

**Memo: Patent Litigation Examination Information**  
**From: Gwen Arcangelo, Assistant Director**

**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. 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 short answer essay questions and is a total of 6 hours: A Morning Section (8:30 a.m. – 11:30 a.m.) 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 short answer 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 patent law and ethics. The questions 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 patent litigation law. It is not designed to be a bar or law school type of examination.

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. You must answer 45 of the questions correctly to pass the multiple choice section. A failing score in the Multiple Choice ETHICS portion of the examination results in a failure of the entire examination.

**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:**

Due to COVID-19, 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 17 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 **508-384-6565** or email me at **[garcangelo@nbtalawyers.org](mailto:garcangelo@nbtalawyers.org)**. I look forward to helping you complete our examination requirement.

## EXAMINEE INFORMATION DOCUMENT

This document is designed to assist eligible applicants prepare for an examination administered by the National Board of Trial Advocacy (NBTA). For the requirements of each specialty area, please visit [www.nbtalawyers.org](http://www.nbtalawyers.org) and click “For Attorneys” and scroll down to “Standards” and “Exam Information”.

The Examination Specifications provide a list of practice related information/skills that relate to the purpose of certification in the specialty area that maybe assessed. **To view “Specifications” please refer to pages 7-8 of this packet.**

### PROCESS:

**Step 1** Complete NBTA’s online application in its entirety to become eligible for one of the next NBTA examinations. If you would like to take the Examination first please contact Gwen Arcangelo: [garcangelo@nbtalawyers.org](mailto:garcangelo@nbtalawyers.org) for further instructions. The following is a list of the application requirements: CLE, Legal Writing, Disclosure of Conduct, Substantial Involvement, Contested Matters, History of Professional Conduct, Application Agreement, and References.

**Step 2** Applicant registers and sits for a Spring or Fall NBTA examination administration. The entire application process must be successfully completed within two years from the online application submission date OR two years from signing up to sit for the Examination (whichever date comes first). E.g. If the application is received 10/20/2020, it must be completed by 10/20/2022.

**Step 3** Once all requirements are satisfied (completion of continuing education in the area of specialty greater than required by general members of the bar, demonstration of a broad-based experience in the specialty area, favorable evaluation by other attorneys and judges familiar with your work in the specialty area and review of your written work) and fees are paid then the Applicant is certified. Please click [here](#) for the entire NBTA Fee Schedule.

### REGISTRATION PROCEDURES:

- If you are eligible to sit for an up-coming examination, you will be sent an examination registration form, two months prior to each examination administration date.
- You MUST use an Apple Mac Computer or Windows Computer (Windows 10 Operation System) that is not older than 3-4 years. Your computer MUST have a functioning webcam. Please CLICK on the [FAQ's](#) for further details or contact Gwen Arcangelo ([garcangelo@nbtalawyers.org](mailto:garcangelo@nbtalawyers.org)) at the NBTA for additional information.

- Testing Accommodations are available to qualified individuals. Please contact Gwen Arcangelo (garcangelo@nbtalawyers.org) at the NBTA for the form or for additional information.
- You may take the examination from your home or office. The Examinees are monitored remotely through your webcam. Artificial Intelligence and NBTA Staff will review your examination sessions for any violations in examination rules. Please CLICK on NBTA's Online Examination [FAQ's](#).

### **COSTS/FEEES:**

- Your registration form must be received by NBTA by the deadline on the form along with payment of the \$400 examination fee. All registration forms MUST be accompanied by the \$400 fee.
- Registration form and fee are NOT accepted after the deadline. You must re-register for the next examination administration and pay the \$400 examination fee.
- If you cancel less than 24 hours prior to the examination day, you will be charged a \$150.00 "No Show" fee. This fee is due before any certification is granted.

