiner. A second is the senior litigation partner in a large urban law firm; he also is a former United States Attorney and an adjunct professor of evidence at a state university law school. The remaining three of us are evidence teachers, one of whom also tries cases from time to time.

Technical competence is assumed. Creativity and wisdom are hoped for.

II. Subject Matters

A. Content: Evidence—An Illustration

The outline from which we work—the specifications of our portion of the MBE—is as follows:

Evidence

NOTE: For the evidence questions the Federal Rules of Evidence are deemed to govern. In case of conflict between general evidence law and the Federal Rules, the Federal Rules of Evidence will control.

I. Presentation of evidence

A. Introduction of evidence
   1. Requirement of personal knowledge
   2. Leading questions
   3. Refreshing recollection
   4. Objections and offers of proof
   5. Lay opinions and expert witnesses
   6. Competency of witnesses
   7. Judicial notice
   8. Roles of judge and jury
   9. Limited admissibility
B. "Burden of proof"
   1. Burden of producing evidence
   2. Burden of persuasion
   3. Presumptions
C. Cross-examination: right, form, and scope
D. Impeachment and rehabilitation
   1. Prior inconsistent statements
   2. Bias and interest
   3. Conviction of crime
   4. Specific instances of conduct
   5. Character for truthfulness
   6. Ability to observe, remember, or relate accurately
   7. Rehabilitation of impeached witnesses

II. Privileges and other policy exclusions
   A. Husband-wife
   B. Attorney-client
   C. Physician-patient
   D. Self-incrimination
   E. Insurance coverage
   F. Remedial measures
   G. Compromise and plea negotiations
   H. Payment of medical expenses
   I. Other privileges

III. Relevancy and reasons for excluding relevant evidence
   A. Probative value
      1. Definition of relevancy
      2. Exclusion for unfair prejudice, confusion, or waste of time
   B. Character: similar happenings; habit
      1. Other crimes, wrongs, or acts
      2. Similar happenings and transactions
      3. Methods of proving character
      4. Habit and routine practice
   C. Experimental and scientific evidence
   D. Real and demonstrative evidence

IV. Writings and other communications
   A. Authentication and identification
   B. Original document rule
   C. Completeness rule

V. Hearsay and circumstances of its admissibility
   A. Definition of hearsay
   B. Admissions of a party-opponent
   C. Former testimony
   D. Statements against interest
   E. Dying declarations
   F. Present sense impressions and excited utterances
   G. Statements of mental, emotional, or physical condition

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H. Business records
   I. Public records and reports
   J. Past recollection recorded
   K. Other exceptions to the hearsay rule

(The approximate proportions of questions in the several areas are 15% in I, A through I, C; 15% in I, D; 10% in II; 22.5% in III; 7.5% in IV; and 30% in V.)

The outline is recognizable by anyone familiar with the tables of contents of standard evidence texts and of the Federal Rules of Evidence. We modify it and refine it from time to time. The terminology of its various entries is current, in the sense that it employs the vocabulary used by this generation of teachers and their students. Sometimes older state bar examiners have trouble with some of our questions because terminology differs slightly from that in use at an earlier time. For example, you will look in vain at this list for the phrase res gestae. Instead, in keeping with current teaching and the
Federal Rules of Evidence, we use "present sense impressions and excited utterances" [V(F)]. You will not find "best evidence rule," but rather "original document rule" [IV(B)], as in the Federal Rules of Evidence. "Materiality" does not appear, because the Federal Rules collapsed it into the concept of relevancy (III). Students coming out of law schools today will have no trouble with these things, even though some bar examiners from earlier law school generations may say, "Where's the res gestae?", as in "Where's the beef?" It's not there.

B. Allocation
The assignment of percentages of questions in each area of a subject is a matter of judgment as to what is important and what is testable. We have revised the percentages slightly, in response to thoughtful studies and audits of the examination. The current allocations appear at the end of the outline above.

C. Governing Law
The Federal Rules of Evidence are controlling in any matter as to which they are applicable. With those rules governing trials in the federal courts and with approximately half the states having adopted comparable rules, the choice of the FRE as governing is almost inevitable.

The federal rules are not comprehensive, however; that is to say, some important matters are covered only generally and others not at all, for example, privileges and impeachment for bias and interest. On such matters, we examine under general principles.

