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Subject ETP
Date 5/10/03

Multiple Choice 42.5
Essay #1 23.0
Essay #2 22.0
Number 687 87.5

(#1)

Write your number, title of course and date above
and in each blue book.
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A+

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Question 4

Testimony by Nancy News

Much (not all) of this testimony qualifies as admissible under 803(4) - medical diagnosis or treatment. The fact that he felt terrible, had been having awful headaches and nausea are all

reasonably pertinent to medical diagnosis or treatment. The statement that these symptoms began when Denise took over his medications

should also be admitted as the "inception"

of the symptoms because from a medical diagnosis perspective, a doctor may want to know this in case the person who's

administering the medications needs further

hand) explanations about how to do so. Therefore,

all of these portions qualify under 803(4) and should be admitted.

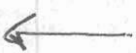
That brings us to "I think she may have been poisoning me. If she can kill me off, she'll inherit my money." This is tougher.

Peter may argue that "poisoning" could be a cause and a diagnosis + thus qualifies for 803(4). Denise will argue that there is no independent evidence of poisoning (although there is the insulin). ~~Denise~~ Denise will ^{then} argue that the probative value of this statement ^{is minimal because it was} made by a man who, the next day was not in his right mind and was

worried about little green men. ~~But~~ Denise will argue that the danger of unfair prejudice is very high because the context (to a medical provider) may inspire the jury to believe it.

I would admit the statement w/ a limiting instruction under 105, that the jury should carefully weigh the credibility of that statement. I believe Peter will be adequately able to counter this testimony w/ testimony from his father's physician.

Peter can offer that under 806 in any event to attack the credibility of a hearsay declarant.



Father's Attending Physician

Generally, an attending physician would not be an expert on whether someone was

sane. But even a lay witness under 701 ✓

can testify to an opinion if it is based on

their perceptions and will help the trier of

fact to understand the evidence or

determine a fact in issue. Peter ✓

lay think testimony as to sanity of someone making

wild accusations against everyone in reach ^{and seeing} little green men

is rationally based on the perceptions of the

witness. So even as a lay witness this

testimony would come in.

~~It could also come in~~

It is not clear from the fact pattern

when Peter's father's physician actually

saw the father. He must have personally
knowledge. If Peter can show that the
physician visited his father every day

for the last four days, personal knowledge

will be established and his testimony

should come in.

Denise may argue that these

statements by the physician amount to

testimony about specific instances of

conduct under 608 b and amount to matters of

improper character testimony which

is not proper on cross. However, the

by the physician are a method of impeaching the credibility of a hearsay declarant under 806. As such the declarant's "testimony" as to "poisoning" can be ~~also~~ impeached via resort to common sense impeachment (should you believe the testimony of someone seeing 'little green men'.) In conclusion, I think the father's physician's testimony as to ~~poisoning~~ sanity should come in.

Denise - impeaching father's physician 803(4)!

If pt entries in charts are always accurate,

this seems like a recorded recollection 803(5)

that should come in - it may be read into

the record but ~~not~~ the document may not

be admitted unless Peter wishes to admit it.

It is a memorandum or record, concerning

a matter about which the witness should

remember (he says they're always accurate and

that the initials appears to be his). Records

like this are generally done when the matter

is fresh in memory. On that theory it

would come in.

Peter may argue that the doctor cannot

would come in for these hearing exceptions. Even if no hearing exception applied it could still be used to impeach as inconsistent statement.

possibly authenticate something he doesn't remember doing because he has no personal knowledge. The question for

the judge is whether she is satisfied ^{104(a)} by a preponderance of the evidence that

the ~~document~~ entry was made by the physician

I would let it in.

#2

Subject ETP

Date 5/10/03

Number 687

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Denise - prior consistent statement

This is only admissible if Peter has alleged that Denise has testified falsely due to a reason to fabricate. In that event the prior consistent statement would still only be admissible if it was made prior to the event that precipitated the motive to fabricate.

Denise may argue that the "event" was her father's death and that her prior consistent statement was made before that point. Peter will argue that his sister had a continuing motive to poison his father and so the statement

is inadmissible per Tome. ✓

good ✓ I think this is improper bolstering.
So it cannot come in under 801(d)(1).