### **EXAMINATION ADMINISTRATION:**

- The purpose of the examination is to verify your basic knowledge of the usual legal procedures, core substantive law and ability that is common to specialists in the area of law tested. The areas examined are listed in the individual Examination Specifications for each area of law. **To view the "Specifications" please refer to Pages 7-8 of this packet.**
- The examination is a total of 6 hours: A Morning Section (8:30 a.m. – 11:30 a.m.) and an Afternoon Section (12:30 p.m. -3:30 p.m.). The Morning Section consists of 60 multiple choice questions. The Afternoon Section consists of 3 hours of short answer essay questions. **To see the "Examination Information" details please refer to page 1 of this packet.**
- Two weeks prior to the date of the examination, you will be required to take a mandatory 2-part mock examination. Mock Examination 1 is an administrative process that teaches you how to use various features of software for the examination and it will have you take a baseline photo of yourself. Mock Examination 2 will compare your baseline photo and verify that your computer meets the minimum system requirements for taking the examination (<https://examsoft.com/resources/examplify-minimum-system-requirements>).

- Examination questions are geared toward generally applicable legal principles. If your state has a particular legal rule which is important to your answer, please indicate what state you are from and describe the rule.
- You are permitted to use designated reference materials during the examination, e.g. the Federal Rules of Evidence, the ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, etc. Please check the specific materials permitted by the individual area of law. **See “Reference Materials” on the Exam Facts Page 9 of this packet.**
- Names must NOT be written on any part of the examination.
- You must supply your own computer that meets the minimum system requirements for the Examssoft Software.
- Multiple choice questions must be answered by selecting the correct choice within the testing software application (Exemplify).
- You must keep track of time. Remain alert to the passage of time. Timing devices can be activated as part of Exemplify.
- You will type answers within Examssoft which operates much like Microsoft Word.
- You will NOT be granted extra time. If you run out of time you will not be able to complete that portion of the examination.
- All examination answers should be uploaded at the end of the individual session.

#### **GRADING AND REVIEW:**

- A passing score is 75%.
- Approximately eight weeks after the administration of that examination’s date, you will be notified of the result.
- Prior to the release of your results, all failing examinations have already been granted an automatic appeal to the members of the Specialty Program Commission. Members of this commission review the failing examinations and make a final determination. Results are released only after all reviews have been completed.
- Results are sent “Confidentially” to your address of record. However, if you wish the results to be sent to an alternate address, notify Gwen Arcangelo (garcangelo@nbtalawyers.org) at the NBTA in writing to provide this information.
- The decision of the Specialty Program Commission is final.

- You may retake the examination one time (contingent upon file eligibility). Upon a second failure you are procedurally denied and must wait a calendar year prior to re-applying to NBTA to sit for the examination.
- Re-applications require that a new application be opened and all standards met and documented. The examination must be re-taken in its entirety.

**AFTER CERTIFICATION:**

- Each year certified attorneys must return a Disclosure Statement and pay a fee of \$295 (and \$50 for each additional specialty). By signing the statement, you are verifying that you continue to meet the requirements for certification. Every 5 years a Recertified attorney must again show that he or she has satisfied the Continuing Education, the Substantial Involvement in the specialty area experience and receive favorable references. **NO EXAMINATION IS REQUIRED.**

**Please direct any questions about the examination to the following:**

**Gwen Arcangelo, NBTA Assistant Director  
850 Franklin Street, Suite 8  
Wrentham, MA 02093  
508.384.6565 (Phone) / 508.384.8223 (Fax)  
garcangelo@nbtalawyers.org**

# **Specifications for the National Board of Trial Advocacy Patent Litigation Certification Examination (Finalized by Patent Board April 16, 2020)**

**Purpose of the Examination:** The Patent Litigation Examination is designed to verify the applicant's basic knowledge of the usual legal procedure, core substantive law, and trial ability commonly possessed by specialists in this area. In addition to the pre-trial and the trial process, patent litigation includes evaluating, handling, and resolving patent matters prior to the initiation of a lawsuit as well as the appellate processes.

An applicant is expected to demonstrate the ability to identify the issues, state and apply the applicable law, and analyze the 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 / 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 / restrictions on right to practice law
- 1.7 Dealing with paralegals and other non-attorney staff
- 1.8 Trial publicity
- 1.9 Disciplinary actions and reporting requirements

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

- 2.1 Patentability requirements
- 2.2 The patent specification and claims
- 2.3 Inventorship
- 2.4 Double patenting
- 2.5 Infringement
- 2.6 Claim interpretation
- 2.7 Unenforceability
- 2.8 Defenses to infringement
- 2.9 Remedies
- 2.10 The Hatch-Waxman Act
- 2.11 Design patents
- 2.12 Patent Trial and Appeal Board Proceedings
- 2.13 Assignments and licenses
- 2.14 Time limits

