



Standards and Guidelines for Drafting Bar Examination Questions

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The following are standards and guidelines for use by attorneys requested to draft bar examination questions for the Idaho State Bar. The Court specifically authorizes the use of the Multistate Essay Exam prepared by the National Conference of Bar Examiners as a component of the Idaho Bar Examination.

I. STANDARDS AND GUIDELINES FOR BAR EXAMINATION QUESTIONS:

1. Wording of the Question

The question should be in the form of a hypothetical fact problem requiring an essay answer. Special effort should be made to phrase the question so as to be as definite and unambiguous as possible so as not to mislead the examinee as to the parties, issues or substantive law. It is suggested that you use descriptive names for each of the parties involved, rather than proper names (e.g., *Buyer* rather than *Jones*, *Seller* rather than *Brown* or other descriptive names such as *Lessor* or *Landlord*, *Lessee* or *Tenant*, or merely *P* or *D*). The question should be reviewed by you to ascertain whether unnecessary time of the applicant will have to be used in order to understand the facts of the question posed rather than analyzing the points of law raised by such facts.

2. Call of the Question

The question should solicit a specific response, sometimes referred to as the *call of the question*. The call of the question should be direct, concise and unambiguous, but at the same time it should not by its wording identify the specific legal issues involved. It is suggested that you avoid such calls as *Advise* or *Advise P*. If the call asks for the legal rights of the parties, make the call specific such as "What are the rights of P against D?"

3. Topics of Law

A question should concern itself with an important area of the subject law covered, within the approved topic areas. The question should be broad enough to raise several issues of law. A question may involve issues in more than one topic area, such as a divorce question may raise issues of domestic relations and constitutional law. In drafting the question, consideration should be given to the time allotted to examinees for reading the question, making an analysis, and writing the answer. If questions are developed from bar examination questions used in other jurisdictions, care should be taken to compare the length of time allotted in such other jurisdictions for answering the question.

4. Length of the Question

The time limit given to examinees to answer each question should be considered in determining the length of a question, and questions should be drafted so as to be direct, clear and succinct in posing the question to the examinee.

5. Scope of the Question

Questions should be designed primarily for the purpose of testing the analytical ability and knowledge of the general law of the topics covered by the questions and should not require knowledge of specific Idaho case or statutory law except in the area of Articles I, II, III and IX of the U.C.C., Water Law, Wills and Intestate Succession Law (U.P.C.), Domestic Relations Law, and Community Property Law. *If a question is drafted to test the examinee on specific Idaho law, the call of the question must specifically ask for the Idaho law and be designed to bring out the variance between the Idaho law and the law generally upon the subject matter, rather than require knowledge of a specific Idaho statute or case decision.* Questions on civil procedure, ethics, and evidence should be framed so that they may be answered under either the Idaho or Federal Rules of Civil Procedure, the Idaho or ABA Model Rules of Professional Conduct, or the Idaho or Federal Rules of Evidence, respectively, but the examinee should be required to indicate which rules he or she is applying. It is suggested that you avoid using a single Idaho decision, or perhaps a matter of current litigation in which you were involved, as the basis for the examination question as such reliance may tend to narrow the scope and inquiry of the question.

6. Difficulty of the Question

Questions should be difficult enough to permit good students to display their superior knowledge and analytical ability. Simple *get well* questions which anticipate most students getting high score should be avoided. The examination will be compiled with the intent to provide all questions of an approximate equal complexity and length in the various areas and topics of law involved.

II. STANDARDS AND GUIDELINES FOR DRAFTING ANALYSES TO QUESTIONS:

1. Scope of the Analysis

The author of each question is requested to draft an analysis of the legal points and discussion which are reasonably raised by the question. The analysis is not a model or correct answer, but an outline or survey of the issues and topics intended to be covered by the question and should be drafted with the intent in mind of aiding the graders to understand the scope and purpose of the question. The length of the analysis is at the author's discretion, but it is suggested that it be abbreviated to the primary points involved for easy identification by the graders.

