

1-27-03

FINAL SUPPLEMENT TO CASE MATERIALS

The deadline for submitting questions was January 24, 2003. No further questions will be posted. If you have any comments about answers provided in this memo, please contact David Trevaskis at the Pennsylvania Bar Association (PBA).

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THIS IS THE FINAL SUPPLEMENT TO THE CASE MATERIALS AND IS THE OFFICIAL SUPPLEMENTAL MEMO WHICH MAY BE USED IN THE COMPETITION, AS PROVIDED BELOW:

Supplemental Materials – Evidentiary Value:

The supplemental clarifications may be used in all the same ways (including for impeachment and as testimony) that the main body of the case materials are used. Answers clarifying a witness statement are to be treated as follows: Where necessary, information will be attributed to a specific witness in which case the clarifying information becomes part of that witness' statement. If the clarifying information is not attributed to a single witness, assume that all witnesses have this knowledge. The practical implication of this is that if a witness is challenged as to his or her knowledge reflected in the statement, he or she may refer to these supplemental clarifications to show knowledge. (See Rule of Competition B.4)

Note to the Final Supplement (1-27-03):

Included are answers to all questions received through January 24, 2003. Questions have been divided into case clarifications and rule and evidentiary interpretations. *The most recent questions have been answered in Questions 66 through 77 of the case clarifications, and in Questions 25-39 of the rule and evidentiary interpretations.*

Most case clarification questions have been answered with a general response: "The case materials provide all of the information available to answer this question." That response sometimes means that there is enough information already in the problem to answer the question asked; more often, the response means that the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of this competition. The problem committee has tried to fill in the unintentional gaps in the case materials without creating too much new information that might burden teams preparing for the competition.

Teams should be careful if they try to elicit information by asking questions which the problem does not answer in detail because, on direct, it will often elicit an objection of "unfair extrapolation" and, if asked on cross exam, the questioner is stuck with the answer given. (Rule of Competition E-6).

Miscellany **12-18-02**

Case Materials / Blank Pages – Some people have noted that when they open up the case from the website, some pages are blank. There are no blank pages in the materials. If this happens to you, try to open the document with Adobe Acrobat Reader on another computer.

Exhibit A (House Diagram) – The Exhibit A initially posted on the website October 10, 2002, was not the correct document. It was pulled down that morning and replaced by noontime. If you copied the first posting, you will need to replace it. The correct Exhibit is labeled as "Exhibit A" and identifies a "TV Room" and the TV location. The incorrect version is not labeled, identifies a "Living Room," and does not indicate the TV location.

Exhibit D (Police Report) – The Exhibit posted on the website contains color which will show up if printed out on a color printer. For the purpose of the competition, teams may use either a color or a black and white copy of Exhibit D.

CASE CLARIFICATIONS

12-18-02

1. At the time of the accident, did Dominique possess a junior license?

No. For the purposes of the competition, there were no restrictions upon Dominique's driver's license. (This information is available to all witnesses)

2. How big is the sign on the keg?

The sign is drawn to scale. (Please see page 31 of the case materials)

3. What were the dimensions of the sign that Coach Knight posted on the keg of beer?

See answer above. (Question 2)

4. What is standard asphalt [as referred to in Albert's affidavit]?

Standard asphalt is the type of asphalt commonly used on roads in Barrister County. (This information is attributable only to Fran Albert)

5. Is Exhibit D a full report?

The Barrister County "Police Crash Reporting Form" is a standard eight-page document. Thus, in that sense, Exhibit D is a full report.

6. Throughout the case materials, the witnesses suggest that the accident occurred near the intersection of Paterno Drive and "Constitution" Way (Fran Albert, p.21 lines 29-30, for example), but the police report map (exhibit D, page 4) shows Paterno drive and "Commonwealth" Avenue. Which is correct, or are they intentionally different? Thank you.

The accident occurred just north of the intersection of Paterno Drive and Constitution Way. It would appear that the officer has mislabeled the reporting form. (This information is available to all witnesses.)

7. On Exhibit D, the Sgt. report, s/he marked the day of the accident as Saturday. The accident was Sunday, is this a typo on the program's part, or did the Sgt. make this mistake?

The police report stands as written.

