February 2001 Bar Examination Sample Answers

DISCLAIMER
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Question 1 - Sample Answer 1.

#1. The handwritten will is not valid because it was not properly written. In other words, under Georgia law, it has not met the requirements. The requirements are that it must be in writing, signed, notarized, and witnessed.

Although John handwrote his will, the will was not notarized or witnessed. Therefore, the court would likely find that the will was not properly executed. However, had John died, Elizabeth could have used the will to argue that it was John's intent to leave his assets to her. In addition, she could have shown that Mary & John were contemplating a divorce. These facts alone may have provided an inference, they would not have provided a conclusive evidence. Hence, the court would likely find that the will was invalid.

#2. The second will was valid because it met all the requirements under the Georgia law of proper execution of a will. The will was prepared by an attorney in writing; it was signedby John; the will was notarized; and it was witnessed by uninterested beneficiaries. It properly devised his assets. Because there is no codicil amending or modifying the will, the second will will likely be held valid.

#3(a) Mary is not entitled to any of the assets of the estate because divorce severs the intent to gift in the absence of contrary intent. John and Mary got divorced after the will was prepared. Thus, the court would likely find that in the absence of codicil amending his intent to convey John's assets to Mary that John intended to revoke that gift.

(b) Susan will receive her legacy of $5,000 because even though John was not the biological father nor had he adopted Susan, he made a specific gift to Susan. It was his intent to give her the gift even though she is not a natural in line to inherit. In addition, there is no codicil contrary to his original intent.

#4.(a) Mary's son, James, would not get anything because he has no natural right to inherit from John because John is not James' biological father nor had he adopted James. In addition, John did not make any express gift. He will not get anything based on the will or intestacy.

(b) Mary's daughter, Susan, as previously discussed can only receive what John gave her in his will since he is not the biological father nor had he adopted Susan.

#5. Norma does not have valid claim against the estate because the sale of Coca-Cola stock

extinguished her right. She is his niece. Even if she could inherit by other means, i.e., if her mother was dead and the only lineal left was Norma, her right to a specific gift disappeared when the testator expressed his contrary intent by selling the particular gift. He only intended to give a specific item, which does not entitle her to his other assets.

#6. The estate's debts will be satisfied from the left over or sale of residency assets. In this case, since divorce severed Mary's right to inherit, the assets, i.e., $5,000 cash, stocks & the lot, will revert to his estate as if he had died intestate. The administrator will be appointed to use those assets list to settle the debts of the estate. Here, the administrator will use those assets to pay for funeral expenses and medical expenses.

The remaining assets could be claimed by Elizabeth since she is the only lineal dec. left. John's parents are dead and he has no other living siblings/lineal dec. Under the intestacy laws, a person who died intestate, his assets are distributed to his lineal dec., which includes parents, grandparents, siblings, etc.

Even though he left a will, his assets mentioned in the will will be treated as if he never wrote the will. The assets under intestacy law, would have been distributed to his parents had they been alive. However, since his parents have predeceased him, Elizabeth, his only living lineal dec. will inherit the rest after the debts of the estate have been satisfied.

Question 1 - Sample Answer 2.

1) John's handwritten will is not valid. While recognized in some jurisdictions, a handwritten or holographic will is not an effective will in Georgia. To be valid, a will must be signed by the testator and witnessed by two individuals. The handwritten will therefore is not valid. The fact that John wrote the will while in the military and in the face of impending death might effect the will's validity under an exception, so should be looked at under Georgia law. Also, the first invalid will was not incorporated by reference into the second will because it was not specifically referenced in the second will, so it is not valid for that purpose either.

2) John's second will is valid in part assuming it was witnessed by two persons and evidences his intent to distribute his bounty. Because John has divorced since the drafting of this will, his former wife's share will be treated as if she predeceased John, therefore Mary (former wife) does not take. John's second will is also valid because it came after his first will and thus trumps the first will, which was invalid anyway.

3) As discussed above, Mary does not take under the second will because Mary and John divorced after the will was drafted. Susan, Mary's daughter, will still receive the $5,000 general legacy as the divorce of her mother and step-father does not effect her bequest.

4) Mary's son and daughter are probably not entitled to any share (other than Susan's 5K) of the estate unless they can prove they were equitably adopted by their stepfather. They will likely be unable to prove equitable adoption because they were born prior to John's marriage to Mary and by a different father. Absent facts that John intended to adopt them, their claim will fail. Moreover, since both are well above the age of majority, no claim for years support is available. Because they are not the issue of John and because no facts supporting equitable adoption are

present, they cannot take under any portion of the estate that is distributed through intestate succession. Mary's portion falls into general estate for intestacy.

