EVIDENCE
Spring 2013
Professor Ben Trachtenberg

Comments on the Final Examination

Having read all the answers to the final examination, I have written a few comments about them. The text below is not intended to serve as a "model answer." I spent more than six hours preparing this document, and I consulted whatever sources I pleased. Accordingly, there is no way that any exam taker could have addressed all of the issues that I discuss below.[1] Instead, this document exists to list some of the main points that students could have raised in response to the questions calling for narrative answers, and it also identifies a few common mistakes. The purpose is to enhance the exam's utility as a teaching tool.

While not everything I discuss below applies to each student's answer, I have focused on issues of broad relevance.

Question 1 [three-fifths (60 percent) of the narrative answer portion of the examination]

The D.A. asks for a memorandum concerning the admissibility of the following pieces of evidence at Thurber's trial, which is set for December 2013:

(a) The photograph of the dead firefighter.

The photo should not be a problem to authenticate. The prosecution will need someone who saw the dead firefighter (around the time the picture was taken) to say the photo is a fair and accurate representation. The witness need not be the photographer.

No hearsay issue; the photo is not a "statement."

The real issue here is Rule 403. The photo is "gruesome," creating a danger of unfair prejudice. And the defendant here doesn't have much of a "you have the wrong guy" defense, meaning he cannot direct the jury's anger toward the "real killer." He can't say he didn't own and run the plant; he's essentially arguing that he wasn't as culpable (negligent, reckless, depravedly indifferent to human life, etc.) as the prosecution claims. So there's real risk the jury will punish Thurber based on an emotional reaction to a dead body, particularly a firefighter.

Then again, the firefighter did actually die at the scene. The picture is gruesome because the events at issue were gruesome. If Thurber is charged with killing the firefighter, I don't see how the defense keeps the photo out entirely. The photo proves an element of homicide and could also be

[1] That said, these comments are by no means exhaustive; my failure to address an issue in this document does not necessarily mean that a student was erroneous in discussing it on the exam. These comments are too brief to acknowledge every good point I read while grading.

relevant to the chemical storage charge (if it shows evidence of that chemical's presence). Counsel would presumably argue about the size of the photo, the length of time it would be displayed, whether it would be color or black & white, and such details.

(b) Wanda Worker's recollection of discussions with Frank Thurber concerning Substance X.

The question does not specify whether the "recollection" comes in the form of Wanda's live testimony or from the newspaper article. If it's the article, the evidence is inadmissible hearsay. The article is asserting that Wanda said certain things, but the out-of-court declarant (the reporter) is not around to be cross-examined. Maybe call the reporter? Many students seemed to think that because Wanda's statement to the reporter likely falls under a hearsay exception (party admission), the newspaper is admissible evidence. Not so. The article itself will not fall under the residual exception; think how hard Judge Wisdom struggled to admit the article in the Dallas County case, which (a) was not a criminal case, and (b) involved an article vastly less likely to contain material errors (report of a courthouse fire as opposed to quotations of hearsay-within-hearsay).

If Wanda testifies, the question becomes whether she personally heard the conversations with Thurber or merely heard *about* them. If she heard them directly, she can testify about them on the basis of personal knowledge. Thurber's own statements are party admissions (*see* Rule 801(d)(2)(A)), and the statements made by others to him (something like "we have too much Substance X") are adopted admissions (*see* Rule 801(d)(2)(B)) because Thurber pretty much admitted the accusation (and if the statements were made by Thurber's employees or agents, they are also covered by Rule 801(d)(2)(D)).

Speaking of Rule 801(d)(2)(D), Wanda might be able to testify about Thurber's conversations concerning Substance X even if she did not hear them herself, so long as she heard about them from an agent or employee of Thurber (who personally heard the conversation). This would be double hearsay, with both layers covered by an exception.

Note too that apart from all these "opposing party's statements" rules, one could argue that the Thurber conversation isn't hearsay at all because it's offered to show its effect on Thurber (*i.e.*, to prove notice, thereby establishing the *mens rea* for the "unlawful storage" offense). (You still have a problem if you wish to admit the newspaper, however.)

(c) A copy of the form sent by federal regulators to Foundation Fertilizer assessing the fine for dangerous conditions. (You were able to download a scanned copy of the form from the regulatory agency's website.)

Depending on the "dangerous condition" at issue here, the evidence may not even be relevant. Perhaps the bathroom floor was too slippery.

