



**The University of New Mexico**

---

School of Law Library  
MSC11 6080  
1 University of New Mexico  
Albuquerque, NM 87131-0001  
Telephone (505) 277-0939  
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

**NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS**

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

**632 EVIDENCE/TRIAL PRACTICE**  
Semester I, 2003-2004

Final Examination  
UNM School of Law  
Six Credits

Professor Barbara Bergman  
Saturday, December 13, 2003  
Tuesday, December 16, 2003  
9:00 a.m. to 12:00 noon

**INSTRUCTIONS**

1. This examination consists of twenty-five (25) multiple-choice questions and one essay question. The multiple-choice questions are worth a total of seventy-five (75) points. The essay question is worth twenty-five (25) points. Thus, the entire examination is worth a total of one-hundred (100) points. That means the multiple-choice questions are worth  $\frac{3}{4}$  of the exam grade and the essay is worth  $\frac{1}{4}$ . I suggest you allocate your time accordingly.
2. Answer the multiple-choice questions on the examination itself. Answer the essay question in a bluebook(s). Please be sure to:
  - (a) Put your examination number on each page of your exam and on each bluebook.
  - (b) For the essay answer in the bluebook, please skip every other line so that your answer is easier to read and I have room to write comments.
  - (c) Turn in everything at the end.
3. This is a **MODIFIED OPEN BOOK EXAMINATION**. You are permitted to use your notes, any outlines that you and/or your classmates prepared, any required texts, and any material distributed in class (including the little Lexis booklet of the Federal Rules of Evidence). You may **not** use any commercial outlines.

End of General Instructions

GOOD LUCK!

**[THE QUESTIONS BEGIN ON PAGE 2.]**

**PART I – Multiple Choice Questions**  
**(Total: 75 points)**

Following are twenty-five (25) multiple-choice questions. Circle the letter of the best answer. Use the Federal Rules of Evidence (or federal common law when appropriate), unless instructed otherwise. If you feel some explanation for your answer is necessary, I have left space for that. You are not, however, required to give any explanation. The purpose of the optional explanation is merely to alert me to potential problems with the way I have drafted the question.

1. According to the prosecution, Tom Rumpole ran a red light at a high rate of speed (approximately 70 miles per hour) and collided with a motorcyclist, killing him instantly. Rumpole is now being prosecuted for manslaughter. The government in its case in chief seeks to introduce evidence that Rumpole has a reputation for driving recklessly at high rates of speed and that he received two speeding tickets in the past year. He paid the fines and did not contest the tickets. The government explains that it wants to introduce such evidence to prove that Rumpole has a propensity to drive recklessly. The defense objects. The court should:
- A. Admit the reputation evidence and the tickets because both types of evidence are admissible to establish Rumpole's propensity to drive recklessly.
  - B. Admit the reputation evidence because it is admissible character evidence but exclude the tickets because specific instances of conduct is not the proper method for proving character.
  - C. Exclude the reputation evidence because it is inadmissible character evidence; but admit the tickets because they constitute admissions by a party opponent.
  - D. Exclude both the reputation evidence and the tickets because both constitute inadmissible character evidence.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. At the same trial as described in Question 1, the prosecution wants to call Officer Juan Gallegos, the first police officer at the scene, to testify about a statement made to him by Wendy Williams, a witness to the accident. According to Officer Gallegos, as soon as he arrived at the scene, Ms. Williams came up to him and said, "Officer, I saw everything that happened. I know that man driving the white Cadillac. His name is Rumpole and he ran that red light. He must have been doing at least 80 miles an hour and he never even tried to stop. That poor guy on the motorcycle never had a chance." According to Officer Gallegos, Ms. Williams appeared to still be quite upset after witnessing the accident. The prosecution seeks to offer this statement to prove that Rumpole ran the red light, was speeding, and did not even try to stop. Officer Gallegos arrived at the scene about fifteen minutes after the accident happened. The defense objects. The court should:
- A. Exclude the statement as inadmissible hearsay.
  - B. Admit the statement because it constitutes an excited utterance.
  - C. Exclude the statement because it was not made immediately after Ms. Williams perceived the accident.
  - D. Admit the statement because Ms. Williams has personal knowledge of what happened.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. At the same trial as described in Questions 1 and 2, assume that the statement in Question 2 was admitted. (This in no way reflects the correct answer to Question 2.) The defense then, in its case in chief, seeks to introduce the following evidence to impeach Ms. Williams: [1] her prior misdemeanor conviction for fraudulent misrepresentation in 1995 and [2] her statement before trial to a defense investigator that she had lied about what happened when she spoke to Officer Gallegos because Rumpole is her ex-lover and she hates him. The prosecution objects. The court should:
- A. Admit both [1] and [2] as proper impeachment.
  - B. Exclude both [1] and [2] because Ms. Williams never actually testified at trial.