5) Norma (John's niece) does not have a valid claim against John's estate because herspecific devise of shares of Coca-Cola stock is abated because it is no longer in existence. Specific devises fail if the object is no longer part of the estate and there is no evidence the testator intended to replace the specific bequest with a like or similar bequest. Any argument that the ABC Shipping stock should be substituted for the Coca-Cola stock must fail because the ABC stock was identified in the will separately.

6) The estates 10K debt will be satisfied first from the assets that were not subject to a specific bequest. Derivative or leftover bequests are used to satisfy the estates debts before general bequests, and specific bequests are attached last. Thus, the leftover cash after grant to Susan covers funeral expenses. The lot presumably went up in value since its 1983 appraisal value - this should more than cover this debt. If needed, after granting the 5K bequest in cash to Susan, the remainder of John's estate will pass intestacy succession. Since John is not married and has no issue, the probate court looks to John's parents. Since they predeceased John, next in line are his siblings. It appears he has only one, Elizabeth. Therefore, Elizabeth will take the remainder of the estate, including the cash, lot and stocks.

The personal representative would be required to gather assets and make an accounting to satisfy the estates obligations before any assets are distributed.

Question 1 - Sample Answer 3.

#1. The handwritten will is not valid. In Georgia, a will is only valid if it is in writing, signed by the testator, in the presence of witnesses (or if testator acknowledges the signature) and two attesting witnesses. While some states recognize handwritten wills, Georgia does not. Therefore, the 1980 will is ineffective.

#2. The will is probably valid. The will was "witnessed, notarized and executed," which probably means that the elements stated above have been satisfied. There was apparently no revocation of the will by express document, physical act, or subsequent inconsistent document. Also, the mere fact that John was divorced subsequent to the will's execution does not constitute a revocation by operation of law. While some changes in family status (e.g., birth of a child or marriage) may revoke a prior will by operation of law, divorce does not effect a revocation. Therefore, the will appears to be valid.

#3. Mary - Even if the will is valid, Mary will not be entitled to receive the bequest contained in the will. While a divorce does not revoke a will by operation of law, Georgia courts will treat the former spouse as if she predeceased the testator. Therefore, Mary is not entitled to take under John's will.

Susan - While the same rationale might apply to preclude the bequest to Susan, a Georgia court would probably not invalidate the bequest to Susan. While divorce shows an intention to disassociate one's self from the former spouse, as a matter of policy there is really no reason to extinguish gifts to children of the former spouse that are specificallycontained in the will.

#4. As explained above, Susan is probably entitled to the bequest of $5,000. However, aside from that bequest, neither Susan nor James are entitled to any portion of the estate.

First, they are not entitled to take Mary's share under Georgia's ant-lapse statute. Under the statute, if a person predeceases the testator, their share will be taken by their issue - the "substituted beneficiary." However, the lapse statue will not apply to gifts to a former spouse, who as explained above, is treated as if he/she predeceased the testator.

Second, they are not entitled to receive any share that passes through in testate succession. Neither James nor Mary are John's natural children, and John never adopted either one. Therefore, they are not "heirs at law" entitled to take through intestate succession.

#5. Norma probably does not have a valid claim against the estate. First, the specific bequest of the Coca-Cola stock was adeemed by extinction. John sold the stock in 1985; therefore, there is no stock to give Norma. Because this was a specific bequest, the doctrine of ademption by extinction applies, and the bequest is ineffective. Norma might argue that any stock purchased after the sale constituted property "in kind" that should be replaced for the Coca-Cola stock, but it appears that no such property exists.

Second, Norma is not entitled to take any share of the estate through intestate successionunless her mother has died. If Elizabeth is still alive, as John's sibling she is the sole heir at law under Georgia's laws of descent & distribution. However, if Elizabeth has died, Norma would properly be John's heir at law, and would be entitled to take any portion of the estate that passes through intestate succession (here, the residue).

#6. John's debts will be satisfied out of the residue of the will. Generally, the order of abatement for bequests is as follows: (1) first, will be paid out of the residue; (2) second, will be paid out of any general bequests, (3) then demonstrative bequests; and, finally, specific bequest. Here, the debts would first be paid out of the residue, which is the "balance of the estate" that was attempted to be given to Mary. If the residue is insufficient to cover the debts of the estate, they will be paid out of the $5,000 given to Susan (which is a general gift). Here, the estate owes $10,000, and the estate contains $15,000 in cash. The cash will probably be used to pay the debt, with $5,000 remaining for Susan. The remainder of the estate will likely pass through intestate succession.

