

Evidence

University of Utah – S.J. Quinney College of Law
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FINAL EXAMINATION

Instructions

1. You will have **three hours and thirty minutes** to complete the examination. *The examination is designed as a three hour exam, with thirty minutes of “buffer” time.*
2. The examination consists of **two (2) questions**, worth 66 and 34 points respectively. You may want to allocate your time accordingly. Please note that each question has multiple sub-parts.
3. There are **eight (8) pages** to this examination, including this instruction sheet. Please be sure that you have all of the pages.
4. You may consult your casebook as well as personally prepared notes and outlines (including materials prepared by classmates with whom you have collaborated/shared materials). You may not consult any commercial outlines, commercial study aids or hornbooks.
5. I am not looking for a “treatise” on Evidence, but rather a thoughtful “treatment” of the issues presented by the questions. With respect to each question, I strongly recommend that you organize and outline your thoughts before you begin to write your answer.
6. Please pay careful attention to what each question is asking you to do.
7. If, in the course of answering a question, you believe that more information is required, describe that information and explain why it is relevant. Likewise, if you deem it necessary to make an assumption not otherwise provided in the question, please state your assumption.
8. Good luck on this examination and in all future endeavors! Please keep in touch!

QUESTION 1: YOGI BOOR (66 Points/Approx. 120 minutes):

Alf and Becky had been dating for three months; they liked each other but lacked any common hobby that might allow their relationship to blossom. One day, Becky noticed that a new yoga studio had opened just outside Sweet River Town, Youta, where she lived. Becky had never tried yoga, a form of exercise that combines stretching, breathing, and meditation in an effort to attain both spiritual and physical health, but was intrigued by the new studio – in part because a much-heralded yogi (teacher of yoga) named **Char** was going to run the outfit. Indeed, Char had a reputation as a true spiritual advisor who could greatly assist people on the path to enlightenment.

Although initially reluctant to attend the studio, Alf succumbed to Becky's wishes and they began to go there regularly. Alf was usually the only male at the classes, while a dozen women would show up. Alf did not find this gender imbalance altogether unpleasant; that is, until he figured out that the women, including Becky, were riveted, almost entranced by Char. One night, Alf confided in his friend **Doug**, noting that "Char's got that fake sensitive guy thing going that women love and guys like me *hate*." Doug and Alf were law school classmates back in the 1990s, and Doug vividly remembered one occasion from their school days when Alf smashed a lamp upon learning that his ex-girlfriend was dating someone new.

After several months, it became apparent that yoga was not bringing Alf and Becky closer together; on the contrary, Becky seemed to be increasingly disinterested in Alf. Eventually, Becky stopped returning his calls, a development that enraged him. One night Alf secretly followed Becky as she drove to an apartment building nearby. Sitting in his car, he scanned the windows of the building, hoping to see her; after a few minutes, he did, catching a glimpse of Becky and Char kissing. The next night, Alf again followed Becky to the apartment building. This time, just after she entered the building, he left his vehicle . . . Twenty minutes later, Becky was found dead in the foyer of the apartment building right in front of the elevator.

PART I(A) (25 Points/Approx. 45 minutes). The police focused on Alf as a suspect after they watched the videotape from the building's security camera. The camera was located on the outside of the building and only provided a view of the front door from the side. The videotape showed Becky pressing an apartment buzzer, then opening the door after it buzzed. Thirty seconds later, it showed Alf approaching the front door with what appeared to be a nail file in his hands and then picking the lock, which consisted of a single, reasonably sophisticated deadbolt. Two minutes later the tape showed Alf leaving the building, walking briskly. There was no security camera inside the building.

After observing the videotape, the police staked out Alf's apartment and his place of work for a full day, but there was no sign of him. Alf's boss told the police he had no idea where Alf might be, but the boss did note that he believed Alf originally came from Capital City in the State of Whyomy, located three hundred miles away. A few days later, the police located Alf in Capital City, and after a brief chase on foot, arrested him.

The police interviewed Doug, who expressed no interest in testifying against his friend, and then visited Char. Char refused to speak with the police at all, beyond stating that he would not divulge anything about his relationship with Becky. Yet Char, like Doug (see previous page), had some potentially pertinent information. One night during a heart-to-heart talk, Becky had told Char that "One of the men I'm seeing has a major temper." Moreover, Char had found Becky in the foyer of the apartment building on the night of her death; she was still breathing when he found her. Char asked her whether "the guy from yoga class did this?" Becky nodded her head slightly and then died in Char's arms.