- C. Admit [1] because it is an impeachable conviction but exclude [2] because the statement the defense seeks to introduce was made after she spoke to Officer Gallegos – not before.
- D. Exclude [1] because it was only a misdemeanor conviction but admit [2] because it shows Ms. Williams' bias against Rumpole.

Optional Explanation: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

4. At the same trial as described in Questions 1-3, assume that Officer Gallegos filled out an accident report describing his investigation of the accident. In that document Officer Gallegos [1] included a diagram showing the location of skid marks after the point of impact and [2] described what Ms. Williams had told him (as set forth in Question 2). Unfortunately, Officer Gallegos dies before trial. The prosecution calls Officer Gallegos's supervisor to testify that reports such as this one are made at or near the time by, or from information transmitted by, a person with personal knowledge. He will also testify that it is the regular practice of the police department for all officers to file such reports. Finally, he will authenticate this report as the one Officer Gallegos wrote concerning this accident. The prosecution then offers the report to prove the facts contained in [1] and [2]. The defense objects. The court should:
- A. Admit the entire report as a business record.
  - B. Admit the entire report as a public record.
  - C. Admit the portion of the report containing the diagram as a public record, but exclude Ms. Williams' statement because she did not have a business duty to provide such information.
  - D. Exclude the entire report as inadmissible hearsay.

Optional Explanation: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

5. At the same trial as described in Questions 1-4, the prosecution seeks to introduce a statement made by Rumpole at the hospital where he had been taken for treatment for his injuries. According to the emergency room doctor, Rumpole had stated: "I know I'm going to die. I'm so sorry. I just wasn't paying attention; but that motorcyclist was going way too fast. There was no way I could avoid him." The defense objects to the emergency room doctor's testimony about Rumpole's statement. The court should:
- A. Admit it as a dying declaration.
  - B. Admit it as a statement against interest.
  - C. Exclude it as inadmissible hearsay.
  - D. Admit it as an admission by a party opponent.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. At the same trial as described in Questions 1-5, the prosecution seeks to call Mr. Rumpole's wife to testify about a private conversation she had with him at their home after Rumpole was released from the hospital. For some reason, the prosecution thinks that Mr. Rumpole may have told her that he had been in a big hurry just before the accident when he ran the red light because he was late for an important meeting. Assume for purposes of this question, that the case is being prosecuted in New Mexico state court and the New Mexico privilege rules apply. Assume also that after this conversation, the Rumpoles divorced. The defense objects to this testimony. The court should:
- A. Prohibit the prosecution from calling the former Mrs. Rumpole to the witness stand at all.
  - B. Permit the prosecution to call the former Mrs. Rumpole as a witness but exclude any testimony concerning confidential communications made to her by her husband during the marriage.
  - C. Permit the prosecution to call the former Mrs. Rumpole as a witness and permit her to testify about any statements her then-husband had made to her as long as Mrs. Rumpole is willing to testify about such communications.

