The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

Exam ID: 514
Course: Evidence and Trial Practice
Professor Name: Bergman
Exam Date: Wednesday, December 08, 2004

45
18
23
86
A

QUESTION 1: Depp and Cox

- only the grand jury testimony

Under 807, the prosecution has qualified itself to be able to offer the statements by providing adequate notice. The question though is whether or not the statements are admissible under the FRE and Confrontation clause analysis? In addition, can Depp's historical conviction be introduced? Obviously both sides will have arguments...

interesting + accurate adj

807- snitch.

maybe no sense to discuss statements to DEA separately from grand jury testimony - otherwise confusing gets

First, under Rule 807 adequate notice is required. This notice has been given, thus giving rise to the rest of my essay. 807 allows for the admission of evidence that has circumstantial guarantees of trustworthiness if the statement is a) offered as evidence of a material fact, b) more probative than any other evidence that can be procured, and c) the interests of the FRE will be served by the admission. The prosecution has a decent argument, which the defense will rebut with the rules and also the confrontation clause.

Te prosecution will say that this evidence will be offered to prove various elements of the offenses, including possession, intent, etc. These are all probative of material facts. Further, this testimony is available and perhaps the only information the prosecution has. Thus, it is probably more probative than anything else. Finally, allowing prosecutors to bring this information will serve the purposes of finding justice, if a few things were done by the prosecutors:

he's dead

First, they need to introduce live testimony (which they will do through Cox). Second, the "reasonable efforts" standard is strict and must be met. The prosecutors can't just be lazy and rely on this guy's statements. Only if other information cannot be found

or was attempted to be found and deemed insufficient can the court have good reason to determine the evidence is more probative than other evidence that could be procured (on the other hand- courts do what they want and offer reasons, so it's more of a convincing game than a black letter law game. Since the standard of review by the Ct App is so high- abuse of discretion- the prosecutors better be on their game in convincing the judge). Finally, "reasonableness" depends on the importance of the evidence. Prosecutors must show, and should have any easy time doing so, that the evidence in question is important to the case at hand.

The prosecution will do all of this relying on 807... and the defense will counter

The defense will argue within the rules that the prosecutions has not found or even tried to find other evidence- that it is relying too heavily on 807 as a way to squirrel a witness into the proceedings. In this way, they did not meet the burden of showing their information is more probative than what was available or should have been found.

Then, the Defense will trump all of this by throwing in the Confrontation Clause. Relying on Crawford, the defense will try to keep the information out since Cox is no longer available. This issue goes to Crawford because the statement to be introduced is testimonial, which will be explained in the next paragraph or two. Under Crawford, the declarant must be unavailable, offer a testimonial statement, and the accused must have had an opportunity to cross.

Obviously, he is unavailable. Cox is dead, which gives rise to the confrontation clause analysis. There will be no issue between the sides.

The statement is testimonial. Scalia pointed out three general areas of testimonial statements (ex parte in court statements, extrajudicial statements, and statements made in circumstances leading one to believe they would be used later at trial). We have two different instances to discuss. The Grand Jury testimony falls into Scalia's first category so it is testimonial without much of a fight. A bit more of a battle could exist around the statements to the DEA agents. The prosecution will say these are not circumstances leading one to believe the information would be used later in trial and it is non-testimonial (to get to the *Roberts* test). The defense will say that DEA agents clearly identified themselves and they were investigating a crime, not acting as informants or undercover officers. Because of that the defense will claim that Cox knew the information could be used at trial later and the statements are in fact testimonial. The court will agree. Thus, all the statements to be admitted are testimonial.

The thorn in the prosecutor's side and the trump card the defense will rely upon is the opportunity to cross. The accused must have had the opportunity to cross. This does not mean that a good cross must be shown, just that 1) the accused was represented by counsel and 2) there was an OPPORTUNITY to cross (whether taken or not or done effectively).

The statements made to the DEA do not have an opportunity to cross. As such, they are not admissible. The defense has an easy victory in the statements made solely to the DEA (and not made in grand jury testimony). The court should automatically grant that.

An issue arises in the grand jury proceedings. The prosecutors will say that the accused had sufficient notice of the grand jury and (probably) had an attorney

representing him there. As such, he had counsel and an opportunity to cross. In a weird scenario, the defense may point to the lack of representation. More likely, it will become a battle of the ability to cross. Since, in a grand jury proceeding, cross is often limited, the defense will argue that they did not have sufficient opportunity to cross and (they better have) made an objection on the record that they did not have sufficient ability to cross. If this is done, then they have a good argument to keep the information out. If they have not made the record, then the grand jury testimony will probably come in. The court will decide based on the availability of cross in the grand jury. (more accurately- the court of appeals will probably decide...)

As a tidbit of trivia, if it can be shown that Depp arranged for the murder of Cox, this long winded tangent is entirely unnecessary. If Depp is responsible for Cox's unavailability, then the testimony should come in under 804 (b) 6 forfeiture by wrongdoing.

Possession of heroin

The prosecutors will rely on Rule 609 (a) (1) to establish a foundation and then go to 609 (b) to put icing on their argument. The Defendants will do the same... and ultimately will win in the eyes of the court.

609 (a) (1) says that evidence that an accused has been convicted... shall be admitted if the court determines that the probative value of admission outweighs the prejudicial effect on the accused. This is a uniquely difficult standard to meet because of

the **risk** of unfair prejudice to the Defendant. In a drug charge case, evidence of prior use, possession or distribution could be the nail in the casket- the jury may quit being impartial and assume propensity. Because of this, it is hard to get those kinds of convictions in under the general test. The prosecution will bring its arguments under precedent.

Other courts have looked at factors such as the nature of the previous crime, the age of the prior crime, the similarity between the prior and current charges, the importance of the D's testimony, the centrality of the credibility issue, and D's social location and lifestyle.

