

**EVIDENCE  
PROFESSOR COYNE  
FINAL EXAM FALL 2005**

SS# \_\_\_\_\_

Only those who dare to fail greatly can ever achieve greatly.

Robert F. Kennedy

Use your social security number on the exam and blue book. Write legibly and coherently.

You will be graded on your knowledge of the law, ability to analyze the issues and your treatment of the issues.

Please take the time to think about and organize your answer. Please do not just define the issue of law, but carefully apply it to the facts and clearly state what the ramifications of your conclusion are. Please limit your answer to six pages and write on only one side of each page.

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**SECTION 1**

**QUESTION 1**

On September 11, 2005, Sean Jean, a Federal officer on guard at the U.S. Constitution Naval Yard in Charlestown Massachusetts stopped a vehicle driven by Rebekah Edwards which had just crashed into a ship at the shipyard. During the stop, officer Jean detected an odor of alcohol coming from Edwards. Edwards' husband, who was a passenger in the car, told the officer that his wife confided to him that Rebekah had stopped for a few drinks before picking him up from work when his shift was over. After conducting field sobriety tests and observing Rebekah's physical condition, the officer arrested her. A videotape was taken by federal officer Coleyman while Rebekah performed the field sobriety tests. Coleyman died before trial. Testing with a BAC DataMaster breathalyzer determined the concentration of alcohol in Edwards's breath to be .134 grams of alcohol per 210 liters of breath. The officer charged Edwards with driving under the influence of alcohol ("DUI") in violation of 28 U.S. Code 2828 in that she was driving on federal land while intoxicated. Edwards moved to suppress the results of the BAC DataMaster test, asserting multiple grounds. In addition to claiming that the officer had no basis to stop her, conduct field sobriety tests, that the machine is not

sufficiently reliable and she also claimed that her stop was from racial profiling and thus impermissible.

You are her trial attorney as a result of and specifically concerned about the following items of evidence:

1. A photocopy of a certificate of approval by the Director of Health of the accuracy of the BAC DataMaster. Edwards asserted that the photocopied certificate was not authenticated, and she objects to the judge's consideration of it.
2. Officer Jean's report containing statements from Mr. and Mrs. Edwards regarding the events of that night as well as the statements of Mike Flyer, a bystander, to officer Jean that he saw the car come roaring down the street and screamed out "stop or you'll go off the dock".
3. The BAC DataMaster determination that the concentration of alcohol in Edwards's breath to be .134 grams of alcohol per 210 liters of breath. Edwards has an expert who is prepared to testify that because of holes in the ozone layer these devices are patently unreliable.
4. Officer Jean's testimony concerning his determination as to the cause of the accident based on his investigation.
5. Rebekah Edwards prior convictions in 1999 and 2001 for leaving the scene of an accident while causing property damage and larceny by false pretenses.
6. The videotape of the field sobriety testing which also shows Rebekah telling the officer "for three lousy drinks you put me through this sh\*t".
7. Six empty beer bottles found in the back seat of Rebekah's vehicle.
8. Officer Jean's stop and arrest records for the last 2 years which Rebekah claims shows racial profiling in that 98% of the stops were of people with the same national origin as her.
9. Pictures of Rebekah taken in the police holding cell drinking the water from the toilet bowl in an effort to dilute her concentration of alcohol prior to the breathalyzer test.
10. Two witnesses who claim they saw Rebekah in Peter's Place on Washington St. in downtown Boston drinking shots of whiskey with beer chasers an hour before the accident.

## SECTION 2

### QUESTION 1

Victim gives a detailed written his assailant to the police at the police station after he was treated at hospital. The police take the victim's statement and have him sign it under oath. Victim dies before court hearing. The government seeks to offer the written statement as evidence at trial.

Admissible  
Inadmissible  
Why?

## QUESTION 2

Paul, the Plaintiff, was seriously injured in a car accident. The jaws of life were used to extract him from the vehicle. He tells the police who arrived at the accident scene within minutes of the accident that the Defendant, Dan, ran the red light and smashed into his door crushing the front of the car and trapping his legs under the dash. Paul sues Dan for his injuries. The Plaintiff calls the police officer and asks him what Plaintiff said to him.

Admissible  
Inadmissible  
Why?

## QUESTION 3

The defendant, Seth Summers, is charged with civil rights violations. Billy Bob, the defendant's lover, is prepared to testify that Donna, Seth Summers' cousin, told him that Seth had told her that he threw the firebomb because he was "sick of them living in my neighborhood".

Admissible  
Inadmissible  
Why?

## QUESTION 4

Plaintiff sues for injuries to his back. Defendant proposes to show videotape. Plaintiff is shown waterskiing and shoveling snow on the videotape. Insurance company had a private investigator follow Plaintiff and video tape these activities. Insurance company believed Plaintiff was faking the extent of his injuries so he could receive more compensation. The jurisdiction recognizes the doctor/patient privilege. The private investigator filmed the Plaintiff's activities and is prepared to testify at trial. The Insurance Company seeks to introduce the videotape during the private investigator's testimony.

Admissible  
Inadmissible  
Why?

QUESTION 5

Defendant is charged with the murder of his girlfriend. Defendant, called by his own attorney, takes the stand, and proposes to testify that on the evening when the murder took place he told the guys at his poker game that, "I'm leaving right from here on a business trip to New York for a week."

Admissible  
Inadmissible  
Why?

QUESTION 6

Plaintiff calls an expert witness who is an accident reconstruction expert to testify in a civil case seeking damages from the Defendant. The expert proposes to testify and show a video reenactment of the accident that he prepared depicting the Defendant's motor vehicle crossing into Plaintiff's lane of travel. He will also testify that the accident happened because the Defendant was going too fast to control the vehicle around that turn as the reenactment shows.

Admissible  
Inadmissible

Why?

QUESTION 7

Plaintiff sues the Defendant for damage to his property in Federal Court. Plaintiff calls the ex-wife of the Defendant to the stand who plans to say that while they were on their honeymoon the Defendant confided to her that he broke into the Plaintiff's summer home, ransacked the cottage and then lit it on fire. Defendant objects to the proposed testimony. Ex-wife's testimony is

Admissible  
Inadmissible

Why?

QUESTION 8

Paula is charged with larceny by false pretenses and she testifies denying she committed the acts. The Government then seeks to ask Paula about her 1998 criminal conviction for larceny by trick. The judge allows the Government's inquiry over Defendant's objection. Judge's ruling was

Permissible  
Impermissible

Why?

QUESTION 9

Peter is charged with the assault and battery of Mike. Mike's friend Ann proposes to testify that as he lay in the street bloodied and beaten badly, Mike told her, "Sorry, honey, I'm dying, but Peter has been stealing money from me and that's why he beat me with a bat." The government offers the testimony as a dying declaration. On that basis, the Judge should rule the testimony is

Admissible  
Inadmissible

Why?

QUESTION 10

Susan sues White Horse Tavern for injuries suffered in an automobile accident caused by Starkis, who had been an underage patron of White Horse Tavern. Susan claims that Starkis was permitted to drink when he should not have been and drank too much liquor at the Tavern before the accident.

Susan offers evidence that the owner of White Horse Tavern installed the ID Checker 5000 at the Tavern shortly after her accident. The ID Checker 5000 is a state of the art identification system guaranteed to prevent underage drinkers from being served alcohol. That evidence is

Admissible  
Inadmissible

Why?

MYFILES/EVIDENCE/Evidence.Final2005

MASSACHUSETTS SCHOOL OF LAW

PROFESSOR COYNE  
EVIDENCE  
FINAL EXAMINATION FALL 2004

SS: \_\_\_\_\_

*A people that values its privileges above its principles,  
soon loses both.*

**Eisenhower**

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**QUESTION ONE**

This case arose from the June 2, 2003 drowning death of Eugene Beck who dropped from a bridge (apparently after jumping) into the Merrimack River in Essex, Massachusetts. The plaintiffs contend that Mr. Beck died because officials of the City and County of Essex, pursuant to a municipal policy, prevented qualified civilian rescue divers on the scene from saving him, even though the city and county provided no meaningful alternative rescue service of their own.

In 1999, the Essex County Sheriff's Department formed a county dive team. The sheriff's department concluded after consultation with an expert that the county was too large to permit this dive team to be held out to the public as a "rescue" team, so instead, it was deemed a "recovery" team. There is evidence that this term connotes the simple recovery of bodies, rather than the rescue and resuscitation of drowning victims. By the time of Mr. Beck's plunge, it included several officers who were certified in diving, but not in dive rescue.

After a fatal drowning accident in the river in 2000, a group of trained civilian divers

formed a private rescue organization called the Essex Search and Rescue Dive Team. This private dive team entered into a contract to provide rescue and recovery services to the town of Essex as needed. The members carried pagers so that the city authorities could use to summon them when needed. A protocol developed whereby the City would page the county dive team first in case of a water emergency, and would call out the private group if the county team was likely to have difficulty responding promptly. However, a city memorandum on this subject that is available states that "Sheriff Ed" would "decide" when the private group would be called out--apparently a reference to Sheriff Edward Haiku.

