

1) (20 points)

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. FRE 404(a)(1). Character is a generalized disposition to engage or refrain from engaging in certain conduct. (ACN FRE 406). The relevancy of evidence cannot "pass through character"—that someone has a character trait and acted consistent with that trait at the relevant time. The relevancy here impermissibly passes through character. Defense attempts to show that Ferrer is an immoral person and therefore engaged in immoral activity (peddling prostitution and smut), which is not constitutionally protected. There are exceptions to the prohibition on character evidence for pertinent traits of character of a defendant or victim in criminal cases. FRE 404(a)(2). But this is a civil action, not a criminal case; those exceptions do not apply. Even if "prostitution peddler" or "smut peddler" qualifies as a pertinent trait, such evidence of a character trait is not admissible in a civil action.

2) (20 points)

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. FRE 404(a)(1). Evidence of a person's character may be admitted for impeachment purposes, pursuant to FRE 607-609. FRE 404(a)(3). "Any party, including the party that called the witness, may attack the witness's credibility. FRE 607. Rule 607 incorporates 14 common law categories of impeachment evidence, 14 aspects of witness credibility and the reliability of testimony that may be attacked. A witness's credibility may be attacked by testimony about the witness's reputation for having a character for untruthfulness or an opinion about that character. FRE 608(a). This rule does not open the door to general character evidence; it allows evidence only of the trait of untruthfulness or untruthfulness. Truthfulness may suggest falseness (affirmative lies) or dishonesty (a willingness to conceal or hide information).

The trait at issue does not go to untruthfulness. Smut-peddling does not involve falseness or dishonesty. It is perhaps unsavory behavior. But it does not entail untruthfulness.

3) (30 points) (850 words)

The objection should be overruled; the evidence is admissible.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. FRE 401. One piece of evidence need not establish a fact; it must move the factfinder towards a finding that the fact is true or not. "Any tendency" requires the slightest rational connection between the evidence and the fact at issue, whether directly (where the evidence establishes the fact) or circumstantially (where the evidence follows a chain of inferences to the fact). A fact of consequence is significant in light of applicable law, one that establishes an element or matters to resolution of the claim, charge, or defense. Relevant evidence is admissible unless another legal source provides otherwise. FRE 402.

These letters form the First Amendment violation. The First Amendment precludes "jawboning" in which "government threatens or suggests the imposition of sanctions against one group of people to coerce that group to cease engaging with another group of people, with the goal of punishing the latter group for their speech or of restraining the latter group's speech." *American Family Association*. These letters attempt to jawbone Visa and Mastercard to cease engaging with Backpage. They inform Visa and Mastercard that they face possible civil and criminal liability and loss of consumer good will if they continue to do business with Backpage, (Ex. C-F), with the goal of coercing or convincing Visa and Mastercard to disengage from the plaintiff.

But these letters are relevant only if connected to Sheriff Dart. Smith's follow-up letters may violate the First Amendment violation by reiterating the threats to Visa and Mastercard if they do not cease doing business with Backpage. But Smith is not the defendant; Dart is. A supervisor cannot be liable for his underling's conduct; he must direct or control the underling's wrongdoing. *Ashcroft v. Iqbal* (2009). Dart therefore can be liable for the violation from these letters (written by Smith) only if he directed or controlled their sending, not if they arise from Smith's independent action.

"When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." FRE 104(b). Proof sufficient to support a finding means a reasonable jury could find the conditioning fact. Plaintiff must offer sufficient evidence that Dart directed or controlled the sending of the Visa and Mastercard letters to show that he directed or controlled Smith in committing this violation.

According to Smith, Dart did not review or approve these specific letters in advance. (Smith A7-8). She did testify to her general letter-writing practices within her position as Chief First Deputy. (Smith A10-17). But that is ordinarily insufficient. Evidence of any other crime, wrong, or act is not admissible to show a person's character to show that the person acted in accordance with that character on a particular occasion. FRE 404(b)(1). Plaintiff cannot use past Dart-approved letters to show Dart approved these letters.

But evidence of a routine organization's practices may be admissible to prove the organization acted in accordance with the routine practice on a particular occasion. FRE 406. The routine practice need not be corroborated. *Id.* Under the common law approach, routine practice may be proven by testimony in the form of opinion or by specific instances of conduct sufficient in number to warrant a finding that the practice was routine. (Unenacted FRE 406(b)).

Smith's testimony is sufficient to support a finding about the routine practice of the Sheriff's Department and when she sends follow-up letters following an initial letter from the Sheriff. She describes it as a regular part of her job, one described in her written job responsibilities and explained to her when she began her job. (Smith A12-14). She testified that she does this for every letter that "directly or indirectly suggests potential criminal or civil exposure." (Smith A11). Dart does not review or approve each letter; she writes and sends it on her own, pursuant to her ordinary job responsibilities that Dart established and informed Smith of in writing and orally. (Smith A12-17).

Smith's testimony about her letter-writing practices, in turn, constitutes proof sufficient to show Dart's direction or control of these letters. Dart did not order Smith to send these letters and did not know she sent them. But Dart established and informed Smith of her job obligations to send them. The letters suggest civil and criminal exposure, (Ex. C-F), the type of letters Smith sends as part of her job. (Smith A11). The letters themselves state they were written with Dart's "support and agreement." (Ex. C-F). This is proof sufficient to establish Dart's role in sending these four letters, thereby connecting Dart to these constitutional violations.