Question 2- **Sample Answer 1.**
(disclaimer)

1. Bank's filing of a financing statement in Atlanta is correct. The controlling provisions of Article 9 of the UCC provide that a proper filing of a financing statement may be in any office of a superior court clerk in the state. Once the security interest has been recorded with the clerk, the secured creditor, here the Bank, has sufficiently filed to protect its security interest.

2. Vendor and Bank have conflicting security interests with neither having a firm priority to the entirety of the forklifts. Under Bank's security interest, the forklifts are covered as equipment because of their use in the business and after acquired collateral because of the timing of the forklift acquisition. The forklifts are covered as a purchase money security interest.

Bank's security interest would be prior to Vendor's interest according to the general rule of Article 9 giving priority to the first creditor to file or perfect. However, Vendor's security interest falls within an Article 9 exception for purchase money security interests. Under this exception, creditors secured by purchase money security interests take priority over prior creditors if a filing is made within 15 days of the debtor taking possession of the collateral. Here, Vendor's filing on November 14, 2000 places it within the 15-day window, giving it priority in the forklifts.

Because Vendor's purchase money security interest was not for the total purchase price, its security interest is limited. A purchase money security interest is only effective in the collateral to the extent that value was given for the collateral. Jet's payment of 1/3 the purchase in cash limits Vendor's security interest priority to $200,000.

3. Between debtor and creditor, a purchase money security is enforceable against a debtor as soon as the security interest attaches. No filing is necessary to create a valid security interest and as such Vendor's security interest became enforceable when it gave value. Because a filing is only necessary to determine priority of claims among creditors, the lack of a filing provides no escape for the debtor against an otherwise valid security interest. As a result, Vendor is entitled to possession of the forklifts due to the default of Jet on its note payments.

4. Judgment creditors are treated very similarly to secured creditors with regards to priority. As a result, Supplier's judgment on the docket is given priority from its execution on November 10, 2000. Vendor's purchase money security interest was not filed within the 15-day window to achieve preferential priority treatment. As a result, Vendor's security interest does not have priority over the judgment creditor. Therefore Vendor's argument for priority will fail.

Question 2- Sample Answer 2.

1. At issue here is the proper location for filing a financing statement in Georgia. Under current Georgia law, a security interest may be filed with the superior court clerk ofany county in Georgia for it to be effective statewide. Because the collateral securing the security instrument is in Georgia, filing was proper in Georgia, or according to the above-mentioned rule, the secured party can file in any county's clerk of superior court office. Note however that if any of the collateral pertains to an interest in land or fixtures, the security interest/financing statement must be filed also in the office where real estate records are maintained in the county where the real property concerned is located. This appears not be apply here, so filing in Fulton County should be okay and proper to perfect the Bank's interest.

2. At issue here is a priority contest between two secured parties. Here, the Bank, by virtue of its after-acquired property clause, has an interest in the forklifts, as does Vendor, who secured $200,000 in debt with them. Because the Vendor filed the financing statement within 15 days of the Debtor (here, Jet, Inc.) taking possession, the Vendor stands in priority to the Bank. As a general rule, the first to file or perfect, whichever comes first, has priority over subsequent security interests in the same property. There are exceptions to the general rule. When a debtor "buys" equipment and the "seller" retains a security interest in it, this is called a Purchase Money Security Interest (PMSI) in equipment. The secured party in a PMSI in equipment can take priority over a previous security interest, even if filed, if the secured party files a financing statement before possession or within 15 days afterward. Since Vendor's security was filed via a financing statement within 15 days of Debtor's possession, the Vendor will have priority over the Bank.

3. At issue here is the right to take possession of property acquired as collateral to a security interest's creation. Even though a financing statement was not filed by Vendor, its security interest has "attached," meaning it is valid as between the Vendor and Jet, Inc. (filing a financing statement can be used to "perfect" a security interest, giving the secured party rights as against the rest of the world). As between Jet, Inc. and Vendor, Jet has defaulted, which gives Vendor a right to possession. Article 9 of the UCC, which governs secured transactions, does not specifically define "default," but it does provide that in the event of default (which appears to be the case as stated in the question), the secured party may take possession to satisfy its debt, provided it complies with certain procedures.

