

**Memo: Criminal Trial Advocacy Examination Information**  
**From: Elizabeth Collins, Director of Examinations and State Accreditations**

**OVERVIEW:**

The Legal Specialization program was created to provide a method for attorneys to earn the designation of certified legal specialist in particular areas of law for the purposes of increasing public protection and encouraging attorney competence. As part of the certification process, an applicant must pass a written examination in the specialization area. Board Certification is the process that is designed to identify the highly qualified attorneys in the practice area.

**FORMAT:**

The examination consists of a combination of multiple choice and essay questions and is a total of 6 hours: A Morning Section (8:30 a.m. – 11:30 a.m.) with a one-hour break and an Afternoon Section (12:30 p.m. – 3:30 p.m.) given on a Saturday. The 3-hour morning section is entirely multiple choice and the 3-hour afternoon section is made up of essays that contain subparts of hypothetical cases and fact patterns which contain a series of questions that require knowledge of Trial Practice, Evidence and Ethics. The questions test knowledge of the current law and are geared to evaluate basic knowledge of the usual legal procedures, core substantive law and trial ability that is common to specialists in the area of criminal trial law.

**NBTA's examination is nationally administered. Questions are to be answered by applying the permitted reference materials below:**

- **Federal Rules of Evidence**
- **ABA Model Rules of Professional Conduct - FOR MULTIPLE CHOICE & ESSAYS OR**
- **ONLY FOR THE ESSAY SECTION OF THE EXAMINATION - If an applicant's state laws differ from Federal Law, an applicant may indicate the state and the applicable state law but is to respond using Federal Law as it applies to a given set of facts in the outcome of the issues presented**

It is not designed to be a bar or law school type of examination.

- **Multiple Choice Questions**

The Multiple-Choice questions test an applicant's knowledge of federal law. Individual state law is not tested on the Multiple-Choice section of the examination.

- **Essay Questions**

The examination's essay questions are also designed to be answered under federal law. However, if an applicant's state laws differ from federal law an applicant may indicate the state and the applicable state law but is to respond using federal law as it applies to a given set of facts in the outcome of the issues presented.

- **A passing score is 75%**

Multiple Choice questions are 40% of the score and Essays are 60%. A combined score of 75% must be achieved in order to pass the examination. There are 60 multiple choice questions. A failing score in the Multiple-Choice ETHICS portion of the examination results in a failure of the entire examination. However, only the ETHICS portion of the examination must be retaken and passed.

**TIMING:**

The examination is given twice a year. Registration material for an examination is sent two months prior to the examination date. You will automatically receive registration material before every examination until you have actually taken and passed one (contingent upon file eligibility). There is no need to contact our office if you cannot take a particular examination.

**LOCATION:**

The NBTA Board Certification Examination in all areas of law will be offered only as an online examination that can be taken from your home or office using software from Examsoft called Exemplify. You must sign up at least 30 days prior to the date of the administration of the examination and NO EXCEPTIONS can be made.

**COST:**

The application fee is \$400. The Examination fee is \$400. Please click [here](#) for the entire NBTA Fee Schedule.

**CONTACT:**

If you have any additional questions, please call me at **386.986.7590** or email me at [ecollins@nbtalawyers.org](mailto:ecollins@nbtalawyers.org). I look forward to helping you complete our examination requirement.

## **Specifications for the National Board of Trial Advocacy Criminal Trial Certification Examination**

Purpose of the Examination: The Criminal Trial Examination consists of a combination of multiple choice and essay questions. It is designed to verify the applicant's basic knowledge of the usual legal procedures, core substantive law (*including recent changes in law and regulations*) and trial ability that is common to specialists in the area of Criminal Trial Law. Criminal Trial Law is the practice of law dealing with litigation of criminal matters in all areas of substantive law before state courts and federal courts. In addition to the pre-trial and the trial process criminal trial includes evaluating, handling, and resolving criminal matters prior to the initiation of a prosecution as well as the appellate processes.

