

Exam # _____

Evidence Mid-Term Examination Spring 2008

General Instructions:

1. Do not write your name anywhere on this exam. Write the number provided to you by the Registrar on every page of the exam.

2. You may only use materials (books, hand-outs, notes, etc.) you already had in your possession (hard copy, saved on your computer, etc.) by the time you picked up the exam. You may not discuss the exam or any aspect of the law of evidence with anyone until all the exams have been turned in. Remember that some students are taking the exam later than others.

3. Assume the Federal Rules of Evidence fully apply, except where otherwise explicitly indicated on the exam.

4. Use a pen (any color but red), not a pencil.

5. On multiple choice questions, circle the letter next to what you think is the correct answer. Circle one and only one answer. Pick the one best answer, even if you think none is correct or if you think more than one is correct. There is no penalty for wrong answers as compared to blanks. No writings other than the circled responses will be considered in grading the multiple choice questions.

6. Where a question calls for a short written response, you must limit your response to the space provided on the exam. You should print or type your response. You should cite and discuss the appropriate Federal Rules of Evidence. The clarity and conciseness of the responses will be considered in grading them. Therefore, I strongly suggest you use another piece of paper first and copy of the final version of your response in the provided space.

7. This exam consists of 10 questions. The number of points assigned to each question (out of 100 points total) is indicated next to the question number.

Good luck!

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1. (5 points) Ellen was standing at the corner of Elm and Merrimack streets when two automobiles collided with each other at that intersection. Moments after the accident, Ellen told Paul, a police officer, that she saw a blue Honda go through the red light and hit a white Toyota. Later, Willy, the driver of the white Toyota, filed a negligence action against Bob, the driver of the blue Honda. In response, Bob asserted that he did not drive negligently, Willy did.

A few weeks after the accident, Paul learned that Ellen may have received a payment from Bob to induce her to testify in his favor when the negligence case went to trial. Paul questioned Ellen, who admitted receiving the payment from Bob.

At trial, Willy calls Ellen as a witness. She testifies that she was present at the intersection and saw a blue Honda go through the red light and hit a white Toyota. On further direct examination of Ellen, Willy asks Ellen if Bob offered her a payment in return for testifying in Willy's favor. Bob objects. The judge should

- (a) sustain the objection because Willy is not allowed to impeach a witness Willy has called.
- (b) sustain the objection because Willy is not allowed to impeach Ellen because her testimony supports Willy's version of the accident.
- (c) sustain the objection because Bob's payment to Ellen is irrelevant.
- (d) overrule the objection.

2. (5 points) Barbara is charged with burglary, a felony. According to the prosecution, she broke into a house in order to steal jewelry. Barbara has a prior burglary conviction from another case in which she was accused of breaking into a house in order to steal jewelry. She was convicted of the prior burglary 12 years ago and served 5 years in prison after trial. Which of the following is correct?

- A. The prior burglary is admissible to show that Barbara is more likely to have committed the charged burglary because she is a burglar who likes to steal jewelry.
- B. The prior burglary is admissible to show that Barbara is more likely to have been the person who committed the charged burglary because the identity of the two burglars may have been the same.
- C. The prior burglary is admissible in the prosecution's case-in-chief if the judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to Barbara.
- D. The prior burglary is admissible if Barbara testifies and the judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to Barbara.

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3. (5 points) David Defendant is accused of the crime of assaulting Victor Victim. David claims that he acted in self-defense. David seeks to introduce evidence that, in the opinion of Wally, who knows Victor quite well, Victor is a violent man. Which of the following is incorrect?

A. David can introduce this evidence and the prosecution can then introduce evidence that David has a reputation for being violent.

B. David can introduce this evidence and the prosecution can then introduce evidence that David assaulted another man in the past.

C. David can introduce this evidence and the prosecution can then introduce evidence that, in Wanda's opinion, Victor is a peaceful man. (Wanda is a person who knows both Victor and Wally quite well.)

D. David can introduce this evidence and the prosecution can then introduce evidence that, in Wanda's opinion, Wally is a liar. (Wanda is a person who knows both Victor and Wally quite well.)

4. (5 Points) Patrick Plaintiff, an assembly line worker, lost his hand in a workplace accident involving the A-1 machine. Patrick has filed a product liability suit against Acme, the manufacturer of the A-1 machine, alleging that the design of the A-1 was defective. Sometime after Patrick's accident, Acme modified the design of the machine involved in the accident by adding an auto shut-off safety system to newly manufactured Acme A-1 machines. If the A-1 that injured Patrick had had the safety system, he would not have been seriously injured. In which of the following situations is the judge most likely to allow Patrick to introduce evidence of this design change:

A. At trial, Acme claims that the design of the A-1 machine that injured Patrick was not defective.

B. At trial, Acme claims that the A-1 that injured Patrick was designed as safely as possible and no change in design would have made it safer.

C. At trial, Acme claims that the accident occurred because Patrick was intoxicated.

D. At trial, Patrick argues that evidence of the design change is admissible because the change was not made to the A-1 machine that was involved in his accident, but only to other A-1 machines manufactured after his accident.