4. Supplier's levy will win over the Vendor's security interest. As stated above, security interests known as PMSIs in equipment are perfected and valid with priority over prior perfected interests if financing statements are filed with 15 days of Debtor's taking possession. However, judgment liens are perfected as of the date recorded, which here was Nov. 10. Since the PMSI in equipment's financing statement was not filed within 15 days of Jet's possession, the general rule--first to file or perfect wins--applies, and Supplier will be entitled to $75,000 satisfied from the sale of the equipment.

Question 2- Sample Answer 3.

1. It was proper for the bank to file its financing statement with the Clerk of Superior Court in Fulton County for the purpose of perfecting its security interest in the collateral securing its loan to Jet, Inc. A financing statement concerning a debt extended to a business that does business in Georgia and the assets of which are located in Georgia may properly be filed with the clerk of superior court in any county in Georgia when land or fixtures are not involved.

2. A purchase money security interest exists where the seller of an asset provides the financing for the acquisition that is secured by the asset purchased. Vendor financed $200,000 of the purchase price of the forklifts, which are used by Jet as equipment in its operations, and obtained a security interest in the forklifts. A purchase money security interest in equipment takes priority over a security interest pursuant to an after-acquired property clause if the purchase money security interest is perfected within 15 days of delivery. Vendor delivered all forklifts November 1, 2000 and perfected the security interest by filing on November 14, 2000, with 15 days thereafter. Therefore, Vendor has priority over Bank with regard to the security interests in the forklifts.

3. Vendor would have the right to take possession of the forklifts. Vendor's security interest in the forklifts attached (that is, became enforceable against Jet) when Vendor gave value to Jet, the parties entered the agreement that Vendor would have a security interest in the collateral, and Jet had an interest in the collateral. Vendor's security interest was enforceable against Jet as soon as these things had taken place, and Vendor's right to repossess the collateral arose at that time, assuming no contrary agreement between the parties. Vendor's failure to perfect its security interest by filing does not impair Vendor's rights in the collateral as against Jet. The failure to perfect the security interest only impacts Vendor's rights in the collateral vis a vis third parties having interests in the collateral.

4. No. Vendor cannot successfully argue that its security interest in the forklifts takes priority over Supplier's levy. Supplier's security interest was perfected on November 10, 2000, when it recorded

its judgment on the court's execution docket and initiated steps to levy on all of Jet's property. A purchase money security interest case priority over prior interests only if the financing statement is filed within 15 days of delivery. Therefore, the general--rule that priority is determined based on the order of in which the security interests are perfected-- applies. Because Supplier perfected its interest on November 10, 2000, and Vendor did not perfect is security interest until November 20, 2000, Supplier's security interest takes priority as the interest perfected first.

Question 3 - Sample Answer 1.

(disclaimer)

1) Pursuant to Rule 26, initial disclosures will include a list of witnesses known to defendant, as well as exhibits defendant knows that will be used at trial. This disclosure can be waived by the parties as part of the case management report. Witnesses disclosed pursuant to this requirement should include Steve Quick, Dan Fox, Clara Bell and the names of persons who the claim agent spoke to. It should also include Les Moore and Pauline Peril. Any known exhibits should be disclosed. If the photographs of the scene are to be used as exhibits, their existence should be disclosed, assuming there is no intention of exercising the work product privilege in the future. Notes taken by the claim agent as to measurements and the incident report most likely are not required to be disclosed at this point in time, and may be protected by the work product privilege. Defendant also is to provide to plaintiff any information regarding available insurance to cover the damages for injuries sustained in the accident.

2) The issue of whether Clara Bell's deposition from the Peril case may be used in the Moore case depends on whether the parties who had interest in her testimony were present or had interests similar to theirs protected at the deposition. Ms. Bell is obviously unavailable, so her prior testimony could be used in the subsequent proceeding. Assuming that Moore's litigation were pending, and his attorney participated in Bell's deposition, it can be used in his case. It is possible that even if Moore's litigation were not pending, but the interests of Peril were so similar to the interests of Moore at Bell's deposition, it is likely that this prior testimony has been subjected to procedural safeguards of confronting the witness, and Bell's deposition from Peril's case may be used in Moore's case.