8. In exhibit D, the day of the accident is marked as Saturday. Is this correct or should it really be Sunday since the accident occurred after midnight?

The police report stands as written.

9. Are we to assume that the different colors on the officers report (Exhibit D) mean that mistakes were made by the officer, causing the officer to change his or her report - making this issue subject to cross-examination? OR was this simply the way this appears on the Website?

Please refer to the explanation provided above under "Miscellany."

10. Who hired Fran Albert?

Fran was hired by the plaintiff. Fran has been paid a \$3,000 flat fee for his/her investigation(s) plus an additional \$150 hourly rate for trial testimony. (This information is attributable only to Fran Albert.)

11. Did Fran Albert ever go to the accident site personally?

Yes. (This information is attributable only to Fran Albert)

12. Was Albert ever at the accident site?

Yes. (This information is attributable only to Fran Albert)

13. Where does Albert get measurements of the road from?

From his/her personal measurements. (This information is attributable only to Fran Albert)

The answer to all of the following questions – Questions 14 through 65 - is:

"The case materials provide all of the information available to answer this question."

As noted above, this response sometimes means there is enough information already in the problem; more often, this response means the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of this competition.

14. Were there any blood alcohol tests administered at the hospital for treatment for the broken leg? What were the results?
15. The skid marks left by the Jeep as it skidded across Paterno Dr.—What were the length, location and direction?
16. Was there any evidence of tire treads on the grass from the Jeep's tires on the side of the road next to the tree?
17. Who reported the accident if no cell phone was called?
18. Was the reporting person still at the scene when the police arrived?
19. Was the statement of the reporting person taken by Sgt. Shaun O'Connor?
20. How long from the accident occurring did it take to report it to emergency officials and how long for emergency officials to respond?
21. Do the hiring practices for the school include a standard of ethics in dealing with students? What are they?
22. Are there certain ethical requirements on the contract for basketball coach? What are they?
23. [Please describe in detail] the refrigerated tap system at the house? Is it part of bar or is it a portable system?
24. When was Fran Albert assigned to investigate the scene? The date?
25. How many reports did Fran Albert reference for consideration to investigate this accident?
26. Over what time period did those reports (that Fran Albert referenced) cover?
27. Is Paterno Drive, at this location, a high traffic usage area?
28. Was it a dry summer?
29. What type of trees were they that were run into by Dominique? Their age? Their overall size?
30. According to Dominique's testimony, s/he shared two cases (of beer) with some cousins the previous summer, how many cousins were there?
31. School board's opinion about the matter, is it a matter of public record?
32. Should not Dominique be subject to criminal charges of underage drinking and DUI because Dominique testifies to it in an sworn affidavit?
33. Was Coach Knight charged with any crime by the police?
34. Since Dominique decided to leave the party because s/he was not feeling well, what was the specific complaint?

35. What kind of break in the leg did Dominique suffer?
36. What kind of rehabilitation was necessary to get the leg back to competitive shape?
37. The [police] report has a box checked that says the driver was distracted. By what?
38. How many people at the party were over 21?
39. Did Day have other options to get home?
40. Did the rain actually stop at 8:00 p.m. or is that just the time recorded last?
41. Is there a pay rate for the expert and police officer?
42. Where was Sethanne throughout the party?
43. Did Devin serve Day the first beer? How did it get there?
44. Were any charges ever filed against Dominique?
45. How familiar was Day with the road?
46. Is it required by law of an officer in Barrister County to give a Breathalyzer test?
47. How many were at the party?
48. Did party have a cover charge?
49. How old was Taylor for first DUI accident?
50. Please describe Taylor's "addiction therapy."
51. Was Taylor's addiction therapy court mandated?
52. Why was Taylor going to Hershey to see the Theater when not a member of the basketball teams?
53. How many alumni players were at the party?
54. How many current players were at the party?
55. How many people were there before Taylor?
56. How does the refrigerated tap system work?
57. Can you get beer out of the keg without a tap? If so, how difficult is it to remove the tap? How difficult is it to get the beer out?
58. What is the scale for the house drawing?
59. When the coach returned to the party, which door did s/he come in through?
60. Was Coach Knight's family (spouse, etc.) at home with his/her sister the night of the accident, or was she alone when she called Coach Knight? Was Coach Knight the only person who could drive her?