Beck and another man, Mark Sander, plunged into the Essex River at approximately 10:07 p.m. on June 28, 2003. A bystander saw their fall and immediately called 911 while filming the feverish activity in the river below. The Essex police arrived in time for one of the officers to see Beck disappear beneath the river's surface at 10:17 p.m. They notified both the Essex Police Chief and the county dive team. The city did not page the private organization that night.

The plaintiffs are interested in presenting the following evidence. Please discuss the issues presented.

1. Evidence that some local officials were hostile to the private dive team's activities. Art Krause, the founder of the private dive team will testify that Sheriff Haik personally told him that he would be subject to arrest if he interfered with the county's operations at any water accident scene.

2. Testimony from Fred LaPoint, a City of Essex firefighter and another private dive team member who will testify that he had seen a memo from Essex County Sheriff Edward Haik stating that all water accident scenes were to be treated as "crime scenes," and that anyone who entered such a scene without his permission would be subject to arrest. While no official copy of the alleged memo can be found, several other witnesses are prepared to also state that they have either seen or heard of such a memo.

3. A videotape of the incident showing Beck and another man, Mark Sander, plunging into the Essex River at approximately 10:07 p.m. This videotape was taken by the bystander who saw their fall and immediately called 911 while filming the feverish struggle to survive in the river below.

4. Testimony from an eyewitness at the scene, that a partially suited-up member of the private dive team approached and asked if the county team needed help. He was told by them that the county "had everything under control." Moreover, he approached the Chief

who consulted with Sheriff Haik by radio, and then instructed the private divers not to enter the water. However, the chief testified on deposition that he was never aware that the private divers were on the scene. Sheriff Haik likewise denied at his deposition having any such knowledge.

5. Testimony that Eugene Beck's mother, Sharon Beck, eventually arrived at the scene and had to be physically restrained her to prevent her from attempting to rescue Eugene herself.

6. Evidence that although the accident scene was quite close to the sheriff's office (about a two-minute drive), the county divers did not enter the water until 11:05 p.m., nearly one hour after Mr. Beck's plunge. The boat experienced mechanical difficulties with its lights and radio, but it proceeded into the water nonetheless.

7. The plaintiffs also want to offer the expert testimony of Dr. Alan Steinman, a former Coast Guard rear admiral and the author of numerous articles in the fields of cold-water drowning and resuscitation. Steinman had also studied many drowning cases in his official capacity at the Coast Guard. He is prepared to opine that if Beck had been recovered as late as 24 minutes after submerging, he probably could have been resuscitated. (In his deposition, he had testified that the cut-off time after which Beck probably would not have survived was between 20 and 30 minutes after submersion.) Steinman testified that his opinion was based on his cutting edge research and testing on cold-water drowning victims, numerous published articles, particularly the work of Dr. Martin Nemiroff, a researcher who had compiled case studies of cold-water drowning victims who had been revived after long periods of submersion, and his own analysis that cold water prompts special physiological responses that increase survivability.

## QUESTION TWO

Stanley and Leo were recently married in Brookline, Massachusetts in the summer of 2004, although they had been living together for many years. At the wedding reception, Stanley confided to Leo that he killed his former partner Mike, dismembered his body and buried the pieces in a shallow grave near MSL. While Leo greatly appreciated Stan sharing his deepest secrets with him, he later came to fear for his own safety. Stan also confided to him that he would sharpen his saws, knives and axes in the basement after having a disagreement with Leo about the lateness of dinner. Leo really got worried and *divorced* Stanley. Stanley later was arrested for murdering Mike.

At the murder trial, the government calls Leo as a witness and asks him to tell the





**QUESTION THREE (Circle your answer and briefly explain your reasoning.)**

1. Defendant is charged with perjury from a prior civil case. The transcript and tape-recording are available from that trial. A court officer, who was present at the prior civil case, is called as a witness by the prosecutor and asked to tell the court what the defendant said at that trial. This testimony is

Admissible  
Inadmissible

Why?

2. Sam sues Character's Bar for injuries suffered in an automobile accident caused by Nicole, who had been a patron of Character's Bar. Sam claims that Nicole was permitted to drink too much liquor at Character's Bar before the accident.

Sam offers evidence that the owner of Character's Bar visited him at the hospital after the accident and said, "That's the least I can do after letting that tramp leave the bar so drunk last night." The statement that Nicole was drunk when she left the bar on the night of the accident is

Admissible  
Inadmissible

Why?

3. List the unavailability exceptions to the Hearsay Rule.

4. Connie was arrested for stabbing her father and taken to the police stations where she was given a *Miranda* warning and otherwise properly advised of her constitutional rights. The police then brought in her father who said, "That's my lousy daughter who stabbed me!" Although Connie was given an opportunity to respond, she said nothing. At the trial the prosecutor attempted to prove that Connie made no response to her father's accusation. This evidence is:

Admissible  
Inadmissible

Why?

5. Charlie is suing the MBTA for injuries sustained when his car was hit by a train. Larry testified that just before the accident, a bystander, Buddy, had screamed "My God, the crossing signal isn't working." The MBTA wants to offer the testimony of Nancy, that Buddy, who is now dead, had previously told her that the crossing signal was working. This is . . . .

Admissible  
Inadmissible

Why?

6. Jean is on trial for the murder of her husband, Joe. She is accused of pushing him from the window of their 12<sup>th</sup> floor apartment. Jean claims Joe jumped. Mike, a friend of Jean's, was called by Jean to testify that she confided to him that she pushed Joe from the window, because he had been abusing her. The judge should rule this testimony:

Admissible  
Inadmissible

Why?

7. Sheriff's bloodhound, "Tracker," is taken to the scene of a robbery. The bloodhound runs for almost two miles and stops at the edge of a cave and poses and points into the cave. The Sheriff and Detective followed the dog and went into the cave and found the Defendant hiding there. Sheriff proposes to testify to all of this.

Admissible  
Inadmissible

Why?

8. The Plaintiff, Billy Budd, alleges that a result of Defendant Doctor's negligent treatment he has developed a serious and offensive body odor which is particularly noticeable in his feet. He proposes to take the stand as a witness, testify and then ask the judge if he can remove his shoes and socks in the presence (in the close presence) of the jury so that the jury can determine the truth. Defendant objects.

Permissible  
Impermissible

Why?

9. Plaintiff asks to use the blackboard to have witness make a diagram of how the accident occurred. Judge refuses request. Was judge's ruling . . .

Permissible  
Impermissible

Why?

10. The Defendant on cross-examination is asked, "Sir, is it not true that 12 years ago, you were convicted of perjury." The Judge sustains the objection." Was judge's ruling . . .

Permissible  
Impermissible

Why?

MASSACHUSETTS SCHOOL OF LAW

PROFESSOR COYNE  
EVIDENCE  
FINAL EXAMINATION FALL 2003

SS:

*A people that values its privileges above its principles,  
soon loses both.*

Eisenhower

Use your social security number on the exam and blue book. Write legibly and coherently.

You will be graded on your knowledge of the law, ability to analyze the issues and your treatment of the issues.

No more than five (5) pages handwritten, one side only, or four (4) typed double-spaced pages for Question One, and please write your answers to Question Two and Section Three in the space provided.

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**QUESTION ONE**

Jack Michaels is a movie star who lives in Foreverland, California. Michaels lives a very unconventional lifestyle. At his 10 acre ranch in Foreverland, Michaels keeps all sorts of unique animals and allows them to roam throughout the ranch and his house including his bedroom.

Michaels last two action movies were tremendous flops, but he still made 10 million dollars for starring in these movies. As a result of a tip from PETA, federal agents recently executed a search warrant on Michaels' ranch and subsequently charged Michaels with violations of the Endangered Species and Exotic Animals Act which makes it a felony offense to possess endangered or exotic animals without being properly licensed. Michaels has no licenses of any kind.

You are Michaels' trial attorney and are concerned about the following material. Please address the evidentiary issue and explain how you would deal with these issues.

- a. Testimony from Jack Michaels' first wife about what she saw Michaels do with the animals while they were married, and what he confided to her about his love for his pets.
- b. Testimony from Dr. Ira Bond, a psychiatrist, who claims that Mr. Michaels

suffers from a disease he recently discovered called Starus Maximus which prevents Mr. Michaels from understanding the difference between what is right and wrong.

- c. Videotape of an interview Mr. Michaels did with Pat O'Brien of Inside Edition, on which Michaels tells O'Brien that he shares his home and even his bedroom with these exotic animals as a means of teaching them about life. One of the animals in question is even shown on the videotape in Michaels' home.
- d. Testimony from Michaels' neighbors that Michaels is considered a very dangerous man, and that he once shot one of them because they asked for his autograph.
- e. Testimony from Jack Black that Michaels asked him to purchase the animals, gave him \$100,000 cash to obtain the animals and told him where to obtain them. Black will further testify what he did to obtain the animals. Black and Michaels were great friends until Michaels divorced his first wife and married Black's wife. Black has a very checkered past of his own, including a number of felony convictions.