Assuming the evidence is relevant (*e.g.*, the danger was presented by an abundance of Substance X), the defense may argue that the evidence is impermissible character evidence barred by Rule 404. (Once a dangerous workplace, always a dangerous workplace.) The prosecution has a good "around the box" rebuttal, which is that the evidence is being offered to show Thurber's knowledge that his plant was dangerous, which is relevant to the homicide charge and the unlawful storage charge.

The form assessing the fine is probably hearsay. It is likely also a public record admissible under Rule 803(8)(A)(i) because assessing the fine is one of "the office's activities." It could also be a business record (*see* Rule 803(6)). The argument for admissibility is especially strong if the record is offered simply to show that a fine was assessed (*i.e.*, that Thurber got a letter demanding money based on the agency's safety inspection) rather than that the fine was proper (*i.e.*, that the plant was truly dangerous, or that a federal regulation was truly violated). Even an erroneous assessment could have put a reasonable owner on notice of potential danger.

Assuming someone can testify about how the form was downloaded (*e.g.*, an investigator employed by the D.A.'s office), establishing authenticity should not be a problem. (If the defense gives the state a hard time, one might need some testimony about how the agency website got the forms, etc.).

If authenticity is proven, then the best evidence rule should be satisfied too. *See* Rule 1003 ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."). Here, we have a "scanned copy," which ought to be pretty accurate.

(d) Testimony from the husband of a fertilizer plant security guard killed during the explosion concerning what a good wife and mother the security guard was.

This is likely irrelevant. If not, it's likely barred by Rule 403. We just don't care whether the homicide victim was nice. Also, even when it's allowed, victim character evidence can't come in unless the defense "opens the door," which seems highly unlikely here.

(e) Testimony from Francine Thurber, wife of Frank Thurber, that when he first saw television news reports of the explosion, Frank said, "My carelessness finally got the best of me."

This is hearsay that falls within the opposing party's statement exception.

The marital confidence privilege likely applies. Thurber said it to his wife with no one else around. Confidentiality is presumed, even though Thurber later said something similar to his brother. Thurber may assert this privilege regardless of whether his wife chooses to testify, so I'll postpone discussion of the spousal testimony privilege for now.

Note that Frank saying the same thing to his brother does not eliminate the marital confidence privilege for the prior statement. The privilege covers communications, not facts, so unless Frank tells his brother, "As I just told my wife …" the privilege survives the second conversation.

(f) Testimony from Francine Thurber that after making the statement quoted above, Frank called his brother in Nebraska and said, "My carelessness finally got the best of me, bro."

This is hearsay that falls within the opposing party's statement exception.

The marital confidence privilege does not apply because Thurber spoke to a third party.

Francine Thurber can probably avoid testifying by asserting the spousal testimony privilege. She is married to a criminal defendant. In most states, she may choose not to testify against her spouse.

So unless the state can convince her to waive the privilege, the evidence stays out. If Fisher is a "defendant spouse" state, then Frank Thurber can prevent the testimony regardless of Francine's wishes.

Note that nothing is stopping the D.A. from calling the brother to testify about what Frank said to him.

Note also that Rule 403 does not help the defense here (or with the item above, assuming the marital confidence privilege could somehow be defeated for that evidence). Yes, the evidence is prejudicial to Thurber, but it is not unfairly so.

(g) Testimony by Frank Thurber's minister concerning Thurber's careful nature and concern for his fellow Foundation residents.

This is admissible character evidence under Rule 404(a)(2)(A) ("a [criminal] defendant may offer evidence of the defendant's pertinent trait"). Thurber's "careful nature and concern for his fellow Foundation residents" are pertinent to the charges, which involve careless (indeed, reckless) conduct. If he offers such evidence, he opens the door to rebuttal evidence about these traits. The minister may testify during direct examination only in the form of reputation and opinion, not about specific acts. *See* Rule 405(a). During cross-examination, the prosecution may ask the minister about specific acts showing Thurber's lack of careful nature and concern. *See id.*

Note that "lack of carefulness" (or something similar) is *not* an essential element of any potential charge (even negligent homicide or depraved indifference murder). A normally careful person can commit a reckless act that constitutes negligent homicide or depraved indifference murder; bad character is not an element, so Rule 405(b) does not apply here.

