

PART THREE
EVIDENCE
(60 minutes)

**ANSWER THE QUESTIONS IN THIS PART OF THE
EXAMINATION IN ANSWER BOOK/S SEPARATE FROM THE
ANSWER BOOK/S CONTAINING ANSWERS TO OTHER
PARTS OF THE EXAMINATION**

Question E-1. (2 minutes) The following facts apply to questions E-1 through E-4. The IRS asserted a deficiency against Ted Taxpayer with respect to his 1999 tax return due to unreported income and disallowed deductions. A Tax Court trial resulted. Both Ted as well as the government moved to have trial witnesses excluded until they gave their testimony in open court. The court issued its standard ruling in such situations, a general exclusionary order prohibiting witness presence until the time that the person testifies. Does this order apply to Ted, who will be a witness in the trial? Answer "yes" or "no," then explain briefly.

Question E-2. (2 minutes) After Ted's case was completed, the IRS presented rebuttal evidence. This was on the second day of the trial. Called first in rebuttal was the case's chief investigative agent for the IRS, a person whom the IRS counsel earlier referred to as "our agency representative in this matter." The agent had been sitting with the government attorney during the entirety of the case to that point. Just before she was sworn, Ted's counsel objected that allowing her to testify would violate the court's ban on witnesses being in the courtroom until they testified. Can the agent testify? Answer "yes" or "no," then explain briefly.

Question E-3. (4 minutes) Another witness was called by the government, one Thaddeus Jones, who testified that Ted had collected substantial fees from Jones, which fees were never incorporated in Ted's reported gross income. On cross-examination by Ted's counsel, Jones admitted that he came into the courtroom the prior day and heard a good deal of the testimony. He explained that there were a number of people in the spectator section, and he felt he would not be noticed. He enjoyed hearing some of the earlier evidence, he said, and it was helpful to him. When Ted's lawyer asked Jones if government counsel had warned him not to attend court proceedings until he testified, Jones replied: "Not that I can recall." At that point, Ted's attorney asked that Jones' entire testimony be stricken from the record. Should the testimony be stricken? Answer "yes" or "no," then explain briefly.

Question E-4. (4 minutes) In addition to attempting to strike evidence from the record, what other sanctions might an attorney request when a witness is shown to have attended court proceedings prior to the time of his testimony, contrary to the court's instructions? List the remedies which a party might request when an opposing witness improperly attends court in cases where the judge has entered a general order excluding witnesses so they cannot hear the testimony of other witnesses.

Question E-5. (3 minutes) The following facts apply to questions E-5 through E-1 9. The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues.

Counsel for Sam called Sam to the witness stand. He testified regarding his income and deductions during the year in issue, 1999. The IRS cross-examined him by asking: "Earlier this year didn't the IRS assert a claim against you for unpaid federal income tax for 1999, which you attempted to settle by offering partial payment?" Sam's counsel objected. Is this a permissible cross-examination question? Answer "yes or no," then explain briefly.

Question E-6. (4 minutes) The next cross-examination question asked Sam to relate what he told attorney Lee Baker about his (Sam's) income and deductions for 2000. Lee Baker is a prominent tax attorney in the local area. He is not representing Sam in this current tax case nor has he ever represented Sam. After hearing Sam out, attorney Baker declined the case. At trial, when the IRS attorney asked Sam "What did you tell Mr. Baker about your income and deductions for 2000?", there was an objection. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

Question E-7. (3 minutes) The cross-examination continued. Sam admitted that two years ago he committed the offense of misdemeanor bank fraud, and received a suspended sentence. Then the IRS attorney asked: "And didn't your theft of bank assets involved in that conviction result in numerous widows and children being deprived of their funds?" There was an objection by the defense. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

Question E-8. (2 minutes) Question E-7 reflects the last cross-examination question by the IRS counsel. Sam then answered a few questions on redirect. His attorney asked him to briefly explain the circumstances of his prior banking conviction. If allowed to testify, Sam would say that there was a bank employee's mistake that resulted in a computation error and ultimately caused Sam's conviction, which conviction was not really attributable to any fraud on Sam's part. However, before Sam could make his explanation, there was an objection by the government: "Objection, improper redirect." Is this a permissible redirect examination question? Answer "yes" or "no," then explain briefly.

Question E-9. (4 minutes) Sam stepped down. As the next witness for Sam, Sam's lawyer called an experienced small business consultant to testify as an expert witness on the propriety and reasonableness of several expense items claimed by Sam. After establishing that the expert looked at Sam's records and that the expenses appeared customary and reasonable, Sam's lawyer asked if the expert had talked about the case with other pizza business owners. The expert replied: "Yes. Their comments provided part of the basis for my opinion here." When Sam's attorney asked: "Will you tell us what they said?", there was a hearsay objection. Is this a permissible question? Answer "yes" or "no," then explain briefly.