61. How were the police notified of the accident?
62. What door did the Coach enter when s/he returned to the Richard's house?
63. In Fran Albert's and Sergeant O'Connor's testimony, please define what is meant by "intersection"?
64. Were skid marks left by this accident?
65. In Fran Albert's testimony, it is testified that Paterno Drive is wide enough for a "single-lane of traffic" does that mean one way traffic, or two lanes of traffic?

1-24-03 (New questions – answers include new or clarifying information)

66. Did Fran Albert visit the site of the accident immediately following the crash?
No. (This information is attributable only to Fran Albert.)
67. Did Fran Albert personally check out the skid marks left by Dominique's Jeep, if so, when?
No. After being retained by plaintiff, Fran Albert obtained photos taken by a police investigator (who was not Sergeant O'Connor) within a day or so of the accident. The photos show skid marks. These photos were not available to Sergeant O'Connor when s/he compiled his/her report. (This information is attributable only to Fran Albert.)
68. Was Fran Albert able to determine for sure that the tread marks were from Dominique's car? If so, what kinds of tests did he do? Is it possible that they were left by another car traveling at a similar or the same speed that passed through the area between the time of the accident and the time that Fran arrived?

The skid marks reviewed by Fran Albert were caused by Dominique's Jeep. (This information is attributable only to Fran Albert.)
69. Was Fran retained immediately after the accident and did he/she get to the scene before Dominique was taken away to the hospital?

No to both questions. (This information is attributable only to Fran Albert.)
70. Did Fran Albert actually go to the scene of the accident in conducting his investigation/analysis? In his statement, Albert says, "I reviewed maps of Paterno Drive and Constitution Way and took numerous measurements of those roadways." This indicates that he did personally visit the scene. However, further on in his statement, Albert says, "I assume the roadway was covered in standard asphalt material since I was not supplied with any information to the contrary. Asphalt is what these types of roads are usually covered with." This second reference suggests that Albert (a highway expert) did not personally view the scene.

Yes. This was addressed in Questions 11, 12 and 13.
71. What is Fran Albert's base fee for investigations and trial testimony?

See answer to Question 10 above.
72. Is the police officer, Sgt. O'Connor, being paid to testify in court? (If so, by whom?)

No. (This information is attributable only to Sergeant O'Connor).

73. How much is Sergeant O'Connor being paid for his testimony?

See answer to Question 72, above.

74. Were the statements of all witnesses provided to Fran Albert, the Plaintiff's expert witness, with the police report?

No.

75. Is it possible for someone to recite the alphabet backward even while "under the influence;" and also to identify oneself?

That is for the fact finder to determine.

76. What was the percentage of the keg the sign that the Coach posted eclipsed. [How big was the sign relative to the keg] ?

The half keg held 7.75 gallons and the sign placed upon it by Coach is drawn to scale (8 ½ x 11").

77. What were the dimensions of the sign that Coach Knight posted on the keg of beer?

See Questions 2 and 76 above.

1-24-03 (New questions – standard answer)

The answer to all of the following questions – Questions 78 through 106 - is:

“The case materials provide all of the information available to answer this question.”

As noted above, this response sometimes means there is enough information already in the problem; more often, this response means the question was not addressed in the case materials and the answer to the question is unnecessary for purposes of this competition.

78. In Fran Albert's witness statement (lines 31-32) she mentions looking at reports of other accidents which occurred at the scene. What was discovered?

79. Where were O'Connor and Law when they received the call for Day's accident?

80. Based on suspicion of the driver, Nique, had been drinking according to police report, did Sgt. O'Connor request a blood test, whether via radio or personally to emergency personnel?

81. What type of door was the back door; a regular entrance door or a sliding glass door?

82. When Coach Knight was reprimanding Devin after he returned, in which direction was he facing?

83. Are we to assume that Fran Albert was at the scene of the accident within a short period of time, since the skid marks were still there when he visited the scene?

84. What kind of student was Dominique before the accident? Was he/she a straight "A" student or were his/her grades sub-par?

85. On page 6 of Sgt. O'Connor's police report, there is a minor discrepancy. In the General Crash Information : Weather Conditions it states that there are no adverse conditions. But, further down

the page under Contributing Information : Environmental / Roadway Potential Information it lists the weather conditions as Slippery Road Conditions (Ice/Snow). Which section contains the correct information?