The prosecutors will look at the nature of the crime and its similarities to the charges at hand. Here, we have a drug conviction that can be probative to the charges at hand. The prosecution can use this to show that he is not a stranger to drug possession and this is probative. In addition, prior drug use can be indicative of Depp's credibility in this case.

The defense will point to the different types of drugs held, the different quantities, and try to show these are completely unrelated. The defense will go to age as their biggest factor. This crime occurred more than a decade ago and will be prejudicial if admitted for any purpose (although we all know it will ultimately be used to show propensity, regardless of the veil).

In this aspect, I think the court will ultimately decide that under 609 (a) (1) this offense is too prejudicial

Further, the court will justify its decision by looking at the argument the litigators will have over 609 (b). Evidence of convictions is inadmissible if ten years has passed since conviction or from release from custody, whichever is later. Obviously, this crime does not meet this rule since he was released 11 years ago. The defense will point this out and rely heavily on it. But, the prosecution can mount up an attack under another probative value test. This one is very stringent: does the probative value of the conviction SUBSTANTIALLY outweigh the prejudicial effect? For the same reasons as above, the prosecutors will have a tough battle, but they will bring it. They will argue that the time limit does not bar such heavily probative information since this guy has a history of involvement in drugs. The defense will use the same types of argument as above which lead to the idea that introduction will all but prove propensity and the prejudicial effect is too great (especially when the prosecutors must show that the probative value SUBSTANTIALLY outweighs).

The court again should rule to keep this information out. If for some reason I am wrong, which happened once years ago, the defense will have a tough decision- illicit it on direct or no? If they illicit it on direct to minimize the impact, then they waive their right to appeal. *Ohler*. But, if they do not illicit it, the prosecution will have a good time with the cross.

Isn't the prior felony conviction an element of the 3rd count - a felon in possession of a firearm?
Old Chief?

Gun

not sure what you mean

Is this included in the admission of evidence in the call of the question? If so, the defense will argue that it is not relevant under 401 and it is unfairly prejudicial under 403. Of course, the prosecution will rebut.

401- the defense will argue that the existence of the gun has no tendency to make the existence of any fact of consequence more or less probably. The defense will claim that the gun has nothing to do with facts relating to someone in CA having cocaine they may belong to Depp. The prosecution might counter with an argument that drugs and guns go hand in hand, especially in crimes of distribution. The court should ultimately decide that the gun is not relevant.

If the court did deem it was relevant, then the defense would argue under 403 that its admission leads to unfair prejudice that outweighs the probative value of the evidence. Again, saying the two are unrelated, the defense will go a logical step further by saying the gun's admission will unfairly prejudice the jury into making assumptions about Depp. The prosecutors will sit back and simply say "of course guns are probative to intent to distribute" in an argument similar to their 401 claim. The court again should keep the gun out due to the prejudice that it would unfairly instill in the jury.

The gun is clearly admissible as an element of the 3rd count.

QUESTION 2: Defense Technologies

SC trying to get reports, manager statements, etc:

Attorney client privilege

In general, attorney client privilege exists at common law. (The only pseudo reference in the FRE is 501). Attorney client privilege applies to documents written at the client's request and work done in the process of representation. This privilege is invoked when one retains an attorney (or in this case, gives a specific assignment to the general counsel so it is clear what legal work is going to be done).

First, SC wants the research that went into the report and the report itself. SC cannot get this information. The research explicitly detailed the work product purpose of the memos and how the results would be used. This is information limited to the attorneys in the case. Had a manager said something outside the scope of the memo, that may not have privilege. But, since managers were answering questions, privilege exists The report is the product of the research and for the same reasons is not available. The *Upjohn* case is instructive about the protection of documents in this type of case and ultimately should be read to protect DT's interests in this issue.

SC will counter saying that the purpose of the research was not clear or that they have access. Under the common law, they will lose.

Second, calling everyone who provided information is similarly protected by privilege. Namely, this information is predicated upon disclosure of the report and research, which is protected by privilege. SC will claim that they are entitled to the

information for the same reasons as above. The court should deny them for the same reasons as above.

Third, SC wants to depose managers and employees. *Upjohn* is instructive here. While DT will try to throw a net of privilege over this too, they will fail under the caselaw. The IRS in *Upjohn* had the ability to depose people, SC in this case should have the same privileges and the court should rule that way

Ultimately, under *Upjohn*, anything said to the lawyers in the course of research is protected and any product of that is protected, but SC is free to do their own discovery.

408 compromise and offers to compromise (and 407 for fun)

I must make an assumption in the facts, or at least clear up some logic... Saying that DT and SC tried to settle the dispute to me means that they made it clear when they were talking that they were in the course of settlement negotiations. If this is the case, then Rule 408 applies. If they did not make it clear that they were in the process of negotiating, then Rule 408 does NOT apply per *Davidson v. UT*. Under *Davidson*, assuming the other side knows this is a settlement discussion is not good enough. In this case, I am assuming that corporate lawyers are not that dumb and the SC attorneys said something to that effect. In that case, the Court should not admit the information at trial as it is protected by Rule 408.

The action taken to fix the defect and correct it may or may not be affected by Rule 407. Evidence of subsequent remedial measures is generally not admissible. SC will claim that fixing their stuff is a subsequent remedial measure and should not be admitted. DT on the other hand will claim that their change in action has nothing to do

with making an injury more or less likely and thus is not protected by the rule. The court respect the defense for a proper application of the rule and say that 407 does not apply (to information kept out with 408).

Expert

This will be a battle for the ages that ultimately will go to weight

To get expert testimony in, the qualifications of an expert must be reviewed under 702. First, it must assist the trier of fact. Second, the expert must be qualified by knowledge, skill, etc. (reliable) and third it must be based on sufficient facts that are applicable to the case at hand (relevant).

