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632 EVIDENCE/TRIAL PRACTICE
Semester I, 1999-2000

Final Examination
UNM School of Law
Six Credits

Professor Barbara Bergman
Friday, December 10, 1999
Saturday, December 18, 1999
9:00 a.m. to 12:00 noon

INSTRUCTIONS

1. This examination consists of fifteen (15) multiple choice questions and two essay questions. The multiple choice questions are worth a total of thirty (30) points. The first essay question is worth twenty (20) points and the second essay is worth forty (40) points for a total of sixty (60) points. Thus, the entire examination is worth a total of ninety (90) 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) Turn in everything at the end.
3. This is a MODIFIED OPEN BOOK EXAMINATION. You are permitted to use your notes, any outlines which you and/or your classmates prepared, any required texts, and any materials distributed in class. You may **not** use any commercial outlines.

End of Instructions

GOOD LUCK!

[THE QUESTIONS BEGIN ON PAGE 2.]

PART I – Multiple Choice Questions
(Total: 30 points)

Following are fifteen (15) multiple choice questions. Circle the letter of the best answer. Use the Federal Rules of Evidence, unless instructed otherwise.

1. Mary's new puppy, Torts, is an adorable black lab cross with a great deal of energy. Shortly after Mary acquires Torts, her elderly neighbor, Mr. Sanchez, came by one day, when Mary was not at home, to return some tools he had borrowed. According to Mr. Sanchez, Torts jumped up on him, knocking him down, and he broke his hip as a result of the fall. He sues Mary for damages, claiming that she was negligent in not properly restraining or training her dog. At trial, Mr. Sanchez's attorney wants him to testify about a statement Mary made to him a few months after the accident. She said: "Well, Mr. Sanchez, you'll be happy to know that I have taken Torts to obedience school and she has learned never to jump on anyone." Mary's attorney objects. The court should:
 - A. Admit the testimony because it is a statement against interest.
 - B. Exclude the testimony because the declarant is available.
 - C. Exclude the testimony because it is irrelevant.
 - D. Exclude the testimony because it is a remedial measure being used to prove liability.

2. In the same case described in Question 1, Mary wants to call the emergency room doctor to testify that Mr. Sanchez made the following statement to him when he arrived at the hospital. "I slipped on a piece on ice on my front walk." Mr. Sanchez's attorney objects. The court should:
 - A. Exclude the statement because it is privileged.
 - B. Exclude the statement because it was made for purposes of medical diagnosis or treatment.
 - C. Admit the testimony because it is an admission by a party opponent.
 - D. Admit the statement because it is a statement against interest.

3. In the same case described in Question 1, Mr. Sanchez's attorney wants to introduce his client's medical records from the private hospital where Mr. Sanchez was taken. He calls Dr. Torres, who was the treating physician, to explain how the records are made and kept as a routine practice in the hospital and to identify the records as Mr. Sanchez's. The records contain the following entry: "Pt. complains of pain in right hip. He says that a neighbor's vicious black dog attacked him and knocked him down." Mary's attorney objects. The court should:
- A. Admit the records as business records.
 - B. Admit the records as business records but redact the sentence about the vicious black dog attacking and knocking him down because that statement was not reasonably pertinent to diagnosis or treatment.
 - C. Exclude the records because the doctor is not the custodian of the records.
 - D. Exclude the quoted portion of the records because the plaintiff may not introduce his own out of court statements for the truth.
4. In the same case described in Question 1, Mr. Sanchez testifies that Mary's black dog knocked him down. Mary's defense is that Mr. Sanchez fell on his own front walk and was not knocked down by her dog. She claims that Mr. Sanchez first said her dog knocked him down two days after he was hurt when he learned that Mary had recently won a million dollars on a new game show. In rebuttal, Mr. Sanchez's attorney wants Dr. Torres to testify that Mr. Sanchez made the following statement to him on the day of the injury: "I was hurt when Mary's black dog jumped on me and knocked me down." Mary's attorney objects. The court should:
- A. Exclude the statement because a party may not introduce their own out of court statement for the truth.
 - B. Exclude the statement because prior consistent statements constitute improper bolstering of a witness's testimony.
 - C. Admit the statement as a present sense impression.
 - D. Admit the prior consistent statement for the truth.

