

General Instructions:

1. Do not write your name anywhere on this exam. Use the number provided to you by the Registrar.
2. This is a closed book exam. You are not permitted to use any materials other than the copy of the Federal Rules of Evidence that is being provided to you along with the exam.
3. Assume the Federal Rules of Evidence apply throughout. Where appropriate, you should cite and discuss the applicable Federal Rules of Evidence.
4. You may write directly on the exam, or use Electronic Blue Book. Where a question calls for a written response, the conciseness and clarity of your response will be considered in grading it. If you write directly on the exam, you must limit your response to the space provided on the exam. If you use Electronic Blue Book, you must use a reasonable font size and limit your response to a length that would fit in the space indicated on the exam. If your answer substantially exceeds this space restriction, only the beginning portion that fits within the size restriction will be considered.
5. This exam, which constitutes 40% of your grade, will be scored out of 40 points.

Good luck!

PART A

Instructions: On these multiple choice questions select one and only one choice. There is no penalty for wrong choices as compared to blanks. No writing beyond your choices will be considered in grading these questions. Each of the five questions in this part is worth two points.

1. At trial in a negligence case, plaintiff seeks to introduce evidence that, in the opinion of a friend of the plaintiff, defendant is a careless person. Before the friend is able to answer plaintiff's question -- "What is your opinion of defendant as to whether he is a careful or careless person?" -- defendant's counsel objects as follows: "Objection, judge, my client's general carelessness is utterly irrelevant." The judge overrules the objection, the jury ultimately returns a verdict in favor of the plaintiff, and judgment is entered accordingly. The defendant appeals, raising on appeal the issue of the admission of evidence of the defendant's general carelessness. The appellate court is:
 - (a) likely to reverse the judgment in favor of the plaintiff and remand the case for a new trial because a person's general carelessness is not relevant in determining whether he acted carelessly on a particular occasion.
 - (b) likely to reverse the judgment in favor of the plaintiff because a friend of the plaintiff is not competent to opine on the defendant's character.
 - (c) likely to uphold the judgment in favor of the plaintiff because the evidence was relevant and the defendant failed to object on Rule 404 grounds.
 - (d) likely to uphold the judgment in favor of the plaintiff because the objection was untimely.

2. In a murder case, the defendant Davood, who has raised the defense of self-defense, seeks to introduce evidence through the testimony of Bob, a bartender, that, a few weeks before Davood shot the alleged victim Vivian, Davood was present at a bar when Vivian shot at someone else. Which of the following is correct?
 - (a) This evidence is not admissible because, in these circumstances, Rule 405 limits character evidence to reputation and opinion testimony.
 - (b) This evidence is admissible under Rules 404(a) and 405.
 - (c) This evidence may be admissible under Rule 404(b).
 - (d) This evidence is inadmissible because of Rule 403.

3. In a products liability action against a pharmaceutical company that produces Valmonium tablets, plaintiff seeks to introduce a medical record in which a doctor wrote a note indicating that plaintiff told the doctor, "My stomach started hurting as soon as I took the Valmonium." The medical record is offered in evidence along with an affidavit signed by an employee from the hospital's medical records department. Which of the following is correct?
- (a) This document is not barred by the hearsay rule if the judge determines that Rules 803(4) and 803(6) are both satisfied.
 - (b) This document is not barred by the hearsay rule if the judge determines that there exists sufficient evidence to permit a finding by the jury that Rules 803(3) and 803(6) are both satisfied.
 - (c) This document is barred by the hearsay rule because it contains multiple levels of hearsay.
 - (d) This document is inadmissible unless an employee of the medical records department or another qualified witness testifies at trial and authenticates the document.
4. Assume that federal common law provides for a "trade secrets privilege" according to which a person has a privilege to refuse to disclose "a trade secret he owns or which is owned by his employee or employer." A "trade secret" means "information that derives economic value from not being generally known to other persons who can obtain economic value from its disclosure or use." In a civil case in U.S. district court arising under federal law, plaintiff intends to use a chemist at trial as an expert witness. In advance of trial, the defendant deposes the plaintiff's expert. The chemist answers all the questions except for certain ones in response to which he invokes the trade secrets privilege. The judge later rules that the privilege was properly invoked. Shortly before trial, the chemist suffers a severe mental health breakdown and is hospitalized indefinitely. If at trial the plaintiff offers portions of the chemist's deposition testimony in which he offered expert opinions, which of the following is correct?
- (a) Such testimony is definitively barred by the hearsay rule because the testimony was not given while testifying at the trial.
 - (b) The deposition testimony is inadmissible at trial because the chemist invoked the trade secrets privilege, thus depriving the defendant of its right to cross-examine the plaintiff's witnesses.
 - (c) Such testimony is not barred by the hearsay rule if the judge determines that, at the deposition, the defendant had a motive to develop the testimony similar to the defendant's motive at trial.
 - (d) Such testimony is admissible if the judge determines that there is a sufficient basis

to permit the jury to conclude that the expert's opinion is based on sufficient facts or data, is the product of reliable principles and methods, and the expert reliably applied those principles and methods to the facts of the case.

