

## **Memo: Complex Litigation 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 civil procedure, evidence, trial practice, substantive complex litigation law 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 complex litigation law. **NBTA's examination is nationally administered. Questions are to be answered by applying the permitted reference materials below:**

- **Federal Rules of Evidence**
- **Federal Rules of Civil Procedure**
- **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**
- **The following statutes: 28 U.S.C. §§ 1331, 1332, 1367, 1391, 1404, 1406, 1407, 1441, 1446, 1453, 1713, 1714, and 2283**

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 75 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 Examplify. 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 Complex Litigation Certification Examination**

**Purpose of the Examination:** The Complex Litigation Examination is designed to verify the applicant's basic knowledge of the usual legal procedures, core substantive law and trial ability that is common to specialists in Complex Litigation. Complex Litigation is the practice of law dealing with litigation of civil matters in all areas of substantive law that are procedurally complex with the potential for a multiplicity of litigants on either side of the docket or a multiplicity of potential related cases. It covers how the Federal Rules of Civil Procedure, relevant portion of the United States Code Title 28, and judicially-created doctrines are employed to deal with these complexities. It addresses the resulting underlying tension among principles of traditional autonomy afforded claimants, fundamental fairness to all litigants, and efficiency for both the litigants and the court system.

An applicant is expected to demonstrate the ability to identify the issues, and state and apply the applicable law to the facts. It is recognized that the subject areas below may overlap, which may require incorporation of more than one substantive or procedural area in an answer. 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.

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

- 1.1 Ethical duties to client, opposing counsel, and the Court
- 1.2 Fee agreements/bases for fees/Court approval/standards and criteria/declining and terminating representation/fees in common-fund or statutory fees/request from objectors' counsel/class counsel fee and fee splitting
- 1.3 Prohibited referrals and inducements/contact with prospective clients/reimbursement and payment
- 1.4 Duties of Class Counsel/independent professional judgment
- 1.5 Conflict of interest
- 1.6 Trial publicity/social media
- 1.7 Dealing with an unrepresented person/entity
- 1.8 Dealing with paralegals and other non-attorneys
- 1.9 Disciplinary actions and reporting requirements
- 1.10 Claims administration
- 1.11 Duties owed by Court Appointed Common Benefit Counsel (including Plaintiff Steering Committee members)
- 1.12 Duties to the Client's individually retained counsel
- 1.13 Ethical finality in settlement terms

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

- 2.1 Class definition/ascertainably ("fail safe" definitions)
- 2.2 Numerosity
- 2.3 Commonality
- 2.4 Adequacy of representation

- 2.5 Incompatible Standards Classes
- 2.6 Limited Fund Classes
- 2.7 Injunctive and Declaratory Relief Classes
- 2.8 Rule of Civil Procedure 23(c)(4) “Issues” Classes
- 2.9 Damage Classes/predominance, superiority, manageability issues)

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

- 3.1 Permissive and necessary parties
- 3.2 Compulsory counterclaims
- 3.3 Consolidation and severance of cases and claims
- 3.4 Impleader and intervention
- 3.5 Subject matter jurisdiction/supplemental jurisdiction/diversity jurisdiction/Class Action Fairness Act/Mass Actions
- 3.6 Jurisdiction over property
- 3.7 Service of process and notice
- 3.8 Venue/ 28 USC 1391/1404/1406
- 3.9 *Forum non-conveniens* and transfer
- 3.10 Stay Orders (“first to file rule and exceptions, Colorado River Doctrine)
- 3.11 Abstention Doctrines
- 3.12 Anti-Injunction Act
- 3.13 All Writs Act
- 3.14 Res judicata and collateral estoppel (prior class action members and exceptions/offensive non-mutual collateral estoppel)

### **Subject Area 4: Multi-District Litigation (MDL) under U.S.C. 1407**

- 4.1 Procedures and standards for consolidation decisions
- 4.2 Pleading requirements and deadlines before the Judicial Panel on Multi-District Litigation
- 4.3 Choice of MDL Forum
- 4.4 Powers of MDL Transferee Judges (define “Pretrial” Lexecon decision and exceptions
- 4.5 Bellwether trials (trial and modified methods/selection process/conduct of trials/use of technology/time limits/videotaping)
- 4.6 Role of Liaison Counsel or Litigation Steering Committee
- 4.7 Judicial findings and conclusions
- 4.8 Awards of attorney’s fees and costs
- 4.9 Coordination among Federal/State Courts in related litigation
- 4.10 Powers functions and role of Special Masters
- 4.11 Exit strategies (remand options)/emergency and injunctive relief
- 4.12 Non-monetary remedies