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

- 3.1 Subject matter jurisdiction
- 3.2 Jurisdiction over parties
- 3.3 Service of process and notice
- 3.4 Venue and transfer
- 3.5 Joinder of parties and claims
- 3.6 Remand

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

- 4.1 Pleading requirements and deadlines
- 4.2 Discovery (see Subject Area 6 below)
- 4.3 Federal Rules of Civil Procedure
- 4.4 Federal procedure for pretrial discovery plan, scheduling conference and order
- 4.5 Rules governing motions and briefs
- 4.6 Rule 12, F.R.Civ.P motions
- 4.7 Judicial findings and conclusions
- 4.8 Directed verdicts and dismissal of cases
- 4.9 Summary judgments and other dispositive adjudication without trial
- 4.10 Settlements / judgments / subrogation / collateral source
- 4.11 Emergency and injunctive relief
- 4.12 Voir dire
- 4.13 Opening statements / closing arguments
- 4.14 Jury instructions
- 4.15 Post-trial motions
- 4.16 Appealability and review / making a record

#### **Subject Area 5: Evidence**

- 5.1 Authentication and introduction of evidence / mode and order / relevance and probative value
- 5.2 Relevance exclusions, including subsequent remedial measures, settlement offers and compromise
- 5.3 Proper use of demonstrative and other trial exhibits / writings, recordings, photographs, experimental evidence and the optional completeness rule
- 5.4 Qualification of expert and lay witnesses / expert and lay testimony and opinions / scientific evidence
- 5.5 Judicial notice
- 5.6 Privileges and other exclusionary policies, including attorney-client and work product
- 5.7 Refreshing recollection and impeachment of witnesses
- 5.8 Hearsay and exceptions to the hearsay rule

#### **Subject Area 6: Discovery**

- 6.1 Scope of discovery and federal automatic disclosure requirements
- 6.2 Timing of and limitations on discovery
- 6.3 Expert designations, reports and privileges
- 6.4 Deposition practice and procedure
- 6.5 Interrogatories, requests for production and requests for admission.
- 6.6 Sanctions
- 6.7 Non-party subpoena practice
- 6.8 Federal rules governing electronic discovery



## **CERTIFICATION EXAMINATION FACTS NATIONAL BOARD OF TRIAL ADVOCACY**

### **WHAT**

Examination in all specialty areas of law is designed to verify an applicant's knowledge in the usual procedures, ethical considerations and substantive law that should be common to specialists in the area of law.

### **ELIGIBILITY**

An applicant must satisfy the requirements for eligibility in the specialty area and must complete the online application in its entirety prior to sitting for the examination. The initial application must be received 45 days prior to the examination dates for the Spring or Fall Examination administration. (I.e. for an April 16<sup>th</sup> examination the application must be received and processed by March 1<sup>st</sup>)

### **REGISTRATION PROCEDURES**

You will receive an email invitation from [exambot@examsoft.io](mailto:exambot@examsoft.io) to activate an ExamSoft Account. Within the email you will be prompted to create a personal account password. Once you create your password you will follow the prompts to the ExamSoft Student (Examinee) portal. Within that portal you can download Examplify. Once the download is complete you will want to install and then launch Examplify. Your institution ID is **National Board of Trial Advocacy**. Once entered in the text field, select your institution from the dropdown menu, then click the green next button. Next enter your ID and password and sign in. You should now be able to use Examplify for your examination!

### **EXAMINATION FORMAT**

The examination is six hours long from 8:30 a.m. - 11:30 a.m. and 12:30 p.m. – 3:30 p.m. The morning section is all multiple choice and the afternoon section is all essay. There are no optional questions.

### **FEE**

There is a \$400.00 Examination Fee in addition to the \$400.00 application fee for a total of \$800.00 to obtain your initial certification. Cancellations 24 hours or less are assessed a \$150.00 “No show” fee.

### **REFERENCE MATERIALS**

Title 35 of the U.S. Code; selected provisions of Title 18 and 21 of the US Code; The Federal Rules of Evidence and Federal Rules of Civil Procedure; either the ABA Model Code of Professional Responsibility, Model Rules of Professional Conduct, or the ethics rules in effect in the applicant's state.