86. What were the physical dimensions of the keg?
87. This question is concerning the witness statement for Sergeant O'Connor. In his/her statement, s/he makes the statement that a large number of accidents occurred at the intersection of Paterno Drive and Constitution Way. I was wondering what types of accidents those were. If they involved two automobiles, or if they were single vehicle accidents.
88. Where on the top of the keg was the sign? Near tap?
89. In PA what tests are required when alcohol is smelled on the breath?
90. Why was there not a Blood Alcohol Test administered at the hospital?
91. How were the police notified of the accident?
92. What door did the Coach enter when he returned to the Richard's house?
93. In the Fran Albert's and Sergeant O'Connor's testimony, please define what is meant by "intersection"?
94. The requirements for qualifying for the district and state basketball playoffs, what are they?
95. In Fran Albert's witness statement (lines 31-32) she mentions looking at reports of other accidents which occurred at the scene. What was discovered?
96. Where were O'Connor and Law when they received the call for Day's accident?
97. Did Fran Albert have the opportunity to talk to Dominique before he/she was taken to the hospital?
98. What is the address of Taylor Montgomery?
99. What is Coach Knight's full-time job; is he a teacher?
100. In the complaint, it says that Coach Knight hosted the party but in Dominique's statement, in line 47, she refers to Devin as "the gracious host." Which one takes precedence over the other?
101. What is the approximate age of the 1997 players?
102. Were the younger players still at the party when Coach Knight returned at 10:30?
103. Did Fran Albert inspect Dominique's Jeep?
104. Did Fran Albert review Sarge's report or use his report?
105. Is the house diagram drawn to scale? If so, what is the scale of the house diagram?

1-27-03 (New question – standard answer)

106. In the Witness statement of Fran Albert s/he says that s/he has testified before in accident investigation and reconstruction. Was s/he paid for these testimonies/investigations as s/he was in this case?

RULE and EVIDENTIARY QUESTIONS

12-18-02

1. Can a team of home schoolers compete and where do they compete?

Yes, with certain limitations. Please consult Rule of Competition A.3.

2. What will be the competition's official definition of contributory negligence and proximate negligence?

"Contributory Negligence" is negligence on the part of a plaintiff that is a substantial factor in bringing about the plaintiff's injury. Negligence is defined on page 6 of the materials.

"Proximate Negligence" is commonly referred to as "Proximate Cause." This term is interchangeable with "Legal Cause." These terms are defined as the negligent conduct on defendant's behalf that was a substantial factor in bringing about the accident. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident.

3. One of the evidentiary stipulations states that - "Evidence that the plaintiff allegedly failed to wear a lap and shoulder restraint cannot be presented at trial for any purpose." - Does this mean there will be no physical evidence possible or does it mean that no witness can even testify to it?

It means that any testimony from any witness that the plaintiff allegedly failed to wear a lap and shoulder restraint is prohibited. Should such testimony be procured at trial, it is subject to an objection for violation of the stipulation.

(The source of the parties' stipulation precluding such evidence arises from statutory law. Otherwise, there would have been no reason for the defendant to stipulate to this point.)

4. Can any negligence be assigned to the owner of the house where the party was hosted in absentia?

While any alleged negligence by the home owners can not be "assigned" to them, in the technical sense, since they are not parties to the case, their acts and omissions may be raised and argued.

5. Can negligence be assigned to the adult alumni players who were present at the party?

Same answer as above. (Question 4)

6. Can we use contributory negligence and place part of the blame on Devin's parents?

Contributory negligence is negligence on the part of a plaintiff. Thus, technically, Devin's parents cannot be contributorily negligent. Nevertheless, their acts and omissions may be raised and argued.

7. Can it be admissible evidence to offer accepted statistics of amounts of alcohol and the subsequent effects on a person of Dominique's physical attributes?

No. In order to approximate one's blood alcohol percentage, both gender and weight must be known. Thus, even if we were to assign a weight to Dominique, gender is not a constant in this case. As a matter of educational background, however, here is a link to the LCB's alcohol impairment chart, which your students might find interesting.