2. Issue of the Question

The analysis should first list the issues which the author believes are reasonably raised by the question. These issues should be framed in terms of general propositions of law rather than probable outcome of the specific factual situation presented by the question. For example, rather than listing an issue *Is P entitled to an injunction against D?* it may be more revealing to state the issue *Is a plaintiff in a divorce action entitled to an injunction against the defendant from removing the children of the parties from the state?* The issues should be so framed as to advise the graders as to what general propositions of law are thought to be involved in the questions, not merely the outcome of the dispute or litigation.

3. Analysis of the Issues

After listing each issue involved in a question, the issues should be separately identified and followed by a brief analysis based on legal principles and theories of general application along with pertinent citations. The citations need not be exhaustive, but merely serve as a possible reference to the graders in the event they desire to examine some authority to more fully understand the question analysis before commencing their grading.

4. Conclusion

The analysis should announce a conclusion or take a position upon the questions asked by the *call of the question*. However, if any alternative treatment or opinion upon an issue or the ultimate question is feasible, the analysis should recognize such alternatives and make appropriate statements as to how an examinee might properly arrive at such alternatives.

5. Weight of the Issues

The analysis need not reflect any suggested allocation of weight or importance to the various issues involved in a question; however, the primary issues should be distinguished from peripheral issues. The final determination as to the relative weight and importance of the issues is in the discretion of the graders after examining the question, the analysis, and the authority cited.



Topics or Subject Areas for Idaho Bar Examination Questions

By order of the Idaho Supreme Court, Bar Examination questions are limited to the following topics or subject areas of the law:

1. Civil Procedure
2. Conflict of Laws
3. Constitutional Law
4. Contracts
5. Business Organizations (Agency & Partnership, Corporations)
6. Ethics
7. Uniform Commercial Code (Articles I, II, III and IX)
8. Family Law
9. Criminal Law and Procedure
10. Equitable Remedies (Equity)
11. Evidence
12. Real Property, including Water Rights
13. Torts
14. Wills, Estates, and Trusts; (Decedent's Estates and Trusts; Future Interests)
15. Community Property

Bar examination questions on the above topics or subject areas must be of a general nature, not requiring specific knowledge of any variance of the Idaho law, except for the the following topics which **must be** answered in accordance with Idaho law:

- ◆ Articles I, II, III, and IX of the UCC
- ◆ Water Law
- ◆ Wills and Intestate Succession (U.P.C.)
- ◆ Family Law and Community Property Law

With regard to civil procedure questions, applicants will be expected to answer using either the Idaho Rules of Civil Procedure or the Federal Rules of Civil Procedure. With regard to ethics questions, applicants will be expected to answer using either the Idaho Rules of Professional Conduct or the ABA Model Rules of Professional Conduct. With regard to evidence questions, applicants will be expected to answer using either the Idaho Rules of Evidence or the Federal Rules of Evidence. In all such cases, applicants will be required to indicate which rules they are applying.

Sample Question

The resort town of Anywhere, Idaho, has suffered five arson fires in its business district during the last two years. All of the fires were started in dumpsters, trash barrels, or other refuse located near a building, and in each fire white gas was used as an accelerant.

The merchant's association finally hired Barney as a security guard to patrol the business district from 8:00 o'clock p.m. until 6:00 o'clock a.m. and offered him a \$50,000 bonus if he apprehended the arsonist before any more fires were set. Barney had recently sold his business for enough to retire comfortably, but he took the security guard job because he had secretly always wanted to be a police officer.

On December 1, 1993, at about 2:00 a.m., Barney was patrolling a dimly-lit alley in the business district when he saw a shabbily dressed man carrying a plastic jug that appeared to be filled with liquid. The man walked quickly over to a dumpster in the alley and crouched down with his back towards Barney, partially concealing himself behind the dumpster. Barney then saw a flash of light from behind the dumpster that appeared similar to someone igniting a cigarette lighter.

Barney immediately began running toward the crouching figure. When Barney was a few steps away, he yelled, "You are under arrest." The man suddenly jumped up, and Barney crashed into him, knocking him against the dumpster. The man then bounced off the dumpster and fell headlong into a pile of crates and boxes. When the man fell against the dumpster, he hit his front teeth against the edge of the dumpster, breaking them off. As he was falling he thrust his right arm out to break his fall, but his arm fractured when he hit the ground.

