

MIDTERM EXAM
Professor Garvey
Spring 2007

This exam is generally open book. You may consult any published written materials, any materials provided by Jon-Michael and/or me, and your own notes. You may NOT consult with other persons or review non-published materials other than as noted above. You may NOT review exam answers of prior students or my comments to prior answers. Your answers must be submitted to the Registrar's Office before 10:30 a.m. on Tuesday, March 20. Submit ONLY YOUR ANSWERS to the questions, and make sure to include your exam #. Do NOT submit a copy of this memo. Your answers must be limited to 10 double spaced pages of 12 point type with one inch margins. I will not read past the first 10 pages, and you will not receive any credit for information past page 10. Your answers should be succinct. I am looking for your analytical thought process, not a polished brief. Show me that you understand the process that the judge will go through in deciding admissibility. To save space, if a certain analysis in one question is the same as in an answer you have already provided, you may refer me to the previous analysis. If any of your answers involve a hearsay analysis, assume that 803, 804, 806 and 807 do not exist. In other words, use only 801 and 802 and 805. Some questions are worth more than others. However, since you have ample time to do a good job on all of them, I will not give you the point distribution until after the exam is finished. If you understand the evidence rules involved with the questions, you will see that some of the questions require more intricate analysis than others. If I alert you to those that are worth more, it will take detract from my ability to see how well you are doing with your analysis.

From: Old Partner (who never had Prof Daddy for Evidence)
To: Brilliant Associate (who did)

I have a couple of trials coming up - one criminal and one civil - and I could use some help on the evidence. Evidence wasn't a required course where I went to law school, and I never took it. I've done pretty well without it, except when the other side says, "Objection". Unfortunately, the trials are going to be against Pierce Law graduates who had Professor Scherr for Evidence, so I'm afraid they'll know what they are doing. I would like you to read the facts, and then answer the questions which follow.

Our client is Mike Connors. He is a student at New Hampshire Technical Institute. He comes from a good family, but he has had some trouble from time to time. When he was 14, he was found delinquent by the Juvenile Court for burglary. This would have been a felony if he had been an adult. When he was 17, he was convicted as an adult for forging a check and for assault with a deadly weapon. (For the assault charge, he got in a fight after a baseball game and swung at someone with a bat. Nobody was hurt.) He could have gotten 3 1/2 years for the forgery, but he was given probation. He could have gotten 3 1/2 years for the assault charge, but only served 90 days in the house of correction.

After that, he seemed to straighten himself out, and he is doing well at NHTI. Last semester, he made the Dean's List. He also volunteers in the public schools, giving speeches about the importance of staying in school and working hard.

Mike was in a car crash involving a single automobile on January 1, 2006. At the time of the crash, Mike was 20 years old. The car belonged to him. In addition to Mike, there were 4 people in the car - Tom Handy, Susan Jenson, Mary Simms, and Joe Bien. Tom Handy was seriously injured, and died 2 days after the crash. Susan was seriously injured, and has a permanent limp. Joe was injured, but has recovered. Mike had a head injury, but is OK now. Mary was not injured. This is a case where critical facts are very much in dispute.

Mike has been charged by the State with vehicular manslaughter. He has also been sued civilly by Tom's estate, for wrongful death. He may eventually get sued by Susan and Joe for their injuries (the statute of limitations is 3 years), but this hasn't happened yet. We have offered Tom's estate \$400,000 to settle the civil case, but they have turned it down. In the criminal case, Mike was given a chance to plead guilty to negligent homicide, with a recommendation for 18 months of jail time, but Mike turned that down.

