

**EXAM NO.** \_\_\_\_\_

# **2009 Mid-Term Evidence Exam**

<b>RAW SCORE</b>	<b>ADJUSTED SCORE</b>

## **ESSAY QUESTION I**

	<b>ISSUE</b>	<b>POSSIBLE POINTS</b>	<b>YOUR POINTS</b>
<b>[1]</b>			
	<u>401/403 Relevancy/Prejudice</u> – The Car’s looks are irrelevant; the racing stripes are unfairly prejudicial and of little or no probative value. There is also a lack of 602 personal knowledge of how fast the car is (although he is a mechanic who inspected it, he may only have a guess as to its speed, not actual knowledge)	<b>1</b>	
	<u>404(a)(1) Improper Character</u> – The description of the defendant’s car as one that people who race or drive fast would drive raises the bad character of the defendant which is improper by prosecution during its case-in-chief. But witness is describing the car, not the defendant (but character implication is pretty clear)	<b>2</b>	
<b>[2]</b>			
	<u>801 Hearsay</u> – What mechanic said he said to his helper before is hearsay, unless it is not being used for truth, but just to show what the declarant/witness mechanic thought about the brakes – that they were in need of repair.	<b>1</b>	
	<u>N/A</u> – Should not waste time objecting – there is a very easy fix, the witness will simply say that the brakes were faulty, the jury will look down on the objection	<b>1</b>	
<b>[3]</b>			
	<u>801 Hearsay</u> – Again what he said is hearsay, unless not being used not for its truth, but only to show that Defendant was on NOTICE of the faulty brakes	<b>1</b>	
	<u>401 Legal Relevance</u> – But having faulty brakes is legally irrelevant in this prosecution (there is no charge of criminal negligence for not properly maintaining the vehicle). [403 unfair to assume he is unsafe, even if relevant]	<b>2</b>	

[4]			
	<u>801 Hearsay</u> – What defendant said is hearsay, but he is making an admission so it is admissible under 801(d)(1)(A) statement of a party opponent,	<b>1</b>	
	and it is defendant’s adoption of the mechanic’s statement 801(d)(1)(B)	<b>2</b>	
	<u>401 Legal Relevance/403</u> – Again, this is a legally irrelevant, and ambiguous, what does the statement “the brakes have felt a little funny” mean in terms of an assault and DUI prosecution of defendant?	<b>1</b>	
[5]			
	<u>N/A</u> – As to the witness’ description that he later walked down Main Street, and heard a collision behind him [and relevant that he did not see it]	<b>1</b>	
	<u>801 Hearsay</u> – But the statements of the witness as reported by the mechanic’s helper witness are hearsay, if trying to prove defendant ran the red light and DUI	<b>1</b>	
	<u>803(1) Present Sense Impressions</u> – But admissible if witness was relating a contemporaneous description by a declarant [“some guy”] who saw it all happen	<b>1</b>	
	<u>803(2) Excited Utterance</u> – Also admissible if the statements of the declarant were made under the stress of the accident and were about the accident, description of defendant as drunk may not apply (not part of the stressful event)	<b>1</b>	
	<u>602/701 Lack of Personal Knowledge and Lay Opinion</u> – The statement that defendant must be “drunk or something” may not be based on the witness’ sufficient perception of defendant, but only the mere speculation by declarant	<b>1</b>	
[6]			
	<u>801 Hearsay</u> – But not inadmissible hearsay if not being used for its truth, but only to show that she accused Dave, and he admits it all by his silence [see #7])	<b>2</b>	
[7]			
	<u>801 (d)(1)(B)</u> – Dave said nothing of being falsely accused, so he admits Polly’s statement [see # 6]. Not used for its truth, but only to show his admission of fault	<b>2</b>	
	<u>409</u> – Can exclude his offer to pay for medical expenses “pay for injuries” – but all other statements admissible under 801(d)(1)(A) statement of a party opponent	<b>2</b>	
	<u>408</u> – But he also offered to pay for “injuries <i>and everything</i> ” implying more at stake than just the medical expenses and then said “So are we good?” as if that would settle everything at issue, so all of his statements would be inadmissible	<b>2</b>	
[8]			
	<u>801 Hearsay</u> But much of this could come in as an 803(1) present sense impression describing what he saw in the car as he saw it	<b>1</b>	
	<u>401/403</u> – Unopened vodka not relevant because not opened (was not drinking it), but shows he drinks, but in any event the low probative value of the bottle of vodka may be outweighed by unfair prejudice in a DUI prosecution.	<b>1</b>	
	<u>411</u> – The lack of insurance is inadmissible, also lack of insurance proof and registration are irrelevant and unfairly prejudicial 401/403	<b>2</b>	
	<u>401/403</u> – Porn videos are irrelevant (no logical or legal relevance) and unfairly prejudicial, while the beer ads are slightly more relevant, but also potentially more prejudicial.	<b>1</b>	

