

**JULY 1997 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Evidence*

**QUESTION**

Dave has been charged with one count of selling cocaine on May 30 of this year. The key government witness against Dave is Carl Smith. The government's theory is that Dave and Carl together sold substantial quantities of illegal drugs, including the particular sale which is the subject of this indictment. Carl has pleaded guilty to a lesser offense and has agreed to testify against Dave. At the jury trial, Carl was called as the first witness and the following questions were asked and answers given:

[Direct examination of Carl]

Q: What is your name?

A: Carl Smith.

Q: Where do you live?

A: 1117 North University, here in town.

Q: Are you acquainted with the defendant Dave?

[1] A: Yes, we have been selling cocaine together for years.

Q: Directing your attention to the evening of May 30 of this year at approximately 7:00 p.m., where were you?

[2] A: I got home at about 7:00 that night. When I got there, I found a message on my answering machine from Dave.

[3] Q: What message had Dave left you?

A: He said that he had a guy who wanted a kilo of cocaine and that we were to meet him at the motel on the edge of town later that night. So I called Dave back and we worked out the details about where the two of us were going to meet before going to the motel.

Q: What happened then?

A: We met up together and took the coke to the motel. I went in and made the sale while Dave waited outside in the car.

[Carl proceeded to testify in detail about the sale of cocaine.]

Q: Now, you were arrested the next day for the sale of that cocaine, weren't you?

A: Yes.

[4] Q: At that point, after you were asked to cooperate with the government, did you plead guilty to possession of cocaine and agree to testify truthfully at this trial?

A: Yes.

Q: Did you testify before the grand jury in this matter?

A: Yes, I did.

[5] Q: Was your testimony there the same as your testimony here today?

A: Yes, it was. I told them the truth just like I'm telling it today.

[Cross examination of Carl]

[6] Q: Now Mr. Smith, you are the same Carl Smith who was convicted of criminal assault in 1994, aren't you?

A: Yes.

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- Q: And you've been on probation for that charge since 1994, haven't you?  
A: Yes.  
Q: One of the conditions of your probation was that you not commit any criminal offense, wasn't it?  
A: Yes.  
[7] Q: And you told your probation officer last week that you haven't done anything illegal since 1994, didn't you?  
A: Yes.  
Q: And that was a lie, wasn't it?  
A: Yes.

At each of the seven indicated points, what objection or objections could reasonably have been made, and how should the court have ruled? Discuss.

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**ANSWER A**

I. Non-responsive: character evidence

The initial problem with Carl's (C's) answer is that it is non-responsive. A witness is supposed to answer the question asked, not volunteer additional information not asked for. The reason for this rule is to allow the other side time to object to improper questions, so that inadmissible evidence does not inadvertently get before the jury. This objection should be sustained.

However, even after the objection is sustained, the prosecutor would be given a chance to ask the question calling for the answer given. So the second question is whether a properly worded question calling for C's answer would be ok.

Rule 402 provides that all relevant evidence is admissible unless a specific rule keeps it out; all irrelevant evidence is inadmissible. Rule 401 states that evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less likely than without the evidence. Here, the government's theory is that Dave (D) and C sold drugs, including the charged sale at issue. C's answer, that he and D had sold cocaine together for years, is relevant to show that C was familiar with D, and that by selling drugs together, C was in a position to know of D's involvement in the current sale.

Rule 404 provides that character evidence is not permitted to show action in conformity with that character on a particular occasion. Thus, the statement can not be used to show that since D has sold cocaine in the past, he probably sold it this time. Rule 404(b) would allow evidence to show other things than conformity, such as motive, or a common plan. Arguably, many past sales could qualify as a common plan, making it more likely D committed this sale. However, no details were given on the unique method of these sales, so the probative value is very low.

Rule 403 makes the otherwise relevant evidence inadmissible if its probative value is substantially outweighed by unfair prejudice, confusion of the issues or delay, waste of time, etc. Here the evidence is extremely prejudicial, and has low probative value for any permissible purpose. The evidence should be excluded.

II. Non-responsive personal knowledge

Again, C is volunteering information not asked for by the prosecutor. The non-responsive objection should be sustained. C also indicated that the message on his machine was from D. Testimony by a witness must be within the personal knowledge of that witness. C couldn't know for sure that the message was from Dave, or at least there has been no foundation that he did know that. However, given D's long acquaintance with C, C would have been able to recognize D's voice, thus, it was within C's personal knowledge that the call was from D. Objection overruled.

