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Qualifying Test Paper:

00390: Recorders (South Eastern Circuit) 2009

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This paper should be left in the test room at the end of the test session. The contents of the test should not be discussed with or divulged to anyone.

CANDIDATE BRIEF – PLEASE READ CAREFULLY BEFORE YOU START

You have 90 minutes to complete the entire test. There are five questions. You should answer **all** of them.

This test has been set to assess:

- Intellectual Capacity – the ability quickly to absorb and analyse information
- Authority and Communication Skills – the ability to explain procedure and any decisions reached clearly and succinctly to all those involved

Marks will be awarded to all the answers that you provide that demonstrate these qualities.

The questions identify where you should express your answer as a series of bullet points and where you should express yourself as you would in a judgment. You should give reasons for each answer. There is no need to recite the facts when answering the questions, save in so far as you find it helpful to do so.

In addressing the problems set you should deal with them on the material that you have – deciding to adjourn for further information will not score marks.

Marking scheme

Question	Marks available for demonstrating the ability quickly to absorb and analyse information	Marks available for demonstrating the ability to explain procedure and any decisions reached clearly and succinctly to all those involved	Total marks available
1	18	12	30
2	15	5	20
3	10	6	16
4	50	30	80
5	20	10	30

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INTRODUCTION

A new radical government has brought in the Community Anti-Social Behaviour Act 2007 which came into force on 1 November 2007 (please note: this is a **fictional** Act).

The Act introduced Community Courts which have Family, Criminal and Civil Divisions. In the Criminal Division a Community Judge or Recorder sits with six lay assessors chosen at random. The Judge is responsible for the conduct of the proceedings, for giving directions and for imposing penalties. The assessors are judges of fact and sit on a separate bench at the side of the court. They may be asked to leave court if matters of law arise. At the end of the trial the assessors retire on their own to reach their verdicts. There is no contact between Judge and assessors other than in open court. The criminal standard of proof applies.

In the Family and Civil Division a Judge or Recorder sits alone. The civil standard of proof applies.

The new Act governs the control of anti-social behaviour in the context of criminal, family and civil proceedings and all other legislation in this area has been repealed. All legislation relevant to questions in this Qualifying Test is contained in the material provided.

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MATERIALS PROVIDED

[The mere fact materials have been provided does not automatically mean that they are relevant]

(1) Community Anti-Social Behaviour Act 2007:

- s76 (Meaning of anti-social behaviour)
- s129 (Qualification for service as an assessor)
- s130 (Assessors – Criminal Court)
- s131 (Discharge of assessor)
- s132 (Continuation of criminal trial on death or discharge of assessor)
- s165 (Hearsay)
- s166 (Unavailable witnesses)
- s189 (Injunctions)
- s399 (Public interest: non-disclosure order)

(2) Community Anti-Social Behaviour Rules 2007

- Rule 1 (The Paramount Objective)
- Rule 2 (The Court's case management powers)

(3) Extract from the European Convention on Human Rights and Fundamental Freedoms

- Article 6 (extract)
- Article 8

(4) Case law

- R v Batt [1996] Crim L.R. 910
- Extract from R v H & Others [2004] 2 AC 134

(5) Text of witness statements

Please note: there are as yet no reported cases on the new legislation

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TEST PAPER

You are dealing with an application made in the Family Division for an injunction preventing Brian Smith from pestering, harassing or distressing his wife. There are allegations made by Rebecca Smith that her husband has been making a nuisance of himself by hanging around outside the former matrimonial home, sending her unpleasant texts and emails and seeking to see the children outside the agreed contact arrangements.

Question 1a

Before the proceedings commence you realise that the advocate for the husband is someone with whom you had an intimate relationship some five years ago which had ended perfectly amicably without any repetition or recriminations on either side and against whom you had appeared regularly during the intervening period.

What if any decision does that lead you to reach and what reasons if any do you give?

[answer in bullet points]

Question 1b

Assume you have done nothing but on going into court Rebecca Smith's advocate invites you to recuse yourself because of the past relationship with the barrister representing the husband.