An applicant is expected to demonstrate the ability to identify and resolve the issues, state and apply the applicable law, analyze and apply the law to the facts given and show knowledge and understanding of the pertinent principles and theories of law, their relationship to each other and their qualifications and limits. Of primary importance in the essay questions will be the quality of the analysis and explanation. It is recognized that the subject areas below may overlap, which may require incorporation of more than one substantive or procedural area in Criminal Trial Law which may apply to several skills in responding to a single question.

The order of the subject areas does not reflect their relative importance, nor does the sequence represent an implied order of their application in practice. Knowledge of the following fundamental lawyering skills may be assessed.

### **Subject Area 1: Professional Responsibility**

- 1.1 Ethical duties to client, opposing counsel, third parties, and the court/attorney as witness
- 1.2 Basis of sanctions
- 1.3 Fee agreements/bases for fees/declining terminating representation
- 1.4 Prohibited referrals and inducements/contact with prospective clients
- 1.5 Dual representation/conflicts of interest/independent professional judgment
- 1.6 Unauthorized practice of law
- 1.7 Trial publicity/client property
- 1.8 Dealing with paralegals and other non-attorney staff

### **Subject Area 2: Evaluation and Defenses**

- 2.1 Homicide/special circumstances
- 2.2 Sex crimes and related consequences
- 2.3 Tactics/strategies
- 2.4 Mental health issues and related consequences
- 2.5 Crimes against property
- 2.6 Crimes against persons
- 2.7 Narcotics

- 2.8 Vicarious liability, aiding and abetting, duress, entrapment
- 2.9 "Victimless" crimes
- 2.10 Conspiracy/RICO
- 2.11 Intent, recklessness, self-defense, necessity

### **Subject Area 3: Jurisdiction and Venue**

- 3.1 Arrest and bench warrants, summons/subpoenas
- 3.2 Arraignment
- 3.3 Grand jury proceedings

### **Subject Area 4: Practice and Procedures**

- 4.1 Preliminary hearings/bail and other forms of release from custody pending finality of judgment
- 4.2 Discovery
- 4.3 Pre-trial motion practice/constitutional issues
- 4.4 Jury instructions
- 4.5 Motions/briefs/preservation of errors
- 4.6 Voir dire
- 4.7 Judicial findings and conclusions
- 4.8 Informants
- 4.9 Post-trial motions/expungement
- 4.10 Appealability and review/making a record
- 4.11 Sentencing and plea bargaining
- 4.12 Deferred entry of judgment and diversion
- 4.13 Immigration Consequences
- 4.14 Opening Statements/Closing Arguments

### **Subject Area 5: Present and Object to Evidence**

- 5.1 Introduction of evidence/mode and order/probative value
- 5.2 Proper use of demonstrative and other trial exhibits/writings, recordings, photographs, experimental evidence and the completeness rule
- 5.3 Character evidence and related concepts
- 5.4 Qualification of expert and lay witnesses and scientific evidence
- 5.5 Judicial notice
- 5.6 Privileges and other exclusionary policies, spousal immunity and marital communications, attorney-client, work product, etc.
- 5.7 Relevancy and reasons for excluding relevant evidence
- 5.8 Refreshing recollection
- 5.9 Impeachment

### **Subject Area 6: Hearsay/Exceptions/Exemptions (Non-Hearsay)**

- 6.1 Definition
- 6.2 Present sense impressions and excited utterances
- 6.3 Statements of mental, emotional, or physical condition
- 6.4 Statements for purposes of medical diagnosis and treatment
- 6.5 Past recollection recorded

- 6.6 Business records
- 6.7 Public records and reports
- 6.8 Learned treatises
- 6.9 Former testimony
- 6.10 Other exceptions to the hearsay rule
- 6.11 Prior statements by witnesses
- 6.12 Admissions by party opponent