However, it might come in as an excited utterance. The startling event would be her father's wish to disinherit Peter. She was still under the stress of that event - she was crying. Under 803(2) I think it comes in. ✓

Anonymous Note

Note - Not. It cannot be authenticated.
 We don't know who wrote it or what
 their motives may have been. They can't
 be cross-examined. Who knows why the
 syringes are there. This is very inflammatory
 unreliable and very prejudicial. I
 would not admit it.

hearing? if
 spend for the truth
 she can authenticate it
 as the note she
 received - that name
 is hearing

(#3)

Subject ETP

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Question 2

What about A's statements in the police car?

12

(1) Victoria's statement is not hearsay under 803(5)(i)(c) IF she testifies at trial + is subject to X-exam. If she is incompetent, that won't work. ✓

It might come in under the residual exception. ^{near miss?} There was no questioning going on, she just volunteered it. It might be considered trustworthy. It is offered as evidence of a material fact (who did it.) It must be more probative on the point than other evidence the proponent might get. If it is in the purpose of the rules and in the interests of justice it could be

allowed. However, it does not seem to me that the witness being unavailable for cross will qualify. It's too important and this child's ~~test~~ statement while heartrending is not trustworthy enough. ~~Also~~, I would not let it in under 807.

It might come in under 803(1) present sense impression. It describes a condition "That's them." made while perceiving it. I think it can come in under 803(1)

Confrontation
Clause issues?

(2) Bert's statement
Against Bert

Against Bert his statements are admissions
of a party opponent made by Bert. They
are more "statements" than admissions per
se but they qualify as 803(d)(2)(A).

(2) Bert's statement
Against Anthony

This is not 803(d)(2) because it's not a co-conspirator's statement (neither during nor in furtherance of conspiracy).

This is not a statement against interest. 804(b)(3). (Assuming they will not testify ^{and} are thus unavailable.) It is not against the Declarant's interest (i.e. ^{Bert} ~~Bert~~). It is against Anthony's interest but he's not the Declarant.

It might come in under 807, but it really does not seem trustworthy. It is too ingratiating and only weakly inculpatory the Declarant.

I think the state should try to offer Bert ^{use} immunity and get him to testify ^{or a plea}. To the extent that he has personal knowledge, he can make these allegations in court. While he will be impeached as to bias due to a ^{plea} deal, the tape recording will be admissible as a party admission against Anthony, also a statement v. interest and that should be sufficient.

Otherwise, I don't think you can use Bert's statement ^{at the police station} against Anthony alone. I think he needs to testify.

(3) Warshawsky's ^{"W"}bite mark testimony

W obviously knows nothing about bitemark. She has read a few articles

R702 refers to an expert qualified by skill (never before been asked), knowledge (a few articles qualifies her as an amateur), experience (none), education (a few articles not sufficient, or training (none in this area). She simply doesn't qualify as a bitemark expert. She may be an

expert in other forensic matters but not this one. She is not an expert.

She also has no personal knowledge of the bitemark itself. This is like the

Case we read where the ~~crime scene~~
forensic investigator got sick + the US
Attorney tried to call someone else to
testify as to what the report said about
testing the white powdery substance.

If "W" is not an expert, she can only
testify as to her personal knowledge and
cannot rely on inadmissible evidence.
She can't testify that the photographs are
authentic, ^{or} that they are of Victoria.

Her testimony will not come in.

(403)

10-10⁴⁵

19

Nancy Heas Testimony
pertinent to med diag in
inheriting - out

Father's Physician

Father's medical records

Denise conversation w/ Father

Denise conversation w/ Felicia

Anonymous note exhibit

632 Evidence/Trial Practice
Final Exam Semester II, 2002-2003

Examination No. 687
Professor Barbara Bergman

632 EVIDENCE/TRIAL PRACTICE
Semester II, 2002-2003

Final Examination
UNM School of Law
Six Credits

Professor Barbara Bergman
Saturday, May 10, 2003
Monday, May 12, 2003
9:00 a.m. to 12:00 noon

INSTRUCTIONS

1 1/2h. → 10:30.
45 + 45
→ 11
→ 12:00

1. This examination consists of twenty (20) multiple-choice questions and two essay questions. The multiple-choice questions are worth a total of fifty (50) points. Each essay question is worth twenty-five (25) points. Thus, the entire examination is worth a total of one-hundred (100) points. I suggest you allocate your time accordingly.
2. Answer the multiple-choice questions on the examination itself. Answer the two essay questions in a bluebook(s). Please be sure to:
 - (a) Put your examination number on each page of your exam and on each bluebook.
 - (b) For the essay answers in the bluebook, please skip every other line so that your answers are easier to read and I have room to write comments.
 - (c) Turn in everything at the end
3. This is a MODIFIED OPEN BOOK EXAMINATION. You are permitted to use your notes, any outlines that you and/or your classmates prepared, any required texts, and any material distributed in class (including the little Lexis booklet of the Federal Rules of Evidence). You may **not** use any commercial outlines.