<http://www.lcb.state.pa.us/edu/adults/chart.asp>

8. You have supplied the alcohol content of the beer and the weight, height of Dominique, can we use this to explain how many drinks she/he would need to be drunk?

No. See explanation above. (Question 7)

9. Are any ramifications of driving with a junior license past midnight admissible?

No. Please refer to the answer provided in Case Clarification Question 1.

10. School board's opinion about the matter, is it a matter of public record? Is it admissible?

The only evidence which is admissible in the mock trial competition is the evidence provided in the problem materials and those reasonable inferences that can be made from that evidence.

11. Does the stipulation that the fixing of a problem after an accident does not imply negligence apply? (The city has no negligence even though they will be in the process of fixing the intersection)

There is no stipulation between the parties as to the admissibility of this "subsequent remedial measure," taken on the road following the accident. Otherwise, the Rules of Evidence address the admissibility of subsequent remedial measures.

12. Does the plaintiff need to prove that the coach broke the statute (selling or furnishing alcohol to minors) and therefore there is negligence per se, or can the plaintiff simply rely upon common law negligence?

No. The plaintiff is not restricted to any single theory of negligence.

13. In Count 1 of his/her complaint, the plaintiff asserts that the defendant was negligent per se for serving and/or providing alcohol to a minor. Is the plaintiff then restricted to proving fault ONLY by a violation of the statute, or can s/he use a common-law claim as well for failure to supervise the party and prevent the plaintiff from driving intoxicated?

No. See answer above. (Question 12)

14. Is it permissible to use hypothetical questions with experts on cross and direct examination (using the facts proved at trial)?

The Rules of Evidence (Article VII) address how experts may be examined. Ultimately, the admissibility of such questions is left to the trial judge's discretion.

15. Are the statements considered under oath?

Yes

16. If a school has two teams, we assume that they need to follow the scouting rules and not attend nor view the video of a trial they are not in. Could you also not allow schools with two teams to tape a trial, until one of their teams has been eliminated?

Schools with multiple teams are subject to the same scouting rules as single team schools. Multiple team schools may videotape their trials, but they cannot share videotapes among any teams still in the competition, whether from the same or a different school.

17. Is the contributory negligence that the defendant is asserting "careless driving, intoxication, and/or driving while intoxicated"?

The contributory negligence asserted by the defendant against plaintiff is contained in his/her New Matter.

18. Who closes first in a Mock Trial Civil Case?

The defense closes first. There is no rebuttal permitted.

19. A note at the top of the Special Jury Interrogatories states that the interrogatories may not be used as an exhibit. Does this mean that the students may not refer to them at all, i.e. during closing, or may not otherwise pose the questions to the jury, i.e. by writing them on an easel pad for use during closing? Thank you for your consideration.

Writing the Special Jury Interrogatories on an easel would violate the rule about enhancements to the problem materials. However, trial participants can refer to the content of the Special Jury Interrogatories as they see fit during the trial. The document itself may not be shown to the jury.

20. Can the defense defer their opening statement until the presentation of their case? (meaning, can they wait until after the plaintiff calls their witnesses)?

No. You cannot defer your opening; plaintiff opens, then defendant opens, then witnesses testify. The trial ends with the defendant's close and then the plaintiff's close.

21. Can Dominique be questioned on a certain statement that is in another witness statement? (specific example: Devin says that Dominique said, "I have to follow coaches rules all the time, not tonight.") Can we still question Dominique on this (specific example: Devin says that Dominique said, "I have to follow coaches rules all the time, not tonight.") if we do not later call Devin as a witness?

No to both questions. Witnesses may not be questioned about matters not within their own statements. If you happen to ask such a question on cross examination, the witness is free to "make up" an answer favorable to his/her side. See Rule of Competition E.6.

22. Can we use real cases as past precedent in our arguments?

You may only refer to cases and statutes cited in the materials. Otherwise, you may use other sources for background information only. Rule of Competition E.11.

23. Can Sergeant O'Connor testify as to the plaintiff's sobriety/intoxication? Is it part of his or her expertise?

Sgt. O'Connor's testimony is controlled by the Rules of Evidence; the Sergeant's expertise is in accident investigation and reconstruction. Otherwise, the Sergeant is free to testify as a fact witness on this issue. S/he may also provide opinion testimony as a lay witness, upon proper foundation, as permitted under the Rules of Evidence.