What do you decide and what if anything do you say?

[answer in bullet points]

Assume that having explained your position the application is withdrawn. The wife's advocate applies to read the statement of Ms Fallon on the basis that the witness is unfit to attend to give evidence and relies upon the statement of Dr George. The husband's advocate objects on the basis that the condition is not made out and relies upon Miss Rutherford. **[N.B. these statements are given as part of the 'Text of Witness Statements' test materials]** Neither doctor can attend court for at least 4 months. The week before the hearing the papers were been placed before a District Judge who, by agreement, directed that this issue be resolved by you on the basis of the medical evidence as set out in the statements.

Question 2

Whose evidence do you prefer and why?

[answer in bullet points]

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At the conclusion of the hearing you make findings of fact and grant the application sought but do so in a manner designed to try and promote harmony between the parties in the hope that the proceedings will not result in even greater bitterness. Whilst 'preferring' the wife's evidence as to the behaviour alleged you do not express yourself in anything that might be suggested to be trenchant terms.

It is now six months later and you are sitting in the Criminal Division with six lay assessors and the case you are to try concerns the same parties as the proceedings in the Family Division but relates to alleged anti-social behaviour that the accused husband is said to have indulged in some time after the injunction was granted.

On the morning of the first day of the hearing both the advocates ask to address you in the absence of the assessors. They tell you that they have agreed an adjournment is required in order that an unnamed witness can be traced. Both sides tell you that it is believed someone may have lived opposite the family home who could have seen several of the incidents. You are asked to adjourn the case to a date to be fixed by consent; they say the "paramount" objective supports their position. The listing officer confirms that if other cases are moved the case can be relisted in six weeks time.

Question 3

What do you decide and why?
[answer in bullet points]

Assume that the proceedings continue and evidence is being called.

The prosecutor sends you a message saying that she needs to make a private application in chambers relating to s.399 of the Community Anti-Social Behaviour Act 2007 **[NB: this section of the Act is reproduced in the relevant part of the test materials]**. As is entirely proper, you agree to see her, albeit with the court clerk present and with the proceedings in chambers being recorded.

The prosecutor tells you that the officer in the case recently attended a meeting involving the various agencies that make up the Family Protection Team and at which the social worker assigned to the family was present. By chance the officer happened to read a private diary maintained by the social worker in which contact with the three children of the family was recorded. The social worker has spent many months trying to gain the trust of these very damaged children and had recorded in her diary that a week before the trial was to begin the elder girl (aged 13 and with a history of self harming and anorexia) asked for a confidential meeting with the social worker. In the course of that meeting she related that her mother had told her she was making up allegations against the defendant in order to promote her position

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in the financial proceedings. The social worker had recorded in the diary that any further destabilising of the family and/or involvement of the children in the conflict between the parents would have a catastrophic effect upon the welfare of the child in question and her siblings.

Question 4

The prosecutor seeks your approval for non-disclosure of the diary entry on the basis that the child could never realistically be called by either side, there is a legitimate public interest in protecting the confidentiality inherent in the relationship between the child and the social worker and social work records that record these matters as well as protecting the welfare of the children. In any event the officer believes that the defendant is deliberately manipulating the child in order to try and damage the prosecution case.

Write out the record of reasons that you would give relating to this matter as required by s.399(5) of the Community Anti-Social Behaviour Act 2007.

[do not use bullet points]

The trial continues until part way through the prosecution case.

Question 5

The somewhat over-familiar and interfering long-serving usher at the court draws to your attention he has heard “those useless lay assessors” squabbling in the retiring room and expresses the view that two of them are ganging up on “the only one with any sense”.

What do you decide and what if any action do you take?

[answer in bullet points]

END OF TEST

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(1) COMMUNITY ANTI-SOCIAL BEHAVIOUR ACT 2007

76. Meaning of anti-social behaviour

(1) Anti-social behaviour is any action by a person which is or was reasonably likely to pester, harass or distress any person.