## **QUESTION TWO**

Please take any piece of evidence from Question One and by way of permissible questioning, introduce that evidence.

I call \_\_\_\_\_.

Reasons for calling this witness:

Q

A

Q

A

Q









Inadmissible  
Why?

**Question Nine**

Plaintiff sues for injuries to his back. Defendant proposes to show videotape. Plaintiff is shown waterskiing and shoveling snow on the videotape. Insurance company had a private investigator follow Plaintiff and tape these activities. Insurance company believed Plaintiff was faking the extent of his injuries so he could receive more compensation. The jurisdiction recognizes the doctor/patient privilege. The private investigator filmed the Plaintiff's activities and seeks to introduce the videotape while testifying.

Admissible  
Inadmissible  
Why?

**Question Ten**

Defendant is charged with the murder of his girlfriend. Defendant, called by his attorney, takes the stand and proposes to testify that early on the evening the murder took place he told the guys at his poker game that, "I'm leaving on a business trip to New York right after I leave here."

Admissible  
Inadmissible  
Why?

MASSACHUSETTS SCHOOL OF LAW

PROFESSOR COYNE  
EVIDENCE  
FINAL EXAMINATION FALL 2002

SS:

*Who's a great lawyer? He, who aims to say  
the least his cause requires, not all he may.  
William Wetmore Story*

Use your social security number on the exam and blue book. Please read each question carefully. Write legibly and coherently and only in the space provided for in Sections two and three. Please use the blue book for Section One and limit your answer to 6 pages (one side only). Have a safe and great break.

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**SECTION ONE**

**Fingers Final Fall**

Fred Fingers is a career criminal who made a bundle during the Internet boom. Despite his good fortune, he continued to engage in petty criminal activities, including an elaborate scheme which used the Internet to take a penny from every transaction an individual made at a given site, and then deposit that penny into Fingers' Bahamian Bank account. Tom Truehart found out about this scheme and confronted Fingers with his findings. Fingers flew into a furious rage and hit Tom with a four by four in the face. Blood flowed from Tom's face as he fell forward to the ground.

As a result of Fingers' assault on Tom, Tom commenced a civil action against Fingers for assault, battery and emotional distress. At trial, the following takes place:

1. Tom calls Benny, an investigator, who testified that he had no present memory of the matter but recalled making notes of his extensive investigation. Benny further stated that he also took notes as part of his job as an investigator which he kept on file. When shown the notes, Benny still has no recollection of his investigation. Tom then offered the notes in evidence. Fingers objected. How should the judge rule?
2. Tom offers photographs of his face taken minutes after the beating. How should the judge rule?
3. Nancy, a neighbor of Fingers, was called to testify by Tom. Over Fingers' objection, which was overruled by the judge, she stated that in her opinion Fingers was a no

good, low life who would steal from his own mother. Was the judge's ruling correct?

4. Fingers was asked on cross-examination by Tom if he was the same Fingers who was convicted of mail fraud eight years ago. Fingers' attorney objected. How should the judge rule?
5. Tom offered a certified transcript of the testimony of an eyewitness, George, from Fingers' criminal trial who was now incarcerated in another state. Fingers objected. How should the judge rule?
6. Sam testified over Fingers' objection, which the judge overruled, that he heard Fingers whispering to his wife, "I made nothing off the stuff I stole from Tom; I should have hit him a lot harder." Was the judge's ruling correct?
7. Tom calls Bill Goats, a professor of computer science at State University, who proposes to testify as to the nature of the Internet scheme, the manner it was conducted, its affects on the public, and his opinion on its legality. He also proposes to show by powerpoint a recreation of Fingers' fraud.

## SECTION TWO

You are the trial judge. Please rule on the following evidentiary issues by circling your ruling and then explain fully your reasons for your rulings.

### QUESTION ONE

The victim, Joe Buttafuco, describes his assailant to a police sketch artist who draws a picture of the assailant that looks exactly like the attacker. Buttafuco dies before trial and the government calls the police sketch artist who attempts to offer his drawing into evidence.

Admissible

Inadmissible

Reasoning:

### QUESTION TWO

Plaintiff proposes to show a "day in the life film" that shows plaintiff, a quadriplegic, being cared for on a daily basis completely unable to do anything for herself other than ask for assistance.

Admissible

Inadmissible

Reasoning:

### QUESTION THREE

Sheriff's bloodhound, "Tracker," is taken to the scene of a robbery. The bloodhound runs for almost two miles and stops at the edge of a cave, poses and points into the cave. Police officer went into the cave and found defendant hiding there. Sheriff proposes to testify to all of this. Sheriff's testimony is?

Admissible

Inadmissible

Reasoning:

### QUESTION FOUR

Defendant is charged with the murder of his girlfriend. Defendant, called by his attorney, takes the stand and proposes to testify that on the evening when the murder took place, he told his bridge group that, "After I leave here, I am going to have dinner with my wife at the Wyndham."

Admissible

Inadmissible

Reasoning:

### QUESTION FIVE

The Defendant is on trial for an assault and battery which took place on May 15, 1999. On direct examination, a forgetful witness is asked, "What, if anything would refresh your recollection?"

He answers, "My daily diary might help me." The attorney then asks him if he keeps a diary and he answers, "yes." After the witness explains the manner in which the diary is kept, including its general accuracy, he looks at the diary entry, but it is unable to jog his memory. His attorney then asks him to read the daily entry from May 15, 1999 into evidence.

Admissible

Inadmissible

Reasoning:

### QUESTION SIX

Plaintiff calls an expert witness who is an accident reconstruction expert to testify in a civil case seeking damages from the Defendant. The expert proposes to testify and show a video reenactment of the accident she prepared depicting the Defendant's motor vehicle crossing into Plaintiff's lane of travel and hitting the Plaintiff's car while it is going excessively fast. This evidence is

Admissible

Inadmissible

Reasoning:

### QUESTION SEVEN

George is arrested for murder. While they were on their honeymoon, George's wife was found dead in the bathtub. There were no signs of a struggle. It appeared as though she may have fallen and not got up. The police investigated and found that this same "accident" had happened to George on three previous honeymoons with three very rich ladies. Police officer proposes to testify to all of this. Why?

### QUESTION EIGHT

Susan sues White Horse Tavern for injuries suffered in an automobile accident caused by Starkis, who had been a patron of the White Horse Tavern. Susan claims that Starkis was permitted

to drink too much liquor at the Tavern before the accident.

Susan offers evidence that the owner of White Horse Tavern visited her after the accident and offered her \$10,000.00 to settle her claim if she promised not to sue him and also said, "I owe you that much after letting Starkis leave the bar so drunk last night." The statement that Starkis was drunk when he left the bar on the night of the accident is

Admissible

Inadmissible

Reasoning:

#### QUESTION NINE

Defendant is charged with perjury from a prior civil case. The transcript and tape-recording are available from that trial. A court officer, who was present at the prior civil case, is called as a witness by the prosecutor and asked to tell the court what the Defendant said at that trial. This testimony is

Admissible

Inadmissible

Reasoning:

#### QUESTION TEN

Peter sued Mike on a breach of contract theory, because Mike refused to sell Peter his house. Devlin testified for Peter. On cross-examination, Mike asked Devlin: "Weren't you convicted of forgery last year in the United States District Court for Vermont."

Permissible

Inadmissible

Reasoning:

### SECTION THREE

Define Hearsay:

What constitutes a witness being unavailable so that the 804 exceptions can be used?

- 1.
- 2.
- 3.
- 4.

What are the 804 unavailability exceptions?

- 1.
- 2.
- 3.
- 4.
- 5.

What is the only hearsay exception which requires the declarant to be available?

- 1.



**EVIDENCE  
MIDTERM FALL 2004  
Professor Coyne**

*A legal decision depends not on the teacher's age,  
but on the force of his argument.*

*Talmud, Bava Batra*

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**QUESTION ONE**

The Plaintiff, Patty Plunder, was seriously injured when her flatscreen television exploded as she was smoking marijuana and watching the football game. She had purchased the flatscreen television just two months before at Circuit City. The injury occurred on Thanksgiving Day, 2003 and severely injured her, and caused her extensive brain damage. Ms. Plunder contends that the injuries resulted from the negligent design and manufacture of the television. She sued both Circuit City and Sony Televisions, Inc., the maker of the television. The Defendants maintain that the television was improperly used by a stoned Ms. Plunder.

