

EXAM # _____

EVIDENCE FINAL EXAM

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General Instructions:

1. Do not write your name anywhere on this exam. Write your exam number on the exam and on your exam book.
2. Use a pen, not a pencil.
3. This is an open-book exam. You may use any books, notes, etc., but may not do any online research.
4. Assume the Federal Rules of Evidence apply, except as otherwise indicated.
5. This exam, which constitutes 2/3 of the course grade, will be graded out of 100 points. Each of the 8 questions in Part A carries 5 points. Each of the 4 questions in Part B carries 10 points. The question in Part C carries 20 points.

Good luck!

PART A

Instructions: Circle the letter corresponding to what you think is the correct answer. Circle one and only one answer. If you think no answer is exactly correct, or if you think that more than one answer is correct, pick the one answer you think is the best answer. No writings and markings other than the circled response will be considered in grading these questions. There is no penalty for wrong answers as compared to blanks, so you should answer all questions.

1. P, the plaintiff in accident case, seeks to introduce evidence of a witness W's statement concerning the accident under the excited utterance exception to the hearsay rule. P claims that W made the statement while under the stress of the accident. D, the defendant, maintains that W's apparent emotional condition in supposed response to the accident was a fabrication.

Which of the following is a correct statement of the law?

A. The judge will admit the statement if the judge finds that W made the statement under the stress of the accident. If the judge admits the statement, D is free to argue to the jury that W's statement is untrustworthy.

B. The judge will admit the statement if there is sufficient evidence from which the jury may find that W's statement was made under the stress of the accident. If the judge admits the statement, D is free to argue to the jury that W's statement is untrustworthy.

C. The judge will admit the statements if the judge finds that W made the statement under the stress of the accident. If the judge admits the statement, D may not argue to the jury that W's statement is untrustworthy.

D. The judge will admit the statement if there is sufficient evidence from which the jury may find that W made the statement under the stress of the accident. If the judge admits the statement, D may not argue to the jury that W's statement is untrustworthy.

2. In D's trial for murder, the prosecution seeks to introduce evidence that D and the victim V were members of rival gangs.

Which of the following is a correct statement of the law with respect to the admissibility of this evidence?

A. The evidence is admissible unless the judge finds that its probative value is substantially outweighed by the danger of unfair prejudice.

B. The evidence is admissible if the judge finds that its probative value substantially outweighs the danger of unfair prejudice.

C. The evidence is admissible because it is relevant.

D. The evidence is inadmissible because it is irrelevant.

3. In an accident case, the plaintiff seeks to introduce evidence that D had insurance to show that D could afford to be careless.

A. This evidence is admissible if Rule 401 is satisfied.

B. This evidence is admissible if Rule 403 is satisfied.

C. This evidence is admissible if Rule 404 is satisfied.

D. This evidence is inadmissible.

4. W, a witness for the defendant in a civil case, was convicted five years ago of perjury. Which is a correct statement of the law concerning the admissibility of this conviction to impeach W?

A. If Rule 403 is satisfied, W may be cross-examined concerning this conviction, and documents establishing the conviction are admissible.

B. If Rule 403 is satisfied, W may be cross-examined concerning this conviction, but documents establishing the conviction are inadmissible.

C. Without any need to engage in Rule 403 balancing, W may be cross-examined concerning this conviction, but documents establishing the conviction are inadmissible.

D. Without any need to engage in Rule 403 balancing, W may be cross-examined concerning this conviction, and documents establishing the conviction are admissible.

5. In a prosecution for murder, the defendant D seeks to persuade the jury that he did not form the "intentional" mental state required for commission of the crime. To this end, he introduces evidence that he had consumed an extremely large quantity of alcohol just prior to shooting the victim. He further seeks to introduce (I) testimony by an expert on the effects of large quantities of alcohol on the brain and (II) testimony by the expert that, given the amount of alcohol D had

consumed, he did not have the “intentional” mental state required for commission of the crime. Which of the following is a correct statement of the law concerning admissibility of these 2 pieces of evidence?

- A. I may be admissible but II is inadmissible.
- B. I and II may be admissible.
- C. II may be admissible, but I is inadmissible.
- D. I and II are inadmissible.

6. Shortly after he was in a car accident with D, P was taken to a hospital where she described the accident to Nurse N. N wrote down P’s statements in P’s medical records. P brings suit against D. At trial, P calls the hospital’s keeper of records and seeks to introduce N’s writings to prove his injuries were caused by the accident.

- A. This evidence is admissible if the records fall within hearsay exception 803(6).
- B. This evidence is admissible if P’s statements to N fall within hearsay exception 803(4).
- C. This evidence is admissible if the records fall within hearsay exception 803(6) and P’s statements to N fall within hearsay exception 803(4).
- D. This evidence is inadmissible even if P’s statements to N fall within hearsay exception 803(4) and the records fall within hearsay exception 803(6) because there is an additional layer of hearsay involved.