We do not seek out differences between the federal rules and traditional common law rules on which to test, although inevitably those differences arise. State examiners are sometimes upset when the correct answer to a question flies in the face of local practice. We see no way to prevent that from happening on occasion; and even then our answer will be correct in the federal courts of that same state.

The existence of a generally applicable "code" makes the Evidence Committee's task easier than that of some other committees because of the relative simplicity and certainty of source material.

III. Drafting Process

A. Assignments
Some weeks before each semi-annual meeting I ask the Committee members to draft at least ten questions, with special attention to subject matter areas in which our pool of questions is low. Earlier in our history other writers were employed to enlarge our supply of questions and to create a greater variety of fact situations. The drafting process is fairly technical, however, and, lacking experience, the occasional, retained item-writers proved not very helpful. All writing is now done by members of the Committee.

B. Source of Ideas
The subject matters and factual settings of our questions come out of our experience—for us who are teachers, out of problems we deal with in our classes; for us who are practitioners, out of cases we have encountered. All of us use advance sheets, evidence newsletters, and the like, but real cases are dangerous sources of questions. Being actual cases, they deal with areas in current controversy, as to which an objective question, as distinguished from a discussion question, may not be fair. Moreover, life often is stranger than fiction, and fictitious cases are clearer, cleaner, and simpler. Subject matter balance is easier to achieve with hypothetical questions than with a reformulated case opinion that happens to come to one’s attention.
C. Special Problems
Undoubtedly there are aspects of such subject matter included in the MBE that pose special difficulties for the drafting committees. There are three that face the Evidence Committee.

First, it is difficult for us to create questions in areas where a judge possesses considerable discretion. The correct answer must be an option that says, in effect, that the judge can do what he or she wants to do. Among other faults, such a question tends to telegraph the answer sought.

Second, issues requiring a large factual context do not work well in the short-question setting of the MBE. For example, it is hard to say whether relevant evidence should be excluded "because it is more prejudicial than probative" without knowing the context, as in the use of a prior conviction to impeach an accused who takes the stand. The rule states that a felony not involving dishonesty or false statement is admissible only if its probative value on credibility outweighs its prejudicial effect to the defendant. That issue cannot be set up without stating many facts, for which there is not room in this type of examination.

Third, problems are posed by variations in local terminology. Consider the problem of a judge who, having let in evidence improperly for one party, is faced with the offer of similar evidence from the other party. One jurisdiction may say, the judge "opened the door." Another, this is "fighting fire with fire." If we employ the latter phrase, the bar examiners of the former state complain, "What is this 'fighting fire with fire'? We've never heard of that." Our committee seeks to avoid quirks in terminology. But much avoidance may narrow the scope of the examination severely.

IV. Committee Discussion

A. Ordering of Priorities
The Committee meets one weekend each spring and fall. Before each meeting our consultant distributes to us a book of the questions to be considered. The questions are divided into two groups. First are items ready for a second, or later, review. (No question is approved without at least two discussions by the Committee.) Second are the new items prepared by the Committee members. Within each section of the book, individual items are presented in the order of need. If, for example, we have a shortage of items under "cross-examination" and an adequate supply of hearsay questions, the cross-examination items will engage our attention first, and the hearsay questions will be discussed only if time permits.

B. Concerns Addressed
As we evaluate and refine the drafted questions, we give attention to many concerns, including clarity and simplicity, consistency of format, correctness of key, attractiveness of other options, difficulty level, and scope off the problem.

Clarity and simplicity. Questions are better, fairer, and more revealing of the quality of the applicant if they are clear and if they are simple. Shorter is better than longer. Facts that are not taken into account are usually inappropriate; if they are unnecessary to the question they should be deleted. Occasionally, we include "red herring" facts to test discrimination in the application of various rules and principles; but in a negligence case there is no need to spell out that the collision occurred at Twelfth and Main streets at 4:00 o'clock on a Friday afternoon. A relaxed narrative may be appropriate in essay questions but not in this tight format.

