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Exam No. _____

632 Evidence-Trial Practice Fall Semester 2005

UNM School of Law
Final Examination
Six Credits

Professor Charles Daniels
Thursday, December 8, 2005
Friday, December 16, 2005

Scantron (Bubble Sheet) Instructions
40 Multiple Choice Questions

All answers must be marked on the answer sheet provided. Only one answer is correct for each question. Mark your answer using a pencil provided by the proctor. Use side one of the answer sheet. **Mark your examination number on your answer sheet in the manner shown in the example below. Do not use the sample examination number!**

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A five-minute warning will be given prior to the conclusion of the examination. **When time is called, stop immediately.** Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

This is an open book examination. You may use any materials you choose to bring with you, just as you can do in a real trial. Base your answers on the federal rules of evidence, federal case law and federal statutes. Do not assume any rulings in the problems are correct. There is only one best answer for each question.

1. Defendant has been indicted for armed bank robbery. The prosecution offers in its case-in-chief a certified copy of the defendant's five-year-old conviction for the felony of armed burglary. The judge should sustain the defense's objection to this testimony because:
 - A. This is evidence of prior bad acts which may not be used to show propensity to commit the charged offense.
 - B. The defendant's character is not an element of the charge or defense.
 - C. The prosecution cannot introduce this conviction before the defendant testifies.
 - D. All of the above.

2. In the same case, the prosecutor wants to offer into evidence a notarized statement from a former codefendant, who is invoking his own privilege against self-incrimination and refusing to testify. In the statement, which the codefendant made in the course of an unsuccessful attempt to negotiate a plea bargain, the codefendant stated that he was the getaway driver who was recruited by the defendant to help rob the bank. On objection by the defense, the court should:
 - A. Sustain the objection, based on a denial of the defendant's right of confrontation.
 - B. Overrule the objection, on the basis of the Rule 804 declaration against interest exception to the hearsay rule.
 - C. Overrule the objection, on the basis of the Rule 801 statement of a coconspirator exclusion to the hearsay rule.
 - D. Sustain the objection, on the basis of the witness's privilege against self-incrimination.

3. In the same case, the prosecutor wants to offer into evidence (1) a surveillance video showing clearly the face of the robber, and (2) the testimony of the teller that the man who robbed her looked just like the defendant. The defense files a motion in limine objecting to both. The court should:
 - A. Sustain the objections.
 - B. Overrule the objections.
 - C. Allow the prosecutor to introduce the video, but not the testimony.
 - D. Allow the prosecutor to introduce the testimony, but not the video

4. In the same case, the defense calls as its first witness the defendant's mother to testify about the many honest things her son has done in his life. The judge should sustain the prosecutor's objection to this testimony because:
 - A. This is not the proper way to prove good character in this case

- B. The defendant's character is not an element of the charge or defense.
 - C. Prior specific acts relating to honesty cannot be inquired into on direct examination in this case.
 - D. All of the above.
5. In the same case, after the judge sustains the objection to the mother's testimony, the mother blurts out to the jury that her son is so honest that he once walked a mile in a snowstorm to return ten cents in change that a shopkeeper erroneously overpaid him. The prosecutor should:
- A. Object to the testimony.
 - B. Move to strike the testimony.
 - C. Ask for a limiting instruction to advise the jury that the testimony is only offered to show a mother's personal opinion and is not to be considered for the truth of the matter asserted.
 - D. None of the above.
6. In the same case, the defense calls as its second witness a clerk at a hotel 200 miles from the victim bank, who testifies that at the time of the robbery, the defendant was checking into the hotel. Immediately after the witness testifies, he tells defense counsel that he wants the five thousand dollars the defendant promised he would get for making up an alibi. The defense attorney should:
- A. Take remedial measures to correct the perjury.
 - B. Take remedial measures to correct the perjury, but only if the defendant will waive confidentiality.
 - C. Take remedial measures to correct the perjury, but only if the witness will waive confidentiality.
 - D. Take remedial measures to correct the perjury, but only if the defendant will waive any conflict of interest.
7. In the same case, after the defense has presented its alibi evidence that the defendant was out of town at the time of the robbery, the prosecution calls defendant's wife as a rebuttal witness to testify that she saw him leave his home (a mile from the bank) a half hour before the robbery and return home a half hour after the robbery. The defense objects. The court should:
- A. Sustain the objection on the basis of the adverse spousal testimony privilege
 - B. Sustain the objection on the basis of the marital communications privilege.