Expert testimony on this subject will assist the determination of the trier of fact. Hearing engineering testimony is beyond the general knowledge of the jury and will be of assistance. No argument exists here.

Relevance also is not an issue. Atkins will speak about the actions taken by SC, the scientific underpinnings and offer an opinion about the ability for them to meet certain requirements. While he has to be careful to stay within his expertise, relevance also is not really an issue here.

Reliability is going to be the battle (which SC will probably win in the end). Caselaw exists as a framework. *Daubert* gave factors a court can use to analyze reliability. These factors are used generally before a trial in motions in limine or hearings to analyze sufficiency. *Daubert* was limited to scientific opinion. While we could talk about whether or not an engineer is a scientist under *Daubert*, that would be a waste since

Kumho Tire took the *Daubert* factors and said they could be applied to any specialized knowledge. Thus, we have to look at reliability.

The first Daubert factor is testability/ falsifiability. Can the technique used to determine the expert opinion be tested or falsified? We do not know if he used a technique beyond general research, but we can still apply a version of this test. Are the underlying methods/ knowledge he relied upon testable or falsifiable. Generally, engineering principles can be proven or disproven so Atkins should be ok under this factor.

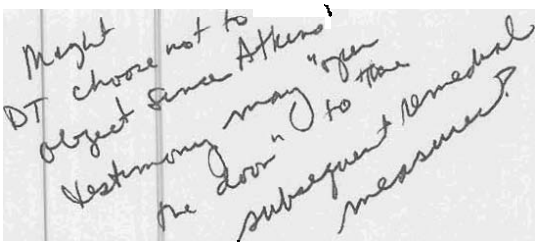
The second Daubert factor is peer review. Has the method been reviewed by peers. Assuming again (using a test that doesn't quite apply except by extension) that general engineering knowledge has been reviewed and improved over time, Atkins should be ok here.

The third Daubert factor is rate of error. This test refers to whether or not a known rate of error exists for the underlying methodology. This really does not apply.

Fourth, the court can use the *Frye* test to look at general acceptance in the scientific community of the underlying methods. Engineering principles might be hotly contested in trade journals and such... so acceptance may be an issue. More likely, the testimony should be ok under a general acceptance test.

After reviewing the four factors (which are non-exclusive and just used as a reference point for courts to make a determination), the court will probably decided that Atkins is qualified to give an expert opinion. Defense will claim that general knowledge of engineering is not sufficient to speak about this case. Defense calls for too stringent a limitation on experts (unless you live in Michigan). Admissibility is generally a low

threshold to be met. People trained generally in an area can speak about issues within their training, even if they do not specialize in that knowledge. The court will let the expert in with a line in the order quoting *Daubert* saying that Defense's contention goes to weight, not admissibility, and in the interests of justice are better addressed through vigorous cross-examination, presentation of contrary expert opinions, or careful instruction on the burden of proof.



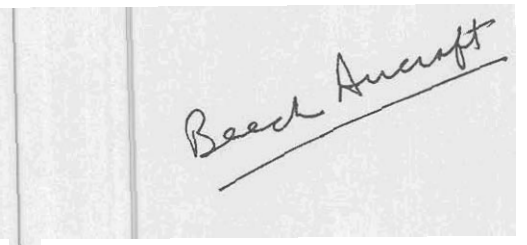
803 (8): public record

The report by the Department of Defense (DoD) is a public record. It is a record of a public agency setting forth information and in that way fits under 803 (8).

Walking through the requirements of 803 (8), this record is admissible. The DoD is a public governmental agency. They are authorized by statute to investigate this type of information and they compiled a report based on their findings. In 803 (8) (b) analysis of this case, they got the information first hand, had an official duty to observe and report, and they were authorized to conduct the investigation. Finally, under section c, this type information is admissible in civil proceedings (more restrictions exist in criminal matters).

SC may try to get out of it coming in by saying the duty to investigate does not include this action and will offer a good argument that reports by law enforcement personnel are restricted. Since the DoD is a law enforcement organization, that is decent argument in a criminal case. Since this is a civil case, SC may want to avoid looking stupid because this restriction does not apply.

In general, this report meets the factual findings, authority vested and public agency requirements of 803 (8) and it should be admitted by the court.



Exam ID: 514
Course: Evidence and Trial Practice
Professor Name: Bergman
Exam Date: Wednesday, December 08, 2004

Exam Start Date: 12-08-2004
Exam Start Time: 09:00:32
Exam End Date: 12-08-2004
Exam End Time: 11:57:56

Pages:	7
Words:	3272
Lines:	271

Disk Space	: 55851 MB
RAM	: 523496 MB
Microsoft Windows	: Windows XP
Microsoft Word	: Word XP
Application Version	: Securexam Student 3.15

514

632 Evidence/Trial Practice
Final Exam Semester I, 2004-2005

Examination No. [redacted]

632 EVIDENCE/TRIAL PRACTICE
Semester I, 2004-2005

Final Examination
UNM School of Law
Six Credits

Professor Barbara Bergman
December 8, 2004
9:00 a.m. to 12:00 noon

INSTRUCTIONS

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 (i.e., 2 ½ points for each question). The essay questions are each worth twenty-five (25) points for a total of 50 points. Thus, the entire examination is worth a total of one-hundred (100) points. I suggest that you take that into account in allocating your time.

2. Laptop computer users: Start the Securexam program entering your examination number, course name, professor's name, and date of the examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. You may indicate the correct answer to the multiple choice questions either by circling the correct answer on the examination itself or by typing the number of the question and then indicating which letter is the correct answer. If you are typing the multiple choice answers and wish to provide an explanation for your answer, you may do so right after the letter answer you have selected.