- D. Permit the prosecution to call the former Mrs. Rumpole and permit them to ask her about any statements Mr. Rumpole made to her when he came home from the hospital since they are no longer married.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 7. At the same trial as described in Questions 1-6, the prosecution seeks to introduce the testimony of Detective Sipowitz that during the interrogation of Rumpole at the hospital, Rumpole stated: "Detective, I assume we can work out some sort of plea bargain here, can't we? I mean if you can promise me probation, then I'd be willing to tell you in more detail what happened." At that point, Sipowitz said that he thought a plea bargain would make a lot of sense in the case. Rumpole then went on: "I'm glad you agree since, while I was speeding and not paying enough attention, I didn't mean to kill that guy." At that point, Rumpole decided that he needed to talk to his attorney before he said anything else. The defense objects to Sipowitz's testimony about Rumpole's statements before he decided to ask for an attorney. The court should:
  - A. Exclude the statements since they were made in the course of plea discussions.
  - B. Admit the statements as admissions by a party opponent.
  - C. Exclude the statements as inadmissible hearsay.
  - D. Admit the statements because they are statements against interest.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 8. At the same trial as described in Questions 1-7, the defense seeks to call Dr. Simon Colfax as an expert in the field of motorcycle safety to testify that in his expert opinion all motorcycles are so inherently dangerous – particularly when ridden without a helmet as done by the deceased in this case – that individuals who ride motorcycles generally



(and particularly those who ride without a helmet) have assumed the risk of a deadly accident. As a result, Mr. Rumpole should not be held criminally responsible for the motorcyclist's death. The prosecution objects to this testimony. The court should:

- A. Exclude the testimony because it is not appropriate expert testimony in this case.
- B. Permit the testimony as long as Dr. Colfax is properly qualified since his testimony will assist the jury in determining Rumpole's criminal responsibility.
- C. Permit the testimony because *Daubert* does not apply to non-scientific expert testimony.
- D. Exclude the testimony unless the defense can establish that Dr. Colfax has relied upon sufficient facts or data.

Optional Explanation: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

9. The widow of the victim in the case described in Questions 1-8 has filed a civil wrongful death lawsuit against Rumpole. Assume for purposes of this question that in the criminal trial an eyewitness to the accident, Wendy Wiley, testified for the defense. Ms. Wiley testified that at the time of the accident Rumpole was driving at about 45 miles per hour and that he had the green light. The prosecution vigorously cross-examined Ms. Wiley. Ms. Wiley died a few months after the criminal trial. In this civil case, the defendant (Rumpole) seeks to introduce a transcript of Ms. Wiley's testimony in the criminal case. The plaintiff objects. (For purposes of this question, assume that the lawsuit has been filed in the Ninth Circuit.) The court should:
- A. Permit the defendant to introduce the transcript because it falls within the former testimony hearsay exception.
  - B. Exclude the transcript because the plaintiff's constitutional right to confrontation would be violated by admitting it.
  - C. Exclude the transcript because it constitutes inadmissible hearsay.
  - D. Permit the testimony as recorded recollection.



Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. In the same case as described in Question 9, the plaintiff seeks to introduce the testimony of Dr. Samuel Sanchez, who was the emergency room doctor who treated the victim (Ben Silva). Dr. Sanchez will testify that after he examined Mr. Silva, he informed him that his injuries were extremely serious and there was little they could do. Dr. Sanchez also asked Mr. Silva if he would like to speak to a priest. At that point, Mr. Silva said he would like to speak to a priest. Mr. Silva then said: "Why did that man in the Cadillac run me down? He was going so fast I couldn't get out of his way even though I had the green light." Shortly afterwards, Mr. Silva died. The defendant objects to this testimony. The court should:
- A. Admit Mr. Silva's statement as a dying declaration.
  - B. Admit Mr. Silva's statement because it was a statement made for purposes of medical diagnosis or treatment.
  - C. Exclude Mr. Silva's statement because it is inadmissible hearsay.
  - D. Exclude the statement because it was self-serving.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. In the same case as described in Questions 9-10, assume that the court permits Dr. Sanchez to testify concerning Mr. Silva's statement at the hospital. (This in no way reflects the correct answer to Question 10.) The defendant wants to cross-examine Dr. Sanchez concerning the following: [1] his close friendship with Mr. Silva and his widow; [2] his lie on his 1985 income taxes about his total income (understating it by \$50,000); and [3] Mr. Silva's prior criminal conviction in 1999 for the felony of negligent homicide. The plaintiff objects. The court should:
- A. Permit all three lines of cross-examination.