As the man lay face down on the ground screaming, Barney jumped on his back and began pulling on the man's right arm in an attempt to handcuff his hands behind his back. Suddenly, Barney heard someone nearby yell, "Freeze." Barney looked up and saw a uniformed police officer standing a few feet away and pointing a revolver at him.

The uniformed officer told Barney to get up, which he did. The uniformed officer then asked Barney what he was doing. Barney answered, "I got the arsonist. He almost got away, but I jumped on him and got him good." The uniformed officer then arrested Barney.

The shabbily dressed man was an undercover narcotics officer who had arranged, after several months of work, to purchase a controlled substance from a suspected drug dealer. The sale was to take place behind the dumpster. The uniformed officer was hiding nearby to assist in the arrest after the buy was made. The suspected drug dealer had just walked into sight when Barney charged in to make his arrest. Needless to say, the drug dealer fled after Barney charged into the undercover officer. The flash of light Barney saw was the officer lighting a cigarette.

Barney has retained you to represent him in both the criminal case and the civil case arising out of this incident.

In the criminal case, Barney is charged with violating the following statutes:

Obstructing an officer: Every person who willfully resists, delays, or obstructs any peace officer in the discharge, or attempt to discharge, any duty of his office is guilty of a felony.

Battery: Every person who willfully and unlawfully uses force or violence upon the person of another is guilty of a misdemeanor.

In the civil case, the undercover officer is suing Barney for damages. Surgery was required to repair the fracture in the officer's right arm. During the surgery, the physician negligently severed a nerve, resulting in partial paralysis of the officer's right hand. As a result, he was required to take early retirement because he could no longer shoot his pistol well enough to qualify with it.

The following statutes are also in effect:

Arrest requirements:

- An arrest may be made by a peace officer or by a private person.
- An arrest is made by an actual restraint of the person, or by his submission to the custody of the persons making the arrest. The person arrested shall not be subjected to any more restraint than is necessary for his arrest and detention.
- A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it.

A security guard is a private person under the statutes and arson is a felony.

1. Assuming that they are relevant, are Barney's statements to the uniformed officer admissible in either the criminal or the civil action? Explain your answer.
2. Is Barney likely to be found guilty of the criminal offenses for which he is charged? Explain your answer.
3. Is Barney liable to the undercover officer for damages? If so, for what type of damages? Explain your answer.

Suggested Analysis

1. **Assuming that they are relevant, are Barney's statements to the uniformed officer admissible in either the criminal or the civil action?**

CRIMINAL ACTION

Barney's statements were in response to a question asked by the uniformed officer. Prior to asking those questions, the uniformed officer did not inform Barney of his Miranda rights. If the officer's question to Barney was a custodial interrogation, then Barney's answer would not be admissible in the state's case in chief. If it was not a custodial interrogation, then the answer would be admissible into evidence.

When the officer told Barney to "freeze" and to stand up, the officer had seized Barney. Miranda rights need not be given whenever someone is seized, however. Berkemer v. McCarty, 468 U.S. 420 (1984). The safeguards prescribed by Miranda only become applicable when a suspect is arrested or his freedom of action is curtailed to a degree associated with a formal arrest. Berkemer v. McCarty, supra, (roadside questioning of motorist stopped for DUI was not custodial interrogation requiring Miranda warnings).

The determination of whether a suspect has been subjected to a de facto arrest is not based upon the officer's subjective intent to arrest the suspect, nor is it based upon whether or not the officer has probable cause to arrest the defendant. Berkemer v. McCarty, supra. An investigative detention (Terry stop) does not become a de facto arrest merely because the suspect is not free to leave. Berkemer v. McCarty, supra. The very fact that the suspect is detained means he is not free to leave. If all detentions were de facto arrests there would be no difference between a Terry stop and an arrest.