3. Bluebooks for writing: Answer the multiple-choice questions on the examination itself. Answer the essay questions in a bluebook(s). Please be sure to:

   (a) On the front of each bluebook please record the class name, professor's name and date of the examination. Make sure to number each bluebook in order.

   (b) For the essay answers in the bluebook, please write on every other line and only on the front page of each sheet.

   (c) Go to the exam check-in table at the conclusion of the exam and fill out an examination receipt.

4. 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 General Instructions

632 Evidence/Trial Practice
Final Exam Semester I, 2004-2005

Examination No. _____

45.0

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

Following are twenty (20) multiple-choice questions. If you are using a Bluebook rather than typing, circle the letter of the best answer on the examination itself. If you are typing, you may either mark the correct answer on the examination or you may type the question number and your answer. Use the Federal Rules of Evidence (or federal common law when appropriate), unless instructed otherwise. If you feel some explanation for your answer is necessary, I have left space for that. You are not, however, required to give any explanation. The purpose of the optional explanation is merely to alert me to potential problems with the way I have drafted the question.

1. On a snowy morning, Denise was driving to the law school when her SUV hit a patch of ice and careened into a car in the next lane driven by Pilaf. Luckily, no one was seriously injured. When the police arrived, Officer Charles asked Denise what had happened. She explained that she had hit a patch of ice and lost control of her vehicle. Officer Charles included that statement in the report he prepared of the accident. Pilaf has sued Denise for the damages to her car. Officer Charles has left the force and cannot be found. At trial, Pilaf seeks to introduce Officers Charles' report containing Denise's statement for the truth. Denise objects on hearsay grounds. The court should:

not excited

A. Exclude the report unless Officer Charles is called as a witness.

B. Admit the report but redact Denise's statement as inadmissible hearsay.

2.5

C. Exclude the entire report because Denise did not have a business duty to provide the information she gave to the officer and, thus, it constitutes inadmissible hearsay.

not 'duty' observed

D. Admit the report with proper authentication as a business record and admit Denise's statement within it as an admission by a party opponent.

D

Optional Explanation: _____

2. Amos is charged with the premeditated murder of his wife. At trial, the prosecution seeks to introduce the testimony of Dr. Audrey Cornelas, a pathologist, who will testify that Amos' wife probably died of asphyxiation although no physical evidence supports that conclusion. She has reached that conclusion based on the elimination of all other possible explanations. Dr. Cornelas is also prepared to testify that, in her expert opinion, Amos probably caused his wife's death since he, by his own admission, was the only person with her at the relevant time period. The defense objects to all of Dr. Cornelas' testimony. The court should:

A. Admit her testimony since the defense's objection goes to weight rather than admissibility and it should be up to the jury to properly evaluate its credibility.

B. Exclude all of her testimony because it is not sufficiently reliable under *Daubert.*

C. Admit all of her testimony because she is an expert who will be subject to cross-examination and her testimony is sufficiently reliable since *Daubert* only imposes a fairly low standard of reliability before such evidence can be admitted.

D. Exclude that portion of her testimony about the likely cause of death since it is only a probability, but admit her opinion that it was probably Amos who caused the death given her expertise in determining the time of death.

can just discuss time"

Optional Explanation: _____

not discussing a mental state - just time of death

3. In the same case as described in Question 2, Amos had been involved in a one-car accident; and when the police arrived at the scene, they found Amos cradling his wife's lifeless body. He claimed to have been taking her to the hospital when the accident happened. Amos was emotionally distraught and crying. He kept saying, "I don't know what happened. She was breathing just fine when we left home." The prosecution seeks to introduce these statements. The defense objects. The court should:

A. Admit the statements under the present sense impression exception to the hearsay rule. — too much time passed,

B. Admit the statements as an admission by a party opponent. → He is charged

C. Exclude the statements unless Amos testifies inconsistently with the statements at trial.

D. Exclude the statements as inadmissible hearsay.

Optional Explanation: _____

4. In the same case as described in Questions 2 and 3, at trial the prosecution establishes from the police who investigated the accident that Amos had been driving a red Blazer that night and the tag was "JYY 281". In his statement to the police shortly after the accident, Amos said he had not stopped for any reason after leaving his house and starting for the hospital with his wife. He also told them that she was awake and talking to him until the accident happened. The prosecution calls Rodney Uphoff as a witness. Uphoff worked the night shift at a gas station not far from where the accident occurred on the night that it happened. Business was slow that night, and Uphoff remembers looking out of his booth and noticing a red Blazer stopping for gas shortly before the accident happened. A man was driving the Blazer and there appeared to be a woman slumped on the passenger side. Uphoff assumed that she was asleep. For some reason, Uphoff jotted down the words "red Blazer" and the first three letters of the tag, which he noted were "JYY". A few days after the accident, the police came by the station. Uphoff vaguely remembered what had happened, but not the details. He was able to locate the scrap of paper on which he had jotted down his notes and he gave that to the police. At trial, Uphoff can no longer remember any details at all about what happened that night. The

recorded recollection

prosecution seeks to introduce the scrap of paper that Uphoff gave the police. The defense objects. The court should:

A. Permit Uphoff to read the words on the scrap of paper if the prosecution first establishes that Uphoff lacks sufficient present memory to be able to testify fully and accurately about those facts, that he once had knowledge of what he had seen, that he accurately wrote down what he had seen when it was fresh in his memory, that this scrap of paper is the paper on which he wrote the information, and that it has not been altered in any way.

B. Permit the prosecution to introduce the scrap of paper as an exhibit if they establish the foundation set forth in Answer A.

C. Exclude the testimony and the scrap of paper as inadmissible hearsay.

D. Permit Uphoff to testify about what he can currently remember, but exclude any testimony about what is on the scrap of paper.