Question E-10. (3 minutes) The expert was then asked on direct if he prepared a summary of comparative expenses, comparing Sam's claimed expenses to those of other, similar companies. He replied "yes, based upon their business records. First, I secured the regularly prepared business records from four other pizza business companies. Then I prepared a chart which shows that Sam's expenses compare favorably to the expenses incurred by the other similar businesses." The chart was offered in evidence as defense exhibit number one. There was an objection to the exhibit on the following ground: "Objection, the underlying records have not been made available to us." When the judge inquired about this, Sam's lawyer said that they had not disclosed the records of other businesses to the IRS because "we have no legal obligation to do so." Will the exhibit (the chart) be received as part of Sam's trial proof? Answer "yes" or "no," then explain briefly.

Question E- 11. (3 minutes) When the direct ended, the IRS attorney asked this question on cross-examination: "Have you testified at the request of Sam Taxpayer's attorney in other tax cases involving other taxpayers?" The expert answered yes, on two occasions. He was then asked: "What were your fees in those two cases?" An objection was lodged on the ground of improper cross-examination. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

Question E-12. (3 minutes) During the case presented by the IRS, Billy Driver testified. Up until a month ago, Billy delivered pizzas for Sam, and ran other errands for the pizza company as well. Before trial Billy stated that he was present at a conversation in the summer of 2000 between Sam and Walt Supplier wherein Sam said: "I know my bill with you is \$10,000, that's what I owe you and that's what you will get. But make out your statement to me like you are charging me \$20,000, that way I can claim more for expenses." Walt declined to inflate the bill. Billy took the stand, seeking to tell about Sam's request to Walt. Before Billy got much of this testimony out, there was a hearsay objection by counsel for Sam. On the issue of whether the statement by Sam is inadmissible hearsay, should the objection be sustained? Answer "yes" or "no ," then explain briefly.

Question E- 13. (3 minutes) Billy stated to the IRS before trial that a couple of weeks after the incident described in question E-12, he picked up the telephone at work and inadvertently overheard an ongoing conversation. He recognized the voices. Sam was talking to Walt, and Walt said to Sam: "You know you have been hiding some of your income for the last year or so." There was a long moment of silence when Sam did not speak, but when he finally said something he changed the subject, asking: "Walt, when are you going to send me some of that whole wheat pizza dough that the health buffs like for their crust?" At trial, the government asked Billy to tell what he overheard Walt say to Sam on the telephone, but there was a hearsay objection. On the issue of whether the testimony by Billy relates improper hearsay, should the objection be sustained? Answer "yes" or "no," then explain whether Wait's statement constitutes improper hearsay, or not.

Question E-14. (4 minutes) Billy also reported prior to trial that another driver for Sam's Pizza, a driver named Clyde, made a damaging request to Walt. The two drivers picked up some pizza supplies from Walt, and Walt was in the process of making out a bill for Clyde to take back to Sam. Clyde told Walt: "Make it out plenty high. The boss will be glad to pay you half of whatever you put down, but he likes the paperwork to show plenty of expenses." In court when Billy is asked by the IRS to repeat what Clyde said, there was a hearsay objection. Should the objection be sustained? Answer "yes" or "no," then explain briefly.

Question E-15. (3 minutes) After the direct examination of Billy was completed, he was cross-examined by counsel for Sam. The counsel asked: "Are you the same Billy Driver who was convicted of felony drunk driving in 1989, but did not serve any jail time because you were sentenced to three years probation?" There was an objection by the IRS on the ground of improper cross-examination. Should the objection be sustained? Answer "yes" or "no," then explain briefly.

Question E-16. (3 minutes) The cross-examination continued. Counsel for Sam asked Billy if just last year, in 1999, he made out a false claim for worker's compensation benefits. The cross-examiner asserted that Billy claimed he had been injured, when in fact there was no injury. The cross-examiner had a factual basis for this question, but the government objected. Is this a permissible question? Answer "yes" or "no," then explain briefly.

Question E-17. (3 minutes) Sam's counsel took a confrontational tone when asking Billy: "Are you what we call a rat?" When Billy asked what that meant, counsel said: "That's somebody who squeals on his boss. I ask again, are you a rat?" There was an objection. Is this a permissible question? Answer "yes" or "no," then explain briefly.

Question E-18. (2 minutes) Finally, counsel for Sam asked Billy, when he swore to tell the truth at the trial, whether he also believed in God. There was an objection to the question on the ground of improper cross-examination. Is this a permissible question? Answer "yes" or "no," then explain briefly.

Question E- 19. (5 minutes) Sam's lawyer recalled Sam as a witness and asked him whether he ever received a note from Billy Driver. Sam said yes, that he got a note wherein the writer said that if he could keep his job with the company, the writer would not cooperate with the IRS, which was investigating Sam. The note was unsigned, but Sam asserted that he felt it came from Billy. Sam's lawyer offered it into evidence "to impeach the credibility of witness Driver." The IRS objected. Is the note admissible in evidence? Answer "yes" or "no" then explain briefly.