<b>[9]</b>			
	<u>801 Hearsay</u> – If used for truth, but Dave’s statements are being used against him so they would be admissible as 801(d)(1)(A) statements of a party opponent	<b>1</b>	
	<u>410 Plea Bargaining</u> – Dave was negotiating with the officer, so this all would be inadmissible; however, the officer has no clear authority here to plea bargain.	<b>2</b>	
<b>[10]</b>			
	<u>801 Hearsay</u> – This is all hearsay but an admissible 801(d)(1)(A) admission by Dave because prosecution is using it against him	<b>.5</b>	
	<u>404(a) Improper Character</u> – Prosecution is improperly raising character in its case-in-chief. Character (good or bad) cannot be introduced by the prosecution. Dave has not yet opened the door on his character traits in his case-in-chief.	<b>1</b>	
	<u>401 Relevance</u> – Drug problem is irrelevant in a DUI alcohol prosecution, but “intoxicated” and “under the influence” may legally include drug influence, and may show more likelihood of alcohol use/drinking, but 403 unfairly prejudicial	<b>.5</b>	
	<u>404(a) Impertinent Character Traits</u> – Even if admissible, most of these character traits – church going, animal kindness, patriotism – would be impertinent to DUI and have very low pertinence to assault charges, but not being “a drunk” and being a “good guy” would be pertinent to the charges if character were admissible	<b>1</b>	
	<u>405(a) Wrong Method</u> – These are not being offered in the proper reputation or opinion method; rather, they are many specific instances of conduct	<b>1</b>	
	<u>610 Religious Beliefs</u> – This is inadmissible if being used to enhance his credibility, however, if being used to show general good character, then it might be admissible if the jury understood the limited use of going to church under 105	<b>1</b>	
	<u>406 Improper Use of Habit</u> – No specific habit is mentioned, the aggregation of “all good” habits is really character masquerading as habit	<b>1</b>	
	<u>N/A</u> – The defense might not object because the prosecution is putting on good, not bad, character evidence of the defendant. However, it is unclear if NOT objecting would be tantamount to opening the door on defendant so that prosecution could then start putting on bad character evidence	<b>1</b>	
<b>[11]</b>			
	<u>611(a) Improper Characterization of Evidence</u> – Witness statement that it was “kind of funny, but sad” is an improper conclusion/characterization of evidence	<b>.5</b>	
	<u>801 Hearsay</u> – Reporting what Dave’s wife said is hearsay if being used to prove that last week he mowed the lawn drunk and always does stuff like this and is pathetic. If not for truth, then irrelevant what Dave’s wife thinks of him	<b>1</b>	
	<u>404(a) Improper Character Evidence</u> – This is the prosecution raising character evidence in its case-in-chief (“always do stuff like this, you’re pathetic”), defendant has not yet opened the door, so prosecution cannot do so now	<b>1</b>	
	<u>405(a) Improper Method to Prove Character</u> – Mowing the lawn drunk last week is an improper method to prove character, even if admissible, because it would be extrinsic evidence of a specific instance of bad character for drunk driving	<b>1</b>	
	<u>401/403</u> – Relevancy of “pathetic,” and may be unfairly prejudicial	<b>.5</b>	
	<u>501 Privileged Marital Communication</u> – But was not intended as confidential	<b>1</b>	

