EVIDENCE
Spring 2015
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. Before I turn to the questions, a quick note on proofreading: Proofreading is worth doing. Errors like "Confrontational Clause" are distracting, as are odd abbreviations (such as "HS" for "hearsay"). I did not consciously deduct points for such imperfections, but they cannot have helped students create an impression of mastery of evidence law.

Question 1 [Police Shooting]

[Note: The event on which this question was loosely based is the death of Eric Harris, who was shot dead by "reserve deputy" Robert Bates in Tulsa, Oklahoma on April 2, 2015. *See* Lindsey Bever & Sarah Larimer, "Tulsa reserve deputy who fatally mistook gun for a Taser turns himself in," WASH. POST (Apr. 14, 2015) ("Why was a 73-year-old insurance company executive playing cop?").]

For each piece of evidence presented by the exam question, I provide brief analysis:

1. ***Attendance sheets.*** This evidence is likely admissible. Portions of the documents are almost certainly admissible hearsay (*e.g.*, the person who wrote the date was making an out-of-court statement that is now being offered for its truth). If the instructor took attendance (perhaps by calling the roll) and noted the results on the sheet, those notes are hearsay too. However, if a sheet was circulated, and students indicated their own presence, then the absence of a note indicating Gates's presence (*e.g.*, he didn't write his initials) is not hearsay because he is not asserting anything by failing to show up and mark the sheet. In any event, the "is it hearsay" debate is unnecessary because the documents appear to be business records and public records. *See* Rule 803(6) & (8). The records were kept in the ordinary course of police business, and at the time of their

[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.

creation, there was not any particularly strong motive to falsify them. Indeed, if such a motive had existed, chances are they would falsely state that Gates attended regularly. *See also* 801(d)(2)(D) (statements were by employees or agents of the department). The evidence is relevant and its admission does not cause unfair prejudice.

2. ***Hospital administrator's testimony.*** Expert testimony of some kind concerning the victim's expected earning capacity is likely admissible. In a wrongful death case, the projected income of the decedent is a useful measure of damages. (Note that this evidence is not "hedonics" evidence of the sort we discussed in class; hedonics is offered in place of more direct financial data.) The question therefore becomes whether the proposed expert satisfies Rule 702.[2] *See also Daubert*. In addition to the expert's qualifications, the four Rule 702 factors are:

    a. Whether "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Looks pretty good for the plaintiff. The jury likely cannot accurately estimate a doctor's lifetime earnings without assistance, and that fact is in issue.

    b. Whether "the testimony is based on sufficient facts or data." We don't really know from the facts. If the witness has reviewed the salaries paid to doctors with various levels of experience, has analyzed trends in physician compensation, and had considered other relevant information, then this requirement is probably satisfied. If not, then not. One would hope that the plaintiffs have selected an expert who has reviewed the appropriate materials.

    c. Whether "the testimony is the product of reliable principles and methods." Although projecting salary is not an exact science, there are people who do it professionally, and they have accepted methods. For example, the amount of life insurance one wishes to buy can depend on expected income, and one's retirement savings plan may be similarly affected. A hospital administrator (depending on her responsibilities) may well need to plan for future budgets by taking projected salary costs in to account. Again, assuming the witness has consulted the relevant literature, which she may rely upon even if such evidence is not admissible so long as other reasonable experts would so rely, *see* Rule 703, this should not be a problem.

    d. Whether "the expert has reliably applied the principles and methods to the facts of the case." Again, we don't know from the facts whether this is satisfied. But if the witness can satisfy the requirements listed above, chances are she can apply her methods to this particular doctor.

[2] Under Rule 701, the witness could not offer a lay opinion about the doctor's expected income. Also, this witness was "hired" by the plaintiffs, and hiring lay witnesses is prohibited.

Note that this expert testimony seems especially proper given the plaintiff's burden of proof.[3] Economic experts are routinely allowed to testify in employment litigation (*e.g.*, when the plaintiff seeks compensation for future lost income because of wrongful discharge) as well as in wrongful death cases. That said, maybe a hospital administrator is not qualified and a trained economist is required; it will depend on the facts.

3. ***Bulger memorandum.*** This letter is hearsay if offered for the truth of the matter asserted, and it does not fall under the employer-employee exception at Rule 801(d)(2)(D) because Bulger had left the department before writing the letter. It does not matter that he wrote about events observed while still employed by the defendant department.[4] The letter is nonetheless likely admissible to show that the department was on notice of the risks of the reserve deputy program and of Rob Gates in particular. In other words, the letter may be used to show its effect on the recipient. Because Gates himself did not receive the letter, it cannot be used to show that he was on notice of its contents, and it probably cannot be offered against him at all. Accordingly, two limiting instructions are (at least theoretically) available if requested by defendants: (1) The police department can get an instruction that the letter is offered only to show notice and not for the truth of its contents (*e.g.*, that Gates is a "buffoon"), and (2) Gates can get an instruction that the letter may not be considered at all with respect to his potential personal liability, as opposed to that of the department. I will not speculate on whether such instructions would be useful.