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5. (25 points) In a criminal trial in 2008 on a charge of filing a false tax return in 2007, the prosecutor intends to impeach the defendant by asking him the following questions after the defendant testifies and denies the crime. With respect to each question, discuss whether the judge will sustain or overrule an objection by the defense, citing any pertinent Rules of Evidence, and mentioning any significant facts or considerations beyond what you have been given here that may cause the judge to decide the issue one way or the other:

A. You were charged with writing bad checks 5 years ago, weren't you?

B. You were convicted of perjury in 1996, weren't you?

C. You lied on your tax return in 2005, didn't you?

D. You were convicted in 2006 of filing a false tax return, weren't you?

E. You were convicted in New Mexico in 2004 of assault with a deadly weapon, weren't you?

6. (10 points) Seventeen-year-old Wendy lives at home with her parents. One night, she goes out with twenty-year-old Donald, whom she had recently met. She tells her parents she will be back home around 10 p.m., but does not get back until after midnight. When she gets home, her father is angry at her for being so late. In the middle of the ensuing argument with her father, she tells him that she was taken by Donald to his apartment against her will and raped. Her father calls the police, who interview Wendy. Wendy repeats her account, adding that she was a virgin prior to the assault. The police take Wendy to the hospital for a sexual assault examination by a physician. During the examination, the physician asks her if she had been sexually active prior to the assault. Wendy tells the physician that she had had sexual intercourse on two or three prior occasions, the last time being a year prior to the assault by Donald.

At trial, Donald's attorney maintains that Wendy agreed to come to Donald's house, where they had consensual sex. He claims that Wendy fabricated the rape allegations to deflect her father's anger. The prosecution calls Wendy as a witness. On cross-examination, Donald's attorney seeks to question her concerning her statements to the police that she was a virgin and to the physician that she had sexual intercourse prior to the assault. Explain whether such evidence is relevant. Also explain whether this evidence is admissible, citing any applicable Rules of Evidence.

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7. (10 points) David, a fifty-year-old man is charged with sexually assaulting Valerie, an adult woman. It is undisputed that David and Valerie met at a bar one night, had dinner together in restaurants a few times over the next couple of months, and Valerie agreed to go over to David's apartment one night for dinner. He maintains that they had consensual sex after dinner. She maintains that he tackled her, held her down, and raped her.

When David was forty-eight, he was accused of breaking into the home of an adult woman named Vanessa while she was asleep in her bed, sexually assaulting her, and leaving the house. David claimed back then that Vanessa was assaulted not by him, but by another man. David was acquitted of sexually assaulting Vanessa.

At David's trial for sexually assaulting Valerie, the prosecution intends to call Vanessa as a witness and have her testify that she was raped by David.

You are a clerk for the trial judge and she has asked you to analyze the admissibility of Vanessa's testimony. First, suppose that you are in a jurisdiction in which the Federal Rules of Evidence apply. Analyze in a short memorandum whether Vanessa's testimony is admissible, citing the applicable Rules. Then, suppose you are in a jurisdiction whose Rules are the same as the Federal Rules, except that the jurisdiction has not adopted Rules 407 to 415. Analyze in a second short memorandum the admissibility of Vanessa's testimony in that jurisdiction, citing applicable rules.

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8. (10 points) Juan has brought an action in federal court based on state libel law against Paul Little as a result of an article that Juan claims Paul Little has written under the pseudonym Paula Lind. The article claims that Juan embezzled money from his employer. At trial, Paul denies being the author of the article. Juan wants to introduce testimony by William to prove that Paul wrote the article. William has three prior perjury convictions, and suffers from severe depression and occasional episodes of psychosis. William would testify that he has known Paul for many years and “he is certain Paul Little wrote the article” in question. Juan has no other evidence to offer to prove that Paul Little wrote the article.

Discuss the admissibility of William’s testimony under Rules 401, 402, 403, 601, and 602.

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9. (10 points) Tom is charged with the crime of possession of cocaine with the intent to distribute, a felony. Tom's defense at trial is that he did not possess any cocaine on the date in question. He maintains this is a case of mistaken identity where a person who looked like him possessed the cocaine. At trial, he has agreed that the jury may be instructed that if the jury finds that he did possess cocaine, then the jury may go ahead and further find that he possessed the cocaine with the intent to distribute. Tom has a prior conviction for possession of cocaine with the intent to distribute from two years earlier. Explain whether Tom's prior conviction for possession of cocaine with the intent to distribute is admissible in the prosecution's case-in-chief. Then explain whether the analysis of the admissibility of Tom's prior conviction is any different after Tom testifies and states that he did not possess any cocaine on the date in question.

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10. (15 points) Sandra is a witness for the plaintiff in an age discrimination law suit filed by Barbara against her employer, in which Barbara claims that on February 9, 2007 her boss fired her because she is too old. The employer claims that Barbara was fired because of poor performance. In a statement given to an investigator prior to the trial, Sandra said the following: "Barbara and I shared an office. On February 9, 2007, I was in the copy machine room next to our office when our boss came into our office and started talking to Barbara in a low volume. I heard him tell her he was letting her go because she was just too old."

At trial, Sandra is called as a witness by Barbara. Sandra testifies that she was sitting at her desk in the office, which is close to Barbara's desk, when their boss entered their office. She could hear him talking in a low volume. Sandra heard their boss tell Barbara that he was letting her go because she was too old.

A. On cross-examination, Sandra is asked, "Isn't it true that in a statement you previously gave to an investigator, you stated that you were in the copy machine room when you heard your boss talking to Barbara?" Barbara objects on the grounds that this is improper impeachment. How should the judge rule on this objection? Explain your answer.

B. Suppose the judge overrules the objection and Sandra denies making this statement. Is the employer permitted to call the investigator as a witness and ask him what Sandra told the investigator about where she was when Barbara and her boss had a conversation on February 9, 2007? Explain your answer.

C. Suppose again that the judge overrules the objection to the question on cross-examination, but that Sandra admits making the statement to the investigator. Is the employer permitted to call the investigator and ask him what Sandra told the investigator? Explain your answer.