You are the trial attorney for the Defendants. Please discuss what you would do about the following:

- a. Information that the Defendants settled six similar cases.
- b. Testimony from Bob Malaguti that he had sold Ms. Plunder an ounce of marijuana that morning.
- c. Testimony from Billy Budd, a visitor at Ms. Plunder's house that Thanksgiving Day, whose vision was damaged in the explosion. Mr. Budd proposes to testify that he was really stoned and believes that Ms. Plunder caused the injury herself.
- d. Color photographs taken immediately after the explosion by the fire department emergency workers, that show a very bloody and severely burned Ms. Plunder.
- e. Expert testimony prepared by the Defendants that they intend to offer that utilizes a video reenactment of the explosion and recreates how it occurred.
- f. Statements made by Ms. Plunder to her boyfriend that she caused the television to explode when she tried to rewire it to make it compatible with her surround sound system.
- g. Evidence that six years ago Ms. Plunder was convicted of tax fraud.

***SEE NEXT PAGE***

QUESTION TWO

1. Define Hearsay:

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2. What constitutes the declarant being unavailable so that the 804 unavailability exceptions can be used? \_\_\_\_\_

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3. What are the unavailability exceptions? \_\_\_\_\_

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4. Define relevance. \_\_\_\_\_

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5. List Coyne's 5 part test for the admissability of evidence.

**EVIDENCE MID TERM**  
**SAMPLE ANSWER**  
**(PlunderCase)**

If we are in Federal Court this case would be resolved using the FRE. If we are in Superior Court, this case will be resolved using the Massachusetts Rules of Evidence. Unlike the FRE, which have codified, the Massachusetts rules of evidence come to us from various statutes, cases and the common law. I may need to move for a Motion in Limine requesting that the court rule in advance of the trial for a ruling on the pieces of evidence for the reasons provided.

The information that the defendants settled similar cases would be offered by Plunder. Relevance is defined as making a material fact - - which is a fact of consequence - - either more or less likely. I would argue that the settlement information is not relevant because it doesn't tend to show that the defendants were negligent in their design of the TV. The settlements merely show that the defendants were trying to keep the peace. I would next argue that Plunder wouldn't be able to lay a proper foundation for admitting the evidence. Foundation is the proper and sufficient basis for the admissibility of the evidence. It must be shown to be reliable and it must be authenticated. I would also argue that under Rule 403 the evidence of the settlements would be more prejudicial than probative. This evidence would be confusing to the jury as to how it contributed to the defendants' negligence. In all likelihood, the jury would misuse this evidence. Typically, evidence of prior settlements is not admissible to show negligence in civil cases. In all likelihood, this evidence will not be admissible either based on the fact that it's not relevant to the case or the fact that it's more prejudicial than probative.

For Bob's testimony to be admissible, it must first be relevant. Here, the fact that it tends to prove or disprove Plunder's contributory negligence to why she may or may not have been injured. The testimony is relevant. Bob's needs to pass the competency standard. Because Bob has first-hand personal knowledge of selling Plunder the marijuana, his testimony will be admissible. For a witness to be competent, he must be able to perceive, understand, remember and communicate. There doesn't appear to be any defect in P.U.R.C. that Bob possesses that would make him incompetent to testify. I would then lay the proper foundation for Bob's testimony. Because he has first-hand personal knowledge, he can testify as to the events surrounding the sale. However, Plunder may object on the grounds that his testimony is unreliable. I would also make a 403 argument that this evidence is more probative than prejudicial. It is central to the case because it shows that Plunder could've contributed to her injuries by being under their influence of drugs. Plunder may attack the credibility of Bob's testimony. This is done by impeaching the witness' character for

truthfulness. It helps to show to the jury that Bob is a liar and untruthful. Plunder may do this by calling reputation witnesses that know Bob's reputation in the community for truthfulness, may bring in other prior bad acts that are probative for truthfulness, or other prior convictions. Plunder may attack Bob on cross examination, if he does indeed take the stand, for bias, credibility, or subject matter of direct. In all likelihood, Bob's testimony will be discredited, because he's a drug dealer. However, I could rehabilitate his testimony by offering evidence that is probative of his truthfulness. In all likelihood, Bob's testimony will be admissible evidence. It will be for the jury to determine how much weight they will give it when determining negligence.

I would argue that Billy's testimony is relevant because it goes to show that Plunder was responsible for the accident, and that it tends to make this fact more likely than not. I would also argue that Billy is a competent witness. He was at the scene of the accident, has personal first-hand knowledge of the incident, and is able to perceive, communicate, understand, and remember. Although he's a lay witness, he may still give his opinion of Plunder's sobriety at the time. This is one area that lay witnesses can give opinion testimony to, including speech, signature, speed of a car, and sanity. Plunder may argue because Billy was so stoned and lost his vision, and thus ability to perceive, that he's not competent. Plunder may also argue that his opinion as to whether she caused the accident is not within the areas which a lay witness is permitted to testify about. Therefore, Billy wouldn't be able to testify about whether Plunder caused the accident, as his "belief" is irrelevant since he is limited to things which he has personal knowledge. However, if he could testify that she was high, I would lay the foundation for this testimony by establishing that it's reliable because Billy has been smoking marijuana for years and with Plunder. Therefore, he knows what she looks and acts like when she's high. The trial judge will prohibit Bill from giving his opinion as to whether Plunder caused the accident, but will allow his testimony pertaining to her sobriety. I would also expect Plunder to argue that this evidence is more prejudicial than probative. However, I don't think this argument will win because Plunder's sobriety is probative as to whether she contributed to the accident and her injuries.

I would argue that the photos are not admissible because they are more prejudicial than probative. They are in color and are so gruesome that they will cause the jury to misuse the evidence. Plunder will argue that they are relevant because they show her injuries which tend to make it more probable that the TV exploded. She will also argue that they are relevant on the issue of damages. Plunder will be able to lay a proper foundation for the photos I she can call a sponsoring witness, probably one of the fire department emergency workers, to testify that the pictures are authentic in that they actually and fairly depict what they purport to, which is that Plunder had these injuries. These photos will most likely be inadmissible as evidence because of the substantial prejudicial effect they will have on the jury. The jury is likely to misuse the evidence in determining the defendant's negligence and therefore excludable under 403.

I would argue that the video is relevant because it tends to show that they're not negligent. I would lay the proper foundation by showing that the recreation is substantially similar to the actual event on Thanksgiving Day, 2003. The weather conditions, temperature, where the TV was located, would all need to be substantially similar. I would therefore show that it's reliable and authentic. I would also establish that the expert was competent. For an expert to be competent as a witness, he must have sufficient background, education, experience and training in this field. I would show that the expert knows a lot about how TVs work and the manufacturing and design defects that contribute to how a TV explodes. I would want this evidence to come in to show that the design and manufacturing had nothing to do with the defendant's negligence. I would also argue that it's more probative than prejudicial. It doesn't tend itself to misuse by the jury. If anything, it assists the jury in realizing how a TV doesn't normally explode without some type of contributory negligence by the owner, or in this case Plunder.

I would offer these statements as exceptions to the hearsay rule in Massachusetts and as a party's own statement and therefore an admission under FRE801. Hearsay under the FRE is defined as any out of court statement offered to prove the truth of the matter asserted therein except for a party's own statement offered against that party. This is a party's own statement that the other side would offer and is therefore not Hearsay under the FRE. I would argue that it's relevant because it proves the defendants aren't responsible for the explosion. I would lay the foundation that it's reliable because it was made by a witness that actually had first-hand personal knowledge because he heard the statement. I would also argue that the boyfriend appears to be a competent witness, for all witnesses are presumed competent. It doesn't appear that he suffers from any physical or mental defect that would compromise his competency.

I would offer this evidence only if Plunder took the stand. I would offer this evidence to impeach her credibility for truthfulness, but could only do so if she testified at trial. This crime is a *crimen falsi*, which is a crime of a dishonest act or false statement. This crime is less than 10 years old, and therefore the judge should not exclude it. It's less than 10 years old because the date of conviction or last date of confinement was only 6 years ago. The judge has no discretion to exclude it. The crime should come in if Plunder testifies, but only if she testifies.

MASSACHUSETTS SCHOOL OF LAW

PROFESSOR COYNE  
EVIDENCE  
FINAL EXAMINATION FALL 2001

SS: \_\_\_\_\_

*Who's a great lawyer? He, who aims to say  
the least his cause requires, not all he may.  
William Wetmore Story*

Use your social security number on the exam and blue book. Please read each question carefully. Write legibly and coherently and only in the space provided for in Sections two and three. Please use the blue book for Section One and limit your answer to 6 pages (one side only). Have a safe and great break.

---

SECTION ONE

QUESTION ONE

At approximately 1:23 a.m. on October 9, 2000, an Amtrak passenger train derailed in the Arizona desert, near Milepost 846.86, on a track then owned and maintained by Southern Pacific Transportation Company.

It is undisputed that the derailment was the result of a purposeful act of sabotage. Physical evidence at the scene indicates that unknown individuals had deliberately removed the bolts and spikes holding the south rail in place. Two angle bars that hold the rails together and fifty feet of rail had been removed. No physical evidence revealed what signs of a defective roadbed, if any, would have been visible to the train crew prior to impact, assuming that the crew had been keeping a proper lookout. The crew depositions contain the only evidence about the quality of the lookout.