- C. Overrule the objection.
- D. Sustain the objection because the evidence is not relevant.
8. In the same case, assume the court has refused to compel the wife to testify about seeing her husband on the day of the robbery. The prosecutor now offers into evidence a transcript of her sworn grand jury testimony concerning the same matters. The defense objects. The court should:
- A. Overrule the objection because her prior testimony is admissible under Rule 804
- B. Overrule the objection because her prior testimony is admissible under Rule 803
- C. Sustain the objection because the defendant has not had an opportunity to cross-examine his wife.
- D. Overrule the objection because this is proper rebuttal evidence, once the defendant has opened the door with an alibi defense.
9. In the same case, the prosecutor calls in rebuttal an investigator to testify that during pretrial plea negotiations with the prosecutor which were unsuccessful, the defendant said, "I shouldn't be charged with armed bank robbery, because that gun I was pointing at the teller didn't work." The defense objects. The court should:
- A. Exclude the statement, unless the defendant has agreed to waive any objection to its admission.
- B. Exclude the statement, whether or not the defendant has agreed to waive any objection to its admission.
- C. Admit the statement, whether or not the defendant has agreed to waive any objection to its admission.
- D. None of the above.
10. In the same case, which of the following statements in the prosecutor's summation is objectionable?
- A. "Ladies and gentlemen, you should use your good old common sense in deciding this case."
- B. "You represent the conscience of the community."
- C. "I've prosecuted a lot of defendants, and I think this is the guiltiest I have ever seen."
- D. All of the above.

11. Plaintiff has filed a civil personal injury suit against the employer of an ice cream truck driver for the employee/driver's negligently failing to slow from 35 mph to 15 mph for a school zone, where he struck and seriously injured plaintiff's minor child, who was crossing the street. The defense has denied negligence and the driver has testified he did not know there was a school zone in that area because of vegetation obscuring the signage. Plaintiff calls a police officer to testify that in the past three years, he has twice cited the driver for failing to slow for the same school zone. What is plaintiff's best argument for admissibility of the officer's testimony?
- A. That it is admissible character evidence to show that the driver is a careless driver.
 - B. That it is admissible to rebut the driver's claim that he did not know there was a school zone at that location.
 - C. That it is admissible impeachment evidence of misdemeanors committed within the previous ten years.
 - D. That it is admissible habit evidence to show that the driver has a habit of speeding through that school zone.
12. In the same case, plaintiff wishes to introduce a statement the driver made to the investigating officer at the scene: "I was in a hurry and I wasn't paying attention to my driving." The court should:
- A. Admit the statement against the employer if the court finds by clear and convincing evidence that the driver was acting as an agent of the employer.
 - B. Admit the statement against the employer if the court finds by a preponderance of the evidence that the driver was acting as an agent of the employer.
 - C. Admit the statement against the employer if the court finds the evidence is sufficient for the jury to decide by a preponderance of the evidence that the driver was acting as an agent of the employer.
 - D. None of the above.
13. In the same case, plaintiff calls in its case-in-chief the employer/defendant. After asking him his name, plaintiff's counsel asks, "Isn't it true that you dispatched the ice cream truck to the school a few minutes before the accident?" The defense objects. The court should:
- A. Sustain the objection because the question is leading.
 - B. Overrule the objection because the question calls for an admission of a party-opponent.
 - C. Overrule the objection because the question calls for a statement against interest