3).a. The conductor's report may be subject to the work product privilege, and accordingly, should not be voluntarily produced. Argument at a motion to compel from plaintiff's counsel will be that such reports are prepared as routine procedure for every mishap, and that because they are not prepared in anticipation of litigation at the direction of counsel, they are not entitled to the work product privilege. Argument can be made also that the report contains only basic facts, and does not reveal any attorney thought processes. However, it may be railroad policy, given the severity of train accidents, that every accident will lead to litigation, and thus the reports are always done in anticipation of litigation. A court may grant a motion to compel this document.

b. Given the nature of the claims agent's job, the statements may not be required to be produced. Again, the claims agent will be charged with resolving claims, which supposes that litigation may result. Such statements are most likely taken in anticipation of litigation and are work product privileged. Additionally, the identity of witnesses must be disclosed and plaintiff can take their own statements from these witnesses and can therefore not make any showing that similar

information cannot be obtained by plaintiff's counsel without substantial hardship.

c. These statements are clearly work product and are not discoverable. They were taken after suit filed by the attorney, and their content will disclose attorney strategy and thought processes about the case. These individuals can be deposed by plaintiff's counsel, so no showing of substantial hardship to defeat the privilege can be made. These individuals are also employees of the defendant, and these statements are attorney-client privileged.

4. A letter disagreeing to this position, setting forth the disagreement should be sent. Plaintiff has put their physical condition at issue by claiming tort damages, and defendant is entitled to such information to determine the impact of such injuries on plaintiff, the effect on life expectancy, or other relevant medical information. If this cannot be resolved, an appropriate motion to compel with supporting memorandum and discovery documents should be filed. Putting injuries at issue entitles defendant to this information.

5. The obligation to disclose and update newly discovered information requires that you notify plaintiff of the existence of this witness and plaintiff should be allowed to conduct additional discovery in this matter. Whether the memo must be produced depends on whether it was prepared in anticipation of litigation by the vice-president and is entitled to privilege under work product. Vice presidents are probably different than claims agents, and establishing the work product privilege may be more difficult. The note attached does not provide any additional privilege. Production of this memo, however, should wait until an appropriate request to produce has been filed.

Question 3 - Sample Answer 2.

1. First, in Federal court parties are required to disclose to each other initial disclosures without request (10 days) before the Rule 16 status conference (unless local rule provides for another time). The parties must identify the names and addresses, if known, of parties that have knowledge about the case. Here, anyone involving the accident that either party is aware of. Additionally, the parties must identify documents that are relevant and knows at the time and the plaintiff must calculate his damages if it can be done at that time. If any experts have been retained at this time, the parties must also disclose this. Additionally, the parties have an ongoing duty to amend the disclosures as additional information is retained. We must provide the names of Les Moore, Pauline Peril, Steve Quick, Dan Fox, Clara Bell, and any other individual that we know of that has knowledge regarding the case, and address if known. Additionally, we would identify the photographs, the recorded conversation of Ms. Bell, and the conductor's report. If any other documents exist that may be relevant to the case, we would have a duty to disclose those items.

2. Clara Bell's deposition could be used at trial. Generally, out of court statements not made by the declarant on the stand cannot be used at trial to prove the truth of the matter asserted at trial. One of the exceptions to the hearsay rule is previous testimony under oath by the declarant that was subject to cross-examination in previous litigation. The parties to the previous litigation must have been the same or have the same interests. In our case, the defendant Quick and C.E.C. were defendants in the case filed by Pauline. While the plaintiff in the present case was also a defendant in the case where Mrs. Bell's testimony was procured, the issues in the two cases are the same or extremely similar. Simply put, both parties had the opportunity to elicit the examination and test the credibility of Ms. Bell under oath. The railroad company's interest in both

litigations, as well as Les Moore's interest, (Les Moore would try to prove that the railroad company was at fault in both cases) were the same in both cases. Furthermore, Ms. Bell is now unavailable which is a requirement through no fault of either party, because she died. (Unless one of the parties killed her which the facts do not indicate.) The fact that she died after pretrial conference does not preclude the deposition, unless the party seeking to introduce the deposition failed to list her as a witness pursuant to the scheduling order or pretrial conference.