Consistency of format. We try to be consistent and helpful in the format we use. Simple, predictable format probably is fairer to the applicant and produces a better result. For example, we state the nature of the controversy and the description of
the case in the past tense, and then switch to the present tense when we pose the precise question—the party “offers,” the judge “is asked,” or whatever—so that the applicant has his attention directed quickly to the intended issue. We identify people with simple names that are easy to keep track of in the pressured examination setting. Because our subject matter is in a litigation context, most of our characters are plaintiffs, defendants, and witnesses; and we give plaintiffs names beginning with P (for example, Peters), defendants with D (Dunn), and witnesses with W (Wells).

Usually the four options consist of two admissibles and two inadmissibles, in that order. Occasionally the options are all admissibles where we want to be sure the applicant understands that we seek not the outcome but the best reason for that outcome. Rarely, will there be a three and one where the correct answer is one of the three. Almost never is there a three and one where the correct answer is the one, because it tends to give the answer away.

These various points are mechanical, but they have much to do with the quality and utility of the questions, and we pay attention to them.

Correctness of the key. It should go without saying that we are concerned about the accuracy of the key. We screen for that quality repeatedly, on every question, not only among ourselves but in response to the several reviews provided by others in the long process. The standard is that the key is to be the best of four options. Usually that means that we provide a flatly correct answer. But in this uncertain world there are some issues as to which there is no indisputably correct answer. When we test in a “fuzzy” area, we make sure that the key is, in any event, clearly the best of the four options.

Attractiveness of other options. Unless each of the four options is plausibly correct in some degree, the question serves little purpose. Accordingly, we earnestly seek attractive options that are wrong. Usually we succeed; occasionally we fail.

One of our satisfactory questions was part of a series in which one Miller was tried for armed robbery of a bank. (As a defendant, he should have had a name beginning with a D!) After a question was posed involving Miller’s testifying in his own behalf, the following question was posed:

134. On cross-examination of Miller, the prosecutor asks Miller whether he was convicted the previous year of tax fraud. The question is
(A) proper to show that Miller is inclined to lie
(B) proper to show that Miller is inclined to steal money
(C) improper, because the conviction has insufficient similarity to the crime charged
(D) improper, because the probative value of the evidence is outweighed by the danger of unfair prejudice

After the examination had been administered, our consultant provided us with the following statistical assessment:

In the box “Base N” the number 1050 means that 1050 examinations are represented in the random, statistically valid sample of the applicants who answered the particular question. A, B, C, and D represent the four choices of items, with the asterisk in A indicating the statistical performance, that is a good question: slightly more than half got it right, and a substantial number thought each of the other options was a reasonable answer in some degree.

We do not always do as well in devising attractive “distracters,” as the following illustrates:

44. In a will case, Paula seeks to prove her relationship to the testator Terrence by a statement in a deed of gift from Terrence, “I transfer to my niece Paula. . . .” The deed was recorded pursuant
to statute in the office of the county recorder and is kept there. Paula calls Recorder, who authenticates an enlarged print photocopy of the deed. The photocopy was made from the microfilm records kept in Recorder’s office pursuant to statute. The photocopy is

(A) admissible as a record of a document affecting an interest in property
(B) admissible as recorded recollection
(C) inadmissible as hearsay not within any recognized exception
(D) inadmissible as not the best evidence

The statistical analysis of this question was as follows:

Of the 1050, 839, or 80 percent, elected the correct option—an “easy” question, but not intolerably so. The problem is that option C drew not a single person. We might as well have had a three-option question. (Incidentally, I am not sure why C drew no one to me, yet 47 people picked B. In any event, question 44 is one in which a distracter simply didn’t work.)

The task of creating appealing but incorrect options is probably the most difficult part of the drafting process. In my own case, about half the questions that I draft I discard because of inability to create four, or sometimes even three, options. It is relatively simple to produce the correct answer and one attractive incorrect answer; but if there are not other seductive options the question must go to the scrap heap.

Difficulty level. In general, the Multistate Bar Examination is designed to distinguish the competent from the incompetent. It is not designed to distinguish degrees of excellence among the competent. That has obvious implications for the intended difficulty level of the questions.

In the armed robbery case mentioned above, the preceding question read as follows:

133. Miller is tried for armed robbery of the First Bank of City.

Miller testified on direct examination that he had never been in the First Bank of City. 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 Miller 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 statistical analysis of that question is as follows:

Only 327—31 percent—answered correctly. Such a question may be useful in separating the superior student from the average student, but it poorly serves the process of determining who is incompetent.

