

FOR EACH OF THE FOLLOWING ESSAY QUESTIONS, ASSUME THE FEDERAL RULES OF EVIDENCE APPLY, AND ANALYZE THE PLAUSIBLE ARGUMENTS THAT WOULD BE PROVIDED BY EACH SIDE AND DISCUSS HOW AND WHY A JUDGE WOULD LIKELY RULE:

ONE ESSAY QUESTION WITH TWO SUB-PARTS
(10:30 am – 12:00 noon)

One day, Paul was driving his car, with his friend Sarah riding in his car, when they were hit at a traffic light intersection by a car that Donna was driving, with her boyfriend Bob riding in her car. Paul alleges that Donna was negligent (and drunk) and damaged his car in the accident. Right after the accident, Donna told Paul that if he did not sue her, she and Paul could go out on a date and she would make it “a lot of fun for him.” Paul smiled and then grabbed Donna sexually and tried to kiss her, at which point Bob, who had been watching, hit Paul in the face. The police immediately came to the scene and took statements from all witnesses.

Paul has been charged criminally with sexual assault, while Bob has been charged criminally, in the same trial, for assault and battery (the “Criminal Trial”). Paul is also suing Donna civilly for negligent driving, requesting property damage to his car; and Paul is also suing Bob civilly in the same case for assault and battery personal damages (the “Civil Trial”).

“Question A” below addresses the Criminal Trial; while “Question B” below addresses the Civil Trial.

QUESTION A – THE CRIMINAL TRIAL

Discuss whether the following items of evidence/testimony would be admissible. In your answers, address the strengths and weaknesses of all arguments supporting both admissibility and exclusion, and explain how and why a judge would likely rule.

- (1) The Prosecution, and Bob, attempt to introduce evidence that: (a) Paul has a violent temper; and, (b) Paul has sexually harassed women in the past with improper sexual comments.
- (2) The Defense attempts to introduce evidence that right after the accident, Sarah heard Donna offer sex to Paul if Paul would not report the accident to police.
- (3) After Paul attacks Donna for being a “drug addict” in his case-in-chief, the prosecution then presents evidence that Paul has a DUI conviction for driving with a 1.2% blood alcohol.

2016-Summer Evidence Mid-Term Exam

EXAM NO. _____

| RAW SCORE | ADJUSTED SCORE |
|--------------|-------------------|
| | |

QUESTION A—CRIMINAL TRIAL

QUESTION A (1)(a): The Prosecution, and Bob, attempt to introduce evidence that: (a) Paul has a violent temper...

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|---|----------------|--------------------|
| <u>404(a)(2)(A) Character of Defendant/406 Habit (Inapplicable)</u> – The prosecution would argue that Paul has a “bad temper,” and he therefore probably acted in conformity with his propensity to act violently. However, the prosecution cannot introduce character/propensity evidence in its case-in-chief, before Paul “has opened the door” (the “Mercy Rule”)—Paul would have to present evidence of his good character first, during his case-in-chief, which has not begun. Also, such may not even be pertinent to a sexual assault case. Although Paul’s acts toward Donna are admissible (404(b)), his general character is not. And this is not Rule 406 habit evidence because having a “bad temper” is too general to be a “habit.” | | 4 |
| <u>404(a)(2)(B)(i) Character of Victim</u> – Because Bob is a <i>co-criminal defendant</i> , Bob has the power as a defendant to “open the door” on the issue of the victim’s (Paul’s) bad character—Paul’s bad temper. The problem is that Paul is BOTH a criminal defendant in the sexual assault charge of Donna (so the prosecution cannot open the door on Paul’s violence, although sexual assaults would be OK); but Paul is <i>also the victim</i> of Bob’s violent assault, so Bob as a criminal defendant can attack a criminal victim’s/Paul’s “bad temper,” but the prosecution could not do so unless Paul: (1) first opens the door on his peaceful nature; or, (2) Paul had a previous sexual assault of some kind which the prosecution could use (413). | | 4 |
| <u>403/611(a)/105 Prejudice; Judicial Control; Limiting Instruction</u> – The very BIG problem here is that the judge should have separated this trial into two separate criminal trials (one trial against Paul; and one against Bob) in order to avoid this dilemma of Paul simultaneously being both a <i>defendant</i> with regard to Donna, and a <i>victim</i> with regard to Bob. It would be very difficult for jurors to keep this all straight (Rule 403); and a Rule 105 limiting instruction would be ineffectual. | | 3 |
| TOTAL SCORE FOR Q A (1)(a) | | 11 |