### **Subject Area 5: Pleadings and Discovery**

- 5.1 Appointment of Class Counsel
- 5.2 Timing of and limitations on discovery (Notice to Class)
- 5.3 Expert designations, reports and privileges
- 5.4 Deposition practice and procedure

- 5.5 Interrogatories, requests for production and requests for admission.
- 5.6 Physical and mental examinations
- 5.7 Sanctions
- 5.8 Non-party subpoena practice
- 5.9 Federal rules governing electronic discovery
- 5.10 Motion practice
- 5.11 Notice to Class
- 5.12 Statutes of limitations and class actions (American Pipe and cross-jurisdictional tolling)
- 5.13 Quasi class actions
- 5.14 Class Action Fairness Act
- 5.15. Preservation Duties and Orders
- 5.16. Litigation holds and associated spoliation issues
- 5.17 Privilege logs
- 5.18 Maintenance and production of electronic discovery
- 5.19 Managing and producing electronically stored information
- 5.20 Confidentiality issues/protective orders (designation and the designation process)

#### **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, depositions
- 6.10 Statements against interests
- 6.11 Other exceptions to the hearsay rule
- 6.12 Prior statements by witnesses
- 6.13 Admissions by party opponent

#### **Subject Area 7 Settlement**

- 7.1 Role of Courts in approval process
- 7.2 Settlement procedures/standards/alternative remedies
- 7.3 *Cy Pres* and fluid recoveries
- 7.4 Coupon settlements
- 7.5 Limited role of court in aggregate settlements
- 7.6 Alternative dispute resolution mechanisms in class and non-class litigation
- 7.7 Sanctions
- 7.8 Post settlement (liens, loans, special need trust and qualified settlement funds)

# COMPLEX LITIGATION EXAMINATION MANUAL

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 sample questions are designed for our Civil Trial Examinees. While they are not specific to Complex Litigation, they are designed to give examinees an idea of the format of the questions that will appear on the Complex Litigation examination.*

## CIVIL EVIDENCE

1. During a break in settlement negotiations in a negligence case, the plaintiff and defendant, not in the presence of their attorneys, are having a cordial conversation. The defendant says to the plaintiff, "I'm sorry about the accident. I should have been more careful." Settlement negotiations are not successful and the case is on trial. During the plaintiff's direct testimony, his attorney asks him about the conversation he had with the defendant while the parties were engaged in settlement negotiations. Defendant's counsel objects.

**Which of the following best reflects the proper ruling on the objection?**  
**Objection-**

- A. sustained because statements made during settlement negotiations are not admissible.
- B. sustained because the statements made by plaintiff are irrelevant to the case.
- C. overruled because defendant's statement was an admission against interest.
- D. overruled because neither party's attorney was present during the conversation.

**ANSWER: A**

2. This is a product liability case on trial in federal district court. Plaintiff is suing for property damage and economic loss because of the malfunction of computer equipment sold to it by defendant. Defendant claims that plaintiff expressly assumed the risk. During its case-in-chief defendant offers into evidence a shipping invoice, signed by plaintiff's receiving agent, which contains the following language:

"BUYER agrees to buy said goods with the full understanding that it will be solely responsible for any losses or consequential damages caused by said goods. BUYER ACKNOWLEDGES THAT IT HAS FULLY EXAMINED THE GOODS AND IS FULLY AWARE OF ANY DEFECTS IN WORKMANSHIP."

**Is the exhibit admissible?**

- A. No, because the invoice is hearsay.**
- B. Yes, because the invoice has independent legal significance.**
- C. No, because the invoice is not a business record.**
- D. Yes, because the invoice is a business record.**

**ANSWER: B**

### **CIVIL ETHICS**

1. Attorney Jones represented Jack, who was injured in a bar-room brawl with Albert. After a pre-trial hearing, Attorney Jones talked to a local news reporter and stated, "We feel good about our chances. My client defended himself that night. He was hit with a pool cue by Albert, who was drunk. Albert failed his breathalyzer test. Go look it up. It's all in the police report. This isn't the first time Albert has done stuff like this. It's time for people in this community to hold him accountable." **Can Attorney Jones make these statements in his media interview?**
  - A. Yes. All statements of Attorney Jones quote or make reference to a public record, or are Jones's personal opinions about Jack and Albert.**
  - B. Yes. Breathalyzer results are inadmissible and will not be considered by the jury.**
  - C. No. An attorney cannot make general, public comments on the character, credibility or criminal record of a party or witness.**
  - D. No. Ethical rules presume that comments from an attorney within 30 days of trial are prejudicial and improper.**

**ANSWER C**

2. You have been informed by a large national insurance company that they would like to retain your services to represent their insured in relation to a car wreck in which their insured was involved and in which a lawsuit has been filed against their insured. The insurance company has informed you that they will pay your attorney's

fees and all costs associated with defending this lawsuit and otherwise representing their insured.

