

EXAM # _____

EVIDENCE MID-TERM EXAMINATION

Professor Scherr

Spring, 2006

General Instructions

1. You have until Monday, March 13, 2004 at 8:30 a.m. (or Thursday, March 16 if you picked it up on Monday, March 13) to complete this exam. You must return the exam to the registrar's office.
2. You may type the answers to the short-answer essay questions or you may use a blue book & handwrite the answers. If you type the answers, you have a 2 1/2-page limit per essay question. The typed page should be double-spaced and the font should be no smaller than 12. The margins should be no smaller than one inch. Violation of any of these form rules will cause me not to read the answer.
3. If you use a blue book, you have a 5-page limit per question. Please do the exam in pen. I will not read an exam done in pencil.
4. If you use a blue book, please write on only one side of a blue book page. I will not read what is written on the other side.
5. The Federal Rules of Evidence are the controlling rules unless otherwise explicitly noted.
6. "Mental propensity" is not an answer to any question on this exam.
7. Answer each question with the facts that are presented to you in that question. Do not make up facts.
8. Please place your exam number on every page of the printed exam and on each blue book you use or on each typewritten page.
9. Each question in Part I-A & I-B is worth 7.5 points. Part I as a whole is worth 120 points. The question in Part II is worth 120 points.
10. You must do this exam alone with no assistance from, cooperation or consulting with **any** other person. The list of persons you may not consult includes, but is not limited to, any law student, lawyer, professor, spouse, partner, family member etc. You may consult written materials, including the rules of evidence. **Please note that this exam is not designed as a test of your research skills and that it is unlikely that there is an existing report of a case that perfectly fits the facts of any question on this exam.**

PART I-A

Instructions

- A. These are multiple-choice questions. There is **only one** correct answer.
- B. Please do not explain your answer. Only mark the correct choice. I will ignore completely any explanations.

1. Tony Stewart, a pedestrian, is injured by an allegedly drunk driver, Earl Daleheart, Jr., who is driving a car borrowed from Jeff Gordon with Gordon's permission. Stewart sues Gordon for negligent entrustment of the car to Daleheart, an allegedly dangerous driver. Stewart's counsel seeks to call Mark Martin, a close friend of Gordon's, to testify that, prior to the time that Gordon lent the car to Daleheart, he had told Gordon, "Daleheart drives too fast too often." Defense counsel objects.

The trial court should:

- A. Sustain the objection because the evidence inadmissible conduct evidence.
- B. Sustain the objection because the evidence is inadmissible opinion evidence.
- C. Overrule the objection because the evidence is admissible under Rule 404(b).
- D. Overrule the objection for a reason other than C.

2. Clifton Chenier is charged with unlawful possession of a sawed-off shotgun. His counsel calls Michael Doucet who will testify that he thinks Clifton is a gentle, nonviolent person. The prosecution objects. The Court should rule that Doucet's testimony is:

- A. Inadmissible because it is not reputation evidence.
- B. Admissible but with a limiting instruction that the evidence cannot be used to draw any conclusions about Chenier's character.
- C. Inadmissible for a reason other than A.
- D. Admissible without limiting instruction.

3. Dar Williams is charged with theft of musical equipment from Katie Curtis. Diana Krull is one of the prosecution's (the U.S. Attorney's office) witnesses. She testifies to a confession that she says Williams made to her. On cross-examination, Williams' public defender asks Krull: "Isn't it true that prior to your reporting of this confession to the police, you were arrested for federal armed robbery by the FBI and the U. S. Attorney's office?" The prosecution objects.

The evidence of the arrest for armed robbery is:

- A. Inadmissible because it is not a conviction.
- B. Inadmissible under Rule 404(a).
- C. Admissible subject to Rule 403.
- D. Inadmissible under Rule 404(b).

4. Defendant was charged with attempted murder of Victor in a sniping incident in which Defendant allegedly shot at Victor from ambush as Victor drove his car along an expressway. The prosecutor offers evidence that, seven years earlier, Defendant had fired a shotgun into a woman's home and that Defendant had once pointed a handgun at another driver while driving on the street.

The evidence should be:

- A. excluded, because such evidence can be elicited only during cross-examination.
- B. admitted as evidence of Defendant's propensity toward violence.
- C. excluded, because it is improper character evidence.
- D. admitted as relevant evidence of Defendant's identity, plan or motive.

5. Passenger is suing Defendant for injuries suffered in the crash of a small airplane, alleging that Defendant had owned the plane and negligently failed to have it properly maintained. Defendant has asserted in defense that he never owned the plane or had any responsibility to maintain it. At trial, Passenger calls Witness to testify that Witness had sold to Defendant a liability insurance policy on the plane prior to the crash.