QUESTION A (1)(b): The Prosecution, and Bob, attempt to introduce evidence that: ... (b) Paul has sexually harassed women in the past with improper sexual comments.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|-------------|-----------------|
| <p>413 -- Sexual Assault of Donna – If this is a criminal sexual assault case against Paul for what he allegedly did to Donna, then the prosecution would attempt to attack Paul’s character using specific instances of his past sexual assaults—his past sexual harassment comments, which would be admissible under 413.</p> | | 2 |
| <p>413 -- But Do Sexual Harassing “Comments,” By Themselves, Constitute Past Sexual “Assaults”? – Paul could argue that sexual harassment “comments” from the past do not qualify as sexual “assaults” because a mere comment is not a <i>physical</i>/touching assault, although it is still a “verbal assault” that is sexual in nature. However, the rule appears to require physical contact to be a sexual assault, so mere comments that he made to women would not qualify as “sexual assaults,” unless a past “sexual assault” is interpreted very broadly.</p> | | 4 |
| <p>“Pertinence” – First, this would not be pertinent to a self-defense claim by Bob involving violence—not sexual assault—so it would be improper if Bob tried to introduce it against Paul. Second, similar to defining whether a comment is a “sexual assault,” Paul could argue that a verbal sexual harassment comment “assault,” is not a pertinent specific instance of conduct to demonstrate bad character for a physical sexual assault (what Paul is being charged with by the prosecution). This also assumes that an “attempted kiss,” and “grabbing [Donna] in a sexual manner,” if unwelcomed, would be sufficient to be a sexual assault as contemplated by criminal law, and the interpretation of Rule 413.</p> | | 2 |
| <p>Not “Unwelcome” Harassment – Paul might also attempt to argue that the alleged sexual harassment comments are not pertinent bad character traits because his actions in this case were not “unwelcome,” given what Donna allegedly said/offered to Paul. Although her promising to make a date “a lot of fun for [Paul]” does not necessarily mean Donna was welcoming Paul’s further sexual advances. Her statement probably is not enough to constitute consent.</p> | | 1 |
| <p>404(a)(2)(B)(i) Character of Victim – To the extent Paul is a victim of Bob’s assault, and Bob, as a defendant, can attack the character of the victim under 404(a)(2)(B)(i), there are two problems here because: (1) sexual harassment comments are not pertinent (see above) to a non-sexual physical assault, like Bob’s violent assault against Paul (and possible self-defense); and, (2) even if they were, these are inadmissible specific instances of conduct, which are not admissible reputation or opinion evidence, in violation of Rule 405(a),(b)—and character is NOT an “essential element” here, under Rule 405(b). So these statements are improper character, they are not of pertinent character traits, and they are not the proper method of proof in any event.</p> | | 4 |
| <p>TOTAL SCORE FOR Q A (1)(b)</p> | | 13 |

QUESTION A (2): The Defense attempts to introduce evidence that ..., Sarah heard Donna offer sex to Paul if Paul would not report the accident....

