

This exam consists of two parts. The first part, which is true/false and multiple choice, must be answered in pencil on the provided Scantron sheet. The second part consists of essay questions and must be answered either in pen in a blue book or on your computer, using Examssoft.

The exam covers all subject areas we studied, except hearsay. Because you already took an exam dedicated to the subject of hearsay, there are no hearsay questions on this test. Also, the exam is confined to the F.R.E. and cases interpreting them; the supplemental Montana material I provided is not on the exam.

You may use for this exam the following: your casebook, your rules book(s), your own notes, and your own outline. You may also use the "Fundamentals of Montana Evidence" handout I provided early in the semester. You may not use any commercially prepared materials, any materials prepared by anyone other than yourself, or any Blackboard postings (including but not limited to earlier exams and answers).

SCANTRON QUESTIONS

I. True/False

1. Rule 404(b) lists all of the other purposes for which other crimes, wrongs, or acts evidence is admissible.

False: 404(b) says "such as..."

2. The prosecution in its case in chief can offer opinion testimony that the pertinent character of the victim for honesty was good.

False: The prosecution may offer character evidence in the form of reputation or opinion testimony as to a pertinent trait of character of the victim only to rebut character evidence in the form of reputation or opinion testimony as to the same pertinent trait of character of the victim offered by an accused. 404(a)(2).

3. Character evidence of carelessness is inadmissible in a civil trial where the plaintiff alleges that the defendant's negligence caused injury to the plaintiff.

True: Under Rule 404, character evidence of a party is never admissible to show action in conformity in a civil trial. The only character evidence allowed in a civil case is to show a witness' character for truthfulness or untruthfulness.

4. An offer to stipulate by the accused greatly reduces probative value and thus virtually assures that the other crimes, wrongs or acts evidence will be ruled inadmissible under Rule 403 when offered by the prosecution.

False: Absent extraordinary circumstances, the prosecution is entitled to present otherwise admissible evidence for the fair and legitimate weight introduction of the evidence could have on

the trier of fact even though the defendant has offered to stipulate as to the matter for which the evidence is relevant. As stated by the U.S. Supreme Court in *Old Chief* (1997):

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

5. If the accused offers character evidence in the form of reputation testimony as to the bad character of the victim for the pertinent trait of peacefulness, then the prosecution can offer opinion character testimony that the accused's character for peacefulness was bad.

True: Rule 404(a)(1); 405(a).

6. Mailing of letters will ordinarily qualify as a routine practice of an organization.

True. Rule 406.

7. A person with no formal education may still qualify as an expert in a particular field.

True. Rule 702 says a witness may be qualified as an expert by knowledge, skill, experience, training or education. Any one will do.

8. Gatekeeping under *Daubert/Kumho/Rule 702* requires the trial court to find the presence of sufficient assurances of correctness of the explanative theory as actually applied to facts, data, or opinions sufficiently established to exist.

True. Gatekeeping as mandated by Rule 702 and illustrated by the discussion in *Kumho Tire* is an as-applied test.

9. Under *Daubert/Kumho/Rule 702* failure to have published a publishable explanative theory espoused by the expert bars its utilization in court.

False. Failure to publish a publishable explanative theory is a negative factor in the determination of sufficient assurances of trustworthiness required by *Daubert/Kumho/Rule 702* but is not preclusive. It is, however, particularly telling if the explanative theory was developed for purposes of litigation and although publishable was not published.

10. A lay witness may testify that a person appeared nervous as she approached the microphone.

True. A lay witness may testify using commonplace "shorthand" opinion testimony as to the condition of another person, including such things as age, condition, health, and nervousness.

11. Familiarity acquired by a lay witness for the purpose of litigation to authenticate handwriting

is permissible.

False. Rule 901(b)(2) provides for authentication by nonexpert opinion as to the genuineness of handwriting based upon familiarity not acquired for purposes of litigation.

12. The voice of a person must have been heard prior to the relevant incident to be identified by an occurrence witness in court.

False. Rule 901(b)(5) provides that identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker, is sufficient authentication.

13. A party upon objection can always require that an opponent introduce an original or show that it is unavailable rather than introduce a xerox copy thereof.

False. Rule 1003 provides that a duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

14. If the prosecution calls the mother of the defendant to testify, the prosecution will most likely be able to conduct the direct examination using leading questions.

True. The mother is almost certainly to be declared a hostile witness under rule 611©) last sentence as being a witness identified with an adverse party.

15. Evidence which does not bear on a material issue in the case but which does go to reasons why a witness might testify one way or the other is irrelevant and thus inadmissible.

False. The definition of relevance includes facts used for impeachment of a witness.