End of Instructions

GOOD LUCK!

[THE QUESTIONS BEGIN ON PAGE 2.]

PART I – Multiple Choice Questions
(Total: 50 points)

Following are twenty (20) multiple-choice questions. Circle the letter of the best answer. Use the Federal Rules of Evidence (or federal common law when appropriate), unless instructed otherwise.

1. Liz Martin had always wanted to live in a real log cabin. In preparation for retirement, she and her husband, Bob, decided to order precut logs to assemble into a cabin on their property in New Mexico. They contacted Natural Homes, a company in Idaho, specializing in constructing cabins “the old-fashioned way.” The company would build the cabin in Idaho, then take it apart, and ship all the component parts to the building site selected by the purchasers. The contract into which the Martins and Natural Homes entered provided that Natural Homes would transport the building materials to the site in New Mexico and assemble the logs for \$65,000. The contract specified that any finishing work -- both externally and internally -- would be completed by the Martins. Unfortunately, when the logs arrived, the Martins were not happy with their quality and when the Natural Homes workers assembled them into the cabin, large gaps appeared between the logs.

When Natural Homes refused to “fix” the cabin, the Martins sued claiming breach of contract and seeking to recover their \$65,000. At trial, Nate Holmes, the owner of Natural Homes, testified that “old-fashioned” cabins often had gaps between the logs. The natural settling of the logs over the first 12 to 18 months after the cabin was constructed would eliminate many of the gaps. In addition, the contract provided that the Martins were responsible for any finishing work and, therefore, any needed filling in of the gaps after the settling process was their responsibility.

The Martins want to call Eric Cook, a carpenter who specializes in woodworking. He will testify that while some minimal spaces might be present initially when the logs were first assembled into a cabin, part of the construction process requires smoothing and evening out the surface of the logs to eliminate any significant gaps. Mr. Cook has never built a log cabin although he has read a few books about the process and how cabins had been constructed in the 1800s. The defense objects to this testimony. The court should:

expert?

- 2.5
- A. Admit his testimony because he has the requisite "expertise" and his testimony would be helpful to the trier of fact.
 - B. Exclude his testimony because general woodworking experience does not qualify him as an expert on the topic of how "old-fashioned" cabins had been built.
 - C. Admit his testimony as lay opinion testimony under Fed. R. Evid. 701.
 - D. Exclude his testimony because he is relying solely upon hearsay that he has read in books about how to build a log cabin.

- 2.
- At the same trial as described in Question 1, Liz Martin seeks to testify that she overheard Mike Manager, a foreman for Natural Homes, say to two of his construction crew members on the New Mexico construction site: "I don't believe how gullible these people are. They're actually buying this shoddy piece of work for quite a chunk of money." The defendant objects. The court should: *party admission*

- 2.5
- A. Exclude the statement as inadmissible hearsay.
 - B. Admit the statement because it is an admission by a party opponent.
 - C. Exclude the statement because Manager was not authorized to make the statement.
 - D. Admit the statement because it was against Natural Homes' interest when made. *D Avail. N.G.*

- 3.
- At the same trial as described in Questions 1-2, the Martins seek to introduce a xerox copy of the contract. The defense objects. The court should:

- 1
- A. Exclude the contract unless the plaintiffs can adequately explain the non-production of the original.
 - B. Admit the contract because it is a business record. *Martin's had no duty to make.*
 - C. Exclude the contract because it is inadmissible hearsay. *Not offered for truth.*
 - D. Admit the contract once it has been adequately authenticated since it is being offered for a non-hearsay purpose. *Independent legal significance*

4. At the same trial as described in Questions 1-3, Bob Martin wants to testify that he called Nate Holmes, the owner of Natural Homes, by dialing the number listed for the company and asking to speak to the "boss." He had never previously met or spoken to Holmes. The person who came to the phone said he was Nate and asked what could he do to help Mr. Martin. After Mr. Martin gave Nate "a piece of his mind" about the condition of the logs, Nate informed Mr. Martin that they always wanted their customers to be satisfied but they had been having some trouble getting good logs this season. Nate then said that, given Mr. Martin's dissatisfaction, the company would immediately send him a check refunding the purchase price. Mollified, Mr. Martin waited for the refund check. It never came. Holmes claims that he never spoke to Mr. Martin on that occasion or any other. *rebuttal*
When Mr. Martin begins to testify about this telephone conversation, the defense objects. The court should:

A. Exclude the testimony because Mr. Martin cannot establish the relevancy of the conversation since he cannot prove to whom he spoke.