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|-------------|-----------------|
| <p><u>401 Relevance</u> – The prosecution would say that it is legally irrelevant if Donna made such an offer to Paul with respect to Bob’s alleged violent assault of Paul, and irrelevant regarding Paul’s sexual assault of Donna because even if there were an offer to go on a date, such does not justify a sexual assault. Paul would correctly argue it is relevant because it tends to show that Paul’s actions were not unwelcome (at least he could argue that). It might also prove/explain why Bob was “provoked”/angered and therefore violently assaulted Bob.</p> | | 2 |
| <p><u>408 Settlement Negotiation</u> – The prosecution might argue that Donna’s offer to Paul was all part of a civil lawsuit negotiation and therefore all discussions surrounding that offer are excluded by Rule 408. Paul would argue that it should not be excluded in this <u>criminal</u> action, even if it should be in a later <u>civil</u> lawsuit. Also, Paul might argue that Donna’s offer was not a legitimate, or even a legal, “offer to compromise” a civil lawsuit (especially if prostitution were implied, and therefore it would be an attempted “obstruction of justice” to not call the police when there was an automobile accident in exchange for a “date”).</p> | | 3 |
| <p><u>412 Character of a Victim in a Sexual Assault Case</u> – Paul would not be able to attack Donna’s sexual character, in this sexual assault case; although under 412(b)(2)(B) this might represent victim’s sexual behavior with the defendant, and therefore be admissible—assuming Donna’s consent is Paul’s defense.</p> | | 2 |
| <p><u>801 Hearsay (Definition)</u> – The prosecution would object to this out-of-court statement, but the defense would argue it is not being offered for its truth, but only to demonstrate the consciousness of guilt by Donna—the declarant—that she simply made an offer to Paul (a verbal “legal act”). However, her liability for civil damages would be irrelevant in this criminal prosecution against Paul for sexual assault, and against Bob for assault. Again, Paul could argue that Donna’s offer shows that his sexual overtures to her were not “unwelcome.”</p> | | 3 |
| <p><u>801 Hearsay (Exclusions/Exceptions)</u> – Donna is not a party in this criminal action, so a Rule 801(d)(2)(A) statement of a party opponent would be inapplicable (but not in the civil case if Paul sues Donna, or vice-versa). Rule 804(b)(3) statement against interest would be available only if Donna were NOT available for trial, but she is available to testify. Donna’s statements may qualify as an 803(1) present sense impression, although she is not describing a situation, but simply making an offer; however, an 803(2) excited utterance might work because the statement was made under the stress of the event.</p> | | 3 |
| <p><u>Hearsay (Weight/Admissibility)</u> – The fact that Sarah is now alleging that Donna actually “offered sex” to Paul, as opposed to simply saying that she (Donna) would “make [a date with Paul] fun for him,” and thus is an improper exaggeration, would merely go to credibility/weight, and not to admissibility.</p> | | 1 |
| <p>TOTAL SCORE FOR Q A (2)</p> | | 14 |

QUESTION A (3): After Paul attacks Donna for being a “drug addict” in his case-in-chief, the prosecution then presents evidence that Paul has a DUI conviction for driving with a 1.2% blood alcohol.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|---|-------------|-----------------|
| <p><u>404(a)(2)(B)(i) Character of the Victim/401 Relevance</u> – Although Paul, a criminal defendant, can attack the character of Donna—the victim—it would have had to have been an attack on a “pertinent” character trait. But being a “drug addict” is really not pertinent to Paul’s defense that he did not commit a sexual assault of Donna, or that his advances to Donna, while sexual in nature, were not “unwelcome” from her perspective. This trait of Donna probably should not have been allowed in the first place as it is irrelevant to the sexual assault charges, and the same for Paul’s DUI, see below.</p> | | 3 |
| <p><u>412 -- Character of the Victim/Sexual Assault/Rule 403</u> – Because this is a sexual assault case, the defendant is not supposed to be able to attack the character of the victim. However, Paul’s attack on Donna’s “drug addict” character would not be an attack on her <i>sexual</i> predisposition or sexual behavior (contemplated by Rule 412), so Rule 412’s protection of Donna as a sexual assault victim might be inapplicable. Still, this status of Donna, coupled with her “offer” to Paul, might be inadmissible as Rule 403 unfair prejudice.</p> | | 3 |
| <p><u>404(a)(2)(B)(ii) -- Character of the Victim/Defendant (Same Trait)</u> – If the judge allowed Paul to attack Donna’s character for being a “drug addict” in his case-in-chief, Paul would have also opened the door on his own character on the same trial (related to being a “drug addict”), even though he never would have put on evidence directly of his own character. But the door would not be open very wide on Paul, meaning that although his DUI conviction is similar to being a drug addict, Paul’s bad character for drinking would not be a pertinent trait to rebut the charge against him for the sexual assault of Donna—negligent driving is irrelevant here; still, the door might be open on his character now.</p> | | 3 |
| <p><u>405(a) Specific Instance of Conduct</u> – Even if a character attack against Paul were allowed, his DUI conviction would be inadmissible as an improper method to prove character, as it is not reputation or opinion (which would be admissible), but it is instead a specific instance of conduct (which would be inadmissible), and character is not an “essential element” under 405(b).</p> | | 2 |
| <p><u>609 Inapplicable</u> – Felony convictions can be used, under Rule 609(a)(1), but only to attack a witness’s character for truthfulness (and only if Paul had testified). Also, often DUI convictions are not felonies, nor do they involve false statement/deceit under 609(a)(2), so 609 would be inapplicable in any event.</p> | | 1 |
| <p>TOTAL SCORE FOR Q A (3)</p> | | 12 |