- D. Overrule the objection because the witness is an opposing party.
14. In the same case, plaintiff wants to call an investigator to testify that a month after the accident, he interviewed a witness to the accident, who told the investigator that when she saw the defendant speeding toward the child, she screamed to her husband, "Oh my God! He's going too fast to stop for that child!" The defense objects to the investigator's testimony about the witness's statement. The court should:
- A. Exclude the testimony because the plaintiff has not shown that the declarant is unavailable.
- B. Admit the testimony as a present sense impression.
- C. Exclude the testimony as inadmissible hearsay.
- D. Admit the testimony for the fact that it was said, and not for the truth of its contents.
15. In the same case, the plaintiff calls to the stand the eyewitness in the previous question to testify about the statement she made to her husband during the accident. The defense objects. The court should:
- A. Exclude the testimony because the witness is available to testify directly about what she saw.
- B. Admit the testimony because the witness is present for cross-examination, and her own prior statement is therefore not hearsay.
- C. Exclude the testimony as inadmissible hearsay.
- D. Admit the testimony as an excited utterance.
16. In the same case, the plaintiff asks the eyewitness in the previous question how fast the ice cream truck appeared to be going when she saw it strike the child. The defense objects. The court should:
- A. Exclude the testimony because it calls for speculation.
- B. Exclude the testimony because the witness has not been qualified as an expert on speed.
- C. Exclude the testimony unless the plaintiff lays a *Daubert* foundation.
- D. Admit the testimony.
17. In the same case, the plaintiff calls to the stand the child's emergency room physician to elicit her testimony that she operated on the child (who later suffered a complete memory loss about the accident) and saved his life. When the plaintiff's lawyer asks the doctor whether the child said

anything to her in the emergency room, the judge sustains the defense's hearsay objection. The plaintiff's lawyer should:

- A. Limit his questions to avoid asking about what the child said
- B. Ask for leave to take an interlocutory appeal.
- C. Ask the court for a limiting instruction.
- D. Make an offer of proof.

18. In the same case, the emergency room physician testifies that as she began operating on the child, the child said, "Am I going to heaven now? The man who was driving was our ice cream man." The defense objects and moves to strike. The court should:

- A. Exclude the statement because it was not made under oath, with the opportunity for cross-examination.
- B. Admit the statement under the medical diagnosis or treatment exception.
- C. Admit the statement under the dying declaration exception.
- D. Exclude the statement because it is testimonial hearsay

19. In the same case, the plaintiff calls to the stand the accounts receivable clerk from the hospital to testify that the day after the accident, the defendant employer of the driver called her and said (1) "I feel terrible—I understand that this accident was my driver's fault" and (2) "I want to pay all of the child's medical bills." The defense objects. The court should:

- A. Exclude statement (1) and admit statement (2).
- B. Admit statement (1) and exclude statement (2).
- C. Admit both statements.
- D. Exclude both statements.

20. In the same case, the defendant offers a copy of the official accident report, certified as correct by the police department records custodian, which contains the investigating officer's diagrams and measurements of the scene, and which also contains an interview the next day with a bystander, who said, "The kid just dashed out in front of the truck in the middle of the block, before the school zone." The plaintiff objects. The court should:

- A. Exclude the report as hearsay unless the officer is called as a witness.