Optional Explanation: _____

5. In the same case as described in Questions 2-4, about a week after the accident, the police showed Uphoff a photo array containing Amos' photo. He picked out Amos' photo as the man he saw putting gas in the red Blazer on the night of the accident. At trial, the prosecution plans to ask Uphoff what photo he had picked when he viewed the photo array. The defense objects. The court should:

A. Exclude the out-of-court identification because it is offered for the truth and, thus, is inadmissible hearsay.

B. Admit the out-of-court identification as long as it is not being offered for the truth.

C. Admit the out-of-court identification because it does not fall within the definition of hearsay. 801 (d) 1 (c)

D. Exclude the out-of-court identification because it is inherently unreliable. more reliable

Optional Explanation: _____

_____

_____

6. In the same case as described in Questions 2-5, the defense seeks to introduce the expert testimony of Dr. Bill Hand, a clinical psychologist, who has prepared a psychological autopsy of Amos' wife. In preparing his report, Dr. Hand reviewed all the police reports, the statement Amos gave to the police, the decedent's prior medical records, and interviews conducted of Amos' and his wife's family, neighbors and friends. Dr. Hand has concluded that, in his expert opinion, Amos' wife was suicidal. Unfortunately, the blood samples on which toxicological tests were to have been conducted were lost, and it was no longer possible to conduct any definitive tests to determine whether Amos' wife had ingested a fatal quantity of drugs prior to her death. Thus, there is no way to confirm or disprove Dr. Hand's conclusion. The prosecution objects to this testimony. The court should:

2. 5 A. Admit Dr. Hand's testimony and permit him to testify about the contents of the reports and statements he relied upon if the court determines that their probative value in assisting the jury in evaluating the expert's opinion substantially outweighs their prejudicial effect. 703 / 705

A B. Exclude Dr. Hand's testimony because it will not be of assistance to the jury, and it is not the best evidence since the toxicological test results would have been more accurate. still need interpretation 1962

C. Admit Dr. Hand's testimony because the prosecution's objections go to weight rather than admissibility and he is subject to cross-examination.

D. Exclude Dr. Hand's testimony because his opinion is based primarily on inadmissible hearsay.

Optional Explanation: _____

after 403, he still is subject to cross if it gets in.

7. In the same case as described in Questions 2-6, the prosecution seeks to introduce evidence that fifteen years before, Amos' first wife had also died under suspicious circumstances. Amos had never been charged with any crime in connection with her death, but her body had been found with no apparent injuries and the medical examiner was not able to determine the cause of death. The last person who had been with her before her death was Amos. The defense objects to the admission of this evidence. The court should:

2.5

A. Admit the evidence to show a plan and the absence of accident under Fed. R. Evid. 404(b).

B. Exclude the evidence because it has no relevance in this prosecution.

C

(C.) Exclude the evidence because it is inadmissible character evidence that the jury will view as proof of Amos' propensity to kill his wives.

D. Admit the evidence as proof of Amos' character for killing his wives.

Optional Explanation: Cannot survive 403 without any concrete findings of what happened. I will "prove the character of a person in order to show action in conformity therewith."

8. In the same case as described in Questions 2-7, the prosecution calls Irwin Schwartz to testify about how in September 2000, he sold Amos and his wife mutual life insurance policies that would pay the surviving spouse $500,000 in the event of the other's death. The defense objects. The court should:

2.5

A. Exclude the testimony because its probative value is substantially outweighed by the danger of unfair prejudice.

B. Exclude the testimony because these were mutual policies with either spouse becoming entitled to the benefits in the event of the other's death.

C

(C.) Admit the testimony to show Amos' possible motive for killing his wife. motive/bias always in, 1/2, etc.

D. Admit the testimony only if Amos testifies that he had no reason to kill his wife.

Optional Explanation: _____

9. In the same case as described in Questions 2-8, Amos seeks to call Mary Roberts as a character witness to testify that she has known Amos for twenty years and that he has the reputation for being a peaceful, non-violent person. In addition, in her opinion, he has a peaceful character, and, more specifically, she has had many opportunities to observe his behavior and she can describe ten different examples of times when Amos demonstrated his peaceful character. The prosecution objects to all of her testimony. The court should:

2.5

A. Admit her testimony concerning Amos' reputation in the community and her personal opinion of this pertinent character trait, but exclude any testimony of specific instances of conduct.

A

B. Exclude all of her testimony since peacefulness is not a pertinent character trait in this case.

C. Admit her testimony concerning her personal opinion and the specific examples that are the basis for her opinion, but exclude the reputation testimony because it is inadmissible hearsay evidence.

D. Exclude her testimony concerning her personal opinion and the specific instances of conduct but admit the reputation testimony since that is the proper method for proving character.

Optional Explanation: _____

crim

10. In the same case as described in Questions 2-9, Amos testifies at trial. The prosecution seeks to cross-examine him concerning the following: (1) his conviction in June 1998 for a misdemeanor fraud; (2) his conviction in January 1975 for a felony robbery charge for which he served five years; and (3) the fact that he misrepresented his actual income to the IRS by understating it by $10,000 on his tax return in 2002. The defense objects to all three lines of cross-examination. The court should:

A. Admit (1) and (2) because these are proper forms of impeachment of a witness under Fed. R. Evid. 609, but exclude (3) because it did not result in a criminal conviction.

B. Admit all three as proper forms of impeachment.

D

C. Admit (2) and (3), but exclude (1) because it is not a felony.

2.5

D Admit (1) and (3) but exclude (2) because it happened too long ago and the interests of justice do not warrant its admission since its probative value does not outweigh its prejudicial effect.