### **SCORING**

75% is a passing score. Examination results (pass or fail) will be released 8 weeks after the administration of the examination.

**QUESTIONS**

**Contact Gwen Arcangelo, Assistant Director, E-mail –  
garcangelo@nbtalawyers.org, Phone 508-384-6565 or NBTA, 850 Franklin  
Street, Suite 8, Wrentham, MA 02093**

## **PATENT LITIGATION EXAMINATION MANUAL (Revised 7/2021)**

**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:**

1. Garcia filed a patent application at the USPTO on February 12, 2013, fully describing and clearly claiming his new levitating light bulb. Garcia claimed international priority from a patent application he had previously filed at the European Patent Office on March 10, 2012. During the course of prosecution at the USPTO, Garcia filed a continuation application on November 3, 2015. The USPTO allowed Garcia's application to issue as a granted patent on August 4, 2016. Garcia's patent was not subject to Patent Term Adjustment. Garcia never paid any maintenance fees with respect to his patent.

**What is the expiration date of Garcia's patent?**

- A. August 4, 2020**
- B. March 10, 2032**
- C. February 12, 2033**
- D. November 3, 2035**

**ANSWER: A**

2. Goldberg developed the idea of a lawnmower robot on November 1, 2019, and constructed a prototype of the robot on December 14, 2019. On January 15, 2020, while on a business trip in Canada, Goldberg displayed the prototype and distributed detailed technical specifications of the robot to participants in a convention for lawn care professionals. Goldberg filed a patent application at the USPTO fully describing and clearly claiming the robot on October 15, 2020.

Park independently conceived of the identical robot on August 23, 2019. Park did not devote further time towards the project until January 1, 2020. At this point Park worked continuously on the project until she developed a prototype on January 13, 2020. Park filed a patent application at the USPTO fully describing and clearly claiming the robot on May 4, 2020.

**Which party is entitled to priority of invention with respect to the lawnmower robot?**

- A. Goldberg, because he was the first to reduce the invention to practice.**
- B. Goldberg, because he was the first to disclose the robot to the public, and he filed an application at the USPTO within a year of that disclosure.**
- C. Park, because she was first to conceive of the robot, and diligent prior to Goldberg's conception until her own reduction to practice.**
- D. Park, because she was first to file an application at the USPTO.**

**ANSWER: B.**

***The additional sample questions that we provide below are designed for our Civil Trial Examinees. While they are not specific to Patent Litigation, they are designed to give examinees an idea of the format of the questions that will appear on the Patent 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 mutter, "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 overhead 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?**

**NBTA POLICY DOCUMENT: Inspection of Examination/Retention  
(Board Approved– November 4, 2014)**

Within 60 days after the announcement of the results of an NBTA examination, an applicant who has failed to pass a specialization certification examination may inspect his or her examination in such manner and place as the NBTA designates.

**PROCEDURE:**

**1. Failure of Examination:**

- Following the failure by an applicant of the Spring or Fall examination he or she will be notified in writing of his or her failure and informed of the examination inspection policy.
- An applicant must timely notify NBTA in writing that he or she wishes to review that examination.

**2. Inspection of Examination**

- NBTA upon request by an applicant will set up an inspection site at the NBTA Office or at a location geographically located as close as possible to the requesting applicant.
- Upon completion of the proctored location arrangement, NBTA will send a filled in copy of the Multiple-Choice Examination, a copy of the Essay portion of the Examination and a copy of the applicant's answers.
- Only the Applicant will be permitted to review his or her examination at a proctored site for an hour's time.
- The applicant is not permitted to copy or make notes of the examination in any way.
- At the end of the hour all examination materials must be returned to the proctor for transmission to the NBTA Offices.
- Upon the date marking the 60th day after the announcement for that examination, all an applicant's examination materials shall be destroyed.

**3. Passage of Examination:**

- Following the passage by an applicant of the Spring or Fall examination he or she shall be notified in writing of his or her passage.
- At the date of the announcement of his or her passage of the examination all his or her examination materials shall be destroyed.

**4. Examination:**

- NBTA shall retain a copy of each administered examination in a secure location and in a secure medium that is accessible only to authorized personnel. All confidential information as to each applicant's examination score will be deleted after 60 days and no information concerning the applicant's file will be provided to a third party.