(2) To constitute anti-social behaviour there must be more than one act prohibited by subsection (1) above.

129. Qualification for service as an assessor

(1) Subject to the provisions of this Act, every person shall be qualified to serve as an assessor in the Community Anti-Social Behaviour Court and be liable accordingly to attend for service as an assessor when summoned under this Act if—

(a) he is for the time being registered as a parliamentary or local government elector and is not less than eighteen nor more than seventy years of age;

(b) ... [not relevant]

130. Assessors - Criminal Court

(1) The assessors to try an issue before a court shall be selected by ballot in open court from the panel, or part of the panel, of assessors summoned to attend at the time and place in question.

(2) The Assessors Oath shall be "I swear by Almighty God that I will faithfully try the defendant and give a true verdict according to the evidence". Any person who objects to being sworn shall be permitted to make his solemn affirmation instead. The wording of the affirmation shall be "I do solemnly, sincerely and truly declare and affirm that I will faithfully try the defendant and give a true verdict according to the evidence".

131. Discharge of assessor

(1) At any time during the course of a trial in the Community Anti-Social Behaviour Court, the judge may, if he considers it appropriate to do so, having regard to the interests of justice, discharge any assessor or assessors.

132. Continuation of criminal trial on death or discharge of assessor.

(1) Where in the course of a trial in the Community Anti-Social Behaviour Court, an assessor dies or is discharged by the judge, but the number of its members is not reduced below four, the remaining assessors shall nevertheless be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.

165. Hearsay

(1) In proceedings under this Act a statement not made in oral evidence in the proceedings is admissible as evidence of any matters stated in it if, but only if,

- (a) the court is satisfied that it is in the interests of justice for it to be admissible; or
- (b) any other provision of this chapter makes it admissible.

166. Unavailable witnesses

(1) In any proceedings under this Act a statement not made as oral evidence in the proceedings is admissible as evidence of any matter stated in it if:

- (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;
- (b) the person who made the statement is identified to the satisfaction of the court as having made the statement;
- (c) any of the five gateways in subsection 2 is satisfied.

(2) The gateways referred to above are:

- (a) ... [not relevant]
- (b) the person who made the statement is unfit to be a witness because of his bodily or mental condition.
- (c) – (e) ... [not relevant]

189. Injunctions

(1) A Circuit Judge or Recorder sitting alone may grant an injunction prohibiting anti-social behaviour pending the determination of any family, civil or criminal trial in the Anti-Social Behaviour Court.

(2) The court may grant an interim injunction prohibiting a person from behaving in an anti-social manner if there are substantial grounds for believing he has behaved in such a manner and it is necessary to grant an injunction to ensure there is no further anti-social behaviour. If the court does not grant an injunction it may impose an Admonishment Order, whereby the Respondent is admonished for his behaviour or may make an Advice Order whereby the Respondent is advised as to future conduct.

(3) Any breach of an interim injunction under this section shall be liable to be dealt with as a contempt of court.

399. Public interest: non-disclosure order

(1) ... [not relevant]

(2) An application may be made in private and without notice to withhold material from any party to proceedings under this Act.

(3) On making an order to which this rule applies, the court shall state its reasons for doing so; a record shall be made of the statement of the court's reasons.

(4) Any party to proceedings or other interested party may appeal against a ruling under this section

(5) An appeal under this section shall be determined by the Court of Review which will consider the record of the judge's reasons which shall not, unless the Court orders otherwise, be disclosed to the appellant but shall be scrutinised by the Court of Review.

(2) COMMUNITY ANTI-SOCIAL BEHAVIOUR RULES 2007

1. The Paramount Objective

(1) In all decisions of the court, it shall seek to further the Paramount Objective so far as is practicable and in the public interest.

(2) The Paramount Objective is to deal with all matters justly.

(1) Dealing with matters justly includes –

- (a) ensuring that all cases are dealt with expeditiously and fairly;
- (b) ensuring that the parties are on an equal footing;
- (c) identifying the issues in the case at the earliest opportunity;
- (d) narrowing the issues between the parties;
- (e) giving appropriate directions to ensure the orderly dispatch of business;
- (f) avoiding delay.