Mike is adamant that he was not driving the car. According to him, everyone in the car had been at a party, and they had all been drinking. Since he was underage, he didn't think he should be the driver. Joe agreed to drive the car, and was driving when the accident happened. He lost control of the car and hit a telephone pole. Mike was knocked out, and doesn't know for how long. When he woke up, he heard a hunch of screaming, and looked around. He could see pretty well, because the telephone pole had a street lamp. Mike says he was in the front passenger's seat, and Susan, Mary and Tom were in the back seat. Mary was in the middle, and was screaming. Tom was in the right passenger's seat, and was unconscious and bleeding. Susan was in the left passenger's seat, and was also screaming. They weren't saying any words - just screaming. Mike suddenly realized that Joe was not in the car. Mike got out of the car to look for Joe, figuring that Joe was trying to get help, since nobody had a cell phone. He saw Joe running down the road and then he cut into some trees. Mike figured he was running to a house. A car came by and someone in it asked if any help was needed, but Mike told them Joe was getting help, and he waved them on. Mike says he didn't realize how seriously Tom had been hurt.

A police cruiser showed up at the scene, followed almost immediately by an ambulance. At first, Mike assumed that Joe had called them. However, Joe never returned. The police officer was Officer Goode. Mike recognized him from earlier encounters. Goode asked who owned the car, and Mike said that he did. Goode asked for his license and registration, and Mike produced them. Goode asked Mike if he had been drinking, and Mike said "no" because he was underage. Goode asked Mike to do a field sobriety test, which he did. According to Goode, he flunked the test, but Mike thought he did pretty well. Goode told Mike he was under arrest for drunk driving. Mike told Goode he wasn't driving the car. Goode told Mike that he could "tell it to the judge". By this time, another police cruiser had arrived, and Mike was taken away in it. At the police station,

his blood-alcohol level was 0.22 percent. The legal limit for someone under 21 is 0.02 percent. That's all that Mike can tell us from first hand information.

We have done a lot of discovery in the civil case, including depositions, so I have a pretty good idea of what the other witnesses are going to say. Here is what I know:

Joe was 23 on the night of the accident. He never did return to the scene of the accident, but he was apprehended the next day. At first, he denied being in the car at all. Later, he told police that he was not driving the car, but he left the scene because he had 2 other warrants outstanding for his arrest on charges of leaving the scene of the accident and operation after suspension. These are both punishable by up to one year in jail, and he was afraid of being caught. In addition to these charges, he has a prior conviction for making a false statement to a police officer. This was punishable by up to one year in jail, but he was given a suspended sentence. He also has a juvenile conviction for false swearing, which would have been punishable by up to 5 years in prison if he had been an adult.

Susan was 22 on the night of the accident. She is Joe's girlfriend, and they have been living together for about 2 years. She initially told Goode that she wasn't sure who was driving, because she had passed out in the back seat. Later, when she learned that Mike was blaming Joe, she told the police that Mike was driving when they all got in the car, and Joe was in the front passenger's seat. When she woke up after the accident, she heard Mary screaming, "Mike, look what you've done!"

Mary was Tom's girlfriend. She was 19 on the night of the accident. She admits that she had "some" beer, but says that she wasn't under the influence. Last month, she signed an affidavit which says that Mike was driving the whole time. However, when Goode tried to interview her at the scene, she was hysterical, and didn't answer his questions. In his police report, Goode stated, "Mary Simms was hysterical and unable to communicate. She appeared to be intoxicated."

Mike has a liability insurance policy that provides \$500,000 per person per accident. However, if an unlicensed driver is using the car, the coverage is only \$25,000. Mike was licensed but Joe was not.

In his police report, Officer Goode stated as follows: "When I asked Mike Connors for his license and registration, he told me that he was not driving the car."

Bill Thomas is a friend of Mike. Bill says that Mike is an honest person and has a great reputation for being honest. One time at school, when the cashier in the cafeteria gave him too much change, Mike gave it back on his own.

Tom was conscious at the hospital before he died. Nurse Smith was deposed, and said that Tom was in a great deal of pain, and needed lots of pain medicine. Just before he died he said, "Please don't let me die!"

The person in the car who was waved on by Mike was Jerry Gomes.

An inspection of the car after the accident revealed that the brakes were defective at the time of the accident. They had been replaced by Mike's mechanic, Tony Lamas, at the last service. After the accident, Tony put in new brakes for free.