3. a) The report by the conductor must be produced. While we could argue that this is privileged because of the work-product doctrine our argument would fail. First, the work product doctrine makes documents privileged that were created at the direction of counsel in anticipation of litigation. Here, the conductor made the document pursuant to company policy, possibly anticipating litigation, but not at the direction of counsel. This doctrine will not protect this report, unless perhaps it could be argued counsel advised company to fill out report after every accident. However, this argument will fail for reasons already stated. Therefore, I would produce this report. Also, the recording of mere descriptive fact, date, time, weather would be outside of privilege.

b) The statements made by the claim agent are a little more unclear. First, the statements could have been obtained by claimant at the instruction of counsel in anticipation of litigation. However, the facts do not say this. Even if they were, the argument should be made that these recordings were not the mental impressions of anyone falling under this privilege, i.e. this is not a document created by someone of knowledge and therefore I would produce the recordings.

c) The statements by the railroad counsel are privileged. Counsel was acting as the railroad's attorney. His interviews of anyone and the recordation of that interview to paper is work product. I would claim the privilege and force the other side to make a showing that they would be entitled to it because of necessity.

4. I would write a letter to opposing counsel demanding production because medicals are in issue and not privileged. If they did not comply, I would file a motion to compel with the court compelling production. If it doesn't produce after court order compelling, move for sanctions, maybe precluding them from showing injuries-medicals.

5. If not created at request of counsel, I would disclose it. It is not privileged. I have an ongoing duty to amend initial disclosures and I would also amend to add his name. I will have to show that we just found this. Just because he put private not disclosure does not matter if not made at counsel's request in anticipation of litigation-work product.

Question 3 - Sample Answer 3.

1. Initial Disclosures

Under the Federal Rules of Civil procedure, which will apply in the Moore v. Quick and L.E. &C. Railroad case, parties are required to disclose certain information without receipt of a discovery request. That information includes the names and addresses of any known witnesses with information relevant to any claim or defense in the pending matter. This is a recent change in the Federal Rule which previously required disclosure of any witnesses with any knowledge relevant to any part of the claim. This will require the disclosure of the names and addresses of all seven (7) witnesses initially located by the claim agent. It will also require disclosure of the name and

address of the claim agent, Dan Fox and the railroad counsel. Additionally, we will be required to identify any expert witnesses who may, or may not, testify at trial and divulge the expected subject matter of their testimony. The expert currently known will be the claim agent and his knowledge will be of the accident scene and weather and other conditions on the date of the accident.

2. Clara Bell's Deposition, under the Federal Rules of Evidence, prior testimony is admissible only if certain conditions are met. The first of these is the witness be unavailable at trial. Secondly, the prior statement must have been made under oath, and finally, the other party to the current litigation must have been present during the prior testimony and have had a chance to cross-examine the witness. In this case, Clara Bell is dead, making her unavailable for trial. Secondly, her prior testimony was made during a deposition and so was under oath. Finally, as parties to the state court action, Quick and LE &C Railroad had an opportunity to cross examine Clara Bell. Therefore, the prior testimony of Clara Bell in the form of her deposition may be used at trial.

3) Production of Witness Statements

(A) The report of the conductor

The report of the conductor is hearsay. It is a statement made out of court offered for the truth of the matter asserted. While this may or may not be a valid objection at trial, it is not sufficient to withstand a request for Production. The standard for relevance is very liberal in Federal Court and states that any fact of consequence which tends to make any issue more or less likely is relevant. The federal discovery rules are liberal as well and allows discovery of any fact relevant to a claim or defense. This report is generally relevant because it recounts the basic facts of the situation around the accident. Additionally, it is subject to discovery as it relates to a claim or defense. Since the report was not made in anticipation of litigation or at the request of any attorney, a work-product privilege claim will not apply.

B) Claim agent statements

Because the claim agent did not take the statements pursuant to attorney instructions, it seems unlikely that a claim of work-product will prevail. However, if the statements were taken in anticipation of litigation, it is possible that attorney work-product will apply.

C) Statements taken by railroad counsel

There could be two privileges here. There is clearly a work-product privilege because the statements of Quick and Fox were taken after litigation was filed and clearly in response to (or in anticipation of) that litigation. Second, if it is deemed that the railroad counsel represents the engineer and conductor, attorney-client privilege could apply. Generally, in-house counsel represents the employer, not the employees but an argument can be made that in this instance, he represents both. Regardless, we do not have to produce those statements unless opposing counsel is unable to get them in any other way or to do so would cause undue hardship. Both Quick and Fox are still available, so the other side has other opportunity to get their statements.

4) Refusal to answer Interrogatory

We should file a motion to compel. He has put his medical condition at issue and we are entitled to the information, or at least, a physical examination.

5.) Vice-president's memo.

There is no claim for attorney work-product nor for attorney-client privilege. Therefore, I should produce the document and try to settle the case! (Not necessarily in that order!)