24. The requirements for qualifying for the district and state playoffs, what are they?

The general requirements are that the winner of a district competition will advance to the regional competition and the winner of a regional competition will advance to the state competition (as well as a few second place teams as described in the Rules of Competition). The specifics of each region's district and regional competition will be determined by the local coordinators.

1-24-03 (New questions)

25. Are the participants to be given a statement of the law to what the burden of proof is in this case?

In civil cases such as this one, the plaintiff has the burden of proving those contentions which entitle him or her to relief.

When a party has the burden of proof on a particular issue, his or her contention on that issue must be established by a fair preponderance of the evidence. The evidence establishes a contention by a fair preponderance of the evidence if you are persuaded that it is more probably accurate and true than not.

To put it another way, think, if you will, of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the plaintiff; onto the other, place all of the evidence favorable to the defendant. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip in favor of the defendant, or are equally balanced, your verdict must be for the defendant.

In this case, the plaintiff has the burden of proving that the defendant was negligent, and that that negligence was a substantial factor in bringing about the accident.

Similarly, the defendant has the burden of proving plaintiff's contributory negligence by a preponderance of the credible evidence. (Source – Pa. Suggested Std. Civ. Jury Instr. §§ 5.50 and 3.03)

Please confer with your attorney advisor on how to use this information.

26. The stipulated facts state that the barrel of beer had "7.75 gallons or 992 ounces." 7.75 gallons equals 496 ounces. Does the barrel have 15 gallons of beer in it?

7.75 gallons does equal 992 ounces. (There are 128 ounces in a gallon. You appear to mistakenly assume that there are only 64 ounces in a gallon.)

27. Is Kerry Knight being charged for: 1 – Negligence, 2 - Negligence Per Se, 3 - Negligence AND Negligence Per Se? This question refers to the complaint.

Since it is a civil case, no one is being charged. Otherwise, this question was answered above under Questions 12 and 13.

28. Will a key to Exhibit A—Diagram of Richard's Residence—be made available?

No.

29. Regarding Rule E 11 of the 2003 Rules of Competition: Footnotes 5 and 6, from the Denial of Summary Judgment. Under Rule E11, may the actual text of the cases cited in the footnotes be referenced during trial proceedings (specifically during arguments)? Rule E11 reads, "Students may read other cases and materials in preparation for trial; however they may cite only the "cases" and statutes given."

This Rule means what it says — students "may cite only the cases and statutes given."

30. Can Taylor and Dominique identify and testify to the [police] accident report?

No.

31. Is evidence of drinking permissible without proof of intoxication?

Yes (to the extent there is some rule of evidence prohibiting such evidence, plaintiff would appear to have waived it by bringing this lawsuit).

32. What is mock trial's policy towards admitting evidence of drinking without proof of intoxication?

All witnesses are free to testify as fact witnesses as to plaintiff's drinking. Furthermore, all witnesses may provide opinion testimony as lay witnesses, upon proper foundation, of impairment/intoxication, as permitted under the Rules of Evidence. (See Question 23 above)

33. Can a lay witness testify as to the intoxication/drunken state of another person?

See answers to Questions 31 and 32 above.

34. Does intoxicated mean drunk?

Not necessarily.

35. Can you be under the influence without being drunk?

Yes.

36. What constitutes "furnishing" under the law?

The case materials provide all of the information available to answer this question.

37. Could entrusting alcohol to a minor satisfy the requirement of "furnishing"?

The case materials provide all of the information available to answer this question.

1-27-03 (New questions)

38. Can a witness answer a question that is not in their affidavit if it is common knowledge?

A witness is bound by his or her affidavit and fair extrapolations thereof. Please see Rule of Competition E.6.

39. The Rules of Competition state that no affidavit or exhibit may be marked, but may we highlight them so that if we need to impeach a witness or to have him/her read a specific sentence he/she may understand which sentence we mean?

The Rule in question state that "students ... may introduce as evidence only those documents and materials that are provided in the form provided. No enlargements, color reproductions, etc. will be permitted during the trial." (E.11) Assuming you do not plan to offer the affidavit into evidence, it would appear proper to highlight it.