The saboteurs had taken deliberate pains to conceal their efforts. The track on which the derailment occurred was equipped with an electric warning system designed to illuminate a red light if the current flowing through the rail was interrupted at any point between "block" signals. The saboteurs had circumvented the system and rewired it so that the block signal would continue to show a green light after the angle bars had been removed.

Two experienced Amtrak passenger locomotive engineers were in the cab of the lead locomotive. Gean Haffey was the engineer and Gary Lawrence was the assistant engineer. The train consisted of an engine unit and twelve cars. The engine and eight of the cars left the track. Numerous passengers were severely injured in the crash.

You are the trial attorney for the defendants and are concerned with the following

expected pieces of evidence:

1. A report prepared by the former Southern Pacific Regional Engineer, David Wickersham. The report described the scene at the point of derailment (POD), as of 6:30 a.m. following the wreck. It also included photographs showing the debris left on the roadbed after the train left the track.
2. After the wreck, government agents, railroad investigators, and other experts visited the scene, inspected the mutilation of the roadbed, and prepared reports. The reports showed that, pursuant to Federal Railroad Administration regulations, a qualified track inspector had twice inspected the track near Milepost 846.86 in the week before the derailment, and a tie plate at milepost 846.82 was replaced on October 5, 1995.
3. The testimony of the plaintiff's expert, Charles Culver, a locomotive engineer with 27 years of experience. Culver has testified in other cases and is prepared to offer testimony concerning the duty of an engineer to maintain a proper lookout in front of the train. He will also testify that a track separation should have been visible on a moonlit night in the added light of the locomotive and, therefore, the defendants were negligent. He also knows and is prepared to testify from his many years of being a locomotive engineer, that the "tops of rails frequently gleam, or shine, in the light thrown by the locomotive headlights," and "the twin ribbons of rail can often be seen shining for a considerable distance ahead of the locomotive."
4. A statement Joe McGinty gave to Amtrak police officers investigating the accident acknowledging that he, Gean Haffey and Gary Lawrence, were smoking pot and drinking beer at the train terminal before the train left the station. The Amtrak officers turned the statement over to you as counsel for Amtrak. McGinty has since fled the area and cannot be located.
5. The testimony of Mike Malagu, one of the saboteurs, who has been cooperating with the Amtrak investigators. Malagu told them of the plans of the saboteurs and described in detail what they did to derail the train and is willing to testify concerning these matters.

Please discuss what you would do concerning these matters.

## SECTION TWO

You are the trial judge. Please rule on the following evidentiary issues by circling your ruling and then explain fully your reasons for your rulings.

### Question One

The victim, Joe Buttafuco, describes his assailant to a police sketch artist who draws a picture of the assailant that looks exactly like the attacker. Buttafuco dies before trial and the government calls the police sketch artist who attempts to offer his drawing into evidence.

Admissible

Inadmissible

Reasoning:

### Question Two

Kurt, the plaintiff, visits Attorney Ima Jones at his office on State Street in Boston. Jones sends him to Massachusetts General Hospital for treatment. Kurt tells nurse that he injured his back in a very serious car accident six months ago, and therefore needs to see the doctor to obtain treatment. Nurse records that on his patient record. Plaintiff seeks to introduce the subpoenaed patient record into evidence with the nurse's notation regarding what Kurt told her.

Admissible

Inadmissible

Reasoning:



### Question Three

Larry is not available to testify at Peter's trial because of his unexpected death in an accident at an amusement park. The prosecution seeks to introduce a transcript of the testimony Larry gave before the grand jury, describing how he observed Peter shoot Diane with a shotgun, place her body in the trunk of his car and then drive off. Peter's attorney objects. The transcript is

Admissible

Inadmissible

Reasoning:

### Question Four

Plaintiff sues for serious back injuries. Defendant proposes to show a videotape. On the videotape, the Plaintiff is shown water-skiing and shoveling snow. AMICA Insurance had a private investigator follow the Plaintiff and tape these activities. AMICA Insurance believed the Plaintiff was faking the extent of his injuries so he could receive more compensation. The jurisdiction recognizes the doctor/patient privilege. The private investigator who filmed the Plaintiff's activities for AMICA is on the stand and its counsel seeks to introduce the videotape.

Admissible

Inadmissible

Reasoning:

### Question Five

Defendant is charged with the murder of his girlfriend. Defendant, called by his attorney, takes the stand and proposes to testify that on the evening when the murder took

place, he told his bridge group that, "After I leave here, I am going to have dinner with my wife at the Wyndham."

Admissible

Inadmissible

Reasoning:

### Question Six

Plaintiff calls an expert witness who is an accident reconstruction expert to testify in a civil case seeking damages from the Defendant. The expert proposes to testify and show a video reenactment of the accident she prepared depicting the Defendant's motor vehicle crossing into Plaintiff's lane of travel and hitting the Plaintiff's car while it is going excessively fast. This evidence is

Admissible

Inadmissible

Reasoning:

Question Seven

Buffy is charged with murder of her husband, Tom. Tom was found dead, with his neck broken, at the bottom of a long set of stairs when Buffy and Tom were on their honeymoon cruise. There were no signs of a struggle. The police investigated the incident and found that this same "accident" had happened to Buffy on three previous honeymoons with three very wealthy men. Police officer proposes to testify to all of this. This testimony is

Admissible

Inadmissible

Reasoning:

Question Eight

Susan sues White Horse Tavern for injuries suffered in an automobile accident caused by Starkis, who had been a patron of White Horse Tavern. Susan claims that Starkis was permitted to drink too much liquor at the Tavern before the accident.

Susan offers evidence that the owner of White Horse Tavern visited her after the accident and, offered her \$10,000.00 to settle her claim if she promised not to sue him and also said, "I owe you that much after letting Starkis leave the bar so drunk last night." The statement that Starkis was drunk when he left the bar on the night of the accident is

Admissible

Inadmissible

Reasoning:

Question Nine

Defendant is charged with perjury from a prior civil case. The transcript and tape-recording are available from that trial. A court officer, who was present at the prior civil case, is called as a witness by the prosecutor and asked to tell the court what the Defendant said at that trial. This testimony is

Admissible

Inadmissible

Reasoning:

Question Ten

Peter sued Mike on a breach of contract theory, because Mike refused to sell Peter his house. Devlin testified for Peter. On cross-examination, Mike asked Devlin: "Weren't you convicted of forgery last year in the United States District Court for Vermont."

Permissible

Inadmissible

Reasoning:

**SECTION THREE**

Assume for the purposes of this question only that the first and third items described in Question One are admissible. Please list the appropriate questions in order to lay the necessary foundation for the introduction of that evidence and have it received by the Court.

On behalf of \_\_\_\_\_ I call \_\_\_\_\_.

Briefly describe why you chose this person as a witness.

Q: Please state your name and spell your last name.

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Use the other side of page if necessary.

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Victim describes assailant to police sketch artist who draws likeness of assailant that victim says looks "exactly like the guy that did this to me." Victim appears at trial and government offers sketch and victim's statement into evidence. This evidence is:

Admissible  
Inadmissible

Why?

### **Question Eight**

Buffy is charged with murder of her husband, Tom. Tom was found dead, with his neck snapped like a twig, at the bottom of a long set of stairs when Buffy and Tom were on their honeymoon cruise. There were no signs of a struggle. The police investigated the incident and found that this same "accident" had happened to Buffy on three previous honeymoons with three very wealthy men. Police officer proposes to testify to all of this. This testimony is

Admissible  
Inadmissible

Why?

### **Question Nine**

Peter sued Mike on a breach of contract theory. Devlin testified for Peter. On cross-examination, Mike asked Devlin: "Weren't you convicted of forgery last year in District Court?"

Permissible  
Impermissible

Why?

### **Question Ten**

Define hearsay, list what satisfies the requirement of being unavailable under 804 and then list the unavailability exceptions.

**SECTION TWO**

In a partnership and patent dispute filed in Federal District Court between two former partners, Diane Copani and Conrad Coppola, questions have arisen regarding who invented the product and the admissibility at trial of the following disputed items of evidence:

1. Coppola's three-year old conviction for mail fraud which occurred during an earlier failed business venture.
2. A videotape taken of Sullivan at the Motel 110, in Methuen, Massachusetts by a private investigator hired by Coppola. On the videotape, Sullivan is shown meeting with the vice president of a rival company for which she ultimately left the partnership and began working. The tape shows Sullivan arriving at the motel very late, spending the night in the motel room and leaving early the next morning.
3. Testimony by Coppola's ex-wife that he once confided to her that Sullivan was the brains behind the company and a true genius at developing new products.
4. Sullivan's journal, in which she records all of her daily activities including scientific developments, business meetings, expenses, income and billings.
5. Expert testimony describing the similarity of the products, the income received for the products and the damages suffered by Coppola and the partnership as a result of Sullivan's actions.

**SECTION THREE**

Take any item listed in Section Two and by way of permissible questioning lay the appropriate foundation for the introduction of that evidence and have it received by the Court.