II. Multiple Choice

16. Kalish sued Berger for \$1,000 seeking damages for pain and suffering and medical expenses arising from a dog bite. Berger responded to Kalish's complaint by denying that Kalish was ever bitten; alleging that if Kalish was bit, it was not by a dog; and if Kalish was bit by a dog, it was not Berger's dog, Mutt; and that if Kalish was bit by Mutt, Mutt acted in self-defense. At trial, Kalish calls Berger adversely and asks "How much did Mutt cost you?" The trial judge should rule the question objectionable because it:

- a) lacks a proper foundation showing that Berger has personal knowledge of Mutt's cost.
- b) is irrelevant.
- c) is leading.
- d) calls for a conclusion.

Answer: b. How much Mutt cost does not have any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

17. Same facts as prior question. Berger's own attorney asks him, "Did Kalish tell you that the dog that bit him was bigger than your dog?" The trial judge should rule the question

objectionable because the question:

- a) is irrelevant.
- b) lacks a proper foundation.
- c) is leading.
- d) calls for an opinion of the witness.

Answer: c. On direct examination, leading questions should not be used except as necessary to develop the witness' testimony. No necessity is present here. 611©).

18- 30: Wendy: get the Qs and As from the book I'll give you Monday: Evidence Exam Pro.

ESSAY QUESTIONS

1. List, in order, the sources you would consult if you were confronted with a Montana Rule of Evidence which we had not studied in class.

2. You represent Big Name Records. You bring a civil action in federal court in Montana against Budget Tapes and Records of Missoula for music piracy. The basis of your complaint is that the defendant encouraged its customers to buy new CDs, burn copies of them and then return the CDs. (Assume that this is against the law and that there are civil remedies). The defendant denies doing this. You have a copy of the Missoulian for Sunday, December 5, 2004. On page A-6, there is the following ad:

Insert ad.... (it's in the book: can you copy it onto the exam? Ok to reduce it to use less paper...)

What will you do to get this into evidence at trial? Identify any witness(es) you will call and write out the specific questions you will ask or statements you will make. Conclude by indicating whether you expect any viable objection from the defense, and whether you expect to get the exhibit entered into evidence or not.

3. You are the judge in a federal civil action. A major road bicycle company, Track, has sued one of its athletes, Karen Carpenter, for breach of contract because it alleges that while she was sponsored by the company, she used performance-enhancing drugs. When she was caught and stripped of her national cycling title, the company alleges that it suffered damages to its reputation because of its affiliation with her. Defendant Carpenter has responded to the complaint by hotly denying that she used any such drugs and therefore claims she did not breach the contract. (In a separate proceeding, she is appealing the decision of the national cycling federation.)

The plaintiff, Track, has listed "the" Lance Armstrong as an expert witness. In its mandatory disclosure, it has provided a report signed by Armstrong in which he states that he is an expert in cycling, having cycled professionally for more than twenty-five years; that he has won 6 Tours de France and numerous other races around the world; and that he himself has been unfairly and falsely accused of drug use. He says that in his opinion, Carpenter must have been using drugs to accomplish the result in her race, which is the fastest time ever recorded by a

woman cyclist. He also says that he believes that her drug use caused great financial detriment to Track. He reveals that he is being paid \$100,000 for his testimony. His resume lists all of his cycling achievements; under "Education" it says only "Austin City High School, Austin, Texas;" and it shows that he has written three highly successful books. (The hobby section says simply: "Cheryl Crowe.")

The defendant deposes Armstrong after receiving his report. In the deposition, Armstrong concedes that:

- he himself has never used any performance-enhancing drugs;
- he has no first hand knowledge of their effects;
- he has no college education;
- he has no training in pharmacology;
- he has no formal training in exercise physiology;
- he had an intimate relationship with Ms. Carpenter for a few months before she dumped him;
- he was sanctioned by the United States Cycling Federation for sexual harassment after Ms. Carpenter made a complaint against him for stalking her; and
- Track is his own sponsor.

The defendant makes a motion in limine to exclude Armstrong as a witness. Decide whether you will grant or deny the motion, and write the opinion you will issue fully explaining your decision.

4. In the same case, now assume you are the plaintiff's lawyer. Assume further that for some reason (good or bad) the judge does allow Lance Armstrong to testify at trial.

The defense begins its cross-examination by asking:

"Isn't it true that you had an affair with Ms. Carpenter and that she dumped you for Russell Crowe?"

- Explain fully your answers to these questions:
- As plaintiff's lawyer, what possible objection(s) will you make?
- What result do you expect? Why?
- Will you in fact object? Why/not?

5. In the same case, you are still the plaintiff's lawyer. The defendant's next question of Armstrong is: "You were still married when you took up with Cheryl Crowe, and you lied to your wife about your relationship with Ms. Crowe, didn't you?"

- Again, explain fully your answers to these questions:
- As plaintiff's lawyer, what possible objection(s) will you make?
- What result do you expect? Why?
- Will you in fact object? Why/not?

Here end the exam, and the semester of Evidence. Thanks so much for your attention, your flexibility, your curiosity, and your humor. Have a great break.