An investigative detention is not transformed into a de facto arrest merely because the officer approached the suspect with his gun drawn. United States v. Sharpe, 470 U.S. 675 (1984) (where officer approached truck with revolver drawn, ordered driver to get out and assume a "spread eagled" position against the side of the truck, and detained driver for 20 minutes, investigative Terry stop was not transformed into a de facto arrest); United States v. Jacobs, 715

F.2d 1343 (9th cir. 1983) (investigative stop did not become an arrest when officer pointed gun at suspect and ordered her to "prone out"); State v. Cook, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984) (where police, with weapons drawn, ordered suspect to halt and return, the investigative stop was not transformed into an arrest).

In deciding that the roadside questioning of a DUI suspect was not the functional equivalent of a custodial arrest, the Supreme Court in Berkemer focused on several issues: the detention prior to the formal arrest was brief, the suspect was not informed that the detention would not be temporary, and the suspect was asked a modest number of questions.

In this case, the investigative detention of Barney was not the functional equivalent of a custodial arrest. The officer's exhibition of his weapon was certainly reasonable under the circumstances. While watching a fellow officer attempt to purchase controlled substances in a dimly-lit alley, someone knocked the officer to the ground, apparently injuring him, and then jumped on him. Under those circumstances, the uniformed officer acted reasonably in drawing his weapon. It was also reasonable for the uniformed officer to detain Barney to investigate what was going on. He certainly had a reasonable, articulable suspicion that Barney had committed the crime of battery. The uniformed officer then told Barney to "freeze" and to stand up, after which he asked Barney only one question: What was he doing? The detention was short, only one question was asked, and prior to asking the question the officer had done nothing to indicate to Barney that he would be detained other than temporarily.

Because the investigatory detention of Barney was not the equivalent of a custodial arrest, the question to Barney did not amount to custodial interrogation. It was not necessary for the officer to inform Barney of his Miranda rights, and Barney's answer could therefore be admitted into evidence in the criminal action.

CIVIL ACTION

Barney's statements to the officer would not be excluded in the civil action for two reasons. First, they were not obtained in violation of Barney's constitutional rights as explained above. Second, the exclusionary rule was developed in criminal proceedings. See, Mapp v. Ohio, 367 U.S. 643 (1961); State v. Arregui, 44 Idaho 43, 254 P. 788 (1927). It has been extended to also include civil forfeiture proceedings brought by the government because such proceedings are quasi-criminal in nature. One 1958 Plymouth Sedan v. Pennsylvania, 380 US. 693 (1965); Idaho Dept. of Law Enforcement v. \$34,000 United State Currency, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1992). However, the exclusionary rule has not been extended to civil proceedings.

2. Is Barney guilty of the criminal offenses for which he is charged?

(a.) **Obstructing an officer.** To be guilty of this charge, Barney must have willfully resisted, delayed, or obstructed a peace officer in the discharge, or attempt to discharge, any duty of his office. He was attempting to catch a drug dealer. By his conduct, Barney obstructed the officer in his attempt to catch the drug dealer. Barney's guilt hinges upon the issue of whether he "willfully" obstructed the officer. The defendant could not have "willfully" obstructed a peace officer in the discharge, or attempt to discharge, a duty of his office unless the defendant knew that the person was a peace officer. State v. Winter, 24 Idaho 749, 135 P.739 (1913). Under the facts, Barney would have no reason to know that the shabbily dressed man was a peace officer. Therefore, Barney would not be guilty of obstructing an officer.

(b.) **Battery.** To be guilty of this charge, Barney would have to have willfully and unlawfully used force or violence upon the person of another. Barney did use force or violence upon the person of the undercover officer. He also willfully used that force. The facts are unclear as to whether Barney intentionally crashed into the undercover officer. The facts are clear, however, that as the officer lay face down on the ground screaming, Barney jumped on his back and began pulling the officer's right arm in an attempt to handcuff his hands behind his back. Thus, Barney willfully used force or violence on the person of another. The issue is whether he did so "unlawfully."

The statutes permitting a private person to make an arrest did not authorize Barney to arrest the undercover officer. Under those statutes, a private person can arrest only in one of three instances.

The first is for a public offense committed or attempted in his presence. Here, there are no facts showing that the undercover officer committed or attempted to commit any offense in Barney's presence. The statute does not authorize a private person to arrest when he has probable cause to believe that an offense was committed or attempted in his presence. The offense must be actually committed or attempted. Cervantez v. J.C. Penney Co., Inc., 595 P.2d 975 (Cal. 1979) (construing identical language in California statute).