2.5 B. Admit the testimony because Mr. Martin has sufficiently authenticated the call as being with Nate Holmes at the Natural Homes' office and it constitutes an admission by a party opponent. *Nate can testify to deny*

C. Admit the testimony because it constitutes a statement against interest. *+ jury can put it out -*

D. Exclude the testimony because it constitutes an offer to compromise that is not admissible to show liability. *credibility not admissib.*

5. At the same trial as described in Questions 1-4, the defense seeks to call Liz Martin as a witness to testify about a conversation she had with her husband. Apparently, Mr. and Mrs. Martin believed they were talking privately, but they did not realize that one of the construction workers was able to overhear their conversation. (Because this is a diversity lawsuit in federal court, the court applies New Mexico privilege law.) The plaintiffs object. The court should:

- 2.5
- A. Prohibit the defense from calling Mrs. Martin as a witness if either she or her husband object to her testifying.
 - B. Prohibit the defense from calling Mrs. Martin as a witness if she objects to being called as a witness in these circumstances.
 - C. Permit Mrs. Martin to be called as a witness but sustain the plaintiffs' objection to the extent that the defense seeks to question her concerning confidential communications with her husband as long as her husband objects.
 - D. Permit Mrs. Martin to be called as a witness but sustain the plaintiffs' objection to the extent that the defense seeks to question her concerning any confidential communications between her and her husband as long as the person who made the confidential communication objects.

6. At the same trial as described in Questions 1-5, Nate Holmes seeks to testify concerning certain provisions in the contract he signed with the Martins and his understanding of what they required. The contract itself has already been admitted into evidence. (This in no way reflects the correct answer to Question 3.) The plaintiffs object. Applying evidentiary rules (rather than any substantive contract law), the court should:

- A. Exclude the testimony because the contract speaks for itself.
- B. Exclude the testimony because it is self-serving.
- C. Admit the testimony because Holmes is entitled to explain his understanding of the terms of the contract to the extent it is relevant given the issues in the case.
- D. Admit the testimony because Holmes is an expert on the terms of the contract.

reasonable
pers on std -
not his
belief

7. At the same trial as described in Questions 1-6, the defense seeks to introduce evidence that Nate Holmes has a reputation for being an honest businessman who would never cheat a customer. The plaintiffs object. The court should:

- 2.5
- A. Permit the testimony because it is being offered by the defendant and is proper character evidence. *Testimony Claim is breach of K, not fraud. Truthfulness testimony not yet in issue.*
 - B. Exclude the testimony because it is inadmissible character evidence.
 - C. Permit the testimony because it falls within the Fed. R. Evid. 803(21) hearsay exception. *gets you past hearsay but not 608*
 - D. Exclude the testimony because it is not relevant to any issues in the case.

8. Richard Farmer was driving his large farm tractor down a steep gully one afternoon while cutting the weeds and multiflora roses infesting his back forty acres. Unfortunately, the gully was apparently steeper than Mr. Farmer realized, and the tractor tipped over. Mr. Farmer was severely injured. He has now sued Taylor Tractors, the company that manufactured this particular tractor, claiming, in part, that the tractor's design was defective. This design defect supposedly caused it to tip over unexpectedly. At trial, Mr. Farmer wants to introduce evidence at trial that 100 other Taylor Tractors, which were the same model as the one that tipped over with Mr. Farmer, had tipped over on other occasions under similar circumstances, i.e., when being driven down a steep incline. All these accidents had occurred before the incident involved in this case. The plaintiff plans to call Eddie Romero, an employee at Taylor Tractors who knows about these other incidents, to prove both that the Defendant had notice of the design defect and to prove that the design of this tractor was defective. Defense counsel objects. The court should:

not remedial

substantiated
similarity
notice

- 2.5
- A. Exclude the testimony because it is not relevant to the issue of whether Mr. Farmer's particular tractor was defective.
 - B. Exclude the testimony because it has minimal probative value and will take too long to present given the lengthy cross-examination that defense counsel insists will be necessary.
 - C. Exclude the testimony because it is inadmissible hearsay
 - D. Admit the testimony to show that Taylor Tractors had notice of the proclivity of this particular tractor design to tip over when going down steep inclines and also to show that the design of the tractor was defective when used in such circumstances.