5. In a first degree murder prosecution, John Tyler, the defendant, claims that he acted in self defense. He plans to testify that before the shooting he was aware of three incidents in which the decedent, Ralph Smith, had attacked people without provocation. The prosecution objects. The court should:
- A. Exclude the testimony because in these circumstances character can only be proven by personal opinion or reputation.
 - B. Admit the testimony as permissible character evidence.
 - C. Exclude the testimony because it does not fit within Rule 404(b).
 - D. Admit the testimony not to prove the decedent's character but only to show that the defendant was reasonably in fear when he killed Smith.
6. In the same case described in Question 5, in rebuttal, the prosecution wants to call a witness who will testify that Ralph Smith, the decedent, had a reputation as a peaceful, non-aggressive person. The defense objects. The court should:
- A. Admit the testimony as proper character evidence.
 - B. Exclude the testimony if offered to show that the victim was likely to have acted in conformity with that character trait.
 - C. Exclude the testimony because the proper method for proving character in these circumstances is through specific instances of conduct.
 - D. Admit the testimony but give the jury a limiting instruction that it is to consider this testimony not for the truth but only to impeach the defendant's self-defense claim.

7. In the same case described in Questions 5 and 6, the defense wants to cross-examine the witness who has testified about Smith's peaceful character by asking whether the witness is aware that Smith had attacked three other people without provocation. The prosecution objects. The court should:
- A. Sustain the objection because specific instances of conduct are not admissible to prove character.
 - B. Overrule the objection because this is permissible cross-examination.
 - C. Overrule the objection because this is the only way in which the defense can challenge such character evidence.
 - D. Sustain the objection because the only way the defense may rebut such a character witness is by calling its own character witness.
8. In an civil antitrust action against a large computer company, the Department of Justice attorneys want to introduce testimony by a former employee about the contents of an internal memorandum that he saw during his employment. He claims that the memorandum from the president of the company to several employees and the corporate general counsel outlined the company's plans to drive its competitors out of business. The defense objects. The court should:
- A. Sustain the objection because the best evidence (or original documents) rule requires introduction of the memorandum rather than the witness's testimony about the contents of the document unless the government has put the defendant, who had the document in its possession, on notice that it should produce the document and the defendant has not done so.
 - B. Overrule the objection because the parties are free to decide in what form they want to introduce evidence.
 - C. Overrule the objection because the memorandum was a statement by a party opponent.
 - D. Sustain the objection because the document was privileged.

9. In the same case described in Question 8, the government wants to introduce the deposition testimony of a company employee that is inconsistent with his trial testimony. The defense objects. The court should:
- A. Admit that portion of the deposition testimony only to impeach and instruct the jury that it is not to consider the deposition testimony as substantive evidence.
 - B. Admit that portion of the deposition testimony and permit the government to argue that the deposition testimony is the truth if that is consistent with the government's theory.
 - C. Exclude the deposition testimony because it is hearsay.
 - D. Admit the deposition testimony only if the court reporter authenticates the deposition.
10. In the same case described in Questions 8 and 9, assume the court permits the government to introduce the inconsistent portion of the witness's deposition testimony. Defense counsel then seeks to introduce at that time the remaining portion of the witness's deposition answer. The government objects. The court should:
- A. Sustain the objection and require the defense to wait until redirect to introduce the rest of the deposition answer.
 - B. Sustain the objection because the testimony is hearsay when offered by the defense.
 - C. Sustain the objection because the court does not have the freedom to alter the order in which evidence is presented.
 - D. Overrule the objection if the portion of the deposition used by the government was taken out of context and misled the jury and the portion offered by the defense should have in fairness been considered by the jury at the same time to prevent distortion.

11. In the same case described in Questions 8-10, the company's president recently married an employee of the company. The government calls her to testify about certain information she obtained during the course of her employment before her marriage. The defense objects to her being permitted to be called as a witness. She does not want to testify. The court should:
- A. Sustain the objection because in federal court a person may not be called over their objection to testify against a spouse during the course of the marriage.
 - B. Sustain the objection if her testimony involved any confidential communications.
 - C. Overrule the objection because she is a competent witness in this case.
 - D. Sustain the objection because a witness may never testify against a spouse.
12. An employee is suing Bob Rar for sexual harrasment. She alleges that he would touch her inappropriately and make sexual comments to her at work. At trial her attorney wants to call another woman employee to testify that Rar had made similar sexual advances to her, touching her inappropriately on many occasions. The plaintiff's attorney also wants to call Rar's stepdaughter to testify that he had molested her for years. Defense counsel objects. The court should:
- A. Exclude all the testimony as improper character evidence.
 - B. Admit all the testimony because such evidence is admissible to prove propensity.
 - C. Admit the testimony of the stepdaughter because those acts constituted a crime, but exclude the testimony of the other employee.
 - D. Admit the testimony of the other employee to the extent it describes sexual assaults like those alleged by the plaintiff if they fall within the category of sexual assaults covered by Rules 413 and 415, but exclude the testimony of the stepdaughter because this claim is not one based on child molestation.