Optional Explanation: fraud = truthfulness

609(b) probative doesn't SUBSTANTIALLY outweigh prejudice

(2), is too old.

Examination No. ____

11. Josh Polar, a nationally known and well-respected law professor, published a treatise on civil rights law. A few months after the publication of Polar's treatise, Kevin Waters filed a lawsuit claiming that Polar plagiarized from his work and improperly published Waters' copyrighted work as his own. At trial, Waters seeks to introduce a paragraph from his earlier book that appears verbatim in Polar's treatise with no quotation marks or any other indication that the words were Waters'. Polar's attorney objects. The court should:

A. Exclude the paragraph as inadmissible hearsay.

B. Exclude the paragraph unless it is being offered as a learned treatise.

2.5 C. Admit the paragraph even though it is only minimally relevant to the issues in the lawsuit.

D. Admit the paragraph because it has independent legal significance and is not being offered for the truth.

Optional Explanation: it is foundation of lawsuit

Examination No. _____

12. Professor Christian Fritz is well-known for his regular forays to the Rio Grande Zoo to commune with the animals. On one such outing, a snapping turtle escaped from its cage and snapped at Professor Fritz's toe causing substantial damage. Reluctantly, Professor Fritz sued the zoo for damages for the injury that he had suffered. At trial, the Zoo sought to introduce the testimony of Dr. Hashi, Professor Fritz's doctor. According to the Zoo, Dr. Hashi will testify that Professor Fritz told him that the snapping turtle had been asleep until Professor Fritz had poked him gently with his foot. At that point, the turtle awakened and snapped at him out of fear. Assume that this is a contributory negligence jurisdiction. Professor Fritz's attorney objects to this testimony. The court should:

A. Admit the statement as an exception to the hearsay rule since it is a statement made for purposes of medical treatment or diagnosis.

B. Admit the statement as an admission by a party opponent.

C. Exclude the statement as inadmissible hearsay.

D. Exclude the statement because it is covered by the doctor/patient privilege.

Optional Explanation: not reasonably pertinent to diagnosis or treatment.

13. In the same case as in Question 12, the Zoo's counsel seeks to introduce Professor Fritz's medical records. The records contain the following statements: (1) Marlene, Professor Fritz's wife, who had accompanied him to the Zoo and to the hospital after he was injured, told the emergency room nurse that Professor Fritz had told her that the injury was not very painful, it looked worse than it felt; (2) the emergency room nurse noted that he observed Professor Fritz' injury and that it was not bleeding when he was admitted; and (3) Professor Fritz had told the emergency room nurse that the toe was not very painful and that he could move it. Professor Fritz's attorney objects to the admission of any of the medical records. The court should:

A. Admit all the medical records as long as a certification pursuant to Fed. R. Evid. 902(11) is submitted or the records are otherwise properly authenticated and a sufficient foundation is laid for their admissibility as business records.

B. Assuming that the records are authenticated, admit parts (1) and (3) because (1) was a statement made for purposes of medical treatment and diagnosis and (3) was an admission by a party opponent, and exclude (2) because no hearsay exception permits it admission.

C. Assuming that the records are authenticated, admit (2) and (3) because (2) falls within the business records exception and (3) is an admission by a party opponent.

D. Exclude all the medical records because they contain inadmissible hearsay.

Optional Explanation: _____

14. In the same case as in Questions 12 and 13, Joseph Aranga, the employee in charge of the turtle exhibit at the zoo, tells Professor Fritz, before Professor Fritz goes to the emergency room, that he is so sorry about what happened. He had neglected to lock the turtle's cage. It was his fault and he was sure that the Zoo would pay for all of Professor Fritz's medical expenses. At trial, Professor Fritz's attorney seeks to introduce these statements through the testimony of Professor Fritz. Counsel for the Zoo objects. The court should:

A. Admit the statements as admissions by a party opponent.

B. Admit the statement about fault as an admission by a party opponent, but exclude the statement about the payment of medical expenses for public policy reasons.

C. Exclude all the statements as inadmissible hearsay.

D. Exclude the statement about leaving the cage unlocked but admit the statement about paying for medical expenses for public policy reasons.

Optional Explanation: _____

15. Thomas Donovan has been charged with raping Melanie Timmons. According to the prosecution, Donovan broke into Ms. Timmons apartment late at night when she was asleep and raped her. The critical issue in the case is the identity of the rapist. Donovan was a total stranger to Ms. Timmons. The prosecution seeks to introduce testimony from Dorothy Tang and Betty Craig. Ms. Tang will testify that fifteen years before she had gone out on a date with Donovan. When they returned to her apartment, she had invited him in. One thing led to another, but then she told him "no" and asked him to leave. He refused and then sexually assaulted her. Ms. Craig will testify that Donovan was her stepfather. Twenty years ago when she was twelve years old, Donovan had sexually molested her. Neither witness has ever brought formal criminal charges against Donovan. Not surprisingly, the defense objects to this testimony. The court should:

A. Exclude the testimony of both witnesses since it constitutes inadmissible character evidence, and the jury is likely to infer that if Donovan sexually assaulted these women, it is more likely that he is the man who raped Ms. Timmons.

B. Admit the testimony of both witnesses since Congress has enacted the evidence rules that make such testimony admissible and permits its use for whatever purpose for which it is relevant.

C. Admit the testimony of Ms. Tang only since it relates to a sexual assault, which is the same crime for which Donovan is currently charged, but exclude the testimony of Ms. Craig since it relates to child molestation and Donovan is not being prosecuted for that.