Question 4 - Sample Answer 1.
(disclaimer)

1. Acme Tire seeks to exclude the testimony of Jack Miles on the ground that his methodology failed to satisfy FRE 702. Rule 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact, a witness qualified as an expert... may testify thereto in the form of an opinion."

To qualify as an expert, a person must possess specialized skill, knowledge, education, experience, or training pertinent to the subject matter of his opinion. Mr. Miles probably is not "qualified" to render expert opinions regarding the cause of the tire malfunction based on his forty-years experience as a wrecker driver, his visual observation of "thousands of blow-outs", & the absence of evidence of tire abuse.

In determining whether to admit evidence under Rule 702, the court is to act as a gatekeeper, Daubert. The opinion must be relevant & reliable. In determining reliability of scientific evidence, the court is to consider such factors as whether the expert's theory has been tested, the potential rate of error, whether the test was done for purposes of litigation, etc. Daubert. This approach is not as helpful in cases, such as this, where the expert's opinion is based not on scientific knowledge but on technical or other specialized knowledge. Kuhmo Tire. In such cases, the court is to look at the "expert's" experience & to see if there is a "fit" between his experience and his opinion.

In this case, Mr. Miles is a wrecker driver . Although he has seen "thousands of blow-outs" in his career, there is nothing in his background to suggest that he is qualified to render opinions as to the cause of a tire blow-out (i.e., whether it be because of abuse or a malfunction). There is no evidence that Mr. Miles has any education or training in the cause of tire blow-outs. Accordingly, this court should grant Acme Tire's motion in limine to exclude Mr. Miles's testimony.

2. David Seeks to exclude any evidence or testimony concerning his statement made at the scene that he "had previously been convicted of vehicular homicide & was not going back to prison." This statement is not relevant because it does not tend to prove or disprove any material fact in this case.

Evidence of a prior bad act is not admissible to prove action in conformity therewith & it doesn't appear that is being offered to prove anything else (e.g., motive, intent etc.). Moreover, evidence of David's prior conviction would not be admissible as impeachment evidence because the conviction does not suggest a lack of trustworthiness.

Additionally, the statement, even if relevant, probably would be inadmissible under Rule 403 because any probative value would be substantially outweighed by the danger of unfair prejudice to David. David 's motion in limine should be granted.

3. Paul moves in limine to exclude any evidence that he was not wearing a seat belt at the time of the accident. David obviously seeks to admit such evidence for purposes of showing that Paul was contributorily negligent or that he failed to mitigate his damages. Pursuant to the Erie doctrine, the federal courts, in deciding substantive matters, such as contributory negligence, must apply the substantive law of the state in which they are sitting. Georgia has specifically held that evidence that a person was not wearing a seatbelt is not admissible to show that person's contributory negligence. Accordingly, Paul's motion in limine should be granted.

Question 4 - Sample Answer 2.

The parties have filed three motions in limine, and they will be addressed as follows:

(a) With respect to the motion of Acne Tire concerning wether Mr. Miles qualifies as an expert, the motion should be granted. There is a complete lack of credibility of Mr. Miles as an expert. Mr. Miles is a wrecker driver, and while he may have experience in the past of seeing tires disintegrate, he certainly has no credibility or reliability with respect to testifying as to the mechanics of rubber and the causes for rubber to fail. His opinions are not subject to peer review, nor based upon scientific criteria or data. Rule 702 of the Federal Rules of evidence, and the leading case on this issue, Daubert, a decision which is followed by most jurisdictions, requires more than the standard not the opinion of an expert "assist the trier of fact." The opinion of an expert must be based on scientific scrutiny. Rule 702 requires specialized knowledge, or scientific knowledge or technical knowledge, none of which has been shown. There has been no satisfaction that he had any methodology in reaching his conclusion that the tire blow out was caused by a manufacturing or design defect. His testimony is not based on sufficient data, criteria or testing, and should not be allowed.

(b) Defendant, David, moves in limine to exclude testimony he made at the scene concerning a prior conviction of vehicular homicide. Although, under the Federal rules of evidence, an admission of a party opponent is not hearsay, there are reasons why this testimony should be excluded and the motion therefore granted in favor of David.

If this testimony concerns a felony conviction of more than one year, the court may allow such evidence to be presented to the jury.

The court may also allow evidence of crimes concerning fraud or dishonesty.

However, with respect to felony convictions of more than a year, and not those involving dishonesty, the court is required to determine if the probative value is substantially outweighed by dangers of unfair prejudice, waste of time, confusion of the jury.