9. At the same trial as described in Question 8, Taylor Tractors wants to introduce evidence that it has sold 20,000 tractors to farmers in the Midwest (where Mr. Farmer lives) which were the same model as that involved in this accident and it has received reports of only 100 accidents (as described in Question 8). (This in no way suggests the correct answer to Question 8, but for purposes of this question, assume that the court admitted the evidence discussed in Question 8.) The plaintiff objects. The court should:

- 2.5
- A. Exclude this testimony as totally irrelevant
 - B. Admit the testimony because the rule of completeness requires that the defendant be permitted to put the plaintiff's evidence into proper perspective.
 - C. Exclude the testimony because it has minimal probative value that is substantially outweighed by the likelihood it will be unfairly prejudicial.
 - D. Admit the testimony because it is relevant to the issue of whether Taylor Tractors had reason to know that the design might be defective.

10. At the same trial as described in Questions 8-9, Taylor Tractors wants to cross-examine Mr. Farmer about the following: (1) his convictions in 1995 for speeding and reckless driving; (2) the fact that he lied on his loan application when he purchased the tractor by stating that he had outstanding debts of \$15,000, when he actually had outstanding debts of \$35,000 when he filled out the application; and (3) his three other pending lawsuits against manufacturers of farm equipment, claiming that he had been injured by the defective design of each of the three different pieces of equipment. Plaintiff objects. The court should:

- A. Exclude (1) and (2) because this is not proper impeachment, but permit the defense to cross-examine Mr. Farmer regarding his other lawsuits to show his motivation in bringing this one.

Exclude all three lines of cross-examination because none of them constitute proper impeachment. *2 for sure*

- C. Permit cross-examination on (2) only in the discretion of the court but exclude (1) because these are not impeachable convictions and (3) because, absent any evidence that the claims raised in the other lawsuits are not valid claims, the pending lawsuits are not relevant.
- D. Permit cross-examination on (1) and (2) but exclude (3) because there is no evidence that the claims raised in the other lawsuits are not valid claims.

You didn't say whether the 1995 convictions were misdemeanors. In that event they should be excluded, leaving "C" as the remaining answer. However convictions relating to truthfulness "shall be admitted," there's no discretion.

11. The Department of Justice is investigating criminal allegations of insider trading by Martha Steiner. On January 5, 2003, an FBI agent served a *subpoena duces tecum* on Steiner Enterprises, a corporation of which Ms. Steiner is the Chief Executive Officer. The subpoena sought production of all documents in the possession of the corporation concerning Ms. Steiner's communications with her stockbroker and anyone else about her sale of 1,000 shares of Livity stock (which is the subject of the insider trading investigation). The corporation has moved to quash the subpoena. The court should:

A. Deny the motion to quash and order compliance with the subpoena because the corporation does not have a privilege against self-incrimination.

Grant the motion to quash because production of the documents might incriminate the corporation. *no 5th for Corp.*

Deny the motion to quash and order compliance with the subpoena unless the corporation can establish to the court's satisfaction that the documents constitute inadmissible hearsay. *can do discovery to lead to admissible evidence - need not be admissible itself*

Grant the motion to quash because production of the documents might incriminate Ms. Steiner.

12. In the same case as described in Question 11, assume that the Department of Justice has obtained an indictment against Ms. Steiner for insider trading. At trial, Ms. Steiner seeks to call David Donald, who will testify that he has known Ms. Steiner for over twenty years and that in his opinion Ms. Steiner is the most honest and law-abiding person he has ever met. The prosecution objects. The court should:

A. Exclude the testimony because it is inadmissible character evidence.

Permit the testimony because it is admissible character evidence. *Def't can under 404 a*

Exclude the testimony because character may only be proven through reputation testimony. *and opinion*

Permit the testimony because Ms. Steiner's character for honesty is an essential element of the charge.

no its not

2.5

2.1

13. In the same case as described in Questions 11-12, assume that the court has admitted David Donald's testimony. (This in no way suggests the correct answer to Question 12.) The prosecution now seeks to cross-examine Mr. Donald on the following three topics: (1) the fact that he had been employed as a consultant by Steiner Enterprises in 2001 and had been paid over \$1,000,000 for his services; (2) his prior inconsistent statement during a conversation with a close family friend that Ms. Steiner is a thief; and (3) whether he is aware that Ms. Steiner was convicted of trespassing on government property (during an anti-war rally this spring). The defense objects. The court should:

*bias
interest or
motive
law-abiding*

- 2.5
- A. Permit all three lines of cross-examination as proper impeachment.
 - B. Permit only (1) and (2) as proper impeachment, but exclude (3) because it is not an impeachable conviction. *law-abiding" gets it in - rebut his opinion*
 - C. Permit (1) and (3) but exclude (2) because the statement was not made under oath subject to the penalty of perjury. *not offered for truth*
 - D. Permit (2) and (3) but exclude (1) because he is not currently employed by Steiner Enterprises. *not a party admission, bias interest & motive*

14. In the same case as described in Questions 11-13, Ms. Steiner testifies that she always sold her stocks if they increased in value by a certain percentage over their original purchase price (as she had done with the Livity stocks in this case). She was superstitious about not being too greedy and so she always sold in those circumstances. She had no idea that the imminent disclosure of certain FDA findings was going to result in the bankruptcy of Livity. She seeks to introduce evidence of ten other times when she instructed her stockbroker to sell her stock after they had increased in value by the specified amount. The prosecution objects. The court should:

*similar
non-wrongful
acts
402+
403*

- 2.5
- Exclude the evidence because it is inadmissible character evidence.
 - B. Admit the evidence because it is probative of her intent and is not being introduced to prove character.
 - Admit the testimony because it constitutes a habit
 - Exclude the evidence because it is irrelevant to her guilt in this case

15. In the same case as described in Questions 11-14, the SEC had also investigated Ms. Steiner's sale of the Livity stock as part of its official regulatory duties. The SEC had issued an investigatory report concluding that there was insufficient evidence to establish that Ms. Steiner had engaged in any improper insider trading (applying a clear and convincing evidence standard). The defense now seeks to introduce that report. The prosecution objects. The court should:



^{803(B)(3)}
A. Admit the report and its findings because it is a public record and there is no evidence that the SEC's sources of information are not trustworthy. *just findings under 803(8)(c)*

- 2.5
- B. Exclude the report and its findings as inadmissible hearsay.
 - C. Exclude the report and the findings because they are not binding on this jury and are likely to mislead or confuse this jury.
 - D. Admit the report as an admission by a party opponent but exclude the findings because the SEC applied a different standard of proof.

16. Danvers has been charged with the rape of Melissa Victor. At trial, the state seeks to introduce the testimony of Betty Bowers and Clara Connors. Bowers will testify that twenty (20) years ago, when she and the defendant were in high school together, they had dated briefly and attended the high school prom together. The night of the prom, according to Bowers, the defendant had raped her. She had never before reported the rape. Connors will testify that she is the defendant's stepdaughter and that when she was five years old, the defendant had molested her. Because she has only recently recovered this repressed memory, the defendant was never prosecuted for this offense. The defense objects to the testimony of both Bowers and Connors. The court should:

Admit the testimony of both women to show the defendant's propensity to commit sexual offenses.

- 2.5
- ~~B~~ Exclude the testimony of both witnesses since neither allegation resulted in a criminal conviction.
 - C. Exclude the testimony of both women because the jury is likely to use the evidence impermissibly to conclude that Danvers has the propensity to commit sexual offenses.
 - D Admit the testimony of Bowers to show Danvers' propensity to commit sexual assaults and exclude the testimony of Connors because Rule 413 only permits the admission of evidence of other sexual assaults in a rape case and Danvers is not charged with child molestation. *No*

17. Dante is being prosecuted in state court for distribution of crack cocaine. At that trial, FBI Agent Filton testified that while he was working in an undercover capacity, he had purchased three kilos of crack cocaine from Dante. Several days later, other agents placed Dante under arrest. For some inexplicable reason, the state jury acquitted Dante. Dissatisfied with the results of the state trial, federal prosecutors indicted Dante for the same offenses in federal court. (This multiple prosecution for the same offense is not prohibited by the double jeopardy clause because of the dual sovereignty doctrine.) By the time of the federal trial, Filton has died. At the federal trial, the prosecution seeks to introduce a transcript of Filton's testimony from the state trial. The defense objects. The court should:

D unavailabl
804
Former testimony

Former testimony is firmly rooted

- A. Admit the evidence under the former testimony exception to the hearsay rule.
- Exclude the evidence because it violates the defendant's constitutional right to confront the witnesses against him. firmly rooted
- Exclude the testimony because Dante has a different attorney at the federal trial than he had at the state trial.
- Admit the testimony because it is being offered for a non-hearsay purpose.