The second is when the person arrested has committed a felony, although not in the private person's presence. Here, there are no facts showing that the undercover officer had committed a felony.

The third is when a felony has been in fact committed and the private person has reasonable cause for believing the person arrested to have committed it. The only felonies committed as shown by the facts were five arsons committed over a period of two years. Barney did not have reasonable cause for believing that the undercover officer had committed any of those felonies.

3. Is Barney liable to the undercover officer for damages? If so, for what types of damages?

(a) **Liability.** The tort of battery requires intentional bodily contact which is either harmful or offensive. White v. University of Idaho, 115 Idaho 564, 768 P.2d 827 (1989). The intent element of the tort of battery does not require a desire or purpose to cause any injury. It is satisfied if the actor's affirmative act causes an intended contact which is not consensual and which is harmful or offensive. White v. University of Idaho, *supra*.

Here, Barney intended to have physical contact with the officer's body. The evidence may be unclear as to whether Barney intended the initial contact. The facts state that he crashed into the officer when the officer suddenly jumped up. The initial contact may have been accidental,

although an intent to make the initial contact could be inferred from Barney's statement that "I got the arsonist. He almost got away, but I jumped on him and got him good." There is no dispute, however, that Barney intended to the later contact. That he jumped on the officer's back and began pulling on his right arm in an attempt to handcuff him.

The facts are also clear that the officer did not consent to the contact, that the contact was harmful or offensive, and that the officer suffered damages as a result of the contact. Therefore, Barney would be liable to the officer for the damages.

If the initial contact was not intentional, Barney may still be held liable for damages arising from that contact on a theory of negligence. There are not enough facts to determine whether Barney's initial collision with the undercover officer was intentional, negligent, or a non-culpable.

(b) **Type of damages.** Barney would be liable for all damages that were a proximate cause of the battery. If the initial contact was the result of Barney's intentional or negligent conduct, he would be liable for all damages caused by that contact. Those damages would include damages for the nature, extent, and duration of the officer's injuries; physical and mental pain and suffering, both past and future; disfigurement resulting from the injuries; impairment of capacity for work and of his ability to perform usual activities on account of the injury; the reasonable value of necessary medical care, services, and devices received as a result of the injury and the present cash value of similar items reasonably certain and necessary to be required in the future; the reasonable value of necessary help in the home which has been required as a result of the injury and the present cash value of such help reasonably certain to be required in the future; and the reasonable value of earnings lost as a result of the injury and the present cash value of earnings reasonably certain to be lost in the future because of the injury.

If Barney did not intentionally or negligently cause the initial contact, he would still be liable for pain and suffering while he was pulling on the officer's right arm in an attempt to handcuff him. If such pulling aggravated the broken arm, then he would also be liable for any damages proximately resulting from such aggravation. One injured by the tortuous act of another may recover damages for aggravation of a pre-existing condition because the tortfeasor takes the injured party as he finds him. Blaine v. Byers, 91 Idaho 665, 429 P.2d 397 (1967).

If Barney was liable for the fracture of the officer's arm, or if his pulling on the arm aggravated the fracture so that surgery was required, Barney would be liable for the damages resulting from the physician's negligence. If a tortfeasor causes an injury which reasonably requires medical treatment, the tortfeasor is also liable for any additional bodily harm resulting from the normal efforts of the physician to treat the original injury, even if such efforts were done in a negligent manner. Union Supply Co. v. Pust, 583 P.2d 276 (Colo. 1978); Barkley v. Freeman, 827 P.2d 774 (Kan. Ct. App. 1992); Martinez v. First Nat'l Bank of Santa Fe, 755 P.2d 606 (N.M. Ct. App. 1987); Woosley v. Dunning, 520 P.2d 340 (Or. 1974); Lindquist v. Dengel, 581 P.2d 177 (Wash. 1978); Restatement (Second) of Torts, § 457 (1965); 25 C.J.S. Damages § 20 (1966).