- B. Permit cross-examination as to [1] and [2] because those constitute proper impeachment of Dr. Sanchez, but prohibit cross-examination as to [3] because that concerns Mr. Silva and not Dr. Sanchez.
- C. Permit cross-examination as to [1] because it is relevant to show Dr. Sanchez's bias in favor of Mr. and Mrs. Silva but prohibit cross-examination as to [2] because it is improper to cross-examine about collateral specific instances of conduct and prohibit cross-examination as to [3] because it concerns Mr. Silva who is not a witness.
- D. Permit cross-examination as to [3] because that constitutes proper impeachment of a hearsay declarant but prohibit cross-examination as to [1] and [2] because they constitute improper impeachment of a credible witness.

Optional Explanation: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

12. In the same case as described in Questions 9-11, the plaintiff seeks to introduce a portion of the emergency room medical records from Presbyterian Hospital where Mr. Silva was treated after the accident. The medical records custodian authenticates the records as being Mr. Silva's and testifies that such records are made and kept in the regular course of the hospital's business and that they contain information provided by employees of the hospital with personal knowledge. The portion the plaintiff introduces states: "Patient's blood test negative for alcohol." The defendant at that time then seeks to introduce the rest of the entry that states: "but positive for cocaine." The plaintiff objects. The court should:
- A. Permit the defendant to introduce the remainder of the entry but only later in the defendant's case-in-chief.
  - B. Exclude the portion offered by the defendant unless the defendant can establish the scientific validity of the technique used to test for cocaine.
  - C. Exclude the portion offered by the defendant because these are Mr. Silva's records and he (or his representative) has not waived the physician/patient privilege as to that portion of the records.



- D. Permit the defendant to introduce the remainder of the entry at that time under the rule of completeness.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

13. Donald Devious, a well-known professional football player, has been charged with rape. Before trial, defense counsel gives notice that she plans to introduce evidence that the complainant had had sex with two other men within the three days before the alleged rape. Counsel claims that the injuries the complainant alleges were the result of the rape were actually caused by these other men. The court holds an in camera hearing at which the defense, prosecution, and alleged victim are present and present arguments. The prosecution and victim object to the admission of such testimony. The court should:

- A. Exclude the testimony because its admission would violate the rape shield evidence rule.
- B. Admit the testimony because it falls within one of the permissible exceptions of the rape shield evidence rule.
- C. Exclude the testimony because it would be unfairly prejudicial to the victim.
- D. Admit the testimony because the defense gave the requisite notice.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

14. In the same case as described in Question 13, the prosecution seeks to introduce testimony from two other women who will testify that Devious had raped them – one ten years and the other fifteen years before. The prosecution seeks to introduce this evidence to show that it is, therefore, more likely that Devious raped the complainant in this case. The defense objects. The court should:

- A. Admit the testimony to show Devious' propensity to commit rape if the court is satisfied that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.
- B. Admit the testimony only if the prosecution can convince the court that a reasonable jury could conclude by clear and convincing evidence that the previous rapes occurred.
- C. Exclude the testimony because it constitutes inadmissible character evidence.
- D. Exclude the testimony because the alleged rapes occurred too far in the past.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

15. In the same case as described in Questions 13-14, the prosecution seeks to introduce a diary that it claims was written by the defendant in which he describes raping the victim. The prosecution calls a qualified handwriting expert who has compared the writing in the diary with a handwriting exemplar provided by the defendant. In this expert's opinion, the defendant was the author of the diary. The defense objects on the grounds that the prosecution has not adequately authenticated the diary. The court should:
- A. Exclude the diary, given the defense's objection, unless the court is convinced by a preponderance of the evidence that the defendant wrote the diary.
  - B. Exclude the diary, given the defense's objection, unless the court is convinced by clear and convincing evidence that the defendant wrote the diary.
  - C. Exclude the diary, given the defense's objection, unless the court is convinced beyond a reasonable doubt that the defendant wrote the diary.
  - D. Admit the diary, given the defense's objection, because a reasonable juror could conclude by a preponderance of the evidence based on the expert's testimony that the defendant wrote the diary.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_