Note too that because the minister would be called by Thurber (why would the prosecution call a witness concerning the defendant's good character?), there is no priest-penitent privilege to worry about; Thurber would waive any privilege concerning his communications with the witness.

(h) Evidence that the same minister was convicted [in] a Kansas court in 2002 of embezzling funds from a church.

Assuming the minister testifies, he may be impeached with certain prior convictions. Because embezzlement involves "a dishonest act or false statement," evidence of such convictions normally "must be admitted" under Rule 609(a)(2). Unless the conviction is stale (see next paragraph), the judge is required to admit it.

Here, however, perhaps "more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." *See* Rule 609(b). The conviction was in 2002, and the explosion and trial are in 2013.[2] If the minister served no time (or was released after a short sentence, more than 10 years ago), then the evidence comes in only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Is the probative

[2] When is the end point for measuring the ten years? It could be the date of the offense, the indictment, the start of trial, or the day the witness testifies. *See* Fisher, page 294. If the indictment controls (which the scholars quoted by Fisher recommend), the D.A. may wish to hurry the grand jury along, depending on the witness's date of release.

value of a 10-plus-years-old embezzlement conviction high? Will evidence of the conviction cause much prejudicial effect against Thurber (we care only about prejudice to the defendant, not the witness)? Reasonable minds may differ. If I were the judge, a stale conviction like this one probably stays out.

Question 2 [one-fifth (20 percent) of the narrative answer portion of the examination]

You are counsel to Ophelia, who has sued her ex-boyfriend, Hamlet. The plaintiff wishes to offer a tape into evidence.

(a) How might you convince the court that the tape is authentic? (Because this piece of evidence is very important to your case, you may wish to propose multiple methods.)

There are a variety of good answers to this. They tended to fall into four broad categories: (1) identifications of the voice on the recording as that of Hamlet, (2) identification of the phone number from which the incoming call came as that of Hamlet or a phone he had access to, (3) evidence that the contents of the message imply that Hamlet was the caller, and (4) other clever ideas, some more practical than others.

Note that good answers stated the relevant legal standard, which appears in Rule 901(a): "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." This is also the Rule 104(b) standard (*a.k.a.* the "*Huddleston* Standard"). No citation was needed if the standard was properly explained.

Because the parties have stipulated that the recording properly captured a message left on Ophelia's voicemail, the only authentication issue is whether Hamlet left the message. If someone else left it, it's not especially relevant (if at all) in a case against Hamlet. So we have a conditional relevance issue. *See* Rule 104(b).

First, witnesses can identify the voice on the recording as Hamlet's. Rule 901(b)(5). While Ophelia herself would be familiar enough with his voice to do so, a less biased witness (*e.g.*, a friend of Hamlet) would be even better. Also, the jury can listen to the tape and to an authentic example of Hamlet's speech (such as his in-court testimony, or an undisputed recording) and decide for itself if the same person left the message. Rule 901(b)(3). An "ear expert" is not appropriate (according to the Advisory Committee Notes to Rule 901).

Second, if the voicemail system has a reliable process for identifying the incoming phone number, then it would be useful to see if 212-555-1234 is Hamlet's phone number. If so, that's good evidence that Hamlet made the call. *Cf.* Rule 901(b)(6). Even if not his number, if it's a number he had access to, it could support a finding of authenticity. Speaking of Hamlet's phone, some students suggested obtaining Hamlet's phone records to see if they show a call to Ophelia at 12:16 a.m. on the night in question.

Third, the message contents (*i.e.*, the words) suggest that the person who left the message knew facts not widely known by the public (*e.g.*, the name of a movie Ophelia saw on a "second date"). *See*

Rule 901(b)(4). It was important to engage with the facts here. Just saying that the message contents could be linked to Hamlet was insufficient.

Finally, a few other ideas: Perhaps a witness will testify about hearing Hamlet leaving the message, or Hamlet himself might admit it. (Good luck.) Perhaps Hamlet's phone tracks his movements, and the location data can put him at a movie theater at the right time (ideally one showing a film much like "The Murder of Gonzago"). Perhaps surveillance videos show him at the theater, or his credit card statement shows the purchase of a movie ticket.

(b) How will you respond to the "best evidence" objection?

The best evidence objection, as stated in the problem, is not strong. Defense counsel seems to misunderstand the rule. The rule does not require that parties produce the "best" evidence. The existence of "better" evidence of harassment does not imply that this evidence is not admissible.