\_\_\_\_\_ calls \_\_\_\_\_.

Briefly describe why you chose this person as a witness.

Q: Please state your name and spell your last name.

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Defendant objects to Judge allowing witness to make a diagram of how accident occurred on the blackboard. Judge's ruling was

Permissible  
Impermissible

Why?

**Question Four**

Plaintiff sues the defendant for damage to his property. Plaintiff calls a cousin of the defendant who says he and the defendant broke into the plaintiff's summer home, ransacked the cottage and then lit it on fire. Cousin's testimony is

Admissible  
Inadmissible

Why?

**Question Five**

Peter is charged with the murder of Mike. At Peter's trial it was alleged that three people, Moe, Larry and Curley helped Peter kill Mike. Peter proposes to testify that he told Moe, Larry and Curley that they could never kill Mike because he cares for Mike too much. Peter's testimony is

Admissible  
Inadmissible

Why?

**Question Six**

Mike's accountant proposes to testify that shortly before he died Mike told him that he and Peter were planning to sell their business next month to some very wealthy individuals. The accountant's testimony is

Admissible  
Inadmissible

Why?

**Question Seven**

Susan sues White Horse Tavern for injuries suffered in an automobile accident caused by Starkis, who had been a patron of White Horse Tavern. Susan claims that Starkis was permitted to drink too much liquor at the Tavern before the accident.

Susan offers evidence that the owner of White Horse Tavern visited her after the accident and, offered her \$10,000.00 to settle her claim if she promised not to sue him and also said, "I owe you that much after letting Starkis leave the bar so drunk last night." The statement that Starkis was drunk when he left the bar on the night of the accident is



3. Testimony of an eyewitness Copani once taught at the School For Retarded Children who said he went up to the teacher at Walmart to say hi and noticed that Copani seemed to be stuffing fishing equipment in some sort of large bag he was carrying.
4. A copy of the written statement Mr. Copani gave to police shortly after his arrest which said:

*I could not help myself. Please forgive me.*

Joe Copani

5. Expert testimony from Copani's psychiatrist that he was not responsible for whatever he did due mental illness.

### SECTION THREE

Take any item listed in Section Two and by way of permissible questioning lay the appropriate foundation for the introduction of that evidence and have it received by the Court.

Government calls \_\_\_\_\_.

Briefly describe why you chose this person as a witness.

Q: Please state your name and spell your last name.

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**Question Eight**

Defendant is charged with perjury from a prior civil case. The transcript and taperecording are available from that trial. A court officer, who was present at the prior civil case, is called as a witness by the prosecutor and asked to tell the court what the defendant said at that trial. This testimony is

Admissible  
Inadmissible

Why?

**Question Nine**

Sam sues Character's Bar for injuries suffered in an automobile accident caused by Nicole, who had been a patron of Character's Bar. Sam claims that Nicole was permitted to drink too much liquor at Character's Bar before the accident.

Sam offers evidence that the owner of Character's Bar visited him at the hospital after the accident and, offering to pay of Sam's medical expenses, said, "That's the least I can do after letting Nicole leave the bar so drunk last night." The statement that Nicole was drunk when she left the bar on the night of the accident is

Admissible  
Inadmissible

Why?

**Question Ten**

Define hearsay and list the unavailability exceptions.

**SECTION TWO**

Connie Sullivan, a former law school professor with a known propensity for dangerous behavior, is charged with killing her former husband, Andy and his partner Pat. You are the trial attorney for Connie Sullivan and are concerned about the introduction of the following evidence?

1. A videotape taken by the police of a high speed chase of Ms. Sullivan in her Yugo. The videotape was taken shortly after Ms. Sullivan was informed that she was a suspect in the case. The videotape also shows Connie disguised as the professional wrestler, Hulk Hogan.

2. A police report prepared by Officer Dick Tracy before his death from cancer. Tracy investigated the murders of Andy and Pat. The report contains a schematic diagram of the house where the murders took place, statements from several eyewitnesses and a statement from the Defendant, Connie Sullivan.
3. Testimony by Connie Sullivan's present husband regarding a conversation he had with his wife regarding her whereabouts at the time of the murders.
4. Testimony of an eyewitness who said that he saw Ms. Sullivan draw a gun and shoot Andy and Carol outside the Notell Motel. He will also testify that he identified Connie Sullivan as the shooter in a police lineup conducted some days later at the police station.
5. The written statement of Mr. A.C. Cohen, who is also charged with murder, which said:

*Me and Connie killed them because they were fooling around.*  
A.C. Cohen

### SECTION THREE

Take any item listed in Section Two and by way of permissible questioning lay the appropriate foundation for the introduction of that evidence and have it received by the Court.

Government calls \_\_\_\_\_.

Briefly describe why you chose this person as a witness.

Q: Please state your name and spell your last name.

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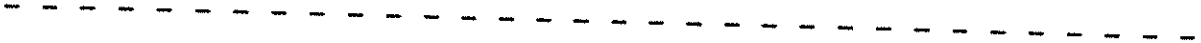
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SS

MASSACHUSETTS SCHOOL OF LAW

PROFESSOR COYNE  
EVIDENCE  
FALL, 1996  
FINAL EXAMINATION

Use your social security number of the exam and blue book. Write legibly and coherently and only in the space provided for in sections one and two. Please use the blue book for section three and limit your answer to 5 pages (one side only). Have a great holiday season.



SECTION ONE

Question One

Paula Plaintiff visits Attorney Chaser who sends her to General Hospital for treatment. She tells intake nurse that she injured her back in a very serious car accident six months ago, and nurse records that on the patient's hospital record. Plaintiff seeks to introduce subpoenaed hospital record into evidence.

Permissible  
Impermissible

Why?

Question Two

In a case charging the defendant with tax evasion, the Commonwealth seeks to introduce a certified copy of his prior criminal conviction for perjury into evidence after he took the stand and testified.

Permissible  
Impermissible

Why?

Question Three

Plaintiff proposes to testify that he was told by his son that the son saw the defendant doctor, drop 3 instruments into the plaintiff's open head wound during the plaintiff's surgery.

Permissible  
Impermissible

Why?

Question Four

Sheriff's bloodhound, "Tracker," is taken to the scene of a robbery. The bloodhound runs for almost two miles and stops at the edge of a cave and poses and points into the cave. Police officer went into the cave and found defendant hiding there. Sheriff proposes to testify to all of this.

Permissible  
Impermissible

Why?

Question Five

Commonwealth charges Sam Smith with murder. Smith states that he believes the victim committed suicide, and it really does not matter because he was not present in the United States when the alleged incident took place. Commonwealth attempts to offer into evidence color photographs of the victim lying in a pool of blood and showing the victim bound, gagged and his throat slashed from ear to ear. The picture appears to indicate that the victim defecated in his pants.

Admissible  
Inadmissible

Why?

Question Six

Defendant is charged with perjury from a prior civil case. The transcript is available from that trial. A court officer who was present at the prior civil case is called as a witness by the prosecution and asked to tell the court what the defendant said at that trial.

Permissible  
Impermissible

Why?

Question Seven

Pete was a passenger on an airplane owned by Air-Mike. Air-Mike's Airplane was involved in an accident which caused Pete serious back injuries. Pete has now filed an action against Air-Mike seeking to



recover damages for his personal injuries.

Immediately after the accident, Pete was examined and treated by Dr. Rosa. Dr. Rosa made an affidavit stating that she had examined Pete the day after the accident and found Pete to be suffering from a back injury. Dr. Rosa is now dead. Pete's counsel seeks to introduce the affidavit she had obtained from Dr. Rosa. The judge should rule the affidavit is:

Admissible  
Inadmissible

Why?

#### Question Eight

Connie was arrested for stabbing her father and taken to the police station where she was given a *Miranda* warning and otherwise properly advised of her constitutional rights. The police then brought in her father who said, "That's the daughter who stabbed me!" Although Connie was given an opportunity to respond, she said nothing. At the trial the prosecutor attempted to prove that Connie made no response to her father's accusation. This evidence is:

Admissible  
Inadmissible

Why?

#### Question Nine

Jean is on trial for the murder of her husband, Joe. She is accused of pushing him from the window of their 12th-floor apartment. Jean claims Joe jumped. Mike, a friend of Jean's, was called to testify that Jean had told him that she pushed Joe from the window. The judge should rule this testimony:

Admissible  
Inadmissible

Why?

#### Question Ten

Charlie is suing the MBTA for injuries sustained when his car was hit by a train. Larry testified that just before the accident, a bystander Buddy, had screamed "My God, the crossing signal isn't working." The MBTA wants to offer, for substantive and impeachment purposes, the testimony of Wilma that Buddy, who is now dead had previously told her that the crossing signal was working. This is...

Permissible  
Impermissible

Why?