4. ***Dash cam video.*** The video is not hearsay. Videos (like photos) in general are not "statements," and Gates's words are not being offered for their truth (*i.e.*, to prove that he was a "lawman") but instead to show that he's an unprofessional menace to the citizenry. And even if they were hearsay, they are party admissions (for both defendants). The real arguments against admissibility are based on Rules 404 and 403. The argument is that the plaintiffs would use to video as improper propensity evidence (suggesting that because Gates was once a careless buffoon during a "prior bad act," he was likely acting like a careless buffoon when he shot the victim). And perhaps its limited probative value is outweighed by the danger of unfair prejudice (can the jury give Officer Yeehaw! a fair trial?). The defense has good arguments here and may prevail. If, however, the plaintiffs can show that someone at the police department saw (or should have seen) the video before the shooting at issue, then the evidence becomes quite useful for showing that the department was on notice of Gates's dangerous nature; this takes the "other acts" evidence "around the propensity box."

5. ***The photos.*** The pictures are not hearsay. They are all likely admissible, subject to Rule 403. The photos are relevant because (1) the post-mortem photos show that the victim is dead, which is element of the wrongful death tort, and (2) the graduation photo

[3] There is no Rule 403 issue caused by the plaintiffs paying the expert. Experts are generally compensated for their time.
[4] Because Bulger was describing past events in his letter, Rule 803(3) also does not apply.

showed what he was like while alive (happy, a medical doctor), which is relevant to damages. Photos and videos of decedents are commonly admitted in wrongful death cases. Absent some unusual circumstances (*e.g.*, an onerous number of photos), Rule 403 should not keep them out.[5] If the post-mortem photos are especially gruesome, then the judge may limit their use (*e.g.*, restrict the amount of time they can be shown, or their size).

6. ***Medical resident's testimony.*** The testimony might seem to violate Rule 404 in that it shows prior bad acts by the victim. But it is probably not being offered as propensity evidence (to suggest he was high on coke when shot). Instead, the defendants could use it to rebut the plaintiff's evidence concerning damages, especially projected future income. A doctor who uses cocaine may have a lesser projected income (and life expectancy) that a doctor who abstains. Assuming that the witness intends to testify on the basis of personal knowledge (*e.g.*, he saw the victim use cocaine), the defendants have a good shot at getting the cocaine testimony admitted.[6] Then again, there is a pretty good Rule 403 argument here. Just how probative is the evidence? The answer may depend on how much cocaine the decedent used, how recently, and how often (we are told "regularly"). And how much unfair prejudice would the plaintiffs face if the evidence is admitted? It depends on whether the jury will unfairly "punish" the victim for being a drug user or will instead give the evidence appropriate consideration. The judge has wide discretion here.

7. ***The Chief's memorandum.*** Her memorandum is barred by Rule 407 because it is evidence of a subsequent remedial measure. Abolishing the reserve deputy program is the sort of thing that, had it happened before Gates shot the victim, would have made the injury less likely to occur. There is no plausible use for the evidence other than to show negligence or other wrongful conduct by the department. Control, feasibility, and the like are not disputed. Note that the department would have no hearsay objection because Rule 801(d)(2)(D) covers a memo by the Chief.

8. ***The Gates apology letter.*** This is hearsay that is admissible against Gates, who wrote it. It is likely not admissible against the department, which discontinued the reserve deputy program one day before Gates wrote the letter. Absent unexpected issues presented by Rule 408 or Rule 409 (which are not developed in the facts), Gates cannot keep the letter out, and the department would be stuck with a limiting instruction.[7]

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[5] Several students cited *State v. Bocharski* (Fisher p. 44) to support of excluding the photos. Recall that most of the photos in that case were deemed properly admitted.

[6] Note that if the witness merely heard the victim state that he used cocaine, then there may be a hearsay problem. It depends on whether Rule 801(d)(2)(A) applies to statements made by the victim in a wrongful death action. The victim is technically not a party, but the plaintiffs sort of stand in his shoes. Courts have split on this issue.

[7] It is not likely that the letter is admissible against the department as a statement against interest, Rule 804(b)(3). Gates must be unavailable at trial for that exception to apply, and if he refuses to testify, the court will likely enter a verdict against him. Then again, he might invoke his Fifth Amendment privilege if he feared prosecution.

9. ***General Notes on this Essay.*** Because this is not a criminal case, there are no Confrontation Clause or Compulsory Process Clause issues presented. Words spent addressing those constitutional provisions were wasted. Also, undue attention to authentication issues wasted time for many students. In general, there is no need to discuss authentication at length for an item whose authenticity cannot likely be challenged in a plausible way (*e.g.*, the attendance sheets, or the Gates letter).

Question 2 [Wolfgang's Weapon]

This question has three subparts, which I address in turn:

1. ***The Defendant's motion for directed verdict.*** This motion should be granted. Possession of the weapon is an element of the offense, and the "shopkeeper is the only witness who can connect Wolfgang with the weapon." In court, she refuses to give the needed testimony. The statement to police, while inconsistent with her testimony, is not covered by Rule 801(d)(1)(A) because it was not made at a prior "proceeding." Evidence of prior inconsistent statements that does not fall under the Rule 801 exception is admissible as described in Rule 613, but such evidence is allowed *only for impeachment*, not as substantive evidence.[8] Because the prosecution has no substantive evidence linking Wolfgang to the weapon, the case should be dismissed.