The statistical analysis of question 134, discussed earlier, is much better. Over half got it right.

One that was much too easy is the following:

171 Drew was tried for the July 21 murder of Victor.

Drew called Wilson to testify to alibi. On cross-examination of Wilson, the prosecutor asked, “Isn’t it a fact that you are Drew’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
Its statistical analysis:

<table>
<thead>
<tr>
<th>1050</th>
<th>1014</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.98</td>
<td>6.02</td>
</tr>
</tbody>
</table>

Of the 1050 sample 1014 answered correctly. Such a question serves almost no purpose on the examination unless we are trying to screen out only the bottom three percent of the applicants. It was a bad question.

Predicting the degree of difficulty is itself difficult, and it seems not to become easier with experience. We do the best we can, but we still err from time to time.

Discrimination. Related to but different from the difficulty level is the degree to which a question discriminates among applicants of varying abilities. Ideally, the correct answer to a given item ought to be elected by the applicants of high ability as measured by their overall performance on the examination, and the incorrect answers ought to be chosen by people of lesser ability as measured by the same standard. Two questions illustrate these measurements, the first a question that performed poorly by this measure, and the second a question that discriminated well.

26. Park sued Dent for breach of an oral contract which Dent denied making. Weston testified that he heard Dent make the contract on July 7. Dent discredited Weston, and Park offers evidence of Weston's good reputation for truthfulness. The rehabilitation is most likely to be permitted if the discrediting evidence by Dent was testimony that

(A) Weston had been promoting highly speculative stocks
(B) Weston had been Park's college roommate
(C) Weston had attended a school for mentally retarded children
(D) Weston had been out of town the whole week of July 4-10

The statistical analysis:

In the "M" boxes under A, B, C, and D there are numbers that have to do with the quality of the individuals who elected each of those options, measured by their performance on the entire examination. The higher the number, the higher the quality. Ideally, the individuals having the correct answer should have also the highest M number. In fact, however, those who chose erroneous options B and A were of higher quality than the 51 percent who chose the correct answer. Even the relatively unattractive C option drew people nearly as good. The item discriminated in a way that is contrary to what is desired and expected.

A question that discriminated well is question 134, set forth earlier, for which I reproduce again the statistical analysis:

The 56 percent who answered correctly had a high 14.3 ranking, and the people who got it wrong were 11.0, 10.4, and 11.8. Those figures indicate useful discrimination. The good people got it right and fewer good people got it wrong.

Scope of Questions. We seek to examine on points of evidence law that a practitioner ought generally to know, not on points that are narrow and technical. For example, in a question dealing with the exception for recorded recollection (FRE 803(5)), it is proper to test the applicant's understanding of the propositions that the declarant must have had firsthand knowledge of the matter recorded, that he must now have insufficient recollection to enable him to testify fully and accurately about the matter, and that there must be a showing that the memorandum or record was made or adopted by him when the matter was fresh in his memory and that it reflects that knowledge correctly. Any combination of facts that raises those issues is surely an appropriate vehicle for testing. The rule goes on to provide, however, that the memorandum may be read into evidence, but may not itself be received as an exhibit. In our judgment, that "fine
detail" is an inappropriate subject for testing on an examination of this kind.

Another illustration of a technical point that is problematic for testing is contained in FRE 609(a), the familiar rule governing admissibility for impeachment purposes of a witness's conviction of a crime. It is appropriate to test for the applicant's understanding of whether, for example, a person's conviction for aggravated assault can be used to impeach him when he is a witness in a personal injury case, or in his own defense when tried for armed robbery. The rule, however, deals not only with what convictions may be used to impeach but also with the time at which proof must be made: during cross-examination. The procedural point is not unimportant, but the question would be unfair if it appeared to be testing for an understanding of what kind of crimes can be used to impeach when in fact it off-handedly mentions that the evidence is offered at a time other than during cross-examination of that witness. If the procedural point is important enough to be tested, then it should appear in a question where one of the keys calls attention to the timing of the proof.

In short, we seek to examine for propositions that have broad application and are generally understood to be basic information in the field, and to present the issues fairly.