2.5

18. In the same case as described in Question 17, assume that the court has admitted the transcript of Agent Filton's testimony. (This in no way suggests the correct answer to Question 17.) The defense at the federal trial now seeks to introduce the following evidence: (1) Filton was addicted to crack cocaine when he allegedly made the purchase from Dante; and (2) Filton had told his best friend, Tom Lawton, who was an attorney, that he was going to lie to put Dante behind bars because he was a scumbag who deserved to go to prison. The prosecution objects. The court should:

planning to commit perjury not covered

- A. Exclude both (1) and (2) because Filton is not present in court as a witness and the defense is stuck with whatever impeachment (which did not include this evidence) was done at the state trial by the other defense counsel.
- Admit both (1) and (2) because they constitute proper impeachment of a hearsay declarant. bias, interest, motive
→ prior bad act
- Admit (1) because it impeaches Agent Filton's ability to perceive what happened on the critical date but exclude (2) because any conversation Filton had with Lawton is protected by the attorney-client privilege.

2.5

- Exclude (1) because there is no evidence that Filton was high on cocaine when he made the alleged purchase and admit (2) because it constitutes an admission by a party opponent.

Filton

19. In the same case as described in Questions 17-18, at trial the prosecution unexpectedly seeks to introduce evidence that Agent Filton had gone down to the local police station the day after the crack cocaine purchase and reviewed a number of photo books in an effort to identify the man from whom he had purchased the three kilos of cocaine. When he came to Dante's mug shot, he immediately stated: "There's the sleazeball I bought the crack from yesterday." Detective Ramos was present during this identification procedure and will testify to what Agent Filton said. This evidence was not presented at the state trial. The defense objects. The court should:

- A. Admit the testimony of Detective Ramos because it is a prior identification by Agent Filton made after he perceived the person.
- B. Admit the testimony under the residual hearsay exception
- C. Exclude the testimony because Agent Filton is not a witness at the trial and is not subject to cross-examination.
- D. Exclude the testimony because it is not sufficiently trustworthy.

*present sense
impression
describe or relate
at the time*

20. In this first-degree murder prosecution of Don Dodson, the state calls a forensic scientist who works in the state laboratory to testify that the large bowie knife recovered from the defendant was the exact same knife used to stab the victim to death. The proffered expert witness bases his conclusion on the measurements he took of the knife and the entry wounds on the victim's body. The blade of the knife has no uniquely identifiable characteristics. The defense objects to this testimony. The court should:

- A. Admit the testimony because it will be of assistance to the trier of fact.
- B. Exclude the testimony because the trier of fact can draw its own conclusions from examining the knife and the autopsy report.
- C. Admit the testimony because it is up to the jury to evaluate such expert testimony.
- D. Exclude the testimony unless the expert can convince the court that the knife wounds on the victim's body are uniquely identifiable and that the techniques used by the expert are sufficiently reliable.

2.5

PART II – Essay Questions
(25 points each for a total of 50 points)

For purposes of answering these questions, assume that the Federal Rules of Evidence (or federal common law when appropriate) apply, unless instructed otherwise. Please answer the question in your bluebook(s).

Question No. 1

Peter Plaintiff is suing his sister, Denise Defendant, for an equal portion of his father's estate. He is claiming that his father's second will is invalid because his father was incompetent when it was executed two days before his father's death and that, even if the will were valid, Denise should not inherit because she intentionally caused their father's death. Under the terms of the original will, Peter was to inherit half his father's estate (worth approximately \$100,000,000). Under the revised will, Peter's father explicitly disinherited him and gave all the estate to Denise. Denise defends on the grounds that the second will is valid and that even if the second will were invalid, Peter intentionally caused his father's death and, thus, under existing case law, he may not benefit from his father's death. Therefore, as her father's sole remaining heir, she is entitled to the entire estate. Her father was eighty-five when he died and had been in poor health for years.

During trial, Peter seeks to introduce testimony from Nancy Nears, the emergency room nurse who first examined his father when his father was admitted to the hospital five days before his death. Ms. Nears will testify that Peter's father told her that he felt terrible. He had been having awful headaches and nausea ever since his daughter, Denise, had taken over responsibility for administering his medications. He said, "I think she may have been poisoning me. [If she can kill me off, she'll inherit half my money.]"