## **CRIMINAL EXAMINATION MANUAL** **(revised 9/2016)**

**Please note: your demonstration of knowledge of EVIDENCE and ETHICS are important.**

**Failure of the ETHICS portion will result in failure of the examination.**

**The following are samples of the multiple-choice portion of the examination:**

### **CRIMINAL EVIDENCE**

1. You were in trial in the City of Pleasantville Municipal Court, and your client was charged with drug possession resulting from a traffic stop by the Pleasantville Police Department. You were moving to suppress the drugs and to dismiss the case because the traffic stop occurred outside of city limits. The arresting officer testified as to the exact location of the traffic stop during the suppression hearing, and testified that the location is within city limits. Following his testimony, you presented to the court a print-out from an internet mapping company, a print-out from internet Maps, a map from the tax assessor's office, and a city map published by the City of Pleasantville, all of which showed that the location is outside of the city limits. You asked the judge to take judicial notice of the fact that the location is not within city limits. **How should the Court rule? The Court should-**
  - A. deny your request, because judicial notice applies only to the Court's instructions to the jury and does not apply in pre-trial proceedings.
  - B. deny your request, because the officer's testimony that the location was within city limits creates a question of fact.
  - C. grant your request, because it is within the judge's personal knowledge that the location is not within the city limits.
  - D. grant your request, because it is a fact that is easily determined by sources whose accuracy cannot reasonably be questioned.

**ANSWER: D**

2. During a trial for possession of child pornography, Officer Jones began to testify that your client's wife told him that she saw child pornography on your client's computer. Your client's wife is on the witness list and will testify later in the government's case. You object on grounds of hearsay. **The Court should:**
  - A. Sustain the objection, because the client's wife is not the one testifying to the statement in question, and the statement is offered to prove the truth of the matter asserted.

- B. Sustain the objection, because the wife is a coconspirator and the statement was made during and in furtherance of the conspiracy.**
- C. Overrule the objection, because the wife will testify and will be subject to cross examination on the statement.**
- D. Overrule the objection, because the statement is not hearsay.**

**ANSWER: A**

**CRIMINAL ETHICS**

1. You accepted payment of attorney fees from a third party to represent John in a multi-defendant drug case. You reviewed your fee agreement with the third party in detail, had him sign the fee agreement and provided him a copy. You also reviewed the agreement with your client John, had him sign the agreement, and provided him a copy. In the agreement is language that expressly states that John is your client, that you have a duty of confidentiality with John and cannot discuss his case with third parties, that you will receive direction in John's case from John only and that third parties have no control over John's case. The prosecutor learned that a third party had paid the defense attorney's fees and reported the matter to the bar disciplinary body. **What will the disciplinary body do?**
  - A. Find that you violated the duty of loyalty to your client.**
  - B. Find that the prosecutor violated his oath of civility to fellow attorneys.**
  - C. Nothing, because your duty to your client was communicated to both client and the third party before accepting the case.**
  - D. Nothing, because it is acceptable to protect a third party's interests if they pay your legal fees.**

**ANSWER: C**

2. Prior to a high-profile murder trial, you are approached by a reporter outside of the courthouse. The reporter asked if you had any comment and you responded, "My client is innocent of the charges and DNA evidence will prove it at the trial." You declined any further comment. **Have you violated any ethics rules?**
  - A. Yes, because it was an extra-judicial statement that will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing the state's case.**
  - B. Yes, unless the prosecutor had previously made statements to the media about your client's guilt and your response was necessary to protect your**

**client from substantial undue prejudice resulting from the prosecutor's extra-judicial statements.**

**C. No, because your client has the right to have his case tried in the media.**

**D. No, because a lawyer may state the claim, offense, or defense involved in a case without violating the rule against extra-judicial statements.**

**ANSWER: D**

**The following are samples of the essay portion of the examination:**

**SAMPLE 1:**

**CRIMINAL TRIAL ETHICS**

You are the senior partner of a law firm whose junior associate was representing a man accused of multiple sexual assaults of his 10-year-old niece, which had allegedly occurred in her bedroom during the period of time the defendant was living with his sister and her husband. Shortly after the last and most serious sexual assault, the niece told her mother what the defendant had done to her, and showed her mother as well as the girl's brother the physical effects of the assault. The mother, in turn, told her husband, and the two confronted the wife's brother, who moved out of state that very night. No reports were made to authorities at that time. In the next few years, the behavior of the little girl deteriorated significantly, to the point that the parents took her to a psychotherapist. Immediately after the girl related the assault to the therapist, police were notified and statements were taken from all involved parties.