**QUESTION: Under what circumstances, if any, can you represent the insured?**

- A. There are no restrictions on an attorney's ability to be able to represent the insured/client under these circumstances.**
- B. Provided that you obtain the insured/client's informed consent, you are ethically permitted to represent the insured/client.**
- C. You can only represent the insured/client under these circumstances if you obtain his informed consent, it does not interfere with your independent professional judgment, and communications with the insured/client are protected as privileged.**
- D. You can only represent the insured/client under these circumstances if you obtain, in writing, his consent.**

**ANSWER: C**

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

**SAMPLE 1:**

**CIVIL ETHICS AND CIVIL LITIGATION**

Adam, an African-American employee of Reliable Towing Company (Reliable Towing), was terminated by Joe, the white owner of the company, for allegedly stealing equipment. Anticipating the firing, Adam secretly carried a tape recorder in his jacket pocket and recorded the firing without Joe's knowledge. Adam had previously seen Attorney Russell, because he felt that Joe was treating him unfairly. His attorney advised him to obtain "concrete" evidence of discrimination if he wanted to pursue a case. Adam returned to see his attorney with a tape recording. Adam filed a wrongful termination suit against Joe and Reliable Towing alleging that the firing violated his civil rights. Joe's attorney sent discovery requests that sought any and all recorded statements related to the events described in the plaintiff's complaint. Adam's attorney, Russell, did not provide or identify the recording in discovery responses. He replied "none" to the request.

Attorney Russell deposed Joe and asked Joe "Did you ever tell my client 'Brother, get off of my property' after you fired him?" Joe responded "no." The next day Attorney Russell sent Joe's attorney and the attorney for Reliable Towing a copy of the tape recording of the firing where the statement "Brother, get off of my property"



may be heard. Attorney Russell sent a letter with the tape arguing that the statement is evidence that Joe fired Adam in violation of his civil rights and demanded an immediate financial settlement.

Pursuant to a local statute it is a criminal violation to “willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any oral communication.” The statute further prohibits one to “willfully disclose, or endeavor to disclose, to any other person the contents of any oral communication, knowing or having reason to know that the information was obtained through the interception of an oral communication in violation of the subtitle.” It is also a violation to “willfully use, or endeavor to use the contents of any wire, oral, or electronics communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication violation of the subtitle.” The statute provides for the recovery of damages and attorney’s fees in a civil action.

1. The wrongful termination case proceeds to trial and the plaintiff intends to introduce into evidence the recording that his client secretly made of his firing. **What pre-trial motion(s) should be filed? List the arguments in support and in opposition to the motion(s). Explain how the Court should rule as to each motion and why?**
2. Joe is furious over the attempted use of a recording that he believes was illegally made in a civil trial and he has hired you to file a grievance against Attorney Russell. **What rules of professional conduct, if any, did Attorney Russell violate and explain how the local grievance committee should rule and why?**
3. Joe’s attorney does not wish to pursue a grievance against the other attorney. **May he decline his client’s request to report this misconduct? Explain.**
4. After the wrongful termination suit is concluded, Joe files suit against Adam and his attorney, Russell for violating the local wiretap statute. Attorney Russell files a motion for Summary Judgment on his own behalf, **what should Attorney Russell argue and how should the Court rule?** Adam retains Attorney Russell to represent him in this action. **May Attorney Russell take this case? Explain.**

## **SAMPLE 2:**

### **CIVIL TRIAL**

On August 15, 2010, Alex, a 16-year-old living with his parents in Fake County, was planning to attend a Back to School party. The party was being hosted by Becky, another minor, at the home of her parents in Fictitious County. Before loaning the family car to Alex, his parents shared cocktails with their son in the backyard by the pool around 6:00 p.m.