The prosecution intends to charge Alf with murder in Youta state court and, at trial, plans to (1) subpoena Doug to testify; (2) subpoena Char to testify; (3) introduce the security camera videotape from the building; (4) present the investigating detective's testimony regarding Alf's arrest in Whyomy; and (5) present a photo of Becky's lifeless body, depicting blood oozing from her neck. Please discuss whether and to what extent the trial court is likely to deem this evidence admissible, and what this evidence will be admissible to prove. Youta's rules of evidence are identical to the Federal Rules.

PART I(B) (23 Points/Approx. 40-45 minutes). Alf hired **Erica** to be his attorney. A top-notch defense lawyer, Erica immediately began the process of investigating the case. At the outset, she did a background check on Doug to prepare to attack his credibility on cross-examination, and found that he had been convicted of a felony (drug possession) while he was a law student. Erica also discovered that Doug had a bit of a reputation as a blowhard and that, specifically, he occasionally boasted about having graduated first in his law school class when he had not. Her investigation of Char revealed unsavory details about him as well – he had a misdemeanor conviction for lying on his automobile insurance policy in 2003. In addition, one of his neighbors was of the opinion that Char was a womanizer who often cheated on his girlfriends.

Erica continued her investigation beyond a background check on the prosecution's witnesses. In particular, she discovered that, many years ago, Becky was an active member of an organization called the **Free Love Society**, which advocated, among other things, periodic sexual orgies along the banks of the Sweet River. Furthermore, Erica tracked down a local psychology professor at the University of Youta named **Gladys** whom Erica thinks might be a good defense witness. Gladys has done extensive research on "Male Inadequacy Syndrome" ("MIS"), a theory that she developed and that she alone has studied. MIS, according to Gladys, explains how and why men frequently become threatened when girlfriends or former girlfriends start dating someone else and that these feelings of inadequacy may manifest themselves into a rage that borders on temporary insanity.

Assume that both Doug and Char will testify as prosecution witnesses, and that Erica wants to introduce the above-mentioned evidence at trial to undermine the prosecution's case and put forth a temporary insanity defense. Please discuss whether and to what extent the trial court is likely to deem this evidence admissible, and what the evidence will be admissible to prove. Please focus on the admissibility of the evidence; you do not need to analyze whether Erica's temporary insanity defense strategy has merit. Youta's rules of evidence are identical to the Federal Rules.

PART I(C) (18 Points/Approx. 30-35 minutes). Becky's family members were devastated by her death. Ultimately, they decided to file a civil tort suit in Youta state court against Char's landlord, **Houdini**, asserting a claim of negligence for the landlord's purported failure to adequately secure the front door to the apartment building. Houdini admired Char and did not believe much in "barriers to humanity." In fact, the building's residents were primarily yoga enthusiasts and aging hippies who often kept their individual apartment doors open and shared meals with one another. To that end, for many years Houdini neglected to have any locks on the front door – until last year when, after a rash of burglaries, Houdini added the camera on the outside of the building and he asked a locksmith to put in the aforementioned single, reasonably sophisticated deadbolt. After Becky's death, yet before the filing of the civil suit, Houdini replaced the deadbolt with an electronic alarm system and multiple locks. Houdini also renewed the liability insurance policy for the building, which he had let lapse, after Becky's death.

In preparing for trial, Houdini's lawyers eventually developed the following defense theory: that Becky was careless and had not properly closed the door after entering the apartment building on the night of her death. In other words, the defense wanted to argue that it was Becky's carelessness, rather than any deficiency in Houdini's security measures, that allowed Alf to enter. To substantiate this theory, the defense lawyers wanted to present evidence that Becky routinely forgot to lock her own apartment door, the door to her car, and the door to her office. As an alternative defense theory, Houdini's lawyers were considering the possibility of claiming that Houdini did not truly control the building because it served as a type of commune, in a sense, and that he could not be held responsible for any crimes in the building's shared, public spaces. Houdini's lawyers, however, were not optimistic about the case and met with attorneys for Becky's family several times to try to work out a deal before trial. At one point, Houdini offered \$50,000 to resolve the dispute, but the family declined it and opted to proceed to trial.

Please discuss the potential evidentiary issues related to this civil suit. As noted above, you may assume that Youta's state rules of evidence are identical to those of the Federal Rules. Moreover, you do not need to address the tort law issues involved in this case.