5. When impeaching a witness W, testimony by another witness offered to prove which of the following is never admissible?
- (a) A prior inconsistent statement by W.
 - (b) Defects in the W's testimonial capacities, including the abilities to perceive, narrate, and remember.
 - (c) W's bias or motive.
 - (d) A false statement by W that shows W's untruthful character.

PART B

Instructions: In part (a), state whether the offered testimony is (or includes any) hearsay, as that term is defined in Rule 801(c). You should give a “yes” (the testimony is hearsay) or “no” (the testimony is not hearsay) answer, and then briefly explain your answer. If the offered testimony is (or includes any) hearsay, in part (b) state whether the offered testimony falls within a Rule 801(d) exemption or a Rule 803 or Rule 804 exception (and, therefore, is not excluded by Rule 802, the rule against hearsay). Here again, your answer should say “yes” (the testimony is not excluded by the rule against hearsay) or “no” (the testimony is excluded by the rule against hearsay), and you should then briefly explain your answer.

If the correct answer to part (a) is “no,” then part (b) will not be graded. I will read and grade your answer to (b) only if the correct answer to (a) is “yes.” If you think the answer to part (a) is “no,” you may choose to leave part (b) blank, but you will not be penalized for answering part (b) even if the correct answer to part (a) is “no.”

In answering the questions in this part of the exam, do not consider the Confrontation Clause or Rule 807.

Each of the seven questions in this part is worth three points.

1. As proof that defendant employer was aware of sexual harassment plaintiff’s treatment by her co-worker Don and failed to take any action, testimony that plaintiff told her supervisor, “Don is always making lewd and offensive comments to me about my clothes.”

(a)

(b)

2. As proof that Paul was in a rush, testimony that he drove through a red light.

(a)

(b)

3. As proof that Darla assaulted Paul, who as a result of brain trauma is not able to testify at trial, testimony in a civil action against Darla that Paul wrote the following note when questioned by a police officer in the intensive care unit a few hours after his alleged assault, "Darla hit me with a baseball bat."

(a)

(b)

4. As proof that Patrick went to Keene on Wednesday, testimony that on Tuesday Patrick said, "I'm going to Keene tomorrow."

(a)

(b)

5. As proof that a woman was robbed by David years earlier, testimony that when she saw David's image during a TV true crime show, she started crying and screamed, "That's the man who robbed me!" This statement is offered in evidence at a trial at which the woman does not testify.

(a)

(b)

6. As proof that plaintiff was very drunk on a particular evening, testimony offered that plaintiff approached his boss that evening at an office party and told him, "You are by far the cutest guy here tonight."

(a)

(b)

7. As proof that Valerie was present at a meeting, testimony by her friend that Valerie told the friend six months before trial that Valerie was present at the meeting, such testimony offered after Valerie testified at trial that she was present at the meeting and was cross-examined about how she was threatened the day before testifying with losing her job unless she testified that she was present at the meeting.

(a)

(b)

PART C

Instructions: While the responses in this part will be graded primarily based on their substantive accuracy, the coherence and clarity of the responses will also be considered.

The first question is worth three points. The second question is worth six points.

Dawn, a teacher, is accused of sexually assaulting her twelve-year-old student Vincent. The criminal accusation came about after Wanda, a student, called a fellow student Wendy, and told her that, while walking by a school building, Wanda looked into Dawn's office and observed Dawn having sex with Vincent. Wanda described to Wendy the sexual contact she maintained she was observing between Dawn and Vincent as the contact was taking place and asked Wendy to call the police to report the incident. Wendy called the police; but when they arrived, Dawn was alone in her office. A few days later, Wanda moved to Morocco because her father got a job there. She has declined to return voluntarily to testify at Dawn's trial, and there is no legal mechanism for forcing her to return to testify.

1. The defense has filed a motion in limine asking the judge to exclude from Dawn's sexual assault trial Wendy's testimony about what Wanda told her, raising hearsay and Confrontation Clause objections. As the judge's clerk, write a brief memorandum addressing these objections.

2. Suppose that Wally, a student at the school, claims to have viewed a video recording of two individuals, who appeared to Wally to be Dawn and Victor, another student in the school, engaged in sexual intercourse. Wally maintains that this video was emailed to him by Vincent a few weeks before Vincent was allegedly assaulted by Dawn. Wally maintains that he deleted this video and used various pieces of software to try to remove any trace of the video from his email account and his computer because he was afraid he could get in trouble for possessing this video. Victor has refused to cooperate with the police, and Dawn is not charged with any crime against him. As the judge's clerk, write a memorandum addressing the admissibility, at Dawn's trial for sexually assaulting Vincent, of testimony by Wally about the sexual contact between Dawn and Victor that he saw on the video. Consider all plausible objections that may be raised by Dawn's defense attorney. If your conclusions depend on facts that have not been provided here, explain that to the judge in your memo.