

## **Narrative Answer Questions [total weight is two-thirds of the examination]**

Assume the Federal Rules of Evidence apply in all cases unless otherwise indicated.

This section contains three (3) questions. The weight of each is stated below.

### **Question 1 [one-third (~33.33 percent) of the narrative answer portion of the examination]**

You are a prosecutor newly assigned to a federal task force responding to bank robberies nationwide. Your boss puts three case files on your desk. While the three cases are completely unrelated to one another, each involves a bank robbery that occurred in 2010.

Case 1: Defendant Xavier has been charged with robbing the First National Bank. The robber wore a black ski mask, pointed a pistol at a teller, and handed over a bag and a note. The note read, “Put the money in the sack and everyone gets out alive.” The teller put \$10,000 in the bag, and the robber ran to a waiting getaway car, which drove away. Xavier was subsequently arrested after trying to spend some of the stolen money. The bills had been marked.

The defense theory is mistaken identity (*i.e.*, someone else robbed the bank, not Xavier).

Xavier robbed a bank in 2005 and as a result spent three years at the Medium Security State Prison. In the 2005 robbery, Xavier wore a blue ski mask, pointed a pistol at a teller, and handed over a bag and a note. The note read, “Give me the money, or I’ll shoot.” The teller put \$9,000 in the bag, and Xavier ran to a waiting getaway car, which drove away. Xavier was caught when his getaway driver confessed to police.

Since his release in 2008, Xavier has had a clean record, at least until his recent arrest.

Case 2: Defendant Yvette has been charged with robbing the Second National Bank. Yvette and a confederate entered the bank, pointed weapons at the tellers, and demanded money. It turned out, however, that the confederate was an undercover FBI agent who had disabled Yvette’s pistol. She was arrested without incident.

The defense theory is entrapment. Yvette says she participated in the robbery only because the FBI agent befriended her, bought her presents, and then—months later—said he desperately needed money for medical treatment and begged her to help him rob the bank. The agent has told superiors that Yvette’s story is false, claiming that she proposed the robbery.

Yvette, along with her then-boyfriend Yusuf, robbed a bank in 2005. As a result she spent three years at the State Reformatory for Juveniles. Since her release in 2008 at age seventeen, Yvette has had a clean record, at least until her recent arrest.

*[Question 1 continues on next page.]*

*[Question 1, continued from previous page.]*

Case 3: Defendant Zoe has been charged with robbing the Third National Bank. The robber rode into the bank on a BMW motorcycle (model R32, manufactured in 1925), brandished a Walther P38 pistol bearing a Nazi crest, and demanded money. The robber received money and fled on the motorcycle. A teller reported that the robber “sounded female and had a German accent.”

Police arrested Zoe after recalling that in 2005, the same bank had been robbed by someone who rode into the bank on a BMW motorcycle (model R32, manufactured in 1925), brandished a Walther P38 pistol bearing a Nazi crest, and demanded money. The 2005 robber received money and fled on the motorcycle. A teller reported that the robber “sounded like a woman from Austria.” Investigators connected Zoe to the 2005 robbery. Because of various miscues at police headquarters not relevant to your current work, no one was ever prosecuted for the 2005 robbery, and your boss has no interest in pursuing that case.

Your boss would like to know what evidence related to the 2005 robberies, if any, is admissible at criminal trials concerning the 2010 robberies.

**Question 2 [one-sixth (~16.67 percent) of the narrative answer portion of the examination]**

Imagine that the American Bar Association accreditation team decides to conduct a random audit of the University of Missouri School of Law. The ABA team chooses an arbitrary class, the Fall 2010 class on Evidence, to investigate. The team then selects a handful of students and demands proof that those students attended class on a regular basis, as is required by ABA regulations.

If you were one of the selected students, how would you recommend the law school prove your attendance in a trial governed by the Federal Rules of Evidence?

[Note: Be sure that your answer does not compromise the anonymity of your exam.]