That said, there was a best evidence rule issue here to discuss, and students who ignored the issue left points behind. Chances are, Ophelia won't bring her phone to court and use it to play the message to the jury. Accordingly, there will be a copy made. And the words captured in the recording are certainly at issue (it's not enough that Hamlet simply called; the parties will care what he said), so an "original … recording is required in order to prove its content unless these rules or a federal statute provides otherwise." FRE 1002.

Fortunately for Ophelia, Rule 1003 allows the use of a duplicate in place of an original, "unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Here, the parties have stipulated that "the tape is a genuine recording of a message left by someone who called the plaintiff's mobile phone," so there is no "genuine question" about its authenticity. A copy is therefore admissible, assuming it's made in some reliable manner (*e.g.*, downloading the message from the phone to a computer, or even playing the message next to a microphone to make a decent recording). *See* Rule 1001(e) ("A 'duplicate' means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.").

Question 3 [one-fifth (20 percent) of the narrative answer portion of the examination]

Your boss leaves you a note one day, which reads: "I read an interesting article suggesting that in civil cases, the hearsay rule is more trouble than it's worth." How do you respond?

The idea floated by the state legislator (abolition of the hearsay rule in civil cases) was not popular. It was nearly unanimously opposed by the students. Perhaps because the idea seemed so silly, some students seemed to forget that the question asks for a memo to your boss. In general, it is unsound to inform your boss that the boss's new pet idea is "preposterous." A more judicious tone would have benefited several students.

Further, even if you think an idea is silly, a memo concerning a legislative proposal should at least consider the merits of the proposal before denouncing it. Regardless of the position taken about the proposal (pro or con), students could not earn full credit without engaging the other side.[3]

Plausible arguments in favor of the proposal[4] include: (1) existing hearsay "exceptions were developed in a haphazard manner and in many cases without justification in principle or logic," (2) hearsay is already admitted in many civil proceedings (such as small claims court) without causing any trouble, (3) objections about hearsay really "go to weight," and such objections normally don't affect admissibility, (4) courtroom demeanor is overvalued, *i.e.*, jurors don't really learn much about a declarant's credibility by seeing live testimony, (5) cross-examination is useful but not perfect; it can even confuse the jury and distract from the truth at times, (6) oaths and affirmations don't guarantee reliability as they once did (if they ever did), and (7) other countries are doing it. Note that a memo opposing the proposal could have listed a few "pro" arguments without using too many valuable words.

Plausible arguments against the proposal were not difficult for students to find. They included[5]: (1) hearsay is unreliable, so abolishing the rule will allow unreliable evidence to infect civil trials, (2) civil trials are important too, so if the rule makes sense in criminal cases, civil litigants deserve no less accuracy in adjudication, (3) divergent rules in criminal and civil cases would be annoying (note however, that we already have several divergences), (4) juries need to see witnesses to evaluate their credibility, (5) absent the hearsay rule and its exceptions, judges will have more Rule 403 arguments to deal with, and lawyers won't know in advance what evidence is admissible, (6) the abolition of the hearsay rule will encourage perjury (note however that the party admissions doctrine already allows would-be perjurers to offer damning false testimony to the effect of "the defendant told me she knew we had a valid contract and she just didn't care" or "the defendant apologized for driving drunk through a red light"), and (7) existing hearsay exceptions already allow in most decent hearsay (especially when one recalls Rule 807), so current law does not cost us much good evidence.

Final comment: This document contains 3,540 words, including footnotes (as well as portions of the questions, comments about common mistakes, and other items not appropriate for a real exam answer). Students who budgeted words carefully should not have had too much trouble answering the questions in the allowable 3,000 words.

[3] For an article taking the "pro" position, see Matthew Caton, *Abolish The Hearsay Rule: The Truth Of The Matter Asserted At Last*, MAINE BAR JOURNAL, at 126 (Summer 2011) (noting that several English-speaking countries have abolished the hearsay rule in civil trials—including New Zealand, Scotland, and England—and that the sky has not fallen).
[4] These all appear in Caton, *supra*. Read it online: http://www.mainebar.org/images/temppdf/MBJsummer2011LR.pdf
[5] The inclusion of an argument here (or in the previous list) does not imply my agreement, only that it could sensibly have been part of a good answer.