The evidence concerning the prior conviction, even if relevant, has no probative value, and even if it did, the damages of unfair prejudice greatly outweigh any probative value.

The evidence should further be denied on grounds of relevance under Rule 402. It does not prove any matter at issue in this case other than the reason why he left the scene after the accident. The fact that he left the scene can be shown without using this testimony. Accordingly, under both Rules 402 and 403 the motion of David should be granted. Further, if the vehicular homicide conviction was considered a misdemeanor, then it cannot be admitted.

(c) Paul has moved in limine to exclude evidence of Paul not wearing a seatbelt at the time of the collision. The motion should be granted.

Under the Erie doctrine the court is to apply the substantive law of the forum state. As this court sits in Georgia, it must follow Georgia's substantive laws. Under Georgia law, which is applicable to this matter as it concerns a defense to be asserted for purposes of comparative fault, the fact that Paul did not have his seatbelt on at the time of the accident is inadmissible. Accordingly, the motion to exclude such evidence should be granted. Even if a conflict with Alabama law, Georgia's lex loci delictis rule would apply and Georgia law controls.

Based upon the foregoing, I would recommend that the court order as follows;

1. The motion of Acne Tire to exclude the testimony of Jack Miles as an expert shall be granted.

2. The motion of defendant David to exclude his statement at the scene concerning his prior conviction for vehicular homicide should be granted.

3. The motion of Paul to exclude evidence of the failure to wear a seatbelt should be granted.

Question 4 - Sample Answer 3.

MEMORANDUM

A. Issue: Should the testimony of Jack Miles be excluded under FRE 702?

Rule - "If scientific, technical, or other specialized knowledge will assist the trier of fact..., a witness qualified as an expert... may testify thereto in the form of an opinion." (emphasis added) FRE 702.

Analysis: The question presented is if Mr. Miles is a "qualified expert" as required under 702. Since Daubert, and to the 1999 case of Khumo Tire the definition of an "expert" has been narrowed significantly, the court must look toward the process or methodology the expert uses. Mere experience does not satisfy this requirement, rather actual scientific methodology must be utilized. Here, this case is akin to Khumo Tire where the purported plaintiff's expert relied on his experience and simply looking at the blown-out tire. The U.S. S. Ct. found this "expert" failed to satisfy 702, and therefore should have been excluded from testifying.

Conclusion: Relying on Daubret & Khumo Tire, Mr. Miles' testimony must not be allowed as an expert witness.

B. Issue: Should David's prior out of court statement be excluded where he talked about a previous vehicular homicide and not getting caught?

Rule: Any out of court statement made by a declarant is heresay and not allowed, unless it falls within one of the exceptions. Then it must be reviewed for probative value verses prejudicial.

Analysis: The most appropriate heresay exceptions include:

1) Statement against self interest, 2) State of mind, 3) Excited utterance. If any of these three exceptions apply to a part of the statement then it is allowed. (That part)

The first part of the statement is relating to being previously convicted of vehicular homicide. This could be allowed under a statement against self interest, as an additional conviction is more severe in punishment than the first, or it could be an excited utterance and David was in a substantial wreck and saw his friend Paul was dead. This would excite the normal person, thereby presenting another exception. However, this statement is highly prejudicial and a normal jury would be unable to disregard the prejudicial nature of this statement, as prior convictions are not allowed.

Conclusion: If this is not a bench trial, then it should be excluded as it is highly prejudicial against David's character with minimal, if any at all, probative value.

If a Bench trial, the judge could allow it for any probative value and disregard the prejudicial nature.

C) Issue: Should the fact Paul was not wearing a seat belt be excluded?

Rule: Under GA law, while a party has a duty to mitigate damages, under GA statutory provisions a plaintiff's disregard in not wearing a seat belt cannot be held against him as a failure to mitigate. I cannot think of any probative reason to allow this fact to be entered in the record if Georgia law applies.

That brings us to the final question, as I only know I am in U.S. district court, I do not know where this is filed. If filed in GA, GA law would apply under the first & second restatement as well as the governmental interest. If filed in Alabama, GA law would likely be applied under the first and second restatement, but Alabama law may be applied under the governmental interest test as Alabama has an interest in protecting citizens against undue burden of suit; therefore, the seat belt may be admissible.

Conclusion: If I work for a U.S. Dist. Court in Georgia, the seat belt testimony should not be allowed.