SECTION TWO

This is a criminal action charging the President of the United States with mail fraud. By way of a direct examination of the Government's witness, Paula Jones, please lay the foundation for the introduction of her daily journal as past recollection recorded. Her journal describes her engaging in various criminal activities including money laundering and theft of government funds with the President of the United States. Paula Jones now suffers from a head injury which was inflicted upon her by the President's angry supporters when she went public with her account.

Government calls Paula Jones.

Q. Please state your name and spell your last name.

A. Paula Jones, J-O-N-E-S.

Q.

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### SECTION THREE

Paula suffered serious injuries to her back and neck as a result of a car accident. Paula sued Daniel for negligence arising out of the traffic accident involving multiple cars on the southeast expressway near the entrance to the South Station Tunnel. Paula called William as a witness and he testified that the accident occurred when Daniel swerved suddenly into Paula's lane of traffic leaving her little time to avoid the collision.

Daniel wants to cross examine William regarding his statement, given at a deposition taken in a relevant civil action, that "Paula drove into Daniel's lane of traffic." The statement was made in a separate action brought by William against Paula and Daniel seeking recovery for his injuries.

A police officer who arrived on the scene within minutes of the accident independently determined that Daniel caused the accident, which he reported in his official accident report.

Shortly before trial, Paula's former husband, Kurt, met Daniel in Pete's Pub and told Daniel that Paula had previously told him that the accident was all her fault.

- A. What evidence would Paula seek to admit to prove the extent of her injuries?
- B. What issues exist regarding William's testimony?
- C. Can the police officer's report be excluded from evidence?
- D. What issues are involved in the incident at Pete's Pub?

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did Bystander say to you?

Question Nine

Defendant is charged with the murder of his girlfriend. Defendant, called by his attorney, takes the stand and proposes to testify that on the evening in question he told his bridge group that, "after we play cards I'm going to meet my wife for dinner." Defendant's testimony is...

Admissible  
Inadmissible

Why?

Question Ten

On direct examination, forgetful witness in a criminal case is asked if anything would refresh his recollection? He answers, "No." His attorney then asks him if he keeps a diary and he answers yes. After the witness explains how the diary was kept his attorney offers the diary into evidence.

Admissible  
Inadmissible

Why?

kv\coyne\evfinal.ex

### Question Two

C.J. Sampson, a former law school professor with a known propensity for violence, is charged with killing his former wife, Judith and her new partner Francis Smith. You are the trial attorney for C.J. Sampson and are concerned about the introduction of the following evidence?

1. A videotape taken by the police of a high speed chase of Mr. Sampson in his Yugo. The videotape was taken shortly after Mr. Sampson was informed that he was a suspect in the case. The videotape also shows Mr. Sampson disguised as a cheerleader.
2. A police report prepared by officer Dick Tracy before his death of cancer. Tracy was the investigating officer for the murders of Judith Sampson and Francis Smith. The report contains a schematic diagram of the house where the murders took place, statements from several eyewitnesses and a statement from the Defendant, C.J. Sampson.
3. Testimony by Mr. Sampson's present wife regarding a conversation she had with her husband regarding his whereabouts at the time of the murders.
4. An eyewitnesses testimony that he saw Mr. Sampson plunge a knife into his former wife causing her death and his subsequent selection, during a police line up of Mr. Sampson.
5. The written statement of Mr. A.C. Cohen, who also charged with murdering the victims who told the police:  
"Me and C.J. killed them because they were fooling around."

### Question Three

Take any two items listed in question two and by way of permissible questioning by the appropriate foundation and introduce that evidence.

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Question Three  
Party Calls \_\_\_\_\_

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Question Three  
Party Calls \_\_\_\_\_

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

MASSACHUSETTS SCHOOL OF LAW

PROFESSOR COYNE  
EVIDENCE  
FALL, 1994  
FINAL EXAMINATION

Use your social security number on the exam and blue book. Write legibly and coherently and only in the space provided for in sections one and two. Please use the blue book for section three and limit your answer to 6 pages (one side only). Have a great break.

-----  
SECTION ONE

Question One

Victim describes assailant to police sketch artist who draws likeness of assailant that victim says looks "exactly like that scumbucket." Victim dies before trial and government offers sketch and victim's statement into evidence.

Admissible  
Inadmissible  
Why?

Question Two

Paul Plaintiff visits Attorney Ambulance Chaser who sends him to Mass. General Hospital for treatment. He tells nurse that he injured his back in a very serious car accident six months ago and nurse records that on his patient record. Plaintiff seeks to introduce subpoenaed patient record into evidence.

Permissible  
Impermissible  
Why?

Question Three

After defendant testified the Commonwealth seeks to introduce certified copy of defendants' criminal conviction for perjury into evidence.

Permissible  
Impermissible  
Why?

Question Four

Plaintiff sues taxi company alleging that Louis DePalma, a taxi driver for Yellow Cab was driving down highway on a Saturday in a Yellow Cab in the lane next to plaintiff when DePalma "flipped him the bird" and made a gesture with his hand that plaintiff described as "moving from one ear to the other in a slashing motion across his neck." DePalma's vehicle then slammed into the side of plaintiff's Rambler and sped off. Yellow Taxi says that DePalma does not work weekends and DePalma says he sneezed and it was just an accident.

Permissible  
Impermissible  
Why?

Question Five

Paul Plaintiff seeks to testify that just before defendant's hot rod slammed into him, as he stood in the crosswalk, he heard unknown bystander cry out, "Oh God, that damn fool is going so fast he could kill someone."

Admissible  
Inadmissible  
Why?

Question Six

Plaintiff in a civil case will testify that he saw the defendant doctor, while operating on him, drop 3 instruments into his open chest wound.

Permissible  
Impermissible  
Why?

Question Seven

Defendant proposes to show a "day in the life film" where plaintiff, who is suing for permanent injuries to his back, is shown carrying bags of groceries, driving a car and waterskiing.

Admissible  
Inadmissible  
Why?

Question Eight

Defendant proposes to show film. On film plaintiff is shown

talking to a doctor who tells him "there is nothing wrong with your back, this can not go on forever." Insurance company had a private investigator follow plaintiff, who they believed was faking the extent of his injuries so he could receive more compensation from the insurance company. The private investigator filmed the plaintiff's activities.

Admissible

Inadmissible

Why?

#### Question Nine

Sheriff's bloodhound is taken to the scene of a robbery. The bloodhound runs for almost two miles and stops at the edge of a cave and poses and points into the cave. Police officer went into the cave and found defendant hiding there. Sheriff proposes to testify to all of this.

Permissible

Impermissible

Why?

#### Question Ten

Plaintiff sues trucking company. At the scene of the accident the truck driver said to the policeman, "I fell asleep at the wheel". Plaintiff calls policeman and asks what, if anything, did truck driver say to you?

Admissible

Inadmissible

Why?

#### Question Eleven

Defendant is charged with the murder of his girlfriend. Defendant, called by his attorney, takes the stand and proposes to testify that on the evening in question he told his bridge group that, "after we play cards I'm going to meet my wife for dinner".

Admissible

Inadmissible

Why?

#### Question Twelve

Commonwealth charges Sam Smith with murder. Smith uses the kitchen sink defense stating that he believes the victim committed

suicide, and it really does not matter because he was not present in the United States when the alleged incident took place. Commonwealth offers as evidence color photographs of the victim lying in a pool of blood and show the victim bound, gagged and his throat slashed from ear to ear. The picture appears to indicate that the victim defecated in his pants.

Admissible

Inadmissible

Why?

#### Question Thirteen

Plaintiff alleges that a result of Defendant Doctor's negligent treatment he has developed a serious and offensive body odor which is particularly noticeable in his feet. Defendant proposes to call plaintiff as a witness and have him remove his shoes and socks in the presence (in the close presence) of the jury so that the jury can determine the truth. Plaintiff objects.

Permissible

Impermissible

Why?

#### Question Fourteen

Plaintiff asks to use blackboard to have witness make a diagram of how accident occurred. Judge refuses request. Was judges ruling...

Permissible

Impermissible

Why?

#### Question Fifteen

Defendant is charged with perjury from a prior civil case. The transcript is available from that trial. A court officer who was present at the prior civil case is called as a witness by the prosecution and asked to tell the court what the defendant said at that trial.

Permissible

Impermissible

Why?

#### Question Sixteen

While they were on their honeymoon, George's wife was found dead in the bathtub. There were no signs of a struggle. It appeared as though she may have fallen and not got up. The police investigated and found that

Admissible

Inadmissible

this same "accident" had happened to George on three previous honeymoons with 3 very rich ladies. Police officer proposes to testify to all of this.

Why?

Question Seventeen

On direct examination witness testified that she "saw the Defendant strike the Plaintiff despite the fact that I was not wearing my glasses". On cross-examination, witness is questioned on her need for her to wear her eye-glasses to see properly. On redirect examination, witness is asked, "Why did you not have your glasses on?" Objection is made and judge sustains the objection, saying, "We have heard enough of that." Was the judge's ruling...