- B. Admit the report under one or more hearsay exceptions.
 - C. Admit the report but redact the bystander's statement as self-serving evidence for the defense.
 - D. Admit the report but redact the bystander's statement as inadmissible hearsay
21. In the same case, assume the court admits the police report in the last question. Plaintiff calls a witness to testify that the bystander has a reputation as a liar and that he had been seen at a local bar drinking with the defendant on two recent occasions. The defense objects. The court should:
- A. Exclude the testimony unless the bystander is called and is given a chance to explain
 - B. Admit the testimony.
 - C. Admit the reputation testimony but exclude the testimony about the relationship with the defendant.
 - D. Exclude the reputation testimony but admit the testimony about the relationship with the defendant.
22. Respondent is the subject of a federal deportation proceeding based on the allegation that the documents he submitted as a basis for obtaining resident alien status the previous year included a forged and fraudulent certificate of marriage to a United States citizen. The government lawyer calls the respondent to the stand and asks him if he forged and submitted the marriage certificate. Which of the following is true:
- A. Respondent can invoke his self-incrimination privilege if his testimony would create evidence that could be used in a later state criminal prosecution.
 - B. Respondent can invoke his self-incrimination privilege if his testimony would create evidence that could result in his own deportation.
 - C. Respondent cannot invoke a self-incrimination privilege because he is a non-citizen.
 - D. Respondent cannot invoke his privilege against self-incrimination privilege during a non-criminal proceeding.
23. A witness before a federal grand jury in Albuquerque refuses to testify on self-incrimination grounds. On request of the Justice Department pursuant to the federal immunity statutes, the judge enters an order requiring her to answer the questions and granting her immunity from the direct or indirect use of her testimony. The order does not on its face grant her complete immunity from prosecution with regard to the events she testifies about. After this order is entered, which of the following is true?
- A. She may refuse to answer any questions until and unless she is granted transactional immunity from federal prosecution for the underlying events related to her testimony.

- (B.) The immunity order will protect her against future use of her grand jury testimony in a New Mexico state prosecution against her.
- C. The immunity order will protect her against future use of her grand jury testimony in a prosecution against her in Mexico.
- D. The immunity order will protect her from prosecution for any offenses that her testimony relates to in any federal or state criminal case in the United States.
24. A corporation is being investigated for unlawfully polluting a river by its plant. The company hires lawyers who interview all company employees in the course of investigating and preparing their case, and learn from the employees that there has been polluting that would create both criminal and civil liability. The Justice Department files a civil suit against the company for the pollution and issues interrogatories to the company to describe the contents of the notes of the interviews with the company employees. Which are the most likely arguments to prevail in the corporation's objections to being required to answer the interrogatories?
- A. That the answers would violate the privilege against self-incrimination and the attorney-client privilege.
- B. That the answers would violate the attorney-client privilege and the best evidence rule.
- (C.) That the answers would violate the work-product privilege and the attorney-client privilege.
- D. That the answers would violate the privilege against self-incrimination and the best evidence rule.
25. When a witness is impeached with a prior inconsistent statement, which of the following showings will provide a sufficient foundation for the statement to be introduced as substantive evidence for the truth of its contents?
- A. That the prior statement was contained in a document.
- B. That the prior statement was witnessed and notarized.
- C. That the declarant is present on the witness stand and is subject to cross-examination.
- (D.) None of the above.
26. When a witness is shown his own prior written statement during his testimony, in which of the following instances may the written statement be introduced as an exhibit by the attorney initially showing the statement to the witness?
- A. When the document refreshes the recollection of the witness.

- B. When the document is a prior inconsistent statement.
- C. When the document is a record of something he wrote down accurately when it was fresh in his memory, but which he can no longer remember.
- D. None of the above.
27. In which of the following situations is the objecting party least likely to get a limiting instruction?
- A. When the evidence is of prior specific acts of wrongful conduct offered under Rule 404(b) to show identity.
- B. When the evidence is of prior specific acts of drunken conduct of the plaintiff in her libel suit against a tabloid for printing a story about her being a drunk.
- C. When the evidence is of proof of purchase of liability insurance on the ice cream truck in the previous questions by the defendant, after he has denied that the truck belonged to him.
- D. When an out-of-court statement has been introduced to show notice to the hearer, rather than for the truth of its contents.
28. Wiley Coyote has filed a negligence case against Acme manufacturing for marketing dynamite sticks with a three second fuse and no warning labels, resulting in severe injuries to Coyote. Acme has denied that it was negligent to use three-second fuses and has denied that warnings should have been required to warn anyone of such obvious dangers. The week after the suit was filed, Acme changed all its dynamite fuses to ten-second ones and placed labels on the sticks that said "WARNING: DYNAMITE WILL EXPLODE AFTER YOU LIGHT THE FUSE. DO NOT KEEP IT IN YOUR HAND AFTER LIGHTING." Coyote's lawyer wishes to introduce evidence of both of Acme's changes to show that the dynamite should have had longer fuses and warning labels. On objection from Acme, the judge should:
- A. Admit the evidence of the longer fuses and exclude the evidence of the new warnings.
- B. Exclude the evidence of the longer fuses and admit the evidence of the new warnings.
- C. Admit both.
- D. Exclude both.
29. Coyote gives pretrial notice that it will offer as exhibits Xerox copies of letters obtained from Acme's files in which 8 injured customers wrote the company before the sale to Coyote to complain that the Acme dynamite exploded so quickly and unexpectedly that they were injured. No showing has been made that these customers could not be subpoenaed to testify in person. On objection from Acme, the judge should:

- A. Admit the letters as corroborating evidence of the dangerous nature of the defendant's three-second fuses.
 - B. Exclude the letters as inadmissible hearsay.
 - C. Exclude the letters on best evidence grounds.
 - D. Admit the letters, but advise the jury that they are not being introduced for the truth of their contents.
30. In the same case, assume that a fire had destroyed the only copies of the complaint letters described in the previous question while Acme's lawyers were reviewing the letters at their offices. Coyote calls to the stand a secretary for Acme's lawyers who had read the letters, for the purpose of having her describe orally the contents of the letters. Acme objects. The judge should:
- A. Sustain the objection based on the best evidence rule.
 - B. Sustain the objection on hearsay grounds.
 - C. Overrule the objection.
 - D. Sustain the objection on attorney-client privilege grounds..
31. In the same case, Coyote's lawyer seeks to introduce a statement Coyote made to his parish priest a week after the explosion that injured him: "It hurt so much I couldn't sleep for three nights." Acme objects. The judge should:
- A. Admit the statement as a statement of mental, emotional or physical condition.
 - B. Admit the statement if Coyote waives his priest-penitent privilege
 - C. Exclude the statement on hearsay grounds.
 - D. Exclude the statement on confrontation clause grounds
32. In its defense, Acme offers evidence of Coyote's many attempts to catch and eat the roadrunner. Coyote objects. The court should:
- A. Admit the evidence, since it shows a common scheme or plan.
 - B. Exclude the evidence, either because it is irrelevant or because any arguable probative value would be substantially outweighed by the danger of unfair prejudice.

- C. Exclude the evidence unless it is offered through a qualified character witness after Coyote has testified.
- D. Admit the evidence as admissible evidence of conduct of a party-opponent
33. In the same case, Acme calls the records custodian for the hospital to introduce Coyote's hospital records. Included in the records are the following: (1) a description by the emergency room nurse (who has not been subpoenaed to testify) of the burns she saw on Coyote's body; (2) a statement by Coyote to the ER doctor (who also has not been subpoenaed to testify) in which he said, "I shouldn't have kept holding that dynamite while I waited for that roadrunner to get into a better position"; and (3) a statement by the doctor to the nurse, "This is what happens when you're careless with dynamite." Coyote objects to each part of the records. The court should:
- A. Sustain the objections as to all of the statements, because they are hearsay.
- B. Admit (1) and exclude (2) and (3).
- C. Admit (1) and (2) and exclude (3).
- D. Admit all of the contents of the records, if properly authenticated as true contents of the official business records of the hospital.
34. Defendant has been sued civilly for a sexual assault (alleged rape) of a woman he met in a bar. Which of the following is most likely to be admitted into evidence during the trial?
- A. The plaintiff's reputation for having sex with other men she had just met
- B. Testimony of another woman that on a church picnic the previous year, the defendant tried to rape her when they were alone in the woods.
- C. Testimony of defendant's best friend that defendant has a reputation for sexually assaulting women.
- D. Testimony of another man that the plaintiff had tried to sexually assault him while on a church picnic the previous year.
35. In the same case, plaintiff offers evidence of a laboratory technician that, although DNA evidence was not obtained, the blood type of the person whose semen was found during her physical examination two hours after the alleged assault was consistent with 78% of the population, including the defendant. The laboratory technician also admits that the test has a 17% error rate, and that DNA evidence is much more accurate. The defense objects. The court should:
- A. Exclude the evidence because the court cannot conclude that it is more likely than not that the defendant was the source of the semen.