16. In the same case as described in Questions 13-15, the defense also objects to the admission of the diary on the grounds that it is hearsay and its admission would violate the defendant's constitutional right against self-incrimination. The court should:
- A. Admit the diary as an admission by a party opponent and because the state did not compel the defendant to make the diary entries.
  - B. Exclude the diary because a defendant cannot be compelled to incriminate himself.
  - C. Exclude the diary because it constitutes inadmissible hearsay.
  - D. Admit the diary as recorded recollection and because the state did not compel the defendant to make the diary entries.

Optional Explanation: \_\_\_\_\_

---

---

17. In the same case as described in Questions 13-16, after the complainant has testified, the prosecution, in its case in chief, seeks to introduce testimony from the complainant's friend, Felicia Fenton, that an hour before the alleged rape, the complainant told her: "You know, Donald Devious, the famous football player, is staying at this hotel. I'm headed up to his room. I'll catch up with you later." The prosecution seeks to introduce this statement to show that the complainant intended to go to Devious' room. (In its opening statement, the defense is claiming that Donald Devious had never met the complainant and that this rape allegation is totally false.) The defense objects to Fenton's testimony. The court should:
- A. Exclude the statement as inadmissible hearsay.
  - B. Admit the statement to show the complainant's then existing state of mind (to establish her intent to go to the defendant's room); to show by circumstantial evidence that it was more likely that she did go to his room.

- C. Admit the statement as a prior consistent statement by the complainant to rebut a charge of recent fabrication.
- D. Exclude the statement as totally irrelevant to any issue in this case.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

18. In the same case as described in Questions 13-17, the defense seeks to have the defendant testify that the complainant sent him a letter the day after the alleged rape. (The complainant did not report the alleged rape for three days.) In that letter, the complainant supposedly said that if the defendant did not pay her \$100,000, within forty-eight hours, she would call the police and accuse him of raping her. The name on the letter was that of the complainant. The defendant had thought it was some crazy person sending him a ridiculous extortion note and, after reading it several times, he threw it into the roaring fire in the fireplace. The prosecution objects to this testimony on hearsay and best evidence grounds. The court should:
- A. Exclude the testimony only because it violates the original documents (or best evidence) rule.
  - B. Exclude the testimony only because it constitutes inadmissible hearsay.
  - C. Admit the testimony because it does not violate the original documents (or best evidence) rule and is not being introduced for the truth.
  - D. Admit the testimony because it does not violate the original documents (or best evidence rule) and, since it is a prior inconsistent statement of the complainant, the jury may consider it for the truth.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

19. With regard to the defendant's testimony described in Question 18, the prosecution also objects to the testimony on the ground that the defense has not shown that the alleged letter existed or, if it existed, that it was written by the complainant. The court should:
- A. Admit the testimony as long as the court is satisfied that a reasonable jury could conclude by a preponderance of the evidence that, based on the defendant's testimony, the letter had existed and, based on the name on the letter as well as its contents (in light of later events), the complainant wrote it.
  - B. Exclude the testimony because it is not trustworthy.
  - C. Exclude the testimony because the defendant destroyed the letter so that it could not be authenticated.
  - D. Exclude the testimony unless the defense can produce something more than just the defendant's testimony to corroborate that the letter had existed.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

20. In the same case as described in Questions 13-19, the complainant, during her testimony, has trouble remembering the defendant's room number at the hotel where the alleged rape supposedly took place. To refresh her memory, the prosecutor shows her an internal prosecution memo that is 5 pages long and which, on page 3, contains the defendant's room number. The prosecutor directs the complainant's attention to that sentence on page 3. After the complainant reads a portion of that page to herself, she returns the memo to the prosecutor and testifies as to the defendant's room number. At that point, the defense counsel asks that the court order the prosecution to give the defense a copy of the entire memo. The prosecution objects. The court should:
- A. Rule that the defense is not entitled to see any portion of the memo because the prosecution properly refreshed the witness's memory and opposing counsel has no right to see what is used to refresh once a witness has retrieved the memory.
  - B. Examine the memo in camera, excise any portions not related to the defendant's room number, and then order the delivery of the remainder to the defense.