803(4)
part tense
not 803(3)
part

Peter also wants to call his father's attending physician, who will testify that he had treated Peter's father for over ten years, and while Peter's father had been in frail health, his mind had always been sharp until a few days before he died. Four days before his death, Peter's father had become delusional making all kinds of wild accusations against everyone, including him (the doctor), the nurses, and Peter. In his opinion, Peter's father had not been in his right mind during the last four days of his life. He was hallucinating and claiming that the little green men were coming for him.

perception
of witness

If the court permits the doctor to testify, Denise will seek to impeach him with an entry found in her father's hospital records dated two days before her father died which states: "Pt. finally resting comfortably. Appears to be oriented to time and place. Visited by daughter and family attorney." The doctor's initials appear immediately after this entry. During his

deposition in this case, the doctor testified that while the handwriting appeared to be his, he does not remember making the notation or the facts contained in it. He did concede during the deposition that his entries in a patient's chart are always accurate when made.

Denise also wants to testify that three days before her father died, he asked her to bring his attorney to the hospital. He told her that he had decided Peter was a ne'er do well and he did not want to squander his hard-earned money on such a wastrel. Denise had tried to talk her father out of disinheriting Peter, but he was adamant. Denise also wants to call a family friend, Felicia Fein, who will testify that three days before Denise's father died, Denise had called her in tears. According to Felicia, Denise had told her that her father was planning to disinherit Peter and she did not know what to do.

*prior
consistent
statements?*

Finally, Denise wants to testify that after her father's death, she received an anonymous note (which she wants to introduce as an exhibit), stating: "I hate to be the one to tell you this, but your brother, Peter, was the one who poisoned your father. Look in the back of the closet in his bedroom." When Denise looked there, she found a syringe that tested positive for insulin and other unknown substances. Her father was not a diabetic, nor is Peter.

You are the lucky judge in this case. What arguments do you anticipate the parties will make concerning these evidentiary issues? How will you rule and why?

Question No. 2

Two brothers, Anthony and Bert Dexter, are charged with kidnapping and **child molestation**. When they were arrested, the police left both of them in the patrol car with, unbeknownst to them, a cassette recorder taping their conversation. When all the police had left the patrol car, Anthony turned to Bert and said: "You, idiot. I told you to get rid of that kid. Now she can testify against us. We're both going down and it's all your fault." Bert made no audible reply. [Assume there are no constitutional criminal procedure grounds for suppressing Anthony's statement as evidence against him. As a result, all you are left with are evidentiary issues.] The state seeks to introduce Anthony's statement against both Anthony and Bert.

child - HUF

Victoria Vanya, the victim in the case, is four years old. Needless to say, she is completely traumatized by what happened to her. When she is called as a witness at trial, she is incoherent and unable to proceed. The court finds that she is not competent to testify. The state then seeks to introduce the following evidence:

- (1) The police had received an anonymous phone call telling them that they could find Victoria in an abandoned house at a particular location. When they went to the house, they found Victoria in a back bedroom crying inconsolably. When they asked her who had done this, she said that she didn't know. As they were taking her out to the patrol

car. however, she looked across the street, pointed to Anthony and Bert Dexter, who were standing on the sidewalk watching the police, and whispered softly, "That's them over there." Officer Perrier is prepared to testify concerning Victoria's statement.

803(d)
(1)(c)

- (2) When the police took both Anthony and Bert down to the police station, they put them in different interview rooms and began to question them. Bert waived his right to remain silent. He admitted that he knew that Anthony had kidnapped Victoria and he had not reported it. He admitted being in the house, but said that everything was Anthony's idea. He (Bert) had not molested Victoria. It was Anthony who had done it all. [The state seeks to introduce these statements against both Anthony and Bert.]
- (3) Doctors at the emergency room noticed a wound on Victoria's back. They took photographs of it but did not call in any forensic experts. Several months later, the crime laboratory learns for the first time of these photographs. C.S.I. Warshawky, a technician at the lab, reviews the photographs and obtains teeth impressions from both Anthony and Bert. Warshawsky concludes that the mark on Victoria's back was a bitemark and unquestionably, it was made by Anthony Dexter's teeth. Warshawsky has never before been asked to identify bitemarks and has only read a few articles about how to evaluate such marks; but she has worked as a crime scene technician and forensic expert for twenty years. The state offers her expert testimony to identify the mark and to connect it to Anthony.

co-consp.
v. interest
not really
against his
int.

Danbert

Again, you are the judge at trial. What arguments do you expect each side to make on these evidentiary issues. How will you rule and why?

[END OF EXAM]