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### III. Hearsay: Best Evidence

C was asked what message D left. That is an out of court statement. It is being offered for its truth (not just to show that it was made, or its effect on the listener), so it meets the core definition of hearsay. Consequently, it is inadmissible unless one of the 401 (d) exclusions make it non-hearsay, or an exception applies. One of the 401 (d) exclusions is for admissions. An admission is a relevant statement by a party offered by the other side. The statement (saying that D had a buyer of cocaine, and they were to meet later) is relevant as making it more likely that D sold him the cocaine. It was made by D, a party, and offered by the government. It is thus an admission and not hearsay. Objection overruled.

#### Best Evidence (BE)

C was testifying as to the contents of a recording, which implicates the BE rule. The BE rule requires the introduction of the original recording unless excused. One excuse would be that the original recording was lost, which is likely the case here, as answering machine tapes are usually not retained. However, no evidence of this unavailability was introduced, so until it is, the objection should be sustained.

### IV. Leading, compound, bolstering

This question has numerous problems. First, it is leading, by telling C exactly what he should say, rather than asking him. Generally, leading questions are not allowed on direct examination except for preliminary matters, or with a hostile witness. This is because of the risk that a witness will just agree with the examiner. Here, the matters asked of are not preliminary - they are central to the case. C is not a hostile witness (an opposing party or someone closely connected with an opposing party or someone who demonstrated hostility by their answers). C agreed to testify against D (probably for a reduced sentence). Thus, leading is not allowed here, and the objection should be sustained.

#### Compound

The question is also confusing and compound, because it asks three questions at once. The examiner should break it up and ask one question at a time, objection sustained.

#### Assumes facts not in Evidence

The prosecutor is assuming that C was asked to cooperate with the government, which hasn't been established yet. He needs to ask that of C first. Objection sustained.

#### Bolstering

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The question (at least the last part of it) appears to be an attempt to bolster C's credibility. Bolstering credibility is not allowed until after credibility has been impeached (rehabilitation). "Agreeing to testify truthfully" appears to have no relevance other than for bolstering, so objection should be sustained.

V. Relevance: Hearsay

This question is attempting to elicit a prior consistent statement (PCS), presumably also for the purpose of bolstering C's credibility as described above. Pre-impeachment bolstering is not allowed. Additionally, the statement is really irrelevant even for bolstering purposes. This is because the grand jury testimony was not made before C had a motive to lie - his cooperation is apparently in exchange for being able to plead guilty to the lesser offense, so C had just as much reason to lie then as he does now; consequently, the fact that he told the grand jury the same story doesn't really make any fact of consequence more or less likely.

Hearsay

Additionally, the out of this court grand jury statement (even though made in a court) is hearsay. One of the 401 (d) exclusions covers PCS, but, similarly to relevancy as discussed above, it only applies to rebut on implied or express charge of recent fabrication whose motive arose after the PCS. Here, there hasn't been any impeachment yet, and even if there had been, the motive to lie predated the PCS. Objection sustained.

VI. Leading improper impeachment

This question is leading; however, leading questions are allowed on cross-examination. Objection overruled.

This question also attempts to impeach C by showing a prior crime. Any crime involving dishonesty or deceit (thus being relevant to veracity) is allowed for impeachment (if less than 10 years old). However, criminal assault does not involve deceit/dishonesty. The Rules allow only felony convictions not involving deceit or dishonesty to be used for impeachment (subject to rule 403's balancing of probativeness against unfair prejudice, since the witness isn't the criminal defendant). Here, it is unclear whether criminal assault is a felony. If not, it definitely can't be used; if it is, it is probably ok, since not highly prejudicial.

VII. Hearsay: prior bad act

Here, C is being asked for his out of court statement to his probation officer. If offered for its truth, it is hearsay. However, it is being used as a prior inconsistent statement, showing that C is not to be believed because he tells multiple versions of the story. That is a non-hearsay use, so objection overruled.

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Prior bad acts not amounting to a crime are ok for impeachment if relevant to veracity. Here, lying to probation officer is relevant so ok (since shown by C's testimony extrinsic evidence would not be allowed).

### **ANSWER B**

1. "Yes we have been selling..."

#### Non-responsive

An answer is non-responsive if it goes beyond what the question was calling for. Here the question, "are you acquainted...?", called for a yes or no answer. Accordingly, the second part of the answer is beyond yes or no. However, since the next question would probably be, "how do you know him?", the judge should not strike the answer for being non-responsive.