The police investigator tried to contact the defendant, who had remained out-of-state, in order to obtain a statement from him. The defendant referred the investigator to his attorney, who indicated that an interview could take place in his office in the state where the defendant was then living. The investigator contacted the attorney several more times to try to establish a time for the interview, and was finally told that the attorney was no longer able to reach the defendant.

At trial, the defendant testified and denied that any sexual contact had taken place. When cross-examined extensively as to why he failed to keep the appointment with the investigator, the defendant testified that his attorney had advised him not to speak to the authorities. You had not been attending the trial, but you came to court to hear the final arguments. The prosecutor argued in summation that all the other parties had cooperated with the police and had given statements, but that the defendant instead had gone out and hired an attorney and had not given a statement. The prosecutor further argued that the key issue in the case was the credibility of the witnesses, and that the jury should give more weight to the witnesses who had given statements and otherwise cooperated with the police.

You are stunned and outraged to learn that your associate had not objected to the trial testimony concerning the defendant's consultation of an attorney. You are just as upset



to have watched your associate fail to object to the prosecutor's final argument that the defendant's credibility should be discounted because he had consulted an attorney and had not given a statement.

Since your firm had entered an appearance in the file, you are able to speak and you request the trial judge to grant a recess to allow you to speak to the junior associate. The request is granted. You are not familiar enough with the evidence at trial to take over the defense and deliver an argument to the jury.

**Discuss what advice to give to the junior associate as to:**

- 1. What objections should trial counsel have made?**
- 2. What constitutional rights of his client had been violated?**
- 3. How to proceed given the above facts?**
- 4. What, if any, rules of professional conduct apply to the prosecutor, the junior associate and the senior partner?**

**SAMPLE 2:**

### **CRIMINAL TRIAL PRACTICE**

Because of prior knowledge, police officers Kelly and Goldberg knew Larry Lewis (Larry) had a suspended driver's license. Kelly and Goldberg also knew there was an outstanding arrest warrant for Larry for driving with a suspended license.

Kelly and Goldberg were present at a house involved in suspected criminal activity. While standing outside the residence, Kelly and Goldberg saw Larry driving a car and turning off the street and into the private driveway of the residence. Larry was the sole occupant of the vehicle. Larry continued to the end of the driveway, parked the vehicle and got out of the car. Larry was walking away from the car. When he had gone approximately 10 feet, Officer Kelly stopped Larry and arrested him on the outstanding warrant. Larry was handcuffed and placed in the back seat of the police car.

Kelly and Goldberg ran the license plate on the vehicle and discovered it was owned by AAA Car Rentals, an agency located in a neighboring jurisdiction. Contact with AAA revealed that the vehicle had been rented to Larry some two weeks ago, and its return date had passed last week with no return of the car. No request for extension of the rental period had been received. AAA had sent a letter to Larry at the address he gave them demanding the immediate return of the vehicle. No response from Larry had been received by AAA. The rental agency had contacted the police in their jurisdiction to make a criminal complaint, but had not yet heard back from the department.

- 1. List what arguments you would make at the suppression hearing?**

2. List what arguments you would expect the prosecutor to make at the suppression hearing?
3. Based on the assumption that your judge makes the proper legal ruling, will your motion be granted or denied? Explain your answer.
4. Would any of your answers be different if a gun was found underneath the jacket in the back seat of Larry's car? Please state why or why not.
5. During the suppression hearing, Larry has testified and is being cross-examined. The prosecutor asks him about his misdemeanor theft of property conviction. You object and the judge wants you to state what Federal Rules of Evidence (FRE) are the basis for your objection. Please list possible objections by FRE Number and description.