



NEW SOUTH WALES
BAR ASSOCIATION®

NSW Bar Examination

February 2023

Candidate Number

F23 - _____

Do **NOT** write your name on this book or any part of the exam

Criminal Examination Questions

Book One (AM)

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Question 1 [ES Q1] Ethics

6 marks

A barrister is briefed to appear at a sentence hearing before the NSW District Court. The barrister filed written submissions a week in advance of the hearing. The day before the hearing, he reads a High Court decision which had just been handed down. The case was adverse to his client's case in relation to a material sentencing consideration. The barrister is relieved that the case was handed down after he filed his submissions because drawing the court's attention to the case would have increased the likelihood of his client going to gaol.

When the barrister arrived at court, he was surprised to see that the crown prosecutor was not tendering his client's South Australian history and overheard the police officer in charge of the case say to the crown prosecutor that the offender had no prior record. The client has previously instructed that he had been convicted of drug possession last year in Adelaide.

The crown prosecutor called the police officer in charge of the matter at the sentence hearing to give evidence about certain matters. In cross examination, the barrister asked the police officer whether his client had any prior convictions, to which the officer answered "no". The barrister said to the crown prosecutor in the morning tea break, prior to submissions being heard, "it'd be so unfair for my guy to be sent into gaol, especially with a clean history and a young family". The barrister submitted orally to the judge in the course of the hearing "my client has strong prospects of rehabilitation because he has completed a rehabilitation program and this is his first offence".

With reference to the Bar Rules, what ethical issues arise in relation to this barrister's conduct?

[You are not required to address any disciplinary consequences which may result from a breach of the Bar Rules in this question]

Question 2 [ES Q2]

18 marks

You are briefed to appear in a trial in the NSW District Court for the NSW Director of Public Prosecutions. The accused, David, is charged with causing grievous bodily harm with intent to do so. The alleged victim is his brother, James. David and James were living in a share house with another room mate, Peter. The prosecution allege that between 6pm and 10pm on 1 September 2021, David entered James' bedroom and hit James more than 5 times to the head with a blunt object while James was in bed, causing serious facial fractures. James does not remember being attacked because of the trauma. David's defence will be that the prosecution have not excluded the reasonable possibility that Peter inflicted the injury upon James. CCTV at the front and back of the property establish that only David and Peter were present in the house during the hours when the offence is alleged to have occurred. Records from Peter's computer indicate that he was playing video games between 6pm and 9:30pm. There is a statement from David and James' mother, Carroll, who says that David rang her at 4:30pm on the afternoon of the alleged offence. Carroll states that David told her that he had an argument with James about money and that David was fuming.

Peter has no criminal record. You are instructed that David has previously pleaded guilty to assaulting James occasioning actual bodily harm to him. The facts of the offence were that on 1 July 2021, David poured a full kettle of boiling water on James when he was not wearing a shirt, causing serious burns to his back and neck. This assault occurred after James refused to pay David \$500 which he owed him. You seek to adduce the evidence relating to this offence as tendency evidence in the District Court trial. You caused a tendency notice to be served upon defence prior to the readiness hearing. The notice asserts that the evidence relating to David pouring boiling water on James demonstrates a tendency to be violent towards James and inflict serious harm upon him.

The defence object to this evidence being adduced as tendency evidence, indicating to the Judge prior to commencement of the *voire dire* that the evidence bears no similarities to the allegations in the trial.

- a. **What submissions do you make to the Judge in support of your argument that the evidence should be admitted as tendency evidence, with reference to relevant provisions and principles? (13 marks)**
- b. **Carroll does not want to give evidence against her son in the prosecution case. Is Carroll permitted to be excused from giving evidence at the trial? How would this issue be dealt with by the court? (5 marks)**

Question 3 [ES Q3]

12 marks

Your client is charged with recklessly wounding a person in company. The person with whom he is alleged to have been in company has also been charged with the same offence. The prosecution intends to conduct a joint trial on the basis that the offence allegedly committed by your client and the co-accused arise out of the same set of circumstances. Your client's matter is listed for a readiness hearing next Friday.

Your instructing solicitor asks you whether your client can make an application to be tried separately from his co-accused.

What advice do you give your solicitor in relation to when the court may order a separate trial for two or more accused persons, including what principles apply. You must also advise your solicitor in relation to the procedure for making this application and when the application should be made.

Question 4 [ES Q4]

2 marks

You are briefed to appear at Liverpool Local Court at a defended hearing next week in relation to a car stealing offence. The client's defence is that the owner of the vehicle (the complainant) consented to the accused borrowing the car. You recognise the complainant's name and remember you appeared for her at a sentence hearing for a fraud offence a couple of years ago.

What should you do?

Question 5 [ES Q5]

4 marks

What matters is the court required to take into account when deciding to grant leave in relation to an *Evidence Act* provision?

Question 6 [ES Q6]

12 marks

An old school friend tells you that her brother, Charles, has been charged with a dishonestly obtaining a financial advantage from his employer. He admits the offence but wants to dispute the facts in relation to the amount of money which the employer claims Charles obtained. He can afford your fees but does not want to engage a solicitor because he will need the money to pay back his employer.

- a. **Must you appear for Charles directly, without a solicitor? (3 marks)**

If you take the brief directly:

- b. **what obligations do you have to Charles in relation to matters you must inform him if you accept the brief? (3 marks)**
- c. **What are your fee disclosure obligations to Charles? (6 marks)**

Question 7 [ES Q7]

4 marks

What conditions must be satisfied in order for a police officer to be permitted to be led through her statement in evidence in chief? In what circumstances can the prosecution ask leading questions of this police officer in evidence in chief?

