

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 [three-fifths (60 percent) of the narrative answer portion of the examination]

[Note: Although the facts in this question may be similar to those of a real recent event reported widely in the news, students should confine their analysis to the facts presented in this question. No attempt has been made to ensure that this question accurately reflects actual recent events.]

You are an entry-level prosecutor in the district attorney's office for the county of George, in the state of Fisher. Your office is in Foundation, the largest town in the county. Foundation is also home to Foundation Fertilizer, a company that manufactures and sells fertilizer to farms throughout the state. Foundation Fertilizer is owned and operated by Frank Thurber.

Late one night in April 2013, a fire spread at the Foundation Fertilizer plant, eventually causing an explosion. Houses in the surrounding neighborhood were destroyed, and the town's middle school was severely damaged. Twelve persons were killed during and soon after the explosion, including two firefighters responding to the disaster.

Several Foundation residents took still photographs and video recordings of the burning plant. A photograph of one of the dead firefighters—showing gruesome chemical burns—has aroused public sympathy nationwide.

In the days after the explosion, news reports stated that Foundation Fertilizer stored vast quantities of certain dangerous chemicals at its plant, including Substance X. Further, the amount of Substance X stored there exceeded the amounts allowed by federal regulations. In one article in the *Foundation Times*, plant technician Wanda Worker was quoted saying, "We knew we had too much Substance X on-site at the plant, and some of us complained to management. But Frank Thurber told us he couldn't move some of it off-site because the extra storage and transport costs would have reduced profits."

Reports also revealed that some years ago, federal safety inspectors fined Foundation Fertilizer because the plant had dangerous working conditions.

Your boss (the district attorney) wishes to charge Frank Thurber with negligent homicide, and perhaps even "depraved indifference" murder. In addition, the D.A. also wishes to charge Thurber with "unlawful storage of dangerous chemicals," which the Fisher Penal Code defines as "knowing possession of a chemical regulated by the laws of this state or the United States in an amount exceeding that which is allowed by law."

The D.A. asks for a memorandum concerning the admissibility of the following pieces of evidence at Thurber's trial, which is set for December 2013:

- (a) The photograph of the dead firefighter.
- (b) Wanda Worker's recollection of discussions with Frank Thurber concerning Substance X.
- (c) A copy of the form sent by federal regulators to Foundation Fertilizer assessing the fine for dangerous conditions. (You were able to download a scanned copy of the form from the regulatory agency's website.)
- (d) Testimony from the husband of a fertilizer plant security guard killed during the explosion concerning what a good wife and mother the security guard was.
- (e) Testimony from Francine Thurber, wife of Frank Thurber, that when he first saw television news reports of the explosion, Frank said, "My carelessness finally got the best of me."
- (f) Testimony from Francine Thurber that after making the statement quoted above, Frank called his brother in Nebraska and said, "My carelessness finally got the best of me, bro."
- (g) Testimony by Frank Thurber's minister concerning Thurber's careful nature and concern for his fellow Foundation residents.
- (h) Evidence that the same minister was convicted a Kansas court in 2002 of embezzling funds from a church.

The state of Fisher has adopted rules of evidence identical to the Federal Rules of Evidence.

Provide the text of your memorandum.

Question 2 [one-fifth (20 percent) of the narrative answer portion of the examination]

You are counsel to Ophelia, who has sued her ex-boyfriend, Hamlet. The complaint alleges that Hamlet has been harassing her by arriving unannounced at Ophelia's home, by calling her often, and by bothering her at work.

The plaintiff wishes to offer a tape into evidence. She claims the tape is of a voicemail message left by Hamlet for her. Both parties have stipulated that the tape is a genuine recording of a message left by someone who called the plaintiff's mobile phone. The following is a transcript of the message.

[Computer voice] First new message. Received at 12:16 a.m. Thursday from phone number 212-555-1234.

[Man's voice] Hey, it's Hamlet. Looks like I missed you again, unless you're screening my calls or something. I just got out of a great movie, "The Murder of Gonzago." You would have loved it. It's just like that play we saw on our second date. Anyway, we really should meet up sometime, like maybe this weekend or something. So gimme a call. You know the number.

Hamlet's counsel has filed a motion in limine requesting that the tape be excluded from evidence. Among other arguments, defense counsel states that the voice on the phone is not Hamlet's.

Defense counsel also argues that even if the tape really is a recording of Hamlet's voice, the tape nonetheless is not the best evidence of the alleged harassment.

- (a) How might you convince the court that the tape is authentic? (Because this piece of evidence is very important to your case, you may wish to propose multiple methods.)
- (b) How will you respond to the "best evidence" objection?

Question 3 [one-fifth (20 percent) of the narrative answer portion of the examination]

You serve as a staff member for a state legislator. Your state lacks codified rules of evidence, and your boss chairs the legislative committee that would be responsible for writing such rules should the legislature decide to do so.

Your boss leaves you a note one day, which reads:

I read an interesting article suggesting that in civil cases, the hearsay rule is more trouble than it's worth. So maybe if we use the Federal Rules as the starting point for our own rules, we should make a little change. Specifically, we could add the words "In criminal cases" at the start of Rule 802, which currently begins with, "Hearsay is not admissible ...". That way, we don't mess around with the rights of criminal defendants, but we make normal trials simpler. What do you think?

How do you respond?

[END OF NARRATIVE ANSWER SECTION.]

[END OF EXAMINATION.]