D. Exclude the testimony of both witnesses because Donovan was not convicted for either of these alleged crimes.

Optional Explanation: _____

16. In the same case as described in Question 15, Ms. Timmons testifies at trial and describes her assailant and what happened in detail. In her 911 call to the police, she had given a physical description of the rapist. (Assume for purposes of this Question only that Ms. Timmons sounded calm and composed during the 911 call.) She said then that he was 6'2" tall, weighed approximately 190 pounds, and had a crescent-shaped scar over his left eye. Donovan is 5'11" tall, weighs 225 pounds, and has no scar. When Ms. Timmons testified before the grand jury, she said that her assailant was roughly 6 feet tall, weighed around 200 pounds and had a scar over his left eye. At trial, she testifies that her assailant was 5'11" tall, weighed 225 pounds, and had no scars that she can remember. The defense seeks to introduce the portions of her 911 call and her grand jury testimony containing her descriptions. The prosecution objects. The court should:

admit

Grand Jury = 1

(A.) Admit her 911 description to impeach her current testimony by showing the inconsistencies (but not admit it for the truth) and admit her inconsistent grand jury testimony both for impeachment and for the truth.

613, etc

B. Admit the inconsistencies in her 911 call and grand jury testimony only for impeachment but not for the truth.

A
2.5

C. Exclude the inconsistencies in both the 911 call and her grand jury testimony because they constitute inadmissible hearsay.

D. Admit the inconsistencies in both the 911 call and the grand jury testimony to impeach but exclude the references to the scar in both the 911 call and the grand jury testimony because Ms. Timmons' current testimony that she can't remember any scars is not directly inconsistent with her prior statements.

Optional Explanation: Grand jury = prior inconsistent 801(d)(1)(A)

Can be for the truth

She was CALM

unavailable

17. In the same case as described in Questions 15 and 16, assume for purposes of this Question, that Ms. Timmons is killed in a car accident several weeks before trial. The prosecution offers (1) Ms. Timmons' hysterical 911 call, (2) her testimony before the grand jury, and (3) her testimony at the preliminary hearing. The prosecution seeks to introduce all of those statements for the truth of what Ms. Timmons said. Assume for purposes of this Question that her various statements are all consistent with each other and highly damaging to Donovan. The defense objects. The court should:

A. Exclude all three categories of evidence because their admission would violate Donovan's confrontation rights.

B. Admit (1) because it is an excited utterance and admit (2) and (3) because they constitute former testimony; thus, all three fit within exceptions to the hearsay rule.

C. Admit (1) because it is an excited utterance which is a firmly rooted hearsay exception; admit (3) because it is former testimony under 804(b)(1); and exclude (2) because Donovan's counsel did not have an opportunity to cross-examine Ms. Timmons during her testimony before the grand jury.

2.5

D

D. Exclude (1) and (2) if the court determines that both of these statements are "testimonial" in nature and their admission would violate Donovan's right to confrontation; admit (3) because it constitutes "former testimony" and Donovan's counsel had an opportunity to cross-examine Ms. Timmons at that hearing.

Optional Explanation: assuming she was "hysterical" and not "calm and composed" (in # 16), Scalia still might not get (1) to be testimonial. There is no opportunity to cross which violates 6th in (1) + (2).

Scalia: Grand Jury = testimonial

Examination No. _____

RAPE

18. In the same case as described in Question 17, assume for purposes of this Question that the Court permits the prosecution to introduce all three categories of evidence described in that Question. (This assumption does not in any way indicate the correct answer to Question 17.) At that point, the defense then seeks to introduce (1) prior inconsistent statements that Ms. Timmons had made on other occasions, (2) Ms. Timmons' prior felony conviction for possession of crack cocaine in 2002; and (3) testimony from her best friend that Timmons had known Donovan for years and had always hated him. The prosecution objects to all of this evidence. The court should:

Timmons unavailable

609 (a) if probative

A. Admit (1) only if those prior inconsistent statements were made under oath and admit (2) and (3) as proper impeachment.

B. Exclude all three categories of evidence because Ms. Timmons is not a witness at the trial.

C. Admit all three categories of evidence as proper impeachment evidence.

D. Admit (1) for the truth regardless of whether the statements had been made under oath and admit (2) and (3) as proper forms of impeachment.

Optional Explanation: 613 - prior statement can be asked about in impeachment, even if it was not made under oath - just can't be admitted for the truth.

19. Again, in Donovan's prosecution for rape, assume now that the defense theory is that while Donovan did have sex with Ms. Timmons, she invited him to her home and the sex was consensual. The defense seeks to introduce evidence that Ms. Timmons had met Donovan several days before at her health club. They had immediately "hit it off" and gone out on a date that night. They had ended up at her home and Donovan had spent the night. According to the defense that is exactly what happened on the night of the alleged rape as well, except that early the next morning Ms. Timmons' husband had unexpectedly returned home early from an out-of-town business trip and saw Donovan leaving the Timmons' home at 7:00 a.m. The defense files a timely and written motion seeking permission to introduce evidence of Ms. Timmons' prior sexual behavior with Donovan as well as testimony of other men from the health club that she had engaged in similar behavior with them. The prosecution and Ms. Timmons object to the introduction of such testimony. The court should:

NOTICE

A. Admit only the testimony concerning Ms. Timmons' prior sexual behavior with **Donovan and exclude the testimony of the other men on public policy grounds.**

B. Admit Donovan's testimony concerning Ms. Timmons' prior sexual behavior with him because it is relevant to the issue of consent and admit the testimony of the other men because it is probative of her pattern of behavior, constitutes proper impeachment, and its exclusion would violate Donovan's constitutional right to present a defense.

C. Exclude Donovan's testimony about Ms. Timmons' prior sexual behavior with him as well as the testimony of the other men because the federal rape shield evidence rule prohibits the introduction of such evidence.

D. Exclude Donovan's testimony about Ms. Timmons' prior sexual behavior with him but admit the testimony of the other men because it is proper impeachment and its exclusion would violate Donovan's constitutional right to present a defense.