13. In a driving while intoxicated (DWI) prosecution, the state wants to call a police officer to testify as an expert witness about a field sobriety test he had administered to the defendant, Jack Jones. The officer has been trained in how to administer the test but has not had any training on the principles on which the test is based. The defense objects to the officer's testimony about the test and the defendant's performance on the test. The court should:
- A. Exclude the testimony until the state can lay a sufficient foundation to show that the test is reliable.
 - B. Admit the testimony because the officer has been trained in how to administer the test.
 - C. Admit the testimony if the test is generally accepted in the field of law enforcement.
 - D. Admit the testimony because the defendant's performance on the test is non-testimonial and thus no Fifth Amendment self-incrimination issues are present.
14. In the same case described in Question 13, the state wants to introduce a copy of a police report prepared by the officer which contains the following statement: "Mr. Jones admits drinking two martinis at dinner." The defense objects. The court should:
- A. Admit the report because Jones' statement is a party admission.
 - B. Exclude the report because it is being offered against a defendant in a criminal proceeding.
 - C. Admit the report because Jones' statement is a statement against interest.
 - D. Exclude the report because it constitutes multiple hearsay none of which falls within any hearsay exception.

15. In the same case described in Questions 13 and 14, the state calls the officer who prepared the report to testify about the statement made to him by Jones. The defense then seeks to introduce expert testimony that Jones suffers from a mental disease which causes him to lie about everything. The prosecution objects. The court should:
- A. Permit the expert testimony, if the expert is qualified, because any party may impeach any witness, including a hearsay declarant.
 - B. Exclude the expert testimony because Jones is not a witness.
 - C. Exclude the expert testimony because the defense may not impeach the defendant.
 - D. Exclude the expert testimony because an expert may not testify as to the defendant's mental state.

PART II – Essay Questions

For purposes of answering these questions, assume that the Federal Rules of Evidence apply, unless instructed otherwise. Please answer the questions in your bluebook(s).

Question 1
(20 points)

Peter, who owns a guitar/music store, purchases a complete computer system from Digitcom, a local computer store. He explains exactly what he needs in a computer network that is designed to keep all the store's business records, including sales and inventory. Peter is functionally computer illiterate although he is a quick study. He relies upon the expertise of the computer store personnel to put together a computer system that will meet his needs. He specifically tells the computer people that he needs the system up and running before the busy Christmas season. After a series of delays in getting the necessary components for the system, the computer people install the system in late October. To say that the system has some problems is a bit of an understatement. Despite the best efforts of Digitcom employees, the computers crash on a regular basis, losing substantial amounts of information which then must be re-entered into the system. The last time this happened while the Digitcom manager, Joe, was working on it, Peter heard him exclaim, "[Expletive deleted]. I told Otis that this system would never work, but he insisted that we use it. I think he was just trying to get rid of some old overstock he had." Otis is the owner of Digitcom. Peter finally has had enough and throws the computer out into the street and sues Digitcom.

In discovery, Peter's attorney learns a few interesting things. First, Otis, the Digitcom owner, has three prior criminal convictions: a misdemeanor fraud conviction in 1985; a felony fraudulent misrepresentation conviction in 1988 for which he got probation; and a misdemeanor unauthorized use of a credit card conviction in 1993. In addition, when Peter checks with the consumer fraud division of the state attorney general's office he learns that over twenty complaints have been filed with that office about the business practices of Digitcom. Indeed, Larry Lawyer, at the attorney general's office, is conducting an investigation of Digitcom, but he will not tell Peter anything beyond that. Peter locates Sally Scene, another dissatisfied Digitcom customer, who explains that she had purchased a computer system from Digitcom several years before and it never worked properly. She ultimately returned it and started over with another company who supplied her with exactly what she wanted within a week. In his deposition, Otis denies that he has ever had any dissatisfied customers.