QUESTION B – THE CIVIL TRIAL

Assume the criminal trial ends in a mistrial. Discuss whether the following items of evidence/testimony would be admissible in Paul's Civil Trial against Donna (for property damages) & Bob (for personal damages). In your answers, address the strengths and weaknesses of all arguments supporting both admissibility and exclusion, and explain how and why a judge would likely rule.

- (1) Paul puts on testimony of Bob, given during the Criminal Trial, that Donna has a previous prostitution conviction.
- (2) Bob puts on evidence that Paul was the first to attack Bob because Paul took the first swing at Bob and then Bob merely defended himself. Paul then attempts to put on good character evidence about Paul in response.
- (3) Paul submits a police report (because the police officer is not there) indicating that Bob did not answer a question by police asking Bob whether Bob was the first to hit Paul.
- (4) Donna submits an affidavit submitted by Sarah stating that Paul is now taking "anger management classes" for his bad temper, after Sarah had testified that Paul was not violent or angry on the day of the accident.
- (5) Paul submits evidence that Donna has no automobile insurance.

QUESTION B (1): Paul puts on testimony of Bob, given during the Criminal Trial, that Donna has a previous prostitution conviction.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|--------------------|------------------------|
| <p><u>801 Hearsay/801(d)(2)(A)/804(b)(1) Former Testimony/ Confrontation Clause Inapplicable</u> – Donna would argue that Bob’s former testimony is an out-of-court statement being used to the truth of the matter asserted, which is inadmissible hearsay. Although Bob is a party opponent, his statement is not being used against him; rather, it is being used against Donna, not Bob, even though Bob, a party, said it. Although it would qualify as 804(b)(1) former testimony, Bob, the declarant, is available for trial here in violation of 804(a) requiring the declarant to be unavailable for trial. The 6th Am Confrontation Clause does not apply here because this is a civil case, not a criminal one.</p> | | 4 |
| <p><u>401 Relevance/403 Prejudice</u> – Donna’s prostitution conviction has nothing to do with Paul’s negligent driving tort claim (irrelevant). Whatever probative value the conviction might have, it would be substantially outweighed by the danger of unfair prejudice under Rule 403. However, Bob might be able to use it to show his “justified” anger at, and provocation by, Paul, for what Paul did to his girlfriend Donna (sexual assault), which Bob then took out on Paul.</p> | | 3 |
| <p><u>404 Character (Civil Case)/405 Improper Method</u> – Attacking Donna’s character is inadmissible in a civil case, and even if it were a minority jurisdiction (where it is allowed, if the underlying action is criminal in nature), a conviction for a crime would be a specific instance of conduct and therefore would be inadmissible (unless character as a prostitute were a Rule 405 essential element here, which it is not in this case).</p> | | 3 |
| <p><u>609(a)(1) Previous Felony Conviction</u> – Donna’s former prostitution conviction does not appear to be a felony conviction (imprisonment for more than a year) that is being used to attack her character for truthfulness after she has testified. Neither is this a conviction involving false statement or deceit, so 609(a)(2) would not allow it. Thus, it could not be justified as Rule 609 attack on Donna’s character for truthfulness (assuming she testifies), and therefore would be inadmissible.</p> | | 1 |
| <p>TOTAL SCORE FOR Q B (1)</p> | | 11 |