**[Narrative answer questions continue on the next page.]**

### **Question 3 [one-half (50 percent) of the narrative answer portion of the examination]**

Crazy Drinks, Inc. (“CDI”) produces and sells a beverage called “Five Loko,” which has the five primary ingredients of water, alcohol, caffeine, ginseng, and “Spice 9,” a secret blend of flavorings. Although the beverage cannot legally be sold to anyone under 21 years of age, Five Loko became extremely popular with college students—including many too young to drink legally—after being introduced to the market in 2008. In early 2009, consumer safety groups expressed concern that Five Loko’s combination of alcohol and caffeine was potentially quite dangerous because drinkers may underestimate their level of alcohol intoxication while feeling the effects of caffeine. A few incidents in which undergraduates arrived in hospitals near death following the consumption of Five Loko put further pressure on CDI. Despite arguments by CDI that alcohol and caffeine had long been paired in drinks such as Red Bull and vodka, not to mention the venerable “Irish coffee,” some states banned the sale of Five Loko in late 2009.

In January 2010, ten students died after consuming Five Loko at a party on the campus of Enormous State University. Two died in a car accident with a highly-intoxicated Five Loko-drinking driver at the wheel. Six passed out drunk at various locations on campus and could not be revived. Two were trampled to death after someone mistakenly yelled “Fire!” at the party, causing panic. Each of the students was 19 years old at the time.

The ten decedents’ families have sued CDI as well as the ESU chapter of the Delta Tau Chi Literary Society (“the Deltas”); the chapter hosted the fatal party. CDI and the Deltas respond that none of the students was forced to drink Five Loko and argue that the defendants should not be responsible for the free choices made by the students. The defendants note as well that sale of Five Loko remains legal in the State of Enormous.

Counsel for the plaintiffs intend to offer the following evidence at trial:

- 1) Testimony by twenty students, each of whom attended the “Loko Night” party and lived to tell about it.
- 2) Videos taken at the party on mobile phones. The videos depict a basement crowded with students, many of them holding Five Loko cans. In one video (taken by one of the student witnesses mentioned above), one of the decedents (who later passed out in the Chancellor’s flower garden) is seen drinking Five Loko as onlookers chant, “Chug! Chug! Chug!” In the other video (taken on the phone belonging to a student later trampled to death), a different decedent (who later drove the fatal car mentioned above) is heard saying, “Gimme my keys. I’m not even drunk.”
- 3) Photographs taken by police at the scene of the car accident and by the medical examiner at the morgue (the latter set of photographs depicts all ten decedents).
- 4) An e-mail message concerning the plans for Loko Night that was sent by Delta’s Social Chairperson to Delta’s executive board before the party. The message reads, “The supplies have been secured. We’ve got 10,000 cans of Five Loko in the basement.”

*[Question 3 continues on next page.]*

*[Question 3, continued from previous page.]*

- 5) A memorandum written by CDI's Head Mixologist in March 2010 and sent to various CDI employees. The memo, entitled "Recipe Update," includes this key sentence: "Effective immediately, the caffeine content of Five Loko will be reduced by 50 percent."
- 6) Testimony by Ebenezer Expert, Ph.D. concerning the effects of Five Loko on underage drinkers. During April 2010, Dr. Expert conducted three parties as an experiment, each held on the campus of a university similar to ESU. Each was open to students and widely advertised. At one party, attendees were served original Five Loko (left over from before the recipe change). At another, attendees were served the new Five Loko. At the third, attendees were served a caffeine-free beverage otherwise identical to Five Loko. The cans at all three parties appeared identical. Dr. Expert will testify that partygoers consuming the original Five Loko behaved in a substantially more dangerous manner, and consumed substantially more beverages per person, than students at the other parties.

The Enormous Rules of Evidence are identical to the Federal Rules. You have been hired by CDI to defend this suit. The CDI general counsel asks you, "Is this evidence all admissible?"

How do you reply?

**[END OF NARRATIVE ANSWER SECTION.]**

**[END OF EXAMINATION.]**