<b>[12]</b>			
	<u>801 Hearsay</u> – Dave began crying, so that conduct – crying in response to her statements – might be hearsay because he is adopting his wife’s statements about him as true. If not being used for its truth (admission), then it has no relevance	<b>1</b>	
	<u>801(a)-(c) Hearsay Definition</u> – “Statement”? – Was Dave’s act of crying a statement/assertion of anything, or was it merely Dave living his poor unfortunate life at that point with a car accident, and no support/care at all from his wife?	<b>2</b>	
	<u>801(d)(2)(B) Admission</u> – However, if it is hearsay (used for its truth as an admission), it is a statement made/adopted by Dave, a party opponent, and as such, it would be admissible against him (but not the 404(a) character portions)	<b>1</b>	
	<u>401/403</u> – The fact that he allegedly was observed to push down Polly and tried to kick her would be relevant and admissible to the assault charge, but the fact that he was then arrested might be irrelevant (but is still basic background) and unfairly prejudicial (the police officer’s assumption of guilt, but the jury already knows Dave obviously was charged with assault and DUI, so not prejudicial)	<b>1</b>	
<b>[13]</b>			
	<u>404(a)(2) Character of Victim</u> – It is proper for the defense to open the door and attack the character of the victim on a pertinent character trait. But it has to be based on actual knowledge, unclear how and in what context he “heard” about the victim’s character or whether he is just reporting hearsay.	<b>1</b>	
	<u>404(a)(2)</u> – OK to open door on victim’s character for violence (regarding the assault charge against defendant) but defendant must also allege self-defense to make it a pertinent trait and have 401 logical and legal relevance.	<b>1</b>	
	<u>404(a)(2)</u> – Defendant is not attacking her character that she is violent when he says she threw the first punch. This is not a homicide case, so alleging the victim was the first aggressor, does not open the door, besides he already opened the door on that issue by saying she is violent.	<b>1</b>	
	<u>405(a) Method</u> – Defendant has to have some reputation or opinion evidence that she “is violent” and it cannot be the specific instance of conduct that she threw the first punch.	<b>1</b>	
	The general self-defense allegations made by the defendant against victim – “she threw the first punch, threw her down in order to protect myself” – are admissible	<b>.5</b>	
	<u>701 – Improper Opinion</u> – Opinion that she “probably ran a red light” may not be proper, was it based on perception or just a guess based on the circumstances?	<b>.5</b>	
<b>[14]</b>			
	<u>801 Hearsay</u> – This is hearsay if it is being used to prove the truth of matter asserted by the mechanic (fault of defendants for faulty brakes), but not hearsay if being used just to show the state of mind of the declarant and/or that Dave and the Repair Shop were on notice of the brake problem and elected to do nothing which also could go to punitive damages.	<b>1</b>	
	<u>801(d)(1)(d) Statement of Agent (Mechanic) of the Repair Shop</u> – The mechanic worked for the Repair Shop and made this statement during the employment and within the scope of that employment, so it can be used against the Repair Shop. However, this may be an improper legal conclusion, and made to another agent.	<b>2</b>	

[15]			
	801 Hearsay – Helper has no personal knowledge regarding the brakes, just reporting what is stated on the work order.	1	
	801(a)-(c) Hearsay Definition/Statement? – What is written on the work order is not an assertion, it is merely a question, although it asserts that the brakes were inspected, it does not conclude that they were faulty, only the word, “-- Repair?” However, one could argue it would not ask about a ‘repair’ if one were not necessary why would the question be asked, but it might simply be an IMPLIED assertion/assumption, not an EXPLICIT assertion that a repair was necessary	2	
	803(6) Business Records Exception – The work order was kept in the ordinary course of business, it was made/transmitted by a person with knowledge who had a business duty to make the record, and it was made at or near the time the person had that knowledge and it does not have any untrustworthy circumstances	2	
	803(5) Past Recollection Recorded – If 803(6) does not work, it could be past recollection recorded, but there are problems. The helper does not know and never knew, so it is the past recollection of the mechanic we are talking about. It was made at or near the time the mechanic had knowledge and had reason to know, although it is being read to the jury, that is OK, that is how it is given to the jury, it is not admitted as a document	2	
<b>TOTAL FOR ESSAY QUESTION I</b>		<b>65</b>	