Permissible

Impermissible

Why

Question Eighteen

On direct examination, forgetful witness in a criminal case is asked if anything would refresh his recollection? He answers, "No". His attorney then asks him if he keeps a diary and he answers yes. After the witness explains how the diary was kept his attorney offers the diary into evidence.

Admissible

Inadmissible

Why?

Question Nineteen

Plaintiff sues Defendant on a violation of federal law in Federal Court for breach of Contract and offers photocopy of contract into evidence.

Admissible

Inadmissible

Why?

Question Twenty

List and describe the unavailability exceptions to the hearsay rule.

SECTION TWO

This is a divorce action. By way of a direct examination of the Plaintiff, Jane Jones, please lay the foundation for the introduction of her daily journal as past recollection recorded. Her journal describes her following her husband and describes him engaging in an affair with his business partner. Jane Jones now suffers from a head injury which was inflicted upon her by her husband when she confronted him with her findings.

Plaintiff calls Jane Jones.

Q. Please state your name and spell your last name.

A. Jane Jones, J-O-N-E-S.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.



Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

Q.

A.

### SECTION THREE

Early in the evening of June 7, 1993, a 1988 Plymouth Volare automobile travelling southbound on State Route 4 and a Ford truck travelling westbound on U.S. Route 20 collided at the intersection of the two routes, seriously injuring one and killing the other five occupants of the Volare. The driver of the truck did not sustain serious injury. U.S. Route 20 at the intersection was a four-lane divided highway running east and west; State Route 4 was a two-lane highway running generally north and south. The intersection was controlled by a traffic light.

The principal issue concerns the admission into evidence of the police accident report prepared by Sgt. John N., Hendrickson, a twenty-eight year veteran of the Ohio State Highway Patrol. Hendrickson, as assistant post commander, was on duty at the Norwalk Post when the accident occurred and, upon receiving the accident report, sped directly to the scene, arriving approximately sixteen minutes after the collision.

Various statements were contained in the report including statements from Joseph Slabach, the driver of the Ford semi-tractor truck, statements from this unidentified witnesses regarding the color of the light at the time of the collision, the fact that the driver of the Ford truck was arrested at the scene by the local police for driving while under the influence of alcohol and Sgt. Hendrickson's determination as to the cause of the accident.

This is a suit involving the occupants of the Volare and Ford truck.

The Plaintiff who was the driver of the Volare seeks to offer the report into evidence.

EXPLAIN THE MANNER AND BASIS FOR ADMITTING THE REPORT.

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MASSACHUSETTS SCHOOL OF LAW

EVIDENCE

PROFESSOR COYNE  
FINAL 1993

Use your social security number on the exam and blue book. Write legibly and coherently.

You will be graded on your knowledge of the law, ability to analyze the issues and your treatment of the issues.

No more than five (7) pages handwritten, one side only. I will not read anything that exceeds the page limitation.

-----  
QUESTION ONE

Jim Rivers was tried for sexual assault.

In the early morning hours of April 16, 1990, Jane Doe's babysitter, Tony Dee, was awakened by Jane's scream. Dee went to Jane's bedroom and witnessed Jim Rivers leaving the room and he then left the house. Dee knew Rivers because Rivers was a friend of Jane's mother, Tammy. Dee asked Jane what had happened. According to Dee's trial testimony, Jane stated that petitioner had put his hand over her mouth, choked her, threatened to whip her if she screamed and had "touched her in the wrong places." Asked by Dee to point to where she had been touched, Jane identified the pelvic area.

Tammy Doe, Jane's mother, returned home about 30 minutes later. Tammy testified at trial that her daughter appeared "scared" and a "little hyper." Tammy proceeded to question her daughter about what had happened. At trial, Tammy testified that Jane repeated her claims that Rivers choked and threatened her. Tammy also testified that Jane stated that petitioner "touched her". Tammy also noticed that Jane had bruises and red marks on her neck that had not been there previously. Tammy called the police.

Officer Terry Lewis arrived a few minutes later, roughly 45 minutes after Jane's scream had first awakened Dee. Lewis questioned Jane alone in the kitchen. At trial, Lewis' summary of Jane's statement indicated that she had offered essentially the same story to him as she had first reported to Dee and to Tammy.

Lewis also offered into evidence his police report and a copy of a chart showing the layout of the bedrooms, kitchen, and living room. Photographs of the home taken some three weeks after the incident were also offered into evidence.

After Lewis concluded his investigation, and approximately four hours after Dee first heard Jane's scream, Jane was taken to

the hospital. She was examined first by Cheryl Rents, an emergency room nurse, and then by Dr. Michael Meinzen. Each testified at trial and their testimony indicated that, in response to questioning, Jane again provided an account of events that was essentially identical to the one she had given to Dee, Tammy and Lewis. Meinzen also testified regarding his findings from the medical examination and the results of the radiologist's and laboratory reports.

Jane never testified at Rivers' trial because she was experiencing emotional difficulties.

Discuss the issues presented.

## SECTION TWO

\*Short answer questions. Circle either admissible/inadmissible or permissible/impermissible and explain why in the block provided.

---

### Question One

Plaintiff in a civil case will testify that he was told by the defendant doctor, that while operating on the plaintiff, the doctor dropped 3 instruments into the plaintiff's open chest wound.

Permissible

Impermissible

Why?

### Question Two

Defendant is charged with perjury from a prior civil case. The transcript is available from that trial. A court officer who was present at the prior civil case is called as a witness by the prosecution and asked to tell the court what the defendant said at that trial.

Permissible

Impermissible

Why?

### Question Three

Plaintiff sues Tom Jones for injuries suffered in an auto accident. Plaintiff proposes to testify that Jones, immediately after the accident, said to her, "I am sorry I caused the accident, I will pay for all your damages if you do not sue me."

Admissible

Inadmissible

Why?

Question Four

Defendant proposes to show a "day in the life film" where plaintiff, who is suing for permanent injuries to his back, is shown carrying bags of groceries, driving a car and waterskiing.

Admissible

Inadmissible

Why?

Question Five

Sheriff's bloodhound is taken to the scene of a robbery. The bloodhound runs for almost two miles and catches and pins the defendant in a tree. Sheriff, who was with the bloodhound, proposes to testify to all of this.

Permissible

Impermissible

Why?

Question Six

In a civil case an expert witness proposes to testify that Defendant's motor vehicle crossed into Plaintiff's lane of travel and caused the motor vehicle accident.

Admissible

Inadmissible

Why?

Question Seven

While they were on their honeymoon, George's wife was found dead in the bathtub. There were no signs of a struggle. It appeared as though she may have fallen and not got up. The police investigated and found that this same "accident" had happened to George on three previous honeymoons with 3 very rich ladies. Police officer proposes to testify to all of this.

Admissible

Inadmissible

Why?

Question Eight

On direct examination witness testified that she "saw the Defendant strike the Plaintiff despite the fact that I was not wearing my glasses". On cross-examination, witness is questioned on

Admissible

Inadmissible

her need for her to wear her eye-glasses to see properly. On redirect examination, witness is asked, "Why did you not have your glasses on?" Objection is made and judge sustains the objection, saying, "We have heard enough of that."

Why?

Question Nine

The Defendant is on trial for larceny by false pretenses. The Defendant on cross-examination is asked, "Sir, is it not true that 6 years ago you were convicted of larceny by false pretenses?"

Permissible  
Impermissible  
Why?

Question Ten

Define Hearsay.

Question Eleven

Forgetful witness in a civil case, on direct examination, is asked if anything would refresh his recollection? He answers, "No". His attorney then asks him if he keeps a diary and he answers yes. After the witness explains how the diary was kept his attorney offers the diary into evidence.

Admissible  
Inadmissible  
Why?

Question Twelve

Plaintiff sues Defendant for breach of Contract and offers photocopy of contract into evidence.

Admissible  
Inadmissible  
Why?

Question Thirteen

Just before bus hit Plaintiff, bystander screams out, "look at that bus he is going so fast he is going to kill someone!" Dan Fouts overheard bystander say this and is called by Plaintiff to testify to this. Fouts' testimony is...

Admissible  
Inadmissible  
Why?

Question Fourteen

Plaintiff sues trucking company. At the scene of the accident the truck driver said to the policeman, "I fell asleep at the wheel". Plaintiff calls policeman and asks what, if anything, did truck driver say to you?

Admissible

Inadmissible

Why?

Question Fifteen (Two Points)

Defendant is charged with the murder of his girlfriend. Defendant, called by his attorney, takes the stand and proposes to testify that on the evening in question he told his bridge group that, "after we play cards I'm going to meet my wife for dinner".

Admissible

Inadmissible

Why?

Question Sixteen (Two Points)

Defendant is charged with speeding and leaving the scene of an accident. Defendant was going 30 MPH on a street in a business district where the speed limit is 15 MPH. No evidence was offered to show street was in a business district. Trial court on its own took judicial notice that street was in a business district.

Permissible

Impermissible

Why?

Question Seventeen (Two Points)

List and describe the unavailability exceptions.

EVIFFL93.COYNE