#### Relevant?

A relevant fact is one which has any tendency to make a fact that is of consequence to the case more or less probable. Here the statement that Carl and Dave have been "selling cocaine together" for years has a tendency to prove that they may have been selling cocaine this time and that Carl can provide such testimony with knowledge. Thus relevancy will be met.

#### Prior Bad Acts

Generally, evidence of a prior bad act, such as selling cocaine, is inadmissible to show propensity to sell cocaine on the instance in question. However, the prosecution will argue they offer the testimony to prove motive or intent to sell on May 30, and thus the testimony is admissible under the mimic rule. If the judge finds that it is offered to show motive it will be admissible.

2. "I got home around 7:00 p.m..."

#### Non-responsive

Again, the witness went beyond the question when he told the court that he was home and received a message from the defendant. Since a pattern of non-responsive answers may be developing, the judge may want to warn the witness to just answer the question.

#### Relevant

The relevancy of the message will be determined by its content if allowed. However, because it was received on May 30, the night in question, the judge will probably allow it subject to a later determination of relevancy.

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### Best Evidence Rule

The best evidence rule states that when the contents of a writing or recording are being presented, such writing or recording in its original form should be produced. Some exceptions to this rule are allowed if the original has been lost or destroyed or if it presents a matter collateral to the issue at bar.

Here, the original message may have been taped over and the message contents may be collateral to the issue of the cocaine sale by Dave, (since it's a sale and not conspiracy the prosecution's trying to prove). Thus the judge should probably allow it in under an exception.

### Authentication

If the original recording is available, a witness with knowledge can authenticate the voice of Dave, is what the proponent claims. Carl may provide testimony the voice on the message is Dave's, since he's known Dave for years and presumably is familiar with his voice.

3. "What message had Dave left?"

### Hearsay

The defense will object that the question calls for hearsay, an out of court statement offered for the truth of the matter asserted. Hearsay is generally not admissible. The prosecution will argue that the answer is either not hearsay as an admission or falls under the then existing state of mind exception to the hearsay rule.

### Admission

When offered by a party opponent, the federal rules exclude an admission from the hearsay definition. Here the prosecution is offering a statement by the defendant, so the party opponent elements are met. Second, the answer if allowed will be a statement by Dave that he was going to sell cocaine on May 30 on the edge of town. Thus the judge may rule it's admissible as an admission.

### Then-existing state of mind

Under the Hillmon Doctrine, a statement of intent is excepted from the hearsay ban and may be admitted to show that the speaker did what he said he would. Here the answer, if allowed, will state Dave's intent to sell cocaine later on May 30 so it will be admissible to show Dave's intent.

4. "At that point...agree to testify truthfully..."

### Compound

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This question asks two questions, “did you plead ....” and “agree to testify.” Since a yes or no answer may confuse the jury as to which question the answer related, the judge should have counsel rephrase.

### Assumes facts not in Evidence

The judge should sustain an objection based on this objection (assumes facts not in evidence) since the witness did not testify that he plead guilty, offered to cooperate or agreed to testify.

### Leading

Leading questions are not allowed on direct (generally). Objection sustained.

### Hearsay

The plea and agreement are out of court statements offered for their truth. They probably don't fit within any of the exclusions or exceptions as statements.

5. “Was your testimony the same”

### Improper Bolstering

The prosecutor is attempting to bolster the witnesses' statements at trial with prior consistent statements at the grand jury proceeding. Generally this is not allowed until the witness has been attacked or impeached. Thus the objection should be sustained.

### Hearsay

Carl's prior statements at the grand jury proceeding would be hearsay. In addition, they may be inadmissible if at the grand jury proceeding they were not subject to cross examination. In any even, they will be excluded as improper bolstering.

6. “Now Mr. Smith ... criminal assault in 1994?”

### Leading

Leading questions are allowed on cross examination. Objection overruled.

### Relevant



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A felony conviction may be relevant to impeach the witnesses' credibility. However, there is no evidence that criminal assault is a felony: Thus if a misdemeanor, it does not involve dishonesty and will be excluded as irrelevant.

7. "And you told your probation officer ..."

Hearsay

This is an out of court statement. If offered for the truth it will be excluded. However, it appears it is not offered to show Carl did nothing illegal since 1994, but offered to impeach. If for this purpose the objection should be overruled and the question allowed.

Relevant

This question will only be relevant to show that the witness made the statement if offered to impeach or show the witness was lying. Thus it may be admitted subject to later extrinsic evidence that Carl did in fact commit an illegal act since 1994.

Impeachment may also be shown and thus the question would be relevant if the court had admitted the testimony that Carl plead guilty to possession of cocaine.