At 7:30 p.m., Alex pulled out of his driveway and headed to the house party. When he arrived at 7:50 p.m., he phoned his parents to tell them he had arrived safely and would call when he was leaving. There was no parental supervision at the party and Becky had coaxed her older brother, who had lived in Delaware for nearly four years and was only in town visiting, into supplying alcohol for the party. At 11:00 p.m., Alex called his parents to let them know he was leaving the party and would be home shortly. The next call from Alex to his parents came at 11:16 p.m. to tell them he had been involved in a car accident in Faux County.

Alex had been texting Becky to thank her for the invitation to the party and the free drinks when he crossed the centerline and collided head on with Jane. Due to the damage to his car in the collision, Alex was forced to leave his car on the passenger side. As he stumbled out of the car, Alex muttered, "Oh no! I hope I'm not asked to take a Breathalyzer!" Eve, an eyewitness to the accident, had stopped and ran upon the scene just in time to hear Alex's mumbled statement. Eve then proceeded to Jane's car to check on her. Fortunately, no one suffered fatal injuries in the crash, but Jane did suffer a broken neck and damage to her spine.

When police arrived on the scene, Eve pulled an officer to the side and reported what she had overheard Alex said as he left his car. Based on this alone, an officer approached Alex and asked Alex to submit to a Breathalyzer. Alex complied and his BAC (Blood Alcohol Content) was determined to be 0.07, just under the legal limit of 0.08. Alex was arrested and charged for underage drinking and driving, texting while driving, careless operation of a vehicle and crossing the centerline.

Jane contacted an attorney decided to file a civil suit against Alex, his parents for respondeat superior liability, Becky, her parents, and her brother. Pursuant to a local statute which allows filing by fax, Jane's attorney fax filed the petition in Fictitious County on August 15, 2011 at 5:01 p.m. The statute provides "the filing shall be deemed complete at the time that the fax transmission is received and a receipt of transmission has been transmitted to the sender by the clerk of court." Generally, the fax would have been received by the Clerk's office the following morning and date stamped according to the transmission time (Aug. 15, 2011 5:01P.M.). However, on August 15, 2011, the regular clerk was out sick and a temporary worker was hired to fill in. The temporary clerk, not familiar with the normal business operations, turned the fax machine off when she left at the close of business on August 15, 2011 at 4:30 p.m. Therefore, Jane's petition for damages was not received by the clerk's office until August 16, 2011 at 8:30 a.m.

Alex's attorney is preparing to answer Jane's petition for damages. He knows that if he does not raise all the exceptions and affirmative defenses in answer, those exceptions and defenses are waived.

- 1. What exceptions and/or affirmative defenses should Alex's attorney raise in answering Jane's petition for damages? List arguments in support of and in opposition to the exceptions and defenses.**

Jane's attorney wishes to amend the original petition in order to add claims against Alex's parents for negligent lending of the vehicle based on information and belief that Alex's parents knowingly allowed him to drink and drive the family vehicle. In order to do so, however, he requires Alex's deposition. Jane's attorney has noticed Alex to appear for deposition. Jane's attorney wants to question Alex about his parents' knowledge that he was drinking and driving their car. Alex is involved in criminal prosecution for his criminal charges as a result of the accident. His attorney seeks a motion for protective order to delay the taking of his deposition pending the outcome of his criminal trial. Jane's attorney thinks it best to depose him now and knows there is a presumption in favor the questioning party (Jane) when the answering party (Alex) pleads the Fifth or remains silent in a deposition.

**2. How should the Jane's attorney oppose the motion for protective order and on what grounds? How should the judge rule?**

Jane's attorney also seeks to subpoena Alex's cell phone records to demonstrate he was texting at the time of the accident, the content of the texts indicated he had been drinking prior to driving, and that Becky was responsible for his drinking too. Becky's attorney wishes to suppress this evidence.

**3. How may Becky's attorney achieve this goal?**

The case proceeds to trial. The court did not grant Alex's motion for protective order to prevent the taking of his deposition while his criminal litigation was simultaneously underway. However, the court permitted Alex to answer questions with "I plead the Fifth" or "I choose to invoke my Fifth Amendment right against self-incrimination" or simply remain silent and decline to answer. Alex was found guilty of underage drinking and driving, texting while driving, careless operation of a vehicle and crossing the centerline in his criminal litigation. Jane's attorney would like to enter Alex's deposition into evidence and his criminal charges. Jane's attorney would also like to call Eve as a witness to testify that she heard Alex make the comment about the Breathalyzer before the police arrived on the scene.

**4. How should Alex's attorney oppose both the criminal charges evidence and his deposition and the testimony of Eve on the stand?**