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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

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:
- A. Exclude the report unless Officer Charles is called as a witness
 - B. Admit the report but redact Denise's statement as inadmissible hearsay.
 - 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.
 - 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.

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.

Optional Explanation: _____

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.
 - B. Admit the statements as an admission by a party opponent.
 - 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

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

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:
- 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.
 - 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.
 - 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: _____

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:
- 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. 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: _____

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:
- 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. Admit the testimony to show Amos' possible motive for killing his wife.
 - 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:
- 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.
 - 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: _____

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

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.
- 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: _____

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: _____

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

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.
 - 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 _____

- 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:
- 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 _____

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:
- 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: _____

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: _____

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?

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.

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]