Optional Explanation: other men's while she does it a lot, the other men are not a habit (406) per se. Rape shield laws have to protect as much history as possible.

20. In the same case as described in Question 19, the defense claims that Ms. Timmons had concocted the rape allegation that she had testified about at trial after her husband saw Donovan leave the Timmons' home early that morning. The prosecution then seeks to introduce Ms. Timmons' 911 call to the police at 7:02 a.m. that morning before Ms. Timmons' husband went into the apartment to confront his wife. On the tape, Ms. Timmons' is crying hysterically and describing how this man came into her home the night before when she was asleep and raped her. The defense objects to this evidence. The court should:

A. Admit it as a present sense impression.

B. Admit it as either an excited utterance or as a prior consistent statement to rebut a charge of recent fabrication if there is evidence that Ms. Timmons had no way of knowing about her husband's return when she placed the call.

C. Exclude it as inadmissible hearsay if offered for the truth.

D. Exclude it because it is "testimonial" in nature and its admission would violate Donovan's confrontation rights.

Optional Explanation: _____

Examination No. _____

PART II – Short Essay Questions

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

Question 1
(25 points)

Donald Depp is charged in federal court with (1) conspiracy to distribute cocaine, (2) possession of cocaine with the intent to distribute, and (3) being a felon in possession of a firearm.

Charles Cox, a co-defendant, was arrested before Depp. The police picked Cox up when he was passing through New Mexico on the train. They had received a tip that Cox fit the profile for a drug courier. He had paid in cash for his one-way ticket from Los Angeles to St. Louis, and he appeared nervous when he boarded the train in California. Two DEA agents approached Cox when the train stopped in Albuquerque. In response to some friendly non-custodial questions, Cox initially told them that he did not know anything about any drugs. He was merely taking a vacation to visit his good friend, Donald Depp, in St. Louis. After the DEA drug dog, Darby, alerted on Cox's suitcase, however, his story changed. At that point, Cox explained that Depp had asked him to bring the suitcase containing two kilograms of cocaine to St. Louis. He made clear that the drugs in the suitcase were actually Depp's, and he was just doing him a favor.

Based on this information, the police arrested Depp. When the police stopped Depp and placed him under arrest, they searched his car and found a gun. Depp had been convicted of possession of heroin fifteen years before and had been released from prison in July of 1993.

Cox worked out a plea bargain and testified before the grand jury to everything he had said that is described above. Shortly before Depp's trial, Cox is found stabbed to death in his cell. The prosecution seeks to introduce at Depp's trial in their case-in-chief all of Cox's statements to the DEA agents as well as his grand jury testimony. They have given timely and adequate notice to the defense that they may be relying on the catchall hearsay exception to introduce Cox's grand jury testimony. They also seek to introduce Depp's prior felony conviction for possession of heroin.

What arguments are the prosecutors likely to make to support introduction of this evidence? What are the likely responses from the defense? How is the court likely to rule and why?

632 Evidence/Trial Practice
Final Exam Semester I, 2004-2005

Examination No. _____

Question 2
(25 points)

Defense Technologies ("DT"), a multi-national corporation, was awarded a contract from the federal government to manufacture a sophisticated electronic surveillance system for use by the armed forces. During its work on the contract, DT's chief executive officer ("CEO") became concerned that one of the subcontractors DT had hired – Southwest Circuits ("SC") -- had been doing shoddy work that perhaps endangered the accuracy of the systems DT was producing. The CEO alerted Larry Lawyer, DT's general counsel, to his suspicions. Larry immediately sent out a confidential memo to the plant managers for the various DT plants involved in manufacturing the system required under the contract. The memo made clear that Larry, as general counsel, was seeking information in an effort to provide legal advice to the senior officials in the corporation. He asked the managers to inquire of the relevant employees under their supervision concerning any conversations they may have had with SC employees about SC's work on the contract as well as any other information they might have about SC's work on the project. He also instructed the managers that they and the employees they consulted were to treat this inquiry and the information they provided as confidential. Based upon the information he received, Larry wrote a report to the CEO. After receiving that report, the CEO notified SC that DT was terminating SC's work on the contract. SC has now sued DT for breaching the contract it had with DT.

In discovery, SC has sought access to all the information that was provided by the managers and their employees to Larry as well as the report Larry submitted to the CEO based on that information. SC has also made clear that once it has reviewed this material, it may call everyone who had input in the process to testify about what information they provided to Larry and what Larry told the CEO. SC also plans to ask the managers and employees directly what they knew about the quality of SC's work.

During the course of the litigation, DT and SC tried to settle the dispute. In discussions between counsel, SC's attorney explained to DT's counsel that SC had been having some problems with a particular design it was using in its work under the contract but that after DT notified SC that it was terminating the contract, SC's technology division had figured out what the defect was and had corrected it. The settlement negotiations ultimately broke down. At trial, DT seeks to introduce the statements made at these discussions by SC's counsel to prove that SC's work under the contract had been deficient.

At trial, SC plans to call Richard Atkins as an expert to testify that the work SC had done under the contract met contract specifications and could not have been done in any other way. Atkins is an engineer but has never worked on an electronic surveillance system.

Examination No. _____

Finally, DT plans to introduce a report prepared by the Department of Defense's Office of the Inspector General. The Inspector General (IG") is authorized by statute to investigate and report on allegations of non-compliance with defense contracts. In this report, the IG summarized the investigation and concluded that SC's work under this contract had been grossly inadequate and endangered the safety of military personnel who would have relied upon these electronic surveillance systems if DT had not corrected the errors.

What arguments are likely to be made by those seeking to get access to this information and/or introduce it at trial? What arguments will be made in response? How is the court likely to rule and why?

[END OF EXAM]