The testimony of Witness is:

- A. inadmissible, because the policy is a subsequent remedial measure.
- B. inadmissible, because the rule against proof of insurance where insurance itself is not an issue.
- C. admissible to show that Defendant had little motivation to invest money in the maintenance of the airplane.
- D. admissible as some evidence of Defendant's ownership of or responsibility for the airplane.

6. Plaintiff sued Defendant Auto Manufacturing for his wife's death, claiming that a defective steering mechanism on the family car caused it to veer off the road and hit a tree when his wife was driving. Defendant claims that the steering mechanism was damaged in the collision and offers testimony that the deceased wife was intoxicated at the time of the accident.

Testimony concerning the wife's intoxication is:

- A. admissible to provide an alternate explanation of the accident's cause.
- B. admissible as proper evidence of the wife's character.
- C. inadmissible, because it is improper to prove character evidence by specific conduct.
- D. inadmissible, because it is substantially more prejudicial than probative.

7. In a sexual assault prosecution, the complainant has testified that she had met the defendant at a bar, invited him up to her apartment for a drink and then asked him to leave so she could go to sleep. The defendant, according to her testimony, had refused to leave and instead had sexually assaulted her. The defendant takes the stand and testifies that he had a drink at the complainant's apartment and then left without anything else happening. Which of the following may the defendant also introduce during the defense case:

___ A. Testimony by the bartender that the complainant had once had consensual sex with after she had invited him to her apartment.

___ B. Testimony by the defendant: "The way the complainant was making the moves on all the other guys in the bar made it clear she wanted to have sex."

___ C. Testimony that the defendant was recently acquitted in a sexual assault case.

___ D. None of the above.

8. Dr. Evans has testified for the plaintiff in a medical malpractice case. On cross, he is asked why he left his academic position at Bemiji State Medical School. He testifies that he got tired of teaching and preferred to practice on his own. The following exchange ensued:

Q: Isn't it true that you were fired?

A: No, it is not.

Q: Isn't it true that the Dean fired you after a formal hearing in which he concluded that you had lied in your testimony as an expert in another case?

A: No, that isn't true. I just got tired of teaching and bureaucracy.

Given Dr. Evans' denials, the defense seeks (1) to admit the Dean's written finding that Dr. Evans had lied and that he was to be fired, and (2) to call the Dean to testify that he had, in fact, concluded that Dr. Evans had lied and that he had, in fact, fired him. The plaintiff objects. The Court should rule that:

___ A. Both (1) & (2) are admissible.

___ B. (1) is admissible but (2) is inadmissible.

___ C. (2) is admissible but (1) is inadmissible.

___ D. Neither (1) nor (2) is admissible.

PART I-B
Instructions

A. These are modified true-false questions. In the space below the question check T or F and cite the rule, if any, which supports your answer. You may use a rule name rather than a rule number, e.g., "Subsequent Remedial Measures." A correct answer without a correct cite may be awarded only partial credit. A correct answer with a wrong cite will receive no credit. Do not explain your answer beyond citing the rule number or name. I will not read any explanations beyond the citation.

9. Seamus Eagan has been charged with committing a bank robbery, which occurred at 9:15 a.m. on Friday, March 17. Eagan is relying on an alibi defense. Eagan's counsel calls John Doyle, who testifies on direct examination that he is absolutely sure that he was with Eagan at his home between 8 a.m. and noon on Friday, March 17. Assume, alternatively, that on cross of Doyle, the prosecutor:

- (1) gets Doyle to admit that two years ago he was convicted of perjury.
- (2) gets Doyle to admit he and Eagan have played in the same Celtic band for the last five years and are brothers-in-law.
- (3) gets Doyle to concede that he is not absolutely sure whether the morning he was with Eagan was Friday, March 17 or Thursday, March 16, but he thinks it was Friday.

Eagan's counsel may respond with witnesses who will testify that, in their opinion, Doyle is a generally truthful person in response to 1, 2 and 3.

 T F _____.

10. A misdemeanor criminal conviction is always inadmissible under Rule 609.

 T F _____.

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11. HardBrain, Inc.'s lawyers believe that SoftBrain, Inc. has infringed on one of its patents. It is contemplating suing SoftBrain for patent infringement. Before it does so, its lead patent counsel sends a letter to SoftBrain stating the basis for the infringement claim; requesting that SoftBrain cease its infringement and asking for \$10.5 million in damages.

SoftBrain's counsel responds by sending a letter that says: "You are right about the infringement and the \$ 10.5 million. However, isn't it worth both our whiles to reduce attorneys' fees and associated litigation costs by settling this out of court for \$5 million?" After a further exchange of letters and a sequence of increasingly fruitless meetings, no settlement is reached.

The patent infringement suit is filed. Counsel for HardBrain now seeks to admit the statements of SoftBrain about settlement in its initial responding letter. SoftBrain's counsel objects. The statements are inadmissible.