QUESTION B (2): Bob puts on evidence that Paul was the first to attack Bob because Paul took the first swing at Bob and then Bob merely defended himself. Paul then attempts to put on good character evidence about Paul in response.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|-------------|-----------------|
| <p><u>401 Relevance (First Aggressor)</u> – It would be fine for Bob to put on evidence that Paul was the first to take a swing at Bob, thus justifying Bob’s self-defense against Paul’s civil assault/intentional tort claim. Such would NOT be improper Rule 404(a)(1) propensity character evidence. It is relevant non-character testimony going to establish Bob’s self-defense defense against Paul’s civil tort complaint.</p> | | 3 |
| <p><u>404(a)(2)(A) Character Evidence Inadmissible</u> – In a civil case, character/propensity evidence is inadmissible (unless we are in a minority jurisdiction, where the underlying action is criminal in nature or where character is a Rule 405(b) essential element—neither of which is the case here). Therefore, Paul, as a plaintiff in a civil case, cannot open the door on his own character (even if it is in response to Bob’s “first aggressor” evidence, if it is used for a character/propensity purpose). Such character/propensity evidence is inadmissible and the homicide exception does not apply (see below).</p> | | 4 |
| <p><u>404(a)(2)(C) Criminal Homicide Case Exception (Inapplicable)</u> – In a civil case, character is inadmissible (see above). Although Bob, the defendant, put on evidence that Paul, the victim plaintiff, was the “first aggressor,” this does not now allow Paul to put on good character evidence of himself under 404(a)(2)(C). First, this is not a criminal case, so the exception does not apply on that ground alone, but even if it were a criminal case, this is not a <i>homicide</i> criminal case—the only type of criminal case in which this special exception would apply, and so Paul’s response would be inadmissible character evidence not allowed by the 404(a)(2)(C) exception.</p> | | 4 |
| <p>TOTAL SCORE FOR B (2)</p> | | 11 |

QUESTION B (3): Paul submits a police report (because the police officer is not there) indicating that Bob did not answer a question by police asking Bob whether Bob was the first to hit Paul.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|-------------|-----------------|
| <p><u>801 Hearsay/805 Hearsay Within Hearsay/613</u> – The police report is a hearsay document because it contains all of the hearsay assertions of the declarant police officer who wrote the report and it is being used for the truth of the matter asserted therein. It also contains 805 hearsay within hearsay as the police officer stated in the report what others have said (or asserted by their conduct). But it is not hearsay if it is just being used to impeach Bob (613) if Bob says anything that is inconsistent with what he may have said previously.</p> | | 2 |
| <p><u>803(8) Public Records Exception</u> – Paul would argue that the police report should be admissible under the 803(8) public records exception to the hearsay rule (and that it is “trustworthy”). Bob would argue that because the officer is not there, the public records exception would not apply under 803(8)(A)(ii); however, that exception to the exception applies only in <i>criminal</i> prosecutions, not in a civil case like this one, so the report would be admissible under 803(8).</p> | | 4 |
| <p><u>801/805 Hearsay Within Hearsay Bob’s Assertive Conduct</u> – Bob would argue that his silence in light of the police officer’s question should not be considered a “statement” by Bob because his silence was non-assertive conduct—it was not intended as a communication or admission. It could be that Bob did not even hear the question, or chose not to respond to it for unrelated reasons, or that a “reasonable person” might very well have remained silent, too, or would have dismissed the question as ridiculous, without intending such silence as any kind of communication to anyone. He also has the right to remain silent/ not incriminate himself. But these concerns likely go to weight, not to admissibility.</p> | | 4 |
| <p><u>801(d)(1)(A)/(B) Statement of a Party Opponent</u> – If Bob’s silence were deemed to be “assertive conduct,” and therefore a hearsay statement, his silence might be admissible as an 801(d)(1)(A)/(B) Statement of a Party Opponent (as Paul is using Bob’s “statement”/conduct <i>AGAINST</i> Bob), so Bob either would have been making a statement himself (801(d)(1)(A)), or would have been adopting the police officer’s question as his own statement (801(d)(1)(B)).</p> | | 2 |
| <p><u>801 Hearsay Definition (Police Officer’s Question)</u> – Although the question asked by the police officer would not technically be Bob’s statement/conduct, it would still be admissible <i>by itself</i> because a question is usually not considered to be an “assertion,” (only Bob’s answer/silence to it would be the assertion).</p> | | 2 |
| <p>TOTAL SCORE FOR Q B (3)</p> | | 14 |

