

Narrative Answer Questions [total weight is two-thirds of the examination]

Assume the Federal Rules of Evidence apply in all cases unless otherwise indicated.

This section contains three (3) questions. The weight of each is stated below.

Question 1 [one-half (50 percent) of the narrative answer portion of the examination]

[Note: The facts in this question may be similar to actual recent events. When answering the question, students should use the facts provided here, not actual events, which are quite different.]

You represent the police department in the city of George, in the State of Fisher. Fisher has adopted the Fisher Rules of Evidence (“FRE”) which are identical to the Federal Rules of Evidence.

The department has been sued for wrongful death. The suit arises from an April 2015 incident in which a “reserve deputy” shot and killed a suspect. According to fellow officers, while police officers were questioning a suspect, a single bullet came from the weapon of Rob Gates, who immediately announced that he’d fired by accident. The bullet struck the suspect in the heart, killing him instantly.

Gates is not a fulltime police officer. Instead, he is an insurance executive who is part of the “reserve deputy” program that allows citizens to accompany officers as they perform police work. In addition, the “reserve deputies” may carry guns and wear badges. Experienced “reserve deputies,” including Gates, have authority to conduct arrests.

The George chief of police has informed you that the “reserve deputy” program exists so that local hotshots can “play cop”—which encourages them to support the police department politically and financially—but that she did try to ensure that the participants had legitimate police training, including regular firearms practice.

The plaintiffs (family members of the suspect who was shot dead by Gates) allege that Gates was insufficiently trained, that the police department provided inadequate supervision, and that both Gates and the department were negligent in multiple ways. They have named both Gates and the department as defendants.

The Board of Police Commissioners, which hired you to defend the department in this suit, has requested a memo concerning the admissibility of the following pieces of evidence:

- (1) Attendance sheets at “reserve deputy” trainings, including gun safety trainings, from the past several years. These documents seem to indicate that Gates rarely attended.
- (2) Testimony from a hospital administrator hired by the plaintiffs to estimate the income that the deceased suspect likely would have earned had he not been killed. The witness is prepared to testify that although the decedent’s salary was quite low at the time of his death, it would almost certainly have risen substantially in a few years and would probably have remained high for decades.

(The decedent was a recent medical school graduate working as a resident in the radiology department of the George University Hospital.)

- (3) A memorandum from Officer Willy Bulger, written in April 2013, that reads,
“Dear George P.D. Commissioners,

Now that I’ve quit your department and work in another state, I feel safe enough to inform you that the “reserve deputy” program is a joke. Businessmen like Rob Gates run around town arresting people and acting like idiots. They don’t even do their training, and they are a disaster for our relations with the community. How are real officers supposed to gain the confidence of the citizenry when buffoons like Gates wear the badge?”
- (4) A “dash cam” video taken in April 2014 that shows Rob Gates conducting a traffic stop. In the video, Gates can be heard shouting, “Yeehaw! I’m a lawman!”
- (5) Photographs of the decedent (a) taken by the George medical examiner during an autopsy two days after the shooting, (b) taken by police at the scene minutes after his death, and (c) taken by his mother at his medical school graduation.
- (6) Testimony from a fellow medical resident who is prepared to testify that the decedent regularly used cocaine.
- (7) A memorandum from the Chief of Police, dated May 1, 2015, informing the Board of Police Commissioners that she was discontinuing the “reserve deputy” program immediately.
- (8) A letter written by Rob Gates, dated May 2, 2015, apologizing to the decedent’s family.

Provide the text of your memorandum.

[The next question begins on the following page.]

Question 2 [three-tenths (30 percent) of the narrative answer portion of the examination]

Amadeus Wolfgang had been charged with being a felon in possession of a firearm. Although such cases are normally fairly straightforward, the prosecution has encountered some difficulties. In particular, the weapon that Wolfgang allegedly possessed has been lost, as have many other items previously stored in the police evidence warehouse. (Police are investigating whether an employee who recently retired may have stolen various items.) In addition, the police officer who arrested Wolfgang has quit law enforcement and moved to Hawaii; she is not planning to attend trial. Wolfgang has stipulated to his status as a convicted felon.

The prosecution locates a shopkeeper who, upon hearing the commotion when Wolfgang was arrested near her store, came outside just in time to see the officer search Wolfgang's pockets and remove a pistol. The shopkeeper is the only witness who can connect Wolfgang with the weapon.

At trial, when the shopkeeper was asked whether she saw the officer produce a weapon from Wolfgang's clothing, she denied having seen any such thing. At this point, the prosecution produced a written statement (signed by the shopkeeper) which the arresting officer had obtained from the shopkeeper soon after the arrest. It read, in pertinent part, "Then the officer patted down Wolfgang, reached into his pocket, and pulled out a gun. I believe the gun was a 9 millimeter."

After presenting the written statement to the shopkeeper and having the witness read the statement aloud to the jury, the prosecutor asked, "Now, I will ask you one more time: Did you see the officer produce a weapon from Wolfgang's clothing?" Again, she denied having seen any such thing.

The prosecutor then asked, "Can you explain why the statement you just read says the opposite?" The witness replied, "I have no idea."

Answer the following questions about the above scenario:

- (1) The prosecution rests its case. Immediately, the defense moves for a directed verdict of acquittal. How should the judge rule?
- (2) Assume for purposes of this part that the judge denies the motion for a directed verdict, and the jury ultimately convicts Wolfgang of the crime charged. On appeal, Wolfgang argues that the trial judge erred in allowing the prosecution to use the shopkeeper's statement to police at trial. Is Wolfgang correct?
- (3) Now assume for purposes of this part that the appellate court vacates the conviction and remands the case for a new trial. At the new trial, the prosecution seeks to admit the police report prepared by the arresting officer (who remains in faraway Hawaii). The report states that the officer removed a 9 millimeter pistol from Wolfgang's pocket. Is the report admissible?

Question 3 [one-fifth (20 percent) of the narrative answer portion of the examination]

You are a clerk to the chief justice of your state, and your state has not yet enacted rules of evidence. The state legislature has recently enacted a law authorizing the state’s supreme court to codify the state’s evidence law into written rules.

Today your boss sent you an email message, which reads:

With respect to the impeachment of witnesses with evidence of their prior criminal convictions, some of my fellow justices believe that we adopt a rule identical to Federal Rule of Evidence 609. Others believe that we should adopt a rule similar to that of Missouri.

For your reference, I will quote the relevant portion of the Missouri statute, which provides that when a witness testifies in the courts of that state, “any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case.”

What do you think we should do?

Provide the text of your response to the Chief.

[END OF NARRATIVE ANSWER SECTION.]

[END OF EXAMINATION.]