2. The Court's case management powers

(1) In furthering the Paramount Objective the court may take any step or make any order for the purpose of furthering the Paramount Objective including compelling a witness to attend a trial...

(3) EXTRACT FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 6 (extract)

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

(2) ... [not relevant]

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) - (c) ... [not relevant]

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(4) CASE LAW

R v BATT

[1996] Crim.L.R. 910

Court of Appeal (Criminal Division)

Stuart Smith L.J., Nelson J. and Judge Capstick Q.C., acting as a judge of the Court of Appeal (Criminal Division)

March 17, 1996.

On the second day of B's trial, Crown counsel was replaced by fresh counsel who was defence counsel's co-habitee. B, having 15 minutes to consider the matter, signed a note written out by defence counsel allowing him to continue to represent B. B appealed against his conviction (for burglary) on the ground that, although it was conceded that there was no unfairness in the conduct of the trial, failure by one (or other) of defence or Crown counsel to withdraw from the case amounted to a material irregularity because, only in that circumstance, would justice have been seen to be done.

Held, dismissing the appeal, there was no material irregularity. In the case of *The King v. Sussex Justices, ex p. McCarthy* [1923] 1 K.B. 256, Lord Hewart C.J. qualified his statement that justice should not only be done but should manifestly and undoubtedly be seen to be done, by saying that a conviction should only be quashed on that ground where the applicant or his legal representative was aware of the point that might be taken, refrained from taking it, and took his chance on acquittal on the facts and then, on conviction, decided to take the point. B was fully informed of what had happened but chose to continue with the same counsel. It was not accepted that he had not had sufficient time to consider the matter; it was a simple decision. Nor was it accepted that the matter should have been referred to the judge, who could have done nothing save adjourned the case, or that B should have been told to take independent advice. This was a case where B was fully aware of the point; he refrained from taking it and then, after conviction, sought to take it. B's sense of grievance was not justified on the facts. Adopting the language of Lord Woolf in *R. v. Gough* [1993] A.C. 673 in considering the principle in *Sussex Justices*, there was no "real danger" of injustice in the case.

It was not part of the court's function to consider the Code of Conduct. However, it was generally undesirable for husband and wife, or other partners living together, to appear as advocates against each other in a contested criminal matter.

R v H and others

[2004] 2 AC 134

“...35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands. If the material contains information which the prosecution would prefer that the defendant did not have, on forensic as opposed to public interest grounds, that will suggest that the material is disclosable. If the disclosure test is faithfully applied, the occasions on which a judge will be obliged to recuse himself because he has been privately shown material damning to the defendant will, as the Court of Appeal envisaged (paras 31 and 33(v)), be very exceptional indeed.

36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions.

(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see para 22 above). In cases of exceptional difficulty the court may require the

appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced? It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review..."

(5) TEXT OF WITNESS STATEMENTS

First Statement of Rebecca Smith [used in the family and the criminal proceedings]

I have been married to Brian Smith for over 20 years. We have three children – Alice aged 13, Melanie aged 11 and Joshua aged 9.

The marriage has always been difficult and Brian has been frequently violent towards me.

Things came to a head last Christmas when Brian got drunk and threw the Christmas lunch all over the floor in the course of a violent argument. The children were all very upset and I decided that I could no longer put up with Brian's behaviour. Initially I left our home and moved into a hostel taking the children with me. I instructed a solicitor and he persuaded Brian that he should leave and we were able to move back into the house in early January and we have lived there ever since. It was agreed via the solicitor that Brian would see the children every Saturday and for two hours each Wednesday evening.

Things were alright for the first month but since then Brian has been seeking to pick arguments with me at every opportunity whether over the children or otherwise. I have seen him hanging round outside the house at all times of the day and night. He is often there around the time the children return home from school and he speaks to them and tries to poison their minds against me. He has also been sending me numerous threatening and unpleasant texts and emails.