2. ***The Prosecution's use of the shopkeeper's statement.*** This argument by Wolfgang appears incorrect. There was nothing wrong with the prosecutor confronting its "turncoat witness" with her prior inconsistent statement.[9] This is a legitimate form of impeachment, and a fair effort (1) to remind the witness of her prior statement (and perhaps thereby refresh her recollection, *see* Rule 612) and (2) to attempt to convince her to give truthful testimony. Under Rule 613, the witness's prior inconsistent statement may be read aloud.

   If the court permitted the prosecution to use the statement for its truth (for example, by claiming in closing argument that the statement is evidence that Wolfgang has the gun), that ruling would be error. Because we are now assuming that the jury convicted, such an error may indeed have occurred. But the actual questioning presented in the fact pattern was fully permissible.

[8] Note that Rule 803(5) (recorded recollection) does not apply here. The facts do not show that the witness confirmed in court that the statement was an accurate reflection of her knowledge when it was made. *See Johnson* (Fisher p. 543).
[9] *See Ince* (Fisher p. 439). This assumes that the prosecution was genuinely surprised by the witness's behavior, as was apparently true at Ince's first trial.

Various implausible hearsay exceptions were mentioned by students arguing that the prior statement was properly used at trial.[10] Rule 803(1) likely does not work because a police statement cannot easily be given "immediately after" the event was perceived, and a written statement of this kind is not likely an "excited utterance," see FRE 803(2). No Rule 804 exception applies because the declarant is testifying about the events. Rule 807, the residual exception, is nearly impossible to apply when a live witness to the events is present on the witness stand.[11]

3. ***The police report.*** The police report is not admissible unless its author is available to be cross-examined about its contents. The statement is testimonial hearsay (written by a police officer after arresting a suspect, concerning the suspect's alleged crime), and under *Crawford* it cannot be offered against the defendant.[12] Also, it likely does not fall into any hearsay exception anyhow (*see* FRE 803(8), which excludes "a matter observed by law-enforcement personnel" from the public records exception if evidence is offered in a criminal case), *see also* Fisher at pp. 569-74, collecting cases in which courts limit the use of FRE 803(6) as an end-run around the limitations of 803(8)).

Question 3 [Prior Convictions]

Your boss leaves you a note one day, which asks whether your state should "adopt a rule identical to Federal Rule of Evidence 609" or whether the state perhaps "should adopt a rule similar to that of Missouri." The Missouri rule is provided to you. How do you respond?

The idea floated by the unnamed justices (adoption of the Missouri rule) was not popular. It was nearly unanimously opposed by students. However, 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 (pro FRE, pro Missouri rule, or something else), students could not earn full credit without engaging counterarguments.

Before offering any arguments, I will note that the Advisory Committee Note to Rule 609, along with the House, Senate, and Conference Reports, are all included in the Fisher supplement and contain robust discussion of what prior convictions should be admissible to impeach witnesses. The Fisher casebook has additional sources.

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[10] Note that anyone who believed the prior statement was admissible pursuant to a hearsay exception should have argued against granting the directed verdict in the prior subpart. If the prior statement is admitted as substantive evidence, them the jury is free to believe the prior statement instead of the trial testimony.

[11] Such an application of the residual exception would essentially eliminate the distinction between Rule 613 impeachment evidence and prior inconsistent statements admitted as substantive evidence under Rule 801(d)(1)(A).

[12] It was important to mention the Confrontation Clause here because the hearsay issue (in particular, Rule 803(6)) is perhaps debatable. Because *Crawford* so clearly applies, however, the Sixth Amendment discussion could be handled well in very few words.

Plausible arguments in favor of FRE 609 include: (1) many convictions admitted under the Missouri rule are not especially probative, especially those for old offenses and for misdemeanors not involving dishonesty, (2) the Missouri rule burdens defendants who wish to testify in their own defense but have prior convictions, (3) the Missouri rule undermines the policy behind "nolo" pleas, and (4) the Missouri rule seems to undermine the policy behind Rule 410, at least if it applies to guilty pleas that were later withdrawn.

Plausible arguments in favor of the Missouri rule include:[13] (1) the rule is simple to state and to understand, (2) the rule trusts juries to properly weigh the importance of a prior conviction, whereas the FRE is unduly paternalistic, and (3) the rule will deter repeat offenders from committing perjury (by keeping them off the witness stand).

Also, other ideas included: Allowing no prior convictions whatsoever to be used to impeach witnesses, or allowing only dishonesty crimes. Good answers could support pretty much any plausible proposal.

Final comment: This document contains 3,238 words, including footnotes[14] (as well as comments about common mistakes and other items not appropriate for a real exam answer).[15] Students who budgeted words carefully should not have had too much trouble answering the questions in the allowable 3,000 words.

[13] 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.
[14] It's 2,743 without footnotes.
[15] It becomes 2,926 words (including footnotes) if one excludes my introductory comments on page 1 and my "final comment" on this page.