- C. Rule that the defense is not entitled to see any portion of the memo because it constitutes work product of the prosecution.
- D. Rule that the prosecution waived any work product privilege by showing the memo to the witness and order that the entire memo must be turned over to the defense.

Optional Explanation: \_\_\_\_\_

\_\_\_\_\_

21. In the same case as described in Questions 13-19, assume that when the complainant cannot remember the defendant's hotel room number, this time the prosecution shows the complainant a copy of the statement she gave to the police. She reviews the statement but testifies that although she has reviewed the statement she still does not have any independent memory of the room number. The prosecution then elicits the following from the complainant: she wrote out the statement when she reported the rape three days after it allegedly happened, the information about the defendant's room number contained in the statement was fresh in her memory when she provided it, and the statement correctly reflects that knowledge. The prosecution then seeks to introduce the statement as State's Exhibit 2. The defense objects on hearsay grounds. The court should:

- A. Admit the entire exhibit as recorded recollection.
- B. Exclude the statement and any reference to its contents because it constitutes inadmissible hearsay.
- C. Exclude exhibit as an inadmissible prior consistent statement being introduced to bolster the complainant's credibility.
- D. Permit the complainant to read the defendant's room number into evidence but not permit the prosecution to introduce the exhibit.

Optional Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



22. The defendant is being prosecuted for possession of cocaine with intent to distribute. He claims that he never intended to sell the cocaine, but that it was merely for his personal use. The prosecution had not had any reason to anticipate this defense, and it now seeks to introduce in rebuttal the testimony of an undercover police officer who will testify that he had purchased cocaine from the defendant on two other occasions approximately four weeks before his arrest in this case. The defense objects. The court should:
- A. Admit the testimony as evidence of the defendant's intent after finding that the prosecution had "good cause" for failing to give notice that it intended to introduce such evidence and then instruct the jury as to its limited admissibility.
  - B. Exclude the testimony as inadmissible character evidence.
  - C. Exclude the testimony because its probative value is likely to be somewhat outweighed by the danger of unfair prejudice.
  - D. Admit the testimony because the prosecution has a right to confront the defendant's case.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

23. In the same case as described in Question 22, assume that the defense now is mis-identification, i.e., the police arrested the wrong person. The drugs were not found on the defendant but in a brown bag a few feet away from him. The defendant testifies that he is not the sort of person who would sell drugs. The prosecution now seeks to cross-examine the defendant about the two drug sales that he made to the undercover police officer approximately four weeks before his arrest in this case. The defense objects. The court should:
- A. Prohibit such cross-examination because the prosecution is seeking to get inadmissible character evidence before the jury.
  - B. Permit such cross-examination because it constitutes proper impeachment once the defendant has put his character into issue.

- C. Prohibit such cross-examination because the defense has not put any particular character trait into issue.
- D. Prohibit such cross-examination because the defendant was never charged with or convicted of selling drugs to the undercover officer.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

24. In the same case as described in Question 22, the prosecution seeks to call an undercover narcotics officer to testify as an expert that the amount of drugs found in the defendant's possession was sufficiently large that the defendant would not have had such a quantity merely for his own personal use. The officer will testify that, given the quantity of cocaine recovered, the defendant possessed the cocaine with the intent to sell it. The defense objects. The court should:
- A. Admit such testimony as appropriate expert testimony that will assist the trier of fact even though it involves an opinion on an ultimate issue.
  - B. Admit such testimony because it is sufficiently reliable under *Daubert*, and *Kumho* has applied *Daubert's* admissibility standard to the testimony of all experts, not just scientific experts.
  - C. Exclude such testimony because undercover police officers cannot qualify as experts.
  - D. Exclude the testimony because expert testimony is not admissible to show that a defendant possessed the requisite mental state in a criminal case.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