_____ T _____ F _____

12. Mitchell Wymon is charged with and tried for burglary in 1998. In the prosecution's case-in-chief, the assistant county attorney offers into evidence Wymon's prior conviction for perjury in 1996, a felony punishable by up to seven years in prison. The conviction is admissible.

_____ T _____ F _____

13. Elliot Bergman is charged with passing a counterfeit twenty-dollar bill. During the trial the defendant takes the stand and denies knowing that the twenty-dollar bill was counterfeit. In rebuttal, the prosecution seeks to offer evidence from a Bobo Wunder, a former friend of Bergman's, that, three years ago, he and Bergman were engaged in printing counterfeit bills. The defense objects. The judge should rule that Wunder's testimony is inadmissible.

_____ T _____ F _____

14. Evidence of a subsequent remedial measure is only admissible if it is offered as proof of ownership, control, feasibility of precautionary measures, if controverted, or impeachment.

 T F _____.

15. Greg Brown sues Bill Staines for running a red light and crashing into Brown's car. Brown calls Iris Dement, an eyewitness to the accident, to testify that the light was red when Staines drove through it. On cross-examination, Staines' lawyer asks Dement: "Isn't it true that you lied on your bar exam application last year?" Dement answers: "No." When the defense case begins, Staines' lawyer seeks to call Martha Gross from the Board of Bar Examiners to testify that in fact Dement had lied on that application. Brown's lawyer objects. Gross's testimony is admissible.

 T F _____.

16. Same facts as # 15. Staines' lawyer also calls Staines to the stand. He testifies that the light was green when he went through it. In his rebuttal case, Brown calls Kate McKenzie, once a close friend of Staines', to testify that, in her opinion, Staines is a liar. McKenzie's testimony is admissible.

 T F _____.

PART II

Instructions

A. This is a **short-answer** question. Use no more than **five (5)** blue book pages or **two and one half (2 1/2)** typewritten pages to answer each question. I will stop reading the answer at the end of five (or two and one half, if typed) pages. Do not write on both sides of a page.

17. On Dec. 2, 2004, Helen Boisvert brought her two-year-old son Ronnie to the emergency room at Hanover Memorial Hospital. Ronnie had sustained second-degree burns on his feet, ankles, legs, buttocks, genitals, and left hand from scalding hot water in a bathtub. Boisvert claimed that Ronnie burned himself accidentally by turning off the

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cold water when she was drawing a bath for him. Upon examining the child, physicians at the hospital noticed that the child had other injuries in various stages of healing. Ronnie had a triangular burn scar on his abdomen, a large abrasion on his chin and upper back, a laceration over his eye, and bruising to both sides of his face, arms, and back.

Skeletal X-rays also revealed seven healing fractured ribs. The defendant was charged with first-degree assault, i.e., purposely placing Ronnie in a bathtub containing scalding water that caused serious bodily injury, i.e., the second-degree burns. Boisvert is not charged with causing the other injuries.

At trial, in addition to medical testimony describing and evaluating the burns on Ronnie's body, the State seeks to present extensive medical testimony detailing Ronnie's other prior injuries, healing and healed. Dr. Peter Partess, a radiologist who evaluated X-rays of Ronnie's chest, testified that he discovered seven healing fractured ribs and concluded: "When you see fractures like this, it means child abuse or abuse, battered child syndrome, whatever term you care to use. It's what they call a sine qua non. If you see that, it's child abuse." Further, the State's Chief Medical Examiner, Dr. Robert Moss, qualified at trial as an expert in child abuse, testify in detail about each of the child's prior injuries, concluding that Ronnie was a battered child. He would state: "If one takes each individual injury by itself, one cannot necessarily say that that is due to abusive injury, but the overall pattern of the multiplicity of the injuries in various stages of healing on various parts of the body are ... indicative of abuse." The defendant's lawyer objects to Partess' and Moss' testimonies and to any description of the non-burn injuries.

Boisvert, a single mother, testifies in her own defense. On cross-examination, the prosecutor asks her, "Isn't it true that last year, after the Division of Child & Youth Services removed Ronnie from your care because of their concern about Ronnie's frequent injuries, they returned him to your custody only on a probationary status conditioned on no further intentional injuries?" The defendant's lawyer objects to the question. The prosecutor explores no other areas on cross-examination.

After Boisvert's testimony, the defense seeks to call Boisvert's neighbor, Donna Leon who would testify that, in her opinion, Boisvert always tells the truth. The prosecution objects.

As to (1) Partess' and Moss' testimonies and to any description of the non-burn injuries; (2) the prosecutor's question on cross-examination and (3) Leon's testimony, what rulings and why?

Assume for the purpose of 2 that the answer to the question would be "yes." Assume for the purpose of 3 that the trial court allowed the question and resulting "yes" answer in 2.