QUESTION B (4): Donna submits an affidavit submitted by Sarah stating that Paul is now taking “anger management classes” for his bad temper, after Sarah had testified that Paul was not violent or angry on the day of the accident.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|-------------|-----------------|
| <p><u>801 Hearsay (Affidavit)</u> – Paul would object to Sarah’s affidavit because it is an out-of-court statement being used to prove the truth of what Sarah is asserting: that Paul is now taking anger management classes due to his bad temper.</p> | | 1 |
| <p><u>611 Impeachment/801(d)(1)(A) Prior Inconsistent Statement Inapplicable</u> – Donna would argue that the affidavit is not hearsay if it is being used solely to impeach Sarah (as an inconsistent statement), and therefore it is not hearsay because Donna is not trying to prove the truth of what Sarah asserted in her affidavit, only that she says different things at different times. If the statement in the affidavit had been under oath (it was) AND it was given at a trial, hearing, deposition or other proceeding (it was NOT), then it could be used for its truth. Paul would also argue it cannot be used at all because it is not a prior inconsistent statement as Sarah has NOT said anything “inconsistent,” unless Paul’s taking such classes NOW, is deemed to be inconsistent with what she specifically said about how he acted back then on the day of the incident.</p> | | 3 |
| <p><u>401 Relevance Paul’s Actions/404 (Not Applicable)</u> – It would be proper for Sarah to testify that Paul was “not violent or angry on the day of the accident,” because his actions on that day would be relevant to how he reacted to Bob’s (and Donna’s) actions, and such evidence is not character/ propensity evidence, which otherwise would be inadmissible in a civil case. This was just a witness’s (Sarah’s) observations of how Paul acted toward Donna and Bob on the relevant time in question (that day). Thus, the door was never opened on any general character traits of Paul (unless it were “character for a day,” but usually character is not limited to such a short time period that way).</p> | | 3 |
| <p><u>404 Improper Character Regarding Paul’s “Anger Management Classes” for His “Hot Temper”</u> – Sarah’s statement in her affidavit would be improper character evidence in a civil case, especially the statement regarding Paul’s “bad temper.” The “anger management classes” Paul is taking also imply a bad character flaw about him, and they would be an improper method (405(b)) to prove character (specific instances, rather than 405(a) reputation or opinion).</p> | | 2 |
| <p><u>407 Subsequent Remedial Measure</u> – If not character, then the anger management classes would be inadmissible as a “subsequent remedial measure” to show Paul’s bad temper. The classes are a “measure” (an action) that were taken “subsequent” to (after) the incident, and it was designed to “remedy” (fix/address) his bad temper, which tends to show that he acted violently on the day of the incident—this would be an inadmissible inference under the rule.</p> | | 3 |
| <p>TOTAL SCORE FOR Q B (4)</p> | | 12 |

QUESTION B (5): Paul submits ... that Donna has no auto insurance.

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|--------------------|------------------------|
| <u>411 Insurance Inadmissible</u> – This is clearly inadmissible evidence not within any exception to 411, but Donna strategically may not want to object as this evidence may actually help her (the jury might keep damages lower for her). | | 2 |
| TOTAL SCORE FOR Q B (5) | | 2 |

TOTALS

| ISSUE | YOUR POINTS | POSSIBLE POINTS |
|--|--------------------|------------------------|
| Q. A (1)(a) | | 11 |
| Q. A (1)(b) | | 13 |
| Q. A (2) | | 14 |
| Q. A (3) | | 12 |
| | | [50] |
| Q. B (1) | | 11 |
| Q. B (2) | | 11 |
| Q. B (3) | | 14 |
| Q. B (4) | | 12 |
| Q. B (5) | | 2 |
| | | [50] |
| Writing, Persuasiveness, & Organization | | 10 |
| TOTAL RAW SCORE | | 110 |