C. Directions to Consultant

When we conclude our discussion of a question at a Committee meeting, we ask the ACT consultant to incorporate the changes we have made, and we choose one of several dispositions. We may direct that it be placed in the pool of items approved for use. We may ask that it be presented to us again at the next meeting, in amended form. Occasionally the changes needed cannot be devised in the Committee session, and the item is returned to the person who drafted it or, possibly, assigned to another member of the Committee to revise it completely and resubmit it as virtually a new item. Occasionally we determine that a question is unsatisfactory and unsalvageable as well, to be discarded.

We operate under a two-meeting rule. No question goes into a form of the examination until we have had a chance to think about it and discuss it on two occasions six months apart.

D. Evaluation of the Most Recent Examination Administered

At each meeting we review the statistical analyses of the most recent examination, giving attention to the kinds of questions that worked well and the kind that did not. The Director of Testing and our consultants provide us with comparative information from the other committees as to difficulty levels, questions that performed poorly, and the like. We reconsider our drafting and review process in the light of those analyses. In short, there is constant study and self-criticism that contributes to the maintaining of the highest possible quality in the end product.

V. Committee's Role in Assembly Process

The several committees vary in the procedures used to choose from the pool of available items the particular questions on a given form of the examination. One committee chairman, for example, assembles the form of the test himself. He maintains a complete file of committee items, selects materials from the file, and chooses the questions to be included. The Evidence Committee, however, assigns that task to the ACT consultants. They employ the outline, with its specifications as to bal-
ance among the various portions, to choose a proper balance of subject matters. In addition, they apply guidelines to achieve an array of easy, average, and difficult questions, based on our ratings of expected difficulty level.

The thirty evidence questions chosen according to these design specifications are submitted to us as "committee copy." Each Committee member reviews the questions editorially and answers all the questions without the benefit of a list of correct answers. The answer sheets and any editorial comments are sent to the consultant, who assembles them and reports the results to me. I then confer with one or more of the other members of the Committee to discuss the editorial suggestions and, of course, to determine what has gone wrong if there have been wrong answers to a question. Occasionally the problem is carelessness, but more often it is a problem in the wording of the question. We take this opportunity to revise questions still further—and occasionally to discard a question and direct that another be drawn from the pool.

In short, the Evidence Committee's role in the assembly process is one of advice, consent, and review, rather than initial construction.

The proposed examination is submitted to the bar examiners of those states that request a preview. Their comments, relayed to us, are frequently useful, pointing out an ambiguity here, a confusing order of presentation of the facts there, a phrase clear to us but obscure to others because of regional language differences, and the like. Sometimes they challenge us on the applicable law and lead us to conclude that there is enough doubt or confusion that the matter is not suitable for objective testing. Often, the responses from the bar examiners simply reflect local idiosyncrasies. To those we say regretfully that the examination is national and that we have no option but to test under the Federal Rules of Evidence, which now have been adopted by about half the states as well. We say also that the current generation of students, by and large, is being taught those Federal Rules even in states which have not adopted them. Accordingly, the matter of the governing law—clearly stated in the MBE descriptive materials and in the directions to the examination itself—poses no problem for the applicants.

Wherever we can, we make changes to accommodate the bar examiners' suggestions. Their review is one more step in the refining process.

Despite the care with which the drafting, reviewing and revising take place, a question may prove to have a major flaw, revealed by a computer analysis of the examination as soon as it is given. Data of the kind we saw under the questions above may suggest, for example, that almost all the applicants are choosing an option other than the key, or that the quality of the applicants choosing a wrong answer is extraordinarily higher than the quality of those choosing the intended answer. Thus alerted, we reexamine the question with great care to try to determine the cause. If we conclude that the question is fundamentally flawed, we have the option of directing that it be removed from the scoring process or that two of the options be scored as correct rather than only the one intended. I am glad to report that these after-the-fact revisions are rarely needed; but they stand as a final guarantee of accuracy and fairness.

Service on the Evidence Committee is, for me, enjoyable and professionally profitable. It is an opportunity to work with extraordinarily able lawyers who have a deep sense of responsibility. I learn from it and from them. I hope, and believe, that our work contributes to the creation of an effective and fair examination as an entrance requirement for the profession.