25. The plaintiff claims that the defendant negligently ran into the back of her car damaging the plaintiff's vehicle and causing her severe injury. The defendant testifies that the

plaintiff passed her at a high rate of speed and then slammed on her brakes making it impossible for the defendant to avoid the collision. As a result, the defendant asserts that the accident was entirely the plaintiff's fault. The plaintiff's attorney cross-examines the defendant alleging that she is lying to avoid liability. The defendant calls her minister to testify that he [1] is familiar with the defendant's truthful reputation in the community; [2] personally believes that the defendant is a truthful person, and [3] knows of at least three specific instances when the defendant has been truthful that he will describe. The plaintiff objects. The court should:

- A. Permit [1] and [2] because the defendant's character for truthfulness has been attacked and these constitute proper methods for proving character.
- B. Permit [1] and [3] because the defendant's character for truthfulness has been attacked and these constitute proper methods for proving character.
- C. Permit [2] only because the defendant's character for truthfulness has been attacked and this constitutes the only proper method for proving character.
- D. Permit [2] and [3] because the defendant's character for truthfulness has been attacked but exclude [1] because reputation testimony constitutes inadmissible hearsay.

Optional Explanation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PART II – Essay Question**  
**(25 points)**

**For purposes of answering this question, assume that the Federal Rules of Evidence (or federal common law when appropriate) apply, unless instructed otherwise. Please answer the question in your bluebook(s).**

You are a law clerk at a local civil litigation firm. The firm has taken on a new case that raises breach of warranty and product liability claims. The facts are as follows:

Maurice Werth and his mother, Betty Werth, want to bring suit against the manufacturer of an allegedly defective t-shirt that caused Maurice to sustain extensive burns. In 2002, Mrs.

Werth purchased this "Tasmanian Devil" t-shirt for Maurice, who was then ten years old. The shirt was an adult size and made of a 50/50 blend of cotton and polyester.

Maurice was wearing the shirt in January of that year while watching the Super Bowl. At some point during the game, Maurice decided to go into the kitchen to cook some hot dogs for dinner. He got too close to the open flame of the gas stove and the shirt caught fire. Maurice suffered second and third degree burns that covered 25 to 35 percent of his body. He has since undergone several surgeries and extensive physical therapy.

In preparation for trial, the firm has consulted Joe Exeter, a flammability expert who has experience with flammability warnings with regard to mattresses and furniture. He has no particular experience or special training with respect to warnings on clothing and has authored no peer reviewed publications in this area. He has, however, read extensively on the topic and is familiar with the writing in the field.

The firm has collected a series of advertisements from the 1990s by manufacturers of flame-retardant materials. The firm's senior partner believes that these advertisements show the defendant's knowledge of the availability of such materials that could have been used in manufacturing the t-shirt.

The firm has also collected portions of the Consumer Products Safety Commission (CPSC) press releases and publications that contain statements made by individual commissioners. (The CPSC is a public agency.) For example, one of the publications includes the statement: "As a mother, I hope parents will wisely choose the safer alternative of tight-fitting cotton sleepwear" and "it is imperative that a visible point of purchase label of some type be on the garment or inside the garment wrapper."

Finally, the firm has put together a video depicting Maurice Werth's therapy, special dressing requirements, and post-surgery condition. The video is in color and graphically portrays the extensive and debilitating effects of the burns Maurice suffered. You watched the video and almost threw up.

The senior partner has asked for your advice about the likely admissibility of (1) Joe Exeter's testimony, (2) the advertisements, (3) the excerpts from the CPSC press releases and publications, and the (4) video. He realizes that he has not given you much detail, but he is primarily interested in your initial input on the evidentiary issues that are most likely to arise and how the firm might try to address them. He expects that the Federal Rules of Evidence will apply. What do you tell him?

**[END OF EXAM]**