7. W testified for the prosecution at a pre-trial hearing in D’s case and was cross-examined by D’s attorney. Shortly before D’s trial, W dies. At trial, the prosecutor seeks to introduce W’s testimony at the pre-trial hearing. D objects on hearsay and Confrontation Clause grounds.

- A. The objection should be sustained only on hearsay grounds.
- B. The objection should be sustained only on Confrontation Clause grounds.
- C. The objection should be sustained on both hearsay and Confrontation Clause grounds.
- D. The objection should be overruled.

8. Plaintiff P meets with his lawyer L at a restaurant, where they discuss P's suit against D. The conversation is recorded by a device attached by D to their table. During the conversation, P tells his lawyer about arrangements P made the previous week to have W, D's star witness, killed by X. L explains to P that P may be subject to the death penalty if X kills W. L does not disclose this conversation to anyone. D turns the tape over to the police and P is charged with the crime of conspiring with X to cause W's death. At P's criminal trial, D is called as a witness for the prosecution to testify to the conversation between P and P's attorney. P objects on grounds of the attorney-client privilege. (For the purposes of this problem, you may assume that the privilege that applies is as set forth in Proposed Rule 503 on pages 764-65 of the textbook).

- A. The objection should be overruled because the privilege does not apply to testimony by someone other than the lawyer or client.
- B. The objection should be overruled because of the "furtherance of crime or fraud" exception to the privilege.
- C. The objection should be overruled if the applicable Rules of Professional Conduct would have allowed the lawyer to disclose this information in order to prevent W's death.
- D. The objection should be overruled because P's conversation with L was not confidential.
- E. The objection should be sustained.

PART B

Instructions: Your responses to each of the following should be included in an exam book and labeled (a) and (b). In part (a), state whether the offered testimony is (or includes any) hearsay, as that term is defined in Rule 801(c). You must give a yes or no answer, and then briefly explain your answer. If the offered testimony is (or includes any) hearsay, then in part (b) state whether the offered testimony falls within an 801(d) exemption or an 803 or 804 exception. Again, you must give a yes or no answer, and then briefly explain your answer. If the correct answer to part (a) is no, then part (b) will not be graded. (If you are not sure whether your response to (a) is correct, you may answer part (b) assuming the answer to (a) is yes, but I will read and grade your answer to (b) only if the correct answer to (a) is yes.)

9. D is prosecuted for murdering V, who was last seen alive in Boston, Mass. To prove the crime was committed in New Hampshire, testimony is offered that V said on the day he disappeared,

“I’m going to Manchester, New Hampshire.”

10. W gives a written statement to the police in which he says he saw T stab V two days earlier. Based on other information, D is arrested and charged with the crime. Prior to trial, W disappears, so D cannot find him to call as a witness. To prove that D did not stab V, D offers in evidence W’s written statement to the police.

11. In a slip-and-fall case, W is called as a witness for the plaintiff P and testifies that the defendant supermarket’s floor was very slippery on the day P fell in the store. To prove that W is not a credible witness, evidence is offered that a week before trial, when asked by a friend whether the supermarket floor was slippery on the day P fell, W shook his head no.

12. H brings a divorce action against his wife W. To prove that W was cheating on him, H offers evidence that, immediately after a car accident in which she was seriously injured, W said, “I want to come clean because I am about to die. I’ve been in a relationship with another man for the past year.”

Part C

Instructions: Your answer to the following question should be written in an exam book. While the responses will be graded primarily based on their substantive accuracy, the coherence and clarity of the response will also be considered.

13. On the second day of the defendant D’s rape trial, a bomb threat is called into the courthouse and is heard by a court clerk C who answered the phone. The call is also recorded, but the recording is accidentally destroyed. The trial is interrupted, but resumes a day later. After 6 days of testimony and a week of deliberations, the jury finds the defendant not guilty. The day after the verdict, M, the mother of the alleged rape victim, tells the police that she had overheard the defendant D calling in the bomb threat, but that M and D had not seen each other because she was in a bathroom next to the phone. D is arrested. He maintains his innocence and his defense at his trial for making the bomb threat is that someone else must have called in the threat.

I. At D’s trial for making the bomb threat, the prosecution seeks to introduce evidence that D was on trial for rape in the courthouse to which the call was made when the bomb threat was called in. The defense objects to this evidence.

II. The defense argues that the court should admit evidence that he was acquitted of rape, but the prosecution objects to such testimony.

III. The defense argues that M's testimony should be excluded because she cannot say she saw D make the call, because M is an obviously biased witness, and because the court clerk who took the call could not identify the voice as being the D's.

IV. The defense argues that testimony by M and C is not admissible because the best evidence of the call was the destroyed recording.

You are the judge's clerk. With respect to each of these items, objectively analyze its admissibility (or admissibility in part) under all plausible theories, citing the controlling Rules of Evidence.