## ESSAY QUESTION II

	ISSUE	POSSIBLE POINTS	YOUR POINTS
<b>A</b>	<b><u>DAVE’S APPEAL FROM GUILT – CRIMINAL TRIAL</u></b>		
o	404(a)(2) – Dave should have been allowed to have a witness testify that Polly is a drunk, violent person. It would be Reversible Error.	<b>1</b>	
	404(a)(2) – In a criminal trial, although the defendant can attack victim’s character on a relevant character trait, these would not be pertinent traits if self-defense and Polly’s negligence in running the red light were not alleged by Dave	<b>1</b>	
o	404(a) – Improper character evidence of general carelessness, not paying attention is more of a general character trait and such is improper when offered by the prosecution if the door has not yet been opened by the defendant	<b>1</b>	
	406 – Improper habit, “not paying attention when he drives” has many possible manifestations and thus it is not specific enough to qualify as admissible habit evidence	<b>1</b>	
	This would be error, but probably would be only harmless error given all of the other evidence against Dave	<b>1</b>	

○	404(a)(1) – This is a criminal case, so Dave, the defendant, can open the door on his own character, and did so very broadly by having the witness state that Dave was a “good guy”—reputation/opinion of the witness. Although the prosecution cannot put on any extrinsic evidence of a specific instance of conduct to prove character now that defendant opened the door, the prosecution can ASK ABOUT a specific instance in order to check/challenge the credibility of the witness	1	
	401/403 – Raping a woman charge – although it may not be pertinent to the DUI charge, it is pertinent to an assault charge. However, this is not a sexual assault charge and therefore might not be relevant and/or unfairly prejudicial, although rape and assault are both general acts of violence and the door was opened very broadly by alleging Dave was a “good guy.” The charge of physically beating a woman in the past is pertinent to the assault charge (this is not a sexual assault case so 413-415 are inapplicable).	2	
	Note that Dave was only “accused” of rape and physical assault, not that he actually did it. However, even if not convicted, the prosecution can ask about it, IF: (1) there is a good faith basis for asking the question; (2) it is of a pertinent character trait; and, (3) it is allowed in the judge’s discretion. Only need a directed verdict standard basis for possibly finding that the person did it.	1	
	This would not be error	1	
○	404(a)(2) – This was reversible error and went to possibly negating Dave’s self-defense defense. The defendant never opened the door on the issue of the victim’s character so it was error for the prosecution to do so.	1	
	Note that this was NOT a homicide case, where an exception might otherwise apply to allow the prosecution to introduce such victim character evidence. The prosecution should not have been allowed to put on this evidence.	2	
○	403 – The judge had a duty to take Dave’s offer to stipulate that his car was red with racing stripes into account. There was no probative value in the photograph in light of the stipulation. However, there was a lot of danger of unfair prejudice in showing his car at a drag strip. But perhaps not much, because the charges were for DUI, not speeding, and physical assault. Hard to say that any unfair prejudice would have substantially outweighed any probative value (relevancy).	2	
	Because this decision is discretionary with the trial court judge, it is highly unlikely that an appellate court would find error, much less reversible error.	1	
<b>B</b>			
○	404(a) – General character is inadmissible in a civil trial, unless character is an essential element (not the case here), and traits of a witness are not pertinent.	.5	
	404(a)(3)/608(a) – Ok to attack the character for truthfulness of a witness in a criminal or civil case, so no error when character for truthfulness is at issue. But must be reputation or opinion (ok bad character for liar) but no extrinsic evidence of a specific conduct, unless it is a felony qualifying under 609	1	
	608(b)/609 – Extrinsic evidence of convictions can be used as long as they satisfy 609, the convictions must be felonies and pass 403, if it is just that he is a drug addict, with convictions, then it is improper 404(a) character or impertinent character because he can be a truth-telling drug addict.	1	

