Kern County College of Law

Evidence I Examination

Fall 2025

Prof. N. Roth

Instructions:
Answer Three (3) Essay Questions
Time Allotted: Three (3) Hours.

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Question One

Steve was a long-time pilot with Ethos Airlines. On January 1, 2025, he was scheduled to pilot a passenger flight from Houston to Bakersfield. Tragically, the flight never made it to Bakersfield; the plane crashed into a reservoir in Arizona. While there were some survivors, Steve and many of the passengers died in the crash. The survivors filed a class-action lawsuit for damages, both against Steve's estate, and against Ethos Airlines. It is anticipated that a major issue in the lawsuit will be whether or not the crash occurred because of Steve's personal error, some mechanical failure, or from some completely unforeseen circumstance beyond anyone's control.

During discovery, the parties learn that two hours prior to take-off, Steve was at an airport bar, drinking and speaking with the bartender and his longtime friend, Winston. Just before Steve got up, Winston said to him "Man, I know you can hold your liquor, but you don't look too good right now, are you sure you're OK?" Steve didn't say anything in response, but he did shrug his shoulders and look down slightly. After Steve left, another bar patron named Mary overheard Winston say to himself, "I really shouldn't have served him that last shot of whiskey." Unfortunately, Winston is legally unavailable for the trial.

Assume the resulting civil trial occurs in a jurisdiction that follows the Federal Rules of Evidence.

1. The attorney for Steve's estate seeks to call James, Steve's co-pilot, as a witness. As an offer of proof, Steve's attorney indicates that James will testify that he has flown over a thousand flights with Steve. James will testify that every time Steve is preparing to fly, he does an incredibly thorough pre-flight check of all of the plane's systems to ensure they are functioning properly, and that if any system is not 100% operational, Steve will immediately notify Ethos Airlines and air traffic control. What objections might the plaintiffs' attorneys make to James' testimony, if any? What responses might the defense give? How should the court rule?
2. The plaintiffs seek to introduce, through the testimony of Mary, Winston's question posed to Steve about if Steve was OK, as well as Steve's response. What objections, if any, should Steve's estate and Ethos Airlines make? How should the

court rule, and should the ruling and analysis be different for the two different defendants?

3. The plaintiffs seek to introduce, through the testimony of Mary, Winston's statement to himself about serving Steve that last shot of whiskey. Both defendants object on hearsay grounds. Should the court sustain or overrule the defenses' objections, and why or why not?
4. The plaintiffs seek to introduce evidence that, two months after the crash, Ethos Airlines instituted a strict policy that no pilots may drink any alcohol or use intoxicating drugs of any kind within 48 hours before or after operating a plane. What objections, if any, should the defendants make to this evidence? How should the court rule?

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Question Two

Daniel is active on a dating app, where he meets Karen. They hit it off after chatting and realizing that they have some mutual friends, including Karen's best friend, Michelle. Daniel and Karen go on two dates, and make plans for a third. On the third date, however, after Karen agrees to go back to Daniel's apartment, things do not go well. Two days afterwards, she calls the local police non-emergency number, to report that Daniel raped her. Daniel ultimately gets criminally charged with rape, and Karen testifies at the preliminary hearing, where it is revealed that she is pregnant. But, prior to trial, Karen moves without telling the local District Attorney's Office about her new residence. The assigned prosecutor makes numerous attempts to find her, utilizing police resources, records checks, and social media monitoring, but nothing works. The trial cannot be delayed any longer, and the matter proceeds to trial without Karen available to testify.

Assume that the trial occurs in a jurisdiction that follows the California Evidence Code.

1. Daniel's attorney wants to call three male witnesses to the stand. Each will testify that, within a month or so of Daniel's third date with Karen, they also went out with Karen, and that each of them had sex with Karen. Two of them had unprotected sex with Karen; the third used a condom. What objections, if any, should the prosecution make? What analysis should the court employ, and how should the court rule?
2. The prosecution seeks to introduce a properly authenticated and certified transcript of Karen's initial call to police, where she reported that Daniel raped her. In that call, she provides a detailed statement of what happened, gives the police Daniel's name and describes his appearance, and breaks down crying at several points during the call. What objections, if any, should Daniel's attorney make? How should the court rule?
3. During their investigation, the defense talks to Michelle. She tells defense investigators that she talked to Daniel before Daniel's first date with Karen. She told Daniel that while Karen was very selective about who she agreed to go out with, if she had agreed to go out with Daniel, that sex would be a "sure thing." Michelle also told Daniel that Karen liked men who were aggressive and "rough in bed." Daniel's attorney seeks to call Michelle as a trial witness, to testify about

her conversation with Daniel. What objections, if any, could the prosecution make? How should the court rule?

4. Due to Karen's unavailability, the prosecution seeks to introduce the authenticated transcript of Karen's preliminary hearing testimony. Daniel objects on hearsay and Confrontation grounds, noting that he had a different attorney at the preliminary hearing, and that his current attorney has since uncovered a lot more information relevant to trial. How should the court rule on both objections?

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Question Three

One of the most popular amusement parks in all of California is "Evidence Land." It is a theme park where all of the rides and rollercoasters have names related to Evidence law. For instance, one of rollercoasters is the Hearsay Express, because every rider is guaranteed to scream an excited utterance while riding it. But one day, the Hearsay Express fails to come to a complete stop at the conclusion of one of its rides, causing serious injuries to the two passengers in the front row. A lawsuit for damages results. Prior to trial, it is discovered that Chad, the ride operator that day, is the ex-boyfriend of one of the plaintiffs, Sarah, and that they had a particularly nasty break-up. It is also discovered that, a week before the accident, Evidence Land caught Chad attempting to deactivate one of the fail-safe systems for the Hearsay Express, which was designed to prevent accidents exactly like the one that ended up happening. Chad claimed that he was just checking it to make sure it was operable. It is unclear whether or not the fail-safe system was re-activated and in proper working order at the time of the accident.

Evidence Land is also a client of Komodo Insurance Company. Komodo initiates an investigation after the accident, and ultimately authors a report detailing its findings. Komodo's report ultimately concludes and opines that Evidence Land did not act negligently and therefore was not at fault for the accident.

Assume the trial happens in a court that follows the Federal Rules of Evidence.

1. At trial, the plaintiffs seek to introduce the fact that, twice in the last year, the Hearsay Express failed to work properly and caused injuries to people that were very similar to the injuries suffered by the plaintiffs. What objections should the defense make, if any, and how should the court rule?
2. The plaintiffs seek to introduce evidence that Chad attempted to deactivate the failsafe system a week before the accident, and that Chad dated Sarah before their relationship ended in dramatic fashion. The defense makes character evidence objections as to both. How should the plaintiffs respond? How should the court rule?
3. The defense seeks to introduce the Komodo report into evidence, after properly authenticating it. Prior to offering in the report, the defense establishes that Komodo began their investigation within days of the accident occurring, and that

Komodo always conducts an investigation and authors a report any time one of their clients is involved in an accident. The plaintiffs make a hearsay objection. How should the defense respond? How should the court rule?

4. Assume, for the sake of argument, that the court excludes the Komodo report. The plaintiffs then seek to introduce the fact that Evidence Land was insured generally, to help establish that Evidence Land acted negligently, if not maliciously, in hiring Chad and allowing him to operate the Hearsay Express. What objections should the defense make, if any, and how should the court rule?

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1)

1. Objections to James Testimony:

Character Evidence:

Under Fed. Rules, Character evidence is introduced to show a persons general personality trait or disposition like being reckless, honest, kind, truthful, etc. Such evidence is offered to prove that a person acted in conformity with that trait on a particular occasion. A party general cannot introduce evidence of a persons character trait to prove action in conformity on a particular occasion.

The plaintiffs will object and argue that James testimony is inadmissible character evidence and will say that the defense is trying to offer evidence of Steve's carefulness as character or conduct in order to show that Steve did in fact act carefully on the day of the crash.

The defense will rebut the plaintiffs claim to prove habit (see below).

Relevance:

Determined under Logical (proves or disproves a material fact at issue) and Legal (probable value is substantially outweigh by dangers of undue prejudice, waste of time, confusion, misleading jury, etc.) relevance.

Here, the plaintiffs may argue that the fact that Steve checked the flight preparations does not make it more probable that Steve acted in this manner. Just because Steve has done so in the past, does not mean that he did on the day in question.

The defense will argue that because James is Steve's co-pilot, evidence that he has gone through the flight preparation in the past is relevant to show that Steve did so on the day in question.

Habit Evidence:

Under Fed. Rules, Habit is prior repeated responses to the same type of situation that show a pattern of how an individual behaves under everyday situations. FRE allows evidence of a persons habit to prove conduct on a particular occasion.

James testimony does not indicate that this is a one time occurrence. In fact, Steve repeatedly checked to make sure the aircraft was secure and operational before every flight. It is apart of Steve habitual routine to do so.

Every flight is a routine, and in accordance with such routine, there are checklists that each expert (pilots) have to go through in order to safely venture with their flight.

Speculation:

Where Evidence is presented that can not be 100 percent determinable that it happened. Calls for speculation on the witness because they do not know for certainty.

The prosecution will say that it is uncertain if Steve in fact made all the checks, but because of Habit (see above), the defense will likely say that this evidence should be admitted because Steve had been on hundreds of flights with James, therefore, James would know the routine in which Steve does his pre-flight checklist.

2. Objections Through Mary Testimony of Winston's Question to Steve:

Hearsay:

Hearsay is an out of court statement offered to prove the truth of the matter asserted.

Effect on Listener:

For the context of Winston's statements, the plaintiffs offer the question to prove Steve actually looked drunk or impaired. Thus, the statement is heavily relied upon by Winston's implied assertion when he asked Steve if he was "OK."

The statement, "you don't look good right now" is used to imply that Steve looked impaired would be hearsay, however, this would fall under the hearsay exception of having an effect on the listener and will likely be admitted as not hearsay.

Non-Verbal Conduct:

An assertive, non-verbal statement is one where a declarant does not give a verbal response, but indicates as such with body movement or an implied assertion of non-verbal activity.

Here, after Winston asked the question of being "OK," Steve shrugged his shoulders and looked down. There was no assertion other than that. We cannot infer that Steve was or was not OK based on that body movement. That was too vague of a response to indicate otherwise.

Had Steve subsequently nodded up and down or shook his head, then it would be intended as hearsay and the objection could be overruled by the defense. The objection should be sustained

however because the plaintiff can not properly indicate that the shrugging of shoulders and looking down asserted conduct that Steve was not OK.

The evidence however should be admitted because Winston's question is not hearsay, and Steve's nonverbal conduct can be treated as a nonverbal admission.

Present Sense Impression:

Winston could have taken the inference of Steve's non-verbal conduct to mean that he was not OK, but this argument is weak. Winston was observing Steve's appearance in the moment.

3. Objection to Mary's Later Testimony of Winston's Statement:

Hearsay:

(See above) Winston is unavailable and the statement is offered to prove that Steve was drunk, Winston served him the "last shot," and Steve was impaired before the flight.

Statement Against Interest:

A statement made goes against the party's interest when there is Monetary, Proprietary, and Penal interest that is effected by the declarant.

This would qualify as a hearsay exception for the plaintiff to show a statement was made against the declarants own interest. Winston is unavailable, and directly implicates himself when he says "he should not have given Steve that last shot." Why would Steve say this unless he knew he should not have. Steve could be subject to penalty for doing so, so the fact that he said those words out loud would fall under the exception above.

The defense will argue that there is no way to corroborate this and they can not cross-examine the witness. Defense will likely claim that this statement is highly prejudicial.

The statement would likely be admitted and the defense objection would be overruled because this statement is directly self-incriminating and the plaintiffs will argue that there is corroboration. i.e. Mary overhearing, and the subtle nonverbal assertions that Steve gave in response.

4. Objection to Post Crash Policy:

Subsequent Remedial Measures:

A subsequent remedial measure is not allowed to be admitted in order to prove negligence, culpability, and defect, or a need for precautionary measures after an incident occurs, but can be done so before.

Here the facts indicate that the policy took effect 2 months after the crash. A later policy that is put into effect, can not be later used to prove negligence.

However, certain exceptions do apply in the sense that SBR can be admitted to show feasibility, control, or impeachment. We have none of those here. Control is not disputed, no witness has opened the door to be impeached, and the airline is not contesting feasibility.

The court will likely exclude the evidence as a prohibited subsequent remedial measure.

2)

1. Three Male Witnesses:

Rape Shield Law:

Evidence of a complaining witnesses prior sexual conduct with persons other than the defendant is inadmissible to prove consent or impeach ones credibility. It is ultimatum used to protect the victim in the case.

However, evidence is allowed to come in to prove someone else was the source of semen, pregnancy, injury. Evidence can also be introduced to prove motive, bias, or fabrication.

Since defense is the one calling the witnesses, they are barred under this rule there is no link between Karen and these men or a specific motive is connected to the three men and Karen. They are simply her previous sexual encounters and can not be used to shame Karen into trying to disprove her allegation that she was raped by Daniel.

Relevance:

Determined under Logical (proves or disproves a material fact at issue) and Legal (probable value is substantially outweigh by dangers of undue prejudice, waste of time, confusion, misleading jury, etc.) relevance.

This evidence would be irrelevant unless it tends to disprove a disputed fact, but it does not.

Karen's sexual history with unrelated men has no bearing against whether or not Daniel indeed raped Karen and has no weight that Daniel committed the charge.

Undue Prejudice:

Courts will have to weight the **balancing test** in this scenario to determine if the probative value of the evidence substantially outweighs the undue prejudice. Even if the men are relevant, the prejudicial effect that this would have on the jury would be unfair to Karen and would essentially be slut shaming her, which is exactly what the Rape Shield Law is there to prevent.

The objection would be sustained for the prosecution and all three men would be excluded under the Rape Shield Law because evidence of prior sexual partners, unless matierial and directly connected to the dispute, have no real credibility.

2. Karen's Transcript:

Hearsay:

An out of court statement offered to prove the truth of the matter asserted.

Karen's out of court statement describing the alleged rape is being offered for its truth and is hearsay...unless the exceptions below apply.

Past recollection recorded:

If a declarant/witness does not remember everything they said or declared, they can then have there memory refreshed as a past recollection. This would require the declarant to testify, but Karen is unavailable. She cannot testify. No past recollection recorded exception.

Spontaneous Statement:

Where a person makes a statement of spontaneity or out of excitement/stress. The call happened 2 days later and Karen called the non-emergency line. It could be argued that because she was allegedly raped a couple days after the incident when she made the call that she was recollecting her emotions and it was painful for her to go over, but this is speculatory in nature. The 911 call happened two days later and wasn't because of stress in the moment. No spontaneous statement exception

Physical Injury Statement:

This only applies to domestic violence and or physical injury situations. Being rapped is an allegation that exceeds this scope unless she was also harmed from the rape physically. Again, Karen called two days after the alleged incident. There needs to be some sort of present sense of injury. No physical injury statement exception.

Prior Inconsistent Statement:

For a statement to be inconsistent, a declarant must testify at trial, here we do not have that. No prior inconsistent statement exception.

Confrontation Clause:

Karen's recorded 911 call is considered testimonial as she went on to further elaborate the incident with police 2 days after it happened. She also made a call to the non-emergency line.

Under this rule, testimonial hearsay is inadmissible unless the declarant is unavailable, and the defendant had a prior opportunity to cross examine her.

Daniel did not get that opportunity and Karen is unavailable.

Due to all of this, the objection would be sustained by the defense and the 911 call would be inadmissible hearsay barred by the confrontation clause.

3. Michelle:

Rape Shield:

(See above rule).

The statements used to associate Karen's likeness of wanting it "rough in bed" fall squarely within the protections of the Rape Shield law. Such statements refer to Karen's sexual predisposition, sexual willingness, and past or anticipated sexual behavior.

Likely will be excluded under this rule because the defense can not start going off topic into Karen's sex life and the manner in which she likes to have sex.

Hearsay:

(See above rule).

The prosecution will object that no exception applies, and that the statements are offered to show Karen was likely to consent rather than not consent.

Effect on Listener:

Defense might say that Michelle statement to Daniel was simply to get him to go out on the date with Karen and it has an effect on the listener and that Karen would have consented.

This wont work.

State of Mind:

Defense would argue that these statements prove the state of mind that Karen was in. That, if Daniel went out with Karen, he was sure to be able to sleep with her. However, this is prohibited because statements if intent to prove conduct in sexual cases is not admissible and Rape Shield would override this anyway.

Improper Character Evidence:

The prosecution will say that this is an improper use of character evidence because this witness is likely to be the wrong person to show evidence of the Victims good character. The defense will likely say that Karen liked aggressive sex, or was sexually willing to consent or did consent with Daniel.

However, simply liking "rough" sexual intercourse, does not imply consent was given, and just because Daniel went out with Karen does not also indicate consent was given.

The evidence will not be admitted.

4. Authenticated Transcript:

Former Testimony:

Former testimony can be admitted when the declarant is not available, and the party against whom the testimony is offered had the right and opportunity to cross-examine the declarant with a similar interest and motive of said prior proceeding.

Changing attorneys later does not defeat the opportunity to cross-examine

Daniel had a prior opportunity to cross-examine at the previous hearing, and even if his attorney is different now, Daniels then attorney had the ability to challenge Karens credibility, perception, and memory.

The argument that he has more information now does not matter.

Confrontation Clause:

(See above); witness is unavailable and the defendant had a prior opportunity to cross examine the witness.

Daniel had a prior opportunity to cross-examine.

Because hearsay is not barred with this, and the confrontation clause is satisfied, the testimony is admissible hearsay.

The transcript should be admitted.

3)

Question 3

(1) Hearsay Express's two failures

What objections should the defense make, if any, and how should the court rule?

Evidence of past conduct or events is generally inadmissible for a different proceeding, however, if the evidence shows a record of continuous conduct and awareness of a condition, it may be admitted.

The defense will likely make an objection that this is evidence of past occurrences and argue that the previous instances of Hearsay Express injuring people has nothing to do with the incident at bar.

The plaintiffs will likely counter, saying that the two crashes has everything to do with whether or not their was a breach on the part of Evidence Land, and that if there had already been two instances of injuries on Hearsay express in the previous year (which is a shockingly high rate of injury for an amusement park ride) that it shows evidence of such a consistent pattern that the evidence should come in despite it being of a past occurrence.

It is likely that the evidence of hearsay express' two failures will come in.

The defense should make a past occurrences objection, and the court should overrule it.

(2) Chad Character Evidence and Sarah Character Evidence

How should the plaintiffs respond to both Character Evidence Objections? How Should the Court Rule?

Character evidence is generally not allowed to be admitted into court proceedings, however if the character evidence goes to show state of mind or motive. The rules for character evidence are different when applied to plaintiffs and defendants.

The plaintiffs will argue that the fact that Chad was caught attempting to deactivate the ride and that Sarah and he had previously dated but the relationship ended dramatically constitute unfair character evidence and should be excluded.

However, the defense will likely counter, saying that they are not seeking to use the evidence to show propensity of any kind on the part of the victim or any party named in lawsuit, but are seeking to show the

state of mind and motive of a party that is neither plaintiff nor defendant (Chad) who may have acted as an intervening cause in the harm at issue, which could potentially absolve Evidence land of liability in their case.

It is likely that the evidence of Chad and Sarah's relationship and Chad's attempted sabotage will be admitted.

The court should overrule the character evidence objection.

(3) Komodo Insurance Report

How should the defense respond to the plaintiff's hearsay objection? How should the court rule?

One of the exception to the hearsay rule is the business records exception, which provides that an out of court statement may be admitted if it is a business record made in the regular course of business, not for the purpose of judicial proceedings, and that the record has been properly authenticated by the court.

The defense would likely respond that even though the report is an out of court statement offered for the truth of the matter asserted, that it falls under the business records exception. They would continue, stating that Komodo insurance is a business contracted with Evidence Land, and that it is standard procedure after one of their clients is involved in an accident to conduct an investigation, meaning that it was not made for the purpose of judicial proceedings (as it was done within days of the accident) and was done in the regular course of business. The report was also authenticated by the court.

It is likely that the report falls under the business records exception to the hearsay rule, and that it will be admitted.

The defense should respond that the report falls under an exception to the hearsay rule and the curt should overrule the objection.

(4) Evidence Land's being generally insured.

What objections should the defense make? How should the court rule?

For public policy reasons, certain types of evidence are inadmissible in judicial proceedings. One of them is that the defendant's carrying of liability insurance cannot be offered to prove the defendant's liability in a negligence claim. This is done so as not to discourage potential tortfeasors from obtaining insurance.

For a piece of evidence to be admissible in court, it must be material and relevant to the proceedings, meaning that it must be related to the event at issue and have a likelihood to increase or decrease the probability of one of the party's claims.

The defense should object on the grounds that Evidence Land being generally insured is both irrelevant to their negligence in hiring Chad and barred from admissibility by public policy.

Relevance

The plaintiffs will likely argue that insurance policies are relevant because it shows that Evidence Land was anticipating any potential harm that would come as a result of anything that could occur, and because of that it would show that Evidence Land was in breach of their duty to the plaintiffs.

The defense will likely counter by arguing that an insurance policy has nothing to do with their negligence in hiring Chad, as whether or not they were insured has no bearing on whether Chad's hiring constituted a breach of Evidence Land's duty to the plaintiffs.

It is likely that Evidence Land being insured is irrelevant, and is not admissible.

Public Policy

The defense will likely argue that because the plaintiffs are offering the fact that Evidence Land was insured generally to prove that Evidence land acted negligently, that it contradicts public policy and is inadmissible.

It is likely that under public policy grounds, that Evidence land being insured will not be admitted.

The defense should make objections on relevance and public policy grounds and the court should sustain both objections.

END OF EXAM