- B. Exclude the evidence because a jury could not conclude that it is more likely than not that the defendant was the source of the semen.
- C. Admit the evidence.
- D. Exclude the evidence because the 17% error rate shows that the test is not scientifically reliable.
36. In the same case, plaintiff calls a psychiatrist to testify that she has suffered post traumatic stress disorder following the alleged incident. On cross-examination, the defendant's attorney asks, "Doctor, how much are you being paid by the plaintiff's lawyer for your diagnosis and testimony?" The defense objects. The court should:
- A. Sustain the objection, unless the defendant can show that the fees are unusually large.
- B. Sustain the objection, on relevance grounds.
- C. Overrule the objection, because it calls for proper impeachment evidence.
- D. Overrule the objection, because it is relevant to show that the witness may have been illegally bribed to commit perjury.
37. In the same case, which of the following would be objectionable in defendant's opening statement, assuming all refer to facts that will be testified to by one or more witnesses?
- A. "You have heard what the plaintiff claims happened between her and the defendant. Now I'm going to tell you what the evidence will show really happened."
- B. "The plaintiff's whole claim that she was forced into having sex is just her word against the defendant's. She is not telling the truth. Here are the seven reasons why you should not believe her story."
- C. "The plaintiff told her friend, just before leaving the bar with defendant, that she was going to show the defendant the time of his life."
- D. "The plaintiff came on to the defendant in a sexually aggressive way, and told him that she was going to show him the time of his life."
38. In the same case, the plaintiff has subpoenaed John Q. Counselor, attorney at law, the next door neighbor of Defendant, to testify about a conversation defendant and Counselor had the day after the alleged rape. On defendant's motion in limine to exclude the testimony, it was established that defendant approached Counselor in his front yard and told him that he might need a lawyer as a result of an incident the night before. After the two of them sat alone in Counselor's car and discussed the situation for about half an hour, Counselor advised defendant that he did not have the expertise to

handle this kind of case, but could refer him to a suitable lawyer. No fee was ever charged for the conversation and Counselor had no further involvement. The court should:

- A. Exclude testimony about the conversation, based on the attorney work-product doctrine.
- B. Exclude testimony about the conversation, based on the attorney-client privilege.
- C. Admit the testimony, because Counselor was never retained to handle the case.
- D. Admit the testimony, because the conversation related to a rape, which is a crime

39. In the same situation, the defendant was indicted for the same rape after the civil case resulted in a hung jury. The alleged victim has since died as a result of being run over by an ice cream truck. At the criminal trial, the prosecutor calls a court reporter to introduce the certified transcript of the alleged victim's direct and cross examinations from the civil case into evidence. The defense objects. The court should:

- A. Exclude the transcript on the basis that it is hearsay.
- B. Exclude the transcript on the basis of the confrontation clause.
- C. Exclude the transcript because it does not relate to the cause of the victim's death.
- D. Admit the transcript.

40. During the same criminal trial, the prosecution offers into evidence a certified copy of the official police investigation record, attested to by the official records custodian as having been kept in the ordinary course of business as part of the police department's official records, pursuant to the statutory duty of the police to investigate criminal offenses. The defense objects to introduction of the official finding of the police investigation in the report that defendant forced victim to have sex against her will. The defense objects. The court should:

- A. Exclude the finding as hearsay.
- B. Admit the finding as a public record under Rule 901.
- C. Admit the finding as a business record under Rule 901
- D. Admit the finding as a public record or report under Rule 803.