**NBTA POLICY DOCUMENT: Testing Accommodations**  
***(Board Approved– February 16, 2013)***

**It is the Policy of the NBTA to administer a specialization certification examination in a manner that does not discriminate, on the basis of a disability, against a qualified applicant with a disability in accordance with the Americans with Disabilities Act, as amended (ADA). A qualified applicant with a disability who is otherwise eligible to take the specialization certification examination may file a request for special testing accommodation if by virtue of a disability the applicant cannot demonstrate, under standard testing conditions, that the applicant possesses the essential skills and aptitudes that the NBTA has determined to be the basis for issuance of certification as a legal specialist.**

**PROCEDURE:**

**1. Requests:**

- **A request for an accommodation for the Spring or Fall examination shall be made in writing and must be received 21 days prior to the date of the general examination's administration.**
- **The Request shall include the following minimum information: Contact information of the requestor (name, address etc.), the date scheduled for the general administration of the examination, and a description of the applicant's disability and the special accommodation requested. The specific reason for the request with any additional documentation in support of the request must be submitted on a Form prescribed by NBTA.**

**2. Decisions on the Requests:**

- **NBTA shall take steps reasonable and necessary for it to reach a fair determination before the general examination.**
- **The Request shall be reviewed by the Staff in consultation with the Dean of Faculty.**
- **A decision on a request shall be completed within 14 days of the receipt of the request.**
- **A denial of a Request may be appealed to the full Examination Committee and shall be filed within 7 days of the applicant's receipt of the denial. The appeal shall be conducted on the basis of the record compiled and the applicant shall be limited to a written argument in support of the appeal.**

**3. Availability of Request Forms**

**All forms necessary to complete a request shall be available at no charge from the NBTA Office.**

## **NBTA POLICY DOCUMENT:**

### **Alternate Examination Administration Day for Religious Reasons (Board Approved– February 16, 2013)**

It is the Policy of the NBTA to permit an applicant to take a specialization certification examination on an alternate date if the applicant for religious reasons is unable to take the examination on the date selected for general administration. This alternate examination day administration must not compromise the validity and reliability of the specialization certification examination for which it is requested.

## **PROCEDURE:**

### **1. Requests:**

- A request for change of date of the Spring or Fall examination shall be made in writing and must be received 21 days prior to the date of the general examination's administration.
- The Request shall include the following minimum information: Contact information of the requestor (name, address etc.) the date scheduled for the general administration of the examination and the alternate administration date requested. The specific reason for the request with any additional documentation in support of the request (on a Form prescribed by NBTA).

### **2. Decisions on the Requests**

- NBTA shall take steps reasonable and necessary for it to reach a fair determination before the examination.
- The Request shall be reviewed by the Assistant Director in consultation with the Dean of Faculty.
- A decision on a request shall be completed within 14 days of the receipt of the request.
- A denial of a Request may be appealed to the full Examination Committee and shall be filed within 7 days of the applicant's receipt of the denial. The appeal shall be conducted on the basis of the record compiled and the applicant shall be limited to a written argument in support of the appeal.

### **3. Availability of Request Forms**

All forms necessary to complete a request shall be available at no charge from the NBTA Office.

**NBTA POLICY DOCUMENT: Completion of Examination  
(Board Approved– February 16, 2013)**

**It is the Policy of the NBTA to permit an applicant to sit for a specialization certification examination twice (contingent upon file eligibility). If an applicant fails the second administration of the examination (any part or the entire examination) an applicant's file will be procedurally denied. Thereafter, an applicant must wait a calendar year from the date of last unsuccessful examination before re-applying to sit for a specialization certification examination, so that an applicant can demonstrate that the applicant possesses the essential skills and aptitudes that the NBTA has determined to be the basis for issuance of certification as a legal specialist.**

**PROCEDURE:**

**1. Failure of Examination:**

- **Following first failure by an applicant of the Spring or Fall examination he or she shall be notified in writing of his or her failure and informed of the examination completion policy.**
- **Following the second failure by an applicant of the Spring or Fall examination he or she shall be notified in writing that; he or she failed; and that his or her application has been procedurally denied; and the date of the next general examination's administration that he or she will be eligible to attend.**
- **Procedural closure of an applicant's file for failing the examination twice is final and not appealable.**