Our defense in both cases is simple – Joe was driving the car. Here are my questions for the civil case, which will be tried after the criminal case:

- 1. When the plaintiff objects to one of my questions, what am I supposed to do?**
- 2. If the judge sustains the objection to one of my questions, what, if anything, am I supposed to do to preserve the record for appeal?**
- 3. If Mary Simms testifies for the plaintiff, can I ask her if she had been drinking? Why or why not?**
- 4. Assuming that I'm allowed to ask Mary Simms about her drinking and she denies it, can I impeach her present testimony by reading Officer Goode's report? Why or why not?**
- 5. If Mary Simms testifies for the plaintiff about what happened in the accident, can she testify to what she claims she said while she was screaming - "Mike, look what you've done"? Why or why not?**
- 6. If Mary Simms testifies for the plaintiff, can she testify to the statements she made in her affidavit? Why or why not?**
- 7. If Susan testifies for the plaintiff, what information could I use to impeach her?**
- 8. If Susan testifies for the plaintiff about what happened in the accident, can she testify to what Mary said? Why or why not?**
- 9. Can I call Bill Thomas during our case as a character witness to testify to Mike's reputation for honesty? How about Bill's opinion of Mike's honesty? How about when Mike returned the change? Why or why not?**
- 10. If Goode doesn't bring it up on direct examination, can I get him on cross-examination to testify to what Mike told him about not driving? Why or why not?**
- 11. If I call Mike to the stand, will his prior convictions be admissible against him? If yes, which one(s) and why?**

12. If the plaintiff calls Joe as a witness to say that he wasn't driving, and doesn't ask him about the arrest warrants for leaving the scene and operation after suspension, will I be able to? Why or why not?

13. If the plaintiff calls Joe as a witness, will either of his convictions be admissible against him? If yes, which one(s) and why?

14. If Susan testifies for the plaintiff, can I impeach her for bias by suggesting that she is blaming Mike instead of Joe because it means there is more insurance available for her? Why or why not?

15. If Mike testifies that he wasn't driving, will the plaintiff be able to ask him why he offered \$400,000 to settle? Why or why not?

16. Can I have Tony testify that the brakes were defective? Why or why not?

17. If the plaintiff calls Nurse Smith as a witness, will she be allowed to testify that Tom said, "Please don't let me die?" Why or why not?

Here are my questions for the criminal case, which will be tried first:

A. If the State calls Joe as a witness, will I be able to ask him if he initially gave a false statement to the police about whether he was at the scene? Why or why not?

B. If the State calls Joe as a witness, will either of his convictions be admissible against him? If yes, which one(s) and why?

C. If the State doesn't call Joe as a witness, but I do, can I still do whatever you have already described in A and B? Why or why not?

D. If the State calls Nurse Smith as a witness, will she be allowed to testify that Tom was in a lot of pain and needed lots of pain medicine? Why or why not?

E. If the State calls Officer Goode, will he be able to testify to his observations during Mike's field sobriety test, if we claim that Mike wasn't driving? Why or why not?

F. If the State calls Jerry Gomes to testify that Mike waved him on, to prove that Mike was trying to avoid detection, can I successfully object on hearsay grounds? Why or why not?

G. On the issue of his innocent state of mind, will I be able to show that Mike turned down the plea agreement? Why or why not?

H. On the issue of his guilt, will the State be able to show that Mike offered \$400,000 to settle the civil case? Why or why not?

I. Is there any way I can call Bill Thomas during our case as a character witness? Why or why not?

J. On the issue of his character, can I show that Mike volunteers in the public schools? Why or why not?

K. If Officer Goode is called to testify that Mike denied drinking, can I object on hearsay grounds? Why or why not?

L. If Mary testifies for the State, can I ask Officer Goode whether she appeared to be under the influence of alcohol at the accident scene? Why or why not?

M. If I can prove that Mary was under the influence at the time of the accident, can I prevent her from testifying? Why or why not?

N. If Officer Goode testifies for the State that Mike admitted that he was driving the car, will I be able to ask him about what he said in his police report about Mike's denial? If yes, for what purpose?