o	NO error regarding Polly's allegations as to what happened to her. Polly was properly allowed to testify as to what happened to her – part of the alleged physical assault (pushing her down and trying to kick her) also includes the sexual groping of her as he pushed her down. These allegations go to the intentional tort allegations and damages to her.	<b>1</b>	
	<u>404(a)</u> -- The other witness' groping allegations against defendant are inadmissible and should not have been allowed. They constitute inadmissible bad character evidence against the defendant in a civil case. 404(b) non-character uses of this a prior bad act does not really fit any of the MIAMI COP uses	<b>1</b>	
	<u>415</u> – This is a CIVIL case at this point, so although 413 allowing past sexual assault acts of the defendant only in criminal sexual assault cases, 415 allows it in civil sexual assault (but the “groping” has to meet the proscription in 413 and this specific description was not provided). So it was NOT error to allow the witness to testify as to the sexual “groping” 12 years ago, as this has now become a civil sexual assault/physical assault case in addition to the negligence/DUI running the red light allegations	<b>2</b>	
	The fact that it was 12 years ago may serve to make it less relevant and more prejudicial but not inadmissible.	<b>1</b>	
o	<u>401</u> – OK to prove that Dave did not check brakes even after he was put on notice – goes to negligence and possibly punitive damages if willful/wanton conduct (assuming punitive damages requested -- legally relevant)	<b>1</b>	
	<u>407</u> – Reversible error that she was allowed to put on evidence of what is clearly a subsequent remedial measure – repairing the brakes after the accident – to show Dave's negligence and culpable conduct, but not if showing something else	<b>2</b>	
	<u>411</u> – If used just to show that his insurance premiums would not go up, it would not be relevant, and the fact that he even has liability insurance to cover the claim would be inadmissible under 411.	<b>1</b>	
	<u>401</u> – It is not relevant that he was later trying to lower his insurance premiums	<b>1</b>	
o	<u>404(a)(1)</u> – These other DUI charges constitute improper character evidence against Dave, cannot open the door on character in a civil case, even if defendant wanted to open the door.	<b>1</b>	
	<u>405(a)</u> – Even if it were possible to present character in a civil case in these circumstances, it would be the wrong method, because this is not reputation or opinion evidence, but these are ex. evidence of two specific instances of conduct	<b>1</b>	
	<u>404(b)</u> – These would be admissible if used for a non-character purpose, but there is no “MIAMI COP” reason apparent.	<b>1</b>	
	<u>608/609</u> – If attacking character for truthfulness, rather than general character, then a witness' former convictions could be admitted under 609, but these are merely charges, not convictions	<b>1</b>	
	<u>401/403</u> – Pot/crack allegations are irrelevant in this DUI prosecution, unless it is for driving while under the influence of any drug, not just alcohol, but still unfairly prejudicial and inadmissible for the reasons set forth above regarding improper character evidence.	<b>.5</b>	

o	404(a) – This was error compounding an error. Dave should not have been allowed to put on evidence of Polly having a bad reputation for driving drunk in the first place because this is a civil case and character was not an “essential issue.” The court compounded its error by allowing Polly to introduce even more inadmissible character evidence. Unless they somehow “offset” one another, this was reversible error	<b>2</b>	
<b>TOTAL FOR ESSAY QUESTION II</b>		<b>35</b>	

## FINAL RAW SCORE

<b>EXAM SECTIONS</b>	<b>POSSIBLE POINTS</b>	<b>YOUR POINTS</b>
<b>ESSAY QUESTION I</b>	<b>65</b>	
<b>ESSAY QUESTION II</b>	<b>35</b>	
<b>Overall Clarity, Persuasiveness, Organization, Creativity, Strategy, etc.</b>	<b>10</b>	
<b>TOTAL SCORE</b>	<b>110</b>	

**NOTE: FINALEXAM SCORE IS “ADJUSTED” SCORE, NOT “RAW” SCORE**