4) (25 points)

The evidence is in a proper form and admissible for credibility.

"Any party, including the party that called the witness, may attack the witness's credibility." FRE 607. Rule 607 (through the word "credibility") incorporates 14 common law categories of impeachment evidence, 14 aspects of witness credibility that may be attacked. Impeachment may touch on collateral or non-collateral issues; a

non-collateral issue is central to the case, while a collateral issue is non-central. One aspect of credibility is bias--evidence that a witness has an emotional predisposition in favor of one party. The predisposition need not be positive; it includes any emotion--including fear--that may cause a witness to shade her testimony in favor of one party. Bias is always non-collateral; it can be proven by non-extrinsic evidence (the testimony of the target witness) or extrinsic evidence (evidence other than the words of the target witness on the stand).

Although plaintiff called Deputy Smith to testify, a party can impeach its own witness. This testimony is relevant to bias. Smith owes her position to Sheriff Dart. He appointed her to her position as second-in-command, holds the position at his pleasure, enjoys no civil service or First Amendment protection; Dart could remove her from the position at any time for any reason. This creates a bias in her testimony--she has motive to testify in a way favorable to Dart to keep him happy and to retain her job. This is non-extrinsic evidence on a non-collateral matter; Smith is the target witness that plaintiff seeks to impeach and she is providing the impeaching testimony.

As for the form of the evidence: A court may allow leading questions on direct examination when "a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." FRE 611(c)(2). A leading question is one that contains the desired answer, requiring a yes or no answer. These questions are leading; counsel essentially made statements about Smith's job security--she lacks any--that she seeks Smith to affirm. Smith qualifies as a witness identified with an adverse party. Dart is a party and Smith is a high-ranking deputy, second only to him in the office. (Smith A2-5).

5) (20 points)

Scharf's testimony is relevant.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. FRE 401. One piece of evidence need not establish a fact; it must move the factfinder towards a finding that the fact is true or not. "Any tendency" requires the slightest rational connection between the evidence and the fact at issue, whether directly (where the evidence establishes the fact) or circumstantially (where the evidence follows a chain of inferences to the fact). A fact of consequence is significant in light of applicable law, one that establishes an element or matters to resolution of the claim, charge, or defense. Relevant evidence is admissible unless another legal source provides otherwise. FRE 402.

Scharf's testimony shows that the Smith letters (Ex. C and E)--received after its June 15 decision to discontinue--reenforced that decision and caused it to remain disengaged from Backpage. Scharf testified that the letters convinced him that the June 15 decision was correct. Scharf had second thoughts and consulted with general counsel and others, kicking around "when and if we might reconsider and under what circumstances we might reconsider." (Scharf A27-30). Those conversations stopped after receiving the letters from Smith--Scharf found the letters "convincing" and "stopped thinking about going back to business" with Backpage. (Smith A.28). This testimony moves the needle towards concluding that the Smith letters caused Visa to stand by its decision to disengage from Backpage.

The decision not to reconsider and to stand by that decision is a fact of consequence. To prevail on a First Amendment jawboning claim, plaintiff must show that the government conduct had the effect of causing the recipient of pressure to disengage or to remain disengaged from any business relationship. *Dart v. Craigslist* (7th Cir. 2009). Scharf's testimony shows that Visa remained disengaged after receiving Smith's letters, a fact that establishes one element of the First Amendment claim.

6) (20 points)

This is impermissible evidence of subsequent remedial measures.

“When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove” culpable conduct. FRE 407. They may be admissible for other purposes, including impeachment or proving disputed ownership, control, or feasibility of precautionary measures. Although commonly used in products-liability cases, FRE 407 covers all evidence of changes in conduct, practices, or procedures, implemented after the events or injuries at issue, where they would have made the injury less likely had they been in place at the time. FRE 407 rests on two policy rationales. Subsequent measures lack real probative value—evidence of improvements to something does not show that the prior was defective or wrongful. As the saying goes, “that the world is getting wiser does not mean it was foolish before.” More importantly, the rule seeks to encourage real-world efforts to innovate and improve. An actor would be less willing to take steps to do things in a safer way if those efforts could be used to establish prior liability.

The county attorney advised Dart not to send letters such as the ones to Visa and Mastercard and that he should clear future letters with counsel’s office; Dart agreed to both changes. (Dart A1-6). The point was to avoid future First Amendment problems. Dart did this on July 5, weeks after the six letters at issue in this case had been sent. (A1; Exhibits A-F). This change would make the injury less likely. The letters create the constitutional violation. Had this practice been in place, Dart would not have sent the letters—or at least would have consulted with the county attorney, who might have recommended against sending them. The injury at issue—that constitutional violation—would have been less likely to occur had the letters not been sent. Evidence of Dart’s changed practices cannot be used to establish liability for the prior letters.

The evidence has not been offered for another, permissible purpose. Plaintiff does not seek to impeach Dart with this evidence. And the defense has not disputed ownership, control, or precautionary measures.