Question 8 [ES Q8]

8 marks

You are before the NSW District Court to appear for your client at her sentence proceedings for drug offences. Whilst on bail awaiting sentence, she has been assisting police with investigations relating to drug importations from a syndicate in Europe. The police officer in charge of the importation investigations has provided a confidential affidavit outlining your client's assistance. Amongst other things, the affidavit outlines the nature of the assistance and confirms that 2 individuals were charged and convicted as a result of her assistance.

- a. **How is assistance to police taken into account on sentence? (1 mark)**
- b. **What is the sentencing court permitted to do in relation to penalty after assessing the degree of assistance? (2 marks)**
- c. **What matters must be considered by the court when assessing whether the assistance will have an affect on the penalty imposed? (3 marks)**
- d. **Is defence counsel permitted to view the confidential affidavit? (2 marks)**

Question 9 [ES Q9]

4 marks

You are appearing for the accused in a robbery trial. The Crown prosecutor called your client's former cell mate as a witness in the trial. This witness gave evidence that your client confessed to him that he committed the robbery for which he is on trial. The witness received a significant discount on his sentence (for an unrelated matter) for providing an undertaking to give evidence at your client's trial.

At the conclusion of the trial, the Judge provides counsel with an outline of the directions she intends to give in her summing up. The proposed directions do not mention the evidence provided by this witness. What should you do?

Question 10 [ES Q10]

16 marks

You and another junior barrister, Sarah, from your chambers are briefed to assist a senior barrister, who is also from your chambers, in a lengthy fraud trial. Every lunchtime, the three of you meet in a conference room to discuss the trial. As you enter the conference room, after buying lunch for the team, the senior barrister has his arm around Sarah's waist and says "we are going to win this trial because of your preparation, Sarah" and kisses her on the cheek. The senior barrister smiles at you and makes a comment about how he considers you all to be like family after working so closely together. A few weeks later, when the case finished, Sarah came into your room, very upset, and tells you that the incident in the conference room was not the first time he had put his arm around her and made her feel uncomfortable. She also said that the day after the incident in the conference room, the senior barrister told her that she was attractive and later that evening, massaged her shoulders in chambers when they were working late on the case. She left the room quickly because she felt unsafe.

- a. **Your floor has adopted the Model Harassment, Discrimination and Bullying Best Practice Guideline (HDB BPG) and the Model Best Practice Guideline: Grievance and Complaint Framework (GFC). What can you suggest to Sarah about the steps she could take in relation to the senior barrister's conduct, by reference to these guidelines? (5 marks)**
- b. **What steps might have been appropriate for you to take at the time or immediately after you witnessed the senior barrister's conduct in the conference room? (3 marks)**
- c. **Assume that the senior barrister admits the conduct after initially denying the conduct in writing to Bar Council. What disciplinary consequences might follow for the senior barrister? (8 marks)**

Question 11 [ES Q11]

8 marks

Your client is to be tried before a jury in relation to a domestic violence offence. A recorded statement by the complainant was served as part of the brief of evidence. Parts of the statement include responses by the complainant in Spanish. The Crown prosecutor has informed you that she intends to play the recorded statement as part of the complainant's evidence in chief and that the complainant has chosen to give evidence from a remote location via audio-visual link.

- a. Are there any procedural requirements in relation to the content of the recorded statement? (2 marks)
- b. What factors must the prosecution have regard to when determining whether or not to have a complainant give evidence wholly or partly in the form of a recorded statement? (2 marks)
- c. Your client wants you to ask the court to not allow the complainant to give evidence via audio-visual link. Is this possible? (2 marks)
- d. Is the Judge required to provide any warnings to the jury about the use of the recorded statement as evidence in chief or the fact that the complainant gives evidence via video link? (2 marks)

Question 12 [ES Q12]

4 marks

You have been asked by a barrister on your floor to undertake a research task for a case he is working on. You are hoping this will be a good chance to show your skills and possibly do further work with him. The barrister is thrilled that you can assist and wants to discuss an arrangement as to rates and hours you are committing to assisting him with research during your reading year. Are you permitted to undertake this work?

Question 13 [ES Q12]

10 marks

You are briefed to appear for an accused charged with sexual assault. The matter has been committed for trial to the NSW District Court. There is evidence in the complainant's statement that she telephoned her counsellor a few hours after the alleged offence and spoke to her about the alleged sexual assault. This communication represents the first and only time the complainant told someone about the alleged sexual assault other than the police when she made her statement. You want to obtain a copy of the counsellor's notes which would likely detail the communications between the complainant and her counsellor.

Explain whether you are able to obtain the counsellor's notes by causing a subpoena to be issued to compel the production of the communications between the counsellor and the complainant referred to in this scenario. Are there any restrictions which may apply to doing so? Can the complainant express to the court her concerns about the impacts upon her if the notes are subpoenaed/produced to the court?

Question 14 [ES Q12]

12 marks

Your client pleads guilty in the NSW District Court to a charge which involved your client unlawfully possessing a pistol in a public place. Prior to the plea being entered, the prosecution provided notice that they would be making a detention application.

- a. What is the test or tests that apply to this detention application? (6 marks)**
- b. When may bail conditions be imposed? (2 marks)**
- c. If the Judge determines to grant bail pending sentence, identify 4 types of bail conditions that may be imposed or required. (4 marks)**