By the time of trial, Digitcom has fired Joe, who has moved to Palau (an island far out in the Pacific) to work on their Y2K problems.

You have been retained by Peter. When you review the documents Peter has concerning the purchase and installation of the computer system, you notice a copy of a letter from Peter to Otis in which Peter states: "In our efforts to resolve these computer problems short of litigation, I admit that perhaps some of the difficulties have been created by the inability of my staff to properly use the computer system, but I am confident that those issues could have been addressed promptly if the computers had been appropriate for our needs. I would like to discuss as soon as possible how we can mutually resolve this situation." Peter tells you he sent Otis that letter when they were still trying to amicably settle the dispute.

Based on the information you have been given, what evidentiary issues do you anticipate? More specifically, what evidence do you want to introduce that your opponent is likely to challenge? And what evidence is your opponent going to seek to introduce to which you want to object? How is the court likely to rule on each of these issues?

Question 2
(40 points)

You are an Assistant District Attorney in New Mexico. (Although this prosecution will be in state court, assume that the Federal Rules of Evidence apply when answering this question.) A number of local women have disappeared during the past year and no trace of them has been found. Law enforcement is concerned that they may have a serial killer on their hands, but they cannot even find any bodies. They get a break in the investigation when a woman runs up to a state patrol car screaming, "Please help me. He's going to kill me." When the officer manages to calm the woman down, he learns that her name is Vicki Wharton and she explains, to the extent she can, that she came upon a stranger in the parking lot of a local store. He had a cast on his arm and was struggling trying to carry several packages. He asked if she could help him to his car and she agreed. He was in his late twenties or early thirties and quite attractive. When they got to the car, he pulled a gun and forced her to get in. He blindfolded her and drove to a cabin in a deserted area. When he left the cabin briefly, she managed to untie herself and escape. Several miles from the cabin she came upon the state police car, who just happened to be patrolling in the area and flagged the officer down.

Vicki is so hysterical that the officer has difficulty getting a coherent statement from her. At that point, she is not able to describe how to find the cabin. Eventually, several days later the police locate the cabin. Pursuant to a valid search warrant, the officers quickly search the cabin and find a typed journal which describes in detail the abduction and murder of ten women. The journal appeared to have been typed on an old-fashioned typewriter found in the cabin. Before the police can dust for fingerprints, the cabin goes up in flames. Apparently, an incendiary device

had been triggered by their entry into one of the back rooms. Unfortunately, no fingerprints are found on the journal. The cabin was owned by a local sixty-year-old businessman who says he had not used it in years.

In the days following the discovery of the cabin, the police take a detailed audiotaped statement from Vicki. She gives a physical description of her assailant and the gun. The police eventually put together a list of possible suspects matching her description. When she is shown a photo array, she becomes upset, and then picks out Danny Delancy's photo saying, "That looks like him. No, no, I'm sure that's the man."

Based on her identification, the police arrest Danny and take him to the station for interrogation. They read him his rights. He initially waives his rights and says, "You can't prove that journal is mine." No one had mentioned any journal to him, although one newspaper article had referred to a book found in the cabin. Danny then invokes his right to remain silent and says nothing more. Vicki testifies before the grand jury and repeats her identification of Danny's identification as the man who abducted her. Based on the information in the journal, the police locate the graves of five other women. Danny is indicted for Vicki's kidnaping and the murder of the five women whose graves have been located.

Danny has a prior felony conviction for rape in 1992. In that case, he abducted a woman from a parking lot at gunpoint and raped her. He was also charged in two very similar cases (abductions at gunpoint) but was acquitted of those charges.

A few weeks before trial, Vicki is killed in a car accident.

Before trial, defense counsel informs you that if evidence of Vicki's identification of Danny is admitted, counsel plans to call Elizabeth Loftus, a leading national expert on eyewitness identification, to testify about the problems with eyewitness testimony, including the studies that show the unreliability of such testimony. She also plans to ask Ms. Loftus specifically about the reliability of Vicki's identification in this case.

Based on the information provided, what evidentiary issues do you anticipate arising at or before trial? More specifically, what evidence do you want to introduce that the defense is likely to challenge and what evidence do you want to exclude? How is the court likely to rule on each of these issues?