I finally decided to go to the police when I discovered that my eldest daughter had been using a razor to cut her arms and when I asked her why she said she could not bear the situation any longer. I believe that unless Brian is kept away from my home, myself and the children by a court order he will never let us have any peace and the health of the children and myself will continue to suffer. He has made a number of threats of serious violence and I am quite sure that he is capable of carrying them out.

Second Statement of Rebecca Smith [used in the criminal proceedings]

Following the grant of the injunction Brian said that he wanted to resume contact but would turn up early and make a nuisance of himself and/or bring the children back late and when I sought to find out where they were he would become aggressive and offensive. He then started hanging about outside the house again and I started getting text messages from a number I did not recognise. The content of the messages left me in no doubt that it was the Brian who was sending them.

Last week I saw Brian in the street outside our house at around midnight. When I shouted at him from the front door telling him that if he did not go I would call the police he ran over, grabbed me by the throat and told me that if I did so he would kill me. He held me so tightly that I could not breathe and I almost passed out. As soon as he left I called the police. I have been to see my doctor.

Statement of Brian Smith [used in the family proceedings]

I dispute that I have ever exhibited any verbal or physical aggression towards Rebecca.

I agree that we argued on Christmas Day but it was Rebecca who threw the Christmas lunch on the floor and thereafter she stormed out of the house taking the children with her without there being the slightest need for her to do so. I agreed to her terms in relation to the nature of contact with the children that I have since been permitted. I refute the suggestion that I have ever initiated any contact with her that she did not welcome or that I have spent time 'hanging around' the former matrimonial home as alleged.

Police Interview of Brian Smith following complaint by Rebecca Smith

The defendant denied that there was a history of violence and intimidation on his part. He denied that he had harassed the complainant in the past. He said the following in relation to the specific allegations that were put to him:

"I deny that I failed to abide by the injunction and in particular I deny that I was violent on the occasion as alleged. I was walking past the former matrimonial home on the night in question when my wife came rushing out shouting that she had 'Got me now'. She said that she would tell the police that I had attacked her and that I would end up in prison and would never see the children again. I never touched her but rather pleaded with not to invent allegations against me telling her that she should refrain to do so if not for my sake then for the sake of the children. I deny each and every one of the allegations that the complainant has made."

Statement of Julie Fallon

I am a neighbour of Mr and Mrs Smith. I can't be exact about any dates but since Christmas I have often seen Mr Smith outside their house holding a mobile phone.

Once or twice he has spoken in a threatening manner to his wife that I heard.

Statement of Miss R Rutherford MB., B.S. (Lon 1972). FRCS. (Eng 1977) Consultant Orthopaedic and Trauma Surgeon

I have not seen or examined this patient. I have made my report after reading her medical records.

I understood that Ms Fallon sustained a complex intra-articular fracture of the calcaneum of her left hind foot when she jumped from a platform 9 or 10 feet above the ground.

I have highlighted the controversy regarding classification, management and prognosis of these fractures in my published papers. The principal residual problems are those of pain, the bony deformity of the sub talar joint, the deformity of the heel, stiffness of the hind foot, progressive osteo-arthritis of the sub talar joint.

I do not understand why she continues to suffer the intense pain which she describes. I consider she is fit to attend court and give evidence.

Statement of Dr Christopher George MBChB MRCPG Specialist Diploma in Pain Management.

I am Ms Fallon's General Practitioner.

I have seen Ms Fallon on frequent occasions after her injury. Ms Fallon described residual pain and stiffness in her hind foot with associated functional disability and swelling. I prescribed her strong painkillers which she continues to take.

There has been no significant change in her clinical findings. I consider that Ms Fallon's symptoms have probably reached a steady state and that there is unlikely to be any marked improvement or deterioration. I credit that she has a constant ache in her left hind foot that is only made tolerable provided that she is able to rest and sit down regularly throughout the day. Even then she seems unable to concentrate.

Her symptoms are intrusive and restrictive. The level of pain from which she suffers is such that I consider she cannot concentrate sufficiently so as to understand court proceedings.