QUESTION II: SMOKE AND MIRRORS (34 Points/Approx. 60 minutes)

Jack and **Karen** had been married for many years and seemed to have a successful, functional relationship – except for one rather significant detail. In addition to his job as a traveling salesman, Jack also worked as a courier for a regional drug lord. In particular, Jack was in charge of smuggling cocaine from Whyomy to Youta; Karen had no knowledge of Jack’s criminal activities. One day, Karen asked to come along with Jack on one of his sales trips to visit the national parks across the border. Jack agreed, reluctantly, and one morning they left their home in Whyomy for southern Youta.

Just after they crossed the state line, smoke started to emerge from the hood and, sure enough, their car broke down right on the highway. Neither Jack nor Karen was an especially good mechanic, so they simply waited in the car, hoping someone would come by. After several hours, they heard a car approach; Jack looked in his rear view mirror and detected the presence of an oncoming state trooper, **Larry**. Jack started to sweat profusely. “Wonderful!” Karen cried. “Our knight in shining armor has arrived! I’ll go hail him down.” She then reached out to open the door, at which point Jack grabbed her arm and yelled, “Don’t you dare – we can’t have that cop sniffing around our car!” Karen turned to Jack and asked, “Are you up to no good, Jack?” Jack failed to answer. Karen then shook her head and remained inside the vehicle.

In any event, Officer Larry pulled up behind the car, troubled by the sight of a forlorn vehicle on the side of the highway, and asked them how they were doing. Jack explained that their car had broken down and then, suddenly, Jack passed out! Perplexed, Officer Larry and Karen began rummaging through the trunk in search of automotive repair materials and something to revive Jack when, lo and behold, the trooper discovered twenty packets of a white powder that appeared to be cocaine . . .

Officer Larry then took both Karen and the now-revived Jack to the local precinct and, after inventorying the packets of white powder in the property clerk's room, placed the two suspects in separate interrogation rooms. They both freely consented to police questioning after waiving their rights and, in sum and substance, this is what they said:

Larry first interrogated Karen. Karen stated that she had no idea where the drugs came from, that she doubted Jack would ever do such a thing and that, in her view, the drugs were planted – most likely by Jack's work colleague, **Mark**, a very competitive traveling salesman who wanted to replace Jack as the company's top-rated employee. Then Larry went to see Jack, who stated that Karen was the mastermind behind their decision to transport drugs into Youta, but acknowledged that he participated in the venture. When Larry started to press Jack about the extent of his involvement in the drug smuggling, Jack again admitted that he participated but swore to God that Karen was the ringleader – before Jack pitched forward and fell on the floor, the victim of a fatal heart attack.

After Jack's death, Larry continued to investigate Karen's potential culpability and, as part of his investigation, he discovered a variety of things. First, he interviewed Mark. Mark denied planting the contraband and dismissed any suggestion that he had a rivalry with Jack. Instead, Mark told Officer Larry that "One day Karen said to me, 'I hate that Jack travels all the time. The only way to keep that man in one place is to put him behind bars.'" (Mark had been so surprised by Karen's comment at the time that, right after their conversation, he had written down her statement in a notebook.) Second, Larry went to Karen's place of employment, a private accounting firm, and asked for her human resources file to see whether she had any record of drug use or disciplinary action whatsoever. Her company's records showed no evidence of drug use or disciplinary problems by Karen.

After lab tests confirmed that the white powder was indeed cocaine, Larry gave the case to the FBI and eventually the U.S Attorney's Office obtained a federal court indictment of Karen for transporting narcotics across state lines with the intent to distribute.

PART II(A) (17 Points/Approx. 30 minutes). Based on the above-mentioned facts, at trial the prosecution sought to introduce (1) the drugs; (2) Officer Larry's testimony concerning the police investigation and the interrogations; and (3) testimony from Mark. When asked by the prosecution on direct examination at trial about what Karen had told him, Mark claimed not to recall the conversation with Karen at all.

Please discuss the evidentiary issues related to the introduction of the drugs, Officer Larry's testimony, and Mark's testimony. You should focus on the evidentiary issues; you need not and should not address any possible criminal procedure issues (such as search and seizure issues and so forth) unless we covered them in class.

PART II(B) (17 Points/Approx. 30 minutes). The prosecution has rested its case, and now it is time for the defense lawyers to figure out whether to present any evidence. Specifically, the defense lawyers are considering whether (1) to try to admit Karen's human resources file into evidence and (2) to have Karen testify on her own behalf. You may assume that Karen is willing to testify, and that her testimony would consist of allegations that Jack, and Jack alone, knew about the drugs.

Please discuss the evidentiary issues related to the introduction of the human resources file and Karen's testimony. As noted above, focus on the evidentiary issues; you need not and should not address any possible criminal procedure issues unless we